

OPINIONS  
OF THE  
**OFFICE OF LEGAL COUNSEL**  
OF THE  
UNITED STATES DEPARTMENT OF JUSTICE  
CONSISTING OF SELECTED MEMORANDUM OPINIONS  
ADVISING THE  
**PRESIDENT OF THE UNITED STATES,**  
**THE ATTORNEY GENERAL,**  
AND OTHER EXECUTIVE OFFICERS OF  
THE FEDERAL GOVERNMENT  
IN RELATION TO  
THEIR OFFICIAL DUTIES

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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-four volumes of opinions published covered the years 1977 through 2000. The present volume covers 2001. Volume 25 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of opinions issued during 2001 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 his or 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.

The Office expresses its gratitude for the efforts of its tireless paralegal and administrative staff—Elizabeth Farris, Melissa Kassier, Jessica Sblendorio, Richard Hughes, Dyone Mitchell, and Lawan Robinson—in shepherding the opinions of the Office from memorandum form to online publication to final production in these bound volumes. Without them, none of this would be possible.



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**OPINION**

OF THE

**ATTORNEY GENERAL OF THE  
UNITED STATES**



## **Assertion of Executive Privilege with Respect to Prosecutorial Documents**

Executive privilege may properly be asserted in response to a congressional subpoena seeking prosecutorial decisionmaking documents of the Department of Justice.

December 10, 2001

THE PRESIDENT

THE WHITE HOUSE

My Dear Mr. President: I am writing to request that you assert executive privilege with respect to memoranda from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno recommending that a Special Counsel be appointed to investigate a matter under review by the Task Force, memoranda written in response to those memoranda, and deliberative memoranda from other investigations containing advice and recommendations concerning whether or not particular criminal prosecutions should be brought. The Committee on Government Reform of the House of Representatives has issued subpoenas to me demanding these documents.

The Department has gone to great lengths, consistent with the constitutional and statutory obligations of the Executive Branch, to accommodate the Committee's needs concerning the prosecutorial decisions that are the subject of these documents. The Department has provided briefings that included explanations of the reasons for the decisions, and we are willing to provide further briefings. The Committee has been unsatisfied with these accommodations, however, and has pressed for access to the documents themselves.

I strongly believe that releasing or otherwise making these extremely sensitive prosecutorial decisionmaking documents available to Congress would compromise the ability of the Department of Justice to assist you in discharging your constitutional law enforcement responsibilities. The authority to investigate and prosecute criminal suspects is one of the core executive powers vested in the President by the Executive Power and Take Care Clauses of Article II of the Constitution. In order to assist the President in fulfilling his constitutional duty, the Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions.

The need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges. The Department's attorneys are asked to render unbiased, professional advice about the merits of potential criminal cases. The formal mechanism by which this process occurs is the preparation of prosecution and declination memoranda. In short,

these documents review the strength of the evidence, substantive legal issues, policy considerations, and overall likelihood of success if the case were to proceed.

If these deliberative documents are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement. As the Supreme Court described its concern about a chilling effect: “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *United States v. Nixon*, 418 U.S. 683, 705 (1974). The Court observed that “the importance of this confidentiality is too plain to require further discussion.” *Id.*

Just as troubling, the prospect of congressional review might force prosecutors to err on the side of investigation or prosecution simply to avoid public second-guessing. This would undermine public and judicial confidence in our law enforcement processes. It is for all of these reasons that the Supreme Court has unanimously recognized the “valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Id.*

Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

The Department respects and cooperates with the legitimate exercise of Congress’s oversight authority. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary. We have significant concerns, however, about oversight requests for prosecution and declination memoranda. The nexus between such inquiries and the purpose of oversight is questionable, and this kind of demand threatens to politicize the criminal justice process. Legislative Branch pressure on prosecutorial decisionmaking is inconsistent with the separation of powers and thereby threatens individual liberty.

The memoranda to former Attorney General Reno and the prosecutorial decisionmaking documents addressed to other Department officials clearly fall within the scope of executive privilege. The Constitution clearly gives the President the power to protect the confidentiality of Executive Branch deliberations. Under controlling case law, 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 Committee 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”).

We believe that the Committee has failed to provide a sufficient reason to disclose these sensitive prosecutorial documents. Congress cannot justify a demand for a decisionmaking document based on its disagreement with a prosecutorial decision. See *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68 (1986). In any event, even if the Committee has a legitimate oversight interest in these documents, its oversight needs cannot outweigh the Executive Branch’s interest in the confidentiality of prosecutorial decisionmaking and our concerns about congressional influence on such decisionmaking in individual cases. I do not believe that access to these prosecutorial decisionmaking documents is “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Committee*, 498 F.2d at 731.

It is my legal judgment that executive privilege may properly be asserted in these circumstances. I request and advise that you do so.

JOHN D. ASHCROFT  
*Attorney General*



**OPINIONS**

OF THE

**OFFICE OF LEGAL COUNSEL**



# **Reimbursing Transition-Related Expenses Incurred Before the Administrator of General Services Ascertained Who Were the Apparent Successful Candidates for the Offices of President and Vice President**

The General Services Administration can reimburse the Bush/Cheney transition for legitimate transition-related expenses, as contemplated by the Presidential Transition Act of 1963, that were incurred after the general election on November 7, 2000 but prior to December 14, 2000, when the Administrator of GSA ascertained that George W. Bush and Richard Cheney were the apparent successful candidates for the offices of President and Vice President.

January 17, 2001

## MEMORANDUM OPINION FOR THE GENERAL COUNSEL GENERAL SERVICES ADMINISTRATION

You have requested our opinion concerning whether, under the Presidential Transition Act of 1963, as amended (“Transition Act,” or “Act”),<sup>1</sup> funds appropriated for purposes of that Act can be used to reimburse the Bush/Cheney transition for transition-related obligations they incurred after the general election but before the Administrator of the General Services Administration (“Administrator”) ascertained that they were the “apparent successful candidates for the office of President and Vice President” within the meaning of the Act. As you have acknowledged, before the Administrator could use any Transition Act funds to pay any such obligation of the President-elect or Vice-President-elect, he “would have to confirm that the obligations were *bona fide* Transition expenses.” Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Stephenie Foster, General Counsel, General Services Administration at 2 n.2 (Dec. 20, 2000).<sup>2</sup>

The Act authorizes the Administrator to expend the funds appropriated to implement the Act only for those services and facilities that are necessary to assist the transition of the “President-elect” and the “Vice-President-elect.” *Id.* § 3(a). The terms “President-elect” and “Vice-President-elect” are defined under the Act to mean the individuals, “following the general elections held to determine the electors,” that the Administrator ascertains are “the apparent successful candidates for the office of President and Vice-President, respectively.” *Id.* § 3(c). We recently concluded that “[s]ince there cannot be more than one ‘President-elect’

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<sup>1</sup> The Presidential Transition Act is set out in the notes to section 102 of title 3 of the United States Code. *See* 3 U.S.C. § 102 note (1994). The Act has also recently been amended. For those amendments, *see* Presidential Transition Act of 2000, Pub. L. No. 106-293, 114 Stat. 1035.

<sup>2</sup> We also address only your question of whether the Act permits such reimbursements. We do not consider whether there are other legal requirements that might relate more generally to transition-related reimbursements.

and one ‘Vice-President-elect’ under the Act, the Presidential Transition Act does not authorize the Administrator to provide transition assistance to more than one transition team.” See *Authority of the General Services Administration to Provide Assistance to Transition Teams of Two Presidential Candidates*, 24 Op. O.L.C. 322, 322 (Nov. 28, 2000) (“*GSA Authority*”). This conclusion, however, does not answer the question whether the Administrator may reimburse the President-elect and/or Vice-President-elect for obligations related to legitimate transition activities that they incurred beginning the day following the general election (November 8, 2000) but prior to the Administrator’s determination that they were in fact “the apparent successful candidates for the office of President and Vice President,” which in this election did not occur until December 14, 2000. Based on the language and purposes of the Act, we conclude that the Administrator can reimburse the President-elect and Vice-President-elect for such expenses.

