OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS

ADVISING THE

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AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first twenty-two volumes of opinions published covered the years 1977 through 1998. The present volume covers 1999. Volume 23 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of opinions issued during 1999 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of her function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

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OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Assertion of Executive Privilege With Respect To Clemency Decision

Executive privilege may properly be asserted in response to a congressional subpoena seeking documents and testimony concerning the deliberations in connection with President's decision to offer clemency to sixteen individuals.

Executive privilege may properly be asserted in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

September 16, 1999

THE PRESIDENT

THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted in response to several subpoenas issued by the Committee on Government Reform and Oversight of the House of Representatives to the White House, the Department of Justice, and certain White House and Department officials seeking documents and testimony concerning your decision to offer clemency to sixteen individuals.

I.

The documents and testimony proposed to be subject to a claim of executive privilege consist of (1) advice and other deliberative communications to the President and (2) deliberative documents and communications generated within and between the Department of Justice and the White House in connection with the preparation of that advice. Documents falling into the former category consist of memoranda and other documents submitted to you by officials and components of the Department and offices within the White House concerning the clemency decision. The documents falling into the latter category include documents containing confidential advice, analysis, recommendations and statements of position that the Pardon Attorney generated in connection with the clemency review, or that other executive branch officials and employees submitted to the offices of the Pardon Attorney or the Deputy Attorney General in connection with that review. For the reasons set forth below, it is my legal judgment that executive privilege may properly be asserted with respect to the foregoing documents and with respect to testimony by Department and White House officials concerning the deliberations in connection with your clemency decision.

Advice to the President and other deliberative communications and materials fall within the scope of executive privilege. *See generally United States v. Nixon*, 418 U.S. 683, 705–13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446–55 (1977). The Supreme Court has recognized

> the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

United States v. Nixon, 418 U.S. at 708. It is thus well established that not only does executive privilege apply to confidential communications to the President, but also to "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.* at 705.

The White House staff and the Department of Justice act as confidential advisors to the President as part of the clemency review process, and executive privilege has long been understood to protect confidential advice generated during that process. Under controlling case law, in order to justify a demand for information protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

The Committee's letter to the Department, dated September 10, 1999, which requested the designation of a witness for the Committee's hearing, indicated that the hearing is entitled "Clemency for the FALN: A Flawed Decision?" and that the Committee is "specifically interested in hearing about information germane to the process of the . . . grant of executive clemency" regarding the sixteen individuals. A compelling argument can be made, however, that Congress has no authority whatsoever to review a President's clemency decision. "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). The granting of clemency pursuant to the pardon power is unquestionably an exclusive province of the executive branch. U.S. Const. art. II, § 2, cl. 1. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147

(1871) ("To the executive alone is intrusted the power of pardon . . . ."); *see also Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (reaffirming that pardon power is "commit[ted] . . . to the exclusive control of the President").

In exercising his clemency power, the President may seek to obtain the views of various advisors as he deems appropriate. Historically, he has sought the advice of the Department of Justice. In response to previous inquiries, the Department has repeatedly emphasized the exclusivity of the President's pardon power. In a letter responding to a request for pardon papers by the Chairman of the House Committee on Claims in 1919, the Attorney General refused to provide Congress with the Attorney General's report, observing:

> [T]he President, in his action on pardon cases, is not subject to the control or supervision of anyone, nor is he accountable in any way to any branch of the government for his action, and to establish a precedent of submitting pardon papers to Congress, or to a Committee of Congress, does not seem to me to be a wise one.

Letter from A. Mitchell Palmer, Attorney General, to Hon. George W. Edmonds, Chairman, House Committee on Claims (Sept. 25, 1919). This position was reasserted by the Pardon Attorney in 1952 in response to an inquiry from Senator Styles Bridges concerning the publication of details of clemency cases. Noting that "the President's exercise of the pardoning power is not subject to statutory regulation or control," the Pardon Attorney explained that,

> [i]n the exercise of the pardoning power, the President is amenable only to the dictates of his own conscience, unhampered and uncontrolled by any person or branch of Government. In my judgment it would be a serious mistake and highly detrimental to the public interest to permit Congress, or any Branch thereof, to encroach upon any prerogative, right or duty of the President conferred upon him by the Constitution, or to assume that he is in the slightest respect answerable to it for his action in pardon matters.

Letter from Daniel Lyons, Pardon Attorney, to Hon. Styles Bridges, U.S. Senator (Jan. 10, 1952) (citation and internal quotation marks omitted). The executive branch has on occasion provided Congress with information relating to particular clemency decisions, but to our knowledge it has done so only voluntarily and without conceding congressional authority to compel disclosure.

Accordingly, it appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision. In any event, even if the Committee has some oversight role, I do not believe its oversight needs would be viewed by the courts as outweighing the President's interest in the confidentiality of the deliberations relating to his exercise of this exclusive presidential prerogative. Conducting the balancing required by the case law, *see Senate Select Comm.*, 498 F.2d at 729–30; *United States v. Nixon*, 418 U.S. at 706–07, I do not believe that access to documents relating to or testimony about these deliberations would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm.*, 498 F.2d at 731. Indeed, this conclusion is confirmed by the fact that the Committee can satisfy any oversight need to investigate the impact of the clemency decision on law enforcement goals by obtaining information concerning the individuals offered clemency and any threat they might pose through non-privileged documents and testimony.

II.

The Counsel to the President is one of several individuals subpoenaed to provide testimony to the Committee. Much, but not necessarily all, of what the Counsel might be asked to testify about at the Committee's hearing would presumably fall within the scope of information that would be covered by your assertion of executive privilege over deliberations leading up to your clemency decision. However, there is a separate legal basis that would support a claim of executive privilege for the entirety of the Counsel's testimony, thereby eliminating any need for her to appear at the hearing. Executive privilege is assertable in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee." [1] This position is constitutionally based. As Assistant Attorney General Theodore Olson observed in 1982:

> The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.[2]

[1] Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re. Executive Privilege* at 5 (May 23, 1977)

[2] Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) (discussing subpoena for testimony of the Counsel to the President). *See also* Memorandum from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re· Availability of Executive Privilege Where*

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congressional committee, but he can also direct them not even to appear before the committee." [3]

An often-quoted statement of this position is contained in a memorandum by then-Assistant Attorney General William Rehnquist:

> The President and his immediate advisers — that is, those who customarily meet with the President on a regular or frequent basis — should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.[4]

It is our understanding that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

Given the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties, I believe that a court would recognize that the immunity such advisers enjoy from testimonial compulsion by a congressional committee is absolute and may not be overborne by competing congressional interests. For, in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities. Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions. Because such a result would, in my view, violate the constitutionally mandated separation of powers principles, it would seem to follow that compelling one of the President's immediate advisers

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Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . a former staff member"), Letter from Edward C Schmults, Deputy Attorney General at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff").

[3] Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re Dual-purpose Presidential Advisers*, Appendix at 7 (Aug 11, 1977)

[4] Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re· Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb 5, 1971)

to testify on a matter of executive decision-making would also raise serious constitutional problems, no matter what the assertion of congressional need.

At a minimum, however, I believe that, even if a court were to conclude that the immunity the Counsel to the President enjoys from testimonial compulsion by a congressional committee is subject to a balancing test, you may properly instruct the Counsel that she need not appear in response to the present congressional subpoena. In my view, a court would, at a minimum find that the constitutional interests underlying the immunity outweigh Congress' interest, if any, in obtaining information relating to the particular process followed, or the advice and other communications the President received, in connection with the President's exercise of his exclusive constitutional authority to grant clemency.

In conclusion, it is my legal judgment that executive privilege may properly be asserted with respect to the entirety of the testimony of the Counsel of the President, based on the immunity that position has with respect to compelled congressional testimony.

JANET RENO
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Applicability of 18 U.S.C. § 1721 to Collection of Fee for Stamped Cards

The Postal Service may charge a fee for stamped cards in addition to the face value of the postage without violating 18 U.S.C. § 1721.

January 7, 1999

MEMORANDUM OPINION FOR THE VICE PRESIDENT AND GENERAL COUNSEL
UNITED STATES POSTAL SERVICE

This responds to your letter of July 27, 1998, requesting the Justice Department's legal opinion whether the provisions of 18 U.S.C. § 1721 (1994) prohibit the sale of stamped cards for a one-cent fee that has been authorized by the Postal Service Board of Governors and that is to be charged in addition to the value of the postage charge identified on the stamp that appears on the face of the cards.[1] We conclude that § 1721 is not properly construed to impose such a prohibition.

I.

"Stamped cards," formerly known as postal cards or postcards, are postcard-sized items of stationery bearing a preprinted postage marking. They are presently sold by the U.S. Postal Service ("Service") at postal retail units throughout the United States at a price of twenty cents per card. Heretofore, the Postal Service has not charged a separate fee for the cost of the stationery component — as distinguished from the face postage value — of stamped cards. Consequently, the price currently recovered by the Service for stamped cards accounts for postage value only; the stationery component is effectively provided free of charge.

Pursuant to its statutory authority to establish postal rates, fees, and classifications, the Service has undertaken to establish a new fee on stamped cards that would enable it to recover its costs for the stationery component.

Under the procedures established by the Postal Reorganization Act, Pub. L. No. 91–375, 84 Stat. 719 (1970) ("PRA"), changes in postal rates, fees, or classifications are initiated when the Postal Service proposes the change to the independent Postal Rate Commission ("Commission"). *See* 39 U.S.C. § 3622 (1994), *as amended by* Postal Employees Safety Enhancement Act, Pub. L. No. 105–241, § 5, 112 Stat. 1572, 1573 (1998) ("PESEA"); *id.* § 3623. If the Commission favor-

[1] Letter for the Honorable James K. Robinson, Assistant Attorney General, Criminal Division, from Mary S Elcano, Senior Vice President and General Counsel, U.S. Postal Service (July 27, 1998) ("USPS Letter"). Your inquiry was referred to this Office for response *See* 28 C F R § 0.25(a) (1998) We requested, and you have provided, the Service's agreement to be bound by our opinion on this issue See Letter for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, from Mary S. Elcano, Senior Vice President and General Counsel, U.S Postal Service (Aug. 14, 1998).

ably recommends the Service's proposal, the Governors of the Postal Service (''Governors'') are vested with the ultimate authority to approve or reject new rates, fees, and classifications. *See id.* §§ 3624, 3625. Changes adopted by the Governors are then formally promulgated as provisions of the Domestic Mail Classification Schedule (''DMCS''), which is published at 39 C.F.R. pt. 3001, subpt. C, app. A (1998), and in the form of Postal Service rules implementing changes to the Domestic Mail Manual (''DMM''). *See* 39 U.S.C. § 401(2) (1994); 39 C.F.R. pt. 111 (1998).

In 1996, the Service petitioned the Commission to recommend the adoption of a new two-cents fee to be paid on the purchase of stamped cards to recover the costs of manufacturing such cards. In the proceedings before the Commission, two individual mailers intervened in opposition to the proposed fee. Among other things, the intervenors argued that collection of the fee would violate 18 U.S.C. § 1721, a criminal statute, which provides in relevant part:

> Whoever, being a Postal Service officer or employee, knowingly and willfully: . . . sells or disposes of postage stamps or postal cards for any larger or less sum than the values indicated on their faces; or sells or disposes of stamped envelopes for a larger or less sum than is charged therefor by the Postal Service for like quantities; . . . or sells or disposes of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law or the regulations of the Postal Service; shall be fined under this title or imprisoned not more than one year or both.

The Commission did not reach the intervenors' contentions regarding § 1721 in its initial disposition. Although it declined to recommend adoption of the proposed fee at that time on factual grounds unrelated to the issue posed here, the Commission did recommend the fee classification proposed by the Service in the form of a ''shell classification''—i.e., a classification earmarked for distinct rate treatment, but without the recommendation of any particular current rate level.

In 1997, the Service again proposed adoption of the two-cents card fee to the Commission, and one of the previously noted intervenors again contended that charging such a fee would violate 18 U.S.C. § 1721. The Commission Presiding Officer, however, determined that the proposed fee ''likely'' would not violate § 1721, stating ''[e]ven if the face value of a stamped card did not equal its price, postal employees would likely not be in violation of the statute.'' Presiding Officer's Ruling on Popkin's Motion to Dismiss, No. R97–1/31, at 3 (Sept. 26, 1997) (''Popkin Ruling'').

Subsequently, the Commission issued a decision recommending a one-cent fee for stamped cards over and above the twenty-cents postage charge.[2] In June 1998, the Governors approved the one-cent fee on stamped cards, "in addition to postage," under the authority of 39 U.S.C. § 3625, and determined that the fee would go into effect on January 10, 1999. The authorized fee was officially published in the form of a change to the DMCS, domestic rates and fees. *See* Changes in Domestic Rates, Fees, and Mail Classifications, 63 Fed. Reg. 39,124, 39,145, and 39,163 (1998).[3] Further implementing the authorized fee, the Postal Service promulgated a Final Rule on July 14, 1998, setting forth the DMM standards adopted by the Service to implement, among numerous other new provisions, the stamped card fee approved in the Decision of the Governors of the Postal Service in Postal Rate Commission Docket No. R97–1. *See* Domestic Mail Manual Changes To Implement the Rate, Fee, and Classification Changes in Docket No. R97–1, 63 Fed. Reg. 37,946, 37,957 (1998) (to be codified at 39 C.F.R. pt. 111). The new provision of the DMM states:

> A $0.01 fee per stamped card and a $0.02 fee per double stamped card will be added to cover manufacturing and printing costs. A fee of $0.40 will be added to the price of a sheet of 40 stamped cards. This is consistent with the existing fee structure for stamped envelopes, where customers are charged postage plus a small fee for the envelope itself.

Id. at 37,957.

In light of the intervenors' contentions in the rate proceedings, you have sought the Department's opinion as to whether charging the one-cent fee on the stamped cards, without changing the postage imprinted on the cards to include the amount of that fee,[4] would result in criminal violation of 18 U.S.C. § 1721.

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[2] The reasons why the Commission recommended (and the Governors later approved) a one-cent fee rather than the two-cents proposed by the Service was explained by the Commission as follows "A one-cent fee for a stamped card easily covers manufacturing costs and makes an adequate contribution with a cost coverage of 125 percent . . . The cost coverage should be relatively low for this service, so that it will provide a low cost method by which an individual can send mail " Opinion and Recommended Decision, Docket No R97–1, at 595 (Postal Rate Commission, May 11, 1998).

[3] The Domestic Mail Classification Schedule is incorporated by reference in the Postal Regulations set forth at 39 C F.R § 111.1 (1998).

[4] We are advised that it would be financially and otherwise impracticable for the Service to alter or modify its large existing inventory of stamped cards so that the face value imprinted on the cards (presently twenty-cents) would be increased to twenty-one cents, reflecting the one-cent non-postage fee in addition to postage value *See* USPS Letter at 4. Moreover, because the price indicia stamped on the existing cards represents the cost of *postage only*, it would appear anomalous and misleading to alter the stamped price to read "twenty-one cents" when the actual postage value is only twenty-cents

II.

In its various submissions to the Commission and the Governors, the Service has asserted that charging the one-cent fee on stamped cards, in addition to the imprinted postage of twenty-cents, would not result in violation of 18 U.S.C. § 1721. Invoking the relevant legislative history, the Service argues that the criminal statute was enacted solely to remedy fraudulent pricing practices engaged in by postmasters in order to inflate their salaries; that § 1721 is therefore concerned solely with *unauthorized* price manipulation by postal employees; and that it is in no way intended to prevent the authorized collection of supplemental postal fees duly approved by the postal authorities. *See* USPS Letter at 4. The Service also contends that interpreting § 1721 to prohibit implementation of the proposed fee arrangement would be inconsistent with the powers and authorities designedly granted the Service by Congress under the PRA. As the Service asserted in a brief to the Commission:

> A stamped card fee would not give rise to a violation of section 1721, since, if implemented, it would be entirely consistent with the policies of Postal Service management, and therefore would not result in the unauthorized sale of postage at inflated rates. It is evident that Congress did not intend the restrictions in 1721 to apply to pricing policies recommended by the Commission, approved by the Governors, and implemented by postal management. since, simultaneously with the enactment of conforming amendments to section 1721 adopted in connection with the Postal Reorganization Act and 39 U.S.C. § 410(b)(2), Congress contemplated that mail classifications such as postal cards would be subject to change, as it created an elaborate scheme for the implementation of and changes to the Domestic Mail Classification Schedule. *See* 39 U.S.C. §§ 3623, 3625.

Reply Brief of United States Postal Service at 111, Special Services Reform, 1996, U.S. Postal Rate Commission, Docket No. MC96–3 (1997).

The Service's position was subsequently endorsed by the Commission Presiding Officer in his opinion denying the intervenor's motion to dismiss based on the § 1721 argument. The Presiding Officer concluded:

> Even if the face value of a stamped card did not equal its price, postal employees would likely not be in violation of the statute. As the Postal Service convincingly argues, this particular criminal statute appears to have been aimed at preventing the misuse of postal items by postal employees attempting to increase their sala-

> ries (postmasters' salaries are determined in part by a post office's revenues). By all appearances, it is not an effort to regulate postal fees. It would be remarkable if Congress had regulated postal fees by criminalizing conduct. "If Congress wished to prevent the Postal Service from authorizing the sale of stamped cards for a fee in addition to postage, Congress would have enacted a law directed at the Postal Service rather than its individual employees and officers." Opposition at 4 n.2.

Popkin Ruling at 3.

The Postal Service also invokes an early opinion of the Solicitor of the Post Office Department to bolster its position that § 1721 is solely concerned with unauthorized sales and pricing practices by postal employees, as distinct from official changes in postage rates and fees authorized by the Service under the provisions of the PRA. As the Postal Solicitor's opinion explained with reference to the "face value" sale requirements of an earlier version of § 1721:

> [B]ut accepting the broad and specific terms of the law as applying here, it must be borne in mind that this is a criminal statute, and in order to constitute a violation a criminal intent is necessary, and while it is well established that intent may be presumed from the commission of the acts prohibited, the circumstances in this case would negative the existence of such intention, *especially should the procedure be authorized by the department*. . . . For it is to be observed that the purpose of the law is not to secure an exact return, for accounting purposes or otherwise, for the stamped paper disposed of, *but to regulate and control postal employees in their handling of stamped papers, this being apparent from the numerous other provisions of the law.*

6 Op. Solicitor of the Post Office 652, 655 (1918) (emphasis added).[5]

Thus, the Service, the Commission, and the Post Office Solicitor's early opinion all appear to agree on the basic proposition that the relevant requirement of 18 U.S.C. § 1721 was intended to apply only to unauthorized and deceptive acts or transactions by Postal employees, and has no proper application to their implementation of authorized fee provisions adopted by the Service in accordance with the provisions of the PRA.

[5] That opinion concerned the peculiarities of U.S. postal operations in Shanghai, China, where a Postmaster General order was proposed that provided for the sale of stamps to the public in exchange for foreign currency pegged to the value of the prevailing daily rate of exchange of U.S currency. The issue presented was whether the sale of stamps during periods when the banks were closed and, consequently, no official exchange rate (and therefore no accurate sales value) could be ascertained, would constitute a violation of the version of § 1721 then in effect Based on the considerations quoted above, the Solicitor concluded that no violation of the statute would result

By contrast, the intervenors in the Commission's proceedings argued that § 1721, by its terms, applies to criminalize the sales arrangements proposed by the Service. Section 1721 prohibits the sale by postal employees "of postage stamps or postal cards for any larger or less sum than the values indicated on their faces," and it makes no express exception for official actions. Because postal employees would be selling stamped cards bearing a twenty-cents postage indicia on their face for a total sales price of twenty-one-cents, it has been argued that the sale of the cards would constitute sales for a "larger . . . sum than the values indicated on their faces." 18 U.S.C. § 1721.

III.

A.

In determining whether the Service's proposed sales arrangement for the stamped cards would violate the criminal prohibition set forth in § 1721, we need not resolve whether the Service is correct to contend that the criminal prohibition is inapplicable to official, authorized acts by Service employees. For even if we assume that § 1721 may apply to some official, authorized acts, we do not believe that the plain text of § 1721 bars the proposed sales arrangement that we have been asked to consider. To see why this is so, it is important to consider not only the precise terms of § 1721, but also the overall statutory structure and relevant legislative history, each of which supports the conclusion that the Service's proposed sales arrangement comports with the terms of the criminal prohibition.[6]

B.

The Service agrees that the literal terms of the statutory prohibition set forth in § 1721, which bars the sale of "postage stamps or postal cards" for sums greater or less than the "values indicated" on their faces, applies to the sale of "stamped cards." The Service concedes that "stamped cards" are "postal cards" for purposes of § 1721, and thus that the criminal prohibition applies to stamped cards in the same manner that it would apply to any type of postal cards. The analysis that follows, therefore, accords no weight to the fact that the Service has designated the sales item in question here with a name — "stamped cards" — that does not expressly appear in § 1721.

The analysis that follows does accord weight, however, to the Service's contention that, in adopting the proposed sales arrangement, it has exercised the discretion that Congress has delegated to it pursuant to the PRA. The Service's contention is important because the enactment of the PRA dramatically altered the legis-

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[6] The Criminal Division of the United States Department of Justice concurs in this conclusion. *See* Memorandum for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, from James K. Robinson, Assistant Attorney General, Criminal Division, *Re: Collection Fee for Stamped Cards* (Dec. 30, 1998)

lative and regulatory context in which postal pricing and sales practices—including those covered by 18 U.S.C. § 1721—must be evaluated. Indeed, Congress amended § 1721 at the time that it enacted its postal reform legislation and thereby expressly linked the existing criminal prohibition with the broader statutory and regulatory changes effected by the PRA. *See* Pub. L. No. 91–375, sec. 6(j)(29), § 1721, 84 Stat. 719, 780 (1970) (extending the prohibition to the sale of postal cards and other postal items "otherwise than as provided by law or the regulations of the *Postal Service*.").[7]

Most significantly, the PRA shifted control over postal pricing and sales practices from Congress to the Service. *See National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 813 (1983) (citation omitted) ("When, in 1970, Congress enacted the Postal Reorganization Act, it divested itself of the control it theretofore had exercised over the setting of postal rates and fees."). In doing so, Congress afforded the Service broad discretion to carry out its functions in a businesslike and cost-effective manner. *See* S. Rep. No. 91–912, at 2 (1970) ("[P]ostal management must now be given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service."); 39 U.S.C. § 404(a)(2) (1994) (giving the Service specific authority "to prescribe, in accordance with this title, the amount of postage *and the manner in which it is to be paid*") (emphasis added); *id.* § 401(2) (granting the Service authority "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of [the PRA]."). Accordingly, § 1721 should be construed, to the extent that its text will allow, in a manner that will permit the Service to exercise the kind of broad discretion to establish fee changes and to implement them in a businesslike and cost-efficient manner that appears to have been contemplated by Congress when it enacted the PRA.

Here, the Service's proposal to sell postal cards for twenty-one cents, adopted to recover the cost of producing the stationery component of such cards, furthers the statutory purpose of ensuring that postal items are sold for amounts that reflect the costs of their production. Specifically, the PRA requires that postal rates and fees must be established in accordance with "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." 39 U.S.C. § 3622(b)(3). The addition of a one-cent fee for the costs of the stationery plainly comports with that statutory command, as the Service has determined that the postage price no longer accounts for the costs of the stationery on which the postage mark appears.

In addition, the Service's proposal to sell its existing inventory of postal cards at the new price, even though these cards do not set forth the new sales price on their face, furthers the statutory purpose of ensuring that fee changes are imple-

[7] Formerly, the statutory prohibition had applied to the "Post Office Department" *See* Act of June 25, 1948, ch 645, § 1721, 62 Stat. 683, 783.

mented in a businesslike and cost-effective manner. *See UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621, 638 (3d Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996) (explaining that "[i]n enacting the PRA, Congress repeatedly explained the fundamental reason for the dramatic changes mandated by the Act; it wanted the Postal Service to operate less like a bureaucratic agency and more like a business. The relevant committee reports repeat this principle again and again."); *see, e.g.*, H.R. Rep. No. 91–1104, at 11 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3660 ("The Postal Service is a public service but there is no reason why it cannot be conducted in a businesslike way and every reason why it should be."). As we have noted, the Service has advised that it would be financially and otherwise impracticable to alter its large, existing inventory of postal cards to account for the newly-determined fee on the face of those cards. *See* USPS Letter at 4. The Service's proposed sales arrangement therefore would appear to promote the statutory aim of economic efficiency by implementing the new fee for postal cards — which has been selected to serve the congressional mandate that the fee reflect all of the costs of production — in a manner that makes use of already-printed postal cards without incurring substantial alteration costs.

The foregoing analysis demonstrates that the adoption of the intervenors' proposed construction of the criminal prohibition set forth in § 1721 of title 18 would effectively preclude the Service from adopting a cost-effective means of implementing a fee change that meets the statutory requirement that postal fees reflect all of the costs of the production of the postal item. Because the Service's proposed sales arrangement appears to represent an exercise of the very type of discretion in the implementation of a fee change that Congress appears to have contemplated when it enacted the PRA, § 1721 should be construed to preclude the exercise of that discretion only if the plain terms of the criminal prohibition would compel that result. In our view, as we explain more fully below, they do not.

C.

The proposed sales arrangement arguably contravenes the plain terms of § 1721's face-sale provision in two distinct ways. First, the Service proposes to sell postal cards for a price — twenty-one cents — that is not set forth on their face. Second, the Service proposes to sell these cards for a price that is greater than the only monetary amount that does appear on their face — namely the amount set forth on the twenty-cents postage stamp that is imprinted on the face of the card.

To assess the seriousness of these two potential points of conflict between the statutory text and the Service's proposed sales arrangement, it is necessary to answer two questions. First, does § 1721 require that postal cards indicate a value on their face? If it does not, as we conclude below, then the Service may authorize the sale of postal cards for an amount — twenty-one cents — that is not indicated on the face of the card. This conclusion, however, leads to a second question: Even if the value need not be indicated on the face of the card, when a monetary amount *does* appear on the face of a postal card in the form of the price of the postage stamp, is the postage amount the only price at which the card may be sold, or is it possible that the card may be sold for a value other than the postage amount? If the latter is possible, as we also conclude below, then the Service may authorize the sale of a postal card for an amount that is greater than the stamped postage mark and that is not otherwise indicated on the face of the card.

In addressing the first question, it is clear that the plain terms of § 1721 are consistent with the conclusion that the Service may sell postal cards for an amount that is not specified on their face. That is, § 1721 does not require that the face of a postal card must indicate the value of the postal card. The statute prohibits the sale of a postal card for a sum greater or lesser than the indicated value of the postal card, but it does not, by its terms, mandate that the face of the postal card indicate what that value is. Nothing in the text of the criminal prohibition appears to require the conclusion, therefore, that the proposed sales arrangement would be prohibited by the face-sale provision of § 1721 simply because the Service proposes to sell cards that would not have set forth the official value of the cards, as opposed to the official value of the *postage* of the cards, on their face.

This reading of the statutory text accords with longstanding administrative practice with respect to the sale of postage stamps, which, like postal cards, are subject to the face-sale requirement of § 1721. The Service has regularly issued letter-series postage stamps, which do not indicate a monetary amount but have only a letter of the alphabet indicated on their faces, for a price authorized by the Service but not indicated on the faces of the stamps themselves. To be sure, letter-series stamps do contain a marking on their faces that signifies their value. The actual sales price that a purchaser must pay for the stamp, however, is not discernible from the face of the stamp. A purchaser may verify the official, authorize sales price only by consulting an official Service document that states the price of a stamp bearing a certain letter. In this respect, letter-series stamps are similar to postal cards that do not bear their sales price on their faces. In each case, a purchaser must look beyond the face of the postal item, and consult official materials, to determine the official price.

Thus, if § 1721, which requires that both postage stamps and postal cards be sold for no more or less than "the values indicated on their faces," imposed a requirement that these items always indicate the monetary amount of their sales price on their faces, then letter-series stamps would have been prohibited. Instead, however, the Service advises that letter-series stamps have not been considered problematic under § 1721,[8] and Congress has not precluded the issuance of such letter-series stamps despite ample time within which to do so. This longstanding administrative practice with respect to postage stamps comports with our conclusion that the plain terms of the criminal prohibition do not require that the Service indicate the sale price of the postal cards on their faces.

We find additional support for our conclusion in the fact that § 1721 explicitly permits the sale of stamped envelopes at prices not indicated on their faces. The provision regarding stamped envelopes suggests that the criminal prohibition set forth in § 1721, when considered as a whole, was not intended to embody a general policy that the price of a postal item must be indicated on the face of the item. Such a policy, after all, would be inconsistent with the provision regarding stamped envelopes. As a result, the overall structure of the statutory criminal prohibition does not provide clear support for a conclusion that the plain terms of the face-sale provision should be construed to include, even if only implicitly, a requirement that the value of a postal card be indicated on its face.

Even though we do not believe that § 1721 precludes the sale of postal cards for an authorized amount not indicated on their faces, we are still left to consider the second question: whether postal cards must be sold at the price of the postage indicated whenever a postage amount *is* indicated on the faces of the cards. Here, the Service proposes to sell postal cards not only for an amount, twenty one cents, that would not appear on the faces of the cards, but also for an amount that would be greater than the only monetary value, twenty-cents, that would appear on the faces of the postal cards — namely, the amount of the postage price marked on the postage stamp. If § 1721 is properly construed so that such a monetary amount necessarily "indicates" the "value" of the card itself, then § 1721 arguably would appear, by its terms, to bar the proposed sales arrangement. If the provision may be construed so that such a monetary amount may be understood to "indicate" only the value of the postage, however, then the Service's sale for twenty-one cents of a card stamped with a twenty-cents postage mark would not contravene the express terms of the criminal prohibition. Under such a construction, the Service's sale for twenty-one cents of a postal card stamped with a twenty-cents postage mark would not be for a sum greater than the "value indicated" on the card's face because the card's face would indicate only the value of the postage and not the value of the card itself.

In our view, the plain text of § 1721 does not require the conclusion that the amount of postage that appears on a postal card necessarily constitutes the "value indicated" of a postal card, even when there is no express countervailing indication of the postal card's value on the face of such a postal card. The statutory text does not reveal, by its terms, the circumstances in which the face of a postal card may be said to have indicated the value of the postal card as opposed to

[8] Telephone conversation between George Smith, Attorney-Advisor, Office of Legal Counsel, and Anthony Alverno, Attorney, National Litigation Section, United States Postal Service (Dec. 22, 1998).

merely the value of the postage stamp that appears on the face of the postal card. The statutory text states only that a sale of a postal card may not be for a sum greater or lesser than the "value indicated" on the face of a postal card. As to whether the appearance of the monetary amount of a postal stamp on a postal card, without more, necessarily indicates the value of the postal card within the meaning of § 1721, the statutory text is silent.

The Service's last regulation that defined the term "postal cards" accords with a construction of the criminal prohibition in which the postage stamp that appears on the face of a postal card need not be understood to reflect the full value of the card itself. The regulation defined a postal card as follows: "A postal card is a card with postage imprinted or impressed on it and supplied by the Postal Service for the transmission of messages." 39 C.F.R., pt. 3001, subpt. C, appx. A, 222.11 (1996).[9] That definition suggests that the postal card is a distinct postal item from the postage that is impressed upon it, a suggestion that accords with the conclusion that the postage stamp that appears on the face of a postal card does not necessarily indicate the value of the card. The statutory prohibition on the sale of postal cards for a value greater than the "value indicated" on the face of the card would appear to be at least ambiguous, therefore, as to whether the textual phrase "value indicated on its face" refers only to the authorized sales price of the card in those cases in which such a value has been indicated on the face of the card, or whether that phrase is instead intended to refer to the sole monetary amount that appears on the face of the card even though the Service has concluded that such an amount actually refers only to the postage price.

The intervenors reject the notion that § 1721 may be read to be ambiguous on this point. Their plain meaning argument against the Service's proposed sales arrangement hinges largely on the contrast in the language that § 1721 employs with respect to postal cards as compared to stamped envelopes. The intervenors contend that because § 1721 refers to the value indicated on the face of postal cards, but not stamped envelopes, it is clear that § 1721 imposes an additional limitation regarding the manner of the sale of postal cards — namely, that they may not be sold for a monetary amount greater than the sole monetary amount that appears on their face, which, in the case before us, is the amount of postage that is stamped on the cards.

A review of the historical background to the current version of the criminal prohibition set forth in § 1721 demonstrates, however, that it is far from clear that the differing language in § 1721 on which the intervenors rely supports their plain meaning argument. At the time that Congress first enacted the criminal prohibition subsequently codified, without material alteration, as 18 U.S.C. § 1721, *see* Revised Statutes of the United States, 1873–1874, § 3920, at 762 (1878)

[9] This regulation was amended through subsequent regulation in 1996 so that the term "stamped card" replaced the term "postal card" *See* Amendment to Domestic Mail Classification Schedule, 61 Fed Reg. 32,656, 32,662 (1996).

("Revised Statutes"), *as amended by* Act of June 17, 1878, ch. 259, 20 Stat. 140, 141, it had statutorily established a single "postage charge" for postal cards of "one cent each, including the cost of their manufacture." *See* Act of June 8, 1872, ch. 335, § 170, 17 Stat. 283, 304. Congress had in this way set the postal card fee at a monetary amount that reflected both the cost of postage and the cost of manufacture. There was therefore no deviation between the postal charge and the value of the postal card at that time because Congress, in one legislative act, had established the value of the postal card to be the equivalent of the postal charge. Indeed, Congress did not even authorize the use of private post cards until 1898, well after it had enacted the face-sale provision of the criminal prohibition now codified in § 1721. Act of May 19, 1898, ch. 347, 30 Stat. 419. Thus, at the time Congress enacted the face-sale provision, there was no market, as there is today, for post cards that could be purchased for a fee separate from the costs of their postage stamps.

In contrast to its treatment of postal cards, Congress, at the time of the first enactment of the face-sale provision, had not established a similarly uniform, fixed statutory value for stamped envelopes. Indeed, it could not have because stamped envelopes were used to mail a wide variety of materials, including newspapers, of varying sizes, and thus no single cost could be affixed due to variations in both the applicable postage rates and the costs of producing differing types of envelopes. *See* 25 Op. Att'y Gen. 354, 359–60 (1905). Congress had instead provided by statute that the Postmaster General shall provide stamped envelopes and that such stamped envelopes "shall be sold, as nearly as may be, at the cost of procuring them, *with the addition of the value of the postage stamps* impressed thereon." *See* Revised Statutes, § 3915, at 761 (emphasis added). This framework meant that the face of a stamped envelope did not set forth the value of the envelope — it set forth only the value of the postage stamp that was impressed on the envelope. Accordingly, the statutory prohibition regarding the manner of the sale of stamped envelopes did not refer to the face value of the envelope but provided instead that such an envelope could not be sold or disposed of "for a larger or less sum than is charged therefor by the Post-Office Department for like quantities[.]" Act of June 17, 1878, 20 Stat. at 141; *see* Revised Statutes, § 3920, at 762. This statutory restriction served to ensure that the sale of stamped envelopes conformed to the authorized, albeit variable, fee for their purchase.

These historical facts regarding the state of nineteenth century postal law make it difficult to conclude that Congress clearly employed the differing language concerning stamped envelopes that appears in § 1721 in order to ensure that the face value of the postage stamp that appears on a postal card would necessarily indicate the value of the postal card itself. The historical context instead may be read to suggest that the face-sale provision was intended to ensure that postal cards, like stamped envelopes, were sold for a price authorized by Congress. The statutory reference to the face value of postal cards, but not the face value of stamped envelopes, may merely have been reflective of the fact that, at the time that Congress first enacted the criminal prohibition now in question, the face of postal cards set forth their legally established value while the face of stamped envelopes did not. It is not at all clear, therefore, that the criminal prohibition should be construed to preclude a proposed sales arrangement of the type at issue here. Under the Service's proposed sales arrangement, stamped cards would be permitted to be sold only for a price that, although greater than the price of postage that appears on their faces, would nevertheless conform to the fee that has been established by the administrative agency that Congress has authorized to set such fees.

In light of the ambiguity as to the inference that should be drawn from the differing statutory treatment of stamped envelopes and postal cards, we do not believe that § 1721 should be construed to bar the Service's proposed sales arrangement. Such a construction would serve to restrict the ability of the Service to adopt a method for the implementation of a fee change that appears to serve the broad purposes of the PRA. Congressional intent is better served by construing the ambiguity on this point in a manner that preserves the substantial discretion that the PRA appears to have been intended to confer upon the Service. For that reason, we conclude that § 1721 does not bar the Service from determining that the postal mark on a pre-stamped card indicates the value of the postage alone, not the value of the postal card, and thus from selling stamped cards bearing twenty-cents stamps for twenty-one cents.

D.

A review of the legislative history to § 1721 accords with our conclusion that the face-sale provision should be construed to afford the Service the discretion to permit the sale of a postal card for an amount that reflects its authorized value even though it exceeds the amount of postage that appears on its face. It is evident from the legislative history that § 1721 was primarily intended to deter, prohibit, and punish fraudulent and *unauthorized* practices by postal employees in the pricing and sale of stamps, postcards, and other postal items. That general purpose accords with a construction of the terms of § 1721 that would permit the Service to offer a postal card for sale only at a price that had been fixed by regulation, even though it may be greater than the amount of postage that appears on its face.

That is not to dispute that a broad requirement that, in the absence of a countervailing indication on the face of a postal item, a postal item may not be sold for a price greater than the postage stamp would also protect against fraudulent sales practices. Such a requirement would arguably make it more difficult for postal employees to sell postal items for unauthorized prices because consumers would need only to consult the face of the postal item to determine the authorized price. In that sense, the general anti-fraud purpose of the criminal prohibition arguably would be furthered by the intervenors' proposed construction of § 1721.

Nevertheless, the pertinent legislative history of § 1721 demonstrates that the predominant purpose of that provision, together with several others enacted or considered with it, was to prevent postmasters and other postal employees from engaging in fraudulent or other unauthorized practices in the sale of stamps, postcards, and related postal items.[10] The legislative history at no point states that the statute was intended to protect against fraudulent practices through the imposition of a broad prophylactic rule that would preclude the sale of postal cards for an amount greater than the stamped postage in circumstances when no other monetary amount would appear on their faces.

The House debate on these measures tersely expressed the main purpose of the reforms under consideration: "The question and the only question for the committee to determine is which is the better proposition for the protection of the Government to prevent dishonest men from swindling the Government." 7 Cong. Rec. 2680 (1878) (remarks of Rep. Hewitt). During the debate on related provisions in the bill aimed at postmaster abuses, Representative Hewitt described the practices underlying the face value sale provision that was included in the bill under consideration and enacted in language essentially similar to that of § 1721:

> In the law as it now stands, as I said a moment ago, there is no prohibition of a postmaster selling stamps to whom he pleases and where he pleases. There is no provision in the law that prohibits him from trading them for goods or paying his debts with them — I mean in the present law as it now stands. And it was under that law this abuse had grown up, and just because the law did not prohibit it . . . .
>
> But now the Committee on Appropriations have reported a bill here which . . . absolutely prohibits the sale of stamps for less than their face value . . . . This bill not only prohibits that, but it prohibits postmasters from trading in stamps for goods, from using them in buying goods, or paying their debts with them; and it affixes a severe penalty for the violation of the law.

7 Cong. Rec. at 2679.

Later, defending the bill reported by the Appropriations Committee (which included the predecessor version of § 1721) against an amendment designed to increase the percentages of postal revenues payable to postmasters as compensation, Rep. Blount stated: "The proposition of the Committee on Appropriations

[10] The predecessor version of § 1721 and the related postal reform measures were considered as part of the Post Office Appropriation Bill for the Fiscal Year Ending June 30, 1879, H.R 4246, 45th Cong. (1878). *See* 7 Cong Rec. 2476 and *passim* (1878).

is not to change the law as to the percentage that the postmasters are paid, but it is simply to adopt another method to ascertain what they are paid. *It is simply an effort to avoid fraud; that and nothing more.*" *Id.* at 2681 (emphasis added). Describing the Post Office Department's position on the pending sale and compensation provisions, Rep. Blount further stated: "The proposition now from the Department is not to decrease by this legislation the amount of [the postmasters'] salary, but to protect the Government against fraud." *Id.* As Rep. Blount proceeded to describe his own general approach to the bill: "[A]s a Representative upon this floor, bound to protect the Government, I shall not hesitate to provide proper legislation against fraud, even if some over-sensitive postmasters should imagine there is some reflection upon their integrity." *Id.*

Authoritative statements accompanying the passage of subsequent amendments and revisions of § 1721 further confirm the intent indicated in the original debate. Thus, when Congress modified and recodified the statute in 1909, ch. 321, *see* Act of March 4, 1909, § 208, 35 Stat. 1088, 1128, the accompanying legislative history characterized it as follows: "This section, like section 207, is designed to punish certain acts the effect of which is to defraud the postal revenue or to misappropriate the postal funds, and by means of the acts forbidden to fraudulently increase the compensation of postmasters and employees." S. Rep. No. 60–10, pt. 1, at 22 (1908). Similarly, the legislative history of the 1956 amendments to the statute, *see* Act of Aug. 1, 1956, ch. 818, 70 Stat. 784, again explained that the purpose of the provision was to prohibit postal employees from "so disposing of stamps, stamped envelopes, or postal cards as to inflate receipts artificially." S. Rep. No. 84–2720, at 1 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3814, 3814. In describing the effect of the 1956 amendments, the accompanying House Report explained that they were designed to

> broaden the class of postal employees who are prohibited by existing law from inducing or attempting to induce any person to purchase postage stamps, stamped envelopes, or postal cards for the purpose of increasing the emoluments or compensation of the postmaster or any employee of any post office or any station or branch thereof.

H.R. Rep. No. 84–555, at 1 (1955).

The review of the legislative history that is set forth above reveals that there are no statements that directly speak to the issue that is before us in this matter. Only by drawing a questionable inference from the general anti-fraud statements that appear in the legislative history, therefore, could one conclude that Congress intended for § 1721 to establish a broad prophylactic rule against a sales arrangement of the type that the Service has proposed here. The broad nature of the administrative discretion that the PRA appears to confer upon the Service to make and implement fee changes, however, counsels against the drawing of such an inference. The general anti-fraud statements that appear in the legislative history simply do not suffice to justify the conclusion that § 1721 should be construed to preclude the Service from exercising its broad administrative discretion in the manner that it proposes here. Accordingly, we conclude that the legislative history accords with our construction of the plain terms of § 1721.

E.

We note one final point. Intervenors contend that their construction of § 1721 is supported by an early opinion of the Attorney General. That opinion asserted that the prohibition against postal sales at less than face value contained in a late nineteenth century version of § 1721, *see* Revised Statutes, § 3920, at 762; 20 Stat. at 141, extended to the Post Office Department and the Postmaster-General as well as to postmasters and other postal employees. *See* 25 Op. Att'y Gen. at 360. In that opinion, the Attorney General concluded that the Postmaster General lacked authority to approve a "Return-Postage" scheme proposed by a private contractor which would have relieved advertisers from paying postage on pre-addressed return cards and envelopes until they were actually deposited in the mails and reached the designated return address preprinted on the card.

Among other things, the Attorney General determined that such an arrangement would "violate the spirit and also the letter" of numerous provisions of the postal laws, including the version of § 1721 then in effect. In referring to that provision, the Attorney General stated that "[t]he Postmaster-General is clearly within the inhibition. Indeed, to rule otherwise would be to do violence to the plain and expressed intent of Congress." *Id.* After further noting that the proposal would allow the contractor to make its initial purchase of the return postal cards and stamped envelopes at a price far below that paid by the general public (reflecting the fact that the postage component would not be paid until the stamped card or envelope was actually returned and delivered), the Attorney General stated:

> I am unable to reconcile such a transaction with the plain and explicit injunction of Congress that 'no stamped envelopes shall be sold by the Post Office Department at less (in addition to legal postage) than the cost, including all salaries, clerk hire, and other expenses connected therewith,' 'or sell or dispose of postal cards for any larger or less sum than the values indicated on their faces.'

Id.

We do not find the reasoning of this opinion pertinent when applied to the matter presented here. Most significantly, the Postmaster-General in 1905 did not possess the broad statutory authority to change postage rates and fees that is vested in the Service today pursuant to the PRA. *See* 39 U.S.C. § 403 (1994); *id.* § 404, *as amended by* PESEA, § 3, 112 Stat. at 1572; *id.* § § 3621–3625, *as amended by* PESEA, § 5, 112 Stat. at 1573. That is why the Attorney General's 1905 opinion stressed that the return postage scheme under consideration there could "not be put into operation without the express authority of Congress," 25 Op. Att'y Gen. at 357, or "without additional legislation." *Id.* at 366. In contrast, changes in postage rates and fees may be adopted today by the Service (with the Commission's concurrence) through administrative action alone pursuant to the procedures of the PRA. Passage of legislation by Congress is no longer required. The legal and regulatory framework on which the Attorney General's 1905 opinion was premised has been fundamentally altered by the intervening enactment of the PRA. Specifically, the Service is now authorized to impose a fee applicable to stamped cards, to prescribe the manner in which it is to be paid, and to promulgate a regulation providing for the collection of that fee. Thus, while the criminal prohibition may have been relevant to the Attorney General's late nineteenth century determination of whether the Postmaster General possessed statutory authority to enter into a contract to sell postal cards at a rate lower than that which had been authorized by Congress, it has no relevance to the present determination of how the Service may implement a change in postal fees that Congress has authorized.

BETH NOLAN
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Application of 18 U.S.C. § 205 to Employees Serving on an Intergovernmental Personnel Act Assignment

A federal employee assigned to a state or local government or other non-federal entity under the Intergovernmental Personnel Act is not prohibited by 18 U.S C. § 205 from representing the interest of the non-federal entity before the federal government, including the employee's agency, if such representational activity is affirmatively included with the scope of the employee's assignment as determined by the federal agency head.

January 11, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

The Federal Bureau of Investigation (''FBI'' or ''Bureau'') has asked for our advice concerning the application of 18 U.S.C. § 205 (1994 & Supp. II 1996) to an assignment under the Intergovernmental Personnel Act (''IPA''), 5 U.S.C. §§ 3371–3376 (1994 & Supp. II 1996), of an FBI agent to the Commonwealth of Puerto Rico/Police of Puerto Rico (''POPR''). Specifically, you have asked whether § 205 would prohibit the assigned FBI agent from representing the interests of the POPR to the Bureau in the course of the IPA assignment. For the reasons set forth below, we conclude that when the head of a federal agency determines that work of ''mutual concern'' under § 3372 of the IPA includes representational contacts with the federal government by the assigned employee on behalf of the non-federal entity, and the IPA assignment affirmatively authorizes such representational contacts, such representation is within the ''official duties'' of the federal employee under § 205 and is not prohibited by the statute.

I.

Your inquiry concerns the intersection of two statutes. Section 205 of title 18 prohibits any ''officer or employee of the United States'' from, inter alia, acting as an ''agent or attorney for anyone'' before any department, agency or other entity of the federal government concerning any matter in which the United States has a direct and substantial interest, except in the ''proper discharge of his official duties.'' 18 U.S.C. § 205(a)(2). *See generally Application of 18 U.S.C. § 205 to Communications Between the National Association of Assistant United States Attorneys and the Department of Justice*, 18 Op. O.L.C. 212 (1994). The IPA provides, inter alia, that ''the head of a Federal agency may arrange for the assignment'' of an agency employee — on detail or on leave without pay — to a state or local government or other non-federal organization[1] to perform "work of mutual concern." 5 U.S.C. § 3372(a)(2). A federal employee assigned pursuant to the IPA "remains an employee of his [federal] agency."*Id.* § 3373(a)(2). The IPA authorizes the head of a federal agency[2] to assign agency employees to perform work that she "determines will be beneficial to both" the federal agency and the non-federal entity. *Id.* § 3372(a)(2). The terms and duties of the assignment may be governed by an agreement between the federal agency and the non-federal entity. *Id.* § 3373(a)(2). You ask whether a federal employee assigned to a non-federal entity under the IPA may, in the course of her IPA assignment, represent the interests of the non-federal entity before the employee's originating federal agency without violating the prohibition of § 205.

This Office previously concluded, on the specific facts presented, that § 205 did not prohibit an employee of the Environmental Protection Agency ("EPA") who was detailed to a state or local government pursuant to the IPA from representing the state or local government's interests before the EPA because such representation was "integral to the statutory scheme administered by" the EPA. *Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments*, 4B Op. O.L.C. 498, 500 (1980) ("EPA Detail Opinion").[3] In the EPA Detail Opinion we observed that the federal environmental laws "encourage, and require," the EPA to provide technical assistance to state and local governments. *Id.* We concluded that it was integral to the statutory regime that EPA employees be detailed to state and local governments (pursuant to the IPA) and that, in the course of such details, they be able to represent the interests of the state and local governments before the EPA, including, necessarily, matters in which the United States has a direct and substantial interest. *Id.* at 502–03. Accordingly, we concluded that where such representational activity is integral to a federal statutory scheme administered by the federal employee's agency, the federal employee is engaged "in 'the proper discharge of his official duties' " within the meaning of § 205. *Id.* at 500.

Because representational contacts with the federal government were integral to the substance of federal environmental laws, the EPA Detail Opinion did not require us to determine whether, in the absence of such a substantive statutory scheme, representational contacts with the federal government would be "in the proper discharge of his official duties" if made pursuant to the employee's IPA

[1] *See* 5 U.S.C § 3371(1) (defining "State"); *id.* § 3371(2) (defining "local government"), *id* § 3371(4) (defining "other organization").

[2] *See* 5 U S C. § 3371(3) (defining "Federal agency")

[3] The EPA Detail Opinion also concluded, on the same rationale, that § 203 of title 18 would not prohibit the federal employee's representation of the non-federal entity 4B Op. O.L.C. at 500 Section 203 provides, in part, that a federal employee may not be compensated in connection with any "particular matter in which the United States is a party or has a direct and substantial interest," except "as provided by law for the proper discharge of official duties" 18 U S.C § 203(a)(1)(B) (1994). Although your request addresses only § 205, our conclusion, as in the case of the EPA Detail Opinion, would mean that an employee assigned under the IPA and engaging in authorized representational activity before the federal government in the course of that assignment, may be paid his salary by the non-federal entity pursuant to the IPA agreement without running afoul of § 203

assignment. Nonetheless, the EPA Detail Opinion did consider this issue, *see id.* at 503–05, and its analysis is consistent with, and indeed lays the foundation for, our conclusion that such representational contacts are permissible under § 205.

II.

We observed in the EPA Detail Opinion that "nothing in the background or legislative history of §§ 203 or 205 suggests that [Congress] . . . intended substantially to limit the uses federal agencies may make of their employees." *Id.* at 504. Moreover, we concluded that if Congress had intended to restrict the manner in which an agency may use its employees, "Congress is unlikely to have chosen as its means a criminal statute, directed at the employees themselves, and containing an exception for 'the proper discharge of official duties.' " *Id.* According to this reasoning, § 205 should not be read to proscribe the ability of agency heads to determine that it would be mutually beneficial for an assignment under the IPA to include representational activity before the federal government.

Furthermore, as we noted in the EPA Detail Opinion, § 205 (as well as § 203) was "designed to prevent any 'conflict between the private interests of a Government employee and his duties as an official.' " *Id.* at 504 (quoting H.R. Rep. No. 87–748, at 6 (1961)); *see also* H.R. Rep. No. 87–748, at 21. In the case of an IPA assignment, the representational activity is undertaken by virtue of an assignment approved by the head of the employee's agency and based upon her statutory determination that such representational activity is "beneficial to both" the federal agency and the non-federal entity, even where the representational activity involves matters of direct and substantial interest to the United States. The employee undertaking such activity as part of an IPA assignment does so as an employee of the federal agency. *See* 5 U.S.C. § 3373(a)(2) (assigned employee "remains an employee of his agency"). Accordingly, an employee's authorized representational activity in the course of an IPA assignment is not private, but part of his official duties, because the agency head has "directed the employees to engage in such activities." 4B Op. O.L.C. at 503 n.2.

For these reasons, we conclude that § 205 does not prohibit a federal employee on assignment to a non-federal entity under the IPA from representing the interests of that entity before the federal government, including the employee's agency, when such representational activity is affirmatively made a part of her official duties under the IPA assignment.[4] We emphasize that although the IPA provides the relevant authority, the statute itself does not automatically exempt representa-

[4] Thus, because the IPA itself provides authority for an agency head to determine whether representational contacts are mutually beneficial and to make such contacts a part of an IPA assignment, it is not necessary for there to be an additional, substantive statutory regime, such as the environmental laws discussed in the EPA Detail Opinion, that necessitates or promotes such representational contacts In the specific case that you present, the IPA authorizes the appropriate agency head to determine that it is of mutual interest and benefit for an FBI agent assigned to the POPR to communicate with the FBI on behalf of the POPR

tional contacts from the scope of § 205; rather, as a legal matter, representational contacts become a part of an employee's "official duties" within the meaning of § 205 only when the agency head has affirmatively authorized such representational contacts as part of the employee's duties under the IPA assignment. To avoid any questions about the scope of the authorization, it may be advisable, as a practical matter, for agency heads who wish to permit their assigned employees to engage in representational activity to provide expressly for such activity in the IPA agreement entered into between the agency and the non-federal entity.

We emphasize that agency heads should use sound judgment when determining what representational contacts should be authorized as part of an IPA assignment. An agency head should consider carefully, for example, whether to authorize a detailed employee to make such contacts with respect to a federal grant or contract or with respect to a claim or other litigation involving the United States. Nothing in our conclusion that agency heads may authorize such contacts limits an agency head's discretion to decline to authorize certain kinds of contacts.

III.

For the reasons stated, we conclude that a federal employee assigned to a state or local government or other non-federal entity under the IPA may represent the interests of the non-federal entity before the federal government, including the employee's agency, if such representational activity is affirmatively included within the scope of the employee's assignment as determined by the federal agency head. In such a case, the representational activity occurs "in the proper discharge of [the employee's] official duties," § 205(a), and is therefore not prohibited by 18 U.S.C. 205.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 208 to National Gambling Impact Study Commission

The National Gambling Impact Study Commission is not an "independent" agency for purposes of a criminal conflict of interest statute, 18 U.S.C. § 208.

January 26, 1999

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

You have asked whether a criminal conflict of interest statute, 18 U.S.C. § 208 (1994), applies to the National Gambling Impact Study Commission ("Commission").[1] The Commission was established by the National Gambling Impact Study Commission Act ("Act"), Pub. L. No. 104–169, § 3(a), 110 Stat. 1482 (1996) (codified as amended at 18 U.S.C. § 1955 note (Supp. IV 1998)), in order to "conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States." *Id.* § 4(a)(1). The Commission consists of nine members, of whom six are appointed by Congress (three by the Speaker of the House and three by the Majority Leader of the Senate), and three are appointed by the President. *Id.* § 3(b)(1)(A)–(C). The appointing authorities are to consult among themselves to ensure that the Commission's membership reflects, "to the maximum extent possible, fair and equitable representation of various points of view" with respect to the Commission's inquiry. *Id.* § 3(b)(3). The congressional leadership also has the predominant role in selecting the Chair of the Commission. *Id.* § 3(b)(5)(A). The Commission's responsibilities are investigatory and advisory: not later than two years after its first meeting, it must submit to the President, Congress, State governors and Native American tribal governments "a comprehensive report of [its] findings and conclusions, together with any recommendations" it may decide to make. *Id.* § 4(b). The Commission has powers to hold hearings, issue subpoenas, secure information directly from Federal agencies, employ personnel and contract with the Advisory Commission on Intergovernmental Relations and the National Research Council. *Id.* §§ 5, 6, 7. Sixty days after submitting its final report, the Commission is to terminate. *Id.* § 10.

Section 208 was enacted in 1962 as part of a general revision of the conflict of interest laws. Pub. L. No. 87–849, § 1(a), 76 Stat. 1119, 1124 (1962). In general, 18 U.S.C. § 208(a) provides that, subject to certain exceptions, "whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States . . . participates personally and substantially as a Government officer or employee, . . . [in a] particular matter in which, to his knowledge, he . . . has a financial interest," shall be

[1] *See* Letter for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, General Services Administration (Nov. 7, 1997) ("GSA Letter")

subject to the criminal and civil penalties provided in § 216 of title 18. We have previously concluded that the Commission is not within the executive branch.[2] Thus, the sole substantive question to be considered here is whether the Commission is an "independent" agency for purposes of § 208.[3]

We conclude that it is not. Although the reach of § 208's reference to "independent" agencies is not clear, and the legislative history is unhelpful (*see* Part I.A below), the Commission falls outside any likely construction of that section. As we discuss in Part I.B below, the Commission does not resemble the agencies whose "independence" from Presidential control was upheld by the Supreme Court in two major cases that preceded the enactment of § 208 — *Humphrey's Executor v. United Statesk, 295 U.S. 602 (1935)*, and *Wiener v. United States*, 357 U.S. 349 (1958). Nor, as we discuss in Part I.C below, do the Commissioners enjoy any form of protection from removal under the Act — and tenure protection is, for many purposes, a recognized test of "independence." Finally, as we discuss in Part II below, there is no other affirmative evidence, whether in the text of the Act or otherwise, that Congress intended the Commission to be regarded as "independent" for purposes of § 208.

I.

Section 208 applies to "an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States." 18 U.S.C. § 208(a). There are at least two possible explanations for Congress's decision to distinguish between the executive branch and "independent" agencies in this context.

First, Congress may have intended § 208 to reach all agencies of the Government other than those within the legislative or judicial branch. "[I]ndependent" agencies on this account would be those agencies that, under the Supreme Court's older jurisprudence, might have been considered to be "hybrid" agencies, outside the executive branch and performing "quasi-legislative" or "quasi-judicial" functions.[4] Under present Supreme Court doctrine, such "independent" agencies are

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[2] *See* Letter for Ms. Kay Cole James, Chairperson, National Gambling Impact Study Commission, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 13, 1997). In support of that conclusion, we observed that the majority of the Commissioners were congressionally appointed; that the congressional leadership controlled the choice of the Commission's Chair; and that the Commission carried out only information-gathering and advisory functions, which need not be performed by the executive branch. *Id* at 1 We further pointed out that "[u]nder the Department's precedents, we regard such commissions as outside the executive branch. . . . Indeed, even where the congressional leadership appoints less than a majority of members, a commission such as [this] may be outside the executive branch." *Id.* (citing precedents). We remain persuaded that the Commission is outside the executive branch.

[3] The Commission is undoubtedly an "agency" within the "expansive definition" of 18 U S.C. § 6, which defines "agency" for purposes of title 18 to include "any . . . commission." *Memorandum Opinion for the Comptroller General of the United States· Conflict of Interest — 18 U.S C. § 207 — Applicability to the General Accounting Office*, 3 Op. O L.C 433, 434 (1979) ("GAO Opinion")

[4] This has often been characterized as the view that there is "a headless 'fourth branch' of government consisting of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either." *Ameron, Inc v U S Army Corps of Engineers*, 787 F 2d 875, 886 (3d Cir. 1986). *See also*

considered to be parts of the executive branch, although the President's power to remove agency heads may be restricted in certain ways. *See Morrison v. Olson*, 487 U.S. 654, 689–91 (1988) (interpreting cases on tenure protection for officials of independent agencies as hinging on whether protection impaired President's duty to execute the laws). Congress could have understood the term "independent agency" in 1962, however, to refer to agencies that we would now consider to be part of the executive branch. On that understanding, § 208 would apply to the executive branch, including agencies within the executive whose heads enjoy some degree of protection from presidential removal, and that may have been viewed in 1962 as outside the executive branch;[5] but it would not apply to the legislative or judicial branches.

Alternatively, in referring to "independent" agencies, Congress may have been recognizing the possibility that some agencies could be regarded as "independent" even while being firmly located within a particular branch. On this reading, § 208 would reach not only "independent" agencies within the executive branch but also any such agencies within the legislative or judicial branches.[6] The pre-1962 case law had at least occasionally noted that in order to be "independent," an agency might need to be protected from *congressional*, as well as executive, control.[7] Moreover, the cases had also suggested that an agency might be, for at least some purposes, "independent," while yet belonging to a particular branch.[8] Consequently, in applying § 208 to "independent" agencies, Congress

id at 892 (Becker, J., concurring in part); *Federal Trade Comm'n v Ruberoid Co*, 343 U S 470, 487 (1952) (Jackson, J, dissenting).

[5] Thus, we have no doubt that agencies such as the Federal Trade Commission ("FTC"), which *Humphrey's Executor* stated "cannot in any proper sense be characterized as an arm or an eye of the executive," 295 U S. at 628, should now be regarded as part of the executive branch

[6] We note that the Court seems usually to have understood "independent" agencies—for purposes of separation of powers analysis—*not* to encompass agencies within the legislative or judicial branches Thus, the Court has said that "independent" agencies are those whose statutes "typically specify either that . . . agency members are removable by the President for specified causes [such as the FTC] . . . or else do not specify a removal procedure [such as the Federal Election Commission]." *Bowsher v. Synar*, 478 U.S. 714, 725 n.4 (1986) By contrast, a statute "that provides for direct congressional involvement over the decision to remove" the agency head creates an entity that is not generally an "independent agency" in the constitutional sense. *See id.* Thus, at least in *Bowsher*, the Court seemed reluctant to view the Comptroller General as an "independent agency" for constitutional purposes Such a view would not negate the possibility of considering the Comptroller General to be "independent" within the meaning of § 208—a possibility that we examine in Part I.C below. An agency might count as "independent" under a particular statutory scheme without necessarily being "independent" in the constitutional sense

[7] For example, *Williams v. United States*, 289 U S. 553 (1933), addressed the question whether a judge of the Court of Claims (a "legislative" or "Article I" court) enjoyed the tenure protection afforded to constitutional courts by Article III, Section 1 of the Constitution Although denying that Court of Claims judges enjoyed such constitutional tenure, the Supreme Court observed that "[t]he preservation of [the Court of Claims'] independence is a matter of public concern The sole function of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence *upon the legislative pleasure* for the tenure of their offices . . . to say the least, is not desirable." *Id.* at 562 (emphasis added).

[8] *See Lathrop v. Donohue*, 367 U S 820, 853 (1961) (Harlan, J, concurring in judgment) (Bureau of the Budget is "independent" although within the executive branch). *See also Dobson v Commissioner*, 320 U S 489, 497 (1943) (Board of Tax Appeals was statutorily designated as "an independent agency in the executive branch of the Government"); *Railroad Retirement Bd. v Alton R. Co*, 295 U.S 330, 344 (1935) (Railroad Retirement Board was "denominated an independent agency in the executive branch of the Government"), *Goldsmith v. United States*

Continued

could have had in view those agencies, whether belonging to the executive, legislative or judicial branch, that enjoyed at least some freedom from the control of higher authorities within that branch by virtue of protections against the removal of the agencies' heads. As discussed below, this account of Congress's intent has found support in this Office's prior opinions.

We do not believe it is necessary in this memorandum to decide between these alternative readings, because the Commission does not count as "independent" under either of the alternatives we describe. Furthermore, as we discuss below, there is no evidence that Congress intended it to be considered "independent."

A.

We begin by reviewing the legislative history of § 208. We have found little relevant history on the precise point at issue, and what little history there is sheds almost no light on it.

"Section 208 was modeled on the former section 434 of title 18, which 'disqualifie[d] an employee of the Government who has an interest in the profits or contracts of a business entity from the transaction of business with such entity.'" *Applicability of 18 U.S.C. § 208 to the Federal Communications Commission's Representative on the Board of Directors of the Telecommunications Development Fund*, 21 Op. O.L.C. 96, 98 (1997) (citation omitted). Section 434 had made no express reference to independent agencies. That reference originated in the general reform of the major federal conflict of interest statutes made by the Bribery, Graft and Conflicts of Interest Act of 1962, Pub. L. No. 87–849, 76 Stat. 1119. The legislation represented Congress's response to the perception of several serious inadequacies in those statutes (including § 434), among them the fact that they were "drafted in unnecessarily broad and imprecise ways," thus creating "uncertainties as to proper conduct and, to a degree, inconsistent practices among the departments and agencies of the Government." *Conflict of Interest Statutes: Intermittent Consultants or Advisers*, 42 Op. Att'y Gen. 111, 112 (1962) (Kennedy, A.G.).

While the reference in § 208 to "independent" agencies as well as to the "executive branch" may have been designed to make the statutory coverage more precise, we have found no explanation of what Congress specifically intended. The House Report on the 1962 law describes § 207(a) (and §§ 208 and 209) as applying to officers and employees of the 'executive branch' or an 'independent agency,' without further elaboration. *See, e.g.*, H.R. Rep. No. 748, 87th Cong., 1st Sess. 11, 12, 13, 23, 24 (1961). The Senate Report describes §§ 207, 208 and 209 as applying to present and former government employees only in very general terms. *See* S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in*

Bd. of Tax Appeals, 270 U.S 117, 121 (1926) (Board of Tax Appeals performed "quasi judicial" functions and was within executive branch).

1962 U.S.C.C.A.N. 3852. *Applicability of Post-Employment Restrictions on Dealing with Government to Former Employees of the Government Printing Office*, 9 Op. O.L.C. 55, 56 n.3 (1985) ("GPO Opinion"). A legal commentator of the time (and participant in the framing of the legislation) observed that §§ 207–209 were to apply to officers and employees of independent agencies as well as of the executive branch, but offered no explanation for this innovation. *See* Roswell B. Perkins, *The New Federal Conflict-Of-Interest Law*, 76 Harv. L. Rev. 1113, 1123 (1963).[9]

B.

Given that the legislative history of § 208 is unilluminating, we have considered an interpretative approach that draws on the Supreme Court's pre-1962 jurisprudence. This approach is based on the rule of construction that "[w]hen Congress codifies a judicially defined concept, it is presumed . . . that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989).

At the time of § 208's enactment in 1962, two major Supreme Court cases on "independent" agencies, *Humphrey's Executor* and *Wiener*, had addressed the constitutionality of statutory limitations on the power of the President to remove agency heads or commissioners. Those cases could serve to explain how § 208's reference to "independent agencies" should be construed.

In *Humphrey's Executor*, the Court upheld a statute restricting the President's power to remove a Commissioner of the FTC on grounds of "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. The Court held that the constitutionality of such removal restrictions turned on "the character of the office." *Id.* at 631. The Court viewed the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." *Id.* at 628. Such an agency was not "an arm or an eye of the executive"; rather, its Commissioners were expected to discharge their functions "without executive leave and . . . free from executive control." *Id.* The powers of the FTC were not "purely" executive,

[9] We note also that, in 1989, Congress enacted 18 U.S.C. § 202(e)(1) (1994), which provided a definition of "executive branch" applicable to § 208. Ethics Reform Act of 1989, Pub. L. No. 101–194, § 401, 103 Stat. 1716, 1748. The definition reaches any "entity or administrative unit in the executive branch," but does not specifically mention "independent agency," which is not otherwise defined. Arguably, some entities previously covered by § 208 as "independent agenc[ies]" were, after the amendment, covered (in addition or instead) by the reference to the "executive branch." We do not believe that the amendment requires giving the term "independent agency" in § 208 a broader meaning than in our analysis, on the ground that otherwise all "independent agenc[ies]" would come within the reference to the "executive branch" and the term "independent agency" would be redundant. First, there is no evidence indicating that, by defining "executive branch," Congress intended to enlarge the extent to which § 208 reaches entities outside the executive branch. Second, if the reference is redundant, that may merely reflect Congress's appreciation of the changes in the Supreme Court's jurisprudence marked by its 1987 decision in *Morrison*. Third, as we discuss in Part I.C below, some entities outside the executive branch could be covered as "independent agenc[ies]."

but were "quasi-legislative or quasi-judicial." *Id.* Insofar as the FTC conducted investigations and reported its findings to Congress, it was acting in a quasi-legislative capacity; insofar as the statute required it to function as a master in chancery, it was acting quasi-judicially. *Id.*[10]

Wiener followed *Humphrey's Executor's* "sharp line of cleavage between officials who were part of the executive establishment" and "those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' 295 U.S., at 625–626, as to whom a power of removal exists only if Congress may fairly be said to have conferred it." 357 U.S. at 353. The Court applied that distinction to the President's removal of a member of the War Claims Commission.[11] Although the statute creating that body said nothing about removal, the Court inferred that "Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate." *Id.* at 352. Looking to "the nature of the function that Congress vested in the War Claims Commission" to decide whether such an implied removal restriction was valid, *id.* at 353, the Court found that that agency had been created as "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise.'" *Id.* at 354–55 (citation omitted). Because the intent of Congress was to vest the War Claims Commissioners "with adjudicatory powers that were to be exercised free from executive control," *Morrison,* 487 U.S. at 688, the implied statutory removal restrictions were constitutional.

The Supreme Court's recent case law casts doubt on the viability of the doctrinal categories used in *Humphrey's Executor* and *Wiener.* In particular, the Court now recognizes the "difficulty of defining such categories of 'executive' or 'quasi-legislative' officials," *Morrison,* 487 U.S. at 689 n.28.[12] Moreover, this Office has found the rationale of *Wiener* "questionable." [13] Nonetheless, the question here is what Congress intended in 1962 when enacting § 208, not whether the

[10] *See also Morrison,* 487 U.S. at 687 (explaining *Humphrey's Executor*); *Power of the President to Remove Members of the Tennessee Valley Authority From Office,* 39 Op Att'y Gen. 145, 146 (1938) (Jackson, Acting A.G.) (*Humphrey's Executor* rested on facts that the FTC "exercises quasi-legislative and quasi-judicial functions and is not a part of the executive branch", Court also stressed legislative history "indicating a purpose of the Congress to secure the maximum independence of the Commission from Executive interference and control").

[11] The War Claims Commission was established by the War Claims Act of 1948, Pub. L. No 80–896, 62 Stat 1240 Its responsibility was to hear and adjudicate certain claims arising out of enemy conduct during the Second World War.

[12] *See also Ruberoid Co* , 343 U.S at 487–88 (Jackson, J , dissenting)

[13] *The Constitutional Separation of Powers between the President and Congress,* 20 Op O.L.C 124, 168 n 115 (1996) ("Dellinger Memorandum"). Specifically, we said that "[t]he rationale of *Wiener,* which is essentially that *Congress* must have implied a for-cause removal restriction when *the Court* believes that the functions of the agency demand such tenure protection, 357 U.S at 353–56, seems questionable. There would be nothing illogical in a legislative decision, for example, to protect against review or revision of the *decisions* of the agency, *see id.* 354–55, while placing the agency's *decisionmakers* within the control of the President. . . To the extent that *Wiener* assumes that control is and ought to be a binary matter—either plenary or non-existent—its reasoning is difficult to reconcile with more recent separation of powers decisions that reject such an either/or approach to presidential control. *Id.* We noted, however, that *Wiener* "continues to be followed" in the lower courts Id.

Constitution admits the possibility of "hybrid" agencies not belonging to any of the three branches. We think it plausible to suppose that in 1962, Congress would have understood a statutory reference to "independent agencies" to mean agencies such as the FTC or the War Claims Commission, i.e., agencies that were not then considered to be part of the executive branch, or indeed of any of the three branches.

Assuming that such was Congress's intent, we find that the Commission would not be an "independent" agency under the standards of *Humphrey's Executor* or *Wiener*. First, unlike the FTC or the War Claims Commission, the Commission exercises no functions that under *Humphrey's Executor* and *Wiener* were considered to be adjudicatory in nature. Second, the Commission exists solely to conduct a study and to report its findings and recommendations to Congress, the President, and State and tribal governments.[14] Its responsibilities are "essentially of an investigative and informative nature, *falling in the same general category as those powers which Congress might delegate to one of its own committees.*" *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (emphasis added). We think that the Commission functions much as a congressional committee does when conducting an investigation or drafting a legislative proposal based on the information it has gathered; indeed, it seems to us that, given its overall statutory structure, the Commission is a part of the legislative branch.[15] It is therefore unlike the "headless fourth branch" regulatory agency that *Humphrey's Executor* took the FTC to be.

In summary: because *Humphrey's Executor* and *Wiener* were assuredly "within the lively knowledge of Congress" when § 208 was enacted, *Wiener*, 357 U.S. at 353, we think that they provide a plausible test of what Congress intended when referring in that section to "independent agenc[ies]." If that test is applied, then the Commission cannot be counted as "independent."

C.

The paucity of relevant legislative history relating to § 208 leaves open a second possibility: that an agency could be considered independent under the statute if, and only if, its head (or, in cases where the agency has a collective head, the members of that body) enjoys at least some degree of protection against removal from superior officials, *whatever* the branch to which the agency belongs. In other words, the Congress that enacted § 208 may have perceived some agencies as "independent" even if they were located in a particular branch (rather than in a putative "headless fourth branch"), provided that they resembled the paradig-

[14] "This commission does not have the power to regulate, only to make recommendations It is a study commission, not a regulatory body " 142 Cong. Rec. 17,421 (1996) (statement of Sen Glenn).