The argument that funds appropriated to implement the Act cannot be used to reimburse the President-elect and Vice-President-elect for post-election transition obligations incurred prior to December 14, 2000 depends on a reading of the Act that would limit such reimbursement only to those obligations incurred by the President-elect or Vice-President-elect after they held that status as defined in the Act. Under such a reading, because the Act defines both these terms as requiring a determination by the Administrator that each candidate is the apparent successful candidate, and because that determination did not take place until December 14, 2000, any obligations incurred prior to that time would not qualify for reimbursement. We conclude, however, that this is not the best reading of the statute.

Section 3(b) of the Act specifies that the Administrator may not expend funds for the provision of services and facilities under the Act

in connection with any obligations incurred by the President-elect or Vice-President-elect—

(1) before the day following the date of the general elections held to determine the electors of President and Vice President under section 1 or 2 of title 3, United States Code; or

(2) after 30 days after the date of the inauguration of the President-elect as President and the inauguration of the Vice-President-elect as Vice President.

If the term “President-elect” in the phrase “incurred by the President-elect” was itself intended to incorporate a temporal limitation on reimbursement—i.e., no reimbursement for any obligations incurred prior to the time the Administrator determines who the President-elect is—then section 3(b)(1) would serve little purpose. As a practical matter, the Administrator cannot determine who “the apparent successful candidate[] for the office of President” is “before the day

following the date of the general elections held to determine the electors of President and Vice President.” The separate prohibition of section 3(b)(1) thus would have little function if the phrase “incurred by the President-elect” already limited reimbursement to those obligations incurred after the designation of the President-elect.<sup>3</sup> Because interpretations of statutes that render language superfluous are disfavored, *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992), we reject the view that the phrase “incurred by the President-elect” itself bars reimbursement for legitimate transition obligations incurred by the person ultimately ascertained to be the President-elect prior to the time that the Administrator designates an apparent successful candidate. Section 3(b)(1) evidently recognizes that the person who *eventually* becomes the President-elect may incur transition-related obligations prior to the election itself (or even within the very brief period of time that may exist between the end of the election and the next day), and the provision operates to bar reimbursement of any such expenses.<sup>4</sup>

Further support for this construction is found in section 3(b)(2) of the Act, which bars the Administrator from reimbursing transition obligations “incurred by the President-elect . . . after 30 days after the date of the inauguration of the President-elect as President.” Plainly, any transition-related obligations incurred after the date of the inauguration cannot be incurred by “the President-elect”; they would instead be incurred by the President. Thus, section 3(b)(2), like section 3(b)(1), reflects Congress’s understanding that the phrase “incurred by the President-elect” does not limit reimbursement to obligations incurred only by a person who, at the time the obligation is incurred, actually is the “President-elect.”

Finally, our construction finds support in section 3(a), which sets out the services and facilities that the Administrator is authorized to provide. This section specifically states:

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<sup>3</sup> It is conceivable that the Administrator could determine that a candidate was the apparently successful candidate after the polls had closed but prior to the day following the election. In such a situation, if the term “President-elect” were understood to operate as a temporal limitation, section 3(b)(1) could serve the independent function of prohibiting the Administrator from reimbursing any transition-related obligations incurred by the President-elect in the few hours after the polls closed but prior to the day following the election. This possibility appears so remote, the amount of obligations that could be incurred so slight and the policy supporting such a distinction so unclear that we consider such a potential independent function to be too insubstantial to support the view that the term “President-elect” itself incorporates a temporal restriction on reimbursement.

<sup>4</sup> This construction of section 3 is consistent with two provisions added to the Act in 2000 that permit the expenditure of funds prior to the election itself. *See* Pub. L. No. 106-293, § 2, 114 Stat. at 1036 (relevant provisions added as paragraphs (9) and (10) of the Presidential Transition Act). Paragraph (10) expressly provides that the Administrator may consult with “any candidate for President or Vice President to develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems.” *See* Presidential Transition Act, § 3(a)(10). Paragraph (9) involves the development of a transition directory prior to the election. *Id.* § 3(a)(9). Only in this narrow category of pre-election transition expenses does the Act authorize disbursements, thus providing support to our view that transition expenses that might be incurred prior to the day after the election are, generally, not reimbursable due to section 3(b)(1).

The Administrator of General Services . . . is authorized to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties as President or Vice President necessary services and facilities, including [payment of compensation of members of office staffs, payment of expenses for the procurement of experts or consultants, payment of travel expenses and subsistence allowances, etc.].

Although this provision authorizes assistance only to the “President-elect” and the “Vice-President-elect,” it does not limit that assistance to expenses incurred after the determination of that fact. To the contrary, the Act as a whole only limits the assistance to obligations that are “in connection with his preparations for the assumption of official duties as President or Vice President” and which were incurred after “the day following the date of the general elections held to determine the electors.” This indicates a congressional intent to reimburse the President-elect and Vice-President-elect for any legitimate transition related expenses incurred by them after the general election.

This reading of the statute is also consistent with its purposes, and promotes its goals. Based on a recognition that “the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President” is in the “national interest,” *id.* § 2, Congress believed that transition efforts are a public function that should be financed by government funds rather than by private interests. *See* 109 Cong. Rec. 13,346 (1963) (statement of Rep. Rosenthal); *id.* at 13,347 (1963) (statement of Rep. Monagan). Congress concluded that it was not fair to place the financial burden on the President-elect, private individuals and the national political parties, *see, e.g., id.* at 13,347 (statement of Rep. Monagan) (“the country cannot reasonably expect that [the costs of transition] will any longer be borne by individuals or even by a party organization. They are an integral part of the presidential administration and should be borne by the public.”), and that it was bad public policy for private individuals possibly to feel that they were entitled to special consideration as a result of helping to fund a cost of government. *See, e.g., id.* at 13,346 (statement of Rep. Rosenthal) (“If someone is going to come forward and help pay what we now recognize is a cost of government, which is actually what it is, during the transitional period, that person may feel inclined to think that he is entitled to special consideration from the government.”).

Those expenses incurred by the President-elect and Vice-President-elect after the election but prior to December 14, 2000 (and in relation to transition activities as contemplated under the Act) are precisely the sort of expenses that Congress felt it was important to fund publicly because Congress viewed these activities as “expenses that are necessary and pertinent to the job of the Presidency and the

Vice Presidency,” 109 Cong. Rec. at 19,738 (statement of Sen. Jackson); “a public function,” *id.* at 13,346 (statement of Rep. Rosenthal); “an integral part of the presidential administration,” *id.* at 13,347 (statement of Rep. Monagan); and, as President Kennedy expressed in his letter transmitting the proposed legislation that was to become the Presidential Transition Act, “the reasonable and necessary costs of installing a new administration in office.” Letter of Transmittal from the President of the United States to the President of the Senate and the Speaker of the House of Representatives (May 29, 1962), *reprinted in* H.R. Rep. No. 88-301, at 9, 12 (1963). As long as the transition obligations at issue were incurred within the time frame specified by the Act, the Administrator’s inability, due to the closeness of the election, to determine the President-elect and Vice-President-elect until several weeks after the election itself should not operate to cut off reimbursement of legitimate, post-election transition-related expenses.

To be sure, in our earlier opinion, we concluded that the Act prohibits the Administrator from *expending* transition funds prior to a determination of “the apparently successful candidates.” That conclusion, however, is consistent with our determination here that, once the President-elect is determined, the Administrator may expend available funds to reimburse the now-designated President-elect for legitimate post-election transition obligations his transition incurred prior to that designation. The prohibition on expenditure prior to the determination of the apparent successful candidate is designed to ensure both that public funds are not disbursed in a manner that might influence the outcome of a disputed election, and that those funds are expended only on obligations that are truly related to the actual transition of the President-elect and Vice-President-elect. As Representative Fascell, a sponsor and manager of the bill, explained:

The pending legislation does not seek to do anything about [the determination of the election of the President and the Vice President] or change it in any way, and we are not directly concerned with the question of election, nomination, or the inauguration, for that matter. But we do provide under this pending legislation, as we have provided in previous congressional actions, the right of the Administrator to determine that funds shall be spent for certain services, supplies, and other things *for the benefit of the President-elect and the Vice-President-elect*.