[15] As discussed above, we have previously concluded that the Commission is not within the executive branch. *See supra* note 2 What branch a commission may fall in depends on a number of factors We do not mean to suggest here that whenever a commission's mission is to conduct a study and to report its findings and recommendations to Congress that it is necessarily legislative rather than executive

matic independent agencies with respect to tenure protection. Accordingly, agencies in the legislative or judicial branches, as well as in the executive, could be counted as "independent" under § 208. In fashioning this interpretation, we again consult the Supreme Court's pre-enactment case law. We also find support for it in several of this Office's precedents.

As construed by the Supreme Court only a year before § 208 was enacted, its precursor statute, 18 U.S.C. § 434 (Supp. II 1946), was said to be designed "to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 548 (1961). The individual with whose conflicted activities the Court was most concerned in *Mississippi Valley* was a part-time consultant to the Bureau of the Budget (the precursor of the Office of Management & Budget). At the time, the Bureau of the Budget was apparently considered to be in some sense "independent." *See Lathrop v. Donohue*, 367 U.S. at 853 (Harlan, J., concurring in judgment); *National Fed'n of Federal Employees v. Cheney*, 883 F.2d 1038, 1045 (D.C. Cir. 1989) (Bureau of Budget was "quasi-independent" entity within Treasury Department), *cert. denied*, 496 U.S. 936 (1990). Nonetheless, the Bureau of the Budget could not have been "independent" in the sense indicated by *Humphrey's Executor* and *Wiener*, if only because the Treasury Department, where the Bureau had been lodged, was plainly within the executive branch.[16] It is at least conceivable, therefore, that Congress intended § 208 to apply to certain agencies that were acknowledged to belong to a particular branch, provided that they had a sufficient resemblance to the constitutional paradigms of "independence." In particular, since protection against removal has figured in the cases as the key element in defining agency "independence," an agency in the legislative or judicial branch could be "independent" within the meaning of § 208 if its head enjoyed some form of tenure protection. *Cf. Williams*, 289 U.S. at 562.

Several of this Office's opinions have reflected this possibility, finding that particular agencies were to be considered "independent" for purposes of § 208, despite the fact that they were situated within the legislative or judicial branches. To be sure, § 208 does not ordinarily apply to officers or employees of the legislative and judicial branches.[17] Nevertheless, although an agency is within the legislative or judicial branch, we have thought that it might still be considered "independent" for purposes of § 208. Our opinions in this line are relevant to the status of the Commission under § 208, insofar as it might be argued that the Commission

[16] *See Power of the President to Remove Members of the Tennessee Valley Authority From Office*, 39 Op Att'y Gen at 146 (under *Humphrey's Executor*, only an agency "not a part of the executive branch" could be considered independent for separation of powers analysis).

[17] *See* GPO Opinion, 9 Op. O.L.C at 56 (discussing legislative history); GAO Opinion, 3 Op. O.L.C. at 435 (§ 208 and companion statutes "do not by their terms and were not intended to apply to officers and employees of the legislative and judicial branches").

is an "independent" agency in the legislative branch. As further discussed below, however, that suggestion ultimately lacks merit.

Three OLC opinions are relevant. First, in the GAO Opinion, we found that the GAO was, under § 208, an "independent" body not within the executive branch and arguably within the legislative branch. *See* GPO Opinion, 9 Op. O.L.C. at 57–58 (citing GAO Opinion, 3 Op. O.L.C. 433). The Comptroller General is removable "not only by impeachment but also by joint resolution of Congress," *Bowsher v. Synar*, 478 U.S. at 728, and consequently he or she is an officer of the legislative branch who "may not be entrusted with executive powers." *Id.* at 732. Nonetheless, it remains the case that the governing statute provides that Congress may remove that officer only for a cause such as inefficiency, neglect of duty, or malfeasance. *Id.* at 728–29. In the GAO Opinion, we analyzed the effect of the tenure protection enjoyed by the Comptroller General, together with other statutory provisions of title 31, on the status of that officer under § 208. Without denying that the Comptroller General and the GAO are "subservient to Congress," 478 U.S. at 730,[18] we found that the statute gave the Comptroller General some measure of "independence" from Congress, so that GAO officers and employees were properly considered subject to § 208. We said:

> The establishment of a fixed tenure of office, subject to removal for cause, has generally been regarded as intended to promote an element of independence of action. *Cf., Humphrey's Executor v. United States*, 295 U.S. 602, 624–26 (1935). Thus, while the Comptroller General and GAO are independent of the exccutive branch, they apparently are expected to be somewhat independent of the legislative branch as well. I therefore am led to conclude that whatever their status for other purposes, the Comptroller General and officers and employees of the GAO are officers and employees of an "independent agency of the United States" for purposes of 18 U.S.C. § 207 — §§ 208 and 209 as well.

GAO Opinion, 3 Op. O.L.C. at 436.[19]

Second, in the GPO Opinion, we concluded that the GPO is not "independent" for purposes of § 208. We reached that conclusion despite the fact that the Public Printer is presidentially appointed. Our analysis tracked the judicial view that the GPO is an entity within the legislative branch, whose primary function is to provide support for Congress. *See* GPO Opinion, 9 Op. O.L.C. at 57.[20] The question

[18] *See also id.* at 746 n.11 (Stevens, J., concurring in judgment) (Comptroller General and GAO "have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission")

[19] In addition, we note that former 31 U S C § 41(a) (1921) (now 31 U.S.C. § 702(a) (1994)), specifically declared the GAO to be "independent" of the executive. *See* GAO Opinion, 3 Op. O.L.C. at 436

[20] We have subsequently reviewed the status of the GPO at some length, and have again found that it is an agency within the legislative branch *See Involvement of the Government Printing Office in Executive Branch Printing* Continued

of the Public Printer's tenure of office was not considered in this opinion, although our conclusion would have been fortified if it had been. The GPO's statute, 44 U.S.C. §§ 301–317, vests appointment power of the Public Printer in the President (subject to Senate advice and consent), but is silent as to the Public Printer's removal. By inference, therefore, the Public Printer can be removed at will by the appointing authority (i.e., the President), and does not enjoy tenure protection. *See* Dellinger Memorandum, 20 Op. O.L.C. at 172–73 (because the Librarian of Congress — like the GPO, a congressional agency — ''is not protected by an explicit for-cause removal limitation, . . . we therefore infer that the President has at least the formal power to remove the Librarian at will''). Our conclusion as to the GPO can thus be read to provide some (indirect) support for the view that an agency in the legislative (or judicial) branch is ''independent'' for purposes of § 208 if, but only if, its head enjoys a degree of tenure protection.

A third opinion addressing the United States Sentencing Commission falls within this line. *See* Memorandum for Jamie Gorelick, Deputy Attorney General, from Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Sentencing Commission/Conflict Rules* at 14 (July 21, 1994) (''Sentencing Commission Opinion''). There we found the Sentencing Commission, which had been established by statute as ''an independent commission in the judicial branch of the United States,'' 28 U.S.C. § 991(a) (1994), to be an ''independent'' agency under § 208; *see also Mistretta v. United States*, 488 U.S. 361, 384–85, 390, 393 (1989) (Sentencing Commission held an independent agency within judicial branch). Like the GAO and unlike the GPO, the Sentencing Commissioners enjoy some degree of tenure protection: the statute ''grants the President authority to remove members of the Commission, although 'only for neglect of duty or malfeasance in office or for other good cause shown.' 28 U.S.C. § 991(a).'' *Mistretta*, 488 U.S. at 409. Here, too, an agency that was located outside the executive branch was found to be ''independent'' under § 208, and here again the agency head enjoyed tenure protection.

In the present case, this test of ''independence'' is not met. Nothing in the Act creating the Commission states or implies that Commissioners are to enjoy any form of tenure protection. On this reading of the statute (which, like the reading outlined in Part I, seems to us a plausible construction), the Commission is not subject to § 208.

Of the three OLC precedents considered in this Part, the GPO Opinion, holding § 208 inapplicable, closely fits the circumstances of the Commission. Moreover, the conclusion that the Commission is not ''independent'' for purposes of § 208 under the test considered here harmonizes with our precedents in another respect: it accords with our past view that the section does not cover those who are ''properly regarded as officers or employees of the Congress or one of its Houses or

and Duplicating, 20 Op. O.L.C. 214 (1996) More recently still, we reaffirmed the analysis of the latter memorandum. *See Government Printing Office Involvement in Executive Branch Printing*, 20 Op. O L C. 282 (1996).

agencies and who are responsible in some immediate sense to the Congress,'' such as ''those officers and employees appointed by the Congress or one House thereof to perform functions in aid of the legislative process.'' GAO Opinion, 3 Op. O.L.C. at 435–36.

II.

We find no other reason to believe that Congress intended to subject the Commission to § 208. On the contrary, our conclusion that the Commission is not ''independent'' for purposes of § 208 is well supported by the language and legislative history of the Act.

First, nothing in the language of the Act itself designates the Commission as ''independent.'' As noted above, this distinguishes the Commission from other bodies that we have found to be subject to § 208, such as the GAO and the Sentencing Commission.

Second, the language of the Act assumes that the nine Commissioners will represent a variety of distinct and incompatible points of view with respect to gambling, and that some Commissioners will be associated with the gambling industry. Thus, section 3(b)(2) of the Act states that ''[t]he [Commission] members may be from the public or private sector, and may include . . . members of . . . industry.'' In addition, section 3(b)(3) states that the appointing authorities are to consult together ''to achieve, to the maximum extent possible, fair and equitable representation of various points of view'' on the Commission. That the Commission membership was intended to include representatives of different points of view — some of whom could be expected to have financial interests in the Commission's recommendations — does not in itself mean that § 208 is inapplicable, *see* Office of Government Ethics Informal Opinion 82 x 22 (1989 ed.). Nonetheless, the statutory criteria for Commission membership clearly indicates that Congress was not attempting to insulate the Commission from outside influences in order to ensure its ''independence.''

The legislative history confirms that understanding. The House Judiciary Committee's Report on the legislation, H.R. 497, stated:

> the Committee expects that the [appointing] authorities may consider for appointment representatives of various interested groups including, gambling proponents and opponents, state gambling regulators, federal and state prosecutors, Indian gambling operators, professionals who treat compulsive gamblers, casino operators, activists who have opposed gambling referenda, state lottery officials, and representatives of non-gambling businesses in areas around gambling operations.

H.R. Rep. No. 104–440, pt. 1, at 8 (1995), *reprinted in* 1996 U.S.C.C.A.N. 1192, 1197.

In the House debate, Representative Hyde, Chairman of the House Judiciary Committee that reported out the bill, sought to answer charges that the Commission might be skewed against the gambling industry. He said:

> I believe that this Commission can do the most good if its study is as neutral, objective, and comprehensive as possible — considering the views of all sides of this issue. In that spirit, I proposed a committee amendment in the nature of a substitute to H.R. 497, which the Judiciary Committee adopted on a voice vote.
>
> My substitute included the vast majority of the provisions contained in H.R. 497 as originally introduced, but it added language so as to assure that all points of view would be represented on the Commission. Specifically, the bill now requires that the appointing authorities consult together to ensure that the overall makeup of the Commission fairly and equitably represent[s] various points of view.

142 Cong. Rec. 3642–43 (1996).[21]

Thus, instead of seeking to promote public confidence in the Commission's study by requiring that the Commission be "independent" of outside influence, Congress preferred an approach in which at least some Commissioners could have open and avowed interests, biases and commitments that would check and balance those of other Commissioners. From this (partly) "adversarial" system, it was hoped that a balanced and objective study would be more likely to result. Plainly, a Commission so conceived would be very likely to include members whose personal stakes in the outcome of the Commission's work would be disqualifying under § 208, if that statute were to apply. Given Congress's careful decisions about the nature of the Commission, the statute gives no indication that § 208 was intended to apply to this advisory body.

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[21] Similarly, in the Senate debate, Senator Coats, a supporter, stated:

> Opponents of this commission have raised many charges against it. They have claimed that the commission is a tool of the religious right. They have claimed that the commission will become a witch hunt against the gambling industry.
>
> Mr. President, these claims are unfounded. The appointment of commissioners will be equally divided between the executive branch and the two Houses of Congress, ensuring that no faction may dominate the work of the commission.

142 Cong. Rec. 17,425, 17,426 (1996).

Conclusion

For all of the above reasons, we conclude that the Commission should not be considered an "independent" agency within the meaning of § 208, whichever meaning of that term is adopted, and hence is not subject to that statute.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Attorney's Fees for Legal Service Performed Prior to Federal Employment

18 U.S.C. § 205 prohibits a Civil Division attorney from receiving attorney's fees for work in a case against the United States performed prior to federal employment when the right to payment depends on a finding of liability and award against the United States that takes place after the attorney's entry into federal employment.

February 11, 1999

MEMORANDUM OPINION FOR THE DIRECTOR
DEPARTMENTAL ETHICS OFFICE

You have requested our opinion whether an attorney in the Civil Division ("Civil attorney") may seek or accept attorney's fees for work in a case against the United States that she performed before becoming a federal employee.* Although you have specifically asked whether 18 U.S.C. § 203 would raise a bar, we do not address that issue, because we have concluded that, whether or not § 203 applies, 18 U.S.C. § 205 prohibits the Civil attorney from receiving such fees.

I.

Your question arises from work that the Civil attorney performed in connection with an employment case that she handled in 1996 and 1997. *See* Memorandum for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Mary Braden, Director, Departmental Ethics Office, Justice Management Division, *Re: Request for Legal Opinion Regarding the Application of 18 U.S.C. Section 203 to Acceptance of Attorneys Fees for Work Performed Prior to Service as Department of Justice Employee* (Jan. 12, 1999) ("Braden Memo"). The work occurred before her service as an attorney with the Civil Division began in March 1998. *Id.* at 1.

In the case in question, the Civil attorney represented an employee of the Department of Commerce who challenged his separation from the Department pursuant to a reduction in force. *Id.* The Civil attorney's client lost his challenge to the separation before an administrative law judge and also on appeal to the Merit Systems Protection Board ("Board"). Following the unsuccessful appeal to the Board, the Civil attorney "provided no further representational services to her former client after January 1997." Braden Memo at 1. However, the client, himself an attorney, pursued a pro se appeal of the Board's decision to the United States Court of Appeals for the Federal Circuit. *See id.* The Federal Circuit

* Editor's Note: For privacy reasons, material has been redacted from this opinion that might identify the Civil Division attorney.

reversed the Board's decision on the ground that it was not supported by substantial evidence.

As we understand the facts, the Civil attorney's retainer agreement with her client provided that he would "pay her a discounted hourly rate of $200, up to a maximum of $10,000 (50 hours)." *Id.* Under the agreement, the attorney's recovery of additional fees would be "contingent upon [the] client prevailing in the case and being awarded attorney's fees." *Id.* The retainer agreement covers only the proceedings before the Board. *Id.* As the Civil attorney has explained, "[t]he retainer agreement . . . expressly excluded the filing of any notice of appeal or of any appellate proceedings before any tribunal other than the [Board]." Memorandum for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Civil attorney, *Re: Request for an Ethics Opinion* at 2 n.1 (Oct. 30, 1998) ("Civil attorney's Memo"). In all, the attorney performed 365.34 hours of legal services to her former client and received compensation, under the retainer agreement, for 50 hours. Braden Memo at 1.

In light of the Federal Circuit's ruling, the Civil attorney advises that her client "is now entitled to petition the [Board] for an award of attorney's fees both to reimburse himself for the money he has already paid to me (i.e., the 'cap' amount) and to finally compensate me for the additional 315 hours I expended upon his behalf in 1996." Civil attorney's Memo at 4. The attorney states that the retainer agreement authorized her "to seek fees from the defendant pursuant to the fee shifting statute should the matter settle or should plaintiff prevail." *Id.* at 2. She notes that a retainer agreement of this type, which contains a fee "cap" with a right to recover an additional amount only if the client prevails, is typical in the field of employment law where the substantive statutes providing the basis for employment claims contain fee shifting provisions that allow plaintiffs to recover attorney's fees from the defendants. *Id.*

II.

Based on previous opinions of the Office of Legal Counsel ("OLC"), your office has advised the Deputy Designated Agency Ethics Official in the Civil Division that 18 U.S.C. § 203 would forbid the Civil attorney from recovering the contingent portion of the fees that she is owed under the retainer agreement. Braden Memo at 2. Under § 203, any officer or employee of the executive branch who, "otherwise than as provided by law for the proper discharge of official duties, directly or indirectly . . . demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another" during the employee's federal service is guilty of a crime. 18 U.S.C. § 203(a) (1994).

In providing your advice, you noted that it is " 'the longstanding view of the Office of Legal Counsel that § 203 prohibits an individual entering government employment from maintaining a contingent interest in fees recoverable in a proceeding involving the United States.' " Braden Memo at 2 (quoting Memorandum for Charles F.C. Ruff, Counsel to the President, from Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Nomination* at 2 (Jan. 28, 1998)). You advised that our office's interpretation "reflects the conclusion that a contingent fee covers the entire representation up to the payment, that the amount remains uncertain until then, and that the fees thus compensate, in part, for representational services performed after the employee began working for the United States." *Id.*

In the present case, you did not find "any basis to distinguish [the Civil attorney's] situation from previous ones in which OLC found that § 203 barred acceptance of compensation by federal employees for services they performed prior to their government service." *Id.* at 3. You explained that "it is undisputed that any recovery in addition to the $10,000 cap her client was obligated to pay was entirely contingent on the case being appealed, and of her client prevailing on appeal." *Id.* Because "[t]he final stages of the appeal and the court's decision took place after she was a federal employee," you concluded that OLC's prior interpretation of § 203 foreclosed her recovery of the outstanding, contingent portion. *Id.* As you explained, "based on OLC's view that contingent fees are based in some part on representations that continue until the contingency is fixed, unless she were to have agreed to a fixed sum from her former client irrespective of the outcome of the case, we did not see any way to distinguish her situation from those in which OLC has found Section 203 to prohibit acceptance of payments for work done prior to federal employment." *Id.* at 3.

In her own submission to our office, the Civil attorney has disputed the conclusion that 18 U.S.C. § 203 would prohibit her recovery of the contingent portion of the fees under the retainer agreement. *See* Civil attorney's Memo, *supra.* She contends that she has "rendered no 'services' to [her client] while serving as a federal employee." *Id.* at 5. She argues instead that she seeks recovery only for hours she worked more than a year before joining the Department of Justice, that those hours are documented, that she had no role in the appeal of her client's case to the Federal Circuit, and that "any fee petition submitted to the [Board] would merely iterate time sheet entries and seek fees based upon total hours worked times a fixed hourly rate of $200.00." *Id.* at 4–5. As a result, she contends that her situation differs from the typical contingency fee case, "wherein the attorney seeks to recover a percentage of the ultimate monetary award." *Id.* at 6. Here, she contends, she seeks only to "recover on a quantum meruit basis fees at a fixed hourly rate for identifiable hours worked in 1996." *Id.*

III.

We do not address whether 18 U.S.C. § 203 would allow the Civil attorney to recover the attorney's fees at issue, because we conclude that, in any event, 18 U.S.C. § 205 bars recovery.

Section 205, among other things, prohibits any officer or employee of the executive branch from "receiv[ing] . . . any share of or interest in" a "claim" against the United States, "in consideration of assistance in the prosecution of such claim." 18 U.S.C. § 205(a)(1) (1994). The Civil attorney thus could not receive any part of attorney's fees that might now be awarded to her client if (1) those fees represent, or constitute a portion of, a "claim against the United States" and (2) the payment to the attorney would be "in consideration of assistance in the prosecution" of such claim. *Id.*

The petition for attorney's fees is a demand for the payment of money by the United States, and such a demand falls within the core meaning of the phrase, "claim against the United States." *See* H.R. Rep. No. 87–748, at 21 (1961); S. Rep. No. 87–2213, at 11 (1962) (citing *United States v. Bergson*, 119 F. Supp. 459 (D.D.C. 1954)); *United States v. 679.19 Acres of Land*, 113 F. Supp. 590, 593–94 (D.N.D. 1953); Bayless Manning, *Federal Conflict of Interest Law* 88 (1964); *see also Acceptance of Legal Fees by United States Attorney*, 6 Op. O.L.C. 602, 603 (1982) (arguing for broader meaning) ("1982 OLC Opinion"); *Prosecution of Claims by Retired Army Officers*, 40 Op. Att'y Gen. 533, 534 (1947) (same). The more difficult question under the statute is whether the payment of fees to the Civil attorney from such an award would be "in consideration of assistance in the prosecution of *such* claim." 18 U.S.C. § 205(a)(1) (emphasis added). A proper resolution of this question requires us to determine the meaning of the statutory phrase "claim against the United States."

There are two possible meanings of that phrase as it relates to the fee petition. The first possibility would be to classify the fee petition as a "claim against the United States" that is distinct from, and independent of, the broader challenge to the Department of Commerce's separation of the Civil attorney's client on which the petition for the attorney's fees award would ultimately rest. The second possibility would be to classify the fee petition as a portion of the relief that would be available to her client incident to his broader "claim against the United States" challenging the Department's separation determination.[1]

[1] We do not address in this opinion whether such a broader challenge would constitute a "claim against the United States" under § 205 in the absence of an accompanying demand for monetary relief We note that Professor Bayless Manning, in his treatise on the criminal conflict of interest laws, recognized that the phrase "claim against the United States" should be construed with due consideration of the fact that a claim that the United States government had improperly discharged one of its employees could give rise to a variety of monetary and non-monetary remedies from among which the plaintiff would be free to select He explained that "even the narrowest conception" of a claim against the United States, a conception that would require a claim to be accompanied by a demand for money, "may cause difficulties" in such cases because of the ties between rights and remedies for the violation of those rights. *Manning, supra* at 87. He noted, for example, that, under the predecessor statute to § 205, a govern-

Continued

Under the first classification of the fee petition, there would be a substantial argument that § 205 would not constitute a bar to the Civil attorney's receipt of all of the fees from the award, even though it would bar her receipt of a portion of such fees. The reference in § 205 to "such claim" would, on this view, refer only to the fee petition, rather than to the broader challenge to the unlawful separation. That is, the fee petition would constitute the relevant "claim." Under this understanding, while the attorney would be barred by § 205 from receiving any fees that constituted consideration for her assistance in the prosecution of the fee petition, she would not be barred by § 205 from receiving the share of the fee award that constituted consideration for her assistance in the prosecution of the challenge to the unlawful separation.[2]

Under the second classification of the fee petition, however, § 205 would appear to constitute a bar to her receipt of any of the fees. On this view, the fee petition would not constitute a distinct and independent "claim against the United States" in its own right that would be severable from the underlying challenge to the Department of Commerce's decision regarding her client's employment. It would merely constitute a portion of the relief that would be available incident to the employee's broader "claim against the United States" challenging the unlawful separation by the Department of Commerce. Under this view, § 205 would bar the attorney's receipt of the fee award because she clearly would be receiving the fee award "in consideration of" her assistance in the prosecution of the challenge to the allegedly unlawful separation.

In our view, the fee petition is more properly classified as a demand for money incident to the employee's broader challenge to the unlawful separation than as a distinct "claim against the United States." This classification appears to accord with the understanding of both the attorney and the client that the petition for the fee award was inextricably bound up with the underlying challenge to the separation decision. The Civil attorney's submission shows that, from the outset, her client's challenge to his separation from the Department of Commerce contemplated a request for monetary relief in the form of attorney's fees. The submission shows further that the attorney was not only aware that an award of attorney's fees was among the types of relief statutorily available to her client if his challenge to the separation succeeded, but also that she made sure that her retainer agreement provided that she would receive any attorney's fees award that her client might be entitled to recover as a consequence of his prevailing on the unlawful separation claim.

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ment employee might be "forbidden . . to assist a former employee in a proceeding for reinstatement" because, although no money was sought in the proceeding for reinstatement, the proceeding could "lead to a claim for back pay" *Id.* Thus, Professor Manning stated that it was an open question whether even a claim that did not include a demand for money should be deemed a "claim against the United States" so long as it could lead to such a demand *Id.*

[2] As we have mentioned, we do not address in this opinion whether § 203 would impose an independent bar to the receipt of any such fees.

In addition, the statutory provisions that govern the award of attorney's fees in employment cases such as her client's treat the determination of liability and the award of attorney's fees as if they were indivisible components of a single claim. Under the provisions, the client could be entitled to attorney's fees only as a "prevailing party," 5 U.S.C. § 7701(g)(1) (1994), and thus these provisions make the fee award contingent upon a determination regarding the merits of the challenge to the unlawful discharge in this case. The statute further provides that the adjudication of the fee petition shall be made by the same decision makers that determine the liability issue, and that the award shall be made "in the interests of justice," *id.*, a standard that appears to contemplate the adjudicators' consideration of the representation that had been provided in the underlying challenge. Indeed, the Board styles the consideration of a motion for attorney's fees as an "Addendum proceeding" to the liability phase, 5 C.F.R. § 1201.203(b) (1998), and because such a proceeding may cover compensatory and consequential damages, too, *id.* § 1201.204(c)(2), it is hard to view the "Addendum" as anything other than the next phase of a single proceeding on a single claim.

A separate provision of the relevant attorney's fee statute, which applies to petitions for awards resulting from certain types of employment claims, lends additional support to the conclusion that the fee petition should not be understood to constitute a "claim against the United States" that is distinct from the challenge to the unlawful separation. *See* 5 U.S.C. § 7701(g)(2) (1994). The provision states that for certain employment claims, the fee petition should be governed by the provisions of 42 U.S.C. § 2000e–5k (1994). *See* 5 U.S.C. § 7701(g)(2). Those provisions, in turn, equate the attorney's fees that may be awarded for such employment claims with the "costs" of bringing the underlying claims. *See* 42 U.S.C. § 2000e–5k. The reference in 5 U.S.C. § 7701(g)(2) to 42 U.S.C. § 2000e–5k, which describes the fee award as covering the "costs" of the underlying employment claim, suggests that the drafters of the statute governing the attorney's fees award in this matter conceived of the petition for such an award as being incident to the underlying claim for relief from the wrongful discharge rather than as a distinct claim in its own right. That suggestion accords with a construction of § 205 that would deem the fee petition to be an aspect of the underlying challenge to the separation determination rather than an independent claim.

We note that the 1982 OLC Opinion suggested that a quantum meruit payment to a federal employee for work he had performed before entering the government might, under the circumstances, have been consistent with § 205. 6 Op. O.L.C. at 603–04. There, however, the lawfulness of the payment depended on establishing that the employee had "eliminated his interest in the claim" against the United States by turning his interest into a non-contingent right to recover from his succeeding counsel. *Id.* at 604. Here, by contrast, the Civil attorney's right to payment depended on a finding of liability, which was contingent when she entered the government, and still depends on an award against the government by the Board. A payment to her thus would be a share of a claim against the United States.

BETH NOLAN
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Office of Legal Counsel

Gulf War Veterans Health Statutes

Section 1604 of the Persian Gulf War Veterans Act of 1998 is constitutionally invalid insofar as it purports to nullify prospectively certain described legislation that might be enacted in the future.

Overlapping provisions of the Veterans Programs Enhancement Act of 1998 and the Persian Gulf War Veterans Act of 1998, although redundant and burdensome in some respects if both statutes are given effect, are not inherently conflicting or mutually exclusive and therefore both provisions must be treated as valid and given effect.

March 12, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

This responds to your letter of December 8, 1998, requesting our legal opinion on questions raised by two conflicting or overlapping statutes, passed by Congress on the same day, responding to the health risks associated with military service in the Persian Gulf War (''Gulf War'').[1] The statutes in question are the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105–368, 112 Stat. 3315 (''VPEA''), and the Persian Gulf War Veterans Act of 1998, passed as Title XVI of Division C of the Act Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Pub. L. No. 105–277, 112 Stat. 2681–742 (''GWVA''). We conclude that: (1) section 1604 of the GWVA is constitutionally invalid and ineffective insofar as it purports to nullify certain described legislation (including section 101 of the VPEA) that might be enacted in the future; (2) under governing principles of statutory interpretation, every effort must be made to reconcile the provisions of two statutes enacted under the circumstances presented here before resorting to rules of construction giving one primacy over the other; and (3) the respective provisions of the two laws that you have asked us to analyze, although redundant and burdensome in some respects if both laws are given effect, are not inherently conflicting or mutually exclusive, and therefore the provisions of both laws must be treated as valid and effective.

I.

The statutes in question here were both introduced in response to the October 1997 recommendation of the Presidential Advisory Committee on Persian Gulf War Illnesses that Congress enact a permanent statutory program for providing

[1] Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Leigh A Bradley, General Counsel, Department of Veterans Affairs (Dec 8, 1998) (''VA Letter'') In considering this matter, we also received and considered the views of the General Counsel of the Office of Management and Budget. *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Robert G Damus, General Counsel, Office of Management and Budget (Jan. 25, 1999)

compensation and benefits to veterans suffering illnesses as a result of their Gulf War service. The VPEA was originally introduced as H.R. 4110 in the 105th Congress. H.R. 4110 was unanimously passed by the House of Representatives on October 10, 1998. It was subsequently passed by the Senate on October 21, 1998 — several hours after final congressional passage of the GWVA as part of the Omnibus Appropriations Act. It was signed into law by the President on November 11, 1998.

The provisions enacted as the GWVA were largely drawn from S. 2358, a bill originally introduced in the 105th Congress by Senators Byrd, Rockefeller, and Specter. *See* 144 Cong. Rec. S12,832 (daily ed. Oct. 21, 1998) (statement of Sen. Byrd). S. 2358 was passed by the Senate on October 8, 1998, but was never taken up as such by the House. The key provisions of S. 2358 were then attached in the form of the GWVA as an amendment to the Omnibus Appropriations Act, at the behest of Senator Byrd, and passed by both the House and Senate on October 21, 1998 — several hours before final congressional passage of the VPEA. The Omnibus Appropriations Act was also signed by the President on October 21, 1998.

In summary, although final congressional passage of both laws occurred on the same day, the VPEA was both passed by the Congress and signed into law by the President after the GWVA. Thus, the VPEA constitutes the later enacted of the two statutes.

Both laws require the Secretary of Veterans Affairs ("Secretary") to seek to enter into an agreement with the National Academy of Sciences ("NAS") to study and report upon the relationship between service in the Gulf War, certain factors and conditions (such as use of particular vaccines and exposure to specified substances) associated with such service, and illnesses experienced by Gulf War veterans. Although the respective NAS studies required by the two statutes overlap in substantial respects, there are a number of differences between them. The study required under the VPEA, for example, requires an assessment of latency periods that is not required under the GWVA. The GWVA, on the other hand, contains a requirement to include Uranium among the synthetic chemical compounds to be considered as a potential source of illness, whereas the VPEA omits that particular requirement. Additionally, the statutory deadlines for completion of the respective NAS studies are different, in that the GWVA provisions establish a considerably shorter timetable. The study authorized by the GWVA must be completed no later than 18 months after that bill's date of enactment (i.e., October 21, 1998), whereas the study authorized by the VPEA is not due until two years after the date the Department of Veterans Affairs ("VA") enters into a contract with the NAS. The most significant variation between the two bills is that the GWVA requires the VA Secretary to make an administrative determination whether the covered illnesses warrant a presumption of service connection, which would substantially enhance the ability of Gulf War veterans to establish claims for disability entitlements under 38 U.S.C. § 1110 (1994), whereas the VPEA merely requires the Secretary to submit to designated congressional committees a report with non-binding recommendations as to whether there is sufficient evidence to warrant a presumption of service connection for the occurrence of the specified illnesses and conditions found in Gulf War veterans.

In light of the differing provisions and requirements of the two statutes, you have requested our legal opinion on a number of questions. Initially, you seek our opinion whether section 1604 of the GWVA, which purports to nullify prospectively later enacted legislation (and section 101 of the VPEA in particular) respecting authorization of a Gulf War study and related issues, is constitutional and effective. In the event we conclude section 1604 does not effectively nullify the provisions of the VPEA, you seek our guidance as to whether the various provisions of the respective bills may be reconciled and, insofar as they cannot be reconciled, which of the two statutes is to be given controlling effect.

II.

A.

The first issue that must be resolved in determining the relationship between these two statutes is whether section 1604 of the GWVA effectively nullifies the Gulf War health study provisions contained in section 101 of the VPEA. Section 1604 provides:

> In the event of enactment, before, on, or after the date of the enactment of this Act, of section 101 of the Veterans Programs Enhancement Act of 1998, or any similar provision of law enacted during the second session of the 105th Congress requiring an agreement with the National Academy of Sciences regarding an evaluation of health consequences of service in Southwest Asia during the Persian Gulf War, such section 101 (or other provision of law) shall be treated as if never enacted, and shall have no force or effect.

As relevant here, section 1604 would prospectively nullify the ability of Congress and the President to enact effective legislation on a designated subject during the remainder of the 105th Congress. Such a measure is incompatible with the provisions for the enactment of laws set forth in Article I, section 7 of the Constitution because it purports to invalidate by statute subsequent legislation duly enacted through valid constitutional processes. *See Manigault v. Springs*, 199 U.S. 473, 487 (1905) ("a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature''); *United States v. Lopez Andino*, 831 F.2d 1164, 1172 (1st Cir. 1987) (Torruella, J., concurring) (''under well-established constitutional precedent, as an act of Congress it does not bind future Congresses''), *cert. denied*, 486 U.S. 1034 (1988); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir. 1978) (''To be sure, Congress is generally free to change its mind; in amending legislation Congress is not bound by the intent of an earlier body.'').[2] Accordingly, we conclude that section 1604 does not nullify or abrogate the later-enacted provisions of section 101 of the VPEA.

B.

Although section 1604 of the GWVA cannot constitutionally nullify the subsequent enactment of section 101 of the VPEA, it remains to be considered what effect, if any, should be given to section 1604 as evidence of congressional intent in construing the effect and relationship of the two statutes. Specifically, does the enactment of section 1604 establish that Congress intended the provisions of the GWVA to be controlling to the extent that they would conflict with the later-enacted provisions of section 101 of the VPEA? In this regard, it is to be noted that section 1604 directly confronts the possibility of conflict between the two provisions, whereas the VPEA does not address that subject at all. It might be argued, therefore, that section 1604 is to that extent a more specific provision that should control over the provisions of the VPEA insofar as there is irreconcilable conflict. *See, e.g., Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990) (where two statutes conflict, regardless of priority of enactment, the more specific statute ordinarily controls the more general).

We conclude that section 1604 does not establish the primacy of the provisions of the GWVA in relation to those of the VPEA insofar as the two provisions conflict. The Gulf War study provisions of the GWVA are not more specific than those of section 101 of the VPEA in the sense in which the specific/general dichotomy is used in this context; rather, the two provisions are at the same order of specificity. The mere fact that section 1604 of the GWVA ineffectually purports to nullify the later-enacted provisions of section 101 of the VPEA, moreover, does not render the former statute more specific than the latter in the sense intended by the rule of construction. Further, section 1604 does not actually address the issue of *reconciling* the two provisions; its sole stated objective is to *nullify com-*

[2] In holding that an act of Congress cannot bind ''future Congresses,'' *Lopez Andino* and other cases using such phrasing do not implicitly suggest that an act of Congress *can* bind the *same* Congress when that Congress subsequently undertakes to enact legislation contrary to the earlier enactment. In either circumstance, the controlling general principle is that an act of Congress (as distinguished, for example, from an amendment to the Constitution) cannot prohibit the enactment of subsequent contrary legislation through valid constitutional processes This is not to say that earlier adopted legislation, such as the Dictionary Act, *see* 1 U.S.C. § 1 (Supp. III 1997), cannot influence the interpretation or meaning of later adopted legislation. Such earlier legislation may influence the meaning of terms in a subsequent enactment, to the extent consistent with that enactment. But Congress always retains the authority, subject to constitutional limitations such as due process, to override the earlier enactment through duly enacted subsequent legislation

pletely any enactment of the provisions of section 101, which is not constitutionally permissible.

Notwithstanding the prior passage of section 1604 as part of the Omnibus Appropriations Act, the Senate proceeded to pass the VPEA hours later—including without alteration, let alone any indication of repeal, the targeted provisions of section 101. Such action is difficult to reconcile with a genuine congressional intent to nullify section 101. The Senate debate on final passage of the VPEA, moreover, does not support the odd view that the Senate intended that the very provisions of section 101 that it was enacting without amendment (let alone removal) would have no effect. In comments upon the VPEA—comments made *after* Congress had already passed section 1604 of the GWVA—Senator Rockefeller (ranking member of the Senate Committee on Veterans' Affairs and an original co-sponsor of S. 2358, the bill that was later essentially enacted as the GWVA) made the following observations touching on the relationship between the two bills:

> [T]his bill [the VPEA] directs the Secretary of Veterans Affairs to enter into agreements with the NAS to conduct studies and provide recommendations for research that may be needed to better understand the possible health effects of exposures to toxic agents or environmental or wartime hazards associated with Gulf War service. The NAS will also provide recommendations to VA on the development of continuing medical education programs on the treatment of war-related illnesses and the assessment of new treatments to alleviate the effects of these illnesses.

144 Cong. Rec. at S12,933 (daily ed. Oct. 21, 1998). Referring to what he perceived as shortcomings in the provisions of section 101 of the VPEA (i.e., H.R. 4110), Senator Rockefeller observed:

> However, I was disappointed that we were unable to move beyond the initial steps contained in H.R. 4110 in negotiations with the House and Senate Veterans' Affairs Committees. H.R. 4110 only provides for VA to contract with NAS to perform the scientific review to identify potential exposures and illnesses associated with those exposures, but excluded the critical directive and guidance to VA to make determinations about compensation and presumption of battlefield exposures. Nonetheless, I felt that it was important that we accomplish what we could in this Congress to begin the process, although I realized this would still leave more for us to accomplish in the 106th Congress.

> We would have been left with *only this initial step* were it not for the senior Senator from West Virginia, Senator Byrd. Senator Byrd successfully negotiated the inclusion of the compensation and presumption provisions of S. 2358 in the Omnibus Appropriations bill.

Id. at S12,933 (emphasis added).

Senator Rockefeller's statement does not support the view that the VPEA was passed with a tacit understanding that it would be subordinate to, or nullified by, section 1604 of the GWVA. Especially in light of the fact that Senator Rockefeller was a proponent of the legislation that became the GWVA, his statement indicates instead that the two provisions were viewed as cumulative, rather than conflicting and mutually exclusive. Thus, Senator Rockefeller described section 101 of the VPEA as an "initial step," with the provisions of the GWVA addressing the perceived shortcomings of the former statute by *additionally* providing for compensation and presumption of service connection.

A conclusion that section 1604 of the GWVA wholly superseded the later-enacted provisions of the VPEA would require a presupposition that the Senate proceeded to enact the VPEA recognizing all the while that its extensive and detailed Gulf War study provisions were meaningless and inoperative. Apart from the text of section 1604 itself — which we have already concluded is ineffective insofar as pertinent here — we find no evidence of that understanding on the part of the Senate as it passed the VPEA, and substantial evidence to the contrary in the statement of Senator Rockefeller.

C.

Having concluded that section 1604 of the GWVA does not effectively nullify the provisions of section 101 of the VPEA, we now consider how these two overlapping enactments should be interpreted and applied. An early opinion of the Attorney General sets forth the key legal principles that were employed to resolve a strikingly similar statutory dilemma:

> By old and well-established canons of construction it is settled that every effort should be made — in the absence of express words of repeal — to harmonize seemingly conflicting provisions in statutes in pari materia passed at the same time, or approximately the same time, even though one of the acts contains language which, in ordinary circumstances and except for the element of contemporaneity, would be deemed to displace the other. The presumption that in such cases the legislature did not intend any inconsistency, no doubt has special force in the case of statutes passed on the

same day, and it is entirely clear that such statutes ought, if possible, to be so construed as to allow both of them to stand, for, as was said by the Supreme Court of Maine in *Stuart v. Chapman*, 104 Me. 17, 23, in discussing a situation similar to the one here presented —

> "It avoids the absurdity of holding that the legislature, whose proceedings are presumed to be conducted with wisdom and deliberation, enacted and repealed a statute upon the same day; or that the house and senate gravely and solemnly passed through all their several stages two inconsistent acts, either one of which would repeal the other, and sent them at the same time to the governor, intending that, and that alone, should become a law of the land to which he happened last to affix his signature."

War-Risk Insurance Act — Repeal of Gratuity Laws, 31 Op. Att'y Gen. 205, 208 (1918) ("AG Opinion").

Here, too, we confront statutes in pari materia passed on the same day, but with one of the acts containing language — i.e., section 1604 of the GWVA — that could (setting aside the temporal sequence of enactment) be deemed to displace the other. Accordingly, we find that the Attorney General's above-quoted formulation provides the appropriate framework for interpreting the two provisions in question here — that is, every effort should be made to harmonize or reconcile their apparent conflicts, without distorting their plain meaning. *See also Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996) ("to the extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one"), *cert. denied*, 519 U.S. 1109 (1997). Moreover, apart from the canon of statutory construction favoring harmonization, with respect to these two statutes there is relevant evidence from the legislative history weighing in favor of harmonization: Senator Rockefeller stated that the VPEA represented the "initial step" and that the GWVA moved beyond that step. *See* 144 Cong. Rec. at S12,933.[3] Given the canon of construction and this legislative history, the case for harmonization is compelling.

[3] Nothing in the debate or floor statements accompanying final passage of the VPEA indicates that it was considered irreconcilable with the provisions of the GWVA. However, Representative Stump (Chairman of the House Veterans' Affairs Committee), in connection with the insertion of the GWVA provisions into the Omnibus Appropriations Act, expressed the view that aspects of the GWVA were irreconcilable with those of the VPEA. *See* 144 Continued

D.

We now consider whether the Gulf War health study provisions of the VPEA and the GWVA may both be given effect through reconciliation, or whether they are in such irreconcilable conflict that one provision must be given primacy under controlling principles of construction. In doing so, we apply the standard of irreconcilability employed by the Attorney General in his 1918 opinion: "To obey one provision is to ignore the other; to disobey one is to give effect to the other." AG Opinion at 209. We conclude that, for all material and significant purposes, the two statutes are not irreconcilable.[4] Although there is considerable overlap and some disparity between the two provisions — for example, they require the preparation of predominantly similar reports on Gulf War service-related illnesses by the NAS, but the reports differ in some notable respects and are subject to different submission deadlines — compliance with either of the statutes does not appear to render compliance with the other impossible or compel disobedience to it.

Probably the most significant difference between the two statutes is their respective approaches to a "presumption of service connection" for illnesses associated with Gulf War service. GWVA, 112 Stat. at 2681–743. Under section 1602 of the GWVA, which would enact a new 38 U.S.C. § 1118, the Secretary must *determine*, based on the NAS report, whether the covered illnesses warrant a presumption of service connection by reason of certain associations described in the GWVA. That determination would be formally promulgated in regulations and then come into play in the disposition of claims for compensation for service-connected disabilities under 38 U.S.C. § 1110. The VPEA, in contrast, does not direct or authorize the Secretary to make such a determination. Rather, section 101(i)(2) thereof merely requires the Secretary to submit to designated congressional committees a report with *recommendations* as to whether there is sufficient evidence to warrant a presumption of service connection for the occurrence of specified conditions in Gulf War veterans, based upon the NAS report and the comments of government agencies in response to that report.

We conclude that these two provisions are not mutually exclusive and that, accordingly, the VA must attempt to comply in good faith with both provisions.

Cong. Rec H11,656–57 (daily ed. Oct 20, 1998). Specifically, Representative Stump contended that the GWVA's provision for a binding Secretarial determination on the presumption of service connection left Congress with "no role in deciding the future compensation policy for veterans," whereas the VPEA provided for the VA Secretary to make non-binding recommendations to Congress with respect to that issue *Id.* at H11,657. While we agree that the two statutes take different approaches to this issue, those approaches do not appear to be mutually exclusive or irreconcilable, as we discuss in Section II.D *infra* As indicated in the text, moreover, it has long been established that roughly contemporaneous statutes should be harmonized where possible Nonetheless, Representative Stump's statement indicates that Senator Rockefeller's view was not universally shared

[4] Given the detailed and technical nature of the two statutes' specifications for the NAS studies and the Secretary's response thereto, our opinion does not purport to determine that there are no irreconcilable discrepancies whatsoever between *any* provisions of the two bills The VA would have superior expertise to identify any such irreconcilable discrepancies at a factual level, but it has not called to our attention, nor have we identified, any of that nature

Compliance with the GWVA's requirement for an administrative determination on the presumption of service connection does not require the Secretary to "ignore" or "disobey," *see* A.G. Opinion at 209, the VPEA's distinct requirement for submitting a recommendation respecting that same issue to the congressional committees. Although it may seem burdensome or redundant, we are unable to find a convincing reason why the Secretary cannot do both. The chief argument supporting the view that the two measures are mutually exclusive might rest on the premise that the later submission of a recommendation to the congressional committees pursuant to the VPEA would amount to a futile or ineffectual gesture inasmuch as the Secretary would already have made an effective administrative determination that the presumption of service connection is warranted or not warranted pursuant to the GWVA. Such a premise would not be valid, however, because the provision of the Secretary's recommendations to the congressional committees would still provide Congress with pertinent information enabling it to consider and possibly to enact legislation reflecting a distinct congressional resolution of the presumption-of-service-connection issue. Compliance with both of these provisions, moreover, would not appear to be inordinately burdensome, inasmuch as the assessment and analysis underlying both the VPEA recommendation and the GWVA determination would involve substantial overlap.

What we have said with respect to the differing provisions of the two statutes on resolving the presumption-of-service-connection issue applies as well to the other possible disparities identified in your submission to this Office.

One set of possible disparities that you have identified is that the two statutes have a number of differences in their provisions for the review of scientific evidence to be conducted by the NAS. *See* VA Letter at 4–6. Under section 101(c)(1)(B) of the VPEA, for example, the NAS would be required to identify illnesses "associated with the agents, hazards, or medicines or vaccines" described in that statute, whereas under the GWVA the requirement calls for the identification of the illnesses (including diagnosed and undiagnosed illnesses) that are "manifest" in Gulf War veterans. GWVA § 1603(c)(1)(B). While these requirements are not identical or co-extensive — there may, for example, be some illnesses "manifest" in Gulf War veterans that are not actually associated with the specific potential causes listed in the VPEA — they clearly entail substantial overlap.

Additionally, there are particular items required in the NAS study described in one of the statutes that are not required in the other. The VPEA, for example, requires the NAS study to assess latency periods between service or exposure to the risk factors and manifestation of the illness, *id.* § 101(c)(3), whereas the GWVA study does not expressly contain such a requirement. On the other hand, section 1603(f) of the GWVA requires the NAS to review separately, for various categories of illnesses, the available scientific data in order to identify empirically valid models of treatment for such illnesses, whereas the VPEA does not contain such a requirement. Rather, section 101(f) of the VPEA merely calls on the NAS to make any recommendation it considers appropriate for additional scientific studies including, among others, "studies relating to treatment models." Additionally, although the lists of agents, hazards, and compounds to be covered in the initial NAS review in the two statutes are nearly identical, only the GWVA includes Uranium in the listing. *Id.* § 1603(d)(1)(F).

The foregoing disparities, however, clearly do not render the study requirements mutually exclusive or even radically divergent. Indeed, it appears that the identical or overlapping requirements of the studies called for by the respective bills may exceed their differences and that the respective study contracts could be drafted so that NAS's performance of one contract satisfies all the identical or overlapping requirements of the other contract.

You have also identified as a potential problem the statutory provisions concerning timing and submission of reports by the NAS. *See* VA Letter at 6–7. For example, the GWVA requires NAS to submit the first of its reports to the Secretaries of VA and Defense and to designated Senate and House Committees no later than 18 months after the date of enactment of that act (i.e., by April 21, 2000, which is 18 months after October 21, 1998), whereas the VPEA does not require the submission of the first of its required reports (to the VA Secretary and a different set of congressional committees) until *two years* after the Secretary and the NAS enter into the required agreement, a considerably later deadline. Again, the more accelerated timetable for submission of the report required by the GWVA presents no irreconcilable conflict between the two laws. It merely means that the portions of the VPEA study that overlap with those of the GWVA study must be completed by the latter's earlier deadline in order to comply with that statute. In that respect, the shorter GWVA deadlines may actually accelerate, rather than preclude, compliance with some requirements of the VPEA.

A final potential disparity that you have noted is the difference in the "sunset" provisions of the two laws: whereas section 101(j) of the VPEA provides for the termination of its provisions eleven years after the end of the fiscal year in which the VA enters into the agreement with the NAS, section 1603(j) of the GWVA provides for termination of its provisions ten years after the end of the fiscal year in which the NAS submits its first report. *See* VA Letter at 7. As in the case of the differing provisions for report submission deadlines, we do not believe these variations create any irreconcilable conflict between the statutes. For example, insofar as the two statutes impose overlapping or identical obligations or tasks that might be performed close to the "sunset" date of the earlier expiring statute, the existence of the differing sunset provisions does not appear to create a genuine or irreconcilable conflict. It merely means that if the VA is unable to complete such an overlapping task before the sunset of the statute with the shorter life it would still have authority to complete the task under the provisions of the statute with the longer duration. In that respect, the dual sunset provisions may prove to supply an added element of flexibility in the completion of overlapping tasks authorized by both laws, rather than rendering any obligation under either statute impossible to perform.

Conclusion

We conclude that section 1604 of the GWVA does not effectively nullify the later-enacted provisions of section 101 of the VPEA and that the Gulf War study and related provisions of the two statutes that the VA has asked us to analyze are not irreconcilable and are therefore valid and effective.

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Guidance on Application of Federal Vacancies Reform Act of 1998

This memorandum provides guidance on the application of the Federal Vacancies Reform Act of 1998 to vacancies in Senate-confirmed offices within the Executive Branch.

March 22, 1999

MEMORANDUM OPINION FOR AGENCY GENERAL COUNSELS

On October 21, 1998, the Federal Vacancies Reform Act of 1998 ("Vacancies Reform Act" or "Act") was signed into law.[1] The Vacancies Reform Act replaces the old Vacancies Act and alters the way in which vacancies in presidentially appointed, Senate-confirmed offices within the Executive Branch may be filled on a temporary basis. The following Q&As are intended to provide general guidance on the Vacancies Reform Act.

Table of Subject Areas Covered by these Questions and Answers:

What is the effective date of the Act?	Q1
How does the Act treat vacancies that arose before the effective date?	Q2
What constitutes a vacancy?	Q3
Which offices are covered by the Act?	Q4–Q9
Who can serve as an acting officer?	Q10–Q21
What are the time limits on an acting officer's service?	Q22–Q38
What enforcement provisions apply under the Act?	Q39–Q49
What are the reporting requirements under the Act?	Q50–Q53

Question 1. When did the Vacancies Reform Act become effective?

Answer. The Vacancies Reform Act took effect on November 20, 1998.

Question 2. Does the Vacancies Reform Act affect offices that became vacant before November 20, 1998?

Answer. For offices that became vacant before November 20, 1998, the *only* provision of the Vacancies Reform Act that applies is the limitation on how long someone may serve in an acting capacity for that office. Further, that time limit is the only part of the Act that applies even if no one is designated to perform the duties of the office on a temporary basis until after November 20, 1998, as long as the office was vacant before that date. (For a more complete discussion of the Vacancies Reform Act's application to offices that became vacant before

[1] *See* Pub. L. No. 105–277, Div. C, tit 1, § 151, 112 Stat 2681, 2681–611 to –616 (codified at 5 U.S.C §§ 3345–3349d (Supp IV 1998)) For ease of reference, further citation to the Vacancies Reform Act will refer only to the section at which the provision is to be codified.

November 20, 1998, including the calculation of the time limits that apply to acting officers filling those offices, see Memorandum for Agency General Counsels, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Initial Guidance on the Federal Vacancies Reform Act of 1998* (Nov. 13, 1998).)

In contrast, the full scope of the Vacancies Reform Act applies to an office that becomes vacant on or after November 20, 1998, including the Act's restrictions on who may serve in an acting capacity and on which duties of the office may be performed by someone other than an acting officer serving in conformity with the Act.

Question 3. When does an office become "vacant" for purposes of the Vacancies Reform Act?

Answer. Under the Vacancies Reform Act, a vacancy arises when a relevant officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." The full range of what would constitute being "otherwise unable to perform the functions and duties of the office" is unspecified in the Act, except that the Act provides that "the expiration of a term of office is an inability to perform the functions and duties of such office." 5 U.S.C. § 3345(c)(2). In floor debate, Senators said, by way of example, that an officer would be "otherwise unable to perform the functions and duties of the office" if he or she were fired, imprisoned, or sick. *See* 144 Cong. Rec. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson); *id.* at S12,824 (statement of Sen. Byrd). The Office of Legal Counsel ("OLC") can assist you with any questions about whether an office is vacant for purposes of the Act.

Question 4. Which offices are covered by the Vacancies Reform Act?

Answer. Generally, the Vacancies Reform Act applies to any office within an Executive agency to which appointment is required to be made by the President, by and with the advice and consent of the Senate (a "PAS position"). The Act, however, excludes from its coverage a few specified offices. The Act also recognizes that a number of PAS positions are covered by other statutes that specifically address how the office is to be filled on a temporary basis. *See* Q6–Q8 for a discussion of the PAS positions expressly excluded from coverage by the Act and of the statutes that continue to apply to filling certain vacant PAS positions on a temporary basis.

Question 5. What is an "Executive agency" within the meaning of the Vacancies Reform Act?

Answer. In short, "Executive agency" as used in the Vacancies Reform Act includes almost the entire Executive Branch. Under the Vacancies Reform Act, Executive agency has the same meaning given to that term in 5 U.S.C. § 105 (1994), except that the Act also expressly includes within the definition of Executive agency the Executive Office of the President and expressly excludes from that definition the General Accounting Office. Section 105 of title 5 defines "Executive agency" to mean "an Executive department, a Government corporation, and an independent establishment.'' The ''Executive departments'' are listed in 5 U.S.C. § 101 (1994 & Supp. II 1996); ''Government corporation'' is defined in 5 U.S.C. § 103 (1994) as ''a corporation owned or controlled by the Government of the United States''; and ''independent establishment'' is defined in 5 U.S.C. § 104 (1994), in relevant part, as ''an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.''[2]

Question 6. Are there executive-branch PAS positions that are not covered by the Vacancies Reform Act?

Answer. Yes, the Vacancies Reform Act expressly excludes certain offices from coverage under the Act. The Act does not apply to any PAS who is (1) a member of a ''board, commission, or similar entity that is composed of multiple members and governs an independent establishment or Government corporation;'' (2) a ''commissioner of the Federal Energy Regulatory Commission;'' (3) a ''member of the Surface Transportation Board;'' or (4) a judge on ''a court constituted under article I of the United States Constitution.'' 5 U.S.C. § 3349c.

Question 7. If a position meets the definition of a covered office under the Vacancies Reform Act, is the Act necessarily the exclusive means of temporarily filling the vacancy?

Answer. The Vacancies Reform Act was intended in most cases to be the exclusive means for filling a vacant executive-branch PAS position (i.e., having a person designated as the ''Acting'' officer). The Act also recognizes, however, the continued applicability of certain other mechanisms for filling PAS positions on a temporary basis. In particular, the Act expressly recognizes that a PAS position may be filled temporarily through (a) a recess appointment and (b) a statutory provision that ''expressly [i] authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or [ii] designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.'' 5 U.S.C. § 3347(a). In addition, § 3349b of the Act provides that the Act does not alter the application of a ''statute that authorizes a person to continue to serve in any office—(1) after the expiration of the term for which that person is appointed; and (2) until a successor is appointed or a specified period of time has expired.'' 5 U.S.C. § 3349b. The Act makes clear, however, that an agency's organic statute does not provide authorization for filling PAS positions on a temporary basis. *See* Q9.

Question 8. Is there a list of the statutes that continue to authorize the temporary filling of a vacant PAS position?

[2] Although the military departments are defined separately in 5 U.S.C. § 102 (1994), the Committee Report indicates that they are nonetheless intended to be covered by the Act. *See* S Rep No 105-250, at 12 (1998) (''Because the Department of Defense is a department within the meaning of 5 U.S.C. § 101, the military departments, which are located in the Department of Defense, are also covered by this Act '')

Answer. The Report of the Committee on Governmental Affairs, United States Senate, on the Vacancies Reform Act lists forty such statutes. *See* S. Rep. No. 105–250, at 16–17. This list is not comprehensive, however, and each Executive agency will need to determine which statutes apply to its PAS positions. OLC can assist you with any questions about the continued applicability of specific statutes.

Question 9. May Executive agencies continue to rely on their organic authorities to designate acting officers for positions covered by the Vacancies Reform Act?

Answer. No. The Vacancies Reform Act provides that "[a]ny statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not" the type of statutory provision that remains a separate, viable authority for filling vacant PAS positions on a temporary basis. 5 U.S.C. § 3347(b).

Question 10. Who may serve in an acting capacity for a vacant executive-branch PAS position under the Vacancies Reform Act?

Answer. There are generally three categories of people who may serve in an acting capacity for vacant PAS positions under the Vacancies Reform Act: (1) first assistants to the respective vacant offices, (2) PAS officers designated by the President, and (3) certain senior agency employees designated by the President. 5 U.S.C. § 3345(a).

Question 11. Who is the first assistant to the office?

Answer. The Vacancies Reform Act does not define the term "first assistant." The Committee Report, however, indicates that establishing first assistants by statute or by regulation would be sufficient under the Act. *See* S. Rep. No. 105–250, at 12. There is also some support for a broader definition of a first assistant. *See* 144 Cong. Rec. S11,037 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman) (identifying first assistant as "a term of art that generally refers to the top deputy" to the position). At a minimum, a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of the Vacancies Reform Act. Others not designated by statute or regulation also may qualify as first assistants under the Act, but there is less explicit support in the legislative history for this proposition.

Question 12. How does the first assistant begin to serve as an acting officer for a vacant position?

Answer. Under the terms of the Vacancies Reform Act, if there is a first assistant to the vacant office, that first assistant begins to serve as the acting officer immediately and automatically upon the occurrence of the vacancy. 5 U.S.C. § 3345(a)(1).

Question 13. If someone is designated to be first assistant after the vacancy occurs, does that person still become the acting officer by virtue of being the first assistant?

Answer. While the Vacancies Reform Act does not expressly address this question, we believe that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant. While someone who is not the first assistant when the vacancy occurs would not qualify to be the acting officer by virtue of being the first assistant, the President may still designate that person to serve as the acting officer if he or she meets the qualifications for serving as an acting officer under a different provision of the Act. *See* Q17–Q20.*

Question 14. Are there limitations on the ability of a first assistant to serve in an acting capacity?

Answer. In addition to the time limit on the length of service of an acting officer, *see* Q23, the Vacancies Reform Act also limits a first assistant's ability to be the nominee for the office and, at the same time, to continue to serve as the acting officer for that office. If the President nominates the first assistant for the vacant office, the first assistant may continue to serve as the acting officer for that position only if (1) the first assistant served as first assistant for at least ninety days (they need not be consecutive days) during the 365-day period that preceded the beginning of the vacancy, or (2) the office of first assistant is itself a PAS position and the Senate approved the appointment of that first assistant to the first assistant's position. 5 U.S.C. § 3345(b).

Question 15. Does this limitation on the ability to be both the nominee and the acting officer apply only to first assistants, or does it also apply to persons who qualify to serve as an acting officer under other provisions of the Vacancies Reform Act?

Answer. The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office. If someone is serving in an acting capacity on another basis, i.e., as a PAS or a senior agency employee designated by the President, this particular limitation does not apply. However, because senior agency employees may not be designated by the President unless they have served in the agency for ninety days within the year preceding the vacancy, *see* Q20, a similar time limitation in fact applies to anyone who is not already in a PAS position.

Question 16. If the first assistant also qualifies to serve in an acting capacity under another provision of the Vacancies Reform Act, does the limitation on the ability to be both the nominee and the acting officer apply?

Answer. If the first assistant also qualifies to serve in an acting capacity under another category, he or she may be designated under that category. Accordingly, if the first assistant meets the requirements to be an acting officer based on his or her status as a senior agency employee, the first assistant could be nominated

* Editor's Note: In 2001, the Office of Legal Counsel reversed its position on this issue and now believes that, on the better view, someone who becomes the first assistant after a vacancy occurs may serve as the acting officer by virtue of being the first assistant

for the position and continue to serve in an acting capacity as long as the President made the required designation for that senior agency employee to serve as the acting officer. (As noted above and discussed in more detail in question 20, the requirements for a senior agency employee to serve as an acting officer include that the employee have served within the agency for at least ninety days in the year preceding the vacancy.)

Question 17. How does a PAS officer come to serve as an acting officer for a vacant position?

Answer. A PAS officer may begin serving as an acting officer for a vacant position only upon direction from the President (and only the President) that that PAS officer is to perform the functions and duties of the vacant office in an acting capacity. 5 U.S.C. § 3345(a)(2).

Question 18. Does the Vacancies Reform Act impose any limitations on which PAS officers the President may designate to serve in an acting capacity for a vacant office?

Answer. The Vacancies Reform Act does not impose any limitations on which PAS officers the President may designate. There are no length of service requirements, and the PAS officer need not be from the same agency as that in which the vacancy arose.

Question 19. How does a senior agency employee come to serve as an acting officer for a vacant position?

Answer. As with PAS officers, certain senior agency employees (*see* Q20) may begin to serve as the acting officer for a vacant position upon a directive from the President (and only the President) instructing that senior agency employee to perform the functions and duties of the vacant office in an acting capacity. 5 U.S.C. § 3345(a)(3).

Question 20. Does the Vacancies Reform Act impose any limitations on which senior agency employees the President may designate to serve as acting officers?

Answer. Yes, the Vacancies Reform Act imposes a number of limitations on which senior agency employees the President may designate. First, the senior agency employee must be from the same Executive agency as the one in which the vacancy occurs. 5 U.S.C. § 3345(a)(3)(A). Second, the senior agency employee must have served in a position within that Executive agency for not less than ninety days during the 365 days preceding the vacancy. *Id.* Third, the rate of pay for the position in which the senior agency employee served must be at least GS–15, step 1. 5 U.S.C. § 3345(a)(3)(B).

Question 21. Are there any other categories of persons qualified to serve in an acting capacity under the Vacancies Reform Act?

Answer. Yes, with regard to PAS positions that are filled for a term set by statute and are located in an Executive department (a narrower category than Executive agencies — *see* Q5), the Vacancies Reform Act also provides for a fourth category of persons who may serve in an acting capacity. For such an office, the President (and only the President) may direct the officer whose term is expiring to continue to serve in that office if that officer is nominated for an additional term to the same office without a break in service. 5 U.S.C. § 3345(c)(1).

Question 22. Does the Vacancies Reform Act impose the same time limits on officers who continue to serve once their terms have expired as apply under the Act to the categories of acting officers?

Answer. No, the Act sets out an additional limitation on how long such an officer may continue to serve. In addition to being subject to the general time limits of the Vacancies Reform Act, the Act also provides that the carry-over officer may no longer continue to serve on a temporary basis once the officer's nomination is either confirmed or rejected by the Senate.

More generally, although the Vacancies Reform Act does not impose such a limitation on other acting officers who are nominated to fill the vacant position in which they are serving in an acting capacity, a similar limitation likely will apply to any such officer as a practical matter. Congress routinely passes an appropriations rider prohibiting the use of appropriated funds to pay someone for filling a position for which that person was nominated if the Senate has voted to reject the nomination. *See, e.g.*, Section 610 of the Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105–277, Div. A, tit. 1, § 101(h), 112 Stat. 2681–480, 2681–515 (1998).

Question 23. Generally, for how long may a vacant office be filled on an acting basis under the Vacancies Reform Act?

Answer. The Vacancies Reform Act does not provide for a static, set number of days during which an acting officer may serve. Instead, the Vacancies Reform Act's limitation on the length of service involves a series of interrelated provisions tied to the submission of a nomination for the vacant position. These provisions permit an acting officer to serve for a 210-day period prior to the submission of a nomination. Once a nomination is submitted, the acting official may continue to serve until the Senate takes action on the nomination or the nomination is withdrawn. If the first nomination is rejected or returned by the Senate, or withdrawn by the President, a new 210-day period of service begins. Once a second nomination is submitted, an acting officer again may continue to serve as long as the nomination is pending in the Senate. If the second nomination also is rejected, returned, or withdrawn, then a final 210-day period begins to run. The submission of a third nomination does not suspend the running of this final 210-day period; once those 210 days have run, the functions and duties of the vacant office may no longer be performed by an acting officer. 5 U.S.C. § 3346. *See* questions 25–38 below for a more detailed discussion of how the time limits are calculated under the Vacancies Reform Act.

Question 24. Are there vacancies to which these time limits do not apply?

Answer. Yes, the time limits of the Vacancies Reform Act do not apply to vacancies caused by sickness. In the case of a PAS who is unable to perform the functions and duties of the office because he or she is sick, the acting officer may continue to serve until the sick PAS officer recovers, at which point the PAS officer again resumes performing the functions and duties of the office. 5 U.S.C. § 3346(a).[3]

Question 25. If the President does not submit a nomination for the vacant position, how long may an acting officer perform the functions and duties of the office?

Answer. If the President does not submit a nomination, an acting officer may serve in an acting capacity during an initial 210-day period. 5 U.S.C. § 3346(a)(1). Under various provisions of the Act, the length of this initial period may be adjusted in a number of ways. *See* Q27 and Q36–Q38 (discussing possible adjustments to this period).

Question 26. From what date do you begin calculating the initial 210-day period?

Answer. The Vacancies Reform Act clarifies prior law, making it clear that the time limit begins to run on the date the vacancy occurs, rather than on the date the acting officer begins performing the functions and duties of the office. 5 U.S.C. § 3346(a)(1).

Question 27. Are there situations in which the time limit will be calculated beginning on a date other than the date the vacancy occurred?

Answer. Yes, the Vacancies Reform Act provides that "[i]f a vacancy occurs during an adjournment of the Congress sine die, the 210-day [initial limit] shall begin on the date that the Senate first reconvenes." 5 U.S.C. § 3346(c). So for example, the Congress adjourned sine die on October 21, 1998. *See* 144 Cong. Rec. H11,704, S12,810, S12,979 (daily ed. Oct. 21, 1998). The *Senate* did not reconvene until January 6, 1999. As a result, for a vacancy that occurred prior to January 6, 1999, the initial 210-day period during which an acting officer may serve in the absence of a nomination began to run on January 6, 1999, and will continue for a 210-day period ending at the end of the day on August 3, 1999.[4]

The Vacancies Reform Act also includes a special provision that adjusts the beginning dates for vacancies at the start of a new President's first administration to account for the increased difficulty and time required to nominate PAS officers at the beginning of a new administration. *See* Q38 for a detailed discussion of that provision.

Question 28. How is the time limit affected when the President submits a nomination to fill the vacant office?

Answer. Once the President submits a nomination to fill the vacant office, an acting officer may continue to serve in an acting capacity while the nomination is pending before the Senate. 5 U.S.C. § 3346(b). A nomination remains pending

[3] *See* questions 6 and 7, as well, regarding vacancies that are not governed exclusively by the Vacancies Reform Act

[4] If August 3, 1999 is a day on which the Senate is not in session, the period of service may be extended. *See* Q36–Q37.

before the Senate until the nomination is confirmed, the nomination is withdrawn by the President, or the nomination is rejected or returned by the Senate.

Question 29. What is meant by the Senate's "rejection" of the nomination?

Answer. The Senate "rejects" a nomination only when the full Senate votes on and disapproves a nomination. A determination by a committee that it will not report the nomination out for a vote of the full Senate or a determination of the Senate otherwise not to vote on the nomination does not constitute a rejection of the nomination. *See Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 274–75 (1989).

Question 30. What is meant by the Senate's "return" of the nomination?

Answer. "Return" takes its meaning from Senate Rule XXXI, which provides in relevant part that "if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." Senate Rule XXXI(6); *see also* S. Rep. No. 105–250, at 15. Nominations left pending at the time of a recess in excess of thirty days and at the end of the first session of a Congress frequently are not returned, but are instead held over pursuant to unanimous consent of the Senate. All nominations left pending at the end of a Congress, however, are returned pursuant to Senate Rule XXXI.

Question 31. How is the time limit affected if a nomination is submitted after the 210-day period has expired?

Answer. The Vacancies Reform Act incorporates a spring-back provision, which permits an acting officer to begin performing the functions and duties of the vacant office again upon the submission of a nomination, even if the 210-day period expired before that nomination was submitted. If the 210-day limitation period expires before the President has submitted a nomination, the restrictions in § 3348 of the Act, which bar anyone from serving in an acting capacity, become operative. *See* Q39–Q49 (discussing these restrictions). If thereafter the President submits a nomination, an acting officer is again able to perform the functions and duties of the office as of the date the nomination is submitted. 5 U.S.C. § 3346(a)(2).

Question 32. What happens if the first nomination is rejected or returned by the Senate or is withdrawn by the President?

Answer. If the first nomination is rejected, returned, or withdrawn, a new 210-day period during which an acting official may serve begins to run on the date that the nomination is rejected, returned, or withdrawn. This is a new, full 210 days, and the period is not affected by the length of time an acting official served before the first nomination was submitted or by the length of time the first nomination was pending before the Senate. 5 U.S.C. § 3346(b)(1).

Question 33. How is the time limit affected by the submission of a second nomination to fill the vacant position?

Answer. The effect of the submission of a second nomination is the same as that of the first nomination. Once the President submits a second nomination, an acting officer may continue to serve in an acting capacity while the second nomination is pending before the Senate. Further, the spring-back provision discussed in question 31 also applies to the submission of a second nomination. 5 U.S.C. § 3346(a)(2), (b)(2).

Question 34. What happens if the second nomination is rejected or returned by the Senate or is withdrawn by the President?

Answer. If the second nomination is rejected, returned, or withdrawn, a new (and final) 210-day period begins to run on the date that that nomination is withdrawn, rejected, or returned. This is again a new, full 210 days, and the period is not affected by the length of time an acting official served before the second nomination was submitted or the length of time the second nomination was pending before the Senate. 5 U.S.C. § 3346(b)(2)(B).

Question 35. What effect does the submission of a third nomination have on the time limit?

Answer. The submission of a third nomination will not suspend or otherwise affect the running of the 210-day limit. The 210-day period that begins upon the rejection, return, or withdrawal of a second nomination is final; once that 210-day period ends, the bar in § 3348 of the Act on serving in an acting capacity takes effect.

Question 36. What happens if a 210-day period ends on a date when the Senate is not in session?

Answer. The Vacancies Reform Act provides for the time period to be extended when the last day of any 210-day period is "a day on which the Senate is not in session." In this circumstance, the last day of the period is deemed to be the second day the Senate is next in session and receiving nominations. 5 U.S.C. § 3348(c).

Question 37. Is there any other provision that would activate the spring-back provision while the Senate is recessed or adjourned?

Answer. The Vacancies Reform Act also includes a provision that would allow the President, in circumstances in which the Senate is recessed or adjourned for more than fifteen days, to provide the Senate with written notice of an intent to nominate and, by providing that notice, to trigger the spring-back provision. 5 U.S.C. § 3349d.

Question 38. Does the Vacancies Reform Act include any provision to account for the increased difficulty and time that may be involved in nominating PAS officers at the beginning of a new administration?

Answer. The Vacancies Reform Act includes a specific provision that adjusts the calculation of the time limits to provide extra time for a new administration to submit nominations for PAS positions. Specifically, the Act provides that for any vacancy existing at any point during a sixty-day period beginning on the date the oath of office is taken by a new President (i.e., a President who was not the President immediately before taking the oath of office) the vacancy shall be deemed, for purposes of calculating the time limit, to have arisen either (i) ninety days after the date the oath of office was taken or (ii) ninety days after the date the vacancy occurred, whichever is later. Thus, even if an office became vacant well before the new President takes office, the time limit begins anew, and an extra ninety days is added on to what is deemed to be the first 210-day period. 5 U.S.C. § 3349a.

Question 39. What are the effects under the Vacancies Reform Act of the time limit expiring or there otherwise being no one qualified to serve in an acting capacity?

Answer. Unless there is a person qualified to serve in an acting capacity under the Vacancies Reform Act, i.e., there is a person who meets the requirements of an acting officer under § 3345, and the time limit for serving has not expired, (i) no one may serve as the "acting officer" and (ii) no one other than the head of the Executive agency may perform any "function or duty" of the vacant office. 5 U.S.C. § 3348(b). *See* Q43 (discussing what is a "function or duty" of the office under this section).

Question 40. If the position of head of the Executive agency is vacant, may the acting head perform a function or duty of a vacant office for which there is no qualified acting officer?