109 Cong. Rec. at 13,349 (emphasis added). However, to construe the Act in such a manner that it bars not only expenditures of funds prior to a determination of the apparent successful candidate, but also reimbursement of legitimate transition obligations that the transition incurs after the election but prior to the designation of the President-elect, would have the perverse effect of denying the President-elect and Vice-President-elect the very funds Congress made available for their

benefit. Neither the language of the statute nor its legislative history supports such a result. As Representative Fascell explained to the House, “this bill formalizes [the process] by authorizing the funding procedures for the orderly transition of executive power so that certain services will be available to the incoming President *between the time of his election and inauguration.*” 110 Cong. Rec. 3539 (1964) (emphasis added).<sup>5</sup> The Administrator’s determination under section 3(c) of the Act confirms which of the candidates for President is entitled to receive transition funds and when the Administrator may first begin expending those funds; that determination does not also serve to establish the time frame within which legitimate transition-related obligations must be incurred in order to qualify for reimbursement. That time frame is set forth in section 3(b) of the Act.

In sum, we conclude that the General Services Administration can reimburse the transition for legitimate transition-related expenses, as contemplated by the Presidential Transition Act of 1963, that were incurred after November 7, 2000 but prior to December 14, 2000.

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

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<sup>5</sup> We noted, in the *GSA Authority* opinion, Representative Fascell’s statement that:

This act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate—apparent successful candidate—for the purposes of this particular act in order to make the services provided by this act available to them. And, if there is any doubt in his mind, and if he cannot or does not designate the apparently successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided and no money expended.

24 Op. O.L.C. at 325 (quoting 109 Cong. Rec. at 13,349). We read this and similar statements in the legislative history to refer to when the Administrator is authorized to make expenditures under the Act rather than to refer to the period in which obligations can be incurred by the transition for which reimbursement expenditures can ultimately be made by the Administrator following his ascertainment of the President-elect.

## Authority of the Office of Government Ethics to Issue *Touhy* Regulations

The Office of Government Ethics may not issue *Touhy* regulations pursuant to 5 U.S.C. § 301 because OGE is not an “executive department” within the meaning of section 301.

OGE may issue *Touhy* regulations, insofar as they concern the production of agency records, pursuant to 44 U.S.C. § 3102.

OGE may issue regulations concerning the appearance of agency employees as witnesses on official matters, pursuant to the implied authority of OGE’s organic statute, 5 U.S.C. app. § 401.

January 18, 2001

### MEMORANDUM OPINION FOR THE DIRECTOR OFFICE OF GOVERNMENT ETHICS

The Office of Government Ethics (“OGE”) has asked for our opinion whether section 301 of title 5, United States Code, authorizes it to issue what are commonly referred to as *Touhy* regulations.<sup>1</sup> Those regulations govern agency procedures for the production of official files, documents, records, and information, and for the appearance of agency employees as witnesses on official matters, in connection with legal proceedings in which the agency is not a party.<sup>2</sup> We conclude that section 301 does not authorize OGE to issue such regulations. We further conclude, however, that OGE may issue *Touhy* regulations concerning the production of agency records pursuant to section 3102 of title 44, United States Code. With respect to *Touhy* regulations concerning employee testimony on official matters, we believe that OGE may issue them pursuant to the implied authority conferred on it by its organic statute, 5 U.S.C. app. § 401 (1994 & Supp. V 1999).

#### I.

In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court addressed the question whether the Department of Justice could issue a regulation governing the production of its official files, documents, records, and information pursuant to 5 U.S.C. § 22, the precursor to 5 U.S.C. § 301 (1994). In particular, this regulation required all officers and employees of the Department to refrain from disclosing any official papers, even in response to a subpoena duces

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<sup>1</sup> These regulations derive their name from the Supreme Court case *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which upheld the authority of the Department of Justice to issue regulations governing the production of official files, documents, records, and information pursuant to 5 U.S.C. § 22, the precursor to 5 U.S.C. § 301.

<sup>2</sup> Memorandum for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, United States Office of Government Ethics, *Re: Authority to Issue Touhy Regulations* (July 13, 1999) (“Potts Memorandum”).

tecum ordering their production, except at the express direction of the Attorney General. *Id.* at 463 n.1. Without addressing the question whether the Attorney General himself could refuse to produce such documents, the Court held that the Attorney General could validly withdraw from his subordinates the power to release department papers. *See id.* at 467-68. Pointing to, among other things, the “obvious” usefulness and need for centralizing disclosure determinations, the Court stated that “it was appropriate for the Attorney General, pursuant to the authority given him by 5 U.S.C. § 22, to prescribe regulations not inconsistent with law for ‘the custody, use, and preservation of the records, papers, and property appertaining to’ the Department of Justice, to promulgate [the regulation].” *Id.* at 468; *see also Boske v. Comingore*, 177 U.S. 459, 469-70 (1900) (concluding that the Secretary of Treasury had authority pursuant to the precursor to 5 U.S.C. § 22 to prescribe regulations withdrawing from employees control over departmental records, while stating “great confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates”).

At issue here is whether OGE may prescribe such regulations. Applicable to legal proceedings in which OGE is not a party, OGE’s contemplated *Touhy* regulations<sup>3</sup> would govern employee conduct with respect not only to requests for the production of official files, documents, records, and other information, but also to requests for the testimony of employees on official matters.<sup>4</sup> The current version of the statute relied upon by the Department of Justice to issue such regulations, 5 U.S.C. § 301, provides, in relevant part, “The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property.” A note to section 301 states that the definition of the words “Executive department” is coextensive with the definition of the same in section 101 of title 5, United States Code. 5 U.S.C. § 301 note (2000). You have asked whether OGE, which is not among the executive departments enumerated in section 101, may nonetheless issue *Touhy* regulations under section 301 or any other source of authority.

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<sup>3</sup> On March 20, 2000, OGE faxed to this Office a draft version of its proposed *Touhy* regulations.

<sup>4</sup> The Supreme Court in *Touhy* did not address the validity of the latter type of regulation, which would govern employee compliance with requests for official testimony. In its memorandum seeking our opinion, OGE assumes that the those portions of its regulation governing testimony would be authorized by 5 U.S.C. § 301. In light of our conclusion that section 301 does not apply to OGE, we need not address that question.

## II.

The authority of OGE to issue *Touhy* regulations under 5 U.S.C. § 301 turns on the meaning of the words “Executive department.” Section 101 of title 5, United States Code, which was enacted as part of the same bill that enacted section 301, defines “Executive department” to include the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veterans Affairs. *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378. The definition does not include OGE.

Several factors support the conclusion that the definition of “Executive department” in section 101 applies to that term as it is used in section 301. First, as mentioned above, section 101 and 301 were enacted as part of the same bill, Pub. L. No. 89-554, 80 Stat. 378 (1966). Second, section 301 follows shortly after section 101 in part I of title 5. Third, following a table illustrating that the derivation of 5 U.S.C. § 301 is 5 U.S.C. § 22, the revision notes explain that “[t]he words ‘Executive department’ are substituted for ‘department’ as the definition of ‘department’ applicable to this section is coextensive with the definition of ‘Executive department’ in section 101.” 5 U.S.C. § 301 note (2000). While revision notes are not conclusive evidence of congressional intent, *see Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 n.4 (1989), we may nonetheless accord them substantial weight. *See, e.g., Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530 (1998). Absent any indication to the contrary, we thus believe that the appropriate definition for the term “Executive department” in section 301 is found in section 101.