Answer. A properly serving acting head of an agency may perform a function or duty of a vacant office.

Question 41. What is the effect of someone other than a qualified acting officer or the head of the Executive agency performing a function or duty of the office?

Answer. Under the enforcement provisions set out in § 3348 of the Vacancies Reform Act, an "action" taken in the performance of a "function or duty" of a vacant office to which the Act applies shall have no force or effect unless it was performed either by someone qualified to serve as an acting officer or by the head of the Executive agency. 5 U.S.C. § 3348(d)(1). Further, the Act expressly provides that an action that has no force or effect under this provision cannot later be ratified. 5 U.S.C. § 3348(d)(2). While the effect of the enforcement provisions is severe, the breadth of conduct to which the provisions apply is expressly limited by the definition of "function or duty."

Question 42. How is an "action" defined under the Vacancies Reform Act?

Answer. "[A]ction" is defined under the Vacancies Reform Act by reference to the definition of "agency action" in 5 U.S.C. § 551(13) (1994). Agency action is defined in § 551(13) as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 3348(a)(1).

Question 43. How is a "function or duty" of the office defined under the Vacancies Reform Act?

Answer. For purposes of § 3348, a "function or duty" is defined as any function or duty of the PAS office that is required by statute or regulation to be performed exclusively by the holder of that office. 5 U.S.C. § 3348(a)(2). *See* Q48 (discussing the practical scope of the definition of "function or duty").

Question 44. May an agency revise its regulations to make what had been an exclusive function or duty under its regulations non-exclusive?

Answer. Yes, the Vacancies Reform Act anticipates that Executive agencies may revise some of their regulations to eliminate a requirement under the regulation that a function be performed exclusively by the PAS officer. The Act, however, also includes a look-back provision that delays the effectiveness of such a revision for purposes of the Vacancies Reform Act. Under the definition, a function or duty will be treated as exclusive if, at any time during the 180 days preceding the date on which the vacancy occurred, the regulation provided that the duty or function was to be performed exclusively by the applicable officer. 5 U.S.C. § 3348(a)(2)(B)(ii).

Question 45. Does such a look-back provision also apply to the revision of statutes imposing exclusive duties on officers?

Answer. No, there is no similar look-back provision for statutes. If a statute is amended to eliminate an exclusive performance requirement, either by eliminating a restriction on the ability to delegate the function or by reassigning the function to another officer, that change will eliminate the exclusivity requirement under the Vacancies Reform Act without any delay. Similarly, if a regulation is revised because of a change in the underlying statutory authority, there is no delay imposed by the Act on the elimination of a requirement that the function be performed exclusively by the PAS officer.

Question 46. What if Congress imposes an exclusivity requirement on an office after a vacancy arises?

Answer. Such a statutory imposition of an exclusive function or duty on an office is effective as soon as the new statutory provision itself becomes effective, even if the statute is not enacted until after the vacancy.

Question 47. What oversight mechanisms exist to ensure agency compliance with the Act and application of the enforcement provisions?

Answer. The Act has a number of mechanisms to ensure agency compliance with the law. Executive agencies, of course, are expected to ensure that they are in compliance with the Act. The Act also establishes a reporting procedure under which events that trigger application of the Act and its enforcement provisions are reported to the General Accounting Office ("GAO") and to each House of Congress to assist their oversight of compliance. *See* Q50–Q53. Congress also expected that private parties would, through litigation challenging agency actions, provide an additional mechanism to ensure compliance. *See* S. Rep. No. 105-250, at 19–20 ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.").

Question 48. Do the enforcement provisions of the Vacancies Reform Act mean that unless there is a properly serving acting officer nothing the PAS officer did may be performed by anyone other than the head of the Executive agency?

Answer. No, Congress understood that there would be occasions when the time limits would expire or when there would, for a period, be no one qualified to serve in an acting capacity. Congress also understood that if everything the PAS officer may have done in the performance of his or her duties had to be performed by the head of the Executive agency, the business of the government could be seriously impaired. *See* S. Rep. No. 105–250, at 30–31 (Additional Views). As a result, Congress delimited which functions could be performed only by a qualified acting officer or the head of the Executive agency, defining them as only those functions or duties assigned exclusively to the PAS officer by statute or regulation. Most, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.

Question 49. Are there PAS offices that are covered by the Vacancies Reform Act, but to which the enforcement provisions do not apply?

Answer. Yes, the Vacancies Reform Act sets out a list of offices to which the enforcement provisions of § 3348 do not apply. These offices are: (1) the General Counsel of the National Labor Relations Board, (2) the General Counsel of the Federal Labor Relations Authority, (3) any Inspector General appointed by the President, by and with the advice and consent of the Senate, (4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate, and (5) any office of an Executive agency for which there is a statutory provision that expressly prohibits the head of the Executive agency from performing the functions and duties of the office. 5 U.S.C. § 3348(e).

Question 50. What reporting requirements does the Vacancies Reform Act impose on agencies?

Answer. The Vacancies Reform Act requires the head of each Executive agency to provide notification of (i) a vacancy covered by the Act, (ii) the date on which the vacancy occurred, (iii) the name of any person serving in an acting capacity in connection with such a vacancy, (iv) the date that person began serving in an acting capacity, (v) the name of any person nominated to fill the vacancy, (vi) the date on which the nomination is submitted, and (vii) the date of any rejection, withdrawal, or return of the nomination. 5 U.S.C. § 3349(a).

Question 51. When must the report of each of these occurrences be provided?

Answer. The report is to be provided "immediately upon the occurrence" of each of these events.

Question 52. To whom should the reporting information described above be provided?

Answer. Each Executive agency is to provide the required information to the Office of Presidential Personnel. The Office of Presidential Personnel, in turn, will provide the information to the Office of Management and Budget, which will be responsible for providing the report to GAO and to each House of Congress.*

Question 53. Why is this information being reported to GAO?

Answer. The information is provided to GAO to permit GAO to supervise compliance with the Act. If GAO determines that an acting officer is serving beyond the time limit allowed under the Vacancies Reform Act, it is to report that determination to relevant congressional committees, the President, and the Office of Personnel Management. 5 U.S.C. § 3349(b).

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

* Editor's Note: This procedure is subject to change, and has been changed, by the current administration, which has directed the agencies to report directly to GAO and Congress *See* Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto R. Gonzales, Counsel to the President, *Re. Agency Reporting Requirements Under the Vacancies Reform Act* at 3 (Mar 21, 2001)

Applicability of Trade Secrets Act to Intra-Governmental Exchange of Regulatory Information

The disclosure to certain federal financial regulatory agencies of propriety information of the Office of Federal Housing Enterprise Oversight obtained from the finance institutions it regulates would be "authorized by law" within the meaning of the Trade Secrets Act and therefore would not violate that Act's prohibitions against unauthorized agency disclosures of trade secrets or other confidential business information.

April 5, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

This responds to your request for our opinion regarding the applicability of the Trade Secrets Act, 18 U.S.C. § 1905 (Supp. II 1996) ("TSA"), to the Office of Federal Housing Enterprise Oversight's ("OFHEO") proposed provision to other federal agencies of certain proprietary information that it receives in carrying out its statutory responsibilities.[1] For reasons set forth below, we conclude that the TSA does not prohibit the inter-agency, official purpose disclosures outlined in your request.

I.

OFHEO is a federal agency, within the Department of Housing and Urban Development, created by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102–550, 106 Stat. 3941, 3944, (codified at 12 U.S.C. §§ 4501–4641 (1994)) ("FHE Act" or "Act"). Its purpose is, inter alia, to ensure that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, "the Enterprises") "are adequately capitalized and operating safely" in accordance with governing legislation. *See* 12 U.S.C. § 4513(a). The Enterprises are the nation's largest housing finance institutions. OFHEO's oversight and regulatory responsibilities with respect to them are similar to those exercised over banks and financial institutions by agencies such as the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency. *See* OFHEO Letter at 1.

In carrying out its responsibilities under the Act, OFHEO from time to time requires the Enterprises to submit various reports on their financial condition and

[1] *See* Letter for Lee J. Radek, Chief, Public Integrity Section, Criminal Division, Department of Justice from Anne E. Dewey, General Counsel, Office of Federal Housing Enterprise Oversight (June 5, 1998) ("OFHEO Letter"). The Attorney General has delegated her authority to provide legal opinions for departments and agencies of the executive branch to this Office and, accordingly, your request has been forwarded to us for disposition. *See* 28 U.S.C. §§ 510–513 (1994), 28 C.F.R. § 0.25(a) (1997).

operations. *See* 12 U.S.C. § 4514. These reports, as well as other regulatory information obtained from the Enterprises by OFHEO in performing its duties, sometimes include sensitive proprietary information. OFHEO Letter at 2.

As explained in your letter, OFHEO desires to exchange regulatory information obtained from the Enterprises (including some proprietary information) with certain other federal financial regulators in order to facilitate "fulfilling its safety and soundness mission." *Id.* at 2. For purposes of this opinion, therefore, we assume that these arrangements will materially enhance OFHEO's performance of its statutory responsibilities. If such disclosures do take place, we are advised that the governmental recipients of the information would be required to maintain its confidentiality and would, of course, be subject to the provisions of the TSA in their own handling and maintenance of that information. *See id.* at 2.

The TSA prohibits officers and employees of federal agencies from publishing or disclosing trade secrets and other confidential business information "to any extent not authorized by law." 18 U.S.C. § 1905.[2] Because some of the proprietary information OFHEO wishes to share with other federal financial regulators would be of the type otherwise covered by the TSA, you seek the Department's legal opinion whether the proposed provision of such information to other federal agencies under the circumstances outlined in your letter would violate the TSA.

II.

There is significant precedential support for the view that the kind of disclosures described in your letter would not violate the TSA. A number of federal court opinions have expressed the view that the TSA applies only to the *public* disclosure of covered information and does not apply to official intra-governmental disclosures of such information. Additionally, two opinions of this Office have concluded that the TSA does not prohibit the exchange of trade secret or proprietary information between federal agencies for lawful governmental purposes — at least where such disclosures are authorized by the Paperwork Reduction Act

[2] The TSA provides in pertinent part as follows·

> Whoever, being an officer or employee of the United States or of any department or agency thereof, *any person acting on behalf of the Office of Federal Housing Enterprise Oversight*, . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association,
>
> shall be fined under this title or imprisoned not more than one year, or both, and shall be removed from office or employment.

18 U S C § 1905 (emphasis added) The underscored phrase, extending the TSA to cover disclosures by "person[s] acting on behalf of the [OFHEO]," was added by Pub L No. 102–550, tit XIII, § 1353, 106 Stat at 3970 As shown by the Senate Report on a contemporaneous bill of the same Congress containing the exact same provision, the apparent purpose of this addition to the statute was simply to "subject[ ] any consultant to the [OFHEO] to the same criminal penalties for release of confidential information as government employees " S. Rep. No. 102–282, at 53 (1992).

of 1980, Pub. L. No. 96–511, 94 Stat. 2812 (''PRA''), *see* 44 U.S.C. § 3510(a) (Supp. I 1995), or by any other federal statute, either explicitly or implicitly. An additional opinion of this Office, moreover, emphasizes the broader principle — grounded on the President's executive powers set forth in Article II of the Constitution — that the exchange of commercial regulatory information among federal government agencies for legitimate government purposes is presumptively lawful, and that only explicit statutory language prohibiting such disclosure can overcome that presumption.[3] These opinions would suggest the conclusion that the TSA does not apply to any authorized inter-agency disclosures. It is not necessary, however, for us to reach that issue, because we conclude that the disclosures at issue here would be ''authorized by law'' within the meaning of the TSA itself. At a minimum, the precedents call for a generous reading of statutes that may implicitly authorize inter-agency disclosures such as those in question, and we thus read the FHE Act as providing such authority here, as we discuss in Part II.C, below.

A.

In *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979), the Eighth Circuit considered whether the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance could lawfully exchange certain information and records that those agencies had gathered from regulated companies reflecting the companies' compliance with federal employment discrimination laws. The court assumed arguendo that the information in question was of the type protected by the TSA. Based upon the pertinent ''pronouncements of Congress, the President and the agencies'' — notably, certain statutory provisions authorizing inter-agency cooperation, *see* 42 U.S.C. § 2000e-4(g)(1) (1994) — the court first concluded that the particular exchanges of information proposed would be ''authorized by law'' within the meaning of the TSA even if that act were otherwise applicable to the inter-agency exchanges. 609 F.2d at 907. The court then proceeded to elaborate upon the proper relationship between inter-governmental information exchanges and the TSA.

> It is again worth emphasizing that the disclosure contemplated . . . is between two agencies, both of which are charged with the task of eliminating employment discrimination. *We seriously doubt whether § 1905 was intended to prohibit any interagency information transfers. Since the Federal Reports Act, 44 U.S.C. §§ 3501–3512, directly controls exchanges between agencies, it appears that*

[3] An example of such an explicit statutory provision is contained in the Privacy Act. *See* 5 U S C § 552a(b) (1994) (providing that ''[n]o agency shall disclose . . . to another agency'' personal records covered by the Privacy Act, subject to listed exceptions). The category of sensitive personal records protected by the Privacy Act is not implicated by the disclosure of commercial regulatory information proposed here

> *§ 1905 was designed to apply only to public disclosures of trade secret material.*

Id. at 907 (emphasis added).

In her separate opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), Justice O'Connor expressed a similar view, observing: "The question of inter-agency use of trade secrets before 1972 is more difficult *because the Trade Secrets Act most likely does not extend to such uses.*" *Id.* at 1023 (O'Connor, J., concurring in part and dissenting in part) (emphasis added). Other courts have also expressed a restrictive interpretation of the TSA in this respect. *See Tri-Bio Laboratories, Inc. v. United States*, 836 F.2d 135, 141 n.7 (3d Cir. 1987) ("*Because the Trade Secrets Act . . . prohibits only public disclosure* of application data, it does not bar internal agency use of submitted data.") (emphasis added), *cert. denied*, 488 U.S. 818 (1988); *Interco, Inc. v. FTC*, 490 F. Supp. 39, 40 (D.D.C. 1979) (documents including trade secrets could be disclosed by FTC to State Attorneys General who provide reasonable assurances of confidentiality because such disclosure would be "authorized by law" under a broad reading of section 6(f) of the Federal Trade Commission Act). *Cf. United States v. Wallington*, 889 F.2d 573, 579 (5th Cir. 1989) (in order to avoid arbitrary enforcement, court narrowly construed TSA to apply only to "confidential" information and "further defined 'confidential' to require *at least* that the government agency in question have an official policy that the information *not* be disclosed (or that nondisclosure be mandated by statute or regulation)").[4]

This Office invoked the above-quoted interpretation of the court in *Emerson Electric* in reaching the conclusion that, in light of the Paperwork Reduction Act, the TSA did not prohibit the Department of Justice from sharing proprietary information obtained from companies under the National Cooperative Research and Production Act ("NCRPA"), 15 U.S.C. § 4305(d) (1994), with other federal departments and agencies. *See* Memorandum for Anne Bingaman, Assistant Attorney General, Antitrust Division, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Sharing of Materials with other Federal Agencies* (May 31, 1994) ("1994 Opinion"). As we noted in that opinion:

> We have also considered whether provision of the information to other federal agencies might be prohibited by the Trade Secrets Act (TSA), 18 U.S.C. § 1905, which prohibits federal officials from

[4] *But see Shell Oil Co. v. Department of Energy*, 477 F. Supp 413, 419 (D Del 1979), *aff'd*, 631 F.2d 231 (3d Cir. 1980), *cert denied*, 450 U S 1024 (1981), where the court assumed, without deciding, that the TSA applies to inter-agency disclosures, after stating "While a number of opinions of the Attorney General have suggested, largely based on practical considerations, that [the TSA] was not intended to apply to inter-agency transfers of proprietary information, no court appears to have so held " The *Shell Oil* opimon was issued before the Eighth Circuit's opinion in *Emerson Electric* In any event, the *Shell Oil* court went on to hold that the Department of Energy was "authorized by law" to disclose the proprietary data in question to any federal agency with a legitimate need for such information pursuant to the Federal Energy Administration Act, 15 U S C §§ 761–790h (1994)

> disclosing, "in any manner or to any extent not authorized by law," trade secrets or similar information in the possession of federal agencies. If the exchanges of information are not prohibited by the NCRPA or the [Hart-Scott-Rodino Antitrust Improvements Act], we believe they would be authorized by 44 U.S.C. § 3510 (part of the Paperwork Reduction Act (PRA)), which provides that "an agency may make available to another agency, information obtained pursuant to an information collection request if the disclosure is not inconsistent with any applicable law." The Eighth Circuit held the TSA inapplicable to inter-agency information transfers in *Emerson Electric Co. v. Schlesinger*, 609 F.2d 898, 907 (1979), stating, "Since the Federal Reports Act (since supplanted by the PRA, as quoted above) directly controls exchanges between agencies, it appears that § 1905 was designed to apply only to public disclosures of trade secret material."

1994 Opinion at 3 n.4.

We expressed similar views in a 1981 opinion concluding that confidential trade information obtained by the Secretary of Commerce pursuant to the Export Administration Act ("EAA") may be lawfully released to federal law enforcement and intelligence agencies. *See Disclosure of Information Collected under the Export Administration Act*, 5 Op. O.L.C. 255 (1981). Although that opinion primarily concerned interpretation of the EAA and the Paperwork Reduction Act, it also rejected the Commerce Department's argument that inter-agency disclosure of the information would violate the TSA:

> We do not agree with the Department of Commerce that 18 U.S.C. § 1905, which prohibits the disclosure of confidential trade information unless authorized by law, would bar interagency disclosure because, assuming no other statutory prohibition against disclosure, § 3510 of the Paperwork Reduction Act would authorize the disclosure. 44 U.S.C. § 3510.

Id. at 261 n.3.[5]

Another opinion of this Office, although not directly addressing the TSA, lends further general support to the view that federal statutes prohibiting *public* disclosure of proprietary regulatory information do not prohibit the exchange of such information between federal agencies for legitimate government purposes. *See Inter-Departmental Disclosure of Information Submitted Under the Shipping Act*

[5] The opinion further observed. "The question whether 18 U.S.C § 1905 applies to intra-governmental transfers . . has never been resolved." *Id* at 262 n 6. Although it did not seek to resolve that question, the opinion did establish a framework for construing the TSA's phrase "authorized by law" that provides the basis for our analysis here. *See* Part II.C, *infra*.

of 1984, 9 Op. O.L.C. 48 (1985) (''Shipping Act Opinion''). There, we concluded that the confidentiality provisions of section 6(j) of the Shipping Act, 46 U.S.C. app. §§ 1701–1719 (Supp. II 1984),[6] do not prohibit the Federal Maritime Commission from disclosing Shipping Act information to other federal government agencies. *Id.* at 48–49. In reaching that conclusion, we discussed the broader constitutional considerations that may be implicated by legislative restrictions on the disclosure of regulatory information between executive branch departments and agencies for official purposes. Referring to ''the general presumption that information obtained by one federal government agency is to be freely shared among federal government agencies,'' and after noting that ''[i]t is axiomatic that all information and documents in the possession of Executive Branch agencies are within the control of the President as the head of the Executive Branch,'' *id.* at 52–53, we continued:

> We believe it follows from these general constitutional principles that a decision by Congress to restrict the flow of information among federal agencies when such information relates to the performance of the official duties of these agencies must be executed by legislation that leaves no doubt as to Congress' intent. Particularly regarding the development by the President of his foreign policy, it would be untenable to read into the statute at issue here an implied intent to deny to those subordinates of the President charged with the formulation of foreign policy those documents and information deemed relevant to that formulation.

Id. at 53. We therefore concluded that section 6(j) of the Shipping Act, as its language indicates, prohibits only *public* disclosure of information obtained under that Act and that such information may be disclosed for official purposes to other federal agencies or executive branch departments.

The Trade Secrets Act would not appear to satisfy the standards of specificity and clarity described in our Shipping Act opinion — i.e., ''legislation that leaves no doubt as to Congress' intent'' — as necessary for legislation to prohibit the official exchange of commercial regulatory records between executive branch agencies.[7] On the contrary, there is more than considerable doubt that Congress

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[6] Section 6(j) of the Shipping Act provides in relevant part.

> Except for an agreement filed under section 1704 of this Appendix, information and documentary material filed with the Commission under section 1704 of this Appendix or this section is exempt from disclosure under section 552 of title 5 [United States Code the Freedom of Information Act] *and may not be made public except as may be relevant to an administrative or judicial action or proceeding* This section does not prevent disclosure to either body of Congress or to a duly authorized committee or subcommittee of Congress.

46 U.S C app. 1705(j) (emphasis added)

[7] Earlier opinions of the Attorney General are also consistent with the conclusion we reach here In an opinion concluding that a predecessor trade secrets nondisclosure statute similar to the TSA (section 708 of the Act of Continued

intended the TSA to criminalize such intra-governmental exchanges, which do not involve the kind of misuse or misappropriation of proprietary information which the TSA was intended to forestall. *See Emerson Electric*, 609 F.2d at 906.

Although the foregoing judicial and administrative precedents support the view that the proposed disclosure of proprietary information to other agencies is not the kind of disclosure that the TSA was intended to prohibit, we need not decide here whether the TSA is wholly inapplicable to authorized inter-agency disclosures. Taking into account the background of these precedents, we believe that the provisions of the Federal Housing Enterprises Act (together with OFHEO regulations recently promulgated thereunder, *see* Part II.D, *infra*) provide adequate authorization for such disclosures to fall within the "authorized by law" exception to the TSA's prohibitions.

B.

Before turning to the FHE Act, we first consider the availability of the Paperwork Reduction Act as a source of authority for the particular category of disclosures contemplated here. That statute warrants consideration because the above-quoted opinions of this Office emphasized that the inter-agency exchanges of information which they approved had been affirmatively authorized by the PRA and were therefore "authorized by law" within the meaning of the TSA. *See* 1994 Opinion at 3 n.4; 5 Op. O.L.C. at 261 n.3. Similarly, the court in *Emerson Electric* bolstered its conclusion that the TSA applies "only to public disclosures" by stressing that the Federal Reports Act (predecessor statute to the PRA) "controls exchanges between agencies." 609 F.2d at 907.

The PRA provides in relevant part:

> (a) The Director [of the Office of Management and Budget] may direct an agency to make available to another agency, *or an agency may make available to another agency, information obtained by a*

Sept 8, 1916, 39 Stat. 756, 798) did not prohibit the U S. Tariff Commission from providing the War Trade Board certain trade secrets obtained by the Commission in performing its regulatory duties, the Attorney General stated:

> It will be noted that the inhibition in the foregoing section is directed against the disclosure of trade secrets "to any person " It is a well-recognized rule of law that *the sovereign power is not included by the general terms of a statute.*
>
> These considerations, it seems to me, are persuasive of an interpretation of section 708, which, in pursuance of the cooperation authorized by section 707, *would not preclude the availability of all the information gathered by the Tariff Commission for any appropriate use by any Department or independent branch of the Government*, including the War Trade Board

Tariff Commission—Disclosure of Trade Secrets, 31 Op. Att'y Gen 541, 542–43 (1919) (emphasis added). *See also Authority of Federal Communications Commission to Disclose Confidential Information to Senate Committee on Interstate and Foreign Commerce*, 41 Op. Att'y Gen. 221 (1955). There, in concluding that the Federal Communications Commission's disclosure of certain proprietary information to a Senate committee was "authorized by law" within the meaning of the TSA, the Attorney General opined that the statutory or other authorization for such intra-governmental disclosure of such material may be "reasonably implied rather than express." *Id* at 228

> *collection of information* if the disclosure is not inconsistent with applicable law.

44 U.S.C. § 3510(a) (emphasis added).

It does not appear, however, that the particular category of information referenced in your opinion request is the kind of information covered by the PRA — that is, information obtained by a "collection of information," *see* 44 U.S.C. § 3502(3) (Supp. I 1995). In this regard, your letter refers to "reports on [the] financial condition and operations" of the Enterprises required by OFHEO; other special reports submitted by the Enterprises that, in the judgment of the Director, are necessary to carry out the purposes of the 1992 Act; and other "sensitive, proprietary data" received from the Enterprises by OFHEO "[i]n carrying out its oversight authorities." OFHEO Letter at 2.

Under the PRA, the term "collection of information" is defined as

> the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —
>
> (i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, *ten or more persons, other than agencies, instrumentalities, or employees of the United States*; or
>
> (ii) answers to questions posed to *agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes*; . . . .

44 U.S.C. § 3502(3)(A) (emphasis added).

The information obtained by OFHEO from the Enterprises does not appear to have been obtained by a "collection of information" that conforms to the definition under either subparagraph (i) or (ii). Subparagraph (i) appears inapplicable because OFHEO's collection efforts are not imposed on "ten or more persons." Rather, it appears that they are imposed only on the two Enterprises. Subparagraph (ii) likewise appears inapplicable based upon both of its criteria. The Enterprises are both private entities, rather than agencies or instrumentalities of the United States. *See* 12 U.S.C. § 1716b (1994) (Fannie Mae re-established as "a Government-sponsored private corporation"); *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1408 (9th Cir.) (Freddie Mac is not a government entity), *cert. denied*, 519 U.S. 812 (1996); *Patriot, Inc. v. HUD*, 963 F. Supp. 1, 7 (D.D.C. 1997) ("Fannie Mae is a 'private corporation,' 12 U.S.C. § 1716b, owned by its private shareholders, and as a private entity, it does not issue regulations."); *Liberty Mortgage Banking, Ltd. v. Federal Home*

Loan Mortgage Corp., 822 F. Supp. 956, 958–60 (E.D.N.Y. 1993) (Freddie Mac is a private corporation rather than a government agency). Moreover, it does not readily appear that the information in question here is to be used for general statistical purposes. Rather, it is to be used for specific regulatory and oversight purposes bearing upon the Enterprises.

Because the information at issue does not appear to have been obtained through a ''collection of information'' within the meaning of the PRA, we do not believe that the PRA's authorization for inter-agency disclosures, *see* 44 U.S.C. § 3510(a), may be relied upon as affirmative authority for the disclosures proposed here. That raises the question whether the proposed inter-agency disclosure is otherwise ''authorized in a general way by law,'' *Liquidation of Reconstruction Finance Corporation—Disclosure of Information*, 41 Op. Att'y Gen. 166, 169 (1953). We believe that it is.

C.

This Office has previously considered whether certain information or records not covered by the express authorizations of the PRA (and also exempt from disclosure to the public under the FOIA, as in the case of trade secrets) may nonetheless be disclosed or provided by one federal agency to another for official agency purposes. See 5 Op. O.L.C. 255 (1981). As we framed the issue in that opinion:

> The existence of an affirmative authorization in the Paperwork Reduction Act for certain information arguably implies that some authorization is required, whether by statute, either expressly or by necessary implication, or by substantive regulation. Moreover, it may be necessary to determine whether there is an authorization for disclosure to federal law enforcement and intelligence agencies to avoid the strictures of 18 U.S.C. § 1905.

Id. at 262. We then described the kind of authorization ''by law'' that would satisfy this concern when the PRA is not apparently applicable:

> The phrase ''authorized by law'' does not mean that the authorization must be ''specifically authorized by law''; it is sufficient that the disclosure is ''authorized in a general way by law.'' 41 Op. Att'y Gen. 166, 169 (1953).

Id. We then listed some examples of the kinds of authorizations that satisfy the foregoing standard, ranging from subpoenas and requests from congressional committees, to substantive agency regulations that expressly or implicitly authorize the waiver of confidentiality, to authorizations that are based upon "necessary statutory implication." *Id.* at 263.[8]

Applying these standards to the matter presented here, we believe the legislation establishing the OFHEO and its powers and responsibilities (i.e., the FHE Act) contemplates a degree of inter-agency cooperation and interaction that reasonably implies authorization to exchange regulatory information obtained by OFHEO with cooperating federal agencies in furtherance of OFHEO's statutory purposes. *Cf. Interco*, 490 F. Supp. at 44, 46 (construing section 6(f) of FTC Act to authorize "non-public release" of trade secret material to State Attorneys General for law enforcement purposes, even while acknowledging that the "statute does not on its face authorize [such] release"); *Shell Oil Co. v. DOE*, 477 F. Supp. at 433.[9]

Initially, we note that the Director of OFHEO is broadly authorized to "take such actions . . . as the Director determines necessary" regarding a broad range of matters, including "examinations of the enterprises," "other matters relating to safety and soundness [of the enterprises]," and "conducting research and financial analysis." 12 U.S.C. § 4513(b)(2), (5), and (10). In exercising this broad authority, the Director could reasonably conclude that appropriately controlled regulatory information exchanges with other federal financial regulators are needed to maintain the level of knowledge and understanding demanded in the highly complex and technical field of federal financial regulation. In this regard, we note that OFHEO's letter to this Office asserts that the proposed exchanges of supervisory information would "enable[] Federal agencies to proactively address regulatory compliance more effectively and efficiently." OFHEO Letter at 3. OFHEO further states that it seeks to exchange the information in question "[i]n fulfilling its safety and soundness mission." *Id.* at 2. In view of such representations, the proposed reciprocal inter-agency exchanges would appear to fall within the broad discretionary authority granted the Director under 12 U.S.C. § 4513(b).

Additional, and more specific, grants of authority to the OFHEO Director under the FHE Act reinforce our conclusion that the statute taken as a whole provides adequate, albeit implicit, authorization for the proposed inter-agency disclosures.

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[8] In this regard, we believe that an application of the Paperwork Reduction Act that would effectively bar official purpose inter-agency disclosures by negative implication would be plainly inconsistent with that legislation's stated objective "to maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government " 44 U S.C § 3501(2) (Supp. I 1995).

[9] In holding that the Federal Energy Administration Act provided adequate authority for inter-agency disclosure of energy company financial and operational information that would otherwise be barred by the TSA, the court in the *Shell Oil* case stated.

> Given the purpose of the National Energy Information System and the express declaration of a policy favoring agency cooperation with respect to energy data, it is difficult to argue that Congress did not contemplate disclosure of energy information by the Administrator at least to those other federal agencies who are vested with policy making responsibility in the energy area

477 F Supp at 433 The court went on to hold that the information could be disclosed to any other federal agency which had a legitimate need for that information. *Id.* at 433–35. *See also Emerson Electric*, 609 F.2d at 906, where the court, in referring to the provisions of the Federal Reports Act (the predecessor version of the PRA), stated "the provisions of the Act are to be read with an eye toward encouraging interagency cooperation . . . ."

For example, the Act provides: "In carrying out the duties of the Office, the Director may use information, services, staff, and facilities of any executive agency, independent agency, or department on a reimbursable basis, with the consent of such agency or department." 12 U.S.C. § 4515(c). Additionally, 12 U.S.C. § 4517(c) authorizes OFHEO, through the Director, to contract with other federal banking agencies (such as the Comptroller of the Currency, the FDIC, and the Office of Thrift Supervision) for the services of examiners to assist OFHEO in conducting examinations of the Enterprises required by the Act. The examiners appointed from other agencies "shall have the same authority and . . . shall be subject to the same disclosures, prohibitions, obligations, and penalties as are applicable to examiners employed by the Federal Reserve banks." *Id.* § 4517(d). In authorizing OFHEO to use the information, personnel, and services of other agencies in carrying out its statutory responsibilities, it is reasonable to assume that these provisions contemplate that OFHEO could disclose its regulatory information to those agencies insofar as necessary to obtain the authorized assistance or support.

In sum, we conclude that these and other provisions of the OFHEO legislation provide adequate "general" authorization for OFHEO to disclose proprietary regulatory information to other federal agencies for the official purposes stated, and subject to appropriate controls to maintain confidentiality, without violating the TSA.[10]

D.

We note finally that, subsequent to the submission of the request for this opinion, OFHEO promulgated new regulations governing the release of its documents and information. *See* Releasing Information, 63 Fed. Reg. 70,998 (1998) (to be codified at 12 C.F.R. pt. 1710). Two of the new provisions appear pertinent to the issue of inter-agency disclosure presented here. The new "General rule" in § 1710.6 provides:

> Except as authorized by this part or as otherwise necessary in performing official duties, no employee shall in any manner disclose or permit disclosure of any document or information in the

[10] As indicated in our Shipping Act Opinion (discussed *infra* pp 78–80), only a clear and specific legislative prohibition is sufficient to overcome "the general presumption that information obtained by one federal government agency is to be freely shared among federal government agencies" when such information "relates to the [official] performance of the official duties of these agencies " 9 Op O L C at 52–53 That position could be said to rest on the more fundamental proposition that executive agencies have *inherent* authority to exchange such information for valid official purposes in the absence of specific legislation, or constitutional provision, prohibiting such exchange. Because we conclude that the provisions of the legislation establishing OFHEO adequately authorize the disclosures in question by statutory implication, and because the information at issue here is proprietary in nature and thus raises special considerations, we need not base our conclusion on an assertion of such inherent authority.

> possession of OFHEO that is confidential or otherwise of a non-public nature, including that regarding OFHEO or [the Enterprises].

12 C.F.R. § 1710.6. Further, with respect to OFHEO's reports of examinations of the Enterprises, which may include confidential financial information of the type otherwise covered by the TSA, the new regulations provide: "The Director may make available reports of examination for the confidential use of Federal agencies responsible for investigating or enforcing applicable Federal laws." *Id.* § 1710.8(c).

These new regulations provide further support for our conclusion. As recognized in our 1981 opinion, duly promulgated agency regulations based on valid statutory authority provide a lawful source of disclosure authority for purposes of the TSA's "authorized by law" exception. *See* 5 Op. O.L.C. at 262 (stating that agency regulations may provide the requisite authorization by law, "provided that the authority on which the regulation is based includes, either expressly or by necessary implication, the power to waive the confidentiality of the information"). Courts have held to the same effect. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1138 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Doctors Hosp. of Sarasota, Inc. v. Califano*, 455 F. Supp. 476, 481 (M.D. Fla. 1978) ("information disclosure pursuant to a validly enacted agency regulation is authorized by law for purposes of 18 U.S.C. § 1905"). Here, OFHEO expressly invoked the provisions of 12 U.S.C. § 4513 (discussed above) as well as other provisions of the FHE Act as providing authority for the regulations in question. Thus, these regulations fortify our conclusion that disclosures of confidential information made pursuant to them would be "authorized by law" and thus outside the prohibitions of the TSA. For example, 12 C.F.R. § 1710.8(c) authorizes the Director to make available reports of examinations of the Enterprises "for the confidential use of Federal agencies responsible for investigating or enforcing applicable Federal laws." We understand that these reports may include the kind of confidential or proprietary business information otherwise covered by the TSA. This regulation would authorize disclosures of such information to other financial regulatory agencies, provided that the agencies in question have some federal investigatory or enforcement authority.[11]

[11] It should be recognized that OFHEO's disclosures of confidential or proprietary information must comply with its own regulations even if such disclosures are not prohibited by the TSA. Thus, new § 1710 6 of the regulations specifically provides that OFHEO employees may disclose confidential information in possession of OFHEO only if the disclosure is authorized by part 1710 or is otherwise "necessary in performing official duties " Apart from § 1710.6 itself and § 1710 8 (governing inter-agency disclosure of reports of examinations of the Enterprises), we have not identified any other provision of part 1710 that authorizes disclosure of confidential or proprietary information to other federal agencies. Consequently, § 1710 6 appears to limit OFHEO's disclosures of confidential information to other agencies (other than that covered by § 1710 8) to situations where the disclosure is considered "necessary in performing official duties " We believe that the Director would have considerable discretion, however, in determining whether particular disclosures are "necessary" within the meaning of the regulation

Conclusion

For all the foregoing reasons, we conclude that the type of inter-agency, official purpose disclosures set forth in your letter would be "authorized by law" within the meaning of the Trade Secrets Act and therefore would not violate that act.

WILLIAM MICHAEL TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

Whether Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use"

Although government reproduction of copyrighted material for governmental use would in many contexts be a noninfringing fair use under section 107 of the Copyright Act of 1976, such government reproduction of copyrighted material does not invariably qualify as a "fair use"

April 30, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

You have requested an opinion from this Office on a legal question raised in connection with an attempt by the Copyright Clearance Center, Inc. ("CCC") to negotiate licenses with the Department of Commerce and other federal government agencies, pursuant to which such agencies would, in exchange for a fee, obtain permission to reproduce certain copyrighted materials by photocopying.[1] *See* Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew J. Pincus, General Counsel, Department of Commerce at 1 (June 23, 1998) ("Pincus Letter"). You inform us that a "key factor in our decision whether such negotiations [with the CCC] even are appropriate is whether there are any circumstances under which the Copyright Act might require a government agency to obtain such a license: if a license is never necessary, there would be no reason to consider entering into negotiations with the CCC, or with individual authors of works." *Id.* Accordingly, you have asked for our opinion on the following question: "whether a government agency ever is required to secure either permission or licensing before making unauthorized reproduction and use of materials that are protected by copyright law, or whether *all* government reproduction and use of such materials per se qualifies for the 'fair use' exception from the obligations of the Copyright Act." *Id.* You further assert that "[t]here appears to be substantial disagreement within the government with respect to this issue." *Id.* In particular, you suggest that the Commercial Litigation Branch of the Department of Justice's Civil Division may have conveyed to certain agencies the view that "virtually all photocopying for government use is permitted under the fair use doctrine," and that that view of the Commercial

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[1] The CCC, a nonprofit consortium, or "clearing house," established in 1977, acts as an agent for participating publishers. Under one of the CCC's offered services, a user pays a flat fee, in exchange for which it receives a blanket annual license to make photocopies for internal use of any copyrighted material contained in any of the works registered with the CCC. The license fee is based on a limited photocopying survey that accounts for the license's employee population and the copying fees for the journals regularly copied by that licensee Upon payment of the fee, the licensee is authorized for a specified term to make unlimited numbers of photocopies, for internal use, from CCC-registered publications The revenue that the CCC derives from the licensee then is allocated among the publishers that have registered publications with the CCC, with the CCC retaining certain service charges *See American Geophysical Union v. Texaco, Inc.*, 802 F. Supp 1, 7–8 (S.D N.Y 1992) (discussing this CCC licensing practice), *aff'd*, 60 F.3d 913 (2d Cir 1994), *cert. dismissed*, 516 U.S. 1005 (1995)

Litigation Branch was "based upon the decision in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975)." *Id.* at 2.

As we explain below, while government reproduction of copyrighted material for governmental use would in many contexts be noninfringing because it would be a "fair use" under section 107 of the Copyright Act of 1976, 17 U.S.C. § 107 (1994), there is no "per se" rule under which such government reproduction of copyrighted material invariably qualifies as a fair use.[2] It is important to note, however, that we have been unable to discern any disagreement within the federal government on this specific question: To our knowledge, no agency of the executive branch has argued, or advised, that government copying is per se a fair use. In particular, the Department of Justice did not urge such a categorical rule in the *Williams & Wilkins* litigation, *see infra* note 15 (brief for the United States in the Supreme Court did not dispute that photocopying by the government may in some circumstances constitute copyright infringement); and, to our knowledge, the Department has not thereafter proffered any arguments, nor provided any advice, inconsistent with the views expressed in that brief.[3]

We do not, in this opinion, reach any conclusions about the circumstances under which government agencies should negotiate to obtain photocopying licenses. We caution, however, that a general practice of government agencies entering into licensing agreements in which they pay licensing fees for uses that *are* fair may, over time, undermine the government's ability to argue successfully that such uses are fair. For this and other reasons, government agencies may wish to ensure that, if they do negotiate licensing arrangements, such arrangements cover only those government photocopying practices that otherwise would, in fact, be infringing.

In Part I of this opinion, we provide some background on the fair use doctrine. In Part II, we review the case law regarding government photocopying and fair use, as well as Congress's enactment of the Copyright Act of 1976, and conclude that government photocopying of copyrighted materials does not invariably qualify as a fair use. Finally, in Part III, we provide some guidance on the factors that an agency should consider in determining whether a particular photocopying practice would be a fair use and whether to negotiate a license with respect to particular photocopying practices.

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[2] In framing the particular question you have asked us to consider, you refer to "unauthorized reproduction and use of materials that are protected by copyright law." Pincus Letter at 1. The bulk of your letter and supporting materials, however, indicates that your inquiry specifically concerns "photocopying for government use" *Id* at 2 Accordingly, we will in this opinion focus, not on all potential federal government uses of copyrighted materials, but instead, on government photocopying of copyrighted materials for internal government use. We note, in particular, that this opinion does not specifically consider the circumstances under which it would be a fair use for an agency to republish copyrighted materials in government publications or in publicly available databases.

[3] Indeed, a Department of Energy memorandum that you provided as an attachment to your letter indicates that the Commercial Litigation Division of the Department of Justice has informed the Department of Energy that, in its view, some cases of government photocopying likely would not be fair uses. *See* Memorandum for Jim Chafin and All Field Offices, from Paul A Gottlieb, Assistant General Counsel for Technology Transfer and Intellectual Property, United States Department of Energy, *Re: Copyright Clearance Center* at 2 (May 23, 1995).

I. *The Fair Use Doctrine*

Article I, Section 8 of the Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Pursuant to that power, Congress enacted the Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. § 101 et seq. (1994)) (the "Copyright Act" or the "1976 Act"). Section 106 of the Copyright Act provides, *inter alia*, that the owner of a copyright under Title 17 of the United States Code "has the exclusive rights . . . to reproduce the copyrighted work in copies," and to "authorize" such reproduction. 17 U.S.C. § 106(1) (1994). Those "exclusive rights," however, are "[s]ubject to" limitations codified in "sections 107 through 120" of the 1976 Act. *Id.* § 106. For present purposes, the most important of those limitations is found in section 107 of the Copyright Act, *id.* § 107. That section, which is entitled "Limitations on exclusive rights: Fair use," provides, in pertinent part:

> Notwithstanding the provisions of section[ ] 106 . . ., the fair use of a copyrighted work, including such use by reproduction in copies . . ., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Section 107's "fair use" limitation on copyright, and the particular factors enumerated in that section, reflect and incorporate a longstanding common law doctrine. *See Harper & Row, Publishers, Inc. v. The Nation Enters.*, 471 U.S. 539, 549 (1985). From the "infancy of copyright protection," courts have found it necessary to provide some opportunity for fair use of copyrighted materials in order "to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.' " *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). Before enactment of the 1976 Act, however, the fair-use doctrine was "exclusively [a] judge-made doctrine." *Id.* at 576. When it codified the fair use doctrine in section 107 of the 1976 Act, "Congress meant 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication." *Id.* at 577 (quoting H.R. Rep. No. 94–1476, at 66 (1976) ("House Report"), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679; S. Rep. No. 94–473, at 62 (1975) ("Senate Report")); *accord Harper & Row*, 471 U.S. at 554.[4]

As noted above, the fair use doctrine, like the copyright protections that it qualifies, is necessary in order "to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.' " *Campbell*, 510 U.S. at 575; *see also, e.g., Harper & Row*, 471 U.S. at 545 ("copyright is intended to increase and not to impede the harvest of knowledge"). As the Supreme Court recently emphasized, "[t]he fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.' " *Campbell*, 510 U.S. at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted)).[5]

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[4] In 1992, Congress added the following sentence to the end of 17 U.S.C. § 107, in order to clarify that the fair-use limitation is applicable to unpublished works: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Pub. L. No. 102–492, 106 Stat. 3145 (1992). Arguably, application of the fair use doctrine to unpublished works is one way in which section 107 departs from the common law. *See, e.g.*, H.R. Rep. No. 102–836, at 4 (1992) ("The common law, going back to late eighteenth century English cases, had been strict in prohibiting fair use of unpublished works under the theory that the author should decide when and in what form his or her work should first reach the public."), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2556; *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir.) ("Though common law, especially as developed in England, appears to have denied the defense of fair use to unpublished works, *see* W. Patry, *The Fair Use Privilege in Copyright Law* 436–41 (1985), the 1976 Act explicitly makes all of the rights protected by copyright, including the right of first publication, subject to the defense of fair use."), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications Int'l, APS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1502 (S.D.N.Y. 1988) (Copyright Act's application of fair use doctrine to unpublished work was "in departure from the common law rule"), *aff'd*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). *But see Harper & Row*, 471 U.S. at 550–51 (although "fair use traditionally was not recognized [at common law] as a defense to charges of copying from an author's as yet unpublished works . . . [t]his absolute rule . . . was tempered in practice by the equitable nature of the fair use doctrine")

[5] *See also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990) ("The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. . . . Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design."); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)):

> The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

II. *Fair Use and Government Photocopying*

The federal government can be liable for violation of the copyright laws. Congress has expressly provided that a work protected by the copyright laws can be "infringed by the United States," 28 U.S.C. § 1498(b) (1994),[6] and further has provided that "the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement," 28 U.S.C. § 1498(b) (Supp. III 1997). At the same time, it cannot be disputed that the federal government's copying (and other use) of copyrighted materials is subject to the fair use doctrine codified in 17 U.S.C. § 107.[7] It follows that any federal government photocopying that is a fair use is not infringing. However, there is no basis for concluding that the photocopying of copyrighted materials by the federal government automatically or invariably constitutes a fair use.

The case law provides very little guidance on the question of when government photocopying is a fair use. Reported cases involving application of the fair use doctrine to governmental conduct are rare. Indeed, the *Williams & Wilkins* decision, to which your letter refers and which we discuss below, is one of the only published opinions containing a significant discussion of governmental fair use.[8] And, outside the context of public schools, we have found only one case — involving circumstances far removed from those at issue in this opinion — in which a court has rejected a government's assertion that its use of copyrighted materials was fair.[9] What is more, even outside the context of governmental use,

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[6] *See also* H.R. Rep. No 86–624, at 2 (1959) ("When the Government deliberately publishes a copyrighted article without obtaining the prior consent of the copyright proprietor, the general assumption would be that the holder, pursuant to the principles of 'just compensation' under the fifth amendment of our Constitution, should be entitled to an action against the Government for infringement ")

[7] There is nothing in the statute to suggest that the federal government cannot invoke the fair use doctrine. The legislative history indicates that certain governmental uses can be fair. *See infra* notes 19, 24 And the courts uniformly have assumed that the fair use analysis provided in section 107 of the Act applies to government uses of copyrighted materials *See, e.g.*, the cases cited in note 8, *infra*

[8] A few other cases contain less extensive discussion of governmental fair use. *See, e g*, *Association of Am. Med. Colleges v. Cuomo*, 928 F.2d 519, 523–26 (2d Cir.), *cert denied*, 502 U.S 862 (1991), *College Entrance Examination Bd. v Pataki*, 889 F. Supp 554, 564–75 (N.D N Y 1995), *Sinai v California Bureau of Automotive Repair*, No C-92-0274-VRW, 1992 WL 470699, at *3–*4 (N.D. Cal. Dec 21, 1992), *College Entrance Examination Bd. v Cuomo*, 788 F. Supp 134, 140–43 (N.D.N Y. 1992), *West v City of New York*, No 78 Civ. 1981 (MJL), 1985 WL 202, at *24–*25 (S.D N Y Jan. 18, 1985), *Key Maps, Inc. v. Pruitt*, 470 F. Supp 33, 37–38 (S.D Tex. 1978). Of these, only *West* and *Key Maps* involved decisions, necessary to the judgment, on the merits of the fair use question; and only *Key Maps* involved a government entity making and distributing multiple copies of copyrighted materials for internal government use

[9] *See College Entrance Examination Bd*, 889 F Supp at 564–75. In that case, the district court, on a motion for preliminary injunction, found a likelihood of success on plaintiffs' infringement claim against a state government. That case did not involve government copying for internal government use. *See supra* note 2. Instead, the case involved a challenge to a state statute that required testing organizations to disclose copies of their copyrighted, confidential tests and related materials, and that further provided that such materials, once disclosed, would become public records.

There also are at least two decisions in which courts have found that a distribution of multiple copies of copyrighted materials to students in a public school was not a fair use. *See Marcus v Rowley*, 695 F.2d 1171, 1174–79 (9th

Continued

there is only a small handful of reported cases involving whether and under what circumstances photocopying is a fair use.[10]

The sole reported decision (apart from the classroom context) concerning whether government photocopying is a fair use is *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). The plaintiff in that case challenged certain practices of the National Institutes of Health (''NIH'') and the National Library of Medicine (''NLM''). The NIH library ran a photocopying service for the benefit of its research staff: On request, researchers could obtain a photocopy of an article from any of the journals in the library's collection, typically to assist them in their on-going projects or for background reading. As a general matter, NIH would agree to provide a requester only one copy of a particular article, only one article per journal issue, and no article of over 50 pages. In 1970, the library filled 85,744 requests for photocopies of journal articles (including journals published by Williams & Wilkins), constituting about 930,000 pages. *See* 487 F.2d at 1348. NLM is a repository of much of the world's medical literature, in essence a ''librarians' library.'' *Id.* Upon request, NLM would provide photocopies of journal articles, free of charge, to other libraries and like research- and education-oriented institutions, both public and private (including commercial organizations, such as drug companies). NLM provided only one photocopy of a particular article per request, and would not honor a request for photocopying of an entire journal issue. In 1968, a representative year, NLM filled about 120,000 requests by photocopying journal articles. NLM made no effort to ascertain the ultimate use to which the

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Cir. 1983), *Wihtol v. Crow*, 309 F.2d 777, 780–81 (8th Cir 1962) Such classroom cases may be instructive on the general matter of fair use in the context of reproduction for nonprofit purposes However, such cases typically involve archival collection or distribution of multiple copies of copyrighted materials that were, in the first instance, prepared and marketed primarily for use in the very same classroom setting. *See, e.g., Marcus*, 695 F.2d at 1175 We assume that the government photocopying practices about which you are concerned will rarely, if ever, involve federal government duplication for educational use in a classroom, or practices that fairly can be said to be analogous to those at issue in *Marcus* Of course, insofar as certain federal government practices are akin to those at issue in the classroom cases, then the courts' reasoning in decisions such as *Marcus* would be germane to the fair use analysis (The holding in *Wihtol* is of less practical value, since the court in that case merely held that ''[w]hatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe '' 309 F.2d at 780.) Furthermore, with respect to such cases it may be instructive to look to the legislative history of the 1976 Act, in which the House Committee on the Judiciary reproduced (i) an ''Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals,'' which had been drafted by representatives of author/publisher and educational organizations, and (ii) a similar, more specialized set of ''Guidelines for Educational Uses of Music,'' which had been drafted by representatives of music publishing and educational organizations *See* House Report at 66–72, *reprinted in* 1976 U.S.C.C.A.N at 5680–86. The House Committee expressed its belief that ''the guidelines are a reasonable interpretation of the minimum standards of fair use'' in the classroom context, *id.* at 72, *reprinted in* 1976 U.S C C A N at 5686, and the House and Senate Conferees ''accept[ed]'' the guidelines ''as part of their understanding of fair use,'' H R Rep No. 94–1733, at 70 (1976), *reprinted in* 1976 U.S.C.C A N. 5810, 5811. (On the question of the legal effect, if any, of these guidelines, *see, e.g., Princeton Univ. Press v Michigan Document Servs., Inc.*, 99 F 3d 1381, 1390–91 (6th Cir 1996) (en banc), *cert. denied*, 520 U S 1156 (1997); *id* at 1410–12 (Ryan , J., dissenting); 4 Melville B Nimmer & David Nimmer, *Nimmer on Copyright* § 13 05[E][3][a], at 13–241–42 (1998))

[10] *See, e g , Princeton Univ. Press*, 99 F.3d 1381; *American Geophysical Union v Texaco, Inc* , 60 F.3d 913 (2d Cir 1994), *cert. dismissed*, 516 U.S. 1005 (1995); *Duffy v. Penguin Books USA Inc.*, 4 F. Supp 2d 268, 274–75 (S D N.Y 1998), *Television Digest, Inc. v United States Telephone Ass'n*, 841 F. Supp. 5, 9–11 (D.D.C 1993); *Basic Books, Inc v Kinko's Graphics Corp.*, 758 F Supp 1522 (S D N Y 1991)

copied articles were put. Although NLM did provide some photocopies to institutions outside the government, NLM declined to provide to *non*-government libraries copies of articles published within the preceding five years in any of 104 journals included on a so-called "widely-available list." *Id.* at 1348–49.

The Court of Claims, in a 4-to-3 decision, held that the NIH and NLM photocopying practices were noninfringing because such practices were fair uses. The majority discussed at length eight separate "considerations which merge to that conclusion," *id.* at 1353:

(i) NIH and NLM are nonprofit institutions, *see id.* at 1354;

(ii) the libraries' photocopying policies were "within appropriate confines" — in particular, the libraries did not sell the copies, distribute them broadly, or, with slight exceptions by NLM, distribute the copies to nongovernmental entities, *id.* at 1354–55;

(iii) such library photocopying practices had long been carried out across the nation "with apparent general acceptance," *id.* at 1355–56;

(iv) medical science would be seriously hurt by a finding that such library photocopying was infringing, *see id.* at 1356–57;

(v) the plaintiff had failed to prove economic detriment as a result of the libraries' practices, *see id.* at 1357–59;

(vi) the statutory language and history were singularly unclear on the question, and it would be "less dangerous" to rule in favor of the libraries until Congress acted to clarify the fair use question, *id.* at 1359–61;

(vii) contemporaneous legislative history of proposed legislation (that had not yet resulted in the 1976 amendment of the copyright law) "indicate[d] the correctness of our general approach," *id.* at 1361; and

(viii) the law in many foreign countries was that such practices were not infringing, *see id.* at 1361–62.

The Court of Claims in its decision also urged Congress to enact legislation to resolve the difficult fair use questions raised by the increasingly prevalent practice of photocopying — questions that were, in the court's words, "preeminently a problem for Congress." 487 F.2d at 1360; *see also id.* at 1353, 1363 ("Hopefully, the result in the present case will be but a 'holding operation' in the interim period before Congress enacts its preferred solution.'').

Williams & Wilkins appealed to the Supreme Court. In that Court, the Department of Justice argued that the Court of Claims correctly analyzed the fair use question, and that the Court should affirm the judgment in favor of the United States. *See* Brief for the United States, *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (No. 73–1279); Paul Goldstein, *Copyright's Highway* 113–26 (1994) (describing Supreme Court proceedings). An equally divided Court, without opinion, affirmed the lower court judgment. *See* 420 U.S. 376 (1975).

Congress was well aware of the dispute in *Williams & Wilkins* and of the Court of Claims' plea that Congress enact legislation to resolve the difficult fair use questions raised in that case. *See, e.g.*, Senate Report at 71. And, in the 1976 Act, Congress did take three steps with respect to the matter of photocopying. First, in section 106 of the Act, Congress expressly affirmed that the rights of a copyright owner include the rights ''to reproduce the copyrighted work in copies'' and to ''authorize'' such reproduction. 17 U.S.C. § 106(1) (1994).[11] Second, the text of section 107 of the Act — in which Congress for the first time formally codified the fair use doctrine — expressly provides that ''reproduction in copies . . . for purposes such as . . . news reporting, teaching . . ., scholarship, or research,'' can be ''the fair use of a copyrighted work.'' Finally, in section 108 of the Act, Congress provided that certain forms of library and archival photocopying are not infringing, *see* 17 U.S.C.A. § 108 (West 1996 & Supp. 1999), thereby creating a discrete carve-out, or safe harbor, that does not ''in any way affect[ ] the right of fair use as provided by section 107,'' 17 U.S.C. § 108(f)(4) (1994). However, Congress did not otherwise resolve the fair use questions raised in *Williams & Wilkins*, and, in particular, did not identify the circumstances under which photocopying — and government photocopying in particular — would, or would not, constitute fair use under section 107 of the 1976 Act.[12] Instead, as explained above, Congress simply enacted 17 U.S.C. § 107 in

[11] As the court in *Williams & Wilkins* indicated, *see* 487 F.2d at 1350–51, 1359, there had been some question whether, under the then-existing copyright laws, the exclusive rights of the copyright owner included the right to control the copying of books and periodicals for personal use. *See also* Brief for the United States at 16 n.26, *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (No. 73–1279) (discussing this question).

[12] In a memorandum attached to your letter, counsel for the CCC argue that section 108 of the 1976 Act ''expressly proscribes the copying at issue in *Williams & Wilkins*,'' and that congressional enactment of section 108 ''signalled Congressional disapproval of [*Williams & Wilkins*] on fair use grounds, and instead indicated that the photocopying activities in question should be covered by a separate statutory provision, namely Section 108.'' Memorandum of Weil, Gotshal & Manges LLP, Re: *Government Photocopying as Copyright Infringement* at 22–23 (July 30, 1997) (''Weil, Gotshal Memo''). *See also* United States Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, at 82 n.262 (Sept. 1995) (''White Paper'') (''precedential value of *Williams & Wilkins* may be reduced'' because of, *inter alia*, ''Section 108's proscription on most 'systematic' photocopying''), *quoted with approval in* Weil, Gotshal Memo at 22; William F. Patry, *The Fair Use Privilege in Copyright Law* 210 (2d ed. 1995) (''In 1976, Congress by subjecting the activity before the Court of Claims to a statutory exemption in Section 108 of the Copyright Act, available only to libraries and archives qualifying under Section 108(a) and then only in the enumerated instances described in Sections 108(d), 108(e), and further subject to the conditions of Section 108(g), indicated its disapproval of the Court of Claims' fair use holding.'').

order to "codify the common-law doctrine." *Harper & Row*, 471 U.S. at 549. Accordingly, the Court of Claims decision in *Williams & Wilkins* remains binding precedent in the Federal Circuit, where infringement claims against the federal government must be brought.[13]

The continued vitality of *Williams & Wilkins* in the Federal Circuit does not, however, mean that all federal government photocopying is a fair use. The *Williams & Wilkins* court, after discussing at length the eight different considerations, or "elements," that contributed to its decision, 487 F.2d at 1353–62, emphasized that its holding (that the library copying practices at issue were noninfringing)

This is incorrect, because section 108 of the 1976 Act does not narrow the protection for fair use provided by the common-law doctrine codified in section 107 Section 108(a) of the Act, 17 U.S.C A § 108(a) (West 1996 & Supp 1999), provides that, under certain conditions, it is "not an infringement of copyright for a library or archives . . to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord," "[n]otwithstanding the provisions of section 106." Section 108(g)(2), in turn, states that "[t]he rights of reproduction and distribution *under this section* . . . do not extend" to certain cases involving the "systematic reproduction or distribution of single or multiple copies." (Emphasis added) Section 108(g)(2) does not "expressly proscribe[ ]" the copying practices at issue in *Williams & Wilkins*—indeed, nothing in section 108 "proscribes" any practice at all. Nor is there anything in section 108 suggesting that "systematic" reproduction is "lawful only via the [section 108(g)(2)] proviso, [and] could not be a fair use " United States Copyright Office, *Report of the Register of Copyrights· Library Reproduction of Copyrighted Works* (17 U.S.C. 108), at 98 (1983) ("1983 Register Report") At most, section 108(g)(2) merely provides that the "rights" to copy and distribute that are provided "under" section 108 "do not extend to" the "systematic" practices described in section 108(g)(2) To be sure, "section 108 authorizes certain photocopying practices which *may not* qualify as a fair use," House Report at 74 (emphasis added), *reprinted in* 1976 U.S C.C.A N. at 5688, *see also* Senate Report at 67 However, the statute does not provide, or even suggest, that the circumstances under which copying is noninfringing under section 108(a) are those "that would *typically not* amount to fair use [under section 107]," White Paper at 84–85 (emphasis added), nor that "Section 108 was enacted to make lawful some types of copying which *would* otherwise be infringements of copyright, fair use notwithstanding," 1983 Register Report at 96 (emphasis added) Indeed, by its express terms, nothing in section 108 "in any way affects the right of fair use as provided by section 107." 17 U.S.C § 108(f)(4) (1994); *see also* House Report at 74 ("No provision of section 108 is intended to take away any rights existing under the fair use doctrine."), *reprinted in* 1976 U.S C C.A N at 5687–88, Senate Report at 67 (same); 122 Cong. Rec. 3836 (1976) (statement of Sen Magnuson) ("the Judiciary Committee clearly set out in their report that the fair use doctrine not only applies to reproduction practices of libraries, but that in no way did they intend section 108 to be a limitation upon the fair use doctrine").

Accordingly, whether section 108 renders certain copying practices "not an infringement" does not affect whether such practices are noninfringing fair uses under section 107 *See Texaco*, 802 F. Supp. at 28 & n 26 (emphasizing that "Section 108 is a separate special statutory exemption governed by an entirely different set of standards [than under section 107]," and rejecting the argument "that the understanding of Section 107 should be influenced by what is permitted under Section 108"); *accord* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[E][2], at 13–240 (1998) A certain copying practice can be "noninfringing" under section 107, under section 108, under both provisions, or under neither. In its 1983 Report, the Register of Copyrights suggested that such a construction of the statute, in which practices permissible under section 108 might also be permissible under section 107, would "render § 108 superfluous." 1983 Register Report at 96 n.4 That is not the case, however. As the Register noted, "the library community sought § 108 to permit copying that had not been *spelled out* in the proposed fair use provision " *Id.* (emphasis added). Section 108 identifies ("spell[s] out") as noninfringing a category of library photocopying that may, or may not, constitute fair use Section 108 thus fairly can be viewed as a very valuable—and not superfluous—safe harbor: If a certain library practice is noninfringing under the specific and detailed provisions of section 108(a) (as confined by section 108(g)(2)), a library need not be concerned about how that particular photocopying practice would fare under section 107's more complex and indeterminate fair use standards.

[13] Section 1498(b) of title 28 provides that "the exclusive action which may be brought for infringement [by the federal government] shall be an action by the copyright owner against the United States in the Court of Federal Claims " 28 U.S.C § 1498(b) (Supp. III 1997). Decisions of that court are appealable to the United States Court of Appeals for the Federal Circuit, *see* 28 U S C § 1295(a)(3) (1994), which in turn considers itself bound by decisions (such as *Williams & Wilkins*) that the former Court of Claims issued prior to October 1982. *See South Corp v. United States*, 690 F 2d 1368, 1370 & n.2 (Fed Cir 1982); *see also, e.g., Gargoyles, Inc. v. United States*, 113 F 3d 1572, 1576 (Fed Cir 1997).

was based upon all of the elements present in that case, and that its decision would not necessarily resolve different cases "with other significant variables," *id.* at 1362. The court expressly noted that it was not determining whether any of the particular elements in the *Williams & Wilkins* case would be sufficient for a finding of fair use, nor whether all of the relevant elements cumulatively were "essential" to the finding of fair use: It sufficed for the court simply to decide that "at least when all co-exist in combination a 'fair use' is made out." *Id.*; *see also id.* ("we feel a strong need to obey the canon of judicial parsimony, being stingy rather than expansive in the reach of our holding").[14] Implicitly, then, the decision in *Williams & Wilkins* itself suggests that there may be some circumstances under which government photocopying might be infringing. *See also* Brief for the United States at 14, *Williams. & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (No. 73–1279) ("The doctrine is applied as its rationale dictates in each case, and has no sharp edges.").[15]

A "per se" rule also would be inconsistent with the approach that the Supreme Court subsequently has taken in its decisions involving section 107 of the Copyright Act. The Court repeatedly has emphasized that the task of determining whether a particular use is fair "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Campbell*, 510 U.S. at 577; *accord id.* at 584 (Congress "'eschewed a rigid, bright-line approach to fair use,'" in favor of "a 'sensitive balancing of interests.'") (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.31, 455 n.40 (1984)); *Harper & Row*, 471 U.S. at 552 ("fair use analysis must always be tailored to the individual case").

III. *Determining Whether a Particular Government Photocopying Practice is a Fair Use*

Our conclusion that government photocopying is not invariably noninfringing does not, of course, answer the question whether government agencies should enter into licensing agreements for photocopying, and if so, what the terms and

[14] More recent fair use decisions involving photocopying similarly have been confined narrowly to the particular copying practices in dispute *See, e g*, *Texaco*, 60 F.3d at 931 ("Our ruling is confined to the institutional, systematic, archival multiplication of copies revealed by the record—the precise copying that the parties stipulated should be the basis for . . . decision . ")

[15] As we discuss *supra* p. 88, we have no reason to believe that any agency of the executive branch has argued, or advised, that government copying is "per se a fair use." In this respect, it is notable in particular that, in its Supreme Court brief in *Williams & Wilkins*, the United States cited a House Report as "indicat[ing] . that photocopying by the government may in some circumstances constitute copyright infringement" Brief for the United States at 15 n 24, *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (No 73–1279) (citing H.R. Rep. No 86–624, at 5 (1959)) In the cited House Report, a House Committee indicated that the federal government could infringe a copyright when it "publishes" an article without permission *See supra* note 6. The Committee did not indicate what it meant by "publishes," and did not expressly mention photocopying At the page of the House Report (page 5) that the Solicitor General cited, however, a letter written by the Department of Commerce assumes that government *photocopying* could be infringing. *See also id.* at 8 (reflecting a similar assumption conveyed by the Librarian of Congress) There is no suggestion in the House Report that the House Committee disagreed with this assumption.

conditions of such agreements should be. In answering that question, there is an inescapable tension. On the one hand, because of the highly fact-bound nature of the fair use inquiry, it is difficult to ascertain in advance which governmental practices will, or will not, be fair uses: There is an "endless variety of situations and combinations of circumstances that can rise in particular cases." House Report at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5680. Such uncertainty, when viewed in isolation, might weigh in favor of entering into relatively broad licensing agreements, so as to ensure that an agency's photocopying will never be infringing. On the other hand, and in addition to the desire to avoid unnecessary costs, there is an important legal consideration that counsels against entering into unnecessary licensing agreements and in favor of limiting such agreements to encompass only those photocopying practices that are infringing—namely, the concern that general custom and usage may be integral to the fair use analysis.[16] Indeed, at least one court has opined, in particular, that whether it is "fair," under the copyright law, to engage in a photocopying practice without compensation may depend, in part, on whether similarly situated entities customarily agree to pay a fee to the copyright holders.[17] We have no occasion here to consider whether that court was correct in this regard; but it is possible that other courts may follow suit. Accordingly, if government agencies routinely agree to pay licensing fees to engage in photocopying practices that were fair uses at the time, there is a chance some courts may conclude that a growing or longstanding custom of paying such fees weighs against a finding that such photocopying practices are fair uses when unlicensed. Thus, an agency that decides to negotiate a photocopying license should seek to limit the scope of the licensing agreement so as not to cover those photocopying practices that the agency, in good faith, concludes are not infringing.

In the end, each agency must do its best to evaluate whether any of its photocopying practices are infringing, and, if so, to obtain proper authorization for such uses of copyrighted materials. Although, as we have explained, there may be many government photocopying practices that are fair uses (or that are, for other reasons, not infringing), under some circumstances government photocopying may not be a fair use. In evaluating whether their practices are infringing, agencies should be guided by *Williams & Wilkins*, which, as noted above, is still binding precedent in the Federal Circuit. However, as explained above, the holding in *Williams & Wilkins* itself was dependent on the particular facts of that case, and the 8150 calculus may be different with respect to govern-

[16] *See, e.g., Williams & Wilkins*, 487 F.2d at 1355–56, *see also Harper & Row*, 471 U.S. at 550 (the fair use doctrine traditionally "was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption")

[17] *See Princeton Univ. Press*, 99 F.3d at 1387 (consideration of the potential licensing revenues for photocopying in a fair use analysis is "especially" appropriate where the copyright holder not only has an interest in exploiting the licensing market, but also "has actually succeeded in doing so") *But cf. Campbell*, 510 U.S. at 585 n.18 (defendants' request for permission to use copyrighted song in a parody does "not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation").

ment photocopying practices that diverge in material ways from the NIH and NLM practices at issue in *Williams & Wilkins.*[18]

Moreover, agencies should be aware that, in two important recent cases in other circuits, sharply divided courts of appeals have held that certain commercial photocopying practices were not fair uses. In *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997), the United States Court of Appeals for the Sixth Circuit held that a commercial copyshop had engaged in willful infringement by reproducing substantial segments of copyrighted works of scholarship and binding such reproductions into coursepacks that the copyshop then sold to students. In *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995), the United States Court of Appeals for the Second Circuit held that Texaco's systematic photocopying of scientific journal articles for its researchers' archival use was infringing. Even if the United States Court of Appeals for the Federal Circuit were to adopt the reasoning of these decisions, the rationale of those decisions would not apply with full force in the context of government photocopying, since the decisions each rested, in part, on the fact that each of the defendants "acquire[d] conspicuous financial rewards from its use of the copyrighted material." *Id.* at 922; *see also Princeton Univ. Press*, 99 F.3d at 1386, 1389. Moreover, as the *Texaco* court noted, "courts are more willing to find a secondary use [i.e., the use that is made of the photocopies] fair when it produces a value that benefits the broader public interest." 60 F.3d at 922. Nevertheless, the ongoing debate among the judges in cases such as these (and in *Williams & Wilkins*) demonstrates that the boundaries of fair use in the photocopying context are uncertain, highly contested, and especially dependent upon the particulars of a given case. And, while in some cases it might be fairly easy for an agency to determine that a government practice is noninfringing,[19] usually that will not be the case: Whether a particular government photocopying practice is a fair use often will depend upon a "'sensitive balancing of

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[18] Moreover, the subsequent advent of the CCC, and the possibility of reasonable licensing agreements with that organization, may affect at least one of the factors that led the Court of Claims to rule against the copyright holder in *Williams & Wilkins*. The Court of Claims reasoned that medical science would be seriously hurt by a finding that the NIH and NLM photocopying was infringing, since the result of such a holding could have been that libraries would have to cease their photocopying practices. *See* 487 F.2d at 1356–57 But insofar as such libraries now could avoid a finding of fair use by agreeing to pay a reasonable and affordable licensing fee — that is, a fee that would not materially deter the actual making and use of valuable photocopies — the harm that the *Williams & Wilkins* court foresaw could be diminished *See Texaco*, 60 F 3d at 924 ("To the extent the copying practice was 'reasonable' in 1973 [when *Williams & Wilkins* was decided], it has ceased to be 'reasonable' as the reasons that justified it before [photocopying licensing] have ceased to exist ') (quoting the district court opinion, 802 F. Supp. at 25) *But see id* at 934 (Jacobs, J , dissenting).

[19] For an example outside the context of photocopying, *see, e.g.*, House Report at 73 ("The Committee has considered the question of publication, in Congressional hearings and documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use."), *reprinted in* 1976 U.S C.C A.N at 5687

interests.'" *Campbell*, 510 U.S. at 584 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

In the text of section 107 of the Copyright Act itself, Congress has instructed that, in determining whether the use made of a work in any particular case is a fair use, "the factors to be considered shall include" the following:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

These four statutory factors should not be treated in isolation, one from another. *Campbell*, 510 U.S. at 578. Nor are those factors exhaustive. *See Harper & Row*, 471 U.S. at 560; H.R. Rep. No. 102–836, at 9–10 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2561–62.[20] Most importantly, it is critical that the statutory factors, as well as all other pertinent factors and considerations, "be explored, and the results weighed together, *in light of the purposes of copyright.*" *Campbell*, 510 U.S. at 578 (emphasis added); *see also id.* at 581 (the fair use inquiry requires that any particular use of copyrighted material "be judged, case by case, in light of the ends of the copyright law").[21] Accordingly, before turning to particular factors and considerations that agencies should consider in the context of government photocopying, it is important once again to identify the "purposes of copyright."

Copyright law "ultimately serves the purpose of enriching the general public through access to creative works." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517–18, 527 (1994); *see also Harper & Row*, 471 U.S. at 545 ("copyright is intended to increase and not to impede the harvest of knowledge"). Thus, in determining whether a particular photocopying practice is a fair use, the ultimate question to be answered is whether permitting the government to continue to engage in the practice without paying a licensing fee would "serve[] the copyright objective

[20] Section 107 expressly provides that "the factors to be considered *shall include*" the four enumerated factors (emphasis added), and the 1976 Act elsewhere provides that the term "including" is "illustrative and not limitative," 17 U.S.C. § 101 (1994)

[21] *See also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13 05[A][5], at 13–195 (1998) ("the protean factors enumerated in Section 107, standing by themselves, lack the concreteness to provide definite answers to difficult cases"); Lloyd L Weinreb, *Fair Use*, 67 Fordham L. Rev 1291, 1306 (1999) ("fair use depends on a calculus of incommensurables").

of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.'' Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990), *cited with approval in Campbell*, 510 U.S. at 578.[22]

Moreover, although the point is less clearly established, the fair use doctrine may be understood to contemplate permitting uses that serve ''not only . . . the purpose of copyright but also . . . other socially recognized purposes.'' Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1144 (1990). For example, the Supreme Court in the *Sony* case held that consumer videotaping of television broadcasts for purposes of ''time-shifting'' was a fair use, in part because such a practice ''yields societal benefits.'' 464 U.S. at 454. Elaborating on this point, the Court cited the example of using a videotaping machine ''to enable a [hospital] patient to see programs he would otherwise miss,'' which, as the Court explained, ''has no productive purpose other than contributing to the psychological well-being of the patient.'' *Id.* at 455 n.40. Of greater pertinence to the subject matter at hand — namely, government copying — the Court further suggested that ''a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote,'' are examples of uses that could be ''fair.'' *Id.*

Thus, it fairly can be argued that, as a general matter, ''courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest,'' *Texaco*, 60 F.3d at 922, in contrast with a use that ''can fairly be characterized as a form of 'commercial exploitation,' i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material,'' *id.*[23] For instance, the federal government typically photocopies materials in order to facilitate some other, ''secondary'' use of such materials, and such secondary use generally is aimed at providing a public benefit, or at serving a ''broad[ ] public purpose.'' *Id.* Insofar as an agency's photocopying is intended to facilitate such public purposes, that should weigh in favor of a finding of fair use.[24] *See also infra* p. 101 (discussing whether purpose of the photocopying is to enhance profitmaking).

[22] *See also, e.g., Atari Games Corp. v Nintendo of Am., Inc.*, 975 F 2d 832, 843 (Fed. Cir 1992) (where, in ''reverse engineering'' of computer software, ''intermediate'' copying permitted the user to study that software and thereafter design new video game programs, the resultant ''growth in creative expression'' weighed in favor of finding that the copying was a fair use).

[23] *See also, e g., Nimmer*, § 13.05[B][4], at 13–205 (''The public interest is also a factor that continually informs the fair use analysis '') (footnote omitted).

[24] *See, e.g., Williams & Wilkins*, 487 F 2d at 1353 (''We cannot believe, for instance, that a judge who makes and gives to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both judges are then considering in a case before them is infringing the copyright, rather than making 'fair use' of his issue of that journal.''), *Key Maps, Inc* , 470 F. Supp at 38 (county fire marshal's distribution of copies of copyrighted maps to 50 fire departments, law enforcement agencies, and civil defense units in the county was ''legitimate, fair, and reasonable,'' since the copies were disseminated ''solely for internal purposes which related to a discernable public interest,'' namely, ''the coordination of fire prevention activities in the unincorporated areas of [the] county''), *see also* House Report at 65 (noting that, under section 107 of the 1976 Act,

In order to decide whether a particular government use of copyrighted materials would, on the whole, "promote the Progress of Science and useful Arts," it is necessary to take into account an "ample view of the universe of relevant evidence." *Campbell*, 510 U.S. at 575, 584. Similarly, in order to determine whether any other benefits to the broader public interest would sufficiently outweigh the costs of any reduction in the incentives for creativity, it is necessary to engage in a comprehensive evaluation of all pertinent factors. We think that, in the particular context of government photocopying, the following specific considerations (each of which bears on the four enumerated statutory factors) might have a significant impact on the fair use calculus:

(a) One important consideration that courts typically address under the first statutory factor ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes") is whether the use in question is undertaken in order to increase the user's profits. In most, if not all, cases, the purposes for which the government makes photocopies do not include profitmaking or commercial exploitation. Although the nonprofit nature of the government's use of photocopies would not be dispositive, *see Campbell*, 510 U.S. at 584, it certainly would be "one element," *id.*, germane to the fair use question.[25] The commercial/nonprofit distinction may be especially significant where, as in most cases of photocopying, the secondary use is not "transformative"—i.e., where the copyrighted material is merely copied in its original form and is not transformed into another valuable product. *See id.* at 579 (the more transformative the use, the less significant to the analysis will be the question of commercialism).[26]

"courts might regard as fair" the "reproduction of a [copyrighted] work in legislative or judicial proceedings or reports"), *reprinted in* 1976 U.S.C.C.A.N. at 5678–79; Senate Report at 61–62 (same), *Harper & Row*, 471 U.S. at 584–85 n.8 (Brennan, J., dissenting) (example of a judicial opinion quoting extensively from copyrighted materials), *Sinai*, 1992 WL 470699, at *3 (state Bureau of Automotive Repairs used materials for a "public purpose" when it disseminated an auto emissions chart to field offices throughout the state so that those offices could assist smog check stations and consumers in complying with the state's emission laws).

[25] *See also Harper & Row*, 471 U.S. at 562, *Texaco*, 60 F.3d at 921–22

[26] Counsel for the CCC, citing *Campbell*, suggest that nontransformative uses "are unlikely to be regarded as fair ones." Weil, Gotshal Memo at 8. However, the Court in *Campbell* simply indicated that, because "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works, . . . [s]uch works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." 510 U.S. at 579. The Court expressly cautioned that such transformative use "is not absolutely necessary for a finding of fair use," *id.*, and in support of that proposition, the Court cited (i) a case (*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)) in which the Court found a nontransformative use to be noninfringing, and (ii) the express indication in section 107 of the 1976 Act that reproduction of multiple copies for classroom distribution can be a fair use. *Id.* at 579 & n.11, *see also id.* at 584–85 (eschewing fair use analysis that relies on a "hard evidentiary presumption," in light of the need for a "sensitive balancing" of interests). It is important to note, as well, that the very first example that section 107 provides of a use that can be "fair" is "reproduction in copies or phonorecords," even though such "reproduction" in most cases would not be "transformative" in the sense the Court described in *Campbell*. *See also* House Report at 66 ("the reference [in 17 U.S.C. § 107] to fair use 'by reproduction in copies or phonorecords or by any other means' is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use"), *reprinted in* 1976 U.S.C.C.A.N. at 5679.

(b) Photocopying more likely will be deemed "fair" where the photocopies are disseminated to a discrete and limited audience within the government. To the extent that copies are sold, or distributed broadly, especially outside the government, that likely would weigh against a finding of fair use. *See Williams & Wilkins*, 487 F.2d at 1353 & n.12, 1354–55. (This consideration likely would be germane to the first ("purpose and character of the use") and fourth ("effect of the use upon the potential market for or value of the copyrighted work") statutory factors.)

(c) Copying that is done "spontaneous[ly]," for the purpose of facilitating an immediate and discrete objective, is more likely to be a fair use than systematic "archival" copying of extensive materials for possible future use. *See Texaco*, 60 F.3d at 919–20. (This consideration, too, would bear on the first and fourth statutory factors.) And, as the third statutory factor expressly indicates, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" also is relevant to determining whether a use is fair.

(d) Copying materials for the purpose of collecting or studying certain facts or ideas contained therein — as opposed to the work's original expression — increases the likelihood that the reproduction will be a fair use. In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), the Court emphasized that, as a matter of constitutional law, "facts are not copyrightable." *Id.* at 344. All facts — scientific, historical, biographical, and news of the day — " 'may not be copyrighted and are part of the public domain available to every person.' " *Id.* at 348 (citation omitted); *accord Harper & Row*, 471 U.S. at 556 ("No author may copyright his ideas or the facts he narrates."). Furthermore, 17 U.S.C. § 102(b) (1994) provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery." The exclusion of facts and ideas from copyright protection, like the fair use doctrine, serves the goal of promoting the progress of science and useful arts. *See Campbell*, 510 U.S. at 575 n.5.[27] Accordingly, copyright protection for a work containing facts or ideas "is limited to those aspects of the work — termed 'expression' — that display the stamp of the author's originality." *Harper & Row*, 471 U.S. at 547. Indeed, as the Court reemphasized in *Campbell*, " 'facts contained in existing works may be freely copied.' " 510 U.S. at 575 n.5 (quoting *Feist*, 499 U.S. at 359).[28] Thus, where the government's copying is limited to the bare facts contained in particular mate-

[27] Moreover, the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas is necessary in order to reconcile the restrictions of the Act with the First Amendment. *See Harper & Row*, 471 U.S. at 556, 560, *see also New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring), *cited with approval in Harper & Row*, 471 U.S. at 556

[28] Thus, for example, the Court in *Harper & Row* implied that although direct quotations from President Ford's biography were subject to copyright protection, the historical facts contained in that biography were not entitled to such protection and could be freely copied. *See* 471 U.S at 565–66 & n.8 (applying copyright analysis only to "verbatim quotes" from the biography, and excluding from infringement consideration historical quotations attributed to third parties and to government documents)

rials, and there is no copying of protected expression, there is no possibility of copyright infringement, and the fair-use question is inapposite.

Moreover, even if a document or book is entitled to some copyright protection, nevertheless, as a general matter "fair use is more likely to be found in factual works than in fictional works." *Stewart v. Abend*, 495 U.S. 207, 237 (1990). Accordingly, even where the government copies materials that contain protected "expression," or factual compilations that arrange or select facts in a manner sufficiently original to trigger some limited, "thin" copyright protection,[29] the photocopying more likely will be a fair use if the purpose of the copying is simply to obtain, collect, or study the facts and ideas contained in the materials. This will be the case especially where, for purposes of photocopying, the facts and ideas cannot readily be segregated from the protected expression, and where the government's copying of the protected expression therefore is merely incidental to its copying of unprotected facts and ideas.[30]

(e) The fourth factor that the statute expressly identifies as relevant to the fair-use analysis is the "effect of the use upon the potential market for or value of the copyrighted work." This factor requires courts "to consider not only the extent of the market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." *Campbell*, 510 U.S. at 590 (quoting 3 *Nimmer* § 13.05[A][4], at 13–102.61 (1993)). The importance of this factor "will vary, not only with the amount of harm, but also with the relative strength of the showing on the other [fair-use] factors." *Id.* at 590 n.21.

[29] "[T]he copyright in a factual compilation is thin," extending only to the selection or arrangement of the facts, if any, that is original or expressive *Feist*, 499 U S at 348 As the Court explained·

> The mere fact that a work is copyrighted does not mean that every element of the work may be protected Originality remains the *sine qua non* of copyright, accordingly, copyright protection may extend only to those components of a work that are original to the author. . . Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them.

Id at 348–49

[30] *See, e g., Texaco*, 60 F 3d at 925 & n.11, *National Rifle Ass'n of Am v Handgun Control Fed. of Ohio*, 15 F 3d 559, 562 (6th Cir.), *cert. denied*, 513 U.S 815 (1994), *Texaco*, 802 F Supp at 15 (although such a fact-centered justification for photocopying "has some merit," and is "ingenious," it "simply does not fit the facts of the case"); *see also, e g , Atari Games Corp* , 975 F 2d at 843 ("When the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying Thus, reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use "); *Sega Enters. Ltd. v. Accolade, Inc* , 977 F.2d 1510, 1524–26 (9th Cir. 1992). By analogy, in the context of publication (rather than mere reproduction) of copyrighted materials, the Supreme Court has indicated that it may be permissible to copy protected expression verbatim where "necessary adequately to convey the facts," or where particular expression is "so integral to the idea expressed as to be inseparable from it " *Harper & Row*, 471 U S at 563, *see also* Leval, *Toward a Fair Use Standard*, 103 Harv L Rev. at 1113–15. Perhaps the most famous case of this sort is *Time Inc v Bernard Geis Assocs* , 293 F. Supp. 130 (S D N Y 1968), in which the court held that it was fair use to depict frames from the copyrighted Zapruder film in a book about the Kennedy assassination, where there was "a public interest in having the fullest information available on the murder of President Kennedy," and where such photographs made the author's theory of the assassination "easier to understand," *id* at 146.

The most obvious way in which copying can have an adverse market effect is where it directly curtails demand for purchase of the original work, such as where an entity uses photocopying in lieu of additional subscriptions of the original work that it otherwise would purchase. *See, e.g., Texaco*, 60 F.3d at 927–29. Furthermore, with the advent of the CCC, it now can be argued that the failure to pay a licensing fee for the photocopying of materials covered by the CCC has an adverse effect on another potential "market" that was not present at the time of *Williams & Wilkins*—namely, the potential "licensing fee" market. *See, e.g., Princeton Univ. Press*, 99 F.3d at 1387–88; *Texaco*, 60 F.3d at 929–31. Because this sort of "harm" to a licensing fee "market" could, by definition, exist whenever an entity refuses to provide the requested compensation for its copies, what is significant is not the simple question of whether any such market harm exists, but rather, the magnitude and effect of the harm. "Market harm is a matter of degree." *Campbell*, 510 U.S. at 590 n.21.[31] Harm to this potential "licensing fee" market, like other forms of market harm, should be germane to the fair-use analysis only if, and to the extent that, such harm would deter " 'the creation and publication of edifying matter.' " *Id.* at 578 n.10 (quoting Leval, *Toward a Fair Use*, 103 Harv. L. Rev. at 1134). If "unrestricted and widespread [photocopying] of the sort engaged in by the [government]," *Campbell*, 510 U.S. at 590 (internal quotation marks omitted) would not appreciably alter the incentives to create and disseminate the underlying works (and other "edifying" original creations), the harm to the fee "market" should have correspondingly limited impact when evaluating this fair use factor.

Conclusion

There is no "per se" rule that government reproduction of copyrighted material—including, in particular, government photocopying of copyrighted materials for internal government use—automatically qualifies as a fair use under section 107 of the Copyright Act of 1976. However, government photocopying would in many contexts be noninfringing because it would be a "fair use"; and there are good reasons that, if an agency decides to negotiate photocopying licensing agreements, it should seek to limit the scope of any such arrangement to cover only those government photocopying practices that otherwise would, in fact, be infringing.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

[31] *See also* William W Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv L. Rev 1659, 1671–72 (1988).

United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency

Under the apportionment provisions of the Antideficiency Act, the United States Marshals Service has an affirmative obligation to take steps to avoid a deficiency in its Federal Prisoner Detention budget and any drastic curtailment of its prisoner detention services by reducing current expenditures and/or exploring alternative sources of funding that would not depend upon the receipt of additional funds from Congress.

May 11, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
UNITED STATES MARSHALS SERVICE

This memorandum provides an initial response to your request that this Office provide the United States Marshals Service ("USMS") with legal advice concerning its obligations under the Antideficiency Act, 31 U.S.C. §§ 1341–1342, 1349–1350, 1511–1519 (1994) ("ADA"), which provides, in relevant part, that

> [a]n officer or employee of the United States Government or of the District of Columbia government may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id. § 1341. Exceptions to the ADA permit expenditures or obligations in excess of an appropriation where "authorized by law" or necessary to address "emergencies involving the safety of human life or the protection of property." *Id.* §§ 1341, 1342. Although we have previously considered these exceptions in the context of actual or anticipated lapses in agency appropriations or authorization,[1] your request asks us to analyze whether, in the event of a deficiency in the USMS FY1999 "Federal Prisoner Detention" ("FPD") appropriated budget that is unrelated to a lapse in appropriations, the USMS could successfully invoke one of the exceptions to the ADA or assert some other grounds for exemption from that statute and the administrative and criminal penalties imposed for noncompliance with its mandate. *See* 31 U.S.C. § 1349 (subjecting ADA violators to "appropriate

[1] *See, e g., Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*, 19 Op. O L C 337 (1995), *Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease*, 12 Op O L C. 290 (1988); *Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation*, 6 Op. O.L C. 555 (1982); *Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations*, 5 Op O L C. 429 (1981), *Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation*, 4A Op. O.L.C. 16 (1980)

administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office''); *id.* § 1350 (imposing a criminal fine of not more than $5,000 and/or a term of imprisonment for not more than two years); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414, 430 (1990) (explaining that ''[i]t is a federal crime . . . for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress''). We expect to provide a final legal opinion on these matters in the near future, but thought it important, in the interim, to advise you of USMS's affirmative obligation under the apportionment provisions of the ADA, *see* 31 U.S.C. §§ 1511–1519, to take steps to avoid a deficiency and any drastic curtailment of its prisoner detention services by reducing current expenditures and/or exploring alternative sources of funding that would not depend upon the receipt of additional funds from Congress. Maintaining current levels of USMS spending without additional funds, in an effort to force or even in anticipation of a supplemental congressional appropriation, would, in our view, be inconsistent with the purpose of the ADA.

Section 1512 of the ADA requires agencies to minimize the potential for engaging in expenditures that exceed congressional appropriations by apportioning their funds. It provides, in relevant part, that

> [e]xcept as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contact before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

31 U.S.C. § 1512. Though the text of this provision refers only to an agency's obligation to apportion its appropriation to avoid an unauthorized expenditure or obligation of funds, we are persuaded that its legislative history — along with that of the ADA as a whole — evinces a general intent on the part of Congress to curb levels of agency spending ''that would indicate a necessity for a deficiency or supplemental appropriation.'' [2]

[2] Section 1515 of the Act exempts agencies from § 1512's apportionment requirements where expenditures in excess of an appropriation are required by law or are necessary to avert an ''emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals.'' 31 U.S.C. § 1512(b)(1)(B). Whether the USMS could take advantage of such exemptions, however, is a matter that we do not address in this interim opinion. Because the § 1515 exemptions appear to have been patterned after other Antideficiency Act provisions, resolution of this question will have to await the completion of our research on the Act It should be noted, however, that an exemption from the requirements of § 1512 would very likely not be enough to exempt an agency from § 1341's mandate. *See* General Accounting Office, 2 *Principles of Federal Appropriations Law* 6–82 to 6–83 (1992) (discussing September 1, 1976 Comptroller General opinion explaining that ''[a]ny deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was

The ADA enforces and extends the prohibition, set forth in Article 1, Section 9 of the Constitution, that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." While the earliest version of that statute, adopted in 1870, merely restated this constitutional principle, *see* Rev. Stat. 3679; 16 Stat. 230, 251 (1870); *see also* Cong. Globe, 41st Cong., 2d Sess. 1553 (1870), subsequent versions specifically targeted agency practices that had historically resulted in an overexpenditure or overobligation of government funds.[3] For example, the 1905 amendment to the ADA, inter alia, both prohibited agencies from making expenditures or obligations in excess of appropriations made by Congress unless "authorized by law" and added a requirement that agency appropriations be apportioned to minimize excessive expenditures in one period of the fiscal year that might result in a deficiency or require a supplemental appropriation at a later time.[4] The apportionment provision read as follows:

> All appropriations made for contingent expenses or other general purposes, except appropriations made for the fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year . . . .

Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. at 1257–58.

The relatively sparse legislative history of the 1905 amendment suggests that Congress was motivated by a very specific desire to eliminate the instances in which high levels of agency spending would require it to make additional funds available to cover a deficiency or to satisfy a request for a supplemental appropria-

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determined that one of the exceptions set forth in [section 1515(b)] was applicable, would constitute a violation of 31 U.S.C. § [1341(a)]") Thus said, it should be emphasized that we have not yet reached a conclusion on the question whether any of the projected USMS expenditures in excess of appropriations could be justified under the "authorized by law" or "emergencies involving the safety of human life or the protection of property" exceptions to § 1341, or any other exemptions from that statute's mandate. That issue will be addressed in a subsequent opinion Our objective in this opinion is merely to advise you of your general obligation to avoid anticipated deficiencies by reducing spending and/or obtaining funds from sources that would not make supplemental funding from Congress necessary

[3] *See, e g.*, The ADA has been amended a number of times since its enactment in 1870. *See* Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257; Act of Feb. 27, 1906, ch 510, § 3, 34 Stat 27, 48; Act of Aug 23, 1912, ch 350, § 6, 37 Stat 360, 414, Act of Sept 6, 1950, ch 896, § 1211, 64 Stat 595, 765, Act of Aug. 1, 1956, ch. 814, § 3, 70 Stat 782, 783; Pub L. No. 85–170, § 1401, 71 Stat 426, 440 (1957); Pub. L No 93–344, § 1002, 88 Stat 297, 332 (1974), Pub. L. No. 93–618, § 175(a), 88 Stat. 1978, 2011 (1975), Pub. L. No. 101–508, § 13213(a), 104 Stat 1388, 1388–621 (1990)

[4] The 1905 statute also amended the 1870 version of the statute in three additional respects. It made it unlawful for any agency or government official to "accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property," inserted a provision allowing certain limited waivers to the statutory prohibitions, and added a penalty provision. 33 Stat. at 1257–58.

tion. In describing the contents of the 1905 amendment to the Committee of the Whole House on the State of the Union, Representative Hemenway, explained:

> Mr. Chairman, I call attention to this particular limitation because we seek by it to prevent deficiencies in the future. It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they can make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them. So we seek by this amendment to in some respect, at least, cure that abuse.

39 Cong. Rec. 3687 (1905).

The legislative histories of other amendments placing constraints on the spending practices of government agencies and officials provide additional support for the view that the ADA was intended to curb agency actions that put Congress in the position of having to cover debts and make appropriations it either had not authorized or had not initially believed necessary to carry out the functions of the government. In 1906, lawmakers described amendments to that statute as Congress's attempt "to take back control of appropriations into its own hands." *See* 40 Cong. Rec. 1274 (1906) (statement by Representative Littauer). Statements to similar effect were made by legislators in 1950. In providing a section-by-section analysis of the 1950 amendment to the ADA, *see* Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765, Representative Norrell explained that the provisions pertaining to apportionment, in particular, were "designed to insure that appropriations which are available for a fiscal year . . . will not be obligated at a rate which would exhaust the appropriation prior to the end of the period for which the appropriation was made and thus result in a need for a deficiency or supplemental appropriation, or an increase in the authorization for administrative expenses of a corporation, or in drastic curtailment of the activity for which the appropriation or authorization was made." 96 Cong. Rec. 6835–36 (1950).[5]

[5] Two reports prepared by Congress prior to the 1951 revision of the ADA provide further support for the view that government agencies have an obligation under that statute to explore methods for reducing spending levels or reprogramming funds whenever an appropriation deficiency is anticipated, as well as when its existence has been established. *See* 36 Comp Gen. 699 (1957). The first report, prepared in 1945, addresses the recurring problem of deficiency spending and communicates the general interest on the part of lawmakers in limiting agency spending practices that result in the need for supplemental appropriations·

> The committee met with instances which indicated either a lack of knowledge or an utter disregard of the so-called antideficiency law (31 U.S.C 665), in that agencies reported overobligations during the first half of the current fiscal year to an extent which places the Congress in the position either of granting additional funds or forcing the curtailment of operations which in some cases would be unwise and harmful That sort of practice cannot be continued, particularly when the Congress is in continuous session. It must be stopped

Given this history, we are persuaded that an agency subject to the requirements of the Antideficiency Act may not properly continue high levels of spending in the face of an anticipated appropriations deficiency. Such spending would arguably violate the purpose of that statute, even where a strong case could be made for a statutory exemption were the existence of an actual deficiency ever proven.[6] Accordingly, we conclude that the USMS has an affirmative obligation either to obtain additional funds from sources that would not require additional funds from Congress or immediately curtail detention-related expenditures and obligations that would eventually require a deficiency or supplemental appropriation. This conclusion is consistent with opinions previously rendered by the Comptroller General and the General Accounting Office. *See* 64 Comp. Gen. 728, 735 (1985) (holding that ICC decision to furlough its employees to reduce costs was consistent with that agency's obligation under the Antideficiency Act to "expend fiscal year appropriations so as to prevent the necessity for a supplemental or deficiency appropriation and to avoid exhausting the funds before the end of the period for which they are appropriated"); 36 Comp. Gen. 699 (1957) (concluding that a Post Office request for reapportionment of its funds was inconsistent with the spirit and purpose of the Antideficiency Act where officials believed that the requested handling of its funds would result in a deficiency at the end of the fiscal year); *see also* B–167656, 1971 WL 25416 (C.G. June 18, 1971) (unpublished); 38 Comp. Gen. 501 (1959).[7]

We understand that you made efforts to address the anticipated funding deficiency by developing a reprogramming arrangement with the Justice Management Division ("JMD"), but that the arrangement under consideration has not received approval. We encourage you to continue to pursue this option and to develop an alternative plan to satisfy the obligations outlined in this memorandum. Without making any specific recommendations about the measures that might be incorporated into such a plan, we note that, in addition to reducing prisoner detention-related expenditures in a manner that would not constitute a drastic curtailment of services within the meaning of the statute, the USMS is free to explore other

H.R. Rep No. 79–221, at 2–3 (1945), on the First Deficiency Appropriation Bill. The second report on the same subject, prepared only a year later, echoes these sentiments, but also reveals that Congress was also concerned about the specific problem of the failure of government officials to adjust rates of expenditures and obligations in anticipation of a possible deficiency. H.R Rep. No. 79–1817, at 4–5 (1946), on the Second Deficiency Appropriation Bill states.

> [I]nstances have occurred where agencies do not actually incur deficiencies but proceed at an obligational rate which make necessary either a deficiency appropriation or the suspension or drastic curtailment of an activity for lack of funds. The committee does not propose to tolerate that practice any longer It intends to see that the antideficiency law (31 U.S.C. 665) is observed in letter and spirit and shall expect the Bureau of the Budget to report quarterly, starting at the close of the first quarter of the next fiscal year, the title of any appropriation not being administered in accordance with the letter and spirit of such law, the reasons therefor, and the name and position of the official immediately responsible.

[6] We reach no conclusion in this opinion whether the USMS would qualify for any of the exemptions from the Antideficiency Act in the event it was found to have a deficiency. We will address that question in a forthcoming opinion.

[7] Though not binding upon this Office, *see Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986), the opinions of the Comptroller General and General Accounting Office provide helpful guidance on matters of appropriations law

possibilities for reprogramming funds within the Department of Justice's appropriation to avoid a possible deficiency. As we concluded in our 1980 opinion on the subject, the Attorney General, except where a specific statutory provision provides otherwise, has authority to reallocate funds among programs of the USMS and to make available to that agency funds presently allocated to other departmental programs and activities funded through the same lump sum appropriation. *Attorney General's Authority to Reprogram Funds for the United States Marshals Service to Avoid Deficiencies*, 4B Op. O.L.C. 701 (1980).

As I indicated above, we continue to research questions concerning the circumstances in which the USMS might be able to benefit from an exemption from the ADA in the event that an actual deficiency in its FPD appropriated budget occurs before the end of the fiscal year. You can expect a final opinion on these and other matters raised by your request in the near future.

TODD DAVID PETERSON
Deputy Assistant Attorney General
Office of Legal Counsel

Accessibility Guidelines and Federal Lease Renewals

The Architectural and Transportation Barriers Compliance Board may require, pursuant to the Architectural Barriers Act of 1968, that buildings first leased by federal agencies after 1976 be brought into compliance with current accessibility standards when the agency negotiates renewal of the lease.

May 26, 1999

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL
U.S. ARCHITECTURAL AND TRANSPORTATION BARRIERS
COMPLIANCE BOARD

This responds to your request for our opinion whether guidelines to be issued by the Architectural and Transportation Barriers Compliance Board (''Board'' or ''Access Board'') under the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157 (1994) (''Act'' or ''Barriers Act''), may require that buildings first leased by federal agencies after 1976 be brought into compliance with updated accessibility standards when the agency negotiates renewal of the lease. *See* Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Elizabeth A. Stewart, Deputy General Counsel, U.S. Architectural and Transportation Barriers Compliance Board (June 10, 1998) (''Board Letter''). Following receipt of your opinion request, we have received and considered additional submissions from both the Board and the United States Postal Service (''USPS'' or ''Service''). We conclude that the Board may lawfully issue guidelines including such a requirement.

I. BACKGROUND

The Act requires four federal departments and agencies (in consultation with the Secretary of Health and Human Services) to promulgate standards for the design, construction, and alteration of buildings occupied or used by federal agencies ''to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.'' 42 U.S.C. §§ 4152–4154a. The Administrator of General Services has general responsibilities for prescribing standards for buildings covered by the Act, *id.* § 4152, while the Secretary of Housing and Urban Development, the Secretary of Defense, and the U.S. Postal Service have separate authority to set standards under the Act for buildings used by their respective departments or services. *See id.* §§ 4153–4154a. The Act further requires that ''[e]very building designed, constructed, or altered after the effective date of a standard issued under this chapter which is applicable to such building, shall be designed, constructed, or altered in accordance with such standard.'' *Id.* § 4155.

It is not in dispute that the Act applies in general terms to buildings that are leased in whole or in part by federal agencies. *See id.* § 4151(2) (defining "building" to include any building or facility "leased in whole or in part by the United States"). The narrower question presented here concerns the timing and extent of compliance obligations — i.e., whether the Board may require a federal lessee renegotiating a lease to modify or retrofit a building to conform to current accessibility standards.

Pursuant to the Rehabilitation Act of 1973, the Access Board was granted authority to establish minimum guidelines and requirements for, and to enforce, the accessibility standards issued by the four departments and agencies designated under the Barriers Act. *See* 29 U.S.C. § 792(b)(1), (3)(A) (1994 & Supp. IV 1998). The minimum Guidelines issued by the Board in 1981 are codified at 36 C.F.R. pt. 1190 (1998).[1] The Board is revising its guidelines to conform more closely to the accessibility requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994 & Supp. II 1996), and anticipates issuing a notice of proposed rulemaking for adoption of the new guidelines in the near future. Among other things, the Board proposes that the revised guidelines require compliance with revised accessibility standards in all buildings or facilities for which leases — including renewals of expired leases — are negotiated by a federal agency after the effective date of the revised standards adopted pursuant to the revised guidelines. This requirement is to be embodied in Section F202.6 of the proposed revised guidelines, which provides:

> *F202.6 Leases.* Buildings or facilities for which new leases are negotiated by the federal government after [effective date of the revised accessibility standard], including new leases for buildings or facilities previously occupied by the federal government, shall comply with F202.6 [requiring that designated elements of leased space be accessible].

Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Zoe Strickland, Attorney, U.S. Postal Service, *Re: Access Board Request for Opinion on ABA Leasing*, Attachment D at 1 (Sept. 30, 1998) ("USPS Letter"). As further explained in the Board's submission, a "new lease" that triggers compliance obligations would include "the negotiation of an agreement to lease a building or facility, regardless of whether the leased space was previously occupied by the Federal government." Board Letter, Attachment A at 1.

[1] The current Board guideline on leasing does not expressly require accessibility compliance as a condition of a federal agency's entering into or renewing a lease *See* 36 C.F.R. § 1190.34. Rather, it requires that when a facility that meets, or most closely meets, the current accessibility standard is available for leasing, the renting agency must give a reasonable preference to that facility. *Id.* § 1190 34(a)

Subsequently, in response to a request for clarification from this Office, the Board has stated that its proposed revised guidelines will also include the following explanatory text or commentary:

> The negotiation of a new lease occurs when (1) the Federal government leases a facility that it did not occupy previously; or (2) an existing term ends and a new lease is negotiated for continued occupancy. The unilateral exercise of an option which is included as one of the terms of a preexisting lease is not considered the negotiation of a new lease. Negotiations which do not result in a lease agreement are not covered by the guidelines.

Letter for George Smith, Office of Legal Counsel, from Elizabeth A. Stewart, Deputy General Counsel, U.S. Architectural and Transportation Barriers Compliance Board, Attachment at 2 (Dec. 21, 1998) ("Board Supplement").[2]

The Postal Service contends that the Board is not authorized to require federal agencies to render a building accessible under updated Barriers Act standards upon renewing an expiring lease if the building was originally leased after January 1, 1977, and previously rendered accessible under Barriers Act standards then in effect. The Board has therefore requested our opinion to resolve this question.[3] In addition to the Board's two submissions on the issues presented, we have received and considered two submissions from the Postal Service as well. *See* USPS Letter; Letter for George Smith, Office of Legal Counsel, from Zoe Strickland, Attorney, U.S. Postal Service, *Re: Access Board Request for Opinion on ABA Leasing* (Jan. 7, 1999) ("USPS Supplement"). The Postal Service summarized its contentions in the following terms:

> The Access Board lacks the authority to issue the leasing guidelines described above because it is contrary to the ABA, which is not tied to negotiations *and only covers renewals of pre-1977 leases*, and because the ABA standard-setting agencies, not the

[2] The last sentence of the above-quoted clarification resolves any possible ambiguity created by the language in Section F202 6, providing that accessibility compliance obligations are triggered whenever "new leases are negotiated." In the absence of a definition of the term "negotiated," the provision might be construed to impose compliance obligations on the basis of negotiations alone, even before a new lease is actually executed or undertaken We believe the inclusion of the above-quoted clarification will adequately address this potential ambiguity, as well as the USPS argument that the proposed guidelines are invalidly "tied to negotiations," USPS Letter at 2.

[3] In a memorandum transmitted to this Office by fax on August 11, 1998, the Board refined and clarified the question originally presented by providing the following illustrative hypothetical of how its proposed interpretation would apply if adopted·

> The U S Postal Service (USPS) leases a facility in 1990. The lease is for a term of 15 years. The facility complies with the accessibility standards in effect in 1990. Subsequently, the Access Board issues new accessibility guidelines and each of the standard setting agencies revise their standards based on the new guidelines The new standards are effective September 1, 1998 In the year 2005, the USPS negotiates a lease to continue occupying the facility for another 15 years. The facility must meet the revised accessibility standards in effect in the year 2005

> Board, are authorized to issue regulations defining statutory coverage.

USPS Letter at 2 (footnote omitted) (emphasis added). More specifically, the Service asserts that the Act requires agencies to render leased buildings accessible in compliance with governing standards only at the time the lease is initially entered or, in the case of "grandfathered" leases entered by the agency *before* 1977, on the occasion of the first renewal of such lease. The Service vigorously contests the Board's authority to issue guidelines requiring updated accessibility whenever an agency enters into a negotiated renewal of an expiring post-1976 lease of a building that has been previously rendered accessible under the statutory requirements.

II. ANALYSIS

A.

This Office has addressed in prior opinions a number of closely related issues concerning application of the Act to federally leased facilities. Those opinions, together with a case from the U.S. Court of Appeals for the Ninth Circuit (discussed in Point II.B, *infra*), establish the legal framework for resolving this matter.

In 1980, we considered whether the accessibility guidelines proposed by the Access Board pursuant to 29 U.S.C. § 792(b) exceeded the Board's statutory authority or improperly usurped the standard-setting authority of the designated standard-setting agencies. *See* Memorandum for Mason H. Rose, V, Chairperson, Architectural and Transportation Barriers Compliance Board, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 31, 1980) ("1980 Opinion"). In upholding the Board's authority to issue detailed and substantive accessibility guidelines against a challenge by the standard-setting agencies, we stated:

> Congress has given little guidance to determine the nature and limits of the Board's authority. *In such circumstances, the Board has a great deal of discretion, even if the practical effect of its construction is to constrain the authority of the standard-setting agencies.*
>
> . . . .
>
> It is plain that Congress accorded rulemaking authority to the Board because of its dissatisfaction with the performance of the standard-setting agencies. *Congress intended the Board to establish minimum*

> *requirements assuring both a certain level of protection for the handicapped* and some uniformity in federal accessibility standards.

Id. at 4–5 (emphasis added).

Our 1980 opinion thus recognized that the Board has been granted broad authority and discretion to issue minimum accessibility guidelines that the designated agencies must follow in setting their respective accessibility standards under the Act. We went on to elaborate upon the scope and purpose of the Board's guideline-setting authority: "As a 'minimum,' the Board must thus establish the lowest of a range of requirements that, in its view, *will achieve the congressional goal of 'ready access and use.'* " *Id.* at 5 (emphasis added). We added that "if the Board is not permitted to require that all of certain facilities be accessible, it could be viewed as violating the terms of the Act." *Id.* at 7. We further determined that the Board's authority extends to issuing guidelines interpreting the Act's accessibility requirements as applied to leasing arrangements, including interpretations determining the circumstances under which leased facilities are covered by the Act's requirements. *See id.* at 14–17.

Thus, our 1980 opinion clearly rejected the contention now advanced again by USPS (*see* USPS Letter at 2, 5, and 10) that the Board lacks basic statutory authority to promulgate substantive guidelines covering matters such as the extent of statutory coverage (including guidelines respecting the coverage of leased facilities).[4] Nothing contained in the USPS submissions herein persuades us to alter that conclusion.

Our 1980 opinion also recognized that the 1976 amendments to the Act, *see* Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94–541, §§ 201–203, 90 Stat. 2505, 2507–08, "were plainly designed to bring leased buildings within the coverage of the Act. . . . [W]e think it evident that Congress intended by its 1976 amendments to make the Act applicable to buildings leased by the United States . . . . Since the congressional purpose is unambiguous, we do not believe that [42 U.S.C. §] 4155 is to be read to exclude leased buildings from the accessibility requirements of the Act." 1980 Opinion at 16.[5] Moreover, in responding to a contention that the guidelines had exceeded the Board's authority by applying the Act's requirements to mere unilateral "extensions" of agency leases, we stated:

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[4] Specifically, under USPS's reading of the Barriers Act, "the Board issues technical requirements and scoping, and the standard-setting agency . . should set statutory coverage, effective dates, etc " USPS Letter at 10 This restrictive interpretation of the Board's authority to issue substantive guidelines is incompatible with the broad, discretionary authority we recognized in our 1980 opinion *See* 1980 Opinion at 4, 6

[5] Our specific reference to 42 U.S.C. § 4155 was in response to arguments by some agencies that Congress's failure to modify that section as well in 1976 indicated that Congress did not intend the act of leasing itself—as distinguished from design, alteration, or construction—to trigger any accessibility compliance action Section 4155 provides that covered buildings "shall be designed, constructed, or altered in accordance with [governing accessibility standards]," without making explicit reference to leasing as such In rejecting this agency argument, we stated: "There is no doubt that Congress believed that its amendment of the definition of the word 'building' was sufficient to bring leased buildings within the coverage of the Act " 1980 Opinion at 16.

> We see no sufficient basis for rejecting the Board's interpretation of the Act. The distinction between "renewals" and "extensions" is an uncertain one that is frequently not followed by the courts and there is absolutely no evidence that Congress intended to exclude "extensions" as technically defined by the Postal Service.

Id. at 17 (citations omitted).

In 1982, we advised the Justice Department's Civil Division that the Postal Service's position that the Act permits federal agencies to lease buildings in their existing conditions was a "permissible" interpretation of the Act that could properly be defended in court (*see infra* Point II.B). The interpretation in question would have permitted federal agencies to lease accessibility-noncompliant buildings in their existing condition, and did not mandate the accessibility alteration of existing buildings as a condition to leasing; rather, compliance with the Act's accessibility standards would have to be achieved only when the leased building would otherwise be *altered.* We concluded that the Postal Service interpretation was a "permissible" and certainly "defensible" one, although we also acknowledged that the inquiry presented a "close question." *See* Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Architectural Barriers Act to Buildings Leased by the United States Postal Service* at 2, 16 (Oct. 21, 1982) ("1982 Opinion"). Our opinion stated:

> [W]e believe that an entirely defensible position may be taken that the Act does not obligate any federal department or service to alter all buildings leased after January, 1977 solely for the purpose of providing access for the handicapped. We conclude that the Postal Service regulations which require newly constructed leased buildings and any remodeling of buildings leased after January, 1977 to meet accessibility standards, and which further require, as a matter of policy, that all newly acquired leased buildings be accessible whenever economically feasible represent a defensible interpretation of the Act.

Id. at 12, 27.[6]

As discussed further below, however, the U.S. Court of Appeals for the Ninth Circuit subsequently rejected the Postal Service interpretation that was addressed in our 1982 opinion. *See Rose v. United States Postal Serv.*, 774 F.2d 1355 (9th Cir. 1984).

[6] Our opinion went on to acknowledge that "Congress never expressly resolved whether leases of existing space were to be treated like new construction or like existing government-owned buildings " 1982 Opinion at 26.

In 1987, we opined on the applicability of the Act's accessibility requirements to leases originally entered into by federal agencies *prior* to January 1, 1977, and renewed *subsequent* to that date. *See* Memorandum for Charles R. Braun, Assistant General Counsel, United States Postal Service, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Oct. 15, 1987) (''1987 Opinion''). That opinion focused on the effective date provisions of the 1976 amendments, which state:

> The amendment made by paragraph (1) of section 201 of this Act [altering the definition of building in section 4151(2) to include buildings leased by federal agencies] shall not apply to any lease entered into before January 1, 1977. It shall apply to every lease entered into on or after January 1, 1977, including any renewal of a lease entered into before such date which renewal is on or after such date.

Public Buildings Cooperative Use Act § 202. The Postal Service argued that the Act's accessibility requirements were not called into play by its ''unilateral exercise,'' subsequent to January 1, 1977, of a renewal option that extended the terms of a pre-1977 lease. We concluded that the subsequent renewal by the Postal Service of leases entered into prior to January 1, 1977, does trigger an obligation to conform the leased facility to the Barriers Act's governing accessibility requirements. As we explained:

> While mindful of the Postal Services' legitimate concerns about cost, we conclude that Congress intended to extend the Barriers Act to renewals of pre-1977 leases of Postal Service facilities with full knowledge of the expense involved and of the understandable reluctance of executive agencies to incur the costs of renovation.
>
> In sum, we believe that the interpretation of ''renewal'' urged by the Postal Service as including only bilateral, and not unilateral, renewal of leases is not consistent with the language, legislative history, or purpose of the 1976 amendments. In our opinion, Congress intended buildings subject to pre-1977 leases to be renovated in compliance with the Barriers Act when the Postal Service exercises options to renew those leases on or after January 1, 1977.

1987 Opinion at 8–10 (footnotes omitted).

Although our 1987 opinion was largely governed by the terms of the effective date provisions contained in section 202 of the 1976 amendments, and focused on the asserted distinctions between ''bilateral'' and ''unilateral'' leases, it also reflected the more expansive interpretation of the Act's accessibility obligations as to leases reflected in the *Rose* opinion. As we explained:

> Moreover, the legislative history of the Barriers Act reveals that Congress intended this remedial legislation to be liberally construed. *See Rose v. U.S. Postal Service*, 774 F.2d 1355, 1358 (9th Cir. 1984). In introducing the 1976 amendments, Representative Ginn stated that the purpose of the legislation was to include within the coverage of the Barriers Act "all Government-leased buildings intended for public use or in which the physically handicapped might be employed." 122 Cong. Rec. 33,511 (1976). The House report likewise states that "all Government-leased buildings and facilities" would be included. H.R. Rep. No. 1584, pt. 1, 94th Cong., 2d Sess., 3 (1976). There is no suggestion that Congress intended to exempt almost 8,000 post offices simply because, as the Postal Service Claims, leases are renewed unilaterally, rather than bilaterally.

1987 Opinion at 7.

B.

The only published federal court opinion we have identified interpreting the Barriers Act's applicability to leases is *Rose v. United States Postal Service*.[7] In *Rose*, the Ninth Circuit rejected the same Postal Service contention that had been the subject of our 1982 opinion — i.e., that a federal agency's entry into a lease does not in itself trigger an obligation to conform the leased premises to Barriers Act accessibility standards then in effect. The court framed the precise issue to be decided as follows:

> The Architectural Barriers Act . . . requires that buildings constructed or leased by the federal government be made accessible to handicapped persons. *The issue before us is one of timing*. The Postal Service argues that the Act requires leased buildings to comply when they are altered for some reason other than handicapped access. Plaintiffs argue that the Government must require compliance as a condition of the lease. *The dispute centers on*

[7] In a case involving the Government's potential liability for a sidewalk slip injury under the Federal Tort Claims Act, one U.S district court, citing the *Rose* opinion, has noted in dicta that "[t]he Architectural Barriers Act . requires *all* buildings leased by the Postal Service after January 1, 1977, to be accessible to the handicapped." *Wisner v. United States*, 154 F.R D. 39, 44 n.2 (N D.N.Y. 1994) (emphasis added). *Wisner* did not provide any further analysis explaining or supporting this assertion.

> *whether leasing or alteration is the event that triggers the Government's duty under the Act.*

774 F.2d at 1356–57 (emphasis added). The court proceeded to hold that *leasing* is the event that triggers accessibility compliance obligations and that the Postal Service therefore had a duty, without reference to alterations, to make all buildings leased by it after January 1, 1977, accessible to the handicapped. Following an exhaustive analysis of the critical 1976 amendments to the Barriers Act, the court concluded: "Ample evidence exists that Congress intended to close the loophole through which inaccessible buildings were leased without alteration." *Id.* at 1360. In reaching this conclusion, the court invoked the following statement by Representative Edgar during House Committee hearings as reflecting congressional intent on the leasing issue when Congress passed the 1976 amendments to the Act:

> The Act [currently] excludes buildings and facilities leased by the government which were not constructed or altered to government-drafted plans and specifications. This provision . . . excludes many buildings which were leased to the government without substantial alteration. The amendment . . . will solve that problem by including such buildings.

Public Buildings Cooperative Use: Hearings on H.R. 15134 Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works and Transportation, 94th Cong. 107–08 (1976) (prepared statement of Representative Edgar) ("House Hearings"). During the same hearings, a representative of the then Department of Health, Education and Welfare ("HEW") similarly testified regarding the intended effect of the 1976 Barriers Act amendments: "If the lease does not involve construction or alteration, then the accessibility requirement does not now apply. . . . The proposed revision would correct this condition to apply the accessibility requirement to all leases." *Id.* at 135 (prepared statement of Gerrit Fremouw, Deputy Assistant Secretary for Facilities Engineering and Property Management, HEW).

Thus, the only court opinion addressing the Barriers Act's applicability to federal agency leases under the 1976 amendments holds that federal agencies executing leases after January 1, 1977, "must require compliance [with Barriers Act accessibility standards] *as a condition of the lease.*" 774 F.2d at 1356 (emphasis added). On the other hand, the *Rose* opinion did not expressly consider the narrower question posed here: whether negotiated renewals of expiring post-1976 leases should be treated as *distinct leasing actions* that trigger compliance obligations defined by standards that have been revised after the date of the original lease. Insofar as the negotiated renewal of an expiring government lease may be equated with the "leasing" of the facility, however, the *Rose* opinion would appear to require that such renewals trigger an obligation to comply with governing standards under the Act. *See id.* Further, inasmuch as our opinions have adopted the view that "renewals constitute new leases under the Act," *see* 1982 Opinion at 12, the *Rose* opinion supports the validity of the Board's proposed guideline.

C.

The critical point of dispute between the Board and the USPS concerns the negotiated renewal of agency leases first entered into *subsequent* to January 1, 1977. The Barriers Board asserts that its guidelines may treat such negotiated renewals (excluding the unilateral exercise of an existing renewal option) as distinct leasing events that trigger an obligation to comply with superseding accessibility requirements in effect at the time of renewal — even, presumably, if the same building was previously rendered accessible in full compliance with *previous* accessibility standards.[8] The USPS counters, based in large part upon the effective date language of the 1976 amendments, that such renewals do not trigger new compliance obligations; in the USPS view, only first-time renewals of leases entered into *prior to* January 1, 1977, trigger such obligations. USPS Letter at 5.[9] According to the USPS arguments, requiring updated accessibility modifications when an agency enters into a subsequent lease for a building previously rendered accessible would be redundant, excessively burdensome, and unsupported by the provisions and purpose of the Act. *See* USPS Letter at 7–8; USPS Supplement at 2, 4.

Initially, we reject the contention that, by expressly providing that renewals of *pre*-1977 leases are subject to compliance obligations, section 202 of the 1976 amendments implicitly establishes that renewals of *post*-1977 leases are exempt from such obligations. *See* USPS Letter at 5; USPS Supplement at 1. Rather, the explicit provision covering renewals of pre-1977 leases was necessary to avoid any possible misunderstanding that buildings first leased prior to 1977 — which were otherwise wholly exempted from coverage under the amendments — were left permanently exempt, or "grandfathered," from accessibility compliance requirements. Construing section 202 as containing an implicit *restriction* on the Board's authority to enhance accessibility requirements on the basis of future post-1977 leasing actions — i.e., negotiated lease renewals — would be inconsistent with the expansive remedial objectives of the Act and its 1976 amendments.[10]

[8] In this regard, the Board also emphasizes that such compliance obligations may be waived under appropriate circumstances to avoid unjust and excessive burdens upon the leasing agency *See* Board Supplement, Attachment at 3.

[9] USPS acknowledges that "a lease when first occupied must be retrofitted to meet the current regulations." USPS Letter at 4.

[10] *See, e.g.*, House Hearings at 107–08, 135, 1987 Opinion at 7.

The amended Act simply does not address whether negotiated renewals of expiring post-1976 leases should require updated accessibility modifications. Rather, that narrow question is the very kind of unspecified, interstitial matter that is properly left to the discretion of the agency charged with primary responsibility for such interpretation — here, the Barriers Board. *See, e.g., Precious Metals Associates, Inc. v. CFTC*, 620 F.2d 900, 911 (1st Cir. 1980) (agency rulemaking proceedings "are designed to fill in the interstices of a statute"); *Public Serv. Co. v. United States Nuclear Regulatory Comm'n*, 582 F.2d 77, 82 (1st Cir.) ("In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress."), *cert. denied*, 439 U.S. 1046 (1978). We have previously acknowledged that the Board "has a great deal of discretion" in fashioning guidelines to effectuate the Act's mandate for maximum accessibility, *see* 1980 Opinion at 4, and the interstitital guidelines proposed here fall within the broad authority conferred on the Board.[11]

We recognize that the text of the Act does not specifically require buildings leased by federal agencies after 1976 to be retrofitted to comply with intervening changes in the accessibility standards every time those leases are renewed. *See* 42 U.S.C. § 4155 (buildings "designed, constructed, or altered" must comply with governing standard under the Act). The same can be said, however, with regard to entering into the *initial* lease of an existing building, which similarly does not constitute the "design[ ]," "construct[ion]," or "alter[ation]" of a building that are the only events explicitly mentioned in the provisions governing compliance with the respective accessibility standards. *See* 42 U.S.C. § 4155. But that basic proposition — i.e., that the act of leasing triggers the agency's duty to render a facility accessible under the Act's standards — is both conceded by USPS itself, *see* USPS Letter at 3–4 ("We agree that a lease when first occupied must be retrofitted to meet the current regulations"), and consistent with the *Rose* opinion, *see* 774 F.2d at 1356. Thus, the guidelines' application to post-1976 renewal leases is merely an incremental administrative application of the broader established principle that leasing actions may trigger accessibility compliance obligations under the Act.

[11] We acknowledge the USPS argument that the proposed leasing guideline would in one respect subject government-leased buildings to stricter accessibility standards than government-purchased buildings — because the latter would be subjected to updated retrofit obligations only in the event of alterations, whereas leased buildings would be subjected to such obligations in the event of a lease renewal as well as in the case of alterations *See* USPS Letter at 6–7; USPS Supplement at 2 Although USPS contends that this disparity is contrary to congressional intent in enacting the Act and its 1976 amendments, we find no evidence that Congress considered, let alone resolved, such distinctions regarding the details and timing of compliance obligations in the case of federally leased buildings It is clear, however, that Congress intended the Act to be liberally construed to insure the broadest feasible accessibility for persons with disabilities, including accessibility to government-leased buildings *See* 42 U.S C. §§ 4152–4154a; House Hearings at 107–08, 135; *Rose*, 774 F.2d at 1358–59;1987 Opinion at 5 Accordingly, we do not believe that the Board's proposed guideline is inconsistent with the congressional intent underlying the Act's accessibility requirements.

We think it is especially pertinent, moreover, that the Act requires that standard-setting agencies "shall prescribe such standards for the design, construction, and alteration of its buildings to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings." 42 U.S.C. § 4154a (emphasis added). That sweeping phrase, "to insure whenever possible," indicates that Congress intended to authorize broad standard-setting authority that would maximize accessibility compliance within the statutory framework. It is therefore permissible, if not mandatory, for the Board to be governed by that strong admonition in discharging its obligation to establish minimum guidelines and requirements for Barriers Act accessibility standards. *See* 29 U.S.C. § 792(b)(3)(A). Given these considerations, and given that we have recognized that the negotiated renewal of an expiring lease is indistinguishable from the execution of a new lease for purposes of the Act, we conclude that imposing a requirement for updated compliance with governing accessibility standards upon an agency's negotiated renewal of a post-1976 lease falls within the substantial discretion allotted to the Board in establishing minimum guidelines for such standards under the Barriers Act. Such guidelines reflect a reasonable interpretation of the statutory requirements, which is entitled to substantial deference.[12]

CONCLUSION

Taking into account all the foregoing considerations, we conclude that the Board would be acting within its statutory authority under 29 U.S.C. § 792(b) in adopting Guidelines requiring federal agencies to comply with accessibility standards then in effect when they enter or renew building leases, including negotiated renewals of leases originally undertaken by the Federal Government subsequent to 1976.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

[12] As one court characterized the role of *Chevron* deference in this same context. "Under *Chevron*, an agency's interpretation of ambiguous statutory language is entitled to deference because of the agency's delegated authority to administer the statute " *PVA v. D.C. Arena L.P.*, 117 F 3d 579, 585 (D C. Cir. 1997), *cert denied*, 523 U S 1003 (1998). Although the standard-setting agencies such as GSA and the USPS have their own authority to set standards under the Act, the Board alone is charged with statutory responsibility to develop and issue the minimum substantive guidelines and requirements that govern those agencies in their issuance of the standards, as well as the authority to ensure compliance with those standards *See* 29 U.S.C § 792(b)(1), (3)(A). In that distinct capacity, the Board's interpretative judgments are entitled to appropriate deference.

Term of a Member of the Mississippi River Commission

The term of a member of the Mississippi River Commission is set by the statute governing his office, and the term dictated by the statute applies even though the language used in his nomination, confirmation, and commission calls for a different term.

May 27, 1999

MEMORANDUM OPINION FOR THE EXECUTIVE CLERK

You have asked for our opinion whether the term of a member of the Mississippi River Commission is set by the language of his nomination, confirmation, and commission, even though the statute governing his office calls for a different term. We conclude that the term dictated by the statute applies.

The Mississippi River Commission consists of seven members, appointed by the President with the advice and consent of the Senate. 33 U.S.C. §§ 641–642 (1994). Three of the members are from the Engineer Corps of the Army, one from the National Ocean Survey, and three from "civil life." *Id.* § 642. Each commissioner from civil life "shall be appointed for a term of nine years." *Id.*

Ordinarily, when a statute provides for an appointee to serve a term of years, the specified time of service begins with the appointment. *Case of Chief Constructor Easby*, 16 Op. Att'y Gen. 656 (1880). A different rule generally applies to commissions whose members have staggered terms. There, to preserve the staggering required by statute, each member may serve only until the passage of the specified number of years calculated from the expiration of his predecessor's term, even if the member's confirmation and appointment take place after that prior term has expired. Memorandum for Tim Saunders, Acting Executive Clerk, Executive Clerk's Office, from Dawn Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: When the Statutory Term of a General Trustee of the John F. Kennedy Center for the Performing Arts Begins* (Sept. 14, 1994); Memorandum for Nelson Lund, Associate Counsel to the President, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Starting Date for Terms of Members of the United States Sentencing Commission* (May 10, 1990).

Because the Mississippi River Commission's members do not serve staggered terms, its members' terms, as we understand the practice, have previously been calculated from appointment, rather than from the expiration of the predecessors' terms. In the case that prompts your question, however, this rule was not followed in the nomination, confirmation, and commission of the member. The predecessor's term expired October 21, 1996. *See* 133 Cong. Rec. 28,444 (1987) (Senate confirmation). The President's nomination of the successor was "for a term expiring October 21, 2005," 144 Cong. Rec. S10,943 (daily ed. Sept. 24, 1998)—nine years after the previous term expired—rather than for a term of nine years to begin upon appointment. *Cf.* 133 Cong. Rec. 1929 (1987) (predecessor's nomination was "for a term of 9 years"). The Senate likewise gave its advice and consent to the nomination incorporating the wrong term. 144 Cong. Rec. S12,963 (daily ed. Oct. 21, 1998). We understand that, in accordance with the nomination and confirmation, the commission also specified a term expiring October 21, 2005.

The language of a nomination, confirmation, and commission cannot alter a statutory term. The opinion of Solicitor General Phillips in *Case of Chief Constructor Easby*, which Attorney General Devens approved, stands for this principle. Easby had received a recess appointment as Chief of the Bureau of Construction and Repair in the Navy Department. The wording of his later nomination, confirmation, and commission for the office, which had a statutory four-year term, rested on a calculation running from the date of the recess appointment, rather than the appointment with the Senate's advice and consent.[1] Solicitor General Phillips concluded that "[t]he law of the term of the office, of course, controls special language in the nomination and confirmation," and because "[t]he term during which Mr. Easby served under the temporary appointment was, by law, a different term from that which commenced" upon his appointment with the Senate's advice and consent, "his term of office begins at the date of his appointment by and with the consent of the Senate, and not at the date of his previous temporary appointment by the President, notwithstanding the special wording of his nomination to the Senate, and of his commission." 16 Op. Att'y Gen. at 656, 657.

This principle squares with a pronouncement of the Supreme Court (although it may only have been dictum), *Quackenbush v. United States*, 177 U.S. 20, 27 (1900) ("the terms of the commission cannot change the effect of the appointment as defined by the statute"), and has been followed by our Office, *Impact of Panama Canal Zone Treaty on the Filling of the Vacancy in the Office of the District Judge for the United States District Court for the District of the Canal Zone*, 1 Op. O.L.C. 236, 237 n.4 (1977); Memorandum for John W. Dean III, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Commissions* at 5 (Dec. 1, 1971).[2]

Consequently, the term in this case ends nine years after the appointment, rather than on October 21, 2005. The "special language in the nomination and confirmation," as well as the language of a commission that "conform[s] to the . . .

[1] The recess appointment took place on April 30, 1877 For reasons that are unclear, the nomination, confirmation, and commission were all "from April 28, 1877." 16 Op Att'y Gen at 656 Also, the entire period from the beginning of the recess appointment had been subtracted from Easby's four-year term, even though the recess appointment expired before Easby was confirmed and appointed *Id.* at 656

[2] Attorney General Cummings' opinion *Term of Office of Major General Patterson as Surgeon General—Recess Appointment*, 37 Op. Att'y Gen. 282, 287 (1933), did not reach a contrary conclusion about the principle, but held that, in view of long practice under a specific statute, the four-year term in that case included prior service under a recess appointment

wording of that nomination and confirmation,'' cannot detract from the statutory specification of the term. 16 Op. Att'y Gen. at 656, 657.

DANIEL KOFFSKY
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Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion

The Attorney General may enter into settlements that would limit the future exercise of executive branch discretion when that discretion has been conferred upon the executive branch pursuant to statute and there exists no independent statutory limitation on the authority of the executive branch to so limit the future exercise of that discretion.

The Attorney General's power to enter into settlements that would limit the future exercise of discretion that has been conferred upon the executive branch directly by the Constitution is constrained by the very constitutional provisions that vest discretionary authority in the President and therefore necessarily preclude the President from subjecting the exercise of that discretion to the control of the other party to a settlement or to judicial enforcement.

Article III of the Constitution does not preclude the executive branch from entering into judicially enforceable, discretion limiting settlements as a general matter or bar federal courts from entering consent decrees that limit executive branch discretion whenever such decrees purport to provide broader relief than a court could have awarded pursuant to an ordinary injunction. Article III limitations may arise, however, when, for example, the terms of the governmental promise are too amorphous to be susceptible to Article III federal judicial enforcement.

Although there may be sound policy reasons to reaffirm Attorney General Meese's 1986 policy regulating the use of discretion limiting settlements, the concerns that led to its adoption do not, in general, amount to legally binding limitations on the scope of the executive branch's power to settle litigation in a manner that may limit the future exercise of executive branch discretion.

June 15, 1999

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum addresses the degree to which federal law places restrictions on the authority of the United States to enter into litigation settlements that purport to limit the exercise of executive branch discretion.[1] It focuses primarily on the concerns about the legality of discretion-limiting settlements that led to the adoption of Attorney General Meese's 1986 policy regulating the use of such settlements by attorneys acting under the supervision of the Attorney General. In doing so, the memorandum addresses a central legal tenet of Attorney General Meese's policy: that it is unconstitutional for the courts to enter consent decrees limiting the exercise of executive branch discretion where the courts would not have had the power to order such relief had the matter been litigated.

Attorney General Meese issued the 1986 policy on consent decrees and settlement agreements pursuant to his litigation and settlement authority. The policy

[1] For purposes of this memorandum, the term "settlements" is employed to refer to both settlement agreements and consent decrees. There are, however, practical and legal distinctions between settlement agreements and consent decrees. Settlement agreements are simply private contracts, which may be enforced upon breach. Consent decrees are court orders, which may be enforced immediately by contempt and may be modified over the objections of the parties to them. *See United States v Swift & Co*, 286 U S. 106 (1932); Timothy Stoltzfus Jost, *Commentary· The Attorney General's Policy on Consent Decrees and Settlement Agreements*, 39 Admin. L. Rev 101, 109–10 (1987)

requires the Attorney General, the Deputy Attorney General, or the Associate Attorney General, to approve proposed consent decrees or settlement agreements that:

> (1) commit the executive branch to expend unappropriated funds or seek appropriations from Congress;
>
> (2) commit the executive branch to promulgate, amend, or revise regulations; or
>
> (3) divest discretionary power granted by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[2]

Determining whether a settlement of the type identified in the Meese Policy conforms to federal law requires a close analysis of the relevant statutory and constitutional provisions. A context-specific inquiry is beyond the scope of this memorandum, however, and thus our intent is to set forth the basic approach that should guide an evaluation of the legal validity of executive branch settlements that purport to limit the exercise of executive branch discretion.[3]

Our analysis proceeds with a summary of our legal conclusions. We then outline our understanding of the basic parameters of the Meese Policy and the types of settlements to which it is directed. Next, we set forth the general legal principles that establish the background against which the types of settlements identified in the Meese Policy must be evaluated. Finally, we apply the general legal principles to the types of settlements to which the Meese Policy is directed.

I. Summary of Conclusions

Due to the length of this memorandum, it is useful to state our conclusions in summary form at the outset. In general, we conclude that the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion when that discretion has been conferred upon the executive branch pursuant to statute and there exists no independent statutory limitation on

[2] *See* Memorandum for All Assistant Attorneys General and All United States Attorneys, from Edwin Meese III, Attorney General, *Re: Department Policy Regarding Consent Decrees and Settlement Agreements* at 3, 4 (Mar. 13, 1986) ("Meese Policy"). Regulations reflecting the Meese Policy are set forth at 28 C.F.R. §§ 0.160–0.163 (1998).

[3] "General principles may be drawn from dictum in cases dealing with the constitutional prohibition on state laws impairing the obligation of contracts, U.S. Const. art. I, § 10, from cases upholding one administration's decision to change a policy adopted by its predecessors; from cases limiting the power of the judiciary, in the absence of any contract, to direct the Executive in the exercise of its discretion; and from cases holding that particular contracts made by one Administration are binding on its successors. However, these broad principles might point to different results in different contexts, depending on the legal rights of the private party, the type of policymaking discretion involved, and the extent to which, and for how long, the government's discretion is curtailed." *National Audubon Soc'y, Inc. v. Watt*, 678 F.2d 299, 305 n.12 (D.C. Cir. 1982).

the authority of the executive branch to so limit the future exercise of that discretion. Significant general statutory limitations that, among others, must be considered in evaluating the lawfulness of possible discretion-limiting settlement terms are those contained in the Administrative Procedure Act, which sets forth restrictions on the manner in which the executive branch may adopt and revise regulatory rules and procedures, and the Anti-Deficiency Act, which restricts the authority of executive branch actors to incur financial obligations on behalf of the United States. With respect to settlements that would limit the future exercise of discretion that has been conferred upon the executive branch directly by the Constitution, such as the discretion that is conferred upon the President by the Pardon Power or the Recommendations Clause, the scope of the Attorney General's settlement power is constrained by the very constitutional provisions that vest discretionary authority in the President and therefore necessarily preclude the President from subjecting the exercise of that discretion to the control of the other party to a settlement or to judicial enforcement.

In addition, we conclude that Article III may place independent constitutional limitations on the power of federal courts to enforce settlements that the Attorney General otherwise would have the legal authority to enter. These limitations may arise when, for example, the terms of the governmental promise are too amorphous to be susceptible to Article III federal judicial enforcement. We do not believe, however, that Article III precludes the executive branch from entering into judicially enforceable discretion limiting settlements as a general matter or that Article III bars federal courts from entering consent decrees that limit executive branch discretion whenever such decrees purport to provide broader relief than a court could have awarded pursuant to an ordinary injunction.

From these general conclusions, it is possible to set forth in summary form the main determinations that we have reached regarding the extent to which federal law would preclude discretion-limiting settlements of the type that are subject to the requirements of the Meese Policy.

First, the Meese Policy in sections II(A)(2) and II(B)(2) raises concerns about the authority of the executive branch to enter into settlements that would commit the United States to expend unappropriated funds or seek appropriations from Congress. *See* Meese Policy at 3–4. We conclude that there is no per se constitutional bar against executive branch settlements that obligate the future expenditure of unappropriated funds. As the Antideficiency Act itself makes clear, Congress may authorize the executive branch to obligate funds in advance of appropriations. Thus, settlements that incur such obligations are permissible so long as there is statutory authority, whether explicit or implicit, for the assumption of the future financial obligation. Implicit authority to assume such obligations should not be readily inferred from general statutory authority, however, nor should the interest in settling litigation be thought in and of itself, at least as a general matter, to justify a construction of general statutory authority that would suffice to permit such an obligation to be incurred. We also conclude that the Constitution does limit the ability of the executive branch to settle litigation on terms that would require executive branch officers to seek appropriations from Congress. This limitation arises primarily from the Recommendations Clause.

Second, the Meese Policy in sections II(A)(1) and II(B)(1) raises concerns about the authority of the executive branch to enter into settlements that would convert the otherwise discretionary authority of executive branch agencies to promulgate, amend, or revise regulations into a mandatory regulatory duty. *See* Meese Policy at 3. We conclude that there is no per se constitutional prohibition against such settlements, and that, in the main, the executive branch's authority to enter into settlements that impose such limitations will be determined by the statutes that govern the executive branch agency on whose behalf the settlement would be entered. We emphasize that the Administrative Procedure Act generally limits the manner by which executive branch agencies may adopt, amend, or revise regulatory rules and procedures, and thus that it will be important to ensure that the terms of any settlement limiting the otherwise discretionary regulatory authority of an executive branch agency conform to the terms of that Act.

Third, the Meese Policy in sections II(A)(3) and II(B)(2) raises concerns about the authority of the executive branch to divest discretionary power granted by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties. *See* Meese Policy at 3–4. Here, we conclude that there is no per se constitutional prohibition against settlements of this type that divest discretionary power granted by Congress, and that, in the main, the executive branch's authority to enter into such settlements will be determined by the statutes that govern the executive branch agency on behalf of which the settlement would be entered. However, the Constitution does bar settlements that would divest the executive branch of discretionary power that has been conferred directly by the Constitution, such as the Recommendations Power or the Pardon Power. In addition, while the executive branch may not settle on terms that would infringe the constitutional rights of third parties, there is no independent constitutional limitation on the authority of the executive branch to enter settlements that would constrain the federal government's discretion to protect the non-constitutional interests of third parties. There may be, however, statutory provisions that protect the interests of third parties, such as the notice and comment requirements of the Administrative Procedure Act, that limit the settlement authority of the executive branch.

In sum, our review leads us to conclude that there are statements in the Meese Policy that appear to adopt an overly narrow view of the legal authority of the Attorney General to settle litigation. In addition, we conclude the policy's distinction between the rules that govern settlement agreements and consent decrees is not one that a concern about the legal authority of Article III federal courts would justify. For these reasons, we conclude that while there may be sound policy reasons to reaffirm the Meese Policy, the concerns that led to its adoption do not, in general, amount to legally binding limitations on the scope of the executive branch's power to settle litigation in a manner that may limit the future exercise of executive branch discretion.

II. Background Assumptions

Before proceeding to a consideration of the legal principles that define the scope of the Attorney General's settlement power, it is useful to set forth the background assumptions that govern our understanding of the Meese Policy and that underlie our analysis of the lawfulness of the types of settlements that are subject to the requirements of that policy.

As we have suggested, it is not entirely clear whether the restrictions set forth in the Meese Policy are rooted in policy or legal concerns. The Meese Policy does not by its terms appear to be premised on a conclusion that the Constitution or other federal law precludes the Attorney General from entering into settlements that would limit the future exercise of executive branch discretion. The Meese Policy does not actually preclude the United States from entering into any settlements; it simply requires that certain settlements — i.e., those that purport to limit executive branch discretion — be approved by the Attorney General, the Deputy Attorney General, or the Associate Attorney General. *See* Meese Policy at 4. In this respect, the Meese Policy appears to reflect a policy judgment about how settlements decisions of certain types should be made within the Department of Justice ("Department") rather than a legal conclusion regarding the extent of the Attorney General's lawful power to enter into certain kinds of settlements.

Nevertheless, there are some indications that the Meese Policy is rooted in legal concerns regarding the constitutionality of discretion-limiting executive branch settlements. The policy declares that it is intended to respond to concerns that, in some cases, executive branch settlements have improperly authorized federal courts to oversee the exercise of executive branch discretion and thereby have infringed upon executive branch prerogatives in violation of the constitutional separation of powers. *See* Meese Policy at 1. Furthermore, the Meese Policy asserts that it is designed to "ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts." *Id.*; *see also* Transcript of Press Conference with Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 2–3 (Mar. 21, 1986) ("Cooper Press Conference").

While there may be sound policy reasons for centralizing the process for approving certain lawful compromises that would limit executive branch discretion, *see* Stoltzfus Jost, *supra* at 105–06, this memorandum considers only the degree to which the Constitution, or other federal law, as a general matter, limits the use of settlements by the executive branch that purport to circumscribe the exercise of executive branch discretion. Thus, the memorandum is intended to make clear the degree to which the limitations imposed by the Meese Policy are properly rooted in constitutional or other legal concerns rather than to set forth the preferred departmental policy for the use of such settlements.

For purposes of setting forth the nature of these legal limitations, it is important to describe the type of agreements to which we believe the Meese Policy is directed and to which the following analysis applies. We understand the Meese Policy to be concerned with, and we accordingly address, those settlements that are enforceable by Article III courts and that in some meaningful respect bind the exercise of executive branch discretion. We therefore do not consider the limits that federal law may place on the Attorney General's authority to enter into agreements that may be enforced in non-Article III tribunals; that are not intended to be legally binding in any adjudicative forum; or that provide as the sole remedy for governmental breach the re-institution of the litigation in its entirety. *See* Memorandum for Anthony C. Liotta, Acting Assistant Attorney General, Land and Natural Resources Division, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Consent Judgment in Environmental Defense Fund, et al. v. Costle* at 2 & n.* (Mar. 30, 1981) (''*Costle* Memo''); Meese Policy at 4 (stating that ''revival of the suit'' shall be ''the sole remedy'' for the executive branch's failure to comply with the terms of a settlement agreement that limits the exercise of executive branch discretion). Agreements of these types either impose no legally meaningful constraint on executive branch discretion, *Costle* Memo at 2, or raise separation of powers concerns that are distinct from the ones that are identified by the Meese policy. *See, e.g., Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995) (''*Binding Arbitration*'') (discussing constitutional concerns raised by giving binding effect to the decisions of congressionally controlled arbitration panels).

Moreover, although virtually every judicially enforceable executive branch settlement limits the exercise of executive branch discretion to some degree, we address here only those executive branch settlements that render ordinarily ''revisable'' executive branch discretion less ''revisable.'' *See* Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. Chi. Legal F. 241, 243–46.[4] We have limited our analysis in this way because we understand the Meese Policy's limitations to be directed only at settlements of this type. An example of a settlement that would render ordinarily revisable executive branch discretion less revisable would be a binding promise by an agency to investigate a particular issue as a possible subject for rule making or enforcement. An agency's decision whether to conduct such an investigation is normally both discretionary and revisable; absent a statutory mandate, the

[4] We borrow the word ''revisable'' from Professor Shane, who uses the term to refer to those executive branch determinations that are ordinarily within the discretion of the executive branch actor who makes them *See id*

agency generally need not investigate, and the agency is generally free to change course and halt the investigation if it later decides that continued investigation is unwarranted. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (discussing executive branch agency authority to revise regulations); *Heckler v. Chaney*, 470 U.S. 821 (1985) (discussing executive branch's enforcement discretion).

A settlement that purported to restrict the agency's future investigatory discretion, by, for example, requiring the agency to pursue a particular investigation, would, however, operate to transform the otherwise revisable exercise of executive branch discretion over investigations into a legally enforceable obligation to investigate. *See* Shane, *supra* at 245. The agency would have agreed to an enforceable settlement that would require it to undertake certain investigations that it would otherwise possess the statutory authority to forego as a matter of discretion. This memorandum focuses on settlements that have this type of consequence.