In its memorandum, OGE states that “any executive agency, whether specifically listed among the executive agencies in 5 U.S.C. § 101 or not, should be covered by section 301 and should have the authority to issue [*Touhy*] regulations just as a matter of common sense administrative practice.” Potts Memorandum at 4. Although it would no doubt have been sensible for Congress to have conferred such authority on agencies in section 301, Congress used the words “Executive department” in that provision, yet in other provisions of the bill enacting section 301 it used the term “agency,” *see, e.g.,* 5 U.S.C. §§ 302, 305 (1994), and we presume that that difference was intentional. Section 302, for example, authorizes “the head of an agency” to delegate certain types of authority vested in him or her to subordinate officials. 5 U.S.C. § 302(b). There, Congress specified that the term “‘agency’ has the meaning given it by section 5721 of [title 5].” *Id.* § 302(a). That section defines “agency” to include, among other things, an executive agency, a military department, a court of the United States, and the Administrative Office of the United States Courts, but not a government-controlled corporation. *Id.* § 5721. The fact that Congress, in conferring particular powers, distinguished between the heads of executive departments in section 301 and the heads of agencies in section

302 counsels against assuming that Congress meant to confer the authority in section 301 on the heads of all executive agencies.<sup>5</sup> See *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

We thus conclude that OGE is not an “Executive department” within the meaning of section 301, and thus OGE may not issue *Touhy* regulations pursuant thereto.

### III.

Although OGE may not issue *Touhy* regulations pursuant to section 301, we conclude that it may issue such regulations, insofar as they govern the production of agency records, pursuant to section 3102 of the Federal Records Act, 44 U.S.C. § 3102 (1994). That section provides, in relevant part:

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for (1) effective controls over the creation and over the maintenance and use of records in the conduct of current business.

The term “records” includes

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of

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<sup>5</sup> It is unclear why Congress chose to give some powers to the heads of executive departments and not to the heads of executive agencies or other Executive Branch institutions. It is clear, however, that in enacting title 5, Congress was responding to the growing number and complexity of personnel statutes scattered throughout the United States Code. Congress sought to consolidate and “restate in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate[d] to Government employees, the organization and powers of Federal agencies generally, and administrative procedure.” H.R. Rep. No. 89-901, at 1 (1965); S. Rep. No. 89-1380, at 18-19 (1966). Revisions of the language of the earlier statutes, the House and Senate reports explain, were intended not to have any substantive effect or to impair the precedential value of earlier judicial decisions and other interpretations of the statutes, but to facilitate the restatement of statutes relating to personnel in one comprehensive title. See H.R. Rep. No. 89-901, at 3; S. Rep. No. 89-1380, at 20-21. “Some of the changes [were] necessary to attain uniformity within the title,” while “[o]thers [were] necessary to effect consolidation of related statutes and to conform to common contemporary usage.” H.R. Rep. No. 89-901, at 2; S. Rep. No. 89-1380, at 19. The fact that Congress, in adopting amendments designed to attain “uniformity,” nevertheless retained the disparate terminology of departments and agencies in title 5, strengthens the presumption that it acted deliberately.

public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

*Id.* § 3301.

Unlike 5 U.S.C. § 301, 44 U.S.C. § 3102 extends to the head of “each Federal agency.” The term “Federal agency” includes, *inter alia*, any “executive agency,” 44 U.S.C. § 2901(14) (1994), which “means any executive department or independent establishment in the Executive Branch of the Government, including any wholly owned Government corporation,” 40 U.S.C. § 472(a) (1994) (cross-referenced in 44 U.S.C. § 2901(13)). Defined as an “executive agency” in its enabling statute, 5 U.S.C. app. § 401, OGE is an independent establishment in the Executive Branch.

Pursuant to section 3102, OGE may establish effective controls over the “maintenance and use of records in the conduct of current business.” 44 U.S.C. § 3102. “Records maintenance and use” includes, among other things, “any activity involving . . . storage, retrieval, and handling of records kept at office file locations by or for a Federal agency.” *Id.* § 2901(4). *Touhy* regulations governing the production of official documents, files, or materials in connection with a legal proceeding would concern the “retrieval,” “handling,” and “use” of agency records, and thus would be authorized by section 3102.<sup>6</sup> Indeed, such regulations, which provide for the centralization of all requests for the production of agency records, would qualify as part of a program for the “economical and efficient management of the records of the agency.” *Id.* § 3102.

That the regulations might cover a broader range of documents and materials than would otherwise be included within the definition of “records,” as that term is used in the Federal Records Act, does not alter that conclusion. The agency is statutorily required to establish effective controls for an extremely broad range of materials, those providing “evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government,” *id.* § 3301, and thus the extent to which the regulations would be over-inclusive would likely be minimal. Moreover, regulations promulgated by the National Archives and Research Administration (“NARA”) to implement the Federal Records Act make clear that agencies must exercise control over all agency

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<sup>6</sup> As the legislative history of the Federal Records Act makes clear, “the measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.” S. Rep. No. 81-2140, at 4 (1950). The Act requires agency heads to establish a system of records management not “to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates [the records].” *Id.*

documents in order to discharge their responsibility to identify the records appropriate for preservation. NARA regulations require each federal agency, among other things, to “[d]evelop and implement records schedules for *all* records created and received by the agency.” 36 C.F.R. § 1222.20(b)(6) (2000) (emphasis added). A “comprehensive schedule” is a “printed agency manual or directive containing descriptions of and disposition instructions for all documentary materials, record and nonrecord, created by a Federal agency.” *Id.* § 1220.14. Thus, the Federal Records Act empowers an agency, such as OGE, to exercise control over all agency materials, not merely those that qualify as “records” within the meaning of that Act.

It is noteworthy, furthermore, that the language of section 3102 discussed here is very similar to that found in the precursor to 5 U.S.C. § 301, 5 U.S.C. § 22, which the Attorney General relied upon in establishing the regulations concerning the production of materials by Department of Justice employees that were at issue in *Touhy*. That is, the authority conferred on agency heads to establish effective controls over “the maintenance and use of records in the conduct of current business,” 5 U.S.C. § 3102, appears, at least for the question presented here, functionally equivalent to the authority conferred on department heads to prescribe regulations for “the custody, use, and preservation of the records, paper, and property” of the department, 5 U.S.C. § 22. As mentioned above, the Supreme Court in *Touhy* concluded that the latter provision authorized the Attorney General to issue regulations withdrawing from subordinates the power to release department records. *See* 340 U.S. at 468. In light of the substantial similarity of the two provisions, *Touhy* provides additional support for the conclusion that section 3102 would authorize such regulations.

#### IV.

As mentioned above, OGE’s contemplated *Touhy* regulations would concern not only requests for the production of official files, documents, records, and other information, but also requests for the testimony of employees on official matters.<sup>7</sup> While it is unclear whether OGE could rely, at least in part, on section 3102 to issue *Touhy* regulations governing such testimony requests,<sup>8</sup> we believe that OGE

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<sup>7</sup> We do not understand the proposed *Touhy* regulations to apply to requests for testimony by an agency employee on matters unrelated to his or her official duties or functions. We therefore do not address whether OGE has the authority to issue regulations governing such testimony.