We note that, by way of contrast, many discretionary governmental decisions are not normally subject to revision once they have been made. We do not address settlements that contain promises to undertake such ordinarily non-revisable discretionary action, i.e., settlements that have the consequence of binding the government to adhere to the terms of a choice that, although itself discretionary, is ordinarily not subject to revision once it has been made. For example, a decision by the government to pay money to compensate a tort victim in a settlement does not constrain the exercise of revisable executive discretion as we use that concept here. Under ordinary principles of contract law, the government's initial decision whether it should pay money in return for the consideration that a plaintiff will terminate a suit is a discretionary one. The government's decision to make the promise to pay, however, is normally binding on the United States once it has been made and the consideration has been received in return. *See, e.g., Lynch v. United States*, 292 U.S. 571 (1934) (government contract binding); *Perry v. United States*, 294 U.S. 330 (1935) (same). A settlement to pay a tort victim money in consideration of the termination of the suit does not, therefore, constrain the executive branch's discretion to make the initial discretionary judgment as to whether the settlement should be effected. It constrains only the government's capacity to decline to provide a payment that it has, in its discretion, consented to make in return for the consideration that it has received from the other party to the settlement. As one commentator has noted, the "fact that a promise to pay damages arises in the specific contractual context of settling a lawsuit does not affect the ordinary status of the contracting decision as one that is nonrevisable." Shane, *supra* at 245.

In this respect, executive branch settlements that purport to bind the exercise of revisable policymaking discretion are distinct from ordinary executive branch tort settlements, just as government contracts purporting to constrain the exercise of regulatory authority are distinct from ordinary government supply contracts.

See United States v. Winstar Corp., 518 U.S. 839, 913 (1996) (Breyer, J. concurring) (distinguishing between types of government contracts); *see* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 227 (1987) (discussing the analogy between government settlements and government contracts); *see also* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 322–25 (same). As a result, we do not believe that ordinary tort settlements that take the form of a binding promise by the United States to pay money to a plaintiff in order to terminate a suit implicate the kind of separation of powers concerns that are identified by the Meese Policy.

We understand that settlements of the type identified in the Meese Policy typically arise when executive branch agencies are defendants. *See* Memorandum for the Associate Attorney General, from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, *Re: Department of Justice Policy Regarding Consent Decrees* at 1 (Nov. 1 1994) ("Patrick Memo"); *see also* Cooper Press Conference at 11–12. In some cases, however, they may also arise in government initiated actions. *See United States v. Board of Educ.*, 744 F.2d 1300, 1301 (7th Cir. 1984) (each party to the agreement assumed obligation to "make every good faith effort" to fund desegregation plan), *cert. denied*, 471 U.S. 1116 (1985); Patrick Memo at 4.

Finally, we note that the Meese Policy draws a distinction between the authority of the executive branch to enter into consent decrees, which are agreements that are formally entered as judicial orders, and the authority of the executive branch to enter into settlement agreements, which are merely contracts that are judicially enforceable. Thus, while the Meese Policy generally limits the settlement authority of the executive branch in the manner set forth above, it describes the limitations that apply to consent decrees differently from those that apply to settlement agreements. For example, the Meese Policy states that it is "constitutionally impermissible for the courts to enter consent decrees containing [certain discretion limiting provisions] where the courts would not have had the power to order such relief had the matter been litigated," but that the Attorney General retains plenary authority to enter into most settlement agreements "on terms that a court could not order if the suit were tried to conclusion." Meese Policy at 2. It appears that the distinction rests on the Meese Policy's conclusion that consent decrees are more constitutionally problematic than settlement agreements because they constitute judicial orders, entered by Article III courts, rather than merely contracts between the executive branch and another party, whether public or private, to the litigation.

In distinguishing between settlement agreements and consent decrees, the policy also states that Department attorneys should not become parties to consent decrees that limit executive discretion in a manner that would "unduly or improperly constrain[ ] executive discretion'' if a similar limitation were imposed by injunction. Specifically, it states that Department attorneys should not enter into consent decrees that require a department or agency to revise, amend, or promulgate regulations where such actions would otherwise have been discretionary; to commit the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or to seek a particular appropriation or budget authorization; or to divest the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties. *Id.* at 3–4.

By contrast, the policy sets forth different limitations concerning settlement agreements. The policy states that Department attorneys should not enter into a settlement agreement that ''interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act;'' that commits the Department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question; that agrees to have the Secretary or agency administrator exercise his discretion in a particular way, where such discretion was committed to him by Congress or the Constitution to respond to changing circumstances, make policy or managerial choices, or protect the rights of third parties, unless the agreement makes revival of the suit the sole remedy for noncompliance. *See id.*

It is not entirely clear what substantive consequences are intended to follow from the difference in terminology that the Meese Policy uses in setting forth the rules that should apply to consent decrees as compared to settlement agreements. As we explain below, we do not believe that the distinction the Meese Policy draws between consent decrees and settlement agreements is of independent legal significance for purposes of determining the legal limits on discretion-limiting settlements except, perhaps, in rare cases. Nevertheless, where relevant to our analysis, we discuss the distinction that the Meese Policy draws between these two means of compromising litigation and how the distinction relates to federal constitutional and statutory restrictions on the authority of the executive branch to settle cases on terms that would limit the future exercise of executive branch discretion.

With these qualifications and clarifications in place, we now turn to a consideration of the general legal principles that define the limits of the Attorney General's power to effect the types of settlements that are at issue in the Meese Policy. After setting forth these general legal principles, we consider in Part IV how these general principles apply with respect to the types of settlements that are the subject of the Meese Policy.

III. General Legal Principles

A. The Source of the Attorney General's Settlement Authority

We begin by considering the source of the Attorney General's settlement power. The Office of the Attorney General is established by statute. Within broad constitutional bounds that are not directly relevant here, therefore, the Attorney General's power to settle litigation is defined, expressly or implicitly, by statute. *See Tenaska Washington Partners v. United States*, 34 Fed. Cl. 434, 440 (1995).[5] The Attorney General's settlement power is not expressly identified by statute, but it has long been understood to exist as an incident to the Attorney General's statutory authority to supervise litigation for the United States. *See Swift & Co. v. United States*, 276 U.S. 311 (1928); 28 U.S.C. §§516, 519 (1994); *Power of the Attorney General in Matters of Compromise*, 38 Op. Att'y Gen. 124, 126 (1934) (the authority "is in part inherent, . . . and in part derived from various statutes and decisions"); *Executive Bus. Media, Inc. v. United States Dep't of Defense*, 3 F.3d 759, 761–62 (4th Cir. 1993); *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992). "Included within this broad grant of plenary power over government litigation is the power to compromise and settle litigation over which the Attorney General exercises supervisory authority." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 59 (1982). In addition, Executive Order No. 6166 transferred to the Department of Justice the powers of other agencies "to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense" of actions involving the United States. *See* Exec. Order No. 6166 (1933), *reprinted in* 5 U.S.C. §901 note (1994).

The Attorney General's settlement power ordinarily attaches upon her receipt of a case and permits her to exercise broad discretion in determining when, and on what terms, settlement would best serve the interests of the United States. *See* 6 Op. O.L.C. at 59; *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976).[6] The settlement power is sweeping, but the Attorney General must still exercise her discretion in conformity with her obligation to "enforce the Acts of Congress." *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55 (1980); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609–13 (1838); *cf. Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945) ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dis-

[5] We do not consider in this memorandum the outer limits of Congress's constitutional authority to control the settlement discretion of the executive branch

[6] *See, e.g*, 28 U.S.C. §2414 (1994) ("Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes . . ."), *Id.* §2677 ("The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under [28 U S C.] section 1346(b) after the commencement of an action thereon ").

pensing power of [Executive] officials.''). Thus, the Attorney General must, as a general matter, exercise her broad settlement discretion in a manner that conforms to the specific statutory limits that Congress has imposed upon its exercise. *See Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture*, 22 Op. O.L.C. 127, 137–38 (1998).[7]

B. Congressional Limitations on the Settlement Power

In addition to statutory limitations directly targeting the Attorney General's settlement power in particular, Congress may place limits on the scope of the Attorney General's settlement power through the general laws that govern the conduct of the agencies on behalf of which the Attorney General purports to settle. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995); *Executive Bus. Media*, 3 F.3d at 762 (''[the settlement power] stops at the walls of illegality''); *Settlement Authority of the United States in Oil Shale Cases*, 4B Op. O.L.C. 756, 758 (1980); *Costle* Memo at 1–2. For example, the statutory requirement that the Department of Defense engage in competitive bidding has been held to preclude the Attorney General from settling a breach of contract claim by promising to award a Department contract outside the competitive bidding process, wholly apart from any concerns about the limitations such a settlement would impose upon the future exercise of executive branch discretion. *See Executive Bus. Media*, 3 F.3d at 762. Similarly, the United States Court of Appeals for the District of Columbia Circuit has explained that a federal statutory limitation on the applicability of the National Environmental Policy Act (''NEPA'') to a federal construction project would constrain the authority of the Attorney General to stipulate that the Secretary of the Interior would stay that project pending resolution of an environmental lawsuit. *See National Audubon Soc'y, Inc. v. Watt* 678 F.2d 299, 308 n.18 (D.C. Cir. 1982) (explaining that ''the general authority of the Justice Department over the conduct of . . . litigation . . . does not compensate for the Secretary's lack of authority under NEPA''). *See also Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1014 (7th Cir. 1984) (suggesting that consent decree limiting the investigatory authority of the Federal Bureau of Investigation may conflict with federal statutes that criminalize certain terrorist conduct).

When statutory limits on the scope of the Attorney General's settlement discretion are unclear, the Attorney General is presumed to have been authorized by Congress to settle on the terms that she determines would best serve the interests of the United States. *See Hercules*, 961 F.2d at 799 (holding that, since sections 122(a)–(f) inclusive of CERCLA do not apply to a cost recovery settlement, ''those provisions cannot be said to contain any clear and unambiguous limitation

[7] In rare cases, however, congressional directives regarding the exercise of executive power may be justifiably disobeyed on constitutional grounds. *See* 4A Op. O.L.C. at 55.

on the Attorney General's plenary ability to enter into settlements of cost recovery litigation''); 6 Op. O.L.C. at 59. The presumption in favor of a broad construction of the settlement power reflects the strong public interest in the swift resolution of burdensome litigation involving the United States, *see, e.g., Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 442 (9th Cir. 1989); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); 6 Op. O.L.C. at 59, as well as a recognition of the Attorney General's broad authority to control the conduct of litigation undertaken on behalf of the United States. Although Congress may restrict that authority through the imposition of statutory limitations on the conduct of the agency on behalf of which the settlement would be entered, it is important to emphasize that the agencies represented by the Attorney General are generally entitled to deference in construing the scope of ambiguous statutory restrictions on their conduct. *See Citizens for a Better Env't*, 718 F.2d at 1126; *SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984) (deferring to Securities and Exchange Commission's construction of statutes governing decree); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); 6 Op. O.L.C. at 55 (explaining that ''in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the policy judgments of the client agency. This deference reflects a recognition of the agency's considerable expertise in the substantive area with which it is primarily concerned.'').[8]

In general, then, limits on the Attorney General's presumptively broad settlement power must take the form of clear statutory directives in order to be effective. *See, e.g, Utility Reform Project*, 869 F.2d at 443 (affirming settlement in which the administration agreed to halt construction of a nuclear power plant pursuant to statute conferring settlement authority upon the administration); *Hercules*, 961 F.2d at 798 (limits must be ''clear and unambiguous''). Those limits may take the form, however, of not only targeted restrictions on the exercise of the settlement power itself but also restrictions on the conduct of the agency that incidentally serve to circumscribe the permissible terms of a settlement.

We emphasize, in this regard, that the statutory limitations on the Attorney General's settlement authority need not take the form of direct prohibitions against the exercise of that authority. The Attorney General generally possesses the congressionally conferred power to settle on terms that would serve the best interests of the United States, but the considerations and terms that inform and structure a settlement must be traceable, nonetheless, to a discernible source of statutory authority. We have explained that ''[i]n deciding to settle or abandon

[8] At the same time, in many circumstances agencies are not free in the course of litigation to alter, amend, or adopt a regulatory interpretation of a statutory provision that governs their conduct Agencies may be required by the Administrative Procedure Act, for example, to adopt such an interpretation only through notice and comment rulemaking Thus, the Attorney General may be unable to rely on an agency's construction of an ambiguous statutory provision in circumstances in which, outside the settlement context, the agency would not be entitled either to adopt such an interpretation or to receive judicial deference for it.

a claim, or not to prosecute at all, the Attorney General is not restricted to considerations only of litigative probabilities, but rather may make a decision, in his discretion, on the basis of policies espoused by the Executive.'' 6 Op. O.L.C. at 60. At the same time, however, we qualified this statement by explaining that the President's constitutional obligation to ''take Care that the Laws be faithfully executed'' necessarily serves to limit the exercise of the Attorney General's settlement authority so that it does not become a dispensing power. *Id.*

As a general matter, certain considerations, such as litigation risk, are inherent in a settlement power itself, and thus the authority to settle on the basis of such considerations may be assumed to have been conferred by the statutes that serve as the basis for the existence of the Attorney General's general settlement power, namely the statutes that entrust the Attorney General with the supervisory authority over litigation involving the United States. *See Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes*, 38 Op. Att'y Gen. 94 (1933). Other types of considerations that concern more particular policy aims, however, generally must be rooted in the purposes of the statutes that govern the agency that has been vested by Congress with the policymaking discretion and on whose behalf the settlement would be effected. It is the governing statutes of the agency involved in the litigation, therefore, that in many instances must provide the authority for a settlement. As we have previously explained in a related context,

> [s]trictly speaking, ''policy'' judgments are confined to those substantive areas in which the agency has developed a special expertise and in which the agency is vested by law with the flexibility and discretion to make policy judgments. However, it is increasingly the case that policy concerns are implicated in decisions dealing with litigation strategy, and in such cases, the Attorney General will accommodate the agency's policy judgments to the greatest extent possible without compromising the law, or broader national policy considerations.

See 6 Op. O.L.C. at 55; Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873, 926 (''[T]here is no inherent executive authority to settle cases on terms that have no connection with the agency's statutory warrant.'') (quoting Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 Tulsa L. J. 325, 338 (1996)).

In the end, the precise line that distinguishes a limitation on an administrative agency's authority from a limitation that also applies against the Attorney General's power to settle litigation on an agency's behalf is necessarily imprecise. In an earlier opinion, we explained that there is some ''tension'' between the Attorney General's broad settlement power and the Attorney General's obligation to enforce valid statutes. 4B Op. O.L.C. at 758. Under the broad settlement authority conferred upon the Attorney General, "it is reasonably clear that the Attorney General — in the exercise of his settlement responsibilities — is not bound by each and every statutory limitation and procedural requirement that Congress may have specifically imposed upon some other agency head in the administration of [the] agency's programs." *Id.* We further explained that "congressional requirements imposed on officials other than the Attorney General should not be thought to be directly [attributable] to him for the performance of his litigation function." *Id.* We went on to explain, however, that "Congress's will is surely not irrelevant to the Attorney General's discretion," *id.*, and that statutory limitations on the authority of an agency head may make it "reasonable to question whether the Attorney General's general litigation supervisory powers would give him a greater discretion." *Id.* at 758 n.2. We concluded, therefore, that "if there is a greater ambit of discretion, it must be located in Congress' actions in creating a centralized litigating department and clothing it with overriding authority to settle particular cases." *Id.*

As the settlement there in question had already been resolved, we declined to pursue the question any further at that time, other than to conclude that a settlement that would result in action "plainly at variance with Congress' intent" would be foreclosed and thus that a determination of the scope of the settlement power in particular cases must ultimately be made with attention to the specific statutes governing the activities that form the subject matter of the litigation. *Id.* at 758. That basic conclusion remains sound. The ultimate task is to arrive at a faithful determination of Congress's intent, taking into account both the purposes that underlie the Attorney General's statutorily conferred settlement power and the terms and purposes of the statutes that are relevant to the particular matter in litigation, including the statutes that limit the discretion of the agency on behalf of which the Attorney General would be entering into a settlement.

In addition to the limitations that Congress may place on the terms of settlements, Congress may also place limits on the kinds of claims that the Attorney General, as opposed to some other official, may settle, but these limits as well must be "clear and unambiguous." *See Hercules*, 961 F.2d at 798; 4B Op. O.L.C. at 756. These limits must be directed at the Attorney General's own settlement power, rather than the settlement power of other agency heads. Because Congress has entrusted the Attorney General alone with general supervisory power over litigation conducted on behalf of the United States, her settlement authority with respect to certain claims is presumed to remain even when Congress has expressly curtailed the settlement authority with respect to those same claims of some other executive branch official. *Id.* Thus, for example, a statute that prohibited the Secretary of the Treasury from settling certain tax claims was not thought to preclude the Attorney General from settling those same claims. *See* 38 Op. Att'y Gen. at 94.[9]

C. Constitutional Limitations on the Settlement Power

Even when Congress has authorized the Attorney General to settle litigation on terms that would limit the future exercise of executive branch discretion, the Constitution may prevent her from doing so. Most obviously, basic constitutional restrictions on governmental action, whether or not such action is taken in the context of a litigation settlement, constrain the Attorney General's exercise of her settlement discretion. Thus, for example, she may not enter into a decree that would require unconstitutional governmental action in violation of the rights of private parties or the structural prerogatives of the states. *Cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986) (explaining that consent decree mandating affirmative action plan would have to conform to the Equal Protection Clause).

In addition, the Constitution places particular limitations on the authority of the Attorney General to enter into judicially enforceable settlements that would limit the exercise of executive branch discretion. These limitations inhere in (1) the constitutional limitations that are rooted in both the general executive power that Article II of the Constitution vests in the President and that may constrain, in extreme cases, the executive branch's authority to adopt enforceable limitations on the future exercise of congressionally conferred executive discretion, as well as the specific discretionary powers that Article II confers directly upon the President, such as the power to recommend legislation to Congress and (2) the restrictions that Article III imposes on the power of federal courts to enforce certain types of executive branch settlements that are otherwise constitutionally permissible. We consider below each of these types of constitutional limitations on the executive branch's power to enter into judicially enforceable settlements.

1. *Article II Limitations on the Attorney General's Settlement Authority.* It is important to distinguish between two types of executive branch settlements, each of which derives from one of the two sources for executive branch power: the power vested in the executive branch by Congress pursuant to statute and the

[9] In concluding that the Attorney General's authority to settle on terms that would limit the future exercise of congressionally conferred executive discretion must be rooted in a statutory grant of power, we do not address the distinct question of the degree to which the constitutional separation of powers would permit the Congress to circumscribe the Attorney General's authority to decline to pursue an enforcement action in the first instance (or to dismiss such an action after it has been commenced). *See* Memorandum for Abbot B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Applying the Tunney Act or Similar Legislation to Dismissals by the United States of Civil Antitrust Actions* (June 7, 1983) (discussing potential separation of powers issues raised by legislation that would circumscribe the Attorney General's authority to dismiss antitrust suits) A limitation of this type would constitute a direct infringement of the discretion that the executive would choose to exercise if permitted to do so, while settlements of the type at issue here concern the judicial enforcement of limitations that the executive has voluntarily agreed to assume

power vested in the executive branch by the Constitution directly. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). First, there are settlements that purport to limit the future exercise of the discretion that Congress has conferred upon the executive branch pursuant to statute. Settlements of this type are generally permissible but may in extraordinary cases implicate structural limitations regarding the authority of the executive branch to divest itself of the administration of federal law. Second, there are settlements that purport to limit the future exercise of the discretion that the Constitution itself, by virtue of Article II, commits to the executive branch without regard to whether there has been a congressional delegation of authority. *See* Shane, *supra* at 255. Settlements of this type are generally impermissible.

(a) *Settlements That Limit Congressionally Conferred Executive Branch Discretion.* In general, Congress may define the scope of the discretion that it authorizes the executive branch to exercise without infringing upon the constitutional separation of powers between the legislative and executive branches. *See Heckler v. Chaney*, 470 U.S. 821, 833 (1985); *see also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in . . . operative statutes"). Because Congress may, within broad constitutional boundaries, define the scope of the discretionary authority that it confers upon the executive branch, *see Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (holding that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority") (citation omitted), it possesses the power to confer upon the executive branch the authority to settle litigation on terms that place limits upon the exercise of that discretion. As one commentator has explained,

> constraints on executive authority to limit discretion that has been vested in the executive by statute are themselves essentially statutory and must be determined with reference to legislative intent. The discretion subject to limitation is discretion delegated by Congress, at *its* discretion. Whether the President may compromise discretion Congress has so vested is likewise a matter within Congress's power to decide.

Shane, *supra* at 255.

The constitutional requirement that the President "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, is consistent with the conclusion that Congress may authorize the Attorney General to settle litigation on terms that place limits on the future exercise of congressionally conferred executive branch discretion. The Take Care Clause "simply requires the President to 'take Care' that whatever valid legal requirements might exist are followed." *Binding*

Arbitration, 19 Op. O.L.C. at 224. It does not, in and of itself, affect the power of the Attorney General to limit the exercise of discretion conferred by Congress, when Congress grants her the broad power to do so through settlement, and no independent constitutional provision stands as an obstacle. *Id.* (reaching the same conclusion with respect to the government's power to submit to binding arbitration in the absent of either a statutory command to do so or a statutory prohibition against doing so). Therefore, to the extent that the Constitution imposes restrictions on executive branch settlements that limit the exercise of congressionally delegated discretion, the Take Care Clause is not the basis for those limitations. Those limitations must be found elsewhere.[10]

Notwithstanding the broad power that Congress possesses to authorize the executive branch to limit its statutorily conferred discretion through an enforceable settlement, Article II, which vests the executive power in the President, and considerations of the constitutional structure may in extraordinary cases give rise to concerns about congressionally authorized executive branch settlements that restrict the exercise of such discretion. As a practical matter, it is unlikely that it will be necessary to consider these possible constitutional limitations, as Congress will rarely, if ever, authorize the executive branch to settle on terms that would divest itself of the kind of administrative authority over federal law that it might be constitutionally required to maintain. Certainly a general conferral of settlement authority would not suffice to authorize an irrevocable divestment of the kind of significant policymaking authority that, as a conceptual matter, would raise constitutional concerns.

In circumstances where a settlement that would effect such a divestment is contemplated, some guidance as to the proper constitutional analysis may be drawn from the precedents that concern the constitutionality of statutory provisions that interfere with the general separation of powers principle, which precludes one branch from unduly interfering with the ability of another branch to perform its constitutionally assigned functions. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); *The Constitutional Separation of Powers*, 20 Op. O.L.C. at 133–35.[11] This general principle, in certain circumstances, may constrain the authority of Congress to delegate the administration of federal law to non-execu-

[10] Because Article III judges are not congressional agents, Congress does not confer power on itself or its agents when it authorizes the Attorney General to settle litigation in federal court on certain terms *Cf Binding Arbitration*, 19 Op. O.L.C. at 225 (discussing constitutional limits on Congress's power to exercise continuing control over an arbitrator). It merely authorizes the executive branch to execute the laws — namely, the laws conferring settlement discretion — free from congressional control and in accord with judicially enforced limitations. Accordingly, statutes that confer settlement power upon the Attorney General do not implicate the anti-aggrandizement principle, which "forbids Congress, directly or through an agent subject to removal by Congress, from intervening in the decision making necessary to execute the law" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C 124, 131 (1996) (footnote omitted) ("*The Constitutional Separation of Powers*") Such statutes merely authorize the executive branch to exercise discretion in a manner that may invite judicial supervision. As we discuss below, however, the enforcement of such settlements may, in certain instances, constitute impermissible exercises of the judicial power conferred on the federal courts by Article III.

[11] We do not address here the extent to which the general separation of powers principle, as applied as a constraint on limitations on executive power, is rooted in part in the Take Care Clause.

tive branch actors because such delegations, like restrictions on the removal power, may undermine the executive branch's ability to perform its constitutionally assigned functions with respect to the administration of federal law. *See id.* at 176–77. The general separation of powers principle does not bar delegations of this type as a general matter, but it may do so in circumstances in which "a congressional delegation of authority to non-federal officials or to private parties might have a significant impact on the executive branch's ability to fulfill its constitutional functions." *Id.* at 177 (discussing delegations to actors outside the federal government that have been made pursuant to congressional mandates); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down congressional delegation to industry group); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (same); Rabkin & Devins, *supra* at 225 (explaining that "[w]here Congress has . . . vested responsibility in an executive program, directly parallel constitutional objections would surely apply to any effort to subdelegate this . . . responsibility to private parties.").[12]

In an extraordinary case, a legally enforceable settlement could be said to have a similarly significant impact on the executive branch's ability to fulfill its constitutionally assigned functions. Some settlements that irrevocably conferred substantial administrative discretion to determine the substance of federal regulations affecting the conduct of third parties could, for example, raise constitutional concerns as the other party to the settlement would not be under the executive branch's control. Thus, the vesting of the executive power in the President, as well as more general principles of constitutional structure, raise concerns about the constitutionality of binding settlements that would have the consequence of delegating to non-executive branch actors substantial administrative discretion of a type that Congress could not itself delegate to actors wholly outside the executive branch's control. In this respect, the general settlement power of the Attorney General should not be construed to authorize the kind of extraordinary settlements that would implicate these constitutional concerns.

Even apart from constitutional concerns that relate to the executive's administration of the laws that Congress has enacted, settlements of this type may also raise independent concerns under the Due Process Clause. For example, such concerns may be presented to the extent that such settlements would preclude third parties from receiving notice of, or commenting upon, substantive regulations that the United States would agree in the settlement to promulgate and that would have an "immediate and direct affect on [the third party's] activities" prior to their adoption. *See Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1257

[12] This office is no longer of the view that the Appointments Clause prohibits the delegation of rulemaking authority to private groups as a general matter, *see The Constitutional Separation of Powers*, 20 Op. O.L.C. at 142 & n 52, although prior opinions of this office had reached that conclusion. *See, e.g*, *Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76*, 14 Op O L C 94 (1990). We now believe that such delegations are more properly considered as implicating the general separation of powers principle *See The Constitutional Separation of Powers*, 20 Op O.L.C. at 176–77

(D.C. Cir. 1980). These concerns are heightened when the settlement, by granting a private party an enforceable right to direct the regulatory discretion of the executive branch, effectively authorizes one industry to regulate its competitors. *See, e.g., Carter Coal*, 298 U.S. at 311. The serious constitutional concerns such extraordinary settlements raise provide an additional basis for construing the scope of the present settlement power to preclude such settlements. *See The Constitutional Separation of Powers*, 20 Op. O.L.C. at 178 (discussing canon of narrow construction to avoid separation of powers issues); *cf. United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) (explaining that "[t]he simple fact that it is the Government may well change the underlying circumstances, leading to a different inference as to the parties' likely intent — say, making it far less likely that they *intend* to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law) (emphasis added).

Notwithstanding the limitations that Article II and the Due Process Clause may impose upon the executive settlement power in certain extreme cases, Congress's general power to authorize the executive branch to settle litigation on terms that would limit the exercise of congressionally conferred executive branch discretion is broad. Indeed, it extends even, as a constitutional matter, to permit Congress to authorize a present administration's executive branch to enter into a settlement that would bind a subsequent administration's exercise of that same statutorily conferred executive discretion. *See* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. Chi. Legal F. 327, 344.[13] Just as Congress may authorize an agency to enter into a settlement that would govern the mode of enforcement of a particular statute for six months, it may authorize an agency to agree to a settlement that would govern the mode of enforcement for six years. In either case, Congress would have simply authorized the agency to limit the future exercise of congressionally conferred executive discretion. And because the limitation would apply only to discretion that Congress had itself conferred, the limitation would in no way infringe upon the executive's constitutional power. "If the laws Congress passes enable one president to curtail the enforcement discretion of later administrations, and a president invokes such authority, then later administrations, implementing their curtailed discretion, are faithfully executing the laws, as Congress has enacted them; no constitutional power has been lost." *See* Shane, *supra* at 291 n.181.

[13] Some commentators have suggested that a contrary rule follows from *INS v Chadha*, 462 U S. 919, 947 (1983), in which the Court permitted President Reagan to challenge the constitutionality of a legislative veto provision that President Kennedy had signed into law. *See, e g.*, Rabkin & Devins, *supra* at 219–20 (citing other similar cases as well) *Chadha* supports only the more limited proposition that one administration may not sign unconstitutional legislation and thereby preclude subsequent administrations from challenging that law's constitutionality. Thus, while *Chadha* helps to explain why settlements that unconstitutionally constrain a present administration may not bind a subsequent one, it does not address whether settlements that permissibly constrain a present administration may constitutionally bind a subsequent one.

That an agreement of this type would extend beyond the duration of the present administration would not appear to be of independent constitutional significance. Numerous exercises of executive discretion that are made pursuant to congressional authority limit the scope of congressionally conferred discretion and bind subsequent administrations. *See Winstar*, 518 U.S. at 872–73 (holding United States liable for prior promises to bear costs of regulatory change made by executive branch agency officials) (opinion of Souter, J.); *id.* at 876 (explaining that "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); Percival, *supra* at 344 ("By necessity, executive agencies undertake many actions that have a profound impact on the policy choices available to future administrations."). The critical point is that such agreements serve to circumscribe and define the enforcement discretion that Congress itself has delegated, not to diminish the executive power that the Constitution has committed to the executive branch.

It should be acknowledged, however, that the Supreme Court's general statements regarding the authority of Congress to bind the future exercise of Congress's legislative discretion have appeared in cases that have involved claims for damages that have resulted from the enactment of subsequent legislation rather than in cases that have involved claims for injunctions against the enforcement of such subsequent legislation. The Court has stated that a present Congress may authorize action that will incur financial obligations that will be borne far into the future, thereby limiting the future lawmaking discretion of Congress in some respects. It has also made reference in several cases, however, to what it has termed the "reserved powers" doctrine, "which [has] held that certain substantive powers of sovereignty could not be contracted away." *Winstar*, 518 U.S. at 874 (opinion of Souter, J.). As Justice Souter recently explained, this general doctrine "has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors or to authorize executive action resulting in such a limitation." *Id.* at 873.

The reserved powers doctrine may be traced to early cases in which the Supreme Court confronted claims that the state legislature had, through subsequent legislation, purported to abrogate apparent state promises to exempt certain private parties from the future application of state regulatory power. In the course of rejecting the Contracts Clause claims of these private parties, the Supreme Court concluded that state legislatures lacked the power to contract away certain of their state powers. *See, e.g.*, *Stone v. Mississippi*, 101 U.S. 814 (1879) (state may not contract away its police power). The reserved powers doctrine has not been applied directly against the federal government to invalidate federal legislation, but, as we have mentioned, Justice Souter's opinion in *Winstar* recently invoked the doctrine in construing a promise that had been made by a federal regulatory agency so as not to limit the future power of Congress to subject private parties to newly imposed regulatory requirements. *See Winstar*, 518 U.S. at 873–74 (opinion of Souter, J.).

The reserved powers doctrine would not appear to preclude the executive branch from making a judicially enforceable promise that would limit the future exercise of congressionally conferred *executive* discretion. Such a promise would not itself bind the legislature; it would merely set forth a limitation on the discretion that the executive branch could exercise pursuant to its then applicable statutory authority. Thus, the consent by an agency to an enforceable limitation on the future regulatory authority of that agency would not, absent independent constitutional limitations that may be imposed by the Due Process or Takings Clauses, limit the ability of Congress to enforce regulatory measures pursuant to a subsequent legislative measure. Indeed, there would be compelling reason to doubt, in the absence of a clear indication to the contrary, that an executive branch agency would be authorized to promise that a particular party would be free from a future, congressionally mandated regulatory change.

Finally, we note that, although there is no general bar to executive branch settlements that limit the future exercise of congressionally conferred executive branch discretion, courts often construe the actual terms of executive branch settlements narrowly on the assumption that they are not intended to bind subsequent administrations and out of respect for executive branch prerogatives. *See, e.g., Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (explaining importance of narrow constructions of decrees that bind the exercise of governmental discretion), *cert. denied*, 511 U.S. 1082 (1994); *Alliance to End Repression v. City of Chicago*, 742 F.2d at 1013 (explaining that "a court will hesitate to assume that by signing a consent decree the government knowingly bartered away important public interests merely to avoid the expense of a trial"). Indeed, the Supreme Court suggested in *Rufo v. Inmates of Suffolk County Jail* that the fact that a new administration had taken office was generally relevant to a determination whether a consent decree limiting governmental discretion may be modified. *See* 502 U.S. 367, 383 (1992).

In this respect, the interpretive practice comports with the rules that apply to government contracts generally. The practice is rooted in an assumption about the government's likely intentions in settling litigation, rather than in a conclusion about the scope of the executive branch's constitutional authority to settle litigation in a manner that limits the future exercise of its statutorily vested discretion. *Cf Winstar*, 518 U.S. at 913 (Breyer, J., concurring) (explaining that "[t]he simple fact that it is the government [that is a party to the agreement] may well change the underlying circumstances, leading to a different inference as to the parties' likely intent—say, making it far less likely that they *intend* to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law"). This interpretive practice, however, indicates that settlements that are intended to contain commitments of substantial duration should make that intention manifest, assuming, of course, that such unusual commitments are authorized.

(b) *Settlements That Limit Constitutionally Conferred Executive Branch Discretion.* Settlements by the Attorney General that purport to resolve litigation on terms that would limit the exercise of discretion that the *Constitution* itself confers upon the executive branch raise different constitutional questions from those presented by settlements that purport to limit the exercise of congressionally conferred discretion. In addition to vesting the general executive power in the President, which, as we have seen, may result in limitations on the executive branch's power to settle litigation on terms that would result in open-ended delegations of administrative authority over federal law to non-executive branch actors, Article II also vests certain more specified powers directly in the President, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and commits their exercise to the President's unfettered discretion. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (distinguishing between these two types of executive power). An analysis of the expressly named discretionary functions that, in addition to the vesting of the executive power itself, the Constitution commits to the President is beyond the scope of this memorandum. As we discuss below, however, the President's power to make recommendations to Congress is among them. *See Memorandum Regarding Delegation of Presidential Functions* at 32 (Sept. 1, 1955) (''Delegation Memo''); *see also Binding Arbitration*, 19 Op. O.L.C. at 226 (discussing pardon, Commander in Chief, and foreign affairs powers).Congress need not act in order for the President to exercise such constitutionally vested discretionary powers, and it is powerless to restrict the President's discretionary exercise of them. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974) (explaining that the pardon power ''flows from the constitution alone . . . and . . . cannot be modified, abridged, or diminished by the Congress''). In vesting these discretionary powers in the President, the Constitution necessarily precludes the Attorney General from settling litigation on terms that would require that their exercise comply with the terms of a binding settlement. *See* Memorandum for Michael J. Horowitz, Counsel to the Director and General Counsel, Office of Management and Budget, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Chicago School Case* at 15–16 & n.9 (Aug. 6, 1984) (''*Chicago School Case*'') (''The essence of such non-delegable functions is that the President alone retains, and must constitutionally retain, the discretion to perform them.''). Such a settlement would authorize a private party or the courts to constrain the exercise of the very unfettered discretion that the Constitution has vested in the President, and thus the very discretionary character of those constitutionally vested powers precludes the executive branch from entering into a settlement that would constrain their otherwise unfettered future exercise. *See generally* Delegation Memo at 28. As a result, Congress may not authorize the executive branch to settle litigation on terms that would interfere with the exercise of such non-delegable, constitutionally-committed executive discretion.

2. *Article III Limitations on the Settlement Power.* Article III provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *See* U.S. Const. art. III, § 1. Article III federal courts may not enforce unauthorized executive branch settlements, and, for that reason, the scope of the Attorney General's settlement power, as defined by both statutory and constitutional limitations, necessarily limits the enforcement power of federal courts. *See Costle* Memo at 2 (explaining that "one must first determine what the agency itself has authority to do in the way of agreeing or consenting to limitations on its own power"); *cf. Winstar*, 518 U.S. at 891–92 (considering whether agency had the statutory authority to enter into a contract that had been allegedly breached).

Even when the Attorney General has been authorized statutorily and constitutionally to settle litigation in a manner that limits the exercise of executive branch discretion, Article III may place independent limits on the power of Article III federal courts to enforce those settlements. The Meese Policy suggests that this is the chief limitation that applies to the Attorney General's use of consent decrees—as opposed to settlement agreements—that limit executive branch discretion. The Meese Policy apparently assumes that Article III prohibits an Article III federal court from entering a consent decree of this type unless the court could have imposed an ordinary injunction that would have imposed the same limitations on the exercise of executive discretion. *See* Cooper Press Conference at 8 ("Our position is, obviously, that no judge can or no judge's powers are enhanced by the agreement of the parties before him. His powers are limited, in a consent decree, to those that . . . he or she could exercise in a litigated decree. You can't go beyond it. And that is, I guess, one of the fundamental premises of these consent decree guidelines."). It therefore states that "[a] department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion." Meese Policy at 3. This aspect of the Meese Policy apparently rests on the view that consent decrees, as enforceable court orders, must, by reason of Article III, necessarily be more limited in scope than settlement agreements, which are merely a species of contract.

After the Meese Policy was issued, however, the Supreme Court set forth a more expansive conception of the permissible scope of consent decrees than the one on which the Meese Policy apparently rests. *See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). While acknowledging that federal courts are not mere " 'recorder[s] of contracts' from whom parties can purchase injunctions[,]" *id.* at 525 (citation omitted), the Court explained that it is the parties' agreement, "rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.'' *Id.* at 522. As a result, *Firefighters* held that consent decrees were distinguishable from ordinary injunctions, and that Article III federal courts could use consent decrees to provide ''broader relief than [courts] could have awarded after a trial.'' *Id.* The Court ruled that so long as an agreement between parties resolves a dispute within the court's subject matter jurisdiction, comes within the general scope of the case made by the pleadings, furthers the purposes of the law on which the complaint is based, and does not otherwise violate federal law, it may be entered as a consent decree even though its terms could not have been included in an ordinary injunction and even though the decree itself has the force of a court order. *See id.* at 525–26.

The Supreme Court reaffirmed *Firefighters* in *Rufo*, another case decided after the Meese Policy had been issued. In setting forth the legal standard that governs consent decree modification, the *Rufo* Court explained that a consent decree may provide relief in excess of what a court could impose absent party consent:

> Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. *See Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 281 (1977). But we have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation,' *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a direction to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement.

502 U.S. at 389. Together, *Firefighters* and *Rufo* reaffirm the essential portions of the longstanding rule that ''[p]arties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.'' *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1879).

Although both *Rufo* and *Firefighters* involved decrees that limited state and local governmental discretion, rather than federal executive branch discretion, we do not believe that this distinction is of consequence for purposes of determining the limits that inhere in Article III. In upholding the decree in *Firefighters*, the Court approvingly cited the D.C. Circuit's opinion in *Citizens for a Better Environment*, *see Firefighters*, 478 U.S. at 525, which expressly rejected the contention that the Constitution prohibits a consent decree — but not a settlement agreement — from imposing limits on executive branch discretion unless the same limits could have been imposed by injunction after trial. *See Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126–29 (D.C. Cir. 1983). Other courts of appeals have concurred in this conclusion with respect to settlements by the federal government. *See, e.g., Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985) (approving consent decree involving Department of Health and Human Services); *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985) (approving consent decree involving Secretary of the Air Force), *cert. denied*, 478 U.S. 1020 (1986); *Sansom Committee v. Lynn*, 735 F.2d 1535, 1540 (3d Cir.) (approving consent decree involving Department of Housing and Urban Development), *cert. denied*, 469 U.S. 1017 (1984). Thus, we do not believe that Article III prohibits a federal court from entering a consent decree that provides broader relief than the court could have ordered in the absence of consent, even when the terms of the decree would limit the exercise of executive branch discretion.

Nor do we believe that the judicial enforcement of a term of a settlement, whether such term is contained in a consent decree or a settlement agreement, is beyond the powers of an Article III court whenever such enforcement would take the form of an injunction that could not have been imposed in the absence of a settlement. The Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is not inconsistent with this conclusion. In *Vermont Yankee*, the Court held that Article III federal courts were barred, for separation of powers reasons, from imposing rulemaking procedures upon executive branch agencies that go beyond those procedures that Congress had required the agency to obey. *Id.* at 524–25. The Court did not address, however, the distinct question whether federal courts were similarly precluded from requiring executive branch agencies to adhere to the terms of settlements that they had voluntarily entered into in order to resolve litigation.

Outside the settlement context, lower federal courts have held that *Vermont Yankee* does not apply to bar the judicial enforcement of a procedure that an agency has voluntarily adopted in the exercise of its administrative discretion so long as there is some independent legal limitation on the agency's authority to deviate from that procedure once it has been adopted. *See*, e.g., *USAir, Inc. v. Department of Transp.*, 969 F.2d 1256, 1260 (D.C. Cir. 1992). Under these decisions, Article III courts may, consistent with *Vermont Yankee*, preclude an agency from deviating from a procedure even though Congress has not mandated that the agency adopt such a procedure in the first instance. So long as Congress has authorized an agency to exercise its discretion in a manner that imposes new procedural obligations upon it, and has precluded the agency from divesting itself of those obligations without following certain independent, statutorily-prescribed procedures, a federal court may hold the agency to the procedures that it initially adopted as a matter of discretion until such time as it has withdrawn those procedural requirements in the manner that Congress has prescribed. *See International Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (explaining that the Administrative Procedure Act requires agencies to adhere to procedural rules which they adopt even when those rules are not themselves required by statute).

This same logic indicates that when agencies consent to settlement terms that accord with statutory limitations but compel them to exercise their statutorily conferred discretion in the absence of any statutory mandate to do so, no Article III problem of the type identified in *Vermont Yankee* arises from the fact that the settlement thereby empowers a federal court to hold the agency to its voluntarily assumed obligations in a manner that comports with the applicable statutes. *See Citizens for a Better Env't*, 718 F.2d at 1127–29, *Costle* Memo at 5–6. The rationale for this conclusion rests on the essential distinction for separation of powers purposes between the judicial enforcement of a voluntarily assumed, and congressionally authorized, executive branch obligation and the judicial imposition of an executive branch obligation that the agency has not assumed and that Congress has not required it to assume. In other words, the rationale rests on the very distinction between consent decrees and injunctions that the Court described in *Firefighters. See, e.g., Citizens for a Better Env't*, 718 F.2d at 1128 ("'manifestly the requirements imposed by the Decree do not represent judicial intrusion into the Agency's affairs to the same extent they would if the Decree were 'a creature of judicial cloth'") (quoting *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981)); *see Costle* Memo at 5–6.

Moreover, the judicial enforcement of executive branch settlements that purport to limit the exercise of executive branch discretion generally do not conflict with the Article III rule that "[q]uestions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government." *Green v. Frazier*, 253 U.S. 233, 240 (1920). This general limitation on Article III federal court power serves to prevent a federal court from compelling an executive branch entity to exercise the discretion that Congress has conferred in a particular manner by, for example, imposing a procedural requirement upon an agency that Congress has not itself imposed. An Article III federal court ordinarily lacks the authority — in the absence of a contrary constitutional imperative, such as the requirement of due process of law — to make the policy determination regarding the procedures that an agency should adopt both because Congress has delegated the discretion to make such determinations to the agency and because of the discretionary nature of the determination. *See Vermont Yankee*, 435 U.S. at 524–25.

This general limitation on the power of Article III federal courts does not, however, suffice to prevent the judicial enforcement of a procedural requirement with which an agency has agreed to comply in a consent decree or settlement agreement. The enforcement of a requirement contained in a settlement generally will not require an Article III federal court to make a policy judgment regarding the merits of that requirement. Enforcement of such a requirement will merely require an Article III federal court to perform its core function of enforcing a congressionally authorized limitation on executive branch policymaking discretion — namely, the limitation that the executive branch agency has itself adopted, in the exercise of its statutorily conferred discretion, through its consent to the requirement contained in the decree or settlement agreement. In this respect, the judicial enforcement of settlement terms does not differ for purposes of Article III's restriction on the authority of federal courts to decide ''questions of policy'' from the judicial enforcement of statutory limits on executive branch discretion. *See Berger*, 771 F.2d at 1579 (comparing consent decree requiring agency to issue regulations to injunction requiring agency to redraft regulations to bring them into compliance with statute).

As we have suggested, however, Article III does place independent limits on the power of Article III federal courts to enforce executive branch settlements in some circumstances. *Cf. Morrison v. Olson*, 487 U.S. 654, 680–81 (1988) (Article III judges ''may not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches.''); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (Article III courts may not exercise ''executive or administrative duties of a nonjudicial nature.''). For example, executive branch settlements may not be enforced if their terms lack judicially-discoverable and manageable standards for enforcement, *cf. Baker v. Carr*, 369 U.S. 186, 217 (1962) (discussing political question doctrine), or depend upon the enforcing court to make ''an initial policy determination of a kind clearly for nonjudicial discretion.'' The precise nature of these limits are unclear, and we are not aware of any settlements that the Supreme Court has deemed unenforceable as a consequence of these ill-defined limits. *See, e.g.*, William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635 (1982); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 39 Stan. L. Rev. 661 (1978).[14]

Some guidance as to the types of judicial judgments that would transgress the limitations on the judicial power that are imposed by Article III may be found in our opinion on the constitutional concerns that arose in the context of a pro-

[14] The D.C. Circuit recently expressed concern that the general and amorphous ''public interest'' standard that the Tunney Act, 15 U.S.C. § 16(e) (1994), instructs courts to apply in reviewing the United States' authority to enter proposed consent decrees for the resolution of antitrust suits violates Article III. *See United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (concluding that judicial rejection of consent decree under the ''public interest'' standard violated the Tunney Act and that a contrary interpretation of the judicial authority conferred by the Act would raise substantial Article III concerns), *see also Maryland v. United States*, 460 U.S. 1001 (1983) (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting), *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 219 n.7 (1989) (noting that there are ''very serious doubts as to the constitutionality'' of the Tunney Act because it ''intrudes into the executive power and requires courts to decide'' policy questions normally reserved for the political branches); *but cf. Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 141 (1967) (rejecting antitrust ''settlement'' after noting that the Department of Justice had ''knuckled under''); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970) (reviewing post-*Cascade* cases)

posed modification to a consent decree that the Attorney General had entered into in an antitrust suit. *See* Memorandum for Kenneth G. Starling, Deputy Assistant Attorney General, Antitrust Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legal Implications of Antitrust Division's Failure to Accede to Judge's Requested Modification of Antitrust Consent Decree* at 11 (May 4, 1988). Among the types of judgments that we identified in that opinion as constitutionally problematic for an Article III court to make were "weighing the relative merits of imposing particular side-conditions vis-a-vis formulating alternative consent decree proposals for judicial consideration; determining what the benefits (or costs) of further prosecution would be; assessing how particular strategies may enhance the effectiveness of antitrust enforcement and aid the Executive Branch's overall policies and programs; and determining how the Government's limited law enforcement resources may best be used." *Id.* We note as well that the Supreme Court has suggested that it would transgress the bounds of Article III for federal courts to "supervise" the prosecutorial discretion of the executive branch. *See Morrison*, 487 U.S. at 681 (upholding the Independent Counsel Act and noting that it did not confer upon the federal courts "the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority").

These limitations on the scope of an Article III court's authority were identified, however, in connection with the consideration of statutory provisions that conferred authority upon Article III federal courts either to limit the executive branch's power to modify a decree or to exercise some measure of control over appointment and removal of the independent counsel. Here, by contrast, we are concerned with the authority of Article III courts to review and enforce the terms of settlements entered into by executive branch actors pursuant to the exercise of their congressionally conferred authority. It is conceivable that Article III federal courts would have somewhat greater authority in the context of enforcing the terms of a settlement that the executive branch had itself consented to enter. Nevertheless, the executive branch surely has no power to expand the types of questions that an Article III court may resolve to include the resolution of policy questions that are not ordinarily susceptible of judicial determination. As a general matter, therefore, settlements that confer upon federal courts the broad authority to determine whether executive branch enforcement action has met some general standard, as opposed to whether it has satisfied a specific promise to undertake previously specified action, would raise Article III concerns.

Of course, litigation compromises that would require Article III judges to make the kind of determinations in the course of enforcing their terms that would press the bounds of Article III also would likely raise substantial constitutional concerns independent of the limitations imposed upon the exercise of the judicial power by Article III. As we have explained, settlements that contain terms that authorize Article III judges to make discretionary determinations in the course of the exercise of their enforcement powers may be objectionable as impermissible delegations of executive branch authority under Article II. *Cf. The Constitutional Separation of Powers*, 20 Op. O.L.C. at 176–77 (discussing delegations to actors outside the federal government that have been made pursuant to congressional mandates). Settlements that contain such open-ended terms potentially confer too much authority over the exercise of congressionally conferred executive authority upon the non-executive branch actors with whom the settlement is effected, and for that reason could be constitutionally suspect without regard to the limitations that Article III places on federal court enforcement. *Id.*

Notwithstanding the Article III limitations described above, executive branch settlements that limit the future exercise of congressionally conferred executive discretion do not necessarily, or even generally, require Article III federal courts to make constitutionally suspect policy judgments in enforcing their terms. Generally, the judiciary is simply called upon to enforce a clear limitation that the executive branch has voluntarily adopted, in much the same manner that the judiciary may be called upon to enforce either an administrative procedure that an agency has agreed, in its discretion, to be bound by, or a clear statutory limitation that has been imposed upon an executive branch actor's discretion. Moreover, out of respect for the limits that Article III imposes on the judiciary's power to supervise executive branch decision making, federal courts generally construe the terms of authorized executive branch settlements narrowly so as to avoid the conclusion that the executive branch has agreed to submit the exercise of otherwise unreviewable discretion to judicially enforceable limits. *See, e.g., Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1019 (7th Cir. 1984) (construing consent decree narrowly to avoid constraining investigatory discretion of FBI); *National Audubon Soc'y, Inc. v. Watt*, 678 F.2d 299, 305 n.12, 306 (D.C. Cir. 1982) (construing stipulation committing Secretary of Interior to stay federal construction project narrowly to avoid constitutional concerns).

IV. Specific Limits Set Forth in the Meese Policy

A. Promises to Spend Unappropriated Funds or to Seek Appropriations

We now consider the more specific limits on the Attorney General's settlement power that the Meese Policy identifies. We begin with the Attorney General's power to settle litigation on terms that commit the executive branch to expend unappropriated funds or to seek congressional appropriations.

The Meese Policy states that lawyers under the Attorney General's supervision may not enter into consent decrees that "commit[ ] the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization." Meese Policy at 3. The policy also prohibits such attorneys from entering into settlement agreements that "commit[] the Department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question." Meese Policy at 3–4.[15] We are advised that the policy aids agencies in settlement negotiations by circumscribing the possible scope of a settlement, see Memorandum for John R. Schmidt, Associate Attorney General, from Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, *Re: Department Policy Regarding Consent Decrees and Settlement Agreements* (Nov. 1, 1994), but our concern is solely with the degree to which federal law precludes settlements that would contain such commitments.

1. *The legal limits on commitments to make unappropriated expenditures.* The Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7. The Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 427–28 (1990). The Anti-Deficiency Act implements and enforces this principle by prohibiting executive officials from making promises to expend funds in advance of appropriation unless "authorized by law." 31 U.S.C. § 1341 (1994).

Neither the Antideficiency Act nor the Appropriations Clause compels a blanket prohibition against settlements that require the executive branch to expend unappropriated funds. The Appropriations Clause does not preclude authorized promises to make expenditures or to incur obligations in advance of appropriations, and such promises, if authorized by Congress, do not wrest the power of the purse from Congress. Nor do binding commitments to pay money in advance of appropriations place unconstitutional constraints on the exercise of executive discretion. Such commitments may restrict the discretion of executive branch actors in the future by imposing financial obligations that either limit future expenditures or necessitate request for additional appropriations, but the Constitution does not prohibit executive branch actions that have these consequences. *See United States v. Winstar Corp.*, 518 U.S. 839, 873–74 (1996) (holding United States liable for prior promises to bear costs of regulatory change made by executive branch agency officials); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); Percival, *supra* at 344 ("By necessity, executive agencies undertake many actions that have a profound impact on the policy choices available to future administrations.")

[15] Although the policy distinguishes between commitments concerning funds "appropriated" and commitments concerning funds "budgeted," it is not clear what that distinction is intended to signify, and, in any event, the Constitution does not suggest any such distinction. Nor does the Constitution require the policy's different rules regarding funding commitments made in consent decrees and settlement agreements, at least insofar as the commitment contained in each type of settlement is intended to be enforceable by an Article III court.

Indeed, the Antideficiency Act implicitly recognizes that promises to expend unappropriated funds are constitutional because it excepts "authorized" promises of this type from its reach, and courts have held that authorized promises to expend unappropriated funds give rise to enforceable obligations on the United States. *See* Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U. L. Rev. 51, 61–62 (1979) (collecting cases).[16] Thus, just as Congress may authorize executive branch officials to impound appropriated funds in certain circumstances, *see, e.g., Train v. City of New York*, 420 U.S. 35, 42–47 (1975), it may authorize executive branch officials to commit to the expenditure of unappropriated funds in certain circumstances as well.

Nevertheless, as we have explained, the settlement power may not be exercised in a manner that is inconsistent with statutory limits. This general principle, as applied in this context, means that the limitations that applicable statutory provisions place on the authority of an agency to incur financial obligations in advance of appropriations outside the settlement context will, at least in the ordinary case, also limit the authority of the Attorney General to settle litigation on behalf of that agency on terms that would incur such obligations. In light of the express terms of the Anti-Deficiency Act,[17] this general principle, as applied here, also means that there must be an identifiable source of statutory authority to incur an obligation in advance of an appropriation before a settlement may be entered that would incur one.

The question whether such authority exists will sometimes be a difficult one. As Professor Tribe explains in discussing the distinct, but nonetheless related, context of impoundment, Congress may authorize impoundment implicitly rather than expressly:

> [t]he language and purpose of a particular appropriations bill involved may permit the conclusion that impoundment is consistent with the legislative will. In some cases, the appropriations bill very clearly invests the Executive branch with wide discretion regarding the spending level. In other cases, the use of mandatory language indicates that Congress has not sanctioned impoundment. Needless to say, the vast majority of cases fall somewhere between these

[16] For example, if a statute authorizes the government to contract for goods and services and the contract is performed, an obligation may arise that the United States may not avoid simply by refusing to appropriate funds *See* Fisher, *supra* at 61. (Of course, it may be that the obligation will not be satisfied if Congress refuses to appropriate the funds lawfully due.) By contrast, when statutes expressly condition performance by the United States upon congressional appropriations, the government's promise may be enforced only if an appropriation is forthcoming *Id.* at 62.

[17] The Anti-Deficiency Act provides, in relevant part, that "[a]n officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation" and may not "involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(A), (B).

> two polls. The Supreme Court has indicated that it will study the legislative history of the appropriations statute and carefully dissect its language in order to determine whether impoundment is permissible.

See Laurence H. Tribe, *American Constitutional Law* 259 n.13 (2d ed. 1988). There is a similar range from the express to the implied grant among statutory provisions that grant executive branch officials the authority to commit to financial obligations in advance of appropriations.

In 1980, Attorney General Civiletti elaborated on this point in setting forth the proper analysis for determining whether an agency or official possesses the statutory authority to assume a financial obligation in advance of an available appropriation. *See Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1 (1981). The analysis that he set forth does not make express reference to the settlement context, but it provides useful guidance nonetheless. Attorney General Civiletti explained that "[i]n a few cases Congress has expressly authorized agencies to incur obligations without regard to available appropriations," *id.* at 3 & n.4 (citing 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11), but that it will often be "necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations." *Id.* at 3. In general, he concluded, "statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies." *Id.* at 4. The authority to make such a commitment instead "must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States." *Id.*

In further elaborating upon this analysis, Attorney General Civiletti referred to prior Attorney General opinions that had established that "when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment." *Id.* He also explained, however, that other Attorney General opinions had established that "when authority for the performance of a specific function rests on a particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations." *Id.* As a consequence, the scope of "necessarily inferrable" authority to incur financial obligations in advance of appropriations is quite limited. As we have more recently explained, the "limited number of government functions funded through annual appropriations [that] must otherwise continue despite a lapse in their appropriations'' include, for example, the ''check writing and distributing functions necessary to disburse'' benefits that operate under indefinite appropriations, the minimal duties that are necessary to closing up an agency during a lapse in appropriations, and the contracting for materials essential to the performance of those emergency services that may continue during a lapse pursuant to an express provision of the Anti-deficiency Act. See Memorandum for Alice Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Operations in the Event of a Lapse in Appropriations* at 4 (Aug. 16, 1995).

Attorney General Civiletti added that, notwithstanding the statutory limitations that would ordinarily constrain executive branch authority to incur obligations in advance of appropriations, ''the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well.'' 5 Op. O.L.C. at 5. He therefore concluded that ''the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted.'' *Id.* at 6. He then identified the conduct of foreign affairs essential to the national security as ''[o]ne likely category into which certain of these functions would fall.'' *Id.* at 7 n.10.

In accord with the above analysis, settlements may raise concerns if they contain terms that contemplate the federal government undertaking actions to be carried out beyond the current appropriations cycle or the terms of the appropriation that, at the moment of settlement, is understood to provide the funding for carrying them out. It may be unclear in such cases whether, at the moment of settlement, funds have been appropriated for carrying out those actions in the future. It may also be unclear whether statutory authority exists that would permit the Attorney General to assume an obligation for the federal government to carry out activities in advance of appropriations to fund them.

Of course, in many instances, the source of the funding for the activity may be the general salaries and expenses appropriation of an agency. Such an appropriation for general salaries and expenses may be available for only one year, but it will in most cases almost certainly be replaced with a substantial, similarly general appropriation the following year. The fact that an available appropriation may be reasonably expected in the following year, however, does not suffice to relieve concern that an executive branch promise to undertake actions in subsequent years may constitute an unauthorized promise to expend funds or incur obligations in advance of an appropriation. An expectation of an appropriation does not itself constitute an appropriation. Thus, absent sufficient authorization, care should be taken to avoid promising to undertake activities in advance of appropriations in entering into even seemingly routine settlements. The possibility always exists, for example, that an appropriations rider may be appended to the otherwise generally available salaries and expenses appropriation in a subsequent year, which would preclude use of the appropriated funds for the promised purpose.

Because of the limited circumstances in which it is likely to be determined that Congress has conferred the unusual authority to incur financial obligations in advance of appropriations, settlements that would commit the executive branch to undertake activities that would require expenditures in the future should not be understood to constitute enforceable obligations to undertake such activities in the event of lapses in available appropriations unless it is made clear in the settlement that the federal government does intend to incur such an obligation. *Cf. United States v. International Brotherhood of Teamsters*, 172 F.3d 217 (2d Cir. 1999) (holding that the United States had not promised to monitor a union election). In addition, the executive branch should make clear its intention to incur an obligation in advance of appropriations only when (1) the statutory authority to assume a financial obligation in advance of an appropriation may be divined from either express statutory language or "necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency," 5 Op. O.L.C. at 5, or (2) the obligation in question is "necessarily incident to presidential initiatives undertaken within his constitutional powers." *Id.* at 7.

The existence of the continuing and indefinite appropriation for the satisfaction of certain judgments and settlements, commonly referred to as the judgment fund, does not suffice to constitute broad authorization for settlements that would otherwise appear to constitute unauthorized obligations in advance of appropriations. *See* 31 U.S.C. § 1304 (1994 & Supp. II 1996). "A law that identifies the source of funds is not to be confused with the conditions prescribed for their payment." *Office of Personnel Management*, 496 U.S. at 432. The general statute appropriating funds for judgments and settlements appropriates funds for the payments obligated only by certain types of authorized settlements. *Id.* It is important to note, in this regard, that the settlements identified in the Meese Policy are likely to give rise to expenditures that would not be payable out of the judgment fund. For example, it is likely that Congress will have intended for agency appropriations to fund the activity that the government promises to perform in the settlement, and the mere fact that such agency appropriations are insufficient to permit the activity to be performed will not suffice to make the judgment fund available. *See Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act*, 13 Op. O.L.C. 362, 366 n.6 (1989) (quoting 66 Comp. Gen. 157, 160 (1986)); *see* 3 Office of the General Counsel, United States General Accounting Office, *Principles of Federal Appropriations Law* 14–26 (2d ed. 1994) ("[I]f payment of a particular judgment is 'otherwise provided for' as a matter of law, the judgment appropriation is not available, and the fact that the defendant agency may have insufficient funds at that particular time does not operate to make the judgment appropriation available.''). Similarly, it is likely that the terms of such settlements will not be appropriately characterized as involving ''money judgment'' claims, and thus that they will fall outside the scope of the judgment fund for that reason. *See Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op.O.L.C. 98, 98–99 (1989) (explaining that ''final judgments [or settlements of such judgments] whose payment is not 'otherwise provided for' are payable from the Judgment Fund if they require the government to make direct payments of money to individuals, but not if they merely require the government to take actions that result in the expenditure of government funds.''). Thus, the judgment fund should not be thought to obviate the need for an inquiry into either whether funds would be available in the future or whether authority exists for the executive branch to incur an obligation in advance of available appropriations.

2. *The legal limits on executive branch commitments to seek appropriations from Congress.* We previously considered this question in connection with a proposed consent decree that would have required the Departments of Navy and Energy to seek certain appropriations from Congress. We concluded that such a commitment would not have been judicially enforceable. We explained that this conclusion followed from the position we had previously taken that ''no executive branch official, including the President, constitutionally could agree to constrain the President's discretion to make whatever legislative proposals he or his successors deemed desirable[.]'' Letter for Steven S. Honigman, General Counsel, Department of the Navy, and Robert R. Nordhaus, General Counsel, Department of Energy, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Sept. 12, 1995) (''Honigman Letter'').

The constitutional constraint is rooted in Article II, Section 3 of the Constitution, which confers upon the President the duty to ''recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient.'' Through this clause, the Constitution expressly commits the President to exercise his personal discretion in making legislative recommendations to Congress. *See Chicago School Case* at 17–18; *see generally* J. Gregory Sidak, *The Recommendations Clause*, 77 Geo. L.J. 2079 (1989) (discussing history of the Clause).[18] The President may not divest himself of his constitutional obligation to judge personally which recommendations should be made to Congress, and thus he may not delegate the authority to exercise that discretion to another person. *See* Delegation

[18] Some have argued that the Recommendations Clause makes plain that the President is constitutionally permitted to recommend legislation to Congress and does not restrict the President's ability to forego the exercise of his personal discretion in making such recommendations. *See, e g*, *Chicago School Case* at 17. Our office has rejected that view. *See id* at 17–18; Honigman Letter, *supra*.

Memo at 32 ("if the messages or recommendations are intended to be in exercise of Constitutional duties, the President cannot delegate the responsibilities").

A settlement of the type at issue in this memorandum that contains a presidential promise to seek certain legislation would constitute an impermissible delegation of the President's Recommendations Power. As we have explained, we are concerned in this memorandum only with settlements the terms of which would be subject to direct enforcement by an Article III court. In consenting to a settlement of this type containing a term requiring the President to seek certain appropriations from Congress, the Attorney General necessarily would be consenting to the issuance of a judicial order compelling the President to make a certain legislative recommendation in the event that he failed to do so in conformity with the settlement. In this respect, such a settlement would necessarily delegate a portion of the President's recommendation power to the other party to the agreement, as it would permit that party to call upon the court to require the President to make a legislative recommendation, even if the President's own judgment at the moment of enforcement were that such a recommendation was neither necessary nor expedient. *Chicago School Case* at 15–16 & n.9. Because of the President's constitutional obligation to exercise personal discretion in making recommendations to Congress, moreover, courts are likely to construe narrowly promises that appear to commit the President to seek certain appropriations from Congress. *See id.*

Settlements that commit executive branch officials to make certain legislative recommendations are constitutionally problematic even if they do not purport to preclude the President from making recommendations on his own. The President's constitutional authority to exercise the Recommendations Power could be undermined if the President were precluded from preventing a subordinate executive branch official from making a recommendation by reason of the executive branch's prior consent to a binding term of a settlement. For example, the President may judge that it is necessary or expedient that no recommendation on a particular matter be made at a particular time. However, that presidential judgment would be compromised if an executive branch actor's prior entry into a settlement could give rise to a judicially enforceable obligation that an executive branch official make a recommendation on the precise issue on which the President had judged it necessary and expedient to remain silent. Similarly, the President may have judged that it is necessary and expedient to make a recommendation, the terms of which would contradict the recommendation that a prior settlement would require a subordinate executive branch actor to make. The President's ability to exercise his own recommendation power could be undermined if he lacked the power to preclude a subordinate from presenting a contradictory recommendation to Congress. Thus, such commitments, even if made by subordinate executive branch officers could "constrain the President's discretion to make whatever legislative proposals he or his successors deemed desirable[.]" Honigman Letter at 1.

In addition, Article II, Section 2, Clause 1 of the Constitution states that "[the President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." A settlement may not commit a principal officer in a Department to recommend certain appropriations to Congress if such a commitment would impinge upon the President's capacity to obtain information pursuant to the Opinion Clause. For example, an agreement that precluded the officer from disavowing the recommendation when asked by the President for his views would impermissibly interfere with the free flow of information to the President contemplated by the Opinion Clause. *See Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 463 (1855) (explaining that the Opinion Clause requires that the "advice or opinion must of course embody the individual thought of the officer giving it"); Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 672–73 (1996) (discussing how the Clause facilitates the President effective execution of the laws). Finally, the judicial enforcement of settlements that require executive branch officials to provide certain advice within the executive branch, or that commit executive branch officials to make certain recommendations directly to Congress, would raise serious separation of powers concerns apart from any limitations that the Recommendations Clause or the Opinions Clause might impose. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) (tracing executive privilege to separation of powers concerns arising from disruption of President's internal decision making processes); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (explaining that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided"); *Smith v. United States*, 333 F.2d 70, 72 (10th Cir. 1964) (holding that federal court could not mandamus the Secretary of the Interior to make legislative recommendations to Congress); *see Chicago School Case* at 17, 19. That is particularly true when executive branch officials promise to adhere to general standards of conduct in advising the President, such as making "best efforts" in seeking certain appropriations. *See Chicago School Case* at 19. Promises of the former type not only invite impermissible judicial supervision of the executive branch but also lack judicially-manageable enforcement criteria. As the Seventh Circuit has explained, its decision to construe the executive branch consent decree contained in *United States v. Board of Educ.*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), so as not to require the United States to seek certain appropriations from Congress was based "in substantial measure . . . [on the] concern that judges should not take control of the budgetary process even with the consent of the parties" *See Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993), *cert. denied*, 511 U.S. 1082 (1994).

B. Promises to Promulgate Rules

The Meese policy states that a "department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations." Meese Policy at 3. The policy also states that a "department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act." *Id.*[19] The policy does not identify the types of agency actions that it intends to encompass within the term "regulations" but we consider a broad range of agency regulatory actions below, from the promulgation of legislative rules, which ordinarily are subject to notice-and-comment requirements, to the initiation of investigations, which ordinarily are not.

As we have already explained, the Attorney General ordinarily may not settle litigation on terms that would transgress valid, otherwise applicable, statutory restrictions on agency conduct. *See Executive Bus. Media, Inc. v. United States Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993). If, for example, a statute prohibits an agency from considering a particular factor in evaluating whether to propose a rule, or specifically limits an agency's consideration of potential rules to certain enumerated factors, the Attorney General generally may not settle litigation by committing the agency to consider the prohibited factors in future rule makings. A contrary conclusion would transform the settlement power into a general dispensing power with respect to those statutes that purported to govern agency conduct. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins., Co.*, 463 U.S. 29, 43 (1983) (explaining that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"); *Citizens to Preserve Overton Park*, 401 U.S. at 416.

Similarly, when the Administrative Procedure Act ("APA") governs the means by which a rule may be adopted, proposed, or considered, the Attorney General may not resolve litigation, in the absence of an express congressional authorization, by committing an agency to follow a contrary rulemaking process. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (holding agency rule not binding on a court where promulgated in violation of the APA). For example, the Act may require the agency to proceed only pursuant to notice and comment rulemaking, thereby precluding the agency from making an enforceable promise to undertake regulatory action through means other than the notice and comment

[19] While the policy forbids only those consent decrees that would limit the discretion to revise, amend, or promulgate regulations, it prohibits any settlement agreements that "interfere[ ]" with the revision, amendment or promulgation of regulations through procedures set forth in the Administrative Procedure Act. It is not clear whether the difference in terminology is intended to reflect a difference in substance. For purposes of this memorandum, we put aside the policy's distinction between consent decrees and settlement agreements and consider the constraints that limit the Attorney General's settlement power generally

procedure. *See Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229,1253–55 (D.C. Cir. 1980) (rejecting challenge to EPA consent decree brought under the APA on the ground that the commitment to undertake a preliminary investigation does not constitute a rule within the meaning of the Administrative Procedure Act). Thus, while the APA does not, as a general matter, preclude the executive branch from entering into settlements that would limit the future exercise of congressionally conferred executive branch discretion, actions taken pursuant to settlements are not inherently immune from APA review. *Id.* at 1253–55. To the extent that a discretion-limiting settlement is subject to APA review, moreover, it must conform to the substantive and procedural requirements that the APA imposes upon agency action outside the settlement context. For that reason, settlements that commit an executive branch agency to promulgate substantive rules, which normally may be promulgated only pursuant to notice and comment procedures, are likely to raise serious concerns that they will transgress the APA's limitations on an agency's rulemaking authority.

In addition to the questions that may arise concerning the limitations that the APA may impose on an agency's authority to constrain its regulatory discretion pursuant to a settlement, it will also be important to ensure that a discretion-limiting settlement would not divest an agency of discretion that Congress has mandated that it retain. *See Kendall v. United States ex rel Stokes*, 37 U.S. (12 Pet.) 524, 609–13 (1838); *Binding Arbitration*, 19 Op. O.L.C. at 224 (discussing executive's obligation to "comply with the terms of valid statutes" committing discretionary power to executive branch officials); *see also* Rabkin & Devins, *supra* at 226 (explaining that courts have held that where a statute vests ultimate decisional responsibility in the executive secretary the secretary cannot delegate this authority); *Morgan v. United States*, 304 U.S. 1, 1–4 (1938) (discussing statutory limitations on subdelegation of executive functions). Difficult interpretive questions arise, however, when the statutes that govern agency conduct confer discretion without making clear either that the executive branch's discretion must be retained or that it may be divested.

For example, numerous statutes authorize agencies to exercise their discretion to adopt rulemaking procedures beyond those that Congress has expressly mandated. *See, e.g., USAir, Inc. v. Department of Transp.*, 969 F.2d 1256, 1260 (D.C. Cir. 1992). It is generally presumed that, although agencies are bound to follow such discretionary procedures once they have been adopted, they retain the power to revise these discretionary procedures in accord with statutory requirements governing the process for the revision of such procedures. *Id.* at 1260. It is far less clear, however, that Congress, in conferring procedural discretion upon agencies, intended to permit them to settle litigation on terms that would divest them of their statutorily conferred power to revise such procedures, and that question will be present even in circumstances in which the revision would be undertaken in accord with the statutory provisions governing the process of revision. Similar confusions may arise with respect to congressional intent regarding the substantive regulatory power of agencies. Congress often authorizes agencies to exercise their discretion in selecting substantive regulatory outcomes without making clear whether those agencies are precluded from settling litigation on terms that would preclude them from revising those selections in the future.

Definitive answers to the interpretive questions that arise when the relevant statutes do not clearly address the executive branch's authority to bind the exercise of the discretion that has been statutorily conferred will necessarily depend upon an examination of the particular statutory context. Nevertheless, certain general principles may help to guide analysis. These principles are set forth in the leading case to have considered the interpretive questions posed by settlements that purport to regulate the policy discretion of executive branch agencies: *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

In *Citizens for a Better Environment*, the court considered a legal challenge to the so-called Flannery Decree, which the Environmental Protection Agency ("EPA") entered into with environmental groups in order to resolve claims that it had failed to implement certain provisions of the Clean Water Act ("CWA"). *Id.* at 1120. The consent decree committed the EPA to a "detailed program for developing regulations to deal with the discharge of toxic pollutants under the CWA." *Id.* Specifically, the decree:

> required EPA to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants. It also mandated the use of certain scientific methodologies and decision-making criteria by EPA in determining whether additional regulations should be issued and whether other pollutants should be included in the regulatory scheme. It did not specify the substantive result of any regulations EPA was to propose and only required EPA to initiate "regulatory action" for other pollutants identified through the research program. The regulations envisaged by the Agreement were, after full notice and comment, to be promulgated in phases by December 31, 1979 and the industries affected by them were to comply with them by June 30, 1983.

Id. at 1120–21.