<sup>8</sup> One might argue, for example, that, to the extent the regulations govern requests for testimony concerning information in agency records, they would be within the discretion of agency heads pursuant to section 3102. On that view, because agency employees preparing for testimony can often be expected to seek access to and review agency records, an agency head may reasonably conclude that the centralization of requests for testimony would better enable the agency to control and oversee the use of its records. Because we believe OGE may issue testimony regulations pursuant to 5 U.S.C. app. § 401, we do not address that argument.

may nonetheless issue them pursuant to the implied authority conferred on OGE by its organic statute, 5 U.S.C. app. § 401. Courts have long recognized that the government as a whole enjoys a common law deliberative process privilege that allows it to withhold information that would reveal “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (internal quotation marks omitted). In authorizing OGE to make a variety of governmental decisions and to formulate governmental policies,<sup>9</sup> Congress must have intended the agency to enjoy the benefit of this privilege, which is designed “to prevent injury to the quality of agency decisions.” *Id.* (internal quotation marks omitted). Congress must therefore be understood to have implicitly conferred on the agency the means necessary to avail itself of the privilege. Advance notice and centralized review of testimony requests would allow OGE to make a timely and informed decision whether assertion of this privilege is necessary to protect privileged deliberations. Indeed, absent a notice requirement, an employee would be more likely to disclose confidential matters without informing the agency, and the privilege could then be found to have been waived. Because there must be the centralization of disclosure determinations for OGE to be able to preserve and assert this and any other privilege the government may assert in litigation,<sup>10</sup> we conclude that the authority to provide for such centralization may be inferred from the organic statute. *See United States v. Bailey*, 34 U.S. (9 Pet.) 238, 255 (1835) (“where the end is required, the appropriate means are given”); *cf. United States v. Maurice*, 26 F. Cas. 1211, 1216 (No. 15,747) (C.C. Va. 1823) (Marshall, C.J.) (“there is a power to contract in every case where it is necessary to the execution of a public duty”).<sup>11</sup>

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<sup>9</sup> OGE’s statutory responsibilities include, among other things, promulgating rules and regulations pertaining to conflicts of interest and ethics in the Executive Branch, monitoring and investigating compliance with federal public financial disclosure requirements by officers and employees of the Executive Branch, conducting reviews of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations, and ordering corrective action on the part of agencies and employees which the Director deems necessary. *See* 5 U.S.C. app. § 402 (1994).

<sup>10</sup> The Director of OGE is expressly authorized to appoint attorneys, 5 U.S.C. app. § 401(c)(1), who are entitled to assert the attorney-client privilege with respect to certain communications with other agency employees. *See Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (“In the governmental context, the ‘client’ may be the agency and the attorney may be an agency lawyer.”).

<sup>11</sup> In concluding that the issuance of the proposed *Touhy* regulations governing official information unrelated to agency records could be a proper exercise of OGE’s authority pursuant to its organic statute, we note that the proposed regulations primarily function as an internal rule of operation for OGE, with only minimal effect on outside parties. The regulations would withdraw from subordinates decision-making autonomy with respect to official testimony and simply require outside parties to submit their testimony requests to a designated party for the agency. The regulations, as we understand them, would not confer on the head of OGE an independent basis of authority to deny requests for testimony.

Recognition of this implied authority is buttressed by constitutional considerations. OGE is part of the Executive Branch and subject to the supervision of the President. The President, in turn, has the authority to prevent the disclosure of documents and information “whenever [he] finds it necessary to maintain the confidentiality of information within the Executive Branch in order to perform his constitutionally assigned functions.” *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 116 (1984). The Director of OGE must therefore be able to learn of subpoenas for documents and testimony, and to supervise responses to these demands for information, in order both to apprise the President of any possible need to invoke executive privilege, and to comply with a presidential assertion of privilege. Accordingly, the separation of powers principles that underlie the doctrine of executive privilege support our conclusion that OGE has implicit authority to centralize disclosure determinations.

V.

We conclude that OGE may not issue *Touhy* regulations pursuant to 5 U.S.C. § 301 because OGE is not an “executive department” within the meaning of section 301. We further conclude, however, that OGE may issue such regulations, insofar as they concern the production of agency records, pursuant to section 3102 of the Federal Records Act. With respect to regulations concerning the appearance of agency employees as witnesses on official matters, we conclude that OGE may issue them pursuant to the implied authority of its organic statute, 5 U.S.C. app. § 401.

JOSEPH R. GUERRA  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

**Effect of the Alienage Restriction in the Personal  
Responsibility and Work Opportunity Reconciliation  
Act of 1996 on the Provision of Stafford Act Assistance  
in the Federated States of Micronesia and the  
Republic of the Marshall Islands**

Congress did not intend the alienage restriction set forth in title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to apply extraterritorially. For this reason, the provision of Stafford Act assistance in the Federated States of Micronesia and the Republic of the Marshall Islands by the Federal Emergency Management Agency would not violate the PRWORA.

January 19, 2001

MEMORANDUM OPINION FOR THE GENERAL COUNSEL  
FEDERAL EMERGENCY MANAGEMENT AGENCY

In the Compact of Free Association Act of 1985, Pub. L. No. 99-239, sec. 201, § 221, 99 Stat. 1770, 1800, 1816 (1986) (codified at 48 U.S.C. § 1901 note) (“Compact Act”),\* the United States agreed to provide disaster relief to persons residing in the Federated States of Micronesia (“FSM”) and the Republic of the Marshall Islands (“RMI”) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974) (principally codified as amended at 42 U.S.C. §§ 5121-5201 (1994)). You have inquired whether the alienage restriction set forth in section 401 of title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2261 (codified as amended at 8 U.S.C. § 1611 (Supp. V 1999)) (“PRWORA” or “Act”), bars the provision of disaster relief by the Federal Emergency Management Agency (“FEMA”) to persons residing in the FSM and RMI. We have concluded that the alienage restriction in the PRWORA does not apply to FEMA’s provision of Stafford Act assistance in the FSM and RMI because the PRWORA’s alienage restriction does not generally apply extraterritorially.

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\* Editor’s Note: The Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands (the “Compact”) is distinct from the joint resolution in which Congress approved the Compact (the “Compact Act”). The Compact, with subdivisions of its own, is recorded in section 201 of the Compact Act, 99 Stat. at 1800-35. Thus, the reference in text is to section 221 of the Compact, as recorded in section 201 of the Compact Act. When this opinion cites the “Compact” with a section number, it refers to the Compact itself, as recorded in section 201 of the Compact Act. For ease of reference, the opinion provides parallel citations to the Statutes at Large, but to avoid repetition it does not each time provide a parallel citation to section 201 of the Compact Act or to 48 U.S.C. § 1901 note.

## **I. Background**

In enacting the Stafford Act, Congress intended “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters.” 42 U.S.C. § 5121(b). When the FSM and RMI became independent nations and were no longer Trust Territories of the Pacific Islands under the control of the United States, the United States and the FSM and RMI agreed to a Compact of Free Association (“Compact”). That Compact establishes a close relationship between the United States and the FSM and RMI. Congress passed a joint resolution in 1986 approving the Compact. Compact Act, § 101, 99 Stat. at 1773 (codified at 48 U.S.C. § 1901). Section 221(a)(2) of the Compact provides that the United States shall make available to the FSM and RMI the “services and related programs of . . . [*inter alia*] the United States Federal Emergency Management Agency,” under the terms established in a separate agreement. 99 Stat. at 1816. That agreement provides that Stafford Act assistance

shall be made available to the Marshall Islands or the Federated States of Micronesia in the same manner as assistance is made available to a “State.” Solely for the purpose of applying the [Stafford Act] pursuant to this Article, the Marshall Islands or the Federated States of Micronesia shall be considered included within the definitions of “United States” and “State” as those terms are defined in 42 U.S.C. 5122.<sup>1</sup>

Federal Programs and Services Agreement Concluded Pursuant to Article II and Section 232 of the Compact of Free Association, art X, § 3, *reprinted in* H.R. Doc. No. 98-192, at 231 (1984) (“Program and Services Agreement”). The Section-by-Section Analysis for section 221 of the Compact explains that

[w]hile the [FSM and RMI] will fund the basic functions of government from grant assistance and [local] revenues, performance of certain activities may be beyond the technical capability of the new governments at the outset of free association. Thus, the United States has agreed in Section 221(a) to continue to provide services of the United States Weather Service, the United States Federal Emergency Management Agency, the United States Postal Service, the Federal Aviation Administration and the Civil Aeronautics Board.

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<sup>1</sup> Section 5122(4) of title 42 provides that “‘State’ means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.”