After the district court entered the decree, an appeal was taken, and the court of appeals remanded for a determination whether the agreement "impermissibly infringe[d] on the discretion Congress committed to the EPA Administrator to make certain decisions under the CWA." *Citizens for a Better Env't*, 718 F.2d at 1121 (describing decision in *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1259 (D.C. Cir. 1980)). The court of appeals began by rejecting the contention that the consent decree exceeded Article III limits on the judicial power. Anticipating the Supreme Court's eventual holding in *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986), the court concluded that Article III permitted the district court to issue the consent decree even though it provided relief in excess of what the court could have imposed by injunction. *See Citizens for a Better Env't*, 781 F.2d at 1124–27. The court also rejected the contention that the Article III limits on judicial power established in *Vermont Yankee* (435 U.S. 519 (1978)) prevented the district court from entering a decree that committed the EPA to undertake regulatory steps that "go beyond statutory requirements." *Citizens for a Better Env't*, 718 F.2d at 1125. The court explained that "[t]he Decree here was largely the work of the EPA and the other parties to these suits, not the district court; manifestly the requirements imposed by the Decree do not represent judicial intrusion into the Agency's affairs to the same extent they would if the Decree were 'a creature of judicial cloth.' " *Id.* at 1128 (quoting *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981)). It further explained that

> [s]ince the solution arrived at was to a considerable extent the work of the Agency itself, and since the district court's role was confined to approving the fairness of the consent decree which incorporates it and ensuring the consistency of the Decree with the Act, *Vermont Yankee*'s concern for 'judicially-conceived notions of administrative fair play' is inapposite here.

Citizens for a Better Env't, 718 F.2d at 1128; *see Costle* Memo at 5–6.

The court of appeals next turned to the question whether statutory provisions that restricted agency authority barred the EPA from binding its discretion in the manner required by the decree. The court noted that the decree imposed only a "limited infringement on the Agency's discretion," *Citizens for a Better Env't*, 718 F.2d at 1129–30, because "it requires EPA to begin the process of formulating regulations in compliance with the Act and describes a methodology to be followed by the Agency, but it leaves the outcome of the process (the substantive regulations) to the Agency's discretion." *Id.* at 1129 n.14. Moreover, it concluded that Congress had impliedly sanctioned this limited, voluntarily-adopted restriction on agency discretion when it amended the CWA in a manner that preserved the decree. *Id.* at 1130.

In so analyzing the issues, the majority impliedly rejected the dissent's constitutional arguments against the decree. The dissent contended that the decree violated the constitutional separation of powers because it permitted an Article III court to require an executive branch agency to "exercise its administrative discretion in a particular way." *Id.* at 1131 (Wilkey, J., dissenting). As a result, the dissent concluded that it was of no consequence that the decree purported to restrict the EPA's discretion only with respect to preliminary procedural decisions, as opposed to final substantive rules. Any judicially imposed limitation on executive discretion, the dissent contended, was unconstitutional. Moreover, the dissent contended, the decree was particularly problematic because it purported to constrain the discretion of subsequent administrations. In this respect, the dissent argued, the decree could not be said to constitute a voluntary limitation on executive discretion. Rather, the discretion of subsequent administrations would be involuntarily constrained by judicial order.

The majority adopted a contrary premise. It held that Congress may authorize executive branch agencies to divest themselves of the statutorily conferred discretion that they would otherwise have been entitled to exercise, and thus to bind themselves to comply with voluntarily-adopted, judicially enforceable commitments that Congress had not mandated. As we have explained above, our analysis of the constitutional limitations on executive branch settlements that limit congressionally conferred executive branch discretion accords with this holding.

Moreover, although the court of appeals emphasized the distinction between an agency's commitment to undertake certain preliminary procedures in formulating rules and an agency's commitment to reach certain "substantive outcomes" in final regulations, it did not suggest that such a distinction was necessarily of constitutional significance. It simply concluded that this distinction was relevant to a determination whether Congress had intended to permit the EPA to settle on terms that would limit the exercise of its discretion. *Citizens for a Better Env't*, 718 F.2d at 1126. Again, we believe this analysis to be correct, and, indeed, the distinction drawn by the court accords with our conclusion that a settlement that would commit an agency to promulgate substantive regulations of the kind ordinarily subject to the notice and comment requirements of the APA would likely be prohibited by the APA.

The Constitution does not generally prohibit Congress from authorizing the Attorney General to enter into a settlement that binds an agency to adopt regulations, whether they are substantive or procedural in nature, but there are nevertheless sound reasons to conclude that an agency's commitment regarding procedural rules is more likely to have been authorized by Congress than an agency's commitment regarding certain substantive regulatory outcomes. *See Costle* Memo at 5. Similarly, agency commitments of shorter duration are less likely to press the limits of congressional authorization than agency commitments of longer duration. As Professor Shane explains:

> [A] promise to maintain a rule in place for ten years absent "exigent circumstances" or a "national emergency" would appear such a bizarre departure from ordinary administrative procedure — a procedure that Congress has never adopted for any regulation whatsoever — that authority to make such a promise could not

> reasonably be implied merely from a general authorizing statute and the Attorney General's broad authority to conduct litigation.

Shane, *supra* at 255; *see also Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 224 (1988) (agency must be expressly authorized to engage in "extraordinary" exercise of retroactive rulemaking).

In addition, in individual cases, the distinction between preliminary procedural regulations and final substantive rules may be relevant to due process limitations on agency rulemaking power, *see Environmental Defense Fund*, 636 F.2d at 1257, or concerns regarding the executive's ability to carry out its constitutionally assigned functions. *Cf. The Constitutional Separation of Powers*, 20 Op. O.L.C. at 176–77. In accord with basic principles of statutory construction, therefore, these constitutional concerns may justify the conclusion that, in some instances, the ordinary presumption in favor of the Attorney General's settlement power should give way to the countervailing principle that statutes should be construed to avoid serious constitutional concerns.

The central point is that federal law restrictions on the scope of settlements that purport to constrain agency rulemaking authority — both procedural and substantive — are primarily rooted in legislative intent, rather than constitutional rule. General presumptions regarding legislative intent may provide a basis for concluding that an agency has broader settlement discretion with respect to its procedures than its substantive regulatory decisions, and these presumptions may be traceable to underlying constitutional principles. In the end, however, it is legislative intent that will, within the broad constitutional limits discussed above, determine the scope of an agency's discretion to circumscribe the exercise of its statutorily-conferred regulatory authority.

Similar issues regarding the limits that federal law places on settlements that purport to restrict the regulatory discretion of executive branch agencies arise outside the specific context of the rulemaking process. For example, settlements may purport to restrict the enforcement discretion of executive branch agencies. The proper analysis is essentially the same as applies to settlements that limit rulemaking discretion.

In *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985), for example, the United States Court of Appeals for the District of Columbia Circuit considered a suit in which a drug manufacturer sought to invalidate a settlement agreement between a competing drug manufacturer and the Food and Drug Administration ("FDA"). The settlement would have prohibited the FDA from undertaking certain enforcement activities for 18 months. The settlement concluded litigation that arose after the FDA had seized a drug that it had claimed was unapproved because it was "new" within the meaning of the relevant statutory framework. The drug manufacturer then brought a declaratory judgment action contending that the drug was not "new," and the FDA counterclaimed. In return for the dismissal of the declaratory judgment action, the FDA agreed not to pursue enforcement activities against the manufacturer with respect to the drug in question for 18 months. The competing drug manufacturer contended that the settlement agreement amounted to an abdication of the FDA's statutory enforcement obligations.

In rejecting the competing drug manufacturer's claim, the court of appeals explained that the agency had harbored doubts about the status of the drug in question and wished to avoid having the status of the drug determined in a judicial rather than an administrative proceeding. "This was precisely the sort of balancing of agency priorities and objectives, informed by judgments on agency expertise, that, absent some 'law to apply,' should not be second-guessed by a court." 779 F.2d at 686. The fact that the agency had agreed to bind the exercise of its enforcement discretion for 18 months did not change the analysis. It simply represented "the quid pro quo that the agency found necessary to procure [the plaintiff's] abandonment of its declaratory judgment action. We can no sooner question the soundness of this bargain than we could a unilateral agency decision not to prosecute ab ibnitio . . . ." *Id.*[20] Thus, as in *Citizens for a Better Environment*, the court of appeals considered the question as one that turned on congressional intent, rather than constitutional restrictions on the power of the executive branch to limit its discretion to enforce congressional statutes.

C. Promises to Divest Discretion

The Meese policy states that a "department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy, or managerial choices, or to protect the rights of third parties." *See* Meese Policy at 3. The Meese policy also states that

> in any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.[21]

[20] The court noted that because the agency had restricted its enforcement discretion only for a limited period of time, *see Schering*, 779 F.2d at 685–86, and had not finally concluded that the drug was "new," *id.* at 685 n 18, there was no question that the agency "has implemented a policy or pattern of nonenforcement that amounts to 'an abdication of its statutory responsibilities[.]' " *Id* at 686

[21] Again, the Meese policy's distinction between the rules that should apply to consent decrees as opposed to settlement agreements is not mandated by federal law

Id.

To the extent that this final limit on the Attorney General's settlement power simply requires executive officials to exercise the discretion that they are required by law to retain, it is unremarkable. As we have explained, when Congress mandates that the executive branch retain discretion over certain questions, the executive branch generally has no authority to divest itself of that discretion. *See Costle* Memo at 5–6. Similarly, when the Constitution vests a discretionary power in the President, such as the power to make recommendations to Congress, the Attorney General may not enter into settlements that divest the President of that constitutionally committed discretion. Absent that constitutional requirement, however, the Attorney General's settlement discretion turns largely on whether Congress has authorized the limitation on administrative discretion proposed in the settlement.

With respect to the effect of settlements on the rights of third parties, there is no general constitutional limitation on discretion-limiting settlements even though such settlements may have consequences for persons or entities not party to the settlements and even though the settlement may therefore constrain the executive branch's capacity to take account of the interests of non-parties in the future. To the extent that a settlement would infringe a legal right of a third party, whether statutory or constitutional, however, the settlement would likely be unlawful as an initial matter, wholly apart from the question whether it may be subject to collateral attack. *See Local 93, Int'l Ass'n of Firefighters*, 478 U.S. at 526 (explaining that consent decree mandating affirmative action plan would have to conform to the Equal Protection Clause); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (holding, in connection with challenge to consent decree implementing affirmative action program, that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings"). Finally, general statutory provisions such as the Administrative Procedure Act may limit the manner in which agencies may adopt certain regulations that would affect the interests of third parties, by, for example, requiring that such regulations be adopted only after notice and an opportunity for comment by interested parties has been provided. These statutory limitations may therefore constrain the exercise of the settlement power in a manner that is protective of third parties.

V. Conclusion

In general, the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion that has been conferred pursuant to statute. Such settlements must be consistent, however, with statutory provisions that directly limit the Attorney General's settlement power as well as statutory limitations that constrain the authority of the executive branch agencies on behalf of which the settlement is entered. The Constitution may bar settlements limiting the exercise of statutorily conferred discretion in extraordinary circumstances, and Article III may render certain types of promises contained in such settlements unenforceable, but neither Article II nor Article III should be understood to impose substantial impediments to the generally broad power of the Attorney General to exercise the settlement discretion that Congress has authorized her to exercise. Article III does not preclude her from settling simply because a court could not have imposed similar discretion-limiting terms by an ordinary injunction. On the other hand, with respect to settlements that would limit the future exercise of discretion that has been conferred upon the executive branch directly by the Constitution, such as the discretion that is conferred upon the President by the Pardon Power or the Recommendations Clause, the scope of the Attorney General's settlement power is constrained by the very constitutional provisions that vest discretionary authority in the President and therefore necessarily preclude the President from subjecting the exercise of that discretion to the control of the other party to a settlement or to judicial enforcement.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

The Federalism Accountability Act

Provisions of the proposed Federalism Accountability Act that would alter the rules under which courts determine whether Congress has preempted state law by statute or authorized preemption by regulation could have far reaching and unintended consequences and should only be enacted if Congress determines that existing preemption doctrine has systematically frustrated congressional intent and that statutory rules of construction would produce better results.

Provisions of the bill that would instruct courts to resolve ambiguities in federal law in favor of preserving the authority of the states could frustrate the intentions of Congress and rulemaking agencies and should not be enacted

July 14, 1999

STATEMENT BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

I am honored to be here today to testify regarding S. 1214, the Federalism Accountability Act of 1999. Mr. Spotila, representing the Office of Information and Regulatory Affairs of the Office of Management and Budget, has discussed the Administration's concerns with section 7 of the bill, which would require Federal agencies to prepare and publish federalism assessments for certain Federal rules. My remarks will focus on section 6, which would establish rules of construction relating to statutory and regulatory preemption.

Section 6 would establish new rules of construction relating to Federal preemption of State law. Sections 6(a) and 6(b) would alter the rules under which courts currently determine whether Congress has preempted State law by statute or authorized preemption of State law by regulation. Section 6(c) would operate more broadly, requiring that any ambiguity in the Federalism Accountability Act or in any other Federal law be construed in favor of preserving the authority of the States and the people. Although we are still evaluating the potential implications of these provisions, we believe that each raises questions that warrant careful consideration.

Under current Supreme Court doctrine, the preemptive force of a Federal statute is determined by examining Congress's intentions with respect to preemption.[1] Congressional intent to preempt can be stated explicitly, in the terms of a statutory provision addressing preemption. This is commonly referred to as "express preemption." In addition, congressional intent can also be conveyed implicitly, through the establishment of Federal law that conflicts with State law, commonly known as "conflict preemption," or that occupies an entire field and leaves no room for State lawmaking, commonly known as "field preemption." Conflict preemption occurs where Federal law and State law are in direct conflict or where

[1] For a general summary of Supreme Court doctrine concerning the preemption of State law by Federal statutes, see *English v General Elec. Co.*, 496 U S 72, 79 (1990) *Accord Boggs v. Boggs*, 520 U S. 833, 839–41 (1997)

State law stands as an obstacle to the achievement of Federal objectives. Field preemption occurs where the creation of a pervasive system of Federal regulation makes it reasonable to infer that Congress intended to disallow supplemental State law measures or where Congress legislates in an area where the Federal interest is so dominant that a Federal system can be presumed to displace State laws on the same subject. The doctrine of field preemption has formed the basis for Federal preemption of State law in a number of important areas, including nuclear safety, collective bargaining, and alien registration.[2]

Section 6(a) would change the rules under which courts and agencies infer congressional intent to preempt by statute. Under section 6(a), no Federal statute enacted after the effective date of the Federalism Accountability Act would preempt State law unless the statute contained an express statement of Congress's intent to preempt or there was a "direct conflict" between the Federal statute and State law so that the two could not "be reconciled or consistently stand together." This provision would profoundly alter the Federal courts' longstanding approach to preemption by Federal statute. It would apparently abolish the doctrine of field preemption and impose significant new limits on conflict preemption.[3]

The findings section of the Act notes that this change is made necessary by Federal court preemption rulings that have applied current doctrine to produce results "contrary to or beyond the intent of Congress." S. 1214, § 2(5). It is not clear, however, which applications of existing preemption doctrine are viewed as having misinterpreted the intent of Congress. Our review indicates that Federal court decisions involving field preemption and conflict preemption generally have demonstrated a strong commitment to the avoidance of preemption that is not necessary to the achievement of clear statutory objectives. The Supreme Court has determined, for example, that Federal law occupies the field of nuclear safety regulation, but does not preempt State regulation of nuclear utilities that does not bear directly on safety; and that the National Labor Relations Act occupies the field of collective bargaining, but not the field of labor relations in general.[4]

In addition, under both conflict and field preemption doctrines, the burden that must be borne by the proponent of preemption varies with the setting. In areas of traditional State primacy, the courts require a heightened showing of congressional intent to preempt. Indeed, the Supreme Court has stated that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the

[2] *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S 190, 212–13 (1983) (nuclear safety), *Metropolitan Life Ins. Co. v Massachusetts*, 471 U.S. 724, 750–51 (1985) (collective bargaining); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (registration of aliens).

[3] The Supreme Court has stated that conflict preemption and field preemption should not be viewed as "rigidly distinct" categories and has suggested that "field preemption may be understood as a species of conflict preemption," since State law operating within a preempted field can be seen to conflict with Congress's intent to exclude State regulation. *English v. General Elec*, 496 U S at 79 n 5 Section 6(a) of S 1214, by confining implied preemption to situations involving "a direct conflict" between irreconcilable or inconsistent directives, would appear to foreclose recognition of field preemption as a subclass of conflict preemption for purposes of section 6 of the bill.

[4] *See Pacific Gas & Elec.*, 461 U S at 212–13 (limited preemption respecting nuclear safety); *Metropolitan Life*, 471 U S. at 750–51 (limited preemption respecting collective bargaining)

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "[5]

More importantly, it seems far from clear that increased reliance on express preemption provisions in Federal statutes will produce better results. It can be extremely difficult to craft express preemption provisions that produce the desired balance between Federal and State authority. Detailed express preemption provisions may be prone to overinclusiveness, displacing State law where such displacement is not truly necessary, or underinclusiveness, undermining the effectiveness of Federal law by failing to displace antithetical State law. Moreover, the problems with such express preemption provisions are likely to be most acute where the stakes are highest — that is, where Congress enacts legislation that applies broadly and over a long period of time. Indeed, some of the harshest criticism of Federal preemption has focused on perceived excesses of preemption under express statutory provisions contained in such legislation. One noteworthy example is section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1994). That provision, which expressly preempts most State laws that "relate to" employee benefit plans covered by ERISA, has been criticized for cutting too wide a swath through State law governing employee benefit plans.[6]

It is also important to note that enactment of S. 1214 would not prevent a later Congress from instructing that the preemptive effects of a particular statute should be determined, notwithstanding section 6(a), by reference to traditional implied preemption doctrines. Indeed, one significant set of interpretive problems that would likely arise in the implementation of this provision — and of the other rules of construction found in section 6 — would involve disputes as to whether Congress implicitly intended to exempt particular statutes from section 6 of the Federalism Accountability Act. For example, if a subsequent Congress enacted a law that established a pervasive Federal regulatory regime and that demonstrated a clear, though not express, intention to preempt, courts might well conclude that the later enactment implicitly repealed section 6(a)'s limitations on field and con-

[5] *California v. ARC America Corp*, 490 U.S. 93, 101 (1989) (quoting *Rice v Santa Fe Elevator Corp*, 331 U S 218, 230 (1947)) Conversely, in fields that implicate certain special and well-established Federal interests, such as the protection of Indian self-government, the test for determining whether State authority has been displaced is less exacting *See, e.g., California v Cabazon Band of Mission Indians*, 480 U.S 202, 215 (1987) (States, in the absence of congressional authorization, can regulate Indian conduct or Indian lands inside Indian country only in "exceptional circumstances"); *White Mountain Apache Tribe v. Bracker*, 448 U S 136, 143 (1980) ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.").

[6] *See, e g.*, Jeffrey E. Shuren, *Legal Accountability For Utilization Review in ERISA Health Plans*, 77 N.C L Rev 731, 772 (1999) ("ERISA's preemption provisions combined with the limited remedies available under ERISA for breach of fiduciary duty have shielded [entities that perform utilization review] as well as third-party payers, from the consequences of [utilization review] decisions."), Jack K Kilcullen, *Groping for the Reins· ERISA, HMO Malpractice and Enterprise Liability*, 22 Am. J L & Med. 7, 9–10 (1996) (preemption under ERISA "interferes with judicial efforts to establish corporate liability" and prevents States from undertaking needed efforts to "reformulat[e] traditional concepts of medical malpractice to reach HMOs"); *see also Andrews-Clarke v Travelers Ins. Co.*, 984 F Supp 49, 63 (D. Mass 1997) ("Under any criterion . the shield of near absolute immunity now provided by ERISA simply cannot be justified.").

flict preemption. Such difficult interpretive issues would introduce a form of confusion not present under current Supreme Court preemption doctrine.

Section 6(b)'s proposed changes to current regulatory preemption doctrine raise concerns similar to those raised by section 6(a)'s proposed changes to current statutory preemption doctrine. The Supreme Court has stated that "in proper circumstances, [a Federal] agency may determine that its authority is exclusive and pre-empt[ ] any state efforts to regulate in the forbidden area," *City of New York v. FCC*, 486 U.S. 57, 64 (1988). In describing these "proper circumstances," the Court has rejected the notion that the rulemaking agency must demonstrate that Congress specifically considered the question of regulatory preemption and decided to confer this authority on the rulemaking agency. Justice White, writing for a unanimous Court in *City of New York*, described the test of agency authority to preempt by regulation in the following terms:

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 383 (1961).

City of New York, 486 U.S. at 64.

Section 6(b) would apparently alter the Supreme Court standard for determining whether rulemaking agencies possess the authority to issue preemptive regulations. Under this provision, a Federal rule issued after the effective date of the Federalism Accountability Act could not preempt State law unless (1) regulatory preemption was "authorized by the statute under which the rule is promulgated" and the regulation was accompanied by a statement in the Federal Register explicitly stating that such preemption was intended, or (2) the regulation directly conflicted with State law.

It is difficult to predict how courts might interpret the reference to statutory authorization in section 6(b)(1). Opponents of new regulations would likely argue that section 6(b)(1) is quite limited — that statutory authorization to issue preemptive regulations, in this context, can only mean specific and express authorization to issue such rules. (Rulemaking agencies would need some sort of statutory authorization to promulgate regulations that preempt by virtue of a direct conflict under section 6(b)(2); the omission of any reference to authorization in that provision might be cited as evidence that the authorization referred to in section 6(b)(1) must be specific and explicit.) Moreover, opponents of new regulations would also be likely to argue that this restrictive reading of section 6(b)(1) must prevail so long as it is merely plausible, since ambiguities in the Act, would have to be resolved in favor of the States and the people by virtue of section 6(c).

These questions concerning the requirements for issuing preemptive regulations under section 6(b)(1) would, at a minimum, engender significant confusion and could produce a substantial volume of litigation. Uncertainty and the threat of litigation could be especially serious for agencies that are called upon to update and revise complex regulations under longstanding statutes that lack specific and express authorizations to issue preemptive rules. The Occupational Safety and Health Administration (''OSHA''), for example, could confront arguments that the Occupational Safety and Health Act, although construed in the past to authorize the issuance of preemptive regulations, lacks the required statutory statement and that new OSHA rules, therefore, can only preempt State law where the new OSHA requirement directly conflicts with State law.[7]

Under section 6(c), any ambiguity in S. 1214, or ''in any other law of the United States''—predating or postdating the Federalism Accountability Act— would ''be construed in favor of preserving the authority of the States and the people.'' The potential implications of an instruction of this sweeping scope are difficult to assess, although the potential for far reaching and unanticipated consequences is pervasive. It is unclear how this provision might affect the reach of Federal statutes and regulations. How would section 6(c) apply to statutory and regulatory language that, although ambiguous on its face, has been clarified by case law or administrative interpretation predating the enactment of section 6(c)? Would section 6(c) require adoption of the narrowest plausible reading of virtually every statutory or regulatory assertion of Federal power on grounds that such a reading operates to preserve the greatest authority for the States and the people? Special difficulties would arise in the interpretation of Federal laws that limit State authority in ways that arguably enhance the authority of the people. How, for example, would section 6(c) affect the operation of the Dormant Commerce Clause, which forbids States from imposing certain burdens on interstate commerce in areas where Congress has not acted affirmatively to authorize State activity? Would ambiguities concerning the scope of a Federal law authorizing State regulation be resolved in favor the authority of the States to regulate or the authority of the people to engage in interstate commerce in an environment free of State regulation? The breadth and generality of section 6(c) create a risk

[7] In *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), eight members of the Court agreed that no express statutory provision invests OSHA regulations with the power to preempt ''nonconflicting state laws'' (that is, supplemental State-law requirements applicable to federally regulated practices). *Id* at 96–104 (plurality opinion of O'Connor, J.), *see id* at 117–18 (Souter, J., dissenting). Nevertheless, a majority concluded that OSHA regulations preempt such nonconflicting State laws, with the plurality basing preemption on the conflict between such State laws and Congress's clear intention to ensure that employees and employers are subject to ''only one set of regulations.'' *Id* at 99, *see id* at 109 (Kennedy, J., concurring in the judgment under an express preemption rationale).

that unintentional ambiguities in Federal statutes and regulations, with tenuous connections to the balance between Federal and State power, could be exploited in unforeseen ways to frustrate the intentions of Congress and rulemaking agencies.

In short, section 6 of S. 1214, as drafted, would have far reaching effects. Sections 6(a) and 6(b) would significantly alter the rules under which courts determine the preemptive effects of Federal statutes and regulations. In our view, systematic reform of this nature would only be warranted if Congress were convinced that existing preemption doctrine systematically operates to frustrate congressional intent (and that statutory rules of construction would produce better results). If, on the other hand, Congress's concerns about current preemption doctrine derive from particular cases or classes of cases, any statutory reform should be tailored to correct the results in those cases or classes of cases. The potential implications of section 6(c) are considerably more pervasive. Section 6(c) has the potential to frustrate congressional intent and agency undertakings wherever questions arise as to the legal allocation of power between the Federal government and the States. It should be eliminated.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

Inapplicability of the Federal Vacancies Reform Act's Reporting Requirements When PAS Officers Serve Under Statutory Holdover Provisions

There is no "vacancy" within the meaning of the Federal Vacancies Reform Act of 1998 when a presidentially appointed, Senate-confirmed officer continues to hold a position under a statutory holdover provision. Therefore, the holdover service is not reportable under the Act.

July 30, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

We recently received two inquires that raised the question whether service of a presidentially appointed, Senate-confirmed ("PAS") officer under a statutory holdover provision is reportable as a vacancy under the Federal Vacancies Reform Act of 1998 ("Vacancies Reform Act" or "Act"). As discussed below, we have concluded that holdover service is not a vacancy for purposes of the Act and therefore is not reportable. We wanted to inform you of our conclusion to facilitate a uniform approach among the executive agencies on the reporting of this information. Because the Act is somewhat confusing on the point, however, we also would strongly urge (and the White House Counsel's Office concurs) that you notify the General Accounting Office that the Administration is not reporting holdover positions as vacancies.

Statutory holdover provisions provide for an officer appointed for a term of years to continue to serve in the office at the expiration of the term for which he or she was appointed. In some cases that period is open-ended — statutorily defined as continuing until a successor is appointed. In other cases, the period continues until either a successor is appointed or a specific period of time has expired. In either case, the PAS officer's term in the office continues until the expiration of the statutorily defined holdover period.

As a matter of constitutional law, the executive branch consistently has taken the position that there is a vacancy for purposes of the Recess Appointments Clause when an appointment for a term of years expires and the officer continues serving under a holdover provision.[1] There is, however, no necessary correspondence between the meaning of a "vacancy" for purposes of the Recess Appoint-

[1] Judicial decisions on the issue have been mixed. *Compare Staebler v Carter*, 464 F. Supp. 585, 588–601 (D.D C. 1979) (holding that a Federal Election Commission ("FEC") office was vacant for Recess Appointments Clause purposes when the incumbent continued to exercise authority pursuant to a holdover provision that provided that "[a] member of the [FEC] may serve on the Commission after the expiration of his term until his successor has taken office") *with Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993) (whether a vacancy exists for Recess Appointments Clause purposes depends on the wording and structure of the particular holdover provision, deciding that the Postal Service holdover provision did not create a vacancy), *vacated as moot*, No 93–5287, 93–5289, 1994 WL 163761 (D C. Cir Mar. 9, 1994)

ments Clause and the meaning of a "vacancy" as used in a statute, such as the Vacancies Reform Act.

Under the Vacancies Reform Act, a "vacancy" occurs when a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a) (Supp. IV 1998). This is a narrower idea of a vacancy than is applicable in the context of the Recess Appointments Clause. It is, as well, a definition that is not, by its terms, applicable to an officer serving under a statutory holdover provision. Under a holdover provision, the Senate-confirmed officer continues to serve in the office and therefore has not died, resigned, or become unable to perform the functions and duties of the office.

In addition, the Vacancies Reform Act provides, in a separate section specifically addressing service under a holdover provision, that the Act is not intended to affect the service of a PAS officer under such a provision:

> Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office —
>
> (1) after the expiration of the term for which such person is appointed; and
>
> (2) until a successor is appointed or a specified period of time has expired.

5 U.S.C. § 3349b (Supp. IV 1998). As a result, we believe that there is no vacancy to be reported under the Act when a PAS officer continues service under a holdover provision.

Although we believe that this is the proper understanding of the Act, § 3345(c)(2) makes what would otherwise be a clear result somewhat less clear. Section 3345(c)(2) provides that "[f]or purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office." Viewed in isolation, this provision could be interpreted to extend the definition of a vacancy to cover service under a holdover provision. Section 3345(c)(2), however, must be interpreted in light of the purpose of § 3345(c) as a whole, and, as so interpreted, it does not alter the conclusion provided by examining the other provisions of the Act.[2]

Section 3345(c) was added as a late amendment to the Act for the purpose of creating an additional class of acting officers for a specific, narrow situation: officers holding fixed terms with no holdover provision who are renominated to

[2] The other part of section 3345(c) is subsection (c)(1), which provides.

> Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

the office. *See* 144 Cong. Rec. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) ("New § 3345(c) was added to address the special case of an executive department (not executive agency) officer who serves not at the pleasure of the President, but under a fixed term, and *without a holdover provision* that governs acting service in that office following expiration of the fixed term." (emphasis added)). Section 3345(c) was not intended to, and does not, supplant or alter the specific statement in § 3349b that the Act does not affect service under a statutory holdover provision.[3]

For these reasons, we believe that when an officer serves under a holdover provision, there is no reportable vacancy under the Act.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

[3] Section 3345(c) refers to "the expiration of a term of office," and § 3349b refers to "the expiration of the term for which such person is appointed." The different phrases convey different meanings. As we discussed above, § 3345(c)(2) was meant to apply to situations in which there is *no* holdover provision and was not intended to supplant or alter the clear statement in § 3349b that the Act does not affect service under a holdover provision. But to the extent § 3345(c)(2) encompasses positions with holdover provisions, its reference to a term of office would sensibly include the full period of service in the office, including the holdover period Section 3349b, on the other hand, refers to "the expiration of the term *for which such person is appointed*" (emphasis added) when it unquestionably intends to exclude the holdover period. This is the term of years designated as the term of appointment in the statute governing appointment to the position *See, e.g.*, 28 U.S C. § 541(b) (1994) ("Each United States attorney shall be appointed for a term of four years On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.")

Eligibility of a Dual United States Citizen for a Paid Position with the Department of Justice

Section 606 of the Treasury and General Government Appropriations Act of 1999 does not bar the Department of Justice from employing, in a paid position, a United States citizen who is also a citizen of another country

August 26, 1999

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF ATTORNEY PERSONNEL MANAGEMENT
DEPARTMENT OF JUSTICE

You have asked whether, under section 606 of the Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681–480, 2681–513 to –514 (1998)[1] ("§ 606"), the Department of Justice may employ, in a paid position, a U.S. citizen who is also a citizen of another country ("dual U.S. citizen"). Section 606 prohibits the Department of Justice from using appropriated funds to employ persons whose post of duty is in the continental United States unless they are "citizen[s] of the United States" or otherwise excepted.[2] *Id.* 112 Stat. at 2681–513. We conclude that § 606 does not bar the Department of Justice from employing a dual U.S. citizen.

I

Section 606 provides as follows:

> Unless otherwise specified during the current fiscal year, no part of any appropriation contained in this [Act] or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post of duty is in the continental United States unless such person: (1) is a citizen of the United States; (2) is a person in the service of the United States on the date of enactment of this Act . . . who, being eligible for citizenship, has filed a declaration of intention to become a citizen . . . (3) is a person who owes allegiance to the United States; (4) is an alien from Cuba, Poland, South Vietnam, the countries of the former Soviet Union, or the Baltic countries lawfully admitted . . . for permanent residence; (5) is a South Vietnamese, Cambodian, or Laotian refugee paroled in the United States after

[1] This provision is set forth as a note to 5 U.S.C. § 3101 (Supp IV 1998)

[2] This memorandum addresses only dual U.S. citizens whose second citizenship does not place them within one of the excepted categories

> January 1, 1975; or (6) is a national of the People's Republic of China who qualifies for adjustment of status pursuant to the Chinese Student Protection Act of 1992. . . . This section shall not apply to citizens of Ireland, Israel, or the Republic of the Philippines, or to nationals of those countries allied with the United States in a current defense effort . . . .

5 U.S.C. § 3101 note (Supp. IV 1998).

In a 1996 memorandum to your office, we addressed the closely related issue of the eligibility for employment of dual nationals who are not citizens of the United States, but who enjoy, as an incident of one of their nationalities, status in an excepted category ("noncitizen dual nationals"). *See Eligibility of a Noncitizen Dual National for a Paid Position Within the Department of Justice*, 20 Op. O.L.C. 366 (1996) ("1996 Memorandum"). In examining the application of § 606 to that situation,[3] we noted that although noncitizen dual national applicants "would seem eligible for hire" by virtue of their membership in one of the excepted categories, these applicants simultaneously would seem to be ineligible, because of their membership in the residual category of nonexcepted persons. *Id.* at 367. Because we did not believe that the plain language of § 606 decided the question, we turned to the purposes of the statutory provision. The 1996 Memorandum concluded that a blanket rule of either ineligibility or eligibility for employment of such noncitizen dual nationals would be in tension with one of "the various, and sometimes conflicting, goals of section 606."[4] *Id.* at 369. As a result, noncitizen dual nationals' eligibility for employment under § 606 had to be evaluated on a case by case basis, by applying the concept of "effective, dominant nationality." *Id.*[5] If the applicant's "effective, dominant nationality"

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[3] The analogous statutory provision in 1996 was section 606 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub L No. 104-208, 110 Stat. 3009-314, 3009-354 (1996). Section 606, as part of an appropriations bill, has been reenacted every year, largely in its current form, since 1938

[4] As the 1996 Memorandum observed:

> The general exclusion of noncitizens from federal employment in the United States seems to be aimed chiefly at protecting national security by ensuring the loyalty of Federal employees, encouraging noncitizens who seek Federal employment to become naturalized, and shielding United States nationals from competition in a substantial sector of the labor market . The exception for nationals of "allied" foreign States, on the other hand, serves distinct, indeed often contrary, interests: it allows Federal employers greater flexibility in meeting their personnel needs, it expresses [the] Nation's solidarity with its allies; and it signifies confidence that the nationals of such allies are unlikely to betray the trust that the United States Government has reposed in them. Any simple, "bright line" rule that treated dual nationals in the applicant's position as eligible — or as ineligible — would promote some of these policies only at the expense of others.

20 Op O.L.C. at 367, *see also Hampton v Mow Sun Wong*, 426 U.S 88, 108, 109 (1976) ("The stated purpose of the [1938 provision] was to give preference to American citizens during a period of widespread unemployment," and its repeated enactment signifies "continuing interest in giving preference, for reasons unrelated to the efficiency of the federal service, to citizens over aliens.").

[5] *See supra* note 3 (citing *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I C.J. 4, 22 (Apr 6)); Note, *Claims of Dual Nationals in the Modern Era The Iran-United States Claims Tribunal*, 83 Mich. L Rev. 597, 613 (1984).

would place him or her in an excepted category, he or she would be eligible; otherwise the applicant would be deemed ineligible.

II

At the very least, in light of the 1996 Memorandum, the Department of Justice can hire dual U.S. citizens where their effective, dominant nationality is with the United States. To conclude otherwise — that § 606 bars the hiring of all dual U.S. citizens — would produce the anomalous result of placing U.S. citizens in a worse position than noncitizens. That result would be particularly untenable here where neither the language nor the purposes of the statute support such a reading. The only question, then, is whether dual U.S. citizens are in a better position for purposes of this statute than the noncitizen dual nationals who were the focus of the 1996 Memorandum — in other words, whether the inquiry into "effective, dominant nationality" is also necessary for purposes of considering the eligibility of dual U.S. citizens for employment.

The 1996 Memorandum read into the statute the concept of effective, dominant nationality. It is not entirely clear that we could not have concluded, from the language and structure of § 606, that the second nationality of the applicant is irrelevant if the applicant possesses one nationality that places him or her in an excepted category. The statute does not define ineligibility for employment, except by providing that an eligible person must possess any of six separate characteristics, and the noncitizen dual national in question did possess one of those six characteristics. Nevertheless, we interpreted the statute to incorporate the inquiry into effective, dominant nationality, and we do not need to revisit that opinion at this time.

There are strong arguments that the potential employees here, being citizens of the United States, are not subject to the test of effective, dominant nationality. Generally, U.S. law evidences hostility towards the notion of inferior classes of American citizenship. *Cf. Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964) (striking down statute providing for denaturalization of naturalized citizens who returned to their original nation to reside for three or more years, noting that it "creates indeed a second-class citizenship").[6] Furthermore, although U.S. policy disfavors dual citizenship,[7] it recognizes that in many cases the status of

[6] U S. law's intolerance for second-class citizenship leads, for example, to assertions that naturalized citizens generally enjoy the same rights as natural born citizens *See Knauer v. United States*, 328 U.S. 654, 658 (1946) ("Citizenship obtained through naturalization is not a second-class citizenship It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency.' "); *United States v. Klimavicius*, 847 F 2d 28, 32 (1st Cir 1988) ("Once naturalized, a person enjoys the same rights and opportunities as a native born citizen.").

[7] *See, e g., Von Dunser v. Aronoff*, 915 F 2d 1071, 1073 (6th Cir 1990) ("In general, American law abhors the status of dual citizenship."), *Sadat v. Mertes*, 615 F 2d 1176, 1184 (7th Cir 1980) ("The official policy of this government has been to discourage the incidence of dual nationality." and noting "ambivalent policy" of U.S. government toward dual nationality).

dual U.S. citizenship may be a function of the laws of another country and is not necessarily a status that an individual may control.[8] *See, e.g., Von Dunser*, 915 F.2d at 1073 (footnote omitted) (''[D]ual citizenship exists, largely as a result of conflicts in nations' ideas of citizenship. Following the rule that each nation is permitted to determine who its citizens are, American law reluctantly recognizes the existence of dual citizenship in certain cases, even where the party has renounced allegiance to foreign powers.'') In fact, courts have repeatedly emphasized that:

> The United States recognizes that a person may properly be simultaneously a citizen of this country and of another. Neither status in itself or in its necessary implications is deemed inconsistent with the other. ''. . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. . . . [D]ual citizenship . . . could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other.''

Jalbuena v. Dulles, 254 F.2d 379, 381 (3d Cir. 1958) (exercise of routine privilege of Philippine citizenship, applying for Philippine passport and subscribing oath to support Philippine Constitution, cannot deprive dual U.S./Philippine citizen of U.S. citizenship) (quoting *Kawakita v. United States*, 343 U.S. 717, 723–25 (1952)).[9]

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[8] There are a number of ways in which an individual who holds U S. citizenship can also hold the citizenship of another country, many of which will depend on the laws of the foreign country, as well as the laws of the United States For example, a child born in the United States to alien parents acquires U.S. citizenship at birth and may also acquire the citizenship of his or her parents. A child born abroad to U S. citizen parents may acquire the U.S. citizenship of his or her parents, as well as the citizenship of the country of birth A U.S. citizen who marries an alien may thereby acquire the nationality of his or her spouse, under his or country's laws A U.S citizen minor whose parents become naturalized in a foreign state may thereby acquire the new nationality of the parents. Also, some states continue to claim persons as their nationals even after they have renounced citizenship on becoming naturalized in the United States. *See* 7 Charles Gordon et al, *Immigration Law and Procedure* § 91.01[3][d] (1999); *Sadat*, 615 F.2d at 1184 n 10 (enumerating non-exclusive list of categories of dual U.S citizens); *see also Restatement (Third) of Foreign Relations Law of the United States* § 212 and Reporters' Notes (1987).

[9] *See Kawakita*, 343 U.S at 725 (''[D]ual citizenship presupposes rights of citizenship in each country ''); *see also Lehmann v Acheson*, 206 F 2d 592, 597–98 (3d Cir. 1953) (same); *Terada v. Dulles*, 121 F Supp. 6, 11 (D. Hawaii 1954) (same), *Rueff v. Brownell*, 116 F. Supp 298, 306 (D.N.J 1953) (same), *Okimura v Acheson*, 111 F. Supp. 303, 305 (D Hawaii 1952) (same), *cf. Coury v. Prot*, 85 F 3d 244, 247–48, 250 (5th Cir. 1996) (rejecting dual U.S. citizen's argument that diversity jurisdiction should be available based on non-U.S nationality, noting that ''there is an emerging consensus among courts that, for a dual national citizen, only the American citizenship is relevant for purposes of diversity under 28 U S.C § 1332 '') (citing cases); *but see Rogers v Bellei*, 401 U.S 815, 822–45 (1971) (upholding statute providing that dual citizens born abroad would lose their U.S. citizenship unless they fulfilled a residency requirement in the United States, but concluding that result does not create impermissible inferior classes of U S citizenship because individuals affected by statute are not ''Fourteenth-Amendment-first-sentence citizen[s],'' ''born or naturalized in the United States'') Even *Bellei* does not support the creation of a broad rule of second-class citizenship based on dual citizenship status. The *Bellei* Court indicated that according

Without deciding whether Congress could place restrictions on the employment opportunities of dual U.S. citizens by virtue of their dual citizenship status, we would look for a much clearer statement before inferring that Congress had intended to create such "second class" citizenship based solely on dual citizenship status. We do not read the language in this appropriations provision to reach that result. We conclude that § 606 does not create any burdens on the employability of dual U.S. citizens by the Department of Justice that do not exist for sole U.S. citizens. No inquiry regarding their "effective, dominant nationality" is necessary for purposes of establishing the dual U.S. citizen's eligibility for employment under that provision. Section 606, in a fairly straightforward manner, carves out an exception for U.S. citizens to the general bar on employment. Because dual U.S. citizens are U.S. citizens, they fall into the excepted category.

At the same time, in particular cases, the nature of individual applicants' ties to the U.S. or the strength of their links to their U.S. citizenship may be relevant when considering them for employment with the Department of Justice, particularly when questions of security or loyalty may arise. The manner in which an individual applicant has held or exercised his or her dual citizenship status — or a variation on the "effective, dominant nationality" test — may be most appropriately incorporated into the hiring process, for example, as one of the many factors to be considered in decisions to grant or withhold security clearances for employment.[10]

III

We conclude that § 606 does not bar the hiring of dual U.S. citizens by the Department of Justice. Although U.S. policy generally disfavors the holding of

different levels of favor to different types of U.S. citizenship would be unacceptable — at least for those whose citizenship claim is "bottomed upon Fourteenth Amendment citizenship," 401 U.S. at 835, that is, who obtained U.S. citizenship by birth or naturalization in the United States. According to the *Bellei* Court, for those who do not qualify as Fourteenth Amendment citizens — and whose citizenship claim is thus "wholly statutory," such as Mr. Bellei, *id.* at 833 — Congress may place a statutory condition subsequent for the purpose of maintaining that citizenship. *Id.* The *Bellei* Court thus rejected the dissent's criticism that its holding presented the danger of creating a class of "second class citizen[s]." *Bellei*, 401 U.S. at 835–36, *but see id.* at 837–39 (Black, J. dissenting) (criticizing majority opinion for suggesting the existence of a "hierarchy of citizenship"). To the extent that a dual U.S. citizen may also be a Fourteenth Amendment citizen, under *Bellei* he or she would be entitled to be considered of the same class of citizens as sole U.S. citizens. *See also Afroyim v. Rusk*, 387 U.S. 253, 262 (1967) ("Once acquired, . . . Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.") Accepting the general proposition that dual U.S. citizens who are Fourteenth Amendment citizens are constitutionally protected from badges of second-class citizenship, we see no reason to read any further distinctions among different types of dual citizens into § 606.

[10] Such an approach would not be unprecedented. See, e.g., 32 C.F.R. §§ 147.5, 154.1, 154.2, 154.6, 154.7, 154.16; 32 C.F.R. Pt. 154, App. H (1998) (Department of Defense regulations governing grant of security clearances to employees, limiting grant of security clearances to U.S. citizens in the absence of specified compelling circumstances, and taking "exercise of dual citizenship," § 147.5(b)(1), into account as one of many factors in determining whether or not to grant clearance); *cf.* 10 C.F.R. §§ 710.2, 710.4, 710.8 (1998) (Department of Energy regulations governing grant of security clearances to employees, not listing dual citizenship as a formal criterion to be considered, but using "exercis[e of] rights of citizenship conferred by a country other than the United States," § 710.4(e), as an example of a circumstance raising a question concerning "an individual's national allegiance," *id.*, and requiring suspension of processing of application for clearance until questions of security risk are resolved)

dual citizenship, such a policy has not served as authority for affording dual citizens as a class fewer benefits or privileges than are given to those who are sole U.S. citizens. Indeed, as U.S. citizens, dual U.S. citizens should be presumed eligible for employment under § 606. How the individual applicant has held or exercised his or her dual citizenship status may be incorporated as one of many factors to be considered, for example, in decisions to grant or withhold security clearances for employment.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Internal Revenue Service Document Request to Department of Defense

The Defense Contract Audit Agency is not under a legal obligation, imposed by 26 U.S.C. § 7602(a), to comply with an Internal Revenue Service request for documents in its possession.

September 1, 1999

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF THE TREASURY
AND
THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This opinion resolves a dispute between the Department of the Treasury ("Treasury") and the Department of Defense ("DOD") concerning whether the Defense Contract Audit Agency ("DCAA") is under a legal obligation, imposed by 26 U.S.C. § 7602(a) (1994), to comply with an Internal Revenue Service ("IRS") request for documents in its possession.[1] We conclude that DCAA is not under such a legal obligation.

Section 7602(a) reads as follows:

> **(a) Authority to summon, etc.**—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> **(1)** To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> **(2)** To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may

[1] Treasury first expressed its views on this dispute in its letter requesting our opinion *See* Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Edward S Knight, General Counsel, Department of the Treasury (May 19, 1997) DOD then provided us with its views, *see* Letter for Dawn E Johnsen from Judith A. Miller, General Counsel, Department of Defense (July 9, 1997), and in response to our request, Treasury submitted additional views, *see* Letter for Paul P. Colborn, Special Counsel, Office of Legal Counsel, from Edward S Knight (Aug 21, 1997) ("Treasury Reply") We subsequently received views from the Tax Division of the Department of Justice

> deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. § 7602(a).

There is no question that a summons issued pursuant to the authority granted in § 7602(a)(2) imposes a legal obligation on the recipient.[2] Treasury does not rely on that second subsection of § 7602(a), however, *see* Treasury Reply at 2,[3] but instead relies on the first subsection, arguing that "section 7602(a)(1) gives the Secretary broad discretionary authority to examine any relevant documents — including all relevant documents in the possession of the Executive Branch. Implicit in that authority to examine is the correlative obligation on the part of Executive Branch agencies to comply." *Id.* Although the focus of Treasury's argument is that subsection (a)(1) imposes a legal obligation on federal agencies, the words of the provision are not susceptible to a reading that its scope is limited to federal agencies. Thus, this argument would suggest that § 7602(a)(1), standing alone, imposes a legal obligation on both federal agencies and any other person or entity in possession of records to provide the records to the IRS upon request.

We observe as a threshold matter that the materials Treasury has submitted to us indicate that, in practice, the IRS does not proceed as if subsection (a)(1) itself imposes a legal obligation on parties holding documents sought by the IRS. Thus, the IRS does not send entities possessing records a letter stating that they are under a legal obligation to produce the documents. To the contrary, the IRS requests the documents, and if it does not obtain voluntary compliance, it issues a summons. *See* Informal Brief for the Appellants at 10, *Peddie v. United States*, 131 F.3d 135 (4th Cir. 1997) (No. 97–1252) ("The IRS's procedures for obtaining . . . information call for the use of informal efforts at voluntary cooperation in the first instance. If such records are not obtained voluntarily, the Service may compel their production by issuing an administrative summons. *See* I.R.M. 4022.3(1)(a)(1987)."). That practice is reflected in the argument that the IRS made in *Neece v. IRS*, 922 F.2d 573, 574 (10th Cir. 1990), where it contended that § 7602(a)(1) "authorizes the IRS to review bank documents informally if the bank voluntarily agrees to cooperate with the IRS."

[2] The legal obligation imposed by the summons is judicially enforceable. *See* 26 U.S.C. § 7604 (1994); 26 U.S.C.A. § 7609 (West 1989 & Supp. 1999).

[3] We therefore do not consider in this opinion whether an IRS summons may be used to compel production of records from another federal agency, whether by issuance of a summons to the agency or to an individual serving as a custodian of records.

Moreover, even apart from this IRS practice, we do not find persuasive Treasury's argument that § 7602(a)(1) imposes a legal obligation. Both statutory text and case law establish that a legal obligation arises under § 7602(a) only when the IRS issues a summons. Under the plain meaning of § 7602(a), subsection (a)(2) — not subsection (a)(1) — must be understood as the subsection that addresses the legal obligation of persons and entities to provide records to the IRS: it is subsection (a)(2) that gives the power "[t]o summon." Indeed, Treasury's interpretation of subsection (a)(1) would render portions of subsection (a)(2) superfluous. A summons to produce "books, papers, records or other data" under the latter provision would add nothing as a legal matter if the former provision were understood to impose a legal obligation. It is also significant that Congress provided a comprehensive scheme for judicial enforcement of IRS summonses. *See* 26 U.S.C. § 7604 (procedures for judicial issuance of orders enforcing obedience to IRS summonses and punishing persons for default or disobedience with respect to such summonses); 26 U.S.C.A. § 7609 (special procedures for summonses issued to party other than the taxpayer). In contrast, neither § 7604 nor § 7609 — nor any other statutory provision — addresses judicial enforcement of § 7602(a)(1).

The Supreme Court has noted that the legal obligation under § 7602 derives from the IRS's issuance of a summons under subsection (a)(2):

> Through § 7602, Congress has imposed a duty on persons possessing information "relevant or material" to an investigation of federal tax liability to produce that information at the request of the Secretary or his delegate. That duty to provide relevant information expressly obligates *the person summoned* to produce documentary evidence and to "appear" and "give testimony." Imposition of such an evidentiary obligation is, of course, not a novel innovation attributable to § 7602. The common law has been the source of a comparable evidentiary obligation for centuries. In determining the scope of the obligation Congress intended to impose by use of this language, we have previously analogized, as an interpretive guide, to the common-law duties attaching to the issuance of a testimonial summons.

United States v. Euge, 444 U.S. 707, 712 (1980) (emphasis added).

The Supreme Court thus recognized in *Euge* that it is a summons that imposes a legal obligation on parties to provide documents or testimony. Subsection (a)(2) is the part of § 7602 that pertains to the summons authority. Subsection (a)(1) is separate, providing only that "the Secretary is authorized . . . [t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry." By its terms, that subsection is not directed to persons or entities possessing records and it does not address or affect the legal obligation of persons or entities to provide records to the IRS. It is directed only to the IRS, serving merely to make explicit what may well be implicit in more general authorization provisions of the Internal Revenue Code: that, in connection with its audit and related responsibilities, *see* 26 U.S.C. § 7601 (1994), the IRS is authorized to examine relevant records. *See Neece v. IRS*, 922 F.2d at 576 ("Literally, section 7602(a)(1) only authorizes the IRS to examine books and records. It gives no guidance concerning from whom the IRS can obtain these records and books or the 'procedures' which the IRS must follow in obtaining them.").

The courts have repeatedly characterized IRS efforts under subsection (a)(1) as informal requests seeking voluntary cooperation, which, of course, is inconsistent with an understanding that the holders of the information have a legal obligation to comply. For example, one court has explained that "[s]ection 7602 provides three separate means of [IRS] inquiry. *Section 7602(a)(1) provides for an informal, noncompulsory means of inquiry.* If an informal inquiry proves inadequate, Sections 7602(a)(2) and 7602(a)(3) provide mechanisms for the formal compulsion of the production of documents and testimony." *Speck v. United States*, 59 F.3d 106, 108 (9th Cir. 1995) (emphasis added) (rejecting argument that subsection (a)(2) describes the only way the IRS may obtain information and that subsection (a)(1) serves only to indicate IRS has authority to examine records after it obtains them pursuant to (a)(2)). *Accord United States v. McLaughlin*, 126 F.3d 130, 137 (3rd Cir. 1997) ("Section 7602(a) permits the government to conduct a formal investigation and issue summonses or to proceed informally. In this case, the government chose to proceed informally, and [the taxpayer's] former accountant cooperated with the investigation."), *cert. denied*, 524 U.S. 951 (1998); *Neece v. IRS*, 922 F.2d at 578 ("[T]he financial institution voluntarily [chose] to allow the IRS, pursuant to 26 U.S.C. § 7602(a)(1), to examine financial records pertaining to a taxpayer.").[4]

The critical distinction between the voluntariness of a response to a subsection (a)(1) request and the legal obligation underlying a response to a subsection (a)(2) summons is illustrated by the decision in *Johnson v. Treasury Dep't*, 917 F. Supp. 813 (N.D. Ga. 1995). In that case, a taxpayer sought injunctive relief to prevent the IRS from procuring certain information about the taxpayer's clients. The IRS had requested the information from the taxpayer, but the court had no information "indicat[ing] that the IRS ha[d] issued a summons to plaintiff." *Id.* at 819. The court dismissed the request for relief on ripeness grounds, stating that "[i]t is only when the IRS issues a summons and seeks to have a court enforce its terms,

[4] Courts have disagreed about whether the IRS can, pursuant to § 7602(a)(1), review customer records voluntarily produced by financial institutions, *compare Neece*, 922 F.2d at 577–78 (review unlawful) *with Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365, 1370 (S.D. Ind. 1989) (review lawful), but this difference reflects disagreement about whether the Right to Financial Privacy Act, 12 U.S.C.A. §§ 3401–22 (West 1989 & Supp. 1999), limits IRS access under § 7602(a)(1). It does not suggest disagreement about whether § 7602(a)(1) imposes a legal obligation to produce records.

that plaintiff may raise his objections. Thus, until a summons has been issued, the Court has no basis for entertaining plaintiff's objections to the IRS' request for information.'' *Id.* at 820. If the court had viewed subsection (a)(1) as imposing a legal obligation, a legal issue ripe for consideration would have been presented.

We emphasize that the only conclusion we reach in this opinion is that 26 U.S.C. § 7602(a)(1) does not impose on DCAA or other federal agencies (or any other person or entity) a legal obligation to provide the IRS with documents that it requests.[5] This does not mean, of course, that the IRS is precluded from requesting access to documents in the possession of federal agencies. The IRS unquestionably has such authority.[6] The nature and scope of its access, however, is a matter to be resolved within the executive branch. The significance of our opinion is that the executive branch deliberations concerning such access may not be premised on an understanding that federal agencies are under a legal obligation under § 7602(a)(1) to provide access.

Treasury has expressed its concern that the interpretation of § 7602(a)(1) that we adopt in this opinion ''would allow the DCAA — and by extension all other government agencies — to block [Treasury's] statutory examination authority solely on policy objections.'' Treasury Reply at 4. Our opinion should not be read as giving any agency the unilateral authority to preclude the IRS from having access to records in its possession. It should be remembered that the President has the constitutional responsibility to ''take Care that the Laws be faithfully executed,'' U.S. Const. art. II, § 3, and the subordinate executive branch officials who in the first instance are responsible for executing the various laws should work together cooperatively so as not to frustrate the President's ability to discharge his overarching supervisory responsibility. Whether the IRS will receive access in a particular situation is a matter to be resolved under applicable executive branch procedures.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

[5] As noted above, *supra* note 3, this opinion does not reach the question whether the IRS could obtain records from a federal agency through use of its summons authority.

[6] Of course, other federal law may circumscribe the circumstances in which a federal agency is authorized to share particular documents with the IRS. Any such limitations, however, are likely to turn on unique circumstances and thus are not addressed in this opinion

Restrictions on Travel by Voice of America Correspondents

The Secretary of State and Chiefs of Mission may restrict travel by Voice of America correspondents in foreign countries in order to protect their safety, but only under conditions ensuring, to the greatest extent possible, the independence of VOA correspondents.

September 10, 1999

MEMORANDUM OPINION FOR THE DEPUTY LEGAL ADVISER
DEPARTMENT OF STATE

You have asked for our opinion whether the Secretary of State and Chiefs of Mission may restrict, on grounds of safety, official travel in foreign countries by Voice of America ("VOA") correspondents. We conclude that the Secretary of State and Chiefs of Mission may impose such restrictions, but only under conditions ensuring, to the greatest extent possible, the independence of VOA correspondents.

I.

The VOA, which broadcasts radio programs to foreign audiences in English and foreign languages, is part of the International Broadcasting Bureau of the United States Information Agency ("USIA"). *See* National Archives and Records Administration, *United States Government Manual 1998/99*, at 696 (1998). It operates under the supervision of the Broadcasting Board of Governors ("BBG"), which is also within the USIA and consists of eight members appointed by the President with the Senate's advice and consent, plus the USIA Director. 22 U.S.C. §§ 6203(b) & 6204(a)(1) (1994). Under the "VOA Charter," as enacted into law, VOA news broadcasts are to be "consistently reliable and authoritative" and "accurate, objective, and comprehensive," to "present a balanced and comprehensive projection of significant American thought and institutions," and to "present the policies of the United States clearly and effectively, and . . . also present responsible discussions and opinions on these policies." *Id.* § 6202(c)(1)–(3) (1994). Although VOA is part of the United States Government, Congress has established some protection for its independence: "The Director of the United States Information Agency and the [BBG], in carrying out their functions, shall respect *the professional independence and integrity* of the International Broadcasting Bureau, *its broadcasting services*, and the grantees." *Id.* § 6204(c) (emphasis added). The creation of the BBG offered an additional safeguard against political control of broadcast content. As the President stated, the BBG "will ensure independence, coherence, quality and journalistic integrity" in services such as VOA. *Statement on International Broadcasting Programs*, 1 Pub. Papers of William J. Clinton 857–58 (1993).

Congress was specifically concerned about the extent to which the Department of State might interfere with the VOA's judgments about reporting. Although the International Broadcasting Act declares that the Secretary of State, acting through the Director of USIA, is to "provide information and guidance on foreign policy issues to the [BBG]," 22 U.S.C. § 6205 (1994), the legislative history makes clear that, in keeping with the need for independence, this is to be the exclusive channel for such guidance, H.R. Conf. Rep. No. 103–482, at 202 (1994), *reprinted in* 1994 U.S.C.C.A.N. 398, 443, and the Secretary of State is not to be "involved in the management or day-to-day decision-making of the [USIA] or any of its operations or programs such as international broadcasting or otherwise." S. Rep. No. 103–107, at 49 (1994).

A statute enacted earlier, the Diplomatic Security Act of 1986, directs the Secretary of State to "develop and implement" measures for the "protection of all United States Government personnel on official duty abroad (other than those personnel under the command of a United States area military commander)." 22 U.S.C. § 4802(a)(1)(A) (1994). Chiefs of Mission, who carry out the instructions of the Secretary of State, have additional authority under the Foreign Service Act of 1980: the Chief of Mission in a country has "full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country," and each agency of the executive branch with employees in a foreign country "shall insure that all [of its] employees in that country . . . comply fully with all applicable directives of the chief of mission." 22 U.S.C. §§ 3927(a), (b) (1994). *See* 1 Foreign Affairs Manual 013, Exhibit 013.2 (Sept. 16, 1994) (text of President Clinton's Letter to Chiefs of Mission) ("I charge you to exercise full responsibility for the direction, coordination, and supervision of all executive branch offices and personnel in [country] . . . except for personnel under the command of a U.S. area military commander, under another chief of mission in [country], or on the staff of an international organization."); *see also* 1 Foreign Affairs Manual 010 (Sept. 23, 1981) (letter of Instruction from President Ronald Reagan to Ambassadors). Pursuant to these provisions, the Department of State ordinarily requires that United States Government employees seek its clearance before they enter a foreign country on official business ("country clearance").

The question here arises from the intersection of VOA's independence, which enables it to present broadcasts that are "reliable and authoritative" and "accurate, objective, and comprehensive," and the Secretary of State's authority to protect United States Government employees abroad. The State Department takes the view that the Secretary of State and the Chiefs of Mission may impose travel restrictions on VOA correspondents when necessary for their protection. *See* Letter for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from James H. Thessin, Deputy Legal Adviser, Department of State (June 27, 1997) ("First Thessin Letter"); Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from James H. Thessin, Deputy Legal Adviser, Department of State (Oct. 20, 1997) ("Second Thessin Letter"). The BBG, on the other hand, believes that such restrictions amount to unlawful interference with VOA's independence. Letter for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from John A. Lindburg, Legal Counsel, Broadcasting Board of Governors (July 31, 1997) ("First Lindburg Letter"); Letter for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from John A. Lindburg, Legal Counsel, Broadcasting Board of Governors (Sept. 19, 1997) ("Second Lindburg Letter").

It has long been recognized that, at least as a matter of policy, the Department of State should limit its control over travel by VOA correspondents. In 1978 the State Department issued Guidelines and Operating Procedures for VOA's Foreign Correspondents. *Guidelines and Operating Procedures for VOA's Foreign Correspondents* (1978) ("Guidelines"). In addition to protecting the reportorial independence of VOA correspondents, the Guidelines left the State Department only a relatively narrow authority to restrict VOA correspondents' travel. These correspondents were not subject to "country clearance" by the State Department. Instead, the Guidelines declared that "[t]he VOA correspondent has a general obligation to inform the [State Department] of his/her presence in the country, and of the general nature of his or her assignment(s)." *Id.* at 3. Moreover, "should a story require travel in a war zone or other dangerous area, VOA correspondents will consult in advance with VOA Washington and will keep the Embassy informed of their plans." *Id.*[1]

After Congress passed the Diplomatic Security Act in 1986, the State Department apparently began to take the position that VOA correspondents, while not required to obtain the usual "country-clearance," needed approval from the State Department before entering "war zones" or "dangerous areas." *See* Memorandum from James H. Thessin, Deputy Legal Adviser, Department of State, *Re: Applicability of Department of State Travel Restrictions to Voice of America Correspondents* at 3 n.1 (June 27, 1997) ("Attachment to First Thessin Letter"). On April 15, 1993, the VOA asked the State Department to "lift the restriction placed on [VOA] on sending correspondents to Afghanistan and similar locations of combat or civil strife." Letter for J. Brian Atwood, Under Secretary for Management, Department of State, from Joseph B. Bruns, Acting Associate Director for Broadcasting, VOA, at 2 (Apr. 15, 1993) ("Bruns Letter"). There appears to be a disagreement between the BBG and the State Department whether this request, in effect, acknowledged the lawfulness of the restrictions. First Lindburg Letter at 4. In any event, at the time, the State Department concluded that VOA correspond-

[1] Under the Guidelines, just as VOA correspondents did not have to follow procedures otherwise applicable to government employees, they did not receive some benefits that might otherwise come with government service. The Guidelines provided that they were to travel on regular, not official or diplomatic, passports, to enter countries with journalist visas, to be subject to all local laws applicable to foreign journalists; to have no access to classified information; and to use commercial, rather than United States Government, communications. Guidelines at 2.

ents would not "be excepted from restrictions that apply to all [United States Government] employees" and denied the request as a general matter, but attempted to speed up case-by-case review of individual requests to travel into Afghanistan by delegating approval authority to the United States Ambassador to Pakistan. Letter for Joseph B. Bruns, Acting Associate Director, VOA, from J. Brian Atwood, Under Secretary for Management, Department of State (May 10, 1993). The matter continues in dispute, particularly with regard to Afghanistan, and you have asked us to review the legal authority for the State Department's restrictions.

After you made this request, Congress reorganized some agencies engaged in the conduct of foreign relations, including the USIA. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, tit. XIII, 112 Stat. 2681–761, 2681–776 (1998) ("Reform and Restructuring Act"). The reorganization, insofar as is relevant here, becomes effective no later than October 1, 1999. *Id.* § 1301. At that time, the USIA will be abolished (except for the BBG and the International Broadcasting Bureau, which will remain in existence), and its functions will be transferred to the State Department. *Id.* §§ 1311–1312. Congress, however, reaffirmed that the Secretary of State is to "respect the professional independence and integrity of the International Broadcasting Bureau, its broadcasting services, and the grantees of the Board." *Id.* § 1323(i) (to be codified at 22 U.S.C. § 6204(d)).

II.

The question here is exceptionally close and difficult. On one hand, Congress has provided for VOA's "professional independence" as a guarantee that VOA will be a "consistently reliable and authoritative source of news" and that its broadcasts will be "accurate, objective, and comprehensive." On the other hand, Congress granted the Department of State wide authority over the protection of civilian employees of the United States while abroad. If potentially conflicting statutes can co-exist, they should be read, " 'absent a clearly expressed congressional intention to the contrary,' " in a manner that treats " 'each as effective.' " *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). To explain the basis on which we believe that these statutes can be read together, we must first set out and evaluate, at some length, the arguments in favor of the outcome sought by each agency in this matter.[2]

[2] We cannot resolve the issue by turning to the principle that, absent a clear intention to the contrary, a specific statute controls a general one *Crawford Fitting Co v. J T Gibbons, Inc.*, 482 U S 437, 445 (1987) Although the statutes on which the State Department relies are the more specific ones on the question of safety, they are less specific on the question of VOA's freedom to report the news.

A.

There is no dispute that, in general, the Department of State may restrict federal employees' official travel abroad. The Secretary of State's authority comes from her statutory mandate to develop programs for the "protection of all United States Government personnel on official duty abroad (other than those personnel under the command of a United States area military commander)," 22 U.S.C. § 4802(a), and from the statute vesting the Chiefs of Mission, subject to the Secretary's ultimate control, with "full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country (except for employees under the command of a United States area military commander)." *Id.* § 3927. Ordinarily, therefore, a government official in Pakistan, for example, could not travel to Afghanistan on official business, if the State Department prohibited the travel on security grounds.

The BBG argues, however, that "both the U.S. International Broadcasting Act of 1994 . . . and the so-called VOA charter . . . provide a reasonable basis for exemption from the authority relied upon by the Department of State." First Lindburg Letter at 2. According to this argument, by requiring the Director of USIA and the BBG to "respect the professional independence and integrity" of VOA, 22 U.S.C. § 6204(c), and by directing that VOA broadcasts be "authoritative," "objective," and "balanced and comprehensive," *id.* § 6202(c)(1), (2), Congress placed beyond the control of the Secretary decisions about the travel that VOA correspondents might undertake to gather the news.

The BBG contends that freedom from travel restrictions cannot be separated from VOA's independence in reporting:

> It simply makes no sense to prohibit the Department of State from interfering with the content of news, and yet allow interference with the gathering of it. For this reason the Broadcasting Act requires respect of the professional "independence" as well as integrity of the broadcasters.

First Lindberg Letter at 6. According to this argument, to be a "consistently reliable and authoritative" and an "accurate, objective, and comprehensive" source of news, 22 U.S.C. § 6202(c)(1), the VOA must be able to dispatch its correspondents to those locations where the news is being made. First Lindburg Letter at 4. A limitation on news gathering is, BBG contends, a limitation on what VOA is able to report, as well as a detriment to its credibility as a news organization. *Id.* at 10–11.

In our view, travel restrictions that are not applied to all United States citizens, or even to all United States reporters,[3] are an exercise of control potentially undercutting the "professional independence" of the VOA and limiting its ability to carry out its statutory duty to present "authoritative" and "comprehensive" news broadcasts. Without a correspondent in a country, VOA could not even confirm for itself, let alone ascertain, the local conditions. *See e.g.*, Chalmers M. Roberts, *The Washington Post: The First 100 Years* 373 (1977) ("THE POST deserved criticism for its delay in covering the Vietnam War. Not until mid-1964, long after the New York *Times*, did the THE POST open a Saigon bureau."). Nor could it obtain face-to-face interviews with local leaders or develop sources outside official channels. *See e.g.*, A.M. Rosenthal, *How It Felt to Be Kicked Out of Poland, in The Working Press* 161,164 (Ruth Adler ed., 1970) (1966) (describing protection of sources by reporter living in totalitarian country). To give a specific example, it would have been hard to credit a broadcast news organization that claimed to be reporting "authoritative[ly]" and "comprehensive[ly]" on the unification of Germany if its correspondents did not at least have the opportunity to speak to Germans outside official channels.

Travel restrictions limit the range of what VOA can report and thus may intrude on its "professional independence." Its reports cannot be "authoritative" if they are second-hand and cannot be "comprehensive" if they exclude on-the-ground news gathering. The same statutory language that guarantees VOA's freedom in selecting the content of its broadcasts also protects its freedom in gathering the news.[4]

"Fresh news," Justice Holmes wrote, "is got only by enterprise and expense." *International News Serv. v. Associated Press*, 248 U.S. 215, 247 (1918) (separate opinion) ("*INS*"). As the Court recognized in *INS*, news organizations may be free to rely on each other's reports to point toward the stories that need to be reported, but the means for gathering the news — the "elaborate organization" and the "money, skill, and effort" that allow for "novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs" — are a distinctive element essential to the individual voice of each provider of news. *Id.* at 238. We believe that the VOA's statutory protection is best read to offer substantial protection to the kind of news gathering at issue here, along with the ultimate content of the VOA's broadcasts that this news gathering does so much to shape.

[3] We do not address the government's ability to limit the access of all media during hostilities, for example, *cf The Nation Magazine v United States Dep't of Defense*, 762 F. Supp. 1558 (S D.N Y 1991) (raising claims about limitations on access during Persian Gulf War), or the government's authority to impose travel or other restrictions on United States citizens generally

[4] Furthermore, when carrying out its duty to offer "programming to meet needs which remain unserved by the totality of media voices available to the people of certain nations," 22 U.S.C. § 6202(b)(4) (1994), the VOA necessarily will be the only news organization reporting fully within those nations on the subjects of its stories In such circumstances, it is all the more important for the VOA to be able to offer first-hand coverage

This interpretation is consistent with the view that President Carter took in transmitting to Congress Reorganization Plan No. 2 in 1977, which he said aimed at "[k]eeping the . . . *news gathering* and reporting functions [of VOA] independent and objective." S. Rep. No. 95–606, at 81 (1977) (emphasis added). It is also consistent with the legislative history of recent amendments that will abolish the USIA. There, too, Congress took the view that the statutory safeguard of "professional independence" extends to news gathering as well as reporting. Recognizing that the Secretary of State would take over functions of the Director of USIA, Congress replaced the reference to the Director with one to the Secretary in the provision directing "respect [for] the professional independence and integrity" of the broadcasting services like the VOA. Reform and Restructuring Act, § 1323(i) (to be codified at 22 U.S.C. § 6204(d)). The relevant committee report states:

> Although the [BBG] will be a federal agency, the work performed by the international broadcasting entities under it can hardly be described as a typical government function. Cynics may deride their work as "propaganda," but in fact the broadcasters are journalists, reporting the news of the United States and the world to foreign audiences. The *news gathering* and reporting functions of the broadcasters must continue to be *independent* and objective.

H.R. Conf. Rep. No. 105–432, at 127 (1998) (emphasis added).[5] Whatever weight this committee report deserves,[6] it is consistent with the conclusion that news gathering, as well as reporting, is entitled to protection.

Even if news gathering is entitled to protection, however, there are strong arguments for the State Department's authority to impose at least some limitations on travel by VOA correspondents. Because the Diplomatic Security Act requires the Secretary to "develop and implement" measures for the "protection of all United States Government personnel on official duty abroad (other than those personnel under the command of a United States area military commander)," 22 U.S.C. § 4802(a)(1)(A), the Secretary's inability to exercise any control over travel by VOA correspondents would conflict with the statutory assignment of responsi-

[5] This committee report addressed H.R. 1757, rather than H.R 4328, the bill actually enacted; but the Chairman of the committee with jurisdiction over H R. 1757, in "apprising the House and the public concerning the legislative history" of the relevant "Division" in H R. 4328, noted that "Division G consists — with but minor changes — of Divisions A and B of the Conference Report on H.R 1757 of the 105th Congress, House Report 105–432" 144 Cong Rec. H11,667 (daily ed. Oct 20, 1998) (statement of Rep Gilman).

[6] Insofar as the committee report deals with the existing law ("must *continue* to be independent and objective"), it might be dismissed as a statement about the action of an earlier Congress *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc*, 447 U.S 102, 117–18 & n.13 (1980). Insofar as it deals with a new statute possibly intended only to maintain existing law, the legislative history might also be dismissed as an attempt to go beyond a legislative, and to assume an interpretive, function *See Pierce v. Underwood*, 487 U S. 552, 566–67 (1988). Still, the committee report may carry some degree of authority, since Congress did not just reenact but amended the earlier language and since the language echoed President Carter's words.

bility for the safety of *all* federal employees abroad with the *sole* exception of those under military command. The authority to "develop and implement" measures for the protection of VOA correspondents must entail an authority to impose *effective* measures, including when the State Department believes that the only effective measure is a travel restriction.

The State Department's authority is reinforced by the letter of instructions that the President sends to all Chiefs of Mission. This letter directs Chiefs of Mission to "protect all U.S. Government personnel on official duty abroad (other than those personnel under the command of a U.S. military commander)." 1 Foreign Affairs Manual 013, Exhibit 013.2, at 3. Moreover, shortly after enactment of the Foreign Service Act of 1980, President Reagan issued letters of instruction stating that the Secretary of State "has the responsibility . . . to the fullest extent provided by law, for the overall policy direction, coordination, and supervision of the United States Government activities overseas." 1 Foreign Affairs Manual 010, at 3. Congress endorsed this assignment of responsibilities in the Diplomatic Security Act of 1986. *See* Second Thessin Letter at 2; 1 Foreign Affairs Manual 010. While we understand all of these directions to incorporate the concept that President Reagan's letter made explicit — that the State Department has the authority "to the fullest extent provided by law" and thus subject to legal constraints that may be imposed by the statutory grant of VOA's "independence" in presenting "authoritative" and "comprehensive" broadcasts — the letter of instructions calls for an interpretation that gives substantial effect to the State Department's broad control over *all* United States personnel abroad.[7]

Furthermore, although the International Broadcasting Act protects VOA's "independence," the statute plainly does not use that term in the same sense in which it would apply to news organizations not affiliated with the United States Government. VOA's activities, for example, must "be consistent with the broad foreign policy objectives of the United States," may not "duplicate the activities of private United States broadcasters" or of "government supported broadcasting entities of other democratic nations," and must present "programming to meet [the] needs which remain unserved by the totality of media voices available to the people of certain nations." 22 U.S.C. §§ 6202(a)(1), (3), (4) & (b)(4). Private broadcasters would be under no such limits in choosing stories. Thus, VOA's "independence," far from being absolute, does not match the independence of news organizations in the United States.

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[7] In the year before passage of the International Broadcasting Act, VOA acknowledged that "[r]ules established in the Department [of State] several years ago *require* any VOA correspondent to obtain cabled permission from the Bureau of South Asian Affairs for . . travel" to Afghanistan and asked the State Department to "lift the restriction" as to that country and similar scenes of conflict. Bruns Letter at 1, 2 (emphasis added) Thus, the VOA arguably conceded the State Department's authority. Attachment to First Thessin Letter at 3 n.1. We are reluctant to read the letter as a concession, however, because it does not address the legal basis for the travel restrictions. Indeed, the letter could be no more than a statement of fact about the State Department's rules, rather than a concession about the validity of those restrictions.

Finally, the International Broadcasting Act, which provides for the VOA's "professional independence and integrity" and which, as amended, now sets out the VOA charter, states that

> [t]he provisions of, and authorities contained in or transferred pursuant to, this chapter are not intended to repeal, limit, or otherwise derogate from the authorities or functions . . . available to . . . the Secretary of State under law, reorganization plan, or otherwise, unless such provision hereof—
>
> (A) specifically refers to the provision of law or authority existing on the effective date of this chapter, so affected; or
>
> (B) *is in direct conflict with such law or authority existing on the effective date of this chapter.*

22 U.S.C. § 6209(f)(7) (1994) (emphasis added).[8] This provision "ensure[s] that no legal authorities available to . . . the Secretary of State on the date of enactment of the Act are inadvertently repealed, modified, or otherwise adversely affected." S. Rep. No. 103-107, at 53, *reprinted in* 1994 *U.S.C.C.A.N.* at 360. By stating that the Secretary's authorities are preserved except in cases of direct conflict, the statute indicates that the State Department may impose incidental and indirect burdens on VOA's activities. Only a direct intrusion on VOA's "professional independence" is ruled out.

B.

Our task is to give effect to both the VOA's "independence" and the State Department's authority for the safety of "all" civilian employees of the United States Government while abroad. If we were to conclude that the State Department could never forbid VOA correspondents from entering dangerous areas, we would deny effect to the State Department's authority. At the same time, unless the exercise of that authority is tightly constrained, the statutory mandate "to respect the professional independence and integrity" of the VOA will not be observed. We conclude, therefore, that the Department of State may restrict travel by VOA correspondents on grounds of safety, but only if in doing so it "respect[s] the [VOA's] professional independence and integrity" to the greatest extent possible. We believe that we can identify standards to give practical application to this conclusion.

The State Department may act only in order to protect VOA's correspondents from physical danger. Because decisions about sending a correspondent to the

[8] This provision is repealed as of October 1, 1999. Pub. L. No. 105-277, § 1323(l)(2), 112 Stat. 2681-780 (1998).

place where a story is unfolding can profoundly affect a news organization's capacity to cover the story "authoritative[ly]" and "comprehensive[ly]," the VOA's "independence" means that the State Department may not make any judgments about the importance of a story or the need for a VOA correspondent to be in a particular location to cover it.

This principle suggests a strong presumption that the State Department may not bar VOA correspondents from entering an area to which any other United States Government employees may travel, absent a threat specifically directed against the VOA correspondents.[9] Any other rule would require the State Department to balance the danger to VOA correspondents against the value of their reporting. Such case-by-case balancing would intrude upon the core of VOA's editorial control over its broadcasts, by allowing the Department of State to make its own editorial judgments about the importance of particular stories or particular information. It would insert the Department of State directly into news decisions.

The presumption against barring VOA correspondents from areas to which any other employees may go could be overcome only for the most compelling reasons. For example, if the only United States Government employees who enter a country are accompanied by bodyguards (a precaution that could not be extended to VOA correspondents), there likely would be a substantial reason for distinguishing between the employees permitted to enter and VOA correspondents. But the presumption could not be set aside without some such compelling ground.

Our conclusion, therefore, recognizes the State Department's authority for the safety of all civilian employees of the government while abroad, but acknowledges that the authority may not be exercised where it would directly conflict with VOA's "independence," as that term is used in the statute. The State Department may not substitute itself for the VOA in making news judgments. By treating VOA correspondents (as to travel restrictions) on an equal footing with the most favorably treated employees of the government, absent some very compelling reason for doing otherwise, the State Department will ensure that it is not invading VOA's reportorial independence.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

[9] Because the State Department lacks authority to develop or implement measures to protect the safety of "personnel under the command of a United States area military commander," 22 U S C § 4802(a)(1)(A), and because the military has a unique mission, the entry of United States military personnel under military command would not typically give rise to this presumption

Office of Personnel Management Petitions for Reconsideration of Non-Precedential Merit Systems Protection Board Decisions

The Director of the Office of Personnel Management is authorized to petition the Merit Systems Protection Board to reconsider a non-precedential decision of the Board only if the Director concludes that such decision has a substantial impact on a civil service law, rule, regulation, or policy directive.

September 13, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

This responds to your request for our opinion concerning petitions for reconsideration of certain "non-precedential" decisions issued by presiding officials of the Merit Systems Protection Board ("MSPB"). These decisions dispose of personnel disputes without publication of an opinion or statement explaining the legal basis of the decisions. *See* Letter for Mr. Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from John J. O'Meara, General Counsel, Federal Retirement Thrift Investment Board (Nov. 6, 1998) ("FRTIB Letter"). As explained in your letter, the Office of Personnel Management ("OPM") has taken the position that it is legally barred from petitioning for reconsideration of such decisions, which effectively precludes the possibility of appealing such decisions to the U.S. Court of Appeals for the Federal Circuit. Your office disagrees with OPM's position on this issue.

Following our consideration of submissions from your office and OPM,[1] we conclude that (1) under the governing provisions of 5 U.S.C.A. § 7703(d) (West Supp. 1999) and 5 C.F.R.§ 1201.119(a)(2) (1997), OPM may petition for reconsideration of an MSPB decision only if the OPM Director determines, in her discretion, that such decision will have a substantial impact on a civil service law, rule, regulation, or policy directive; (2) the Director has statutory authority to petition for reconsideration of non-precedential MSPB decisions if the Director concludes in the good faith exercise of her discretion that the decision has a substantial impact on a civil service law, rule, regulation, or policy directive; and (3) the Director also is vested with discretion under the statute to determine that non-precedential MSPB decisions *per se* fail to satisfy the substantial impact standard and therefore may not be the subject of a petition for reconsideration under the authority of 5 U.S.C.A. § 7703(d).

[1] *See* FRTIB Letter; Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management (Jan. 15, 1999) ("OPM Letter"); Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from John J. O'Meara, General Counsel, Federal Retirement Thrift Investment Board (Feb. 5, 1999) ("FRTIB Letter II") In addition to these written submissions, representatives of this Office met with representatives of the Federal Retirement Thrift Investment Board and OPM on March 11, 1999, to consider oral presentations on the issues in question.

I.

Federal employees aggrieved by personnel decisions of their employing agencies may seek relief by appealing to the MSPB. *See* 5 U.S.C.A. § 7701 (1994). The MSPB may either hear such appeals itself or refer them to an administrative law judge or other presiding official it has designated to hear such cases. *Id.* § 7701(b)(1). In cases in which the interpretation of the federal civil service laws is in issue, the OPM Director may intervene as of right, "as early in the proceeding as practicable," provided that she determines that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. *Id.* § 7701(d)(1).

When the MSPB issues a ruling adverse to an employing agency, the agency itself is not authorized to seek reconsideration or to appeal. Rather, under 5 U.S.C.A. § 7703(d), only OPM is authorized to petition on behalf of federal agencies for judicial review of MSPB decisions. As the statute provides:

> The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing . . . a petition for judicial review in the United States Court of Appeals for the Federal Circuit *if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.* If the Director did not intervene in a matter before the Board, *the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied.*

Id. (emphasis added).

Thus, as a precondition to seeking judicial review, the OPM Director must first determine in her discretion "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." *Id.* In MSPB cases in which OPM has not previously intervened, moreover, OPM may petition for judicial review only if it has first filed an unsuccessful petition for reconsideration with the MSPB. *See Newman v. Corrado*, 897 F.2d 1579, 1580 (Fed. Cir. 1990).[2] Consequently, unless OPM files a petition

[2] In some instances, the MSPB has denied reconsideration of issues raised by OPM on the grounds that the issues raised did not satisfy the above-quoted standards of 5 U.S.C.A. § 7703(d). *See Horner v. Burns*, 783 F.2d 196, 198 (Fed. Cir. 1986) (discussed further, *infra*). As discussed in Point II.B, *infra*, however, the Federal Circuit's Continued

for reconsideration in cases in which it has not intervened, an MSPB ruling adverse to a government agency is final and unappealable.

Under MSPB procedures, certain cases are disposed of by MSPB presiding officials without written explanation or review by the full Board. The MSPB refers to such decisions as "non-precedential" decisions because they are not considered to be binding on the MSPB in future cases. MSPB treats non-precedential decisions as *per se* lacking a substantial impact on the civil service laws or regulations within the meaning of 5 U.S.C.A. § 7703(d), and that treatment has been upheld by the U.S. Court of Appeals for the Federal Circuit, which hears all appeals from the MSPB. *See Horner v. Burns*, 783 F.2d at 201. In reliance on the *Burns* opinion, moreover, OPM asserts that it will not and cannot petition for reconsideration — and therefore cannot petition for judicial review — of *any* MSPB non-precedential decision. As OPM has explained its position:

> [T]he MSPB's practice of issuing non-precedential decisions that are insulated from OPM-initiated judicial review has been upheld by the United States Court of Appeals for the Federal Circuit, the court that reviews MSPB decisions. *Horner v. Burns*, 783 F.2d 196, 200 (Fed. Cir. 1986). Based upon that precedent, *OPM is unable to exercise its statutory authority to seek reconsideration and judicial review of the MSPB's non-precedential Order in this case.*

Letter for Hon. Roger W. Mehle, Executive Director, Federal Retirement Thrift Investment Board, from Janice R. Lachance, Director, Office of Personnel Management (June 3, 1998) (emphasis added). OPM has reaffirmed this position in a letter to this Office, stating:

> OPM is prohibited from seeking reconsideration of a non-precedential MSPB decision because, by virtue of the Federal Circuit's decision in *Horner*, it may not lawfully make the substantial impact determination required by law to permit reconsideration and judicial review.

OPM Letter at 7.

The Federal Retirement Thrift Investment Board ("FRTIB"), in contrast, contends that OPM retains discretionary authority to petition the MSPB for reconsideration of its decisions whether they are precedential or not. *See* FRTIB Letter at 2–3. Among other things, the FRTIB contends that some non-precedential decisions issued by the MSPB *do* have a substantial impact on the civil service laws and that the *Burns* opinion, which the FRTIB believes is applicable only

opinion in *Newman v Lynch*, 897 F.2d 1144, 1146 (Fed. Cir 1990), sharply circumscribes the MSPB's authority to "pass judgment" on OPM's discretionary decisions to seek reconsideration of MSPB decisions.

to petitions for judicial review (as opposed to administrative reconsideration), does not prohibit the OPM Director from exercising her discretion to petition for reconsideration of such decisions. *See id.* at 2–3; FRTIB Letter II at 3. Additionally, the FRTIB disagrees with OPM's view that the sole purpose of petitions for reconsideration of MSPB decisions is to satisfy a prerequisite to judicial review. In the FRTIB's view, petitions for reconsideration serve the additional important purpose of affording the MSPB an opportunity to correct errors without the necessity of judicial review. *See* FRTIB Letter at 2–3.

II.

A.

Apart from § 7703(d)'s provision that the submission and denial of a petition for reconsideration of an MSPB decision is a prerequisite to judicial review in cases where OPM did not intervene before the MSPB, the statute provides no express standards governing when OPM may submit petitions for reconsideration or under what circumstances they may be granted. *See* 5 U.S.C.A. §§ 7701–7703. Indeed, § 7703(d)'s judicial review provisions contain the statute's only reference to, or provision for, the reconsideration procedure. To resolve the questions presented here, we must first determine whether the statute nonetheless is fairly read to incorporate a substantial impact standard as a prerequisite for seeking reconsideration as well as judicial review. We believe that it is.

Initially, a requirement that OPM must make a substantial impact determination as a prerequisite to petitioning for reconsideration of MSPB decisions is logically consistent with the overall statutory scheme. Such a determination is a prerequisite not only to OPM's seeking intervention or petitioning for MSPB review of an initial decision, *see* 5 U.S.C. § 7701(d)(1)(B) and (e)(2), but also to OPM's petitioning for judicial review of final MSPB decisions. In this regard, we note that an OPM petition for reconsideration in a case where it has not previously intervened is essentially a belated form of seeking both intervention and administrative review. Because the statute requires a substantial impact determination as a prerequisite to each of those procedural steps, it would be anomalous if that requirement could be bypassed only when OPM seeks to enter the case through a petition for reconsideration. Consequently, we agree with OPM that a substantial impact determination is required as a precondition to its petitioning for reconsideration under § 7703(d).

To be sure, the text of 5 U.S.C.A. § 7703(d) does not specify that OPM may file a petition for reconsideration of an MSPB decision only if that decision, in keeping with the standards for seeking judicial review, "will have a substantial impact on a civil service law, rule, regulation, or policy directive." In contrast, as noted above, the statutory provisions governing both OPM's right to intervene in proceedings before the MSPB and its right to petition the full MSPB for review of an initial decision explicitly require an OPM determination that the case in question meets the substantial impact test. *See id.* § 7701(d)(1)(B) and (e)(2). It might therefore be argued that the absence of a "substantial impact" determination requirement in § 7703(d)'s provision for petitions for reconsideration reflects a conscious congressional choice to omit such a requirement, given that Congress knew how to, and did, make explicit provision for such a requirement in the case of other procedural steps before the MSPB.

Viewing the statutory scheme as a whole, however, we do not believe that this factor should be considered dispositive in this context. *Cf.* 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.25 (5th ed. 1992) (the interpretive maxim "expressio unius est exclusio alterius" should not be applied if its application would result in a contradiction or would not serve the purpose for which a statute was enacted). In providing in § 7703(d) that a petition for reconsideration would be a prerequisite to OPM's obtaining judicial review of MSPB decisions in cases in which it had failed to seek intervention, Congress did not purport to establish the particular procedural requirements that would govern the filing and consideration of petitions for reconsideration. Rather, Congress merely specified that OPM lacks authority to seek judicial review in a non-intervention case unless it seeks reconsideration and that request is denied. In contrast, Congress did undertake to establish specific procedural requirements in its statutory provisions for intervention and petitions for administrative review by the full MSPB. *See* 5 U.S.C. § 7701(d)(1) and (e). Congress's greater specificity in addressing these actions, however, does not imply that Congress intended different procedures to apply when OPM seeks reconsideration, and the structure of the Act supports the view that the same substantial impact requirements should apply.

The conclusion that a substantial impact determination is required for petitions for reconsideration is also consistent with the Senate Report accompanying the Civil Service Reform Act of 1978:

> A Committee amendment to this subsection limits the occasions on which the OPM could petition the Board for review to only those instances where the OPM director first determines that the decision is erroneous and that, if allowed to stand, the decision would have a substantial impact on the administration of the civil service laws within OPM's jurisdiction. The OPM should limit the cases in which it seeks the review by the Board to those that are exceptionally important.

S. Rep. No. 95–969, at 55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2777. The respective functions of OPM petitions for review and petitions for reconsideration are so similar that it seems unlikely that Congress intended for them to be governed by differing procedural standards in this respect. Further, because § 7703(d) refers to OPM petitions for reconsideration by MSPB solely in the context of establishing the preconditions to seeking judicial review, logic and consistency suggest that the threshold standards for pursuing reconsideration should reflect the minimum standards for pursuing an appeal.[3]

This interpretation of the statute also accords with the MSPB regulations governing OPM's submission of petitions for reconsideration. Those regulations provide:

> (a) Criteria. Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order *if he or she determines*:
>
> > (1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and
> >
> > (2) That *the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.*

5 C.F.R. 1201.119 (1997) (emphasis added).[4] MSPB's rule requiring a substantial impact determination by OPM represents a reasoned interpretation of the statute to which OPM properly adheres, even if it goes beyond matters of procedure and touches on the exercise of OPM's discretion. Moreover, although the statute (as discussed below) places the decision to seek reconsideration within *OPM*'s discretion, the MSPB has a critical role in interpreting the statute, and OPM plainly may choose to follow the MSPB's reasoned interpretations even of OPM's discretionary powers.

Accordingly, we conclude that the OPM Director must determine that an MSPB decision satisfies the substantial impact test before she may properly file a petition for reconsideration of such decision. We now consider how the OPM Director's

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[3] As the MSPB explained its interpretation in one opinion·

> Such a petition [for reconsideration] is a prerequisite for judicial review, and the statute does not establish a different standard for . . reconsideration. Like a petition for judicial review, a petition by OPM for reconsideration must allege that it will have a substantial impact on a civil service law, rule, regulation or policy directive.

Hammond v. Department of Navy, 50 M S.P.R. 174, 178 (1991)

[4] In the absence of specific statutory provisions governing petitions for reconsideration of MSPB decisions, the agency charged with administration of the statute is generally authorized to fill in the interstices of the statutory scheme through administrative rulemaking *See, e.g , Public Service Co. v. U S. Nuclear Regulatory Comm'n*, 582 F 2d 77, 82 (1st Cir 1978) ("In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress "); *Precious Metals Assocs , Inc. v. CFTC*, 620 F 2d 900, 911 (1st Cir. 1980) (agency rulemaking proceedings "are designed to fill in the interstices of a statute") In particular, judicial deference to agency rules "is especially applicable" when the agency is "structuring its own rules of procedure and methods of inquiry " *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995).

discretion in making that substantial impact determination is affected by the non-precedential status of the decision.

B.

In *Newman v. Lynch*, 897 F.2d at 1145–47, the Federal Circuit endorsed a broad interpretation of OPM's authority to petition for, and to obtain, meaningful reconsideration of MSPB decisions under 5 U.S.C.A. § 7703(d). In that case, the MSPB had upheld a discharged federal employee's allegations of discrimination on the basis of handicap. OPM filed a petition seeking reconsideration of the MSPB's decision, contending that the MSPB's finding that the employee had carried his burden of proposing a "reasonable accommodation" for his disability was inconsistent with prior MSPB decisions and erroneous as a matter of law. 897 F.2d at 1145. The MSPB, however, refused to consider OPM's petition on the merits, ruling that the decision in question "did not concern a civil service law" and that OPM therefore lacked authority to petition for reconsideration under the requirements of § 7703(d).

The Federal Circuit reversed, holding that "the MSPB has no authority to review the Director's exercise of discretion in seeking reconsideration of an MSPB decision" and rejecting "the Board's effort to restrict OPM with respect to what issues fall under OPM's authority granted in section 7703(d)." *Id.* at 1145–46. As the court further explained: "The portion of section 7703(d) granting OPM the right to seek reconsideration by the Board would be emasculated if the Board may refuse reconsideration without addressing the merits of the substantive issues raised by OPM." *Id.* at 1147. The *Newman* opinion also emphasized the narrow scope of the court's prior holding in *Horner v. Burns*, noting that the *Burns* court "meticulously limited the scope of its decision," and stressing that "[w]e did not recognize the broad authority now asserted by the Board to pass judgment on the propriety of the [OPM] Director's exercise of discretion in seeking reconsideration." 897 F.2d at 1146.[5]

Under the *Lynch* opinion, the MSPB lacks authority to circumscribe OPM's discretion in determining whether or not a particular MSPB decision may satisfy the substantial impact standard. In light of the broad discretionary authority allotted to OPM under *Newman*'s analysis, we believe that OPM may properly determine that even a non-precedential MSPB decision may have a "substantial impact" in particular circumstances.

[5] *See also Newman v. Corrado*, where the court invoked the legislative history of § 7703(d) in explaining the purpose and significance of petitions for reconsideration filed by OPM

> The Senate Report [on 5 U.S.C § 7703(d)] certainly suggests that something more than the equivalent of a functus officio response was contemplated in Board proceedings. *The petition for reconsideration by OPM, in the words of the Senate Report, provides "an opportunity to consider the concerns of OPM."* *See* S. Rep. No. 95–985, *supra* at 2786.

897 F 2d at 1582 (emphasis added).

The MSPB itself has recognized OPM's discretion in determining whether the statutory prerequisites to intervening, appealing, or petitioning for reconsideration are satisfied. In *Uhlig v. Department of Justice*, 70 M.S.P.R. 443 (1996), for example, the Board stated:

> We cannot . . . decline to consider the merits of the Director's intervention brief on the grounds that we disagree with his discretionary determination that the Board erred in interpreting a civil service law, rule, regulation, or policy directive and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

Id. at 445.

It is difficult to reconcile the foregoing precedents with the view that the *MSPB*'s interpretation of the substantial impact test takes away OPM's discretion to find that a given non-precedential decision may in fact have a substantial impact on a civil service law, rule, or policy directive, and therefore warrant filing a petition for reconsideration. Such a view would preclude OPM from exercising the discretion recognized in the foregoing opinions, as well as in the MSPB's own regulation, *see* 5 C.F.R. § 1201.119(a). That regulation authorizes the OPM Director to file a petition for reconsideration when "he or she"—not the MSPB—determines that a decision will have the requisite substantial impact. Neither that regulation nor the Federal Circuit's opinion in *Burns* provides that the Director may make that discretionary determination only if it comports with the *MSPB*'s interpretation of the substantial impact test. Such an interpretation would also be inconsistent with *Lynch*'s holding that the MSPB may not "pass judgment on the propriety of the Director's exercise of discretion in seeking reconsideration." 897 F.2d at 1146. Just as the MSPB may not foreclose OPM's authority to petition for reconsideration by "determin[ing] which civil service laws fall within the responsibility of OPM," *id.* (citing *Horner v. Schuck*, 843 F.2d 1368, 1372 (Fed. Cir. 1986)), we do not believe it can do so by usurping OPM's authority to make its own discretionary determinations regarding the substantial impact standard.

Although the MSPB has itself acknowledged the broad discretion allowed OPM under the *Lynch* opinion, it has pointedly reserved the right to "question" OPM's authority in submitting petitions for reconsideration of non-precedential decisions:

> Noting its previous decisions which had rejected restrictive interpretations of OPM's authority to seek reconsideration under section 7703(d), the [*Lynch*] court concluded that the Board may not refuse to consider the Director's petition on the merits because it disagrees with the Director's discretionary determinations which

> the Director is required to make before filing the petition. Therefore, in accordance with the court's decision, we hold that, *with the exception of petitions for reconsideration of nonprecedential decisions*, the Board may not question the authority of the Director of OPM to seek reconsideration of a Board decision, but must consider the Director's petition on the merits.

Hammond, 50 M.S.P.R. at 179–80 (1991) (emphasis added; citations and footnote omitted).[6]

The MSPB's opinion in *Hammond* asserts its authority to *refuse* reconsideration of non-precedential decisions "on the merits." It does not establish that OPM lacks authority to*submit* such a petition as a predicate to seeking judicial review before the Federal Circuit under § 7703(d). In this regard, we consider it significant that the *Burns* opinion upheld the MSPB's rule denying reconsideration of non-precedential decisions on the carefully qualified grounds that it was "based upon sound policy considerations" and was an "appropriate practice *for the Board to utilize* in handling its heavy volume of cases." 783 F.2d at 201 (emphasis added). The court did not, however, hold that the MSPB was *required* to follow that interpretation on the grounds that it was the only permissible interpretation of the statutory substantial impact standard. Nor did the court consider or decide whether, as an objective matter, a non-precedential decision could never have a "substantial impact on civil service law, rule, regulation, or policy directive" from the distinct perspective of the *OPM Director* (as opposed to the "case management" perspective of the MSPB). *Hammond*, 50 M.S.P.R. at 178.

Thus, we do not believe that *Burns* prohibits the OPM Director from petitioning for reconsideration of a decision that she in good faith determines will, in fact, have the requisite substantial impact. An MSPB presiding officer might decide without explanation, for example, that a major, newly adopted agency personnel management policy directive was unlawfully applied to a particular employee. Although the policy directive would not be legally invalidated due to the non-precedential nature of the decision, the decision might well deter agency managers from adhering to the policy directive and thus seriously undermine its future application and utility. In the event that the OPM Director were to determine that the decision had a substantial impact on the policy directive under the circumstances, we do not believe she would be legally barred from submitting a petititon for reconsideration in accordance with the requirements of 5 U.S.C.A. § 7703(d) and 5 C.F.R. § 1201.119. Ultimately, then, the decision whether a non-precedential MSPB decision has a substantial impact on the civil service laws or regulations so as to justify an OPM petition for reconsideration rests solely

[6] In support of this reservation, the Board asserted that *Horner v Burns* had upheld the rule "that reconsideration of nonprecedential decisions is inappropriate " 50 M S P.R. at 180 n 4. The *Burns* decision, however, did not establish or uphold any rule precluding *OPM* from *seeking* reconsideration of non-precedential decisions of the MSPB. It narrowly addressed the permissibility of the standards applied by MSPB in *disposing* of petitions for reconsideration

in the discretion of OPM. The Director is not legally precluded from petitioning for reconsideration of a non-precedential decision that she believes has such an impact; nor is she required to do so. Although we recognize that non-precedential decisions are generally unlikely to have a substantial impact on civil service laws, rules, regulations, and policies, we must also recognize that the OPM Director might legitimately conclude that, in certain unique circumstances, the requirement is satisfied.

C.

In *Horner v. Burns*, the court upheld the MSPB's practice of denying petitions for reconsideration of unreviewed initial decisions of MSPB presiding officials on the grounds that such decisions are not "precedents of the Board" and therefore, for purposes of 5 U.S.C. § 7703(d), "would not have a significant impact upon civil service laws, rules, regulations, and policies." 783 F.2d at 199. As the court explained:

> The Board's treatment of unreviewed initial decisions of presiding officials as non-precedential is based upon sound policy considerations and is a reasonable and appropriate practice for the Board to utilize in handling its heavy volume of cases. . . .
>
> . . . . The Director has not given any convincing reason why this practice of the Board is not an appropriate and proper method for the Board to use in handling its large docket.

Id. at 201.

As we have shown, § 7703(d) and 5 C.F.R. § 1201.119(a) vest the OPM Director with broad discretion in determining whether to pursue an appeal from, or a petition for reconsideration of, an MSPB decision. In exercising that discretion, we believe the Director is free to follow the MSPB's interpretation of the substantial impact test upheld in *Burns* and adopt a *per se* rule that non-precedential MSPB decisions do not satisfy that test and therefore cannot provide justification for a petition for reconsideration. Indeed, insofar as the Director concludes that non-precedential decisions, by their very nature, do not satisfy the substantial impact standard, a practice of declining to seek reconsideration of non-precedential decisions would appear to conform to the governing MSPB regulation, *see* 5 C.F.R. § 1201.119. As discussed in Point II.B, however, we do not believe that such a conclusion is legally *compelled* by statute or case law.

Conclusion

OPM may petition for reconsideration of an MSPB decision only if the OPM Director determines that the decision will satisfy the substantial impact standard. Although the Director may exercise her discretion to adopt a *per se* rule that non-precedential MSPB decisions never satisfy the substantial impact standard, the *Horner v. Burns* opinion does not dictate such a practice nor prevent the Director from exercising her statutory discretion to determine on a case-by-case basis whether that standard is satisfied on the particular facts of each non-precedential decision.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 219 to Representative Members of Federal Advisory Committees

Representative members of federal advisory committees — i.e., members who are chosen only to present the views of a private interest — are not "public officials" covered by 18 U.S.C. § 219

September 15, 1999

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum responds to your request for our opinion about the applicability of 18 U.S.C.A. § 219 (West Supp. 1999) to representative members of federal advisory committees. We conclude that representative members of federal advisory committees are not "public officials" covered by § 219. This memorandum supersedes our 1991 memorandum addressing the same question. *See Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65 (1991).

Congress enacted the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 (1972), to enhance the public accountability of federal advisory committees and to reduce wasteful expenditures on them. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 459 (1989). Towards those ends, the Act provides that the membership of federal advisory committees should "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2, § 5(b)(2) & (c) (1994). In enacting that provision, Congress contemplated that "persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee." *National Anti-Hunger Coalition v. Executive Comm.*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (citing S. Rep. No. 92–1098 (1972); H.R. Rep. No. 92–1017 (1972)).[1]

Under 18 U.S.C.A. § 219(a), it is a criminal offense for a "public official" to act as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 or as a lobbyist required to register under the Lobbying Disclosure Act of 1995. Section 219(c) defines "public official" to include, as relevant here, "an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government."

In our 1991 memorandum, we concluded that representative members of federal advisory committees — defined in the memorandum as members who are "chosen for committee membership only to present the views of a private interest" — per-

[1] The FACA "confers no cognizable personal right to an advisory committee appointment," however. *National Anti-Hunger Coalition*, 711 F 2d at 1074 n 2

form their committee duties "for" the United States and thus are "public officials" within 18 U.S.C. § 219(c). *See* 15 Op. O.L.C. at 66. We further concluded the Emoluments Clause of the Constitution, U.S. Const. art. I, § 9, cl. 8, independently prohibits agents of foreign governments from serving on federal advisory committees because committee members "hold offices of profit or trust" within the meaning of the Clause. *See* 15 Op. O.L.C. at 67–68.[2]

In later opinions, however, we receded from the position taken in the 1991 memorandum and recognized that "not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the [Emoluments] Clause." Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Conrad K. Harper, Legal Adviser, Department of State (Mar. 1, 1994).[3] We ultimately concluded that representative members of federal advisory committees do not hold offices of profit or trust because they "owe their loyalty to outside interests and are not 'servant[s] of the Government.'" *Applicability of Emoluments Clause to "Representative" Members of Advisory Committees*, 21 Op. O.L.C. 176, 177 (1997) ("Esserman Letter") (quoting Office of Government Ethics Informal Opinion 82 x 22, at 330 (1989 ed.) (quoting Memorandum of the President, "Preventing Conflicts of Interest on the Part of Special Government Employees" (May 2, 1963)).

For similar reasons, we now conclude that representative members of federal advisory committees are not "public officials" covered by 18 U.S.C. § 219. The definition of "public official" in § 219 is modeled on the definition of "public official" in the federal bribery statute, 18 U.S.C. § 201 (1994), and is identical in relevant respects. *See* 130 Cong. Rec. 1295 (1984) (remarks of Sen. Denton); H.R. Rep. No. 99–797, at 22 (1986).[4] In *Dixson v. United States*, 465 U.S. 482, 496 (1984), the Supreme Court held that a person is a "public official" under the bribery statute if "the person occupies a position of public trust with official federal responsibilities." The Court explained that "[t]o be a public official under § 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy." *Id.* at 499.[5]

Representative members of advisory committees do not fit that definition. Such representatives "are chosen to present the views of private organizations and interests." Esserman Letter, 21 Op. O.L.C. at 176. Under well established prece-

[2] The Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State " U.S. Const art. I, § 9, cl.8.

[3] We specifically determined that members of the State Department's Advisory Committee on International Economic Policy did not hold offices of profit or trust under the Emoluments Clause *See The Advisory Committee on International Economic Policy*, 20 Op. O L.C 123 (1996).

[4] The term "public official" in the bribery statute includes "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, . . in any official function, under or by authority of any such department, agency or branch of Government." 18 U S.C. § 201(a)(1) (1994).

[5] Applying that standard, the Court held that officers of a private, nonprofit corporation responsible for distributing federal community development block grants were public officials under the bribery statute. *See Dixson*, 465 U.S at 497

dents, "'[o]ne who is requested to appear before a Government department or agency to present the views of a non-governmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the Government.'" *Id.* (quoting Office of Government Ethics Informal Opinion 82 x 22, at 330 (1989 ed.) (quoting Memorandum of the President, "Preventing Conflicts of Interest on the Part of Special Government Employees" (May 2, 1963)). Indeed, "[t]o characterize an industry representative or the like as a Federal functionary is a contradiction in terms." Office of Government Ethics Informal Opinion 82 x 22, at 333–34.

The structure of 18 U.S.C. § 219 confirms that representative members of advisory committees are not "public officials" within the statute. Although § 219(a) makes it a criminal offense for a public official to act as an agent or lobbyist for a foreign government, § 219(b) provides that an agent of a foreign principal may serve "as a special Government employee in any case in which the head of the employing agency certifies that such employment is required in the national interest." As our 1991 memorandum recognizes, § 219(b) could not be used to exempt representative members of advisory committees from the prohibitions in § 219(a), because representatives are not considered federal employees, special or otherwise. *See* 15 Op. O.L.C. at 67; *see also*, *e.g.*, Office of Government Ethics Informal Opinion 93 x 14, at 49 (June 24, 1993) (a representative member of an advisory committee "is not considered an employee or special Government employee for purposes of the conflict of interest statutes"). It would be quite anomalous, however, if an agent or lobbyist for a foreign principal could serve as a special Government employee but not as a representative, because special Government employees are generally subject to more restrictive standards than are non-employees. The natural conclusion is that there is no need for a statutory mechanism to exempt representatives from the prohibitions in § 219(a) because those prohibitions simply do not apply.

We therefore conclude that representative members of federal advisory committees are not "public officials" subject to the prohibitions in 18 U.S.C. § 219, and reject the contrary view expressed in the 1991 OLC memorandum.

DANIEL KOFFSKY
Acting Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of EEOC Proposed Final Rule to the Department of Veterans Affairs

The Veterans' Benefits Act is not inconsistent with the proposed Equal Employment Opportunity Commission final rule on hearings for federal employees' EEO complaints, and therefore the Department of Veterans Affairs would be subject to the rule to the same extent as other executive branch agencies.

September 28, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

This memorandum responds to your request for our opinion whether, in light of the Veterans' Benefits Act of 1997, Pub. L. No. 105–114, 111 Stat. 2277 (codified as amended in scattered sections of 38 U.S.C.) ("VBA"), the Department of Veterans Affairs ("VA" or "Department") would be subject to a proposed final rule promulgated by the Equal Employment Opportunity Commission ("EEOC" or "Commission") concerning the procedures to be followed in employment discrimination cases against federal sector employers in which the complainant requests a hearing. *See* Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Leigh A. Bradley, General Counsel, Department of Veterans Affairs, *Re: Request for an Opinion on Whether the Department of Veterans Affairs is Subject to EEOC's Proposed Final Rule Revising 29 C.F.R. Part 1614 Insofar as Proposed Sections 29 C.F.R. § 1614.109(i) and § 1614.110(a) Abrogate the Statutory Authority of VA's Office of Employment Discrimination Complaint Adjudication to Make Final, Dispositive Decisions as to the Merits of Employment Discrimination Complaints* (Apr. 5, 1999) ("VA Request"). For the reasons discussed below, we conclude that the provisions of the VBA are not inconsistent with the EEOC's proposed final rule and that VA would therefore be subject to the proposed final rule to the same extent as other executive branch agencies.

Background

A. Title VII and the Proposed Regulation

Title VII of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C.A. §§ 2000e to 2000e–17 (West 1994 & Supp. 1999)) ("Title VII"), protects most federal employees against employment discrimination on the basis of race, color, religion, sex, or national origin. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, sec. 11, § 717(a), 86 Stat.103, 111 (codified as amended at 42 U.S.C.A. § 2000e–16(a)) ("section 717"). The statute authorizes aggrieved federal employees to sue for relief under certain circumstances. In particular, section 717(c) of Title VII provides:

> Within 90 days of receipt of notice of *final action taken by a department, agency, or unit* referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e–16(c) (1994) (emphasis added). This provision's reference to "final action" by an agency arguably assumes that the agency has a definitive decisional role regarding administrative complaints apart from the role played by the EEOC.

Under current regulations, once an EEOC administrative judge ("AJ") has rendered a decision on an EEO complaint, the respondent agency may then reject or modify the AJ's decision, including by substituting the agency's preferred remedy, *see* 29 C.F.R. §§ 1614.109–110 (1998), subject to the complainant's right to administrative appeal, *see* 29 C.F.R. §§ 1614.401, 1614.403 (1998). According to the EEOC, the current system has engendered dissatisfaction based on a concern that federal agencies are allowed to judge their own behavior. *See* Proposed Final Rule (attachment to VA Request) at 21 ("The Commission strongly believes that allowing agencies to reject or modify an administrative judge's findings of fact and conclusions of law and to substitute their own decisions leads to an unavoidable conflict of interest and creates a perception of unfairness in the federal EEO system.").

The EEOC has issued a Proposed Final Rule ("PFR") that, among other provisions, would change the current system by limiting the discretion of an agency to take a "final action" that modifies the AJ's determination. In the Commission's view, the proposed new regulations preserve the opportunity for final agency action contemplated by section 717(c) of Title VII:

> Administrative judges will issue decisions on all complaints referred to them for hearings. Agencies will have the opportunity to take final action on the complaint by issuing a final order within 15 days of receipt of the administrative judge's decision. The final order will notify the complainant whether or not the agency will fully implement the decision of the administrative judge and will contain notice of the complainant's right to appeal to EEOC. If the agency's final order does not fully implement the decision of the administrative judge, the agency must simultaneously file an appeal of the decision with EEOC. In this way, agencies will take final action on complaints referred to administrative judges by issuing a final order, but they will not introduce new evidence or write a new decision in the case.

PFR at 21–22.[1]

B. The Veterans' Benefits Act of 1997 and VA's Objection to the Proposed Regulation

Unlike other executive branch departments and agencies, VA's system for the processing of employment discrimination complaints is governed by an agency-specific statute, the Veterans' Benefits Act of 1997. The question here is whether EEOC's proposed regulation conflicts, not with the "final action" reference in Title VII itself, but with a provision of the VBA that creates a new office within the Department of Veterans Affairs and authorizes it to make the "final agency decision within the Department on the merits of any employment discrimination complaint." VBA, Sec. 102(a)(1), § 319(b)(1), 111 Stat. at 2280. You contend that the EEOC lacks authority to limit VA's latitude in taking final action on complaints because the VBA uniquely reserves to VA's Office of Employment Discrimination Complaint Adjudication the authority to make final decisions on EEO complaints involving VA. VA Request at 3.

Congress enacted the VBA in response to complaints that VA's complaint adjudication system did not adequately protect victims of sexual harassment.[2] The

[1] We offer no opinion whether the EEOC's PFR is consistent with Title VII and otherwise lawful, and instead consider only whether, assuming the PFR is lawful under Title VII, VA alone is exempt from its provisions by virtue of the VBA. The EEOC's current proposal modifies an earlier one that the EEOC has since abandoned. *See* PFR at 20–21 A number of executive branch agencies objected to the earlier proposal on several grounds, including that it would be inconsistent with the references in section 717(c) of Title VII to a "final action" by the agency as a prerequisite to a civil suit. *See id.* at 20 The Commission, without agreeing to the objecting agencies' interpretation of section 717(c) and without seeking a legal opinion from this Office, "decided to revise the proposal in order to make needed improvements in the procedures while recognizing the concerns expressed by the agencies " *Id.* at 21.

[2] *See, e g* , H.R Rep. No 105–292, at 5 (1997) (reporting conclusion "that a culture of tolerance of sexual harassment and abusive behavior exists at certain VA facilities, and that the policy of 'zero tolerance' of sexual harassment is insufficient to address these problems"), *see also* David Dahl, *VA Must Get Tough on Harassment*, St Petersburg

Act generally directs the Secretary of Veterans Affairs to "take steps to ensure that the [complaint resolution] system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective." VBA, sec. 101(a)(1), § 516(a), 111 Stat. at 2278. To further that goal, Congress created a new office within VA, the Office of Employment Discrimination Complaint Adjudication ("OEDCA"), to act as a quasi-independent adjudicator of employment discrimination complaints against the Department. *Id.* sec. 102(a)(1), § 319, 111 Stat. at 2280. The VBA provides that the Director of OEDCA "reports directly to the Secretary or the Deputy Secretary concerning matters within the responsibility of the Office," and "is responsible for making the *final agency decision* within the Department on the merits of any employment discrimination complaint filed by an employee, or an applicant for employment, with the Department." *Id.* sec. 102(a)(1), § 319(a)(3), (b)(1) (emphasis added).[3]

You argue that the EEOC lacks authority to limit VA's latitude in taking final agency action on complaints because the VBA uniquely reserves to VA's OEDCA the authority to make final decisions on EEO complaints involving VA. You assert that the provisions of the VBA that make the director of OEDCA "responsible

Times, Nov 11, 1997, at 3A, *available in* 1997 WL 14076191 ("Alarmed by the case of a sexual harasser . . Congress on Monday passed a bill that forces the Department of Veterans Affairs to set up some of the strictest anti-harassment measures in the government The legislation, approved over the objections of the VA, creates an office to hear employee complaints and empowers Congress and an outside auditor to oversee the department's performance in policing harassers. Congress acted after learning that [a] North Carolina VA hospital director was transferred to [another facility], with a six-figure salary, even though a VA investigation found he sexually harassed an employee and spoke offensively to two others.").

[3] The full text of the provision establishing the OEDCA follows·

Office of Employment Discrimination Complaint Adjudication

(a)(1) There is in the Department an Office of Employment Discrimination Complaint Adjudication. There is at the head of the Office a Director.

(2) The Director shall be a career appointee in the Senior Executive Service.

(3) The Director reports directly to the Secretary or the Deputy Secretary concerning matters within the responsibility of the Office.

(b)(1) The Director is responsible for making the final agency decision within the Department on the merits of any employment discrimination complaint filed by an employee, or an applicant for employment, with the Department. The Director shall make such decisions in an impartial and objective manner.

(2) No person may make any ex parte communication to the Director or to any employee of the Office with respect to a matter on which the Director has responsibility for making a final agency decision

(c) Whenever the Director has reason to believe that there has been retaliation against an employee by reason of the employee asserting rights under an equal employment opportunity law, the Director shall report the suspected retaliatory action directly to the Secretary or Deputy Secretary, who shall take appropriate action thereon

(d)(1) The Office shall employ a sufficient number of attorneys and other personnel as are necessary to carry out the functions of the Office Attorneys shall be compensated at a level commensurate with attorneys employed by the Office of the General Counsel.

(2) The Secretary shall ensure that the Director is furnished sufficient resources in addition to personnel under paragraph (1) to enable the Director to carry out the functions of the Office in a timely manner

(3) The Secretary shall ensure that any performance appraisal of the Director of the Office of Employment Discrimination Complaint Adjudication or of any employee of the Office does not take into consideration the record of the Director or employee in deciding cases for or against the Department

38 U S.C § 319 (Supp III 1997).

for making the final agency decision within the Department on the merits of any employment discrimination complaint'' would exempt VA from the operation of the EEOC's proposed new procedural rules even if those rules lawfully bind other federal agencies. In your view, ''the adjudication authority granted to the [OEDCA] Director in Section 102 [of the VBA] cannot be limited in any way by EEOC regulations[,] which may be inconsistent with the statutory grant of dispositive authority provided to the Director of OEDCA.'' VA Request at 3. For the reasons set forth below, we conclude that the proposed EEOC rule is not inconsistent with section 102 of the VBA.

Discussion

Assuming as you do for purposes of your request that the Proposed Final Rule permits agencies in general to take sufficient final action to comply with section 717(c) of Title VII, there is no reason to conclude that such opportunity for final action would be insufficient under the VBA. Put differently, nothing in the VBA's reference to a ''final agency decision'' suggests that the VBA reserves to VA broader or more inviolate decisional authority than other agencies are assumed to have by virtue of Title VII's references to agencies' ''final action.''

We have found nothing in the statute or legislative history to suggest that Congress intended the Director of OEDCA to be more independent of EEOC regulation than the officials of other executive branch agencies responsible for taking final agency action on employment discrimination complaints. To the contrary, the House Report explicitly stated that ''[t]he OEDCA is expected to enjoy a level of independence comparable to that of administrative law judges employed by other federal agencies.'' H.R. Rep. No. 105–292, at 8. That statement indicates that the enactment of the VBA was intended as a remedial measure to address a particular problem in VA's employment discrimination complaint resolution system by reallocating and insulating EEO functions within the agency; the VBA was not meant to shield that system against regulation by the EEOC on the same basis as the Commission regulates the systems within other executive branch agencies.

It is consistent with the general intent of Congress to read the VBA as providing OEDCA with independence within VA, and not as carving out an exception to procedures mandated by the EEOC. It appears that both the VBA and the EEOC's Proposed Final Rule are motivated to some extent by the same concern: an employment discrimination complaint resolution system that allows an entity to judge its own actions is likely to be perceived as biased against complaining employees. In its report on the VBA, the House Committee on Veterans' Affairs described the fundamental problem that prompted the remedial legislation:

> The [Veterans' Affairs Oversight and Investigations] Subcommittee has concluded that a culture of tolerance of sexual harassment and abusive behavior exists at certain VA facilities, and that the policy of "zero tolerance" of sexual harassment is insufficient to address these problems. Consequently, the Committee believes it is critical for VA to establish and maintain an EEO complaint resolution and adjudication system that is both in fact and in the perception of VA employees fair, impartial and objective. The complaint process should be completely free and independent of undue influence, and the appearance thereof, from supervisors, line managers or directors. Objectivity and fairness should permeate the complaint process, from its initial informal stages through the Department's final agency decisions. Accordingly, the Committee has concluded that the processing of unlawful discrimination complaints should occur outside the particular facility where the alleged discriminatory conduct was said to have arisen, and that final agency decisions on the merits of a complaint should be made by a quasi-independent entity, the Office of Employment Discrimination Complaint Adjudication (OEDCA). The OEDCA would be headed by a Director who would report directly to the Secretary of Veterans Affairs or the Deputy Secretary. In addition, the Secretary should provide a work place free of harassment and discrimination by ensuring that employees and managers alike receive the education and training necessary for proper behavior in the workplace. The Secretary should be held responsible for ensuring that employees and managers are accountable for their conduct and behavior.

H.R. Rep. No. 105–292, at 5.

Part of the specific problem revealed at the hearings on the bill was that VA employees perceived the VA employment discrimination complaint resolution system as unfair. VA employees feared that their directors, who were also their EEO officers, would not impartially evaluate EEO complaints, and would use their supervisory authority to retaliate against employees for complaining. The House Report explains:

> The Committee believes that removing the facility director from [EEO] duties would address the concern among VA employees that an employee who files an EEO complaint is, in effect, making a claim against the facility director. Some VA employees who have been discriminated against believe that it would be futile to file an EEO claim because the facility director would oppose the claim

> as reflecting poorly on management. Consequently, too many VA employees fear that if they file an EEO claim, not only is it unlikely to be resolved in their favor, but they might be punished by the facility management via transfer, demotion or other forms of retaliation.

H.R. Rep. No. 105–292, at 6.

Congress in the VBA responded to those problems by separating the function of VA review of EEO complaints from the chain of supervisory authority over VA employees. In describing "[t]he operating independence of the OEDCA" as "its most important feature," H.R. Rep. No. 105–292, at 8, the House Committee on Veterans' Affairs referred exclusively to the OEDCA's independence from VA's Office of General Counsel ("OGC") and made no reference to independence from regulation by the EEOC. The division of responsibility between the OEDCA and the OGC that the VBA established could continue under the Commission's PFR.

You base your argument in favor of VA independence from EEOC procedures on the fact that, whereas section 101 of the VBA explicitly provides that "[t]he provisions of this section shall be implemented in a manner consistent with procedures applicable under regulations prescribed by the Equal Employment Opportunity Commission," VBA sec. 101(a)(1), § 516(h), 111 Stat. at 2279, nothing in section 102 of the VBA, which established OEDCA, similarly refers to EEOC regulations, VBA sec. 102(a)(1), § 319, 111 Stat. at 2280. *See* VA Request at 2–3. We draw a different conclusion from that text and the related legislative history.

Section 101 of the VBA addresses VA's system for handling employment discrimination complaints in general terms; section 102 addresses a particular aspect of that system. One of the "provisions" that section 101 directs be "implemented in a manner consistent with procedures applicable under regulations prescribed by the Equal Employment Opportunity Commission" is a general requirement that the Secretary establish and administer an EEO complaint resolution system that is, and is perceived to be, "objective, fair and effective."[4]

The best interpretation of section 101's reference to "the employment discrimination complaint resolution system within the Department" includes the functions of the OEDCA established by section 102. Thus, despite the fact that section 102 of the VBA does not reiterate the requirement that OEDCA employ procedures consistent with EEOC regulations, section 101 effectively requires the Secretary

[4] The pertinent VBA provision states.

> The Secretary shall provide that the employment discrimination complaint resolution system within the Department be established and administered so as to encourage timely and fair resolution of concerns and complaints. The Secretary shall take steps to ensure that the system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective

VBA, sec. 101(a)(1), § 516(a), 111 Stat. at 2278.

to ensure that OEDCA, as an important component of the Department's employment discrimination complaint resolution system, discharges its responsibilities "in a manner consistent with procedures applicable under regulations prescribed by the Equal Employment Opportunity Commission."

This interpretation is consistent with the overall intent of the VBA's drafters. Congress, presented with the problem that VA's system for resolving employment discrimination complaints was perceived as unfair due to bias or a perception of bias by Department EEO officials, sought to amend VA's system to better ensure impartiality. Nothing in the legislative history of the VBA suggests that Congress was seeking to give VA a unique exemption from the otherwise applicable regulations of the EEOC.

Conclusion

For the reasons discussed above, we conclude that the Veterans' Benefits Act of 1997 does not exempt VA from the EEOC's proposed final rule.

CORNELIA T.L. PILLARD
Deputy Assistant Attorney General
Office of Legal Counsel

Proposed Change in EEOC Regulations Concerning Right-to-Sue Notices for Public Sector Employees

The Equal Employment Opportunity Commission proposal to amend its procedural regulations to allow the Commission to issue a right-to-sue notice where it has failed to make a reasonable cause determination within 180 days after the filing of a charge against a state or local governmental entity is not permissible under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990.

October 7, 1999

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

You have asked for our opinion whether a change the Equal Employment Opportunity Commission (the "EEOC" or the "Commission") proposes to its procedural regulations is consistent with Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, tit. VII, 78 Stat. 241, 259, as amended ("Title VII"), and the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327, 328, as amended (the "ADA").[1] The Attorney General has the federal government's exclusive litigating authority in Title VII cases against state and local governmental employers. *See* 42 U.S.C. § 2000e–5(f) (1994). It has also been the Attorney General's role to issue right-to-sue notices in such cases, with one exception: under a current regulation, 29 C.F.R. § 1601.28(d) (1998), the EEOC may issue right-to-sue notices in cases in which it dismisses claims against state and local governmental entities based on specified grounds, such as a Commission finding that there is no reasonable cause to proceed. *See* 29 C.F.R. § 1601.18 (1998) (setting out grounds for dismissal). In letters to the Civil Rights Division dated May 12 and November 18, 1997, the Commission has proposed amending § 1601.18 of the regulations to create an additional basis for dismissal where the complainant has requested a right-to-sue notice and the EEOC determines that there is no law enforcement reason to continue processing the charge. By virtue of the current regulation permitting the EEOC to issue right-to-sue notices in governmental-entity cases resulting in dismissal, the proposed provision would allow the EEOC to issue a right-to-sue notice on request when it has failed to make a reasonable cause determination within 180 days following the filing of a charge against a state or local governmental employer.[2] You have raised the

[1] The procedures applicable under Title VII also apply under the ADA. *See* ADA, 42 U.S.C. § 12117(a) (1994). Accordingly, the analysis herein focuses on Title VII and does not separately discuss the ADA.

[2] The draft rule does not limit the EEOC's dismissal authority to cases in which 180 days have elapsed, but counsel for the Commission told this office that the draft rule was intended to be so limited, and that the text could be amended accordingly. In light of an existing regulation, the proposed regulation would in any event allow the EEOC to issue a right-to-sue letter prior to the expiration of the 180-day period whenever an appropriate EEOC official "has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge." 29 C.F.R. § 1601.28(a)(2) (1998).

concern that such a procedure violates the plain language of section 706(f)(1) of Title VII, 42 U.S.C. § 2000e–5(f)(1), which provides that notification of the right to sue "shall" be provided by "the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision." For the reasons set forth below, we conclude that, although the issue is a close one, the EEOC's proposal to take over this function from the Attorney General is not permissible under Title VII or the ADA.

A. Statutory Background

When Congress enacted Title VII in 1964, the statute applied only to private, non-governmental employers. Moreover, the EEOC had no authority to sue in its own name or to intervene in private suits; the sole governmental litigation authority under Title VII rested with the Justice Department. 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1525 (3d ed. 1996) ("Lindemann"). In 1972, Congress extended Title VII to prohibit employment discrimination by "governments, governmental agencies, [or] political subdivisions." Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103, 104 (the "1972 amendments"). At the same time, Congress assigned to the EEOC most of the Department's former responsibilities under the statute for litigation against private sector employers. *See* 42 U.S.C. § 2000e–6(c) (1994). With respect to governmental entities, however, Congress limited litigation authority to the Justice Department. *See* 42 U.S.C. § 2000e–5(f); Lindemann, *supra* at 1525–26.

In furtherance of Congress's new allocation of responsibilities between the EEOC and the Justice Department, the 1972 amendments set up a detailed procedural scheme for the processing of Title VII complaints. Under this scheme, all charges concerning either private or governmental employers must be filed with the EEOC. The EEOC is required to investigate all such charges and to make a determination in each case (within 120 days if "practicable") as to whether there is reasonable cause to believe the charge is true. Where the EEOC finds no reasonable cause, Title VII directs it to "dismiss the charge and promptly notify" the complainant and respondent of its action. 42 U.S.C. § 2000e–5(b). Where the EEOC determines that there is reasonable cause to believe that unlawful discrimination occurred, the statute requires the Commission to seek voluntary compliance through conciliation. *Id.* The statute sets no time limit on conciliation efforts.

Up to the conciliation stage, Title VII draws no distinction between complaints against private and governmental employers. Failure to reach a conciliation agreement, however, leads to a diverging allocation of further enforcement responsibilities. While the Commission may, upon the failure of conciliation, bring a civil action against "any respondent not a government, governmental agency, or political subdivision,'' it may ''take no further action'' with respect to a complaint involving a governmental entity, and must ''refer the case to the Attorney General who may bring a civil action.''[3] 42 U.S.C. § 2000e–5(f)(1). In a case involving a governmental entity, if the Justice Department has not filed a civil action within 180 days of the filing of the complaint with the EEOC,[4] the complainant is entitled to a ''right-to-sue'' letter, upon receipt of which the complainant has 90 days to file his or her own suit in federal court. *See* 42 U.S.C. § 2000e–5(f)(1); 29 C.F.R. § 1601.28. Specifically, the pertinent sentence of section 706(f) of the statute provides:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, *or the Attorney General in a case involving a government, governmental agency, or political subdivision*, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

42 U.S.C. § 2000e–5(f)(1) (emphasis added). The question you have presented requires us to determine whether the proposed regulation is consistent with this statutory language.

When it amended Title VII in 1972, Congress was well aware of the EEOC's large backlog of cases and resulting delays in the processing of charges. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 369 & n.25 (1977). Title VII nonetheless does not specifically set forth the procedure to be followed when the EEOC has failed to make a reasonable cause determination within 180 days regarding a complaint against a governmental employer, and thus has yet either to dismiss

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[3] Pursuant to the Reorganization Plan No 1 of 1978, the Attorney General has delegated this function to the Civil Rights Division of the Justice Department 43 Fed. Reg. 19,807 (1978); 42 U.S.C. § 2000e–4 note (1994).

[4] Pursuant to subsections (c), (d) and (f)(1) of 42 U.S.C. § 2000e–5, the commencement of the 180-day period may be delayed in some instances pending potential state or local enforcement proceedings in jurisdictions that have comparable employment discrimination laws. These provisions do not affect our analysis here and we therefore do not address them.

the charge for want of reasonable cause or refer it to the Justice Department. Under current practice, if a charge against a governmental entity has been pending with the EEOC for more than 180 days and the complainant requests a right-to-sue notice, the Commission refers the request to the Justice Department, which in turn issues the notice. The EEOC now seeks to amend its regulations to eliminate the referral requirement by giving itself the authority to dismiss charges in these circumstances. We conclude that section 706(f) gives the Attorney General exclusive authority to issue right-to-sue notices in cases against governmental entities, and thus precludes the EEOC's proposed regulatory amendment.

B. Discussion

Title VII does not expressly address the question of which agency should respond to a complainant's request for a right-to-sue letter where the EEOC has not made a reasonable cause determination. We believe that the better reading of section 706(f)(1) gives the Attorney General the exclusive authority to issue right-to-sue letters under such circumstances in cases involving state and local governmental employers. This interpretation comports with the language and punctuation of the relevant clause. Title VII's structure and purpose also support this reading. Given Title VII's consistent assignment of sole litigation authority to the Attorney General in governmental-entity cases, and the fact that only the Attorney General can make the decision whether to file a civil action against a state or local governmental employer, it is logical to read the statute as conferring on the Attorney General the exclusive authority to notify complainants of their right to sue when the federal government has not filed a civil action against a governmental employer within the prescribed time.

The question is admittedly a close one, but we conclude that the statutory authorization of issuance of right-to-sue letters by "the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision" is most naturally read to give only the Attorney General the authority to issue letters in governmental-entity cases. While the phrase could conceivably be read to permit either the Commission or the Attorney General to issue a letter in such cases, that reading would require giving "or" a conjunctive meaning, as if the statute designated "the Commission, or [either the Commission or] the Attorney General in a case involving a government, governmental agency, or political subdivision." Viewed in the context of the statute as a whole, the more plausible reading is that the "or" is disjunctive, so that the statute limits the authority to "the Commission, or [in a case involving a government, governmental agency, or political subdivision,] the Attorney General."

That reading is supported by other portions of section 706(f)(1) that refer in the alternative to the Commission or the Attorney General, each of which clearly gives the Attorney General exclusive authority in governmental-entity cases. For example, the sixth sentence of section 706(f) provides: "Upon timely application, the court may, in its discretion, permit *the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision,* to intervene in such civil action upon certification that the case is of general public importance" (emphasis added). Since Title VII gives the Attorney General sole litigating authority in governmental-entity cases, that provision cannot be read to permit intervention by the EEOC in such cases. Therefore, in the absence of any reason to believe that Congress intended the "or" in the passage relating to right-to-sue notification to be interpreted differently, the same disjunctive interpretation should be adopted here. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (noting that "normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning' ") (citations omitted).

The majority of courts that have considered this issue have interpreted the statute as directing the Attorney General, rather than the EEOC, to notify complainants of their right to sue in all cases involving governmental entities. At least four courts of appeals have reached this conclusion. *See Moore v. City of Charlotte*, 754 F.2d 1100, 1104 n.1 (4th Cir.) (stating that the Attorney General is "the authority designated by Title VII [to issue the right-to-sue notice] for cases in which the defendant is a political subdivision of a state"), *cert. denied*, 472 U.S. 1021 (1985)); *Solomon v. Hardison*, 746 F.2d 699, 701–02 (11th Cir. 1984) (noting "requirement that the Attorney General issue the right to sue letter"); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1525–26 (11th Cir. 1983) (same); *Hendrix v. Memorial Hosp. of Galveston County*, 776 F.2d 1255, 1256–57 (5th Cir. 1985) (construing section 706(f)(1) as requiring complainant "to await the action of the Justice Department before commencing her lawsuit"); *see also Dougherty v. Barry*, 869 F.2d 605, 611 (D.C. Cir. 1989) (observing that "[c]ourts have tended to interpret Title VII as laying th[e] responsibility [for issuing right-to-sue notices in cases involving governmental entities] at the Attorney General's door"); *Thames v. Oklahoma Historical Soc'y*, 646 F. Supp. 13, 16 (W.D. Okla. 1985) (holding that issuance of right-to-sue notice by Attorney General in cases involving governmental entities "is expressly required by the statute and furthers the goals of the Civil Rights Act as remedial legislation by bringing the reluctance of governmental agencies to comply with Title VII to the attention of the Attorney General"), *aff'd*, 809 F.2d 699 (10th Cir. 1987) (per curiam) (affirming district court judgment "for the reasons contained in its written Order").[5] *Cf. Shea v. City of St. Paul*, 601 F.2d 345, 349–51 & n.6 (8th Cir. 1979) (holding that EEOC's notice of dismissal for lack of probable cause constituted notice of right to sue

[5] Some of those courts have waived the requirement of a right-to-sue notice issued by the Attorney General, and have permitted particular cases to proceed on equitable or other grounds despite the issuance of notice by the EEOC. *See Moore*, 754 F.2d at 1104 n.1 (declining to penalize complainant for "any EEOC assumption of Justice Department duties"); *Solomon*, 746 F.2d at 701–02 (waiving requirement as nonjurisdictional), *Fouche*, 713 F.2d at 1525–26 (same).

where no party claimed that defendant's status as a governmental entity was relevant).

The overwhelming majority of district courts have also interpreted the statute as authorizing only the Attorney General, and not the EEOC, to issue right-to-sue notices in governmental-entity cases. *See, e.g., Kane v. Iowa Dep't of Human Servs.*, 955 F. Supp. 1117, 1133 (N.D. Iowa 1997) (Justice Department must issue notice in cases where EEOC has been unable to obtain conciliation agreement, "which this court reads to include situations . . . in which the EEOC simply has not reached the case"); *Ying Shen v. Oklahoma State Dep't of Health*, 647 F. Supp. 189, 189 (W.D. Okla. 1985) (dismissing complaint where plaintiff filed suit after receiving right-to-sue notice from EEOC because "the Right to Sue notice where a governmental agency is to be sued for discrimination must come from the office of the Attorney General"); *Dillard v. Rumph*, 584 F. Supp. 1266, 1268 n.1 (N.D. Ga. 1984) ("the statutory requirement of notice by the Attorney General must be waived in this case"); *Woods v. Missouri Dep't of Mental Health*, 581 F. Supp. 437, 442–44 (W.D. Mo. 1984) (concluding that "the Attorney General is required by statute to issue a notice of right to sue letter when the charge is dismissed in a case" against a governmental entity, but waiving requirement on equitable grounds, as "[p]laintiff should not be punished for the inability of the EEOC and Attorney General to follow the terms of the statute"); *English v. Ware County Dep't of Family & Children Servs.*, 546 F. Supp. 689, 690–91 (S.D. Ga. 1982) (holding that "notification by the United States Attorney General is a statutory prerequisite to institution of a Title VII action against a state governmental body"). Only one district court has held to the contrary, and that court did not address the issue presented by the proposed regulation. *See Flint v. California*, 594 F. Supp. 443, 445, 448–49 (E.D. Cal. 1984) (finding statutory language "inherently ambiguous" but concluding that "better reading" is that notice may be issued by the EEOC). Thus, our analysis of the statute's text is consistent with that of virtually all of the courts that have considered this matter.

Our interpretation is also consistent with the policy considerations that appear to underlie section 706(f)(1). Although there is no indication that Congress gave consideration specifically to which agency should issue a right-to-sue notice against a governmental respondent when the EEOC has made no probable cause determination, the overall congressional intent with respect to cases involving governmental entities is clear. While carrying over to governmental cases the EEOC's administrative function in the initial processing of charges and its important role in seeking to obtain voluntary compliance through conciliation, Congress unequivocally conferred sole litigating authority in such cases on the Attorney General. The legislative history suggests that Congress was motivated by a "strong feeling that cases of discrimination by State and local government agencies should be handled by the full force of the United States of America acting directly through the Attorney General." 118 Cong. Rec. 1070 (1972) (statement of Sen. Williams). *See Osiecki v. Housing & Redevelopment Auth.*, 481 F. Supp. 1229, 1232 (D. Minn.1979) ("The purpose of referring discrimination complaints involving governmental employees to the Attorney General was two fold: (1) to limit the number of federal agencies authorized to sue state governments, and (2) to bring the prestige of the Attorney General to bear on the reluctance of local governmental entities to comply with Title VII. . . . The statutory scheme embodied in section 706(f) clearly limits the power of the EEOC with respect to governmental employers, and vests the power to bring and intervene in civil actions involving governmental respondents solely to the Attorney General.") (citation omitted); *Woods*, 581 F. Supp. at 442 (same).

Given that only the Attorney General can make the decision to bring a civil action against a governmental employer under Title VII, it makes sense that the statute also gives the Attorney General the responsibility, at least where the complaint has not been dismissed, to inform a complainant that no civil action has been filed and that the complainant may proceed with his or her own suit. *See Osiecki*, 481 F. Supp. at 1232–33 ("As the administrative process has not been completed in cases involving governmental employers until the Attorney General has determined that it will not bring a civil action, it would be inconsistent with the intent of section 706(f) to allow the 90 day period [within which the complainant may sue] to commence prior to the Attorney General's involvement in the administrative process."); *English*, 546 F. Supp. at 691 ("This vesting of authority implies that the Attorney General should have more than just the ministerial responsibility for bringing suits against state employers, but also the discretion to decide whether and when to bring them."). Courts have further suggested that one purpose of the referral requirement is to "insure[ ] that the Attorney General would be able to review the file and make a determination whether [the United States] should exercise its discretionary power to file suit on behalf of the charging party." *Woods*, 581 F. Supp. at 442; *see also English*, 546 F. Supp. at 692 (requirement "insures at least a cursory review of the file, which is elemental in determining whether to intervene"); *Thames*, 646 F. Supp. at 16 (requirement "furthers the goals of the Civil Rights Act as remedial legislation by bringing the reluctance of governmental agencies to comply with Title VII to the attention of the Attorney General").

It could be argued that, under Title VII's overall procedural scheme, it would be appropriate for the EEOC to refer complaints to the Attorney General only once the Commission has found reasonable cause, failed at conciliation, and the case is ready for litigation. The District of Columbia Circuit in *Dougherty* suggested in dictum that the EEOC should refer a case to the Attorney General "only" after finding probable cause and unsuccessfully seeking compliance through conciliation. 869 F.2d at 611. That dictum might be read to imply that, in those cases in which there has not yet been a probable cause finding and unsuccessful conciliation, the EEOC should retain the case and issue the right-to-sue notice. *Dougherty* cannot, however, support that implication. The *Dougherty* court appears to have assumed that the Commission will have made a cause determination one way or the other within 180 days following the complainant's filing; the opinion simply does not speak to the category of cases at issue here, in which the Commission has failed to act by the time the complainant requests her right-to-sue letter. More importantly, the *Dougherty* dictum fails to account for section 706(f)'s unequivocal language giving the Attorney General the duty of notifying complainants of their right to sue in such cases. We decline to adopt an interpretation that would be in tension with the language of the statute.[6]

CONCLUSION

For the reasons stated above, we conclude that the proposed regulation is not permissible under Title VII or the ADA.

CORNELIA T.L. PILLARD
Deputy Assistant Attorney General
Office of Legal Counsel

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[6] The EEOC's authority to issue a right-to-sue notice in any case in which it has dismissed a charge against a state or local governmental entity for lack of probable cause is not inconsistent with our conclusion here The EEOC amended its regulations in 1980 to provide that it would issue right-to-sue letters in those circumstances. *See* 29 C.F.R § 1601 28(d) (1998). That limited authority does not depend on a conjunctive reading of the "or" in section 706(f)'s reference to "the Commission, or the Attorney General." that would generally authorize either to issue the notice. Rather, the Commission made the 1980 amendment in response to the Eighth Circuit's decision in *Shea v. City of St. Paul*, 601 F 2d 345 (8th Cir. 1979), dismissing an action as untimely even though the plaintiff filed suit within 90 days of the Justice Department's right-to-sue letter issued pursuant to section 706(f). The court held that Shea's action was time-barred because she filed it more than 90 days after receipt of the EEOC's dismissal notification pursuant to a different statutory provision from the one at issue here—section 706(b), which directs the Commission, upon finding no probable cause, to "dismiss the charge *and promptly notify* the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e-5(b) (emphasis added). *Shea*'s interpretation of the EEOC's section 706(b) dismissal notification as a right-to-sue letter triggering the 90-day limitations period meant that, if the Attorney General had continued the practice of issuing separate right-to-sue letters under section 706(f), such letters would only create a trap for the unwary by erroneously suggesting that a complainant had 90 days from the Attorney General's notice within which to file her complaint This Office found the 1980 regulatory amendment to be "not . . . inconsistent with the enforcement scheme that Congress contemplated in enacting § 706(f)(1) " Memorandum for David L. Rose, Chief, Federal Enforcement Section, Civil Rights Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Delegation of Authority of Ministerial Function to EEOC—Right to Sue Letters Under Title VII* at 2 (Feb. 6, 1980) *But see Fouche*, 713 F.2d at 1524, *Ying Shen*, 647 F Supp. at 189 (suggesting that the 1980 regulation conflicts with the express language of Title VII)

Appointment of a Senate-Confirmed Nominee

The President is not legally obligated to appoint a nominee to whom the Senate has given its advice and consent. Until the President takes the final public act necessary to complete the appointment, which in the case of a Senate-confirmed official is customarily evidenced by the President's signing the commission, the President retains full discretion not to appoint the nominee.

October 12, 1999

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the President has a legal duty to appoint and commission a nominee once the Senate has given its advice and consent to the nomination. It has long been established that the President, until he takes the final public act necessary to complete the appointment, retains the full discretion not to appoint a nominee. The appointment is the voluntary act of the President, and the consent of the Senate does not place him under any legal obligation. Accordingly, until the President makes the appointment, which in the case of a Senate-confirmed official is customarily evidenced by the President's signing a commission, the Constitution commits to the President's sole discretion whether to appoint the nominee.

Article II of the Constitution provides that, except as to certain inferior officers, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States" and that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 2, cl. 2; § 3. The Constitution thus calls for three steps before a presidential appointment is complete: first, the President's submission of a nomination to the Senate; second, the Senate's advice and consent; third, the President's appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary. Even after the Senate's advice and consent, up to the moment that the President signs the commission, he can grant or withhold an appointment in accordance with his will and judgment.

Chief Justice Marshall's opinion for the Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–58 (1803), examined in detail the President's discretion over appointments. *See also id.* at 162, 167. The Court stated that the President's appointment of an officer "is . . . a voluntary act, though it can only be performed by and with the advice and consent of the senate." *Id.* at 155. As Justice Story explained in his *Commentaries on the Constitution*,

> Upon the fullest deliberation, the court were of opinion that, when a commission has been signed by the President, the appointment is final and complete. The officer appointed has then conferred on him legal rights, which cannot be resumed. *Until that, the discretion*

> *of the President may be exercised by him as to the appointment;* but, from that moment, it is irrevocable.

2 Joseph Story, *Commentaries on the Constitution of the United States* § 1546, at 371 (Melville M. Bigelow ed., 5th ed. 1994) (emphasis added). *See also* 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 987, at 1506 (2d ed. 1929).

The courts have continued to apply the principle set out in *Marbury v. Madison*. In *D'Arco v. United States*, 441 F.2d 1173 (Ct. Cl. 1971), the court held that a military officer had not been promoted even though the Senate had confirmed his nomination, because no commission had been signed: "Chief Justice Marshall's reasoning teaches that, even if the office had been for a term of years, like Marbury's, the executive could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission." *Id.* at 1175. *See also National Treasury Employees Union v. Reagan*, 663 F.2d 239, 242 (D.C. Cir. 1981) ("For more than one hundred and seventy-five years, the rule as to when an appointment takes place has been clear: 'when the last act to be done by the [appointing authority] was performed.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 157)).