Section-by-Section Analysis of the Compact of Free Association and Joint Resolution, H.R. Doc. No. 98-192, at 100 (1984). The Compact also states that the United States shall continue to provide the services and programs referred to in the Compact “unless their modification is provided by mutual agreement or their termination in whole or in part is requested by any recipient Government.” Compact § 222(b), 99 Stat. at 1817. The terms of the Compact (as amended) provide that “[e]very citizen of the Marshall Islands or the Federated States of Micronesia who is not a resident of the United States shall enjoy the rights and remedies under the laws of the United States enjoyed by any non-resident alien.”<sup>2</sup> Compact § 172(a), 99 Stat. at 1810. When Congress approved the Compact in 1986, it consented to the subsidiary agreements, including article X. Compact Act § 101(a)-(b), 99 Stat. at 1773 (codified at 48 U.S.C. § 1901(a)-(b)).

Your office has informed us that there are three Stafford Act programs administered by FEMA that could be subject to the alienage restriction in the PRWORA. Under the Disaster Housing Program, FEMA reimburses individuals for short-term lodging, helps restore homes to a livable condition, provides rental properties for victims, and makes mortgage or rental payments for individuals or families who, as a result of financial hardship caused by the disaster, face eviction or foreclosure. *See* 42 U.S.C. § 5174; Federal Emergency Management Agency, *Disaster Assistance: Section One* at 22 (Nov. 1995). Under the Individual and Family Grant program, FEMA makes cash grants to individuals and families for “disaster-related necessary expenses or serious needs.” 42 U.S.C. § 5178(a); *accord* Federal Emergency Management Agency, *Disaster Assistance: Section One* at 23 (Nov. 1995). Finally, FEMA distributes food in conjunction with the Department of Agriculture’s Food and Nutrition Service. *See* Federal Emergency Management Agency, *Programs and Activities in the Freely Associated States of the Republic of the Marshall Islands (RMI) and the Federated States of Micronesia (FSM)* at 2 (Feb. 14, 2000). The Department of Agriculture provides the funding to purchase food, and FEMA funds distribution of the food, administration of the program, and other related costs. *See id.*<sup>3</sup>

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<sup>2</sup> In light of the conclusion we reach here, we need not resolve whether this provision of the Compact would entitle these individuals to benefits as “qualified aliens” under 8 U.S.C. § 1641(b). We do note that the term “non-resident alien” is not a defined term under United States immigration law.

<sup>3</sup> We understand that there is a fourth program that, at least as a theoretical matter, could be affected by the PRWORA. Under the Stafford Act, the Department of Agriculture oversees the Food Coupons and Distribution program, which provides food stamps and surplus commodities to families in need. *See* 42 U.S.C. § 5179. In the FSM and RMI, however, there is no food stamp program because the program “has never been implemented in those jurisdictions and no retail redemption system exists.” Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Charles R. Rawls, General Counsel, Department of Agriculture (Sept. 14, 1998). Similarly, there is no distribution of surplus provisions because the Department of Agriculture “has no ongoing programs in these countries.” Federal Emergency Management Agency, *Programs and Activities in the Freely Associated States of the Republic of the Marshall Islands (RMI) and the Federated States of Microne-*

In 1996 Congress passed the PRWORA. In title IV of the Act, Congress set forth its purposes in a section entitled “Statements of national policy concerning welfare and immigration.” 8 U.S.C. § 1601. Congress established that

(1) [s]elf-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that—

(A) aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities or the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

8 U.S.C. § 1601(1)-(2) (Supp. V 1999). The remaining statements in section 1601 are related to these purposes. *See, e.g., id.* § 1601(5) (“It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.”).

To give effect to these goals and policies, Congress restricted alien eligibility for federal benefits, providing that “[n]otwithstanding any other provision of law . . . an alien who is not a qualified alien . . . is not eligible for any Federal public benefit.” 8 U.S.C. § 1611(a). In title IV, Congress incorporated the Immigration and Nationality Act’s broad definition of an “alien” as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (1994) (cited in 8 U.S.C. § 1641(a) (Supp. V 1999)). Although “qualified aliens” are eligible to receive specified federal public benefits within certain time frames, *see* 8 U.S.C. § 1612 (Supp. V. 1999), the definition of qualified aliens does not explicitly include citizens of the FSM and RMI. *See* 8 U.S.C. § 1641(b) (qualified aliens include, for example, legal permanent residents, asylees, refugees); *see also supra* note 2. Congress broadly defined federal public benefits to include

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

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*sia* (FSM) at 2 (Feb. 14, 2000). Because this program has never been implemented in the FSM and RMI, we do not address it in this opinion.

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1)(A)-(B).

With this legal framework in mind, we turn in more detail to the applicability of the alienage restriction to FEMA’s provision of Stafford Act assistance in the FSM and RMI.

## II. Analysis

To determine whether the alienage restriction in title IV of the PRWORA is applicable to the provision of Stafford Act assistance in the FSM and RMI, the critical question to answer is whether the PRWORA’s alienage restriction applies outside of the United States.<sup>4</sup> To answer this question, we examine both the text and the legislative history of title IV.<sup>5</sup> We conclude that the alienage restriction in title IV, in general, operates only within the United States. Because the FSM and

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<sup>4</sup> It could be argued that the FSM and RMI are actually part of the United States for purposes of Stafford Act assistance and therefore the extraterritoriality question is not presented. The Program and Services Agreement provides that “[s]olely for the purpose of applying the [Stafford Act] pursuant to this Article, the Marshall Islands or the Federated States of Micronesia shall be considered included within the definitions of ‘United States’ and ‘State’ as those terms are defined in 42 U.S.C. 5122.” Program and Services Agreement at 231. We found no support for reading this provision of the Program and Services Agreement to obviate the question of extraterritoriality. The best reading of this provision is that it is intended to reflect the parties’ intent that the FSM and RMI should receive Stafford Act assistance on the same terms as states, not that the FSM and RMI are part of the United States for purposes of domestic laws.

<sup>5</sup> We also have considered whether the presumption against extraterritoriality would apply. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). We believe it would apply with less force than in other contexts because the presumption, at least in part, is intended “to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 248 (1949). It is unlikely that the extraterritorial application of the alienage restriction would conflict with the law of another country because the restriction applies only to eligibility for benefits under United States law. Nonetheless, the presumption is not wholly irrelevant because the statutory purposes of title IV—eliminating an incentive for immigration and discouraging aliens within the United States from relying on federal benefits—would not be served by the extraterritorial application of the alienage restriction. These purposes are not exportable, as they concern circumstances in the United States. *See Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (“the presumption is rooted in a number of considerations, not the least of which is the common sense notion that Congress generally legislates with domestic concerns in mind”). Ultimately, however, the question of extraterritoriality is one of statutory construction and, for the reasons we discuss below, we believe Congress did not intend to apply the alienage restriction extraterritorially.

RMI are not within the United States, the PRWORA's restrictions are not applicable in these countries.

Title IV addresses the domestic issues of "welfare and immigration." See 8 U.S.C. § 1601. In the introductory section, entitled "Statements of national policy concerning welfare and immigration," Congress set forth the statutory purposes for title IV. These purposes include ensuring that "aliens *within the Nation's borders* not depend on public resources to meet their needs," and that "the availability of public benefits not constitute an incentive for immigration *to the United States*," 8 U.S.C. § 1601(2)(A), (B) (emphases added).