This principle has been repeatedly recognized in the authoritative legal judgments of the executive branch. In 1843, for example, the Attorney General wrote that the President's nomination and the Senate's advice and consent "serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee." *Appointments to Office — Case of Lieutenant Coxe*, 4 Op. Att'y Gen. 217, 219 (1843). In 1931, the Attorney General stated that the Appointments Clause

> contemplates three steps. There is, first, the nomination, which is a mere proposal. Next comes action by the Senate consenting or refusing to consent to the appointment. Finally, if the Senate consents to the appointment there follows the executive act of appointment. It has long been recognized that the nomination and the appointment are different acts, and that the appointment is not effected by the Senate's so-called confirmation of the nomination. After the Senate has consented to the appointment, the nominee is not entitled to the office until the consent is followed by the executive appointment. After a nomination is sent to the Senate and has received the approval of that body, the President may, having changed his mind, decline to make the appointment.

Legality of Appointment of Certain Members of the Federal Power Commission, 36 Op. Att'y Gen. 382, 384–85 (1931); *accord Nominations for Prospective Vacancies on the Supreme Court*, 10 Op. O.L.C. 108, 109 (1986) ("Confirmation does not confer any rights on the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission."). *See also, e.g., President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32, 42 (1866); *Case of Virgil S. Eggleston*, 13 Op. Att'y Gen. 44, 45 (1869); *Relief of Fitz John Porter*, 18 Op. Att'y Gen. 18, 25–26 (1884).[1]

The Comptroller General, an officer in the legislative branch, likewise has acknowledged that the President may withhold an appointment after confirmation by the Senate. *Appointments and Promotions — Presidential Appointees and Per Diem Experts — Social Security Board Appropriation Limitations*, 17 Comp. Gen. 249, 252 (1937) ("The nomination is not an appointment; neither is the confirmation. The nomination and confirmation serve but to indicate the purpose of the President to appoint and the consent of the Senate that the appointment may be made thereafter. They do not divest the executive authority of the discretion to withhold the actual appointment. That discretion may be exercised at any time before the commission is actually signed." (internal quotation and citation omitted)).

We therefore conclude that even after the Senate gives its advice and consent, the President lawfully may decline to appoint a nominee.

DANIEL L. KOFFSKY
Acting Deputy Assistant Attorney General
Office of Legal Counsel

[1] In 1895, the Acting Attorney General concluded that a Senator's appointment to an executive office was barred by the clause of the Constitution forbidding appointment of a member of Congress to a position for which the salary was increased during that member's elected term According to the opinion, the Senator was appointed on February 23, 1895, the date he was nominated and confirmed, rather than March 5, 1895, the date his commission was signed. *Member of Congress—Appointment to Office*, 21 Op. Att'y Gen 211 (1895) The opinion arguably could be read to equate the Senate's advice and consent with the appointment. However, because the commission had been backdated to February 23, and the appointee had been sworn in on March 4, the last act necessary to make the appointment, under the peculiar facts of the case, could be taken to have occurred before the signing of the commission. *See id.* at 212, 214; *see also Marbury*, 5 U S (1 Cranch) at 156 ("if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer").

Tribal Restrictions on Sharing of Indigenous Knowledge on Uses of Biological Resources

The Indian Civil Rights Act, rather than the federal Constitution, limits the power of an Indian tribe vis-à-vis its members. In interpreting provisions of the ICRA, it is appropriate to look to precedents under analogous constitutional provisions constraining federal and state action, although particular facts about tribal structure and traditions may be relevant to the analysis.

In some factual circumstances, a tribal ordinance prohibiting members from sharing, with researchers or others outside the tribe, information on possible commercial uses of biological resources would raise concerns under the free speech provision of the ICRA. The legality of such an ordinance would depend on a number of factors including how widely known the information is; whether those who hold the information have a particular relationship of trust with the tribe; the magnitude of the tribal interest underlying the tribe's effort not to disclose the information; and whether the information can be viewed as tribal property under an intellectual property regime that is otherwise consistent with applicable law.

October 12, 1999

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

This memorandum responds to the Environment and Natural Resources Division's request, conveyed orally, for guidance on whether an Indian tribe's efforts to prevent its members from disclosing, to researchers or others outside the tribe, information on possible commercial uses of biological resources would raise First Amendment or other concerns. As discussed below, the request raises several complex issues that cannot be resolved fully in the abstract. We therefore attempt only to set forth the general framework that might guide the analysis of a tribal restriction on members' ability to share information with outside researchers. First, the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301–1341 (1994), rather than the federal Constitution, limits the power of an Indian tribe vis-à-vis its members. Although the ICRA contains a free speech clause similar to that of the First Amendment, it is unclear whether a tribal action limiting the speech of tribal members would be evaluated under the same substantive standards as federal and state action. The task of interpreting the ICRA falls primarily to tribal courts. We have not attempted to survey the decisions of the varied tribal court systems to determine how tribal courts interpret the ICRA's substantive guarantees. Second, even if conventional free speech principles apply, the legality of tribal action could depend upon factual circumstances likely to vary from tribe to tribe. In particular, the analysis could turn in part on the relationship between the tribe and those who hold the relevant information, whether the information in question should be viewed as tribal property, and the importance of the tribal interest in nondisclosure. We are not in a position to identify and evaluate the range of possibilities in this regard. In some factual circumstances, however, it is possible that a tribe's attempt to guard against disclosure of information by directly prohibiting its members from sharing that information with others would violate the free speech provision of the ICRA.

I. Background

The request for views presented arises in connection with the United States' involvement in implementation of the Convention on Biological Diversity, *opened for signature* June 5, 1992, S. Treaty Doc. No. 103–20, 31 I.L.M. 818 (entered into force Dec. 29, 1993). The United States signed the Convention on June 4, 1993, but the Senate has not ratified it. The United States is involved as an observer in international negotiations concerning the implementation of the Convention. Article 8(j) of the Convention addresses indigenous knowledge of uses of biological resources. It provides:

> Each Contracting Party shall, as far as possible and as appropriate:
>
> . . .
>
> j. Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

An interagency working group discussing the United States' position on implementation of Article 8(j) has raised the question whether federal law imposes limits upon indigenous communities' own efforts to protect indigenous knowledge through direct restrictions on members' ability to reveal such knowledge to outside researchers.[1] In turn, you have asked us to provide you with a general background discussion on the possible impact of the First Amendment on such restrictions.

[1] We express no view on whether and to what extent our discussion of the narrow question presented to us bears upon compliance with the obligations imposed by Article 8(j) of the Convention.

II. Discussion

A.

As a general matter, constitutional provisions limiting the actions of federal and state governments do not constrain Indian tribes exercising inherent powers of self-government. *See Talton v. Mayes*, 163 U.S. 376 (1896). Accordingly, the First Amendment ordinarily would not restrict a tribe's efforts to prohibit its members from sharing information concerning uses of biological resources with researchers. *See Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (First Amendment religion clauses do not constrain tribal action); *Janis v. Wilson*, 385 F. Supp. 1143, 1149 (D.S.D. 1974) (First Amendment Free Speech Clause does not constrain tribal action); *Dodge v. Nakai*, 298 F. Supp. 17, 23 (D. Ariz. 1968) (same).[2] Through title I of the Indian Civil Rights Act,[3] however, Congress has imposed upon tribes restrictions similar to several of those contained in the Bill of Rights and the Fourteenth Amendment. *See* 25 U.S.C. §§ 1301–1303. The Act includes a provision parallel to the Free Speech, Assembly, and Petition Clauses of the First Amendment: "No Indian tribe in exercising powers of self-government shall . . . make or enforce any law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." 25 U.S.C. § 1302(1).

In analyzing the application of title I of the ICRA to tribal efforts to guard against disclosure of indigenous knowledge, we first consider a threshold question: whether, in evaluating tribal action, it is appropriate to look to precedents under analogous constitutional provisions constraining federal and state action. As will become clear, the text, structure, and legislative history of the ICRA give rise to two lines of argument regarding its interpretation. Because the task of interpreting the ICRA falls primarily to tribal courts, it is difficult to predict whether

[2] For purposes of our discussion, we assume that the tribal conduct would be independent of federal or state action. In instances in which tribal action is closely intertwined with federal or state action, a different analysis might apply For example, particular facts and circumstances might give rise to the conclusion that tribal action is somehow attributable to the federal or state governments *See, e g*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) In addition, although the Supreme Court has held that in some circumstances the Constitution may constrain the conduct of a private entity on privately owned property-in particular, where a company owns a town and assumes the functions of a municipal government-this principle has been narrowly applied *Compare Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (invalidating state conviction for distribution of religious literature on sidewalk of company-owned town· "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute ") *with Hudgens v NLRB*, 424 U S 507, 518 (1976) (rejecting application of *Marsh* to shopping center). We are aware of no instance in which *Marsh* has been invoked to support the application of the Constitution to tribal conduct

[3] The Indian Civil Rights Act was initially passed by the Senate on December 7, 1967, as a stand-alone measure containing six titles S 1843, 90th Cong., 113 Cong Rec. 35,471, 35,473 (1967) (as amended). The bill was ultimately enacted as titles II through VII of a larger civil rights measure, the Civil Rights Act of 1968, Pub. L 90–284, 82 Stat. 73, 77. We refer to the title designations in S 1843, as have courts construing the statute *See Santa Clara Pueblo v Martinez*, 436 U.S. 49, 51 n.1 (1978); *Poodry v Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881 n 9 (2d Cir.), *cert. denied*, 519 U S 1041 (1996).

tribal action would be analyzed under the standards that apply to federal and state action. Nevertheless, we believe that the better view is that conventional First Amendment principles, applied with due regard for tribal traditions and customs, should govern the analysis of a tribal restriction on speech.

As the Supreme Court stated in *Santa Clara Pueblo v. Martinez*, the Indian Civil Rights Act reflects Congress's intent to "strengthen[ ] the position of individual tribal members vis-à-vis the tribe." 436 U.S. at 62. As noted, the text of the free speech clause of § 1302(1) is virtually identical to that of the First Amendment, just as other provisions of title I of the ICRA track the language of other guarantees contained in the Bill of Rights. It could be argued, then, that Congress's use of language virtually identical to that of corresponding constitutional provisions reflects a clear intent to hold tribal governments to the substantive standards applied to federal and state action. The Senate Report accompanying the ICRA provides some support for this view. S. Rep. No. 90–841, at 6 (1967) (stating that the limitations of title I "are the same as those imposed on the Government of the United States by the U.S. Constitution and on the States by judicial interpretation"); *id.* at 10–11 (Title I "provides that any Indian tribe in exercising its powers of local self-government shall, with certain exceptions, be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the Constitution.").

Nevertheless, title I of the ICRA does not impose on tribal governments the full range of constitutional restraints. Rather, the statute incorporates specific rights. Among the constitutional provisions omitted in the statute are the guarantee of a republican form of government, a prohibition on the establishment of religion, and the Second and Third Amendments. In addition, the statute does not require jury trials in civil cases or the appointment of counsel for indigent defendants in criminal cases. The ICRA's legislative history confirms that, in incorporating particular rights rather than all constitutional restraints, Congress sought to limit the extent of its intrusion upon tribal sovereignty. As the Supreme Court stated in *Santa Clara Pueblo*, Congress sought "to promote the well-established federal 'policy of furthering Indian self-government.'" 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Indeed, the first version of what would become title I of the ICRA, introduced in 1964 and reintroduced without change in 1965, would have applied to tribal governments the "same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." S. 3047, 88th Cong., 110 Cong. Rec. 17,329 (1964); S. 961, 89th Cong., 111 Cong. Rec. 1799 (1965). Tribes, attorneys specializing in Indian affairs, and the Department of the Interior criticized this proposal during 1965 hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. *Constitutional Rights of the American Indian: Hearings on S. 961–968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong. 17–18, 36, 84, 90, 130, 221–27 (1965) ("1965 Hearings"); Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., *Constitutional Rights of the American Indian* 9 (Comm. Print 1966) ("1966 Report"). A revised version of S. 961, introduced in 1967 as S. 1843, largely followed a proposal offered by the Department of the Interior at the 1965 hearings that incorporated, and in some cases modified, specific constitutional rights. 113 Cong. Rec. 13,473 (1967). With some changes in wording not relevant here, S. 1843 and several other measures were consolidated into a single bill, *see* S. 1843, 90th Cong., § 102, 113 Cong. Rec. 35,471 (1967) (as amended), and enacted as part of a broader civil rights measure. *See* 113 Cong. Rec. 30,711 (1967); 114 Cong. Rec. 5835 (1968).

Based on the fact that Congress sought to limit its intrusion on tribal sovereignty, some commentators have argued that constitutional precedents should not apply even as to provisions of the ICRA that are worded similarly to constitutional guarantees. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1359 (1969) ("Indian Bill of Rights"); Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 617 (1972). The fact that Congress deleted certain restrictions on governmental activity, these commentators suggest, signals Congress's effort to avoid imposing requirements that would cause serious disruption of tribal life, not Congress's intent "to force modifications of tribal ethnic and cultural autonomy where necessary for the application of those restrictions on governmental conduct which remain in the statute." Indian Bill of Rights at 1359.

Federal case law provides little additional guidance as to whether those provisions that Congress chose to include in the ICRA should be interpreted in the same manner as corresponding constitutional provisions. In *Santa Clara Pueblo*, the sole Supreme Court case directly addressing the structure, purpose, and legislative history of the ICRA, the Court held that federal courts lacked jurisdiction to entertain a civil cause of action against a tribe or its officials alleging a violation of title I of the ICRA. 436 U.S. at 67–68. Accordingly, because the Court disposed of the case on jurisdictional grounds, the Court had no opportunity to consider the scope of the Act's substantive guarantees. The Court's jurisdictional discussion nevertheless reflects the importance of applying the ICRA with sensitivity to tribal customs and traditions. *See id.* at 63 (noting that the ICRA as a whole manifests "a congressional purpose to protect tribal sovereignty from undue interference"); *id.* at 71 ("Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.").

Since the Court's 1978 ruling, only a handful of federal courts have addressed, in the criminal context, the scope of ICRA's substantive guarantees in relation to similarly worded constitutional provisions.[4] Prior to the decision in *Santa Clara Pueblo*, a number of federal courts had exercised jurisdiction over civil claims arising under ICRA and had interpreted the Act's substantive guarantees in a variety of ways. We discuss these categories of cases in turn.[5]

Recent federal decisions addressing claimed violations of title I of the ICRA typically involve habeas review of a tribal court conviction or direct or collateral review of a federal conviction that followed certain challenged tribal investigatory conduct, such as a search or arrest. In cases involving tribal prosecution or investigation of criminal conduct, most courts have concluded that Congress's use of constitutional language in title I of the ICRA reflects an intent to apply to tribal governments the substantive standards that apply under the Constitution to federal and state action. *See, e.g., Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 952 (9th Cir. 1998) ("[B]ecause the ICRA [compulsory process] clause is identical to the Compulsory Process Clause of the Sixth Amendment, the cases that interpret the Constitution speak directly to Selam's right of compulsory process under the ICRA."); *United States v. Strong*, 778 F.2d 1393, 1397 (9th Cir. 1985) (noting that the limitations imposed by the ICRA search and seizure provision "are identical to those imposed by the fourth amendment to the federal constitution"); *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981) ("In light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution, we consider the [challenge to a tribal search] under fourth amendment standards.") (citation omitted); *United States v. Clifford*, 664 F.2d 1090, 1091 n.3 (8th Cir. 1981) (same); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d at 893 & n.21 (concluding that the ICRA's habeas remedy is coextensive with other federal statutes providing for collateral relief). *But see United States v. Doherty*, 126 F.3d 769, 779 (6th Cir. 1997) (finding denial of right to retained counsel in tribal court proceeding, but declining to suppress confession because to do so would upset the "careful[] balance[]" between "the desire to protect the rights of Native Americans [and] the desire to avoid extensive interference with internal tribal affairs"), *cert. denied*, 524 U.S. 917 (1998).

Pre-*Santa Clara Pueblo* decisions applying the provisions of title I outside of the criminal context (that is, based on the now rejected assumption that the ICRA impliedly provided for a civil cause of action in federal courts against tribal officials) reflect less consensus on the scope of the ICRA's substantive guarantees.

[4] The Tenth Circuit has recognized an exception to the rule announced in *Santa Clara Pueblo* and has permitted federal court adjudication of certain civil actions in cases in which no tribal remedy exists. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir 1980), *cert. denied*, 449 U S 1118 (1981). We do not address cases falling within this exception, which has been rejected by at least two other circuits, *see Shortbull v. Looking Elk*, 677 F 2d 645 (8th Cir.), *cert. denied*, 459 U.S. 907 (1982), *R.J. Williams Co. v. Fort Belknap Hous Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 472 U.S 1016 (1985), and narrowed by the Tenth Circuit itself, *see White v Pueblo of San Juan*, 728 F.2d 1307, 1311–12 (10th Cir. 1984).

[5] As noted above, we do not attempt to discuss tribal court decisions regarding the scope of the ICRA's substantive guarantees

Some courts recognized that Congress did not intend to apply the full panoply of constitutional restrictions to tribes but reasoned that, as to those provisions in which Congress adopted wording virtually identical to that of a constitutional guarantee, existing constitutional precedents should apply. *See Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1977) ("The Act substantially tracks the precise language of the Bill of Rights portion of the Constitution, thereby acting as a conduit to transmit federal constitutional protections to those individuals subject to tribal jurisdiction. . . . [O]ur court has written that the due process clauses of both documents have the same meaning.") (citing *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 202–03 n.4 (9th Cir. 1973)). Others concluded that constitutional precedents applicable to federal and state governments did not apply with full force to tribes, even as to provisions with language closely tracking the Constitution. *See, e.g., Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir. 1975) (concluding that the equal protection clause of the ICRA should not be construed in the same manner as the Equal Protection Clause of the Fourteenth Amendment); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (rejecting claim that the passage of the ICRA made the Due Process and Equal Protection Clauses applicable to tribes); *Lohnes v. Cloud*, 366 F. Supp. 619, 622 (D.N.D. 1973) (following *Groundhog*).[6] In a third category of cases, courts held that federal precedents apply under the ICRA so long as the challenged policy does not reflect a long-standing tribal tradition. *See Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 239 (9th Cir. 1976) (applying "the Anglo-Saxon notion of equal protection" to election and voting procedures based on those "found in our culture" (internal quotation marks omitted)); *Means v. Wilson*, 522 F.2d 833, 842 (8th Cir. 1975) (applying traditional constitutional principles to practice that "is not founded [on a] tribal custom or governmental purpose which would justify modification of traditional equal protection concepts"), *cert. denied*, 424 U.S. 958 (1976); *White Eagle v. One Feather*, 478 F.2d at 1314 (applying traditional equal protection principles to evaluate compliance with "voting procedures precisely paralleling those commonly found in our culture").

[6] Several cases in this category follow *Groundhog*, which is based on an incomplete analysis of the ICRA's legislative history The Department of Interior's proposed equal protection provision would have guaranteed "any member of the tribe" within the jurisdiction of the tribal government equal protection under the tribe's laws, a standard narrower than that of the Fourteenth Amendment. 1965 Hearings at 318. A summary report of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee recommended adoption of the Interior substitute and stated that the substitute would "impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions," including, "in some respects, the equal protection requirement of the 14th amendment." 1966 Report at 25. The version of the bill described in the report was amended prior to being voted out of the full Judiciary Committee to guarantee "any person" located within the tribe's jurisdiction equal protection under the tribe's laws, S Rep. No. 90–841, at 2, thereby making the scope of the clause commensurate with that of the Fourteenth Amendment. Without acknowledging the subsequent amendment by the full committee, the *Groundhog* court relied on the report's statement to conclude that "the equal protection clause in § 1302(8) of the Indian Bill of Rights was not as broad as the equal protection clause of the Fourteenth Amendment." 442 F.2d at 682. Courts subsequently quoted the *Groundhog* court's analysis without independently evaluating the legislative history. *E.g., Wounded Head*, 507 F 2d at 1082, *White Eagle v. One Feather*, 478 F.2d 1311, 1313 (8th Cir. 1973); *Lohnes*, 366 F Supp at 622.

Although courts have disagreed over the extent to which provisions of the ICRA should be interpreted in the same manner as their constitutional counterparts, we believe that the better view is that conventional constitutional principles should generally apply where the language of title I of the ICRA closely tracks that of the Constitution. To be sure, the discussion in *Santa Clara Pueblo* suggests that title I of the ICRA must be interpreted with sensitivity to tribal customs and traditions. *See supra* pp. 238–39; 436 U.S. at 63, 71. Congress sought to limit its intrusion on tribal sovereignty by selecting specific rights to include in the ICRA. Congress did not, however, simply identify those rights in concept and formulate specific language for the tribal context. Rather, in many cases it imported the precise constitutional language in an effort to impose upon tribes, "with certain exceptions," "the same limitations and restraints as those which are imposed on the Government of the United States by the Constitution." S. Rep. No. 90–841, at 10–11. Generally speaking, recent federal cases arising in the criminal context have applied to tribal governments the same substantive standards that apply under the Constitution to federal and state action. Although earlier cases reflected less consensus, it appears that a number of cases holding that constitutional standards do not apply can be traced to a case based on an incomplete discussion of the ICRA's legislative history. *See supra* note 6. We attempt below to set forth certain principles of First Amendment law that might guide the analysis of a tribal ordinance challenged under § 1302(1) of the ICRA, and to identify areas in which tribal structure and traditions would be relevant to the analysis.

B.

A tribal ordinance restricting the dissemination of information concerning biological resources would, in effect, limit the speech of those members of a tribe who wished to share the information with others. How such an ordinance should be evaluated under conventional free speech doctrine would depend in part on two related considerations that could vary from case to case: first, how best to describe the relationship between the tribe and holders of the information that the tribe seeks to protect; and second, whether the information in question can properly be viewed as tribal proprietary information. To frame the analysis, we first assume (1) that it is appropriate to think of the relationship between the tribe and its members as roughly analogous to the relationship between a state government and its citizens; and (2) that the restriction on the dissemination of information applies to information that is not properly viewed as tribal property under federal or other law. We then discuss how the analysis might change if we relax these assumptions.

1. If the relationship between a tribe and its members should be thought of as analogous to the relationship between a state and its citizens, and a tribe seeks to limit the dissemination outside of the tribe of lawfully obtained information

that is not tribal property, it is doubtful that the tribal restriction would survive scrutiny under conventional free speech principles. The Supreme Court has held on several occasions that "the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest order." *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (internal quotation marks omitted); *see Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (setting aside award of compensatory and punitive damages against newspaper that published rape victim's name, in violation of Florida law, after obtaining it from police document); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (affirming writ of prohibition against prosecution of newspaper that published name of youth involved in juvenile proceeding, in violation of West Virginia law); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845–46 (1978) (reversing conviction of corporate newspaper publisher that revealed identity of judge under investigation in confidential state proceedings, where newspaper was not alleged to have obtained the information by illegal means); *Oklahoma Publ'g Co. v. Oklahoma County Dist. Court*, 430 U.S. 308, 311 (1977) (per curiam) (invalidating state pretrial order enjoining publication of the name of juvenile in connection with a proceeding involving that juvenile and attended by reporters); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 (1975) (invalidating civil damages award entered against television for broadcasting name of a rape-murder victim that the station obtained from courthouse records). The fact that the information in question might not otherwise be widely available to the public does not appear to change the First Amendment's limitations on the government's ability to prevent further dissemination. *See, e.g., Landmark; see also New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to restrain third parties' publication of classified study secured by unauthorized leak from former government employee).

Florida Star and similar cases do leave open the possibility that, in rare circumstances, the First Amendment might not bar sanctions on the publication or dissemination of true, lawfully obtained information. We lack the expertise regarding tribal affairs, however, to speculate whether such a weighty justification may exist in this context. *Cf. Near v. Minnesota*, 283 U.S. 697, 716 (1931) (invalidating, as prior restraint, statute permitting suppression of malicious, scandalous, or defamatory periodicals; noting that, in exceptional cases, statute restraining publication might survive scrutiny, as where publication would reveal troop movements or obstruct recruitment of soldiers during a time of war or incite acts of violence (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). We may be unaware of facts regarding indigenous knowledge that could trigger such an exception. It may be relevant, for example, whether the tribe seeks to limit the dissemination of information outside of the tribe for compelling religious or cultural reasons or instead to profit from future arrangements with researchers or manufacturers.

2. If the relationship between the tribe and those who hold knowledge concerning the use of biological resources should not be thought of as analogous to that between a government and its citizens, the analysis reflected in *Florida Star* and similar cases may not apply. The cases discussed above do not involve restrictions on the dissemination of information by one who, by virtue of a fiduciary or other relationship with the government, is under a duty not to disclose particular information to the public. Case law suggests that the government may lawfully limit disclosure of sensitive or confidential information by an individual who assumes a position of trust. In *Aguilar*, for example, the defendant, a district court judge, learned of a confidential wiretap order and disclosed the existence of the order to its target after its expiration. In rejecting the defendant's claim that the statute prohibiting disclosure of wiretap information should, on First Amendment grounds, be construed not to cover the judge's revelation of an expired order, the Court stated: "Government officials in sensitive confidential positions may have special duties of nondisclosure. . . . As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. at 606 (citations omitted). Similarly, in *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), the Court held that a former agent of the Central Intelligence Agency ("CIA") had, by virtue of his employment contract, a fiduciary duty not to disclose any information regarding the CIA or its activities without the CIA's prior permission. The former agent breached this duty by publishing confidential (though unclassified) information without prior approval. The Court rejected the view that the CIA's pre-publication review procedure constituted impermissible censorship of its employees' speech. *See* 444 U.S. at 513 n.8. In addition, the Court observed that,

> even in the absence of an express agreement . . . the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.

Id. at 509 n.3 (citations omitted).

Aguilar and *Snepp* suggest that, in some circumstances, the relationship between the government and one who possesses certain information will be a relationship of trust, and that the government may, in pursuit of a substantial government interest, reasonably impose upon an individual who enters into that relationship a duty not to disclose information obtained by virtue of that relationship. Although it is not clear that the relationship between a tribe and those who hold information concerning use of biological resources would ordinarily be the sort of relationship that would give rise to a duty of confidentiality, we may be unaware of particular facts, including facts about tribal structure and culture, that would bear upon the analysis. For example, it may be relevant whether information is held solely by tribal elders or members of a ruling entity, as opposed to being known more widely throughout the tribe. In addition, we may be unaware of a substantial or compelling tribal interest that would support a requirement of nondisclosure.

3. We have thus far assumed that information on uses of biological resources would not properly be viewed as tribal intellectual property, and we have identified limitations that the ICRA's free speech clause might impose upon a tribe's ability to restrict the dissemination of such information. If the information were properly viewed as tribal property, it is likely that a tribe could lawfully impose some restrictions upon the dissemination of that information. The possibility that information on uses of biological resources could be treated as tribal property, however, raises a prior question: whether the recognition of a tribal property interest would itself be consistent with applicable law. We first consider the limitations that federal law would impose on the creation or recognition of a tribal property interest in information on uses of biological resources. We then examine whether a tribe could invoke current federal or state intellectual property law to establish a tribal property interest in such information.

a. There are two possibilities for recognition of a property interest in information on uses of biological resources: first, that *federal or state law* would create or recognize, on behalf of a tribe, a property interest in information on uses of biological resources; and second, that *tribal law* would create such an interest.

A federal or state regime that created or recognized a tribal property interest in information on uses of biological resources-as distinct from the tribe's action to enforce its rights under that regime-would be subject to scrutiny under the First Amendment (or, in the case of a state, the First and Fourteenth Amendments), rather than under the ICRA. While the precise limits that the First Amendment imposes upon the ability of the government to provide protection for the intellectual property of its citizens are somewhat unclear, *see generally* Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665 (1992), we can make some general observations.

First, the Supreme Court has permitted the government to recognize a property interest in information and to prevent its dissemination when the information is confidential and has been provided to another on the express condition that it not be further disclosed. For example, the Court has recognized that a state may protect trade secrets by allowing one who discovers a formula or process to prevent those privy to the relevant information from disclosing it to others. *See Kewanee Oil Co. v. Bicron Corp*, 416 U.S. 470, 479, 486 (1974).[7]

Second, to the extent that the Supreme Court has permitted the government to recognize and protect a property right for exclusive use of a particular process, performance, or formula, it has done so where the party seeking protection can establish that it devoted energy and resources to developing that process, performance, or formula. Thus, for example, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), the Supreme Court rejected a First Amendment challenge to a federal statute granting the United States Olympic Committee the exclusive right to use the word "Olympic" in connection with the sale of any goods and services or the promotion of any exhibition, performance, or competition. The Court concluded that Congress's grant of an exclusive right to use the word "Olympic" was consistent with the recognition that, "when a word acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word." *Id.* at 532 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918)). Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the First Amendment, applied to the states through the Fourteenth Amendment, did not prohibit a state from protecting a performer's right to the value of his performance by providing a cause of action for damages against those who broadcast his act without his consent. In rejecting a news organization's claim that the First and Fourteenth Amendments required the state to recognize a privilege to include in its newscasts material that would otherwise be protected under state law, the Court emphasized that the performance

> is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. . . . Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.

[7] Although no First Amendment claim was presented in *Kewanee*, the Court's reliance on *Kewanee* in disposing of a First Amendment claim in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), suggests that the Court would uphold a trade secret law against a First Amendment challenge. *See id.* at 578 n.13 (noting that, in *Kewanee*, "[a]lthough recognizing that the trade-secret law resulted in preventing the public from gaining certain information, the Court emphasized that the law had 'a decidedly beneficial effect on society,' and that without it, 'organized scientific and technological research could become fragmented, and society, as a whole, would suffer' ") (quoting *Kewanee*, 416 U.S. at 485, 486).

433 U.S. at 575–76.[8]

As this discussion suggests, a tribe's ability to use recognition of an intellectual property right as a tool for preventing the dissemination of information on uses of biological resources may turn on the extent to which the information sought to be protected is not generally available and the extent to which the tribe itself can be said to have developed the information in question. A private entity seeking intellectual property protection, for example, could demonstrate that it sponsored employee efforts leading to a particular innovation and went to reasonable efforts to prevent those privy to the relevant information from disseminating it. It is unclear whether a tribe seeking recognition of an intellectual property right in knowledge of uses of biological resources could establish that the tribe-rather than individual members of the tribe-was responsible for the development of the information or process that it seeks to protect, or that the information is not generally known. Again, there may be particular facts of which we are unaware that would bear on this analysis. For example, it may not be accurate to characterize the contribution of a member of a tribe to the development of a particular process as an individual rather than tribal contribution.

We turn now to whether a tribe itself could establish an intellectual property regime to protect information on uses of biological resources and thereby restrict dissemination of such information. As in the case of direct tribal limitations on speech, the principal question is whether title I of the ICRA would constrain the tribe's conduct. For purposes of discussion, we assume that tribes retain the power to recognize and enforce property rights of those within the tribe's sovereign reach and that tribes can exercise this power to the extent that it does not conflict with federal law in this area. *Cf. Kewanee*, 416 U.S. at 479 (discussing limits on state regulation of intellectual property). If conventional free speech principles apply to tribal action in this context, then the analysis of a tribal regime under the ICRA would follow that outlined above with respect to federal or state protection of intellectual property. If, however, the tribe sought not to enforce the property rights of those within its reach, but instead to vest a property right in itself, its action could raise additional concerns under the ICRA. First, insofar as the ICRA envisions the tribe as a sovereign-like entity, it is unlikely that the ICRA's free speech clause would permit a tribe simply to deem information to be tribal information so as to prevent its dissemination, just as the First Amendment would not permit the federal government or a state to deem particular information, generally known within its jurisdiction, to be confidential government information solely in order to prevent its dissemination. Second, the ICRA also prohibits an Indian tribe, "in exercising powers of self-government," from "tak[ing] any private property for a public use without just compensation." 25 U.S.C. § 1302(5).

[8] For a more detailed discussion of potential First Amendment limitations on the government's ability to recognize intellectual property rights in information, *see generally Constitutional Concerns* Raised by the Collections of Information Antipiracy Act, 22 Op O L C 166, 186–190 (1998)

To the extent that the development of knowledge concerning uses of biological resources is attributable to an investment of resources by individual members of the tribe rather than the tribe itself, and to the extent that it is appropriate to characterize such contributions as individual contributions, the tribe's action could raise concerns under the ICRA's takings clause.

b. Having outlined the restraints that federal law would impose on recognition of a property interest in information on uses of biological resources, we briefly examine the possibilities for such protection under existing federal and state intellectual property regimes. It does not appear that a tribe could invoke current federal or state intellectual property law to establish a tribal property right that could, in turn, justify a restriction on the dissemination of tribal information. Federal patent law, for example, permits one who has developed a particular process to establish a property right in that process; the patentee, however, must publicly disclose the process in exchange for an exclusive, temporary right to use it. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 149 (1989).[9] State law protections on trade secrets permit one who has developed a formula or process to prevent those privy to information concerning the formula or process (such as employees) from disclosing it. For knowledge to be considered a trade secret under existing law, it must ordinarily have independent economic value by virtue of being kept secret and must be the subject of reasonable efforts to maintain its secrecy. *See* Restatement (First) of Torts § 757 cmt. b (1939). Matters of public or general knowledge cannot qualify as trade secrets. *Id.* To the extent that information on uses of biological resources has been shared with those outside of a tribe, trade secret protection would likely be unavailable to the tribe. It is unclear whether information held within a tribe, but widely known among tribal members, could qualify as a trade secret, analogous to information held within a corporation.

Conclusion

As this discussion suggests, it is difficult to determine in the abstract whether a tribe could prevent its members from sharing knowledge concerning possible commercial uses of biological resources with persons outside the tribe. The task of deciding whether the ICRA limits a tribe's ability to prevent its members from disseminating information will fall primarily to tribal courts. It is therefore difficult to predict whether conventional free speech principles will guide the inquiry; in our view, the better reading of the ICRA is that such principles should apply. If conventional free speech principles do apply, then the legality of a tribal ordinance restricting the dissemination of information would depend in large part on

[9] In addition, to merit federal patent protection, a process must (among other things) be novel and nonobvious, *see* 35 U.S.C. § 103 (Supp. I 1995), and must not have been "known or used by others in this country," 35 U.S.C. § 102(a) (1994) To the extent that tribal members and others have, over time, known of or implemented a particular process, patent protection for the tribe probably would be unavailable

whether, under the ICRA, the relationship between tribes and their members should be thought of as analogous to the relationship between a government and its citizens. What is more, the analysis would turn on particular factual circumstances likely to vary from tribe to tribe. In particular, the analysis could turn on who holds the information that the tribe seeks to protect; whether those who hold the information have a particular relationship of trust with the tribe; the magnitude of the tribal interest underlying the tribe's effort not to disclose the information; and whether the information in question can be viewed as tribal property under an intellectual property regime that is otherwise consistent with applicable law.

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Office of Legal Counsel

Participation by Processor-Owned Catcher Vessels in Inshore Cooperatives Under the American Fisheries Act of 1998

Section 210(b) of the American Fisheries Act of 1998 permits catcher vessels owned by shoreside processors to participate in AFA-authorized fishery cooperatives.

December 10, 1999

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

You have requested our advice as to the appropriate construction of section 210(b) of the American Fisheries Act, Pub. L. No. 105–277, 112 Stat. 2681–616, 2681–629 (1998) ("AFA"). Specifically, you have asked whether catcher vessels owned by shoreside processors may participate in fishery cooperatives in the inshore sector of the Alaska pollock fishery, which are authorized under section 210(b) of the AFA, or whether participation in such cooperatives is limited to independently owned catcher vessels. *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew J. Pincus, General Counsel, Department of Commerce (Aug. 10, 1999) ("Commerce Letter"). As explained more fully below, we conclude that section 210(b) does permit processor-owned catcher vessels to join AFA-authorized fishery cooperatives.

I. BACKGROUND

A. *The BSAI Fishery*

The Bering Sea and Aleutian Islands ("BSAI") fishery, located in the Bering Sea off the coast of Alaska, is the largest single-species groundfish fishery in the world. In recent years, growing market demand for the Alaskan pollock — a fish used in the United States primarily as an ingredient in breaded fish products and used worldwide for processing into the protein paste surimi — has spurred tremendous growth in the BSAI fishery, with increasing numbers of vessels entering the fishery each year to compete for a share of the annual catch.

The pollock harvested in the BSAI fishery are processed by two competing sectors, inshore (including shoreside) and offshore processors. Inshore processors operate traditional land-based processing plants and floating processors that are moored in a single location for the entire year. They obtain fish either from catcher vessels that are independently owned ("independent catcher vessels") or from vessels in which they or other processors have an ownership interest ("processor-owned catcher vessels"). Offshore processing takes place on factory trawlers (also known as "catcher-processors") or motherships. Catcher-processors are large vessels that harvest pollock and process their own catch. They also purchase fish harvested by catcher vessels and process that catch. Mothership processors are vessels engaged solely in processing; they operate at sea by taking deliveries of fish harvested by catcher vessels and processing them.

The BSAI fishery is managed by the Secretary of Commerce ("Secretary") through the National Marine Fisheries Service ("NMFS") and the North Pacific Fishery Management Council ("Council"). The Council acts as an advisory board and recommends fishery management actions to the Secretary. *See generally* 16 U.S.C. § 1852 (1994). Among the Council's responsibilities is to recommend to the NMFS a "total allowable catch" ("TAC") for each species of fish in the BSAI fishery. *See* 50 C.F.R. § 679.20 (1998). The TAC represents the maximum amount of fish that can be harvested in any given fishing season.

Before 1998, the Council was responsible for recommending to the Secretary how the annual TAC for Alaskan pollock should be allocated between the offshore and inshore components of the BSAI fishing industry. In 1992, the Council recommended an allocation that permitted the offshore sector to harvest sixty-five percent of the pollock TAC, and the inshore sector to harvest thirty-five percent. *See* General Accounting Office, *Fishery Management: Market Impacts of the American Fisheries Act on the Production of Pollock Fillets* 3 (June 1999). Not surprisingly, that percentage allocation was the subject of bitter dispute each year between the offshore and inshore sectors. Moreover, although the Council's allocation formula limited the amount of pollock each sector could harvest, it did not regulate the amount of pollock that individual catcher vessels or catcher-processors could catch. As a result, a "race for fish" ensued within this open access system: each fishing season, vessels within each sector raced to catch as much pollock as possible until their allocation was reached and the season closed. Those vessels that caught the most fish made the most money. Over the years, as more and more vessels joined the race in response to increased market demand for pollock, the fishery suffered increasingly from overcapitalization and inefficiency.

B. *The American Fisheries Act of 1998*

In 1998, Congress enacted the AFA to address some of these problems. Senator Breaux, one of the AFA sponsors, described the legislation as "another major milestone in our long efforts to reserve U.S. fishery resources for bona fide U.S. citizens as well as take steps to substantially improve the conservation and management of our Nation's fishery resources through a reduction in the overcapitalization of our fishing fleets." 143 Cong. Rec. S10,299 (daily ed. Oct. 1, 1997) (statement of Sen. Breaux). The sponsors of the AFA thus sought to accomplish three goals — "Americanization, decapitalization, and rationalization" of the BSAI fishery. *See* 144 Cong. Rec. S12,801 (daily ed. Oct. 21, 1998) (statement of Sen. Gorton); *see also id.* at S12,777 (statement of Sen. Stevens).

Subtitle I of the AFA attempts to achieve "Americanization" by imposing new ownership requirements on U.S. flag vessels. *See* AFA § 202, 112 Stat. at 2681–617 to 2681–618. Subtitle I also partly addresses the problem of overcapitalization of the fishery by placing limits on the size of new vessels in U.S. waters. *See id.*

Subtitle II of the AFA advances the goals of "decapitalization" and "rationalization" through various provisions that reduce excess capacity in the fishery and substitute a comprehensive management scheme for the pre-existing open access system. Section 206 deals with the question of the appropriate allocation of the pollock TAC by establishing statutory allocations for the offshore and inshore sectors. After setting aside ten percent of the TAC as a directed fishing allowance for the western Alaska community development quota program, section 206 divides the remainder of the TAC equally between the inshore and offshore processing sectors. *See* § 206(a)–(b)(1). The offshore sector allocation is split further, with catcher-processors and the catcher vessels supplying them receiving forty percent of the TAC and the catcher vessels harvesting pollock for motherships receiving ten percent. *See* § 206(b)(2)–(b)(3).

Sections 207 through 209 aim to streamline and restructure the BSAI industry. Sections 207 and 209 provide for a buyout of nine predominantly foreign-owned catcher-processors that will henceforth be ineligible to participate in the BSAI fishery. Section 208 limits participation in the fishery by establishing strict eligibility requirements for vessels and processors in both the offshore and inshore sectors. *See* § 208(a) (eligibility requirements for catcher vessels delivering to shoreside processors); § 208(b) (listing eligible catcher vessels delivering to catcher-processors and eligibility criteria for other catcher vessels delivering to catcher-processors); § 208(c) (listing eligible catcher vessels delivering to motherships and eligibility criteria for other catcher vessels delivering to motherships); § 208(d) (listing eligible motherships); § 208(e) (listing eligible catcher-processors); § 208(f) (eligibility criteria for shoreside processors).

Section 210 of the AFA, the provision at issue here, seeks to eliminate the race for fish by providing a framework for the formation of fishery cooperatives in each of the BSAI processing sectors. *See* § 210(b) (cooperatives of catcher vessels delivering fish to shoreside processors), § 210(c) (cooperatives of catcher vessels delivering fish to catcher-processors), § 210(d) (cooperatives of catcher vessels delivering fish to motherships). Although certain types of fishery cooperatives were already authorized under the Fisherman's Collective Marketing Act of 1934, 15 U.S.C. § 521 (1994) ("FCMA"), section 210 provides a powerful incentive for the creation of fishery cooperatives: It reserves a certain percentage of the TAC for the members of each cooperative, thereby guaranteeing them a share of the fish that they can harvest at their own pace.

The precise criteria for the establishment of AFA fishery cooperatives in the inshore processing sector are set out in subsection 210(b). Under those criteria, if eighty percent or more of the "qualified catcher vessels" that delivered pollock to a particular shoreside processor the previous year sign "a contract implementing a fishery cooperative under subsection (a)"—i.e., a contract under section 1 of the FCMA—and if these vessels further agree to deliver pollock only to that particular shoreside processor (and the processor agrees to process the pollock), then the Secretary of Commerce may establish a separate allocation for the cooperative. § 210(b)(1). That allocation would be equal to the average percentage of the TAC that the vessels in the cooperative caught during 1995, 1996 and 1997. *See id.* If a fishery cooperative is formed, section 210(b)(2) requires the cooperative to permit other catcher vessels that delivered most of their catch to that shoreside processor to join the cooperative under the same terms and conditions as member vessels. *See* § 210(b)(2).

Catcher vessels that participate in a fishery cooperative under section 210(b) may harvest only the pollock that is allocated to them by the Secretary; they are not allowed to harvest any of the pollock that remains in the "open access" portion of the inshore allocation under section 206(b)(1). *See* § 210(b)(5). The open access allocation is equivalent to that portion of the inshore allocation that has not been reserved by the Secretary for fishery cooperatives. *See id.*

II. DISCUSSION

The question before us is whether catcher vessels that are owned by shoreside processors may participate in fishery cooperatives under section 210(b) of the AFA. Section 210(b)(1), which creates the entitlement of fishery cooperatives to a portion of the TAC, provides:

> (b) **Catcher Vessels Onshore**—
>
> (1) **Catcher vessel cooperatives.**—Effective January 1, 2000, upon the filing of a contract implementing a fishery cooperative under subsection (a) which—
>
> (A) is signed by the owners of 80 percent or more of the qualified catcher vessels that delivered pollock for processing by a shoreside processor in the directed pollock fishery in the year prior to the year in which the fishery cooperative will be in effect; and
>
> (B) specifies, except as provided in paragraph (6), that such catcher vessels will deliver pollock in the directed pollock fishery only to such shoreside processor during the year in which the fishery cooperative will be in effect and that such shoreside processor has agreed to process such pollock,

> the Secretary shall [set aside a fishing allowance from the inshore allocation of the TAC for that fishery cooperative].

Section 210(b)(1) points to two possible statutory bases for limiting eligibility to independently owned vessels. First, the AFA by its own terms might impose the limitation. Second, the reference in section 210(b)(1) to "a contract implementing a fishery cooperative under subsection (a)" might effectively incorporate limits from the FCMA, since subsection (a) refers to "a contract implementing a fishery cooperative" under the FCMA.

A. *Language and Legislative History of AFA*

Taken by itself, the AFA does not restrict eligibility to independently owned catcher vessels. Section 210(b)(3) defines "qualified catcher vessel" as follows:

> **Qualified catcher vessel.**—For the purposes of this subsection, a catcher vessel shall be considered a "qualified catcher vessel" if, during the year prior to the year in which the fishery cooperative will be in effect, it delivered more pollock to the shoreside processor to which it will deliver pollock under the fishery cooperative in paragraph (1) than to any other shoreside processor.

Nothing in this definition suggests an ownership limitation. Pursuant to section 210(b)(3), whether or not a catcher vessel is "qualified" under the AFA to participate in a fishery cooperative linked to a particular shoreside processor depends upon whether the vessel delivered the majority of its catch to that processor, not upon its ownership structure.

Nor does the definition of the underlying term "catcher vessel" contain any ownership-based restriction. "Catcher vessel" is defined in section 205(3) of the AFA as "a vessel that is used for harvesting fish and that does not process pollock onboard." What this definition excludes are boats that process fish onboard—catcher/processors (*see* § 205(2)) and motherships (*see* § 205(8))—but it does not, by its own terms, exclude vessels on the basis of ownership.

Further clarification of the scope of the term "catcher vessel" appears in subsections 208(a) and (c). Section 208 generally sets forth eligibility criteria for catcher vessels participating in the inshore and offshore sectors of the BSAI fishery. Under section 208(a), eligibility to harvest pollock for the inshore sector is limited to those catcher vessels that: (1) either have delivered at least 250 metric tons of pollock to a shoreside processor in 1996, 1997 or 1998, or are less than sixty feet long and have delivered at least forty metric tons of pollock to a shoreside processor in any of those years; (2) have an approved license to harvest pollock; and (3) are not listed in subsection 208(b) (which lists catcher vessels eligible to deliver pollock to catcher/processors). *See* § 208(a)(1). None of these eligibility criteria relates in any way to ownership of the catcher vessel.

Subsection 208(c), which defines the eligibility of catcher vessels delivering pollock to motherships, also offers textual support for an interpretation of "catcher vessel" that makes no distinction based on ownership. Section 208(c) lists specifically named "catcher vessels" that remain eligible to harvest the portion of the TAC allocated to motherships. While some of the catcher vessels identified in section 208(c) are independently owned, many of those listed are owned wholly or in part by a mothership. *See* Robert Halvorsen et al., "Discussion Paper on Inshore Sector Catcher Vessel Cooperatives in the Bering Sea/Aleutian Islands Pollock Fisheries" at Appendix C (Sept. 13, 1999) ("University of Washington Discussion Paper") (listing vessels participating in BSAI fishery and their ownership structure). By including both independently owned vessels and mothership-owned vessels within the list of eligible "catcher vessels," section 208(c) extends the scope of that term to vessels owned by an entity within one of the processing sectors. Although none of the vessels listed in section 208(c) is owned by a shoreside processor,[1] section 208(c) makes clear that the term "catcher vessel" is not limited to non-processor-owned boats. Since there is nothing in the definition of "catcher vessel" to distinguish between different types of processor owners, it follows that the term "catcher vessel" includes boats owned by shoreside processors as well.

The overall purpose animating section 210(b), as revealed in the language and history of the provision, supports this inclusive definition. Rather than placing any ownership limitation on vessel participation in cooperatives, section 210(b) expressly encourages broad participation in inshore cooperatives by all vessels. Section 210(b)(2) provides that "[a]ny contract implementing a fishery cooperative under paragraph (1) must allow the owners of other qualified catcher vessels to enter into such contract after it is filed . . . under the same terms and conditions as the owners of the qualified catcher vessels who entered into such contract upon filing." The conference report to the AFA explains that this provision extends the authority to join cooperatives to all qualified catcher vessels "on a class-wide basis":

> If a fishery cooperative is formed, other catcher vessels that delivered most of their catch to that shoreside processor would be required to be allowed to join the fishery cooperative under the same terms and conditions as other participants at any time before the calendar year in which fishing under the cooperative will begin. . . . The vessels eligible to harvest pollock allocated for processing by shoreside processors would continue to have the

[1] This comes as no surprise, since a catcher vessel owned by a shoreside processor would likely be delivering the majority of its catch to that shoreside processor, not to a mothership

> authority to form a fishery cooperative on a class-wide basis as well.

144 Cong. Rec. S12,780 (daily ed. Oct. 21, 1998).

Moreover, the manner in which Congress chose to structure fishery cooperatives for the inshore sector requires the participation of shoreside processor-owned catcher vessels in order to achieve the goal for which AFA cooperatives were being established: to end the race for fish. In order for a fishery cooperative to be formed under section 210(b), the owners of eighty percent or more of the qualified catcher vessels that delivered pollock to a particular shoreside processor in the previous year must agree to join the cooperative. *See* § 210(b)(1). In 1998, however, processor-owned vessels apparently made up over twenty percent of the total number of vessels delivering pollock to six out of seven shoreside processors. *See* University of Washington Discussion Paper at 46. Thus, if processor-owned vessels were excluded from participating in AFA cooperatives, six out of seven of the potential cooperatives that might be formed under the AFA could not reach the eighty percent threshold for vessel participation. In other words, if participation in AFA cooperatives was limited to independently owned vessels, only one cooperative could be formed pursuant to the requirements of section 210(b). *See* Commerce Letter at 1–2.

Similarly, if processor-owned vessels were excluded from AFA cooperatives, none of the fishery cooperatives that Congress intended to create within the mothership sector pursuant to section 210(d) could be formed. Like section 210(b), section 210(d) permits "the filing of a contract implementing a fishery cooperative under [section 1 of the FCMA]." § 210(d)(1). These contracts must be entered into "by the owners of 80 percent or more of the catcher vessels eligible under 208(c)." *Id.* The latter provision lists 19 named vessels, 13 of which are processor-owned. Section 208(c) includes a provision allowing additional vessels to be added to this list, but only if the Secretary of Commerce makes certain factual findings and the new vessel is eligible to harvest pollock under a license limitation program recommended by the North Pacific Council. *See* § 208(c)(20)(A), (B). Unless an additional 46 independently owned boats were added to this list by January 1, 2000, there would be no possibility that 80 percent of the catcher vessels eligible under section 208(c) could be independently owned. Because one of the central aims of the AFA was to *reduce* excess capacity in the fishery, it is obvious that Congress did not intend to authorize the creation of FCMA cooperatives within the mothership sector only if the number of catcher vessels within that sector more than tripled, from 19 to 65. Section 210(d), therefore, confirms that Congress expected processor-owned vessels to enter into contracts "implementing a fishery cooperative under" the FCMA.

Thus, interpreting the AFA to exclude processor-owned vessels would essentially defeat the primary purpose of the Act, which was to encourage the formation of fishery cooperatives in order to end the annual race for fish. As noted above, *see supra* p. 253, under section 210(b)(5), catcher vessels that do not participate in a fishery cooperative may harvest pollock from that portion of the inshore allocation that is reserved for open access. If only a small number of catcher vessels join cooperatives, the percentage of the TAC set aside for cooperatives will also be small, leaving a correspondingly greater percentage of the TAC available for open access, with a large number of non-cooperative vessels competing for a portion of that catch. The race for fish would continue.

The legislative history of the AFA likewise confirms that Congress intended fishery cooperatives to play a critical role in ending the race for fish. As Senator Murray explained during the Senate debate on the AFA,

> This bill relies in great measure on the ability and willingness of the North Pacific pollock fishery sectors to form fishery cooperatives. Fishery cooperatives, authorized under current law, are a privately negotiated allocation on a company-by-company or vessel-by-vessel basis of a portion of the total allowable catch. Similar to an individual fishing quota program, cooperatives provide fishery participants with the certainty they need to stop the race for fish, and harvest and process the fish on a more flexible schedule with greater attention to bycatch, efficiency, and safety. The existing fishery cooperative in the offshore sector of the Pacific Whiting fishery has shown tremendous benefits in these regards and has helped rationalize the fishery. It is hoped that cooperatives can do the same in the pollock fishery.

144 Cong. Rec. S12,708 (daily ed. Oct. 20, 1998) (statement of Sen. Murray).

It can reasonably be assumed that, in crafting cooperatives as a solution to the open access problem, Congress was familiar with the BSAI fishing industry and its various components. *Cf. Rodriguez v. Peters*, 63 F.3d 546, 567 (7th Cir. 1995). More particularly, it is clear that Congress was aware of the extent to which the shoreside processing sector was vertically integrated and that Congress did not intend to omit processor-owned boats from the fishery cooperatives whose formation was essential to the purposes of section 210. The clear language of the AFA and its legislative history and purpose thus demonstrate a congressional intent to include processor-owned vessels in fishery cooperatives under section 210(b).[2]

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[2] To be sure, the purpose of section 210(b) could also be achieved if processors sold their catcher vessels to independent operators The legislative history, however, makes no reference to such divestiture, and it seems unlikely that Congress, without even referring to divestiture, would make the entire success of section 210(b) rest on this contingency.

B. *Section 210(b) Reference to FCMA Cooperatives*

We now turn to the question whether the reference in subsection 210(b) to "fishery cooperative[s] under subsection (a)," which refers to the fishery cooperative provision of the FCMA, 15 U.S.C. § 521, places any limitations on the formation of cooperatives under the AFA. The National Oceanographic and Atmospheric Administration ("NOAA") does not dispute the conclusion that the text and legislative history of the AFA indicate a congressional intent to include processor-owned vessels in cooperatives under section 210(b). However, NOAA argues that, by referring to FCMA fishery cooperatives under section 210(b), Congress necessarily incorporated into the AFA cooperatives those eligibility restrictions that apply to FCMA cooperatives. *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Monica P. Medina, General Counsel, National Oceanographic and Atmospheric Administration (June 7, 1999) ("NOAA Letter"). And because NOAA interprets the FCMA to preclude the participation of processor-owned vessels, it concludes that, likewise, processor-owned vessels are ineligible to participate in cooperatives under § 210(b) of the AFA. *See id.* at 5.

Because the question of the interplay between the FCMA and the AFA is relevant to a proper interpretation of section 210(b), we will briefly discuss the antitrust exemption under the FCMA and the statute upon which it is modeled, the Capper-Volstead Act, 7 U.S.C. § 291 (1994), before returning to the AFA.

1. *Integrated Processors under the FCMA and the Capper-Volstead Act*

The FCMA grants an exemption from antitrust liability for certain collective activities in the fishing industry. Specifically, it provides:

> Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged. . . . Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes.

15 U.S.C. § 521. The FCMA exemption was patterned after a similar antitrust exemption for agricultural activities, set forth in section 1 of the Capper-Volstead Act, 7 U.S.C. § 291. In fact, the only court that has considered the scope of the FCMA exemption concluded that "though there are some differences between

Capper-Volstead and the Fisherman's Act, the two Acts provide exemptions from antitrust liability for essentially the same activities." *United States v. Hinote*, 823 F. Supp. 1350, 1354 n.7 (S.D. Miss. 1993).

The Supreme Court considered the scope of the Capper-Volstead exemption in *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) ("*NBMA*"). In *NBMA*, the United States brought a civil action against a nonprofit cooperative association of producers of broiler chickens — the NBMA — alleging a conspiracy in violation of section 1 of the Sherman Act. The question before the Court was whether a producer of broiler chickens, which did not own a breeder flock or hatchery, could nevertheless qualify as a "farmer" within the meaning of the Capper-Volstead Act. *See id.* at 817. After reviewing the legislative history of the Capper-Volstead Act, the Court concluded that it could not:

> We, therefore, conclude that any member of NBMA that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act. The economic role of such a member in the production of broiler chickens is indistinguishable from that of the processor that enters into a preplanting contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops. . . . We hold that such members are not "farmers," as that term is used in the Act, and that a cooperative organization that includes them — or even one of them — as members is not entitled to the limited protection of the Capper-Volstead Act.

Id. at 827–29 (footnotes omitted).

In coming to this conclusion, the Court specifically reserved the question of the status of the integrated producer:

> [W]e need not consider here the status under the Act of the fully integrated producer that not only maintains its own breeder flock, hatchery, and grow-out facility, but also runs its own processing plant. Neither do we consider the status of the less fully integrated producer that, although maintaining a grow-out facility, also contracts with independent growers for a large portion of the broilers processed at its facility.

Id. at 829 n.21. In a concurring opinion, Justice Brennan did address these questions reserved by the Court. He reviewed the legislative history of the Capper-Volstead Act, and asserted that "Congress' manifest purpose to protect the small, individual economic units engaged in farming," *id.* at 835 (Brennan, J., concurring), precluded automatic extension of the exemption to the integrated producer:

> I seriously question the validity of any definition of "farmer" in § 1 which does not limit that term to exempt only persons engaged in agricultural production who are in a position to use cooperative associations for collective handling and processing — the very activities for which the exemption was created. At some point along the path of downstream integration, the function of the exemption for its intended purpose is lost, and I seriously doubt that a person engaged in agricultural production beyond that point can be considered to be a farmer . . . . Thus, in my view, the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an association is exempt.

Id. at 835–36.

Only one court has actually ruled on the question whether an integrated producer is entitled to Capper-Volstead or FCMA exemption. In *United States v. Hinote*, 823 F. Supp. 1350, 1359 (S.D. Miss. 1993), the district court, relying largely upon Justice Brennan's concurrence, concluded that catfish processors could not take advantage of the antitrust exemption under the FCMA solely by purchasing or leasing some interest in a catfish farming operation. The court reasoned that if it were to come to the opposite conclusion,

> large integrated agribusinesses organized to market and sell agricultural products could exempt themselves from the antitrust laws by the simple expedient of purchasing and/or leasing some interest in a farming operation, no matter how de minimis the interest. Such a result, however, would undermine Congress' express purpose in enacting both the Sherman and Capper-Volstead Acts.

Id. There is certainly support in the legislative history of the Capper-Volstead Act for this conclusion, much of which is catalogued by Justice Brennan in his *NBMA* concurrence. However, as Justice White recognized in his dissent in *NBMA*, there is also conflicting evidence in the history and language of the statute that might lead to the opposite conclusion. 436 U.S. at 844–49.

While we understand that it is generally assumed that integrated producers and processors may not participate in exempted cooperatives, the sparse case law interpreting the scope of the FCMA and Capper-Volstead exemptions cannot be said to have dispositively resolved the question. However, as we discuss in the next section, we need not decide that question in order to determine whether processor-owned vessels may participate in the cooperatives authorized under section 210(b).

2. *Reconciling the FCMA with the AFA*

It is a well-established principle of statutory interpretation that the law favors rational and sensible construction. *See, e.g.*, 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.12 (5th ed. 1992). Thus, if there exists some reasonable interpretation that reconciles two otherwise allegedly inconsistent statutes in a manner that does not destroy or hinder the intent or meaning of either one, that interpretation is favored. *See id.* Moreover, if a statute is capable of more than one interpretation, it should be construed to effectuate its underlying purpose. *See Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328, 333 (8th Cir. 1998); *cf. United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (stressing that, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (How.) 113, 122 (1849)). Applying these principles to the case before us, we must, if possible, construe the cross-reference to FCMA cooperatives in section 210(b) in a reasonable manner that is both consistent with the purposes of the AFA and compatible with section 1 of the FCMA.

Congress's primary purpose in enacting section 210 was to encourage the formation of as many fishery cooperatives as possible in order to rationalize the BSAI fishery and end the race for fish. *See supra* pp. 256–57. Congress chose to effectuate this purpose for the inshore sector of the BSAI fishery by creating "catcher vessel cooperatives" under section 210(b). Congress chose also to define section 210(b) cooperatives by cross-referencing the FCMA. Because the participation of processor-owned vessels in section 210(b) cooperatives was critical to achieving Congress's purpose, Congress must have intended that such vessels would be included in cooperatives under the FCMA.[3] In interpreting section 210(b)'s cross-reference to the FCMA, therefore, we are presented with three possibilities: (1) Congress was mistaken about the scope of the FCMA, which excludes such integrated processors, and processor-owned vessels may not participate in cooperatives under section 210(b); (2) Congress correctly understood the FCMA to include integrated processors, and processor-owned vessels may participate in cooperatives under section 210(b); or (3) Congress has in the AFA effectively declared that, regardless of the actual scope of the FCMA in other contexts, processor-owned vessels may participate in FCMA fishery cooperatives in the BSAI fishery. Of these three possible interpretations, we must reject the first because it so plainly frustrates the purpose of the AFA. We need not decide between the second and third possible interpretations, however, because, under either, it is clear

[3] Of course, it might be argued that Congress deliberately referred to the FCMA cooperatives in section 210(b) in order to exclude processor-owned boats from AFA cooperatives However, there is nothing in the legislative history of the statute to support such an assertion, and there is significant evidence to the contrary. *See supra* pp 253–57 Thus, we do not think this interpretation of the reference to the FCMA merits consideration

that catcher vessels owned by shoreside processors may participate in the fishery cooperatives authorized by section 210(b) of the AFA.

The first of these interpretations assumes the conclusion reached by NOAA, namely that the FCMA does not permit integrated processors to participate in cooperatives under 15 U.S.C. § 521. To argue further, as NOAA does, that this cross-reference necessarily incorporates the limitations of FCMA cooperatives into the AFA scheme requires us to conclude that Congress mistakenly assumed that FCMA cooperatives could include integrated processors and, as a result, enacted a provision that cannot operate as Congress intended. Moreover, as we have already observed, if processor-owned vessels are excluded from participating in cooperatives under section 210(b), only one fishery cooperative could be formed under section 210(b), thereby thwarting the primary purpose of section 210. Thus if we accept this first interpretation, we render section 210(b) practically ineffective.[4]

We are reluctant to adopt a construction of a statute that presumes congressional error and that renders its provisions either ineffective or contrary to stated legislative objectives. The "unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A Singer, Sutherland Statutory Construction § 45.12; *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible.").

We therefore look to the two other proposed interpretations to see if they offer a more reasonable result that achieves the AFA's underlying purposes. The second interpretation accomplishes these goals because it would allow processor-owned catcher vessels to join cooperatives under both the FCMA and the AFA. Of course, this interpretation would require us to determine that integrated processors may participate in fishery cooperatives under the FCMA, a conclusion that cannot be said to be settled under the case law and that we understand may have profound implications for both the fishing and other industries. We are therefore reluctant to rely upon this conclusion, and need not do so because, even if the FCMA exemption does not cover integrated processors, we believe Congress's intent to permit the formation of cooperatives under section 210(b) that include processor-owned vessels can still be given effect under the third interpretation.

The third interpretation posits that Congress declined to express or assume a view concerning the scope of the FCMA generally and instead decided that, regardless of whether processor-owned vessels are permitted to participate in all cooperatives under the FCMA, they should participate in the FCMA cooperatives

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[4] It might be argued that the fact that one cooperative of independently owned catcher vessels could be formed under the provisions of section 210(b) is sufficient to render this interpretation viable. However, in light of Congress's clear intent in section 210(b) to encourage the formation of cooperatives on a "class-wide basis," we think such an interpretation would in fact "thwart the obvious purpose of the statute." *In Re Trans Alaska Pipeline Rate Cases*, 436 U S 631, 643 (1978). Moreover, as noted above, *see supra* pp 256–57, this interpretation would completely nullify section 210(d)

authorized by the AFA. By referring to the FCMA in a statute that intended to include integrated processors in its fishery cooperatives, Congress effectively determined that, at least for the purpose of BSAI directed pollock fisheries, processor-owned vessels are entitled to participate in cooperatives that enjoy FCMA antitrust immunity.

"[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Here, however, as noted above, there was no dispositive judicial interpretation of the scope of either the FCMA or the Capper-Volstead Act to guide Congress when it enacted the AFA in 1998. Moreover, because it was not actually amending the FCMA, Congress had no reason in the AFA to settle this far-reaching issue. *Cf. Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (stating that "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means"); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 508–09 (1982) (according interpretive weight to views of a subsequent Congress where that Congress acted in light of settled rule that exhaustion is not required in section 1983 actions and imposed an exhaustion requirement for a discrete class of 1983 claims). Rather, all that was required was for Congress to determine that processor-owned vessels should be allowed to participate in AFA cooperatives that enjoy FCMA immunity.

The language of section 210 offers textual support for the view that Congress legislated in this limited manner. Notably, while it authorized the execution of contracts "implementing a fishery cooperative under" the FCMA, Congress did not describe the signatories to such contracts by cross-reference to the FCMA. Thus, it did not authorize "fishermen, within the meaning of the FCMA, who own qualified catcher vessels" to enter into contracts under section 210. Nor did it authorize "owners of qualified catcher vessels otherwise eligible to form FCMA cooperatives" to do so. Indeed, Congress did not use any of the FCMA's operative terms — "persons," "fishermen," "planters" — in specifying who could participate in section 210(b) cooperatives entitled to antitrust immunity. Instead, Congress provided that FCMA contracts under section 210(b)(1) be signed by "owners" of "qualified catcher vessels," and nothing in the statutory definition of "qualified catcher vessels" suggests any limitation based on ownership or vertical integration. The text of the statute is thus entirely consistent with a congressional intent to permit integrated processors to participate in FCMA cooperatives for purposes of the AFA, whether or not such entities could participate in FCMA cooperatives generally. *Cf. Lorillard*, 434 U.S. at 582 (construing one statute in light of congressional "selectivity . . . in incorporating provisions and modifying certain . . . practices" under an earlier statute that Congress incorporated by reference in the subsequent statute).

Unlike the first interpretation we outlined above, the third interpretation effectuates Congress's underlying purpose in the AFA while simultaneously reconciling the AFA with the FCMA. It best gives effect to Congress's express intent: that all catcher vessels, both independently-owned and processor-owned, participate in FCMA fishery cooperatives under the AFA so that the race for fish in the BSAI fishery can be ended. Particularly in light of the fact that there is no clearly settled law on the question whether, and if so, under what circumstances, integrated processors can participate in FCMA cooperatives, that congressional intent should control here.[5]

This interpretation does not require us to accept or reject Justice Brennan's interpretation of the Capper-Volstead Act or the *Hinote* court's view concerning the scope of the FCMA. As we read section 210, Congress did not take any position on the scope of the FCMA — a statute it left entirely undisturbed — and instead effectively declared that, whatever the scope of that statute generally, processor-owned vessels could participate in pollock fishery cooperatives entitled to FCMA immunity.

In any event, Justice Brennan's analysis in *NBMA* is simply inapplicable here. In his concurring opinion, Justice Brennan concluded that the Capper-Volstead exemption should not extend to those who are not "in a position to use cooperative associations for collective handling and processing," 436 U.S. at 835–36, presumably those who already have their own processing capacity. The purpose of cooperatives under the AFA, however, is not to facilitate collective processing — in fact, each cooperative that might be formed under section 210(b) is expressly tied to an existing shoreside processor that is responsible for processing the catch of the cooperative. Rather, cooperatives under the AFA are formed for the purpose of receiving a guaranteed allocation of the pollock TAC, thereby permitting members of the cooperative to fish more efficiently and safely. It thus makes no sense to evaluate the eligibility of participants in AFA cooperatives on the basis of their ability to use the cooperative only for purposes of collective processing.

We do not share NOAA's concern that this third interpretation is inconsistent with section 210(d), which expressly extends the antitrust exemption under the FCMA to processing activities by motherships. NOAA argues that, because, Congress expressly extended the reach of the FCMA to include one type of processor in section 210(d), we should not read such an extension into § 210(b) on an implied basis. *See* NOAA Letter at 4 n.4. However, the principle *expressio unius*

[5] In fact, as noted above, under this interpretation, the scope of the FCMA in other contexts is irrelevant to the result. If the FCMA permits integrated processors to participate in cooperatives in other contexts, then the AFA simply makes clear that this authority applies to all catcher vessels in the BSAI fishery, including those owned by processors, and encourages them to take advantage of the existing authority by offering catcher vessel cooperatives a guaranteed allocation of the TAC If the FCMA does not permit integrated processors to participate in cooperatives in other contexts, Congress's intent that they be permitted to participate in FCMA cooperatives for the purpose of harvesting pollock in the BSAI fishery is a decision to extend FCMA immunity to a limited group of processor-owned vessels operating in a single fishery.

est exclusio alterius is a canon of statutory construction, not a rule of law, and can be overcome by a showing of contrary legislative intent or policy: "[W]hether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole." 2A Singer, *Sutherland Statutory Construction* § 47.25 n.1 (citing *Massachusetts Trustees of E. Gas & Fuel Assocs. v. United States*, 312 F.2d 214 (9th Cir. 1963)); *see also United States v. Barnes*, 222 U.S. 513, 519 (1912) ("The maxim invoked [*expressio unius*] expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not."). Given the strong evidence in the AFA that Congress intended integrated processors to participate in all fishery cooperatives in the BSAI fishery, we do not find the maxim persuasive here.

A narrower reading of section 210(b) might also be urged based upon the rule that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963). This rule comes into play, however, only if the FCMA does not extend to processor-owned vessels, a question we need not decide. Morever, even if we assume that the FCMA does not include such vessels, we believe that this is one of those unusual situations that presents a case of "plain repugnancy between the antitrust and regulatory provisions," *id.* at 351, a rare exception to the general rule. Where, as here, "Congress has made a judgment that [certain] restrictions on competition might be necessitated by the unique problems of" a particular industry, "the antitrust laws must give way if the regulatory scheme established" by that statute is to work. *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 729–30 (1975). Congress's purpose in enacting the AFA was to increase efficiency by decreasing excess capitalization and ending the race for fish, and its mechanism for achieving that purpose was the creation of fishery cooperatives that are necessarily exempt from antitrust liability.

Indeed, in the context of the BSAI fishery, where there is a fixed quota of fish in a highly regulated industry, the creation of fishery cooperatives does not undermine the goals of the antitrust laws. In the related context of the Pacific Whiting fishery, the Antitrust Division recognized that "reliance on an olympic race system to gather a fixed quota of fish 'is both inefficient and wasteful,' " and concluded that "eliminating the race will increase processing efficiency and concomitantly the output of [fish]." Letter for Joseph M. Sullivan, Esq., Mundt, MacGregor, Happel, Falconer, Zulauf & Hall, from Joel L. Klein, Acting Assistant Attorney General, Antitrust Division at 3 (May 20, 1997). The Antitrust Division further determined that, in such a fixed quota setting, elimination of the race for fish was unlikely to have an anticompetitive effect: "[E]limination of the race to gather an input whose output is fixed by regulation seems unlikely to reduce output or increase price under any likely scenario." *Id.* Thus, from the perspective of antitrust principles, there is no reason to read section 210(b) narrowly; on the contrary, reading section 210(b) broadly to facilitate the formation of as many fishery cooperatives as possible would ultimately allow for greater efficiency in processing and might have procompetitive effects.[6] *Cf. id.* at 3–4 (''To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Pacific Whiting and/or reduces the inadvertent catching of other fish species whose preservation is also a matter of regulatory concern, it could have procompetitive effects.'').

In short, there exists at least one interpretation of section 210(b) that is consistent with its text and effectuates the purposes of the AFA. Because a statute should be interpreted whenever possible to effectuate Congress's purposes, and because it is possible to do so here, we conclude that processor-owned vessels may participate in section 210(b) cooperatives. In light of this conclusion, we need not resolve the further question whether the FCMA generally permits such vessels to participate in cooperatives that enjoy antitrust immunity.

CONCLUSION

The language and the legislative history of the AFA indicate that Congress intended processor-owned catcher vessels to participate in inshore cooperatives under the AFA. Because section 210(b) can be read in a manner consistent with that intention, we conclude that processor-owned catcher vessels may join fishery cooperatives under the AFA.

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[6] Our conclusion that processor-owned vessels may participate in FCMA cooperatives under the AFA is therefore unlikely to lead to anticompetitive results Nevertheless, to minimize the possibility of negative effects on the fishing industry, Congress included within the AFA several provisions designed to eliminate potentially adverse economic consequences. *See, e.g.*, § 213(c)(1) (granting the North Pacific Council the authority to recommend conservation and management measures ''that supersede the provisions of this title . . to mitigate adverse effects in fisheries or on owners of fewer than three vessels in the directed pollock fishery caused by . . fishery cooperatives in the directed pollock fishery''); *see also* 144 Cong Rec. S12,708 (daily ed. Oct. 20, 1998) (statement of Sen. Murray) (''In the interest of ensuring that small, independent fishermen are the true beneficiaries of fishery cooperatives, the bill includes a number of requirements for fishery cooperatives in all three sectors which are designed to provide these small, independent fishermen with sufficient leverage in the negotiations to protect their interests.'') Thus, should shoreside processors in the BSAI fishery affiliate with catcher vessels for no purpose other than to engage in anticompetitive conduct under the umbrella of antitrust exemption, the AFA would appear to give the Council the authority to check such abuses