This explicit concern with aliens already in the United States and aliens who might immigrate to the United States is also reflected in the legislative history of title IV. In reference to the alienage restriction, the relevant House, Senate, and conference reports discuss only aliens in the United States and potential immigrants. See H.R. Rep. No. 104-651, at 1442, 1443 (1996) ("It is the intent of the [House] Committee [on the Budget] that individuals who are *illegally present in the U.S. or here* for a temporary purpose such as to attend school should not receive public welfare benefits.") (emphasis added); H.R. Rep. No. 104-430, at 463 (1995) (Conf. Rep.) (determining that "[a]ny individual who is not *lawfully present in the U.S.* is ineligible for any Federal benefit" other than specified narrow exceptions) (emphasis added); Staff of S. Comm. on the Budget, 104th Cong., Personal Responsibility, Work Opportunity, and Medicaid Restructuring Act of 1996, at 215, 229 (Comm. Print 1995) ("It is the intent of the [Senate] Committee [on the Budget] that individuals who are *illegally present in the U.S. or here* for a temporary purpose such as to attend school should not receive public welfare benefits"; limiting eligibility "for public benefits will reduce the incentive for aliens to *illegally enter and remain in the U.S.*") (emphases added). Numerous statements by members of Congress reflect concern with the receipt of federal benefits by aliens inside the United States. See, e.g., 142 Cong. Rec. 17,605 (1996) (statement of Rep. Lofgren) (expressing concern about long-term legal immigrants in United States not receiving nursing home coverage); *id.* at 17,606 (statement of Rep. Torres) (expressing concern about ineligibility of long-time legal immigrants in United States for benefits); *id.* at 17,609 (statement of Rep. Ensign) (stating that welfare benefits should be reserved for United States citizens; immigrants on welfare should be deported); *id.* at 17,923 (statement of Sen. Moynihan) (noting that Act would cut off income for severely disabled legal immigrants in this country); *id.* at 17,941 (statement of Sen. D'Amato) ("There are those people who . . . sign up to bring elderly people in[to the United States] and say they are going to be responsible for them, and [then] they put them right on welfare"). We are aware of no statements referring to the receipt of federal benefits by aliens abroad.

Thus, the stated purposes and the legislative history of title IV point firmly to the conclusion that Congress did not intend the alienage restriction to apply extraterritorially.

A counterargument could be made based on two provisions of the PRWORA, *see* 8 U.S.C. §§ 1611(b)(2), 1643(c) (Supp. V 1999), and three subsequent amendments, *see id.* §§ 1611(b)(3), 1611(c)(2)(C), 1643(b). Under this argument, these five provisions protect the receipt of benefits extraterritorially, and thereby suggest that, as a general matter, the alienage restriction *does* apply extraterritorially because if it did not, it would have been unnecessary for Congress to carve out the exceptions. A close examination of these provisions, however, undermines the argument that the provisions reflect the view that the PRWORA applies extraterritorially.

Section 1643(c), one of the two relevant provisions in the statute as originally passed, provides that the alienage restriction “does not apply to any Federal, State, or local government program, assistance, or benefits provided to an alien under any program of foreign assistance as determined by the Secretary of State in consultation with the Attorney General.” If “foreign assistance” refers to assistance given to non-U.S. citizens in foreign countries, then arguably this provision suggests that Congress intended the alienage restriction to apply to the receipt of federal public benefits abroad other than approved programs of foreign assistance. Yet, the phrase “foreign assistance” in section 1643(c) might, alternatively, be understood to refer only to such assistance actually provided in the United States. In our view, section 1643(c) is best read as limited to these programs.

First, it is important to note that certain “foreign assistance” is provided within the United States. For example, under section 605 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405, 440 (codified at 22 U.S.C. § 4704 (1994)), the federal government administers and funds scholarship programs that permit students in developing countries to study in the United States.<sup>6</sup> The text of section 1643(c), moreover, appears to contemplate that foreign assistance will encompass assistance provided in the United States because Congress included state and local government programs of foreign assistance in section 1643(c). It seems unlikely that Congress sought to regulate the provision of overseas assistance by state and local governments. Indeed, because the provision of assistance beyond our borders is generally the province of the federal government, inclusion of state and local governments in this provision suggests that Congress contemplated that it would, at a minimum, have domestic application.

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<sup>6</sup> We do not decide whether this or other similar programs of foreign aid constitute federal benefits within the meaning of the PRWORA. We merely note that certain foreign aid is provided within the United States.

Having established that section 1643(c) could encompass foreign assistance both abroad and in the United States, we must determine whether it encompasses *only* assistance in the United States. An analysis of the text and the legislative history of section 1643(c) makes clear that the better reading of the provision is that it refers only to foreign assistance provided within the United States.

Section 1643(c) requires a determination “by the Secretary of State *in consultation with the Attorney General*” (emphasis added). If section 1643(c) were intended to cover the provision of foreign assistance abroad, it seems unlikely that Congress would have seen an appropriate role for the Attorney General in determining whether to continue aid to a foreign country. Providing assistance abroad is generally the bailiwick of the Secretary of State. *See* Exec. Order No. 12163, 3 C.F.R. § 435 (1980) (generally delegating to the Secretary of State “functions conferred upon the President by . . . the Foreign Assistance Act of 1961”); *see also, e.g.*, 22 U.S.C. § 2151(b) (“Under the policy guidance of the Secretary of State, the Director of the United States International Development Cooperation Agency should have the responsibility for coordinating all United States development-related activities.”). Immigration, in contrast, is generally the bailiwick of the Attorney General. *See* Reorganization Plan No. V of 1940, 5 U.S.C. app. 1, § 1 (“The Immigration and Naturalization Service of the Department of Labor . . . and its functions are transferred to the Department of Justice and shall be administered under the direction and supervision of the Attorney General. . . . In the event of disagreement between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, final determination shall be made by the Attorney General.”); *see also, e.g.*, 8 U.S.C. § 1103(a)(1) (Supp. V 1999) (“The Attorney General shall be charged with the administration and enforcement of the [Immigration and Nationality Act] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers.”). If section 1643(c) refers only to assistance provided within the United States, the role of the Attorney General makes sense: she could help the Secretary of State determine whether a particular program would serve or hinder the immigration policies set forth in title IV.

Additionally, the legislative history of section 1643(c) simply does not support the conclusion that Congress was referring to the provision of foreign aid outside of the United States. If such aid was the focus of Congress’s attention, surely Congress would have debated the merits of terminating, subject to reinstatement by the Secretary of State, all foreign assistance that would be considered a federal public benefit. Instead, there is simply a statement in the Conference Report that “[t]his title does not address alien eligibility for . . . any program of foreign assistance.” H.R. Rep. No. 104-725, at 391 (1996). The precise meaning of this

legislative history is unclear because the text of section 1643(c) *does* address alien eligibility for a program of foreign assistance. The statement in the Report would suggest that Congress was referring only to alien eligibility for foreign assistance abroad and not for foreign assistance within the United States. In this way, if the alienage restriction does not apply extraterritorially, the Report correctly describes section 1643(c): the provision does not address alien eligibility for foreign assistance abroad.

Finally, the reading advanced here is most consistent with the purposes of title IV. Furnishing foreign assistance abroad is unlikely to undermine self-sufficiency in the United States or to create an incentive to immigrate. For all these reasons, we believe section 1643(c) does not refer to the provision of foreign assistance abroad and therefore the provision does not reflect a congressional intent to legislate extraterritorially.

The second provision in the PRWORA as originally enacted that might be read to suggest extraterritorial effect is found in 8 U.S.C. § 1611(b)(2). In this subsection, Congress specified that the alienage restriction should not trump an international agreement or the statutory provisions governing payment of Old Age, Survivors and Disability Insurance (“OASDI”) benefits to aliens abroad. Pursuant to the OASDI program, the President may enter into an international agreement with a foreign country to establish a system for determining an individual’s entitlement to, and the amount of, OASDI benefits based on the time the individual spent in the United States and the other country. *See* 42 U.S.C. § 433(a) (1994). Additionally, an alien abroad is eligible for OASDI benefits, subject to certain restrictions set forth in 42 U.S.C. § 402(t) (1994) (for example, non-U.S. citizens residing outside of the United States for longer than six months are ineligible for benefits). In title IV, Congress specified the interaction between the alienage restriction and the OASDI program, providing that the alienage restriction “shall not apply . . . to any benefit if nonpayment of such benefit would contravene an international agreement described in [42 U.S.C. § 433], [or] to any benefit if nonpayment would be contrary to . . . [42 U.S.C. § 402(t)].” 8 U.S.C. § 1611(b)(2). This provision may refer in some respects to the provision of federal benefits abroad, and thus would seem to contemplate some extraterritorial application of the alienage restriction. Nonetheless, it appears that the provision is principally intended to address benefits that are, at least in large part, earned within the United States. And thus, without clarification by Congress, these benefits might have fallen within the ambit of the PRWORA because the potential to earn such benefits could create an incentive for immigration to the United States. In this light, it seems most reasonable to understand section 1611(b)(2) as a clarification that aliens should continue to receive the benefits as specified in international agreements and 42 U.S.C. § 402(t). Congress may have done so, at least in part, to ensure that it was not putting the United States in breach of an international agreement. In any event, because this is the sole provision in the

original act—an act with an exclusively domestic focus—that clearly refers to the provision of federal benefits outside of the United States, it is insufficient, in our view, to outweigh the substantial evidence in the original act indicating that the alienage restriction does not apply extraterritorially.

After the 104th Congress enacted the PRWORA in 1996, the 105th Congress added three provisions to title IV that refer to the receipt of federal benefits abroad. In each case, however, Congress specified that the provision was simply a “clarification” that the alienage restriction does not apply to the receipt of federal benefits abroad. These amendments were not a “carve out” to the extraterritorial application of the alienage restriction, but, rather, are best understood to have removed any doubt that may otherwise have existed regarding the inapplicability of the Act to the programs at issue. The first two amendments were adopted in 1997, when, as part of the Balanced Budget Act of 1997, Congress added two additional exceptions to the alienage restriction in title IV. *See* Pub. L. No. 105-33, §§ 5561, 5574, 111 Stat. 251, 638, 642 (codified at 8 U.S.C. § 1611(b)(4);<sup>7</sup> 8 U.S.C. § 1643(b)<sup>8</sup>). The House Report accompanying section 1611(b)(4) states that “[t]h[is] provision[] *clarifies*] that, despite general restrictions on Federal benefits for ‘non-qualified aliens,’ certain benefits—specifically . . . Railroad Retirement and Unemployment Insurance—are to remain available to those who earned them through work.” H.R. Rep. No. 105-78, at 94 (1997) (emphasis added). Similarly, in the House Report, the only report that mentions the exception in section 1643(b), the Committee on Ways and Means explained that

[t]his provision *clarifies* that in administering all provisions of Title IV, and especially Sections 401 and 411 relating to benefits for non-qualified aliens, restrictions on public benefits do not apply to earned benefits from work by noncitizens outside the U.S. or by noncitizens who have since left this country and are collecting veteran, pension or other benefits based on their prior work in the U.S.

H.R. Rep. No. 105-78, at 101 (emphasis added).

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<sup>7</sup> “[The alienage restriction] shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C. §§ 231 *et seq.*] or the Railroad Unemployment Insurance Act [45 U.S.C. §§ 351 *et seq.*] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside of the United States.”

<sup>8</sup> “Notwithstanding any other provision of this title, the limitations on eligibility for benefits under this title shall not apply to eligibility for benefits of aliens who are not residing, or present, in the United States with respect to—

“(1) wages, pensions, annuities, and other earned payments to which an alien is entitled resulting from employment by, or on behalf of, a Federal, State, or local government agency . . . ; or

“(2) benefits under laws administered by the Secretary of Veterans Affairs.”

The third post-PRWORA change was adopted in 1998, when Congress again amended title IV. This time Congress stated even more explicitly its understanding that the original Act did not apply extraterritorially and that it was not attempting to alter the solely domestic application of the restriction. In the Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Congress determined that the limitation on aliens receiving professional licenses should not apply to “the issuance of a professional license to, or the renewal of a professional license by, a foreign national *not physically present in the United States.*” Pub. L. No. 105-306, § 5(a)(3), 112 Stat. 2926, 2927 (codified at 8 U.S.C. § 1611(c)(2)(C)) (emphasis added).<sup>9</sup> The legislative history of this amendment indicates that Congress understood the PRWORA’s alienage restriction as applying only domestically. The House Report states that

[t]his provision should not be taken to alter the original intent of Congress that *the provisions of the 1996 welfare reform law apply only to citizens and non-citizens physically present in the United States.* Despite this intent, several professional societies have complained that States are misapplying the 1996 law by restricting access by foreign nationals to professional licenses in the United States. Thus this provision is designed to clear up any confusion on the part of States, without altering the general intent of the welfare reform law and its application solely to individuals physically present in the United States.

H.R. Rep. No. 105-735, pt. 1, at 11 (1998) (emphasis added). This statement makes clear that the 1998 amendment should not be read to create an exception to an otherwise extraterritorial application of the alienage restriction.

The fact that a subsequent Congress added three provisions referring to federal benefits abroad does not alter our conclusion that the alienage restriction does not apply extraterritorially because Congress noted, when enacting each amendment, that the amendment was simply a clarification that the restriction does not apply outside of the United States.

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<sup>9</sup> In 1997 Congress amended section 1611(c)(2)(A), clarifying that citizens of the FSM and RMI working in the United States on a contract, or who need professional or commercial licenses, are not subject to the alienage restriction. See Pub. L. No. 105-33, § 5565, 111 Stat. at 639 (codified at 8 U.S.C. § 1611(c)(2)(A)). This amendment does not bear on the question of extraterritoriality because the amendment addresses the applicability of the alienage restriction in the United States, and not in the FSM or the RMI. See H.R. Rep. No. 105-78, at 97 (1997) (“this provision clarifies that, in keeping with the[] compacts, residents of the freely associated states may enter the U.S. and pursue work by qualifying for contracts and professional and commercial licenses that are otherwise restricted to ‘non-qualified aliens.’”).

### **III. Conclusion**

In sum, we conclude that Congress did not intend the alienage restriction in title IV of the PRWORA to apply extraterritorially.<sup>10</sup> For this reason, FEMA's provision of Stafford Act assistance in the FSM and RMI would not violate the PRWORA.

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

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<sup>10</sup> To the extent any uncertainty endures with respect to our determination that the alienage restriction does not apply extraterritorially, we note that this could be resolved by the Secretary of State determining that Stafford Act assistance in the FSM and RMI is a program of foreign assistance pursuant to 8 U.S.C. § 1643(c). Nonetheless, we believe the better reading of the PRWORA is that the alienage restriction does not apply extraterritorially.

## Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation

Any expenditure of funds in violation of a condition or internal cap in an appropriations act would generally constitute a violation of the Antideficiency Act.

January 19, 2001

### MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

The Constitution provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. The Antideficiency Act, codified at 31 U.S.C. §§ 1341-1342, 1349-1351, 1511-1519 (1994) (“ADA”), is one of several means by which Congress has sought to enforce this fundamental principle. *See* J. Gregory Sidak, *The President’s Power of the Purse*, 1989 Duke L.J. 1162, 1234 (“The statutory mechanism by which Congress guards its appropriations power is the Anti-Deficiency Act.”). The Act’s central prohibition, set out at 31 U.S.C. § 1341(a)(1), provides in relevant part:

An officer or employee of the United States Government or 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.

A violation of this section requires “appropriate administrative discipline,” *id.* § 1349(a), including possible suspension without pay or removal from office, and, if the violation was knowing and willful, a fine of up to \$5,000 and/or imprisonment of up to two years, *id.* § 1350. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990) (citing sections 1341 and 1350 for the proposition that “[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress”); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996) (“The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.”). In addition, violations must be reported by the head of the agency concerned to the President and Congress. 31 U.S.C. § 1351.

You have asked whether a violation of a “condition” or “internal cap” within an appropriations act would violate the Antideficiency Act. For purposes of this opinion, we assume that a “condition” on an appropriation would prohibit an agency from expending any of its funds for a particular purpose, and that an

“internal cap” would prohibit an agency from expending any of its funds in excess of a designated amount for a particular purpose. Your question arises in the specific context of the following provision of the Department of Justice Appropriation Act, 2000, Pub. L. No. 106-113, div. B, app. A, 113 Stat. 1501A-3, 1501A-11 (1999):

For salaries and expenses for the Border Patrol program, the detention and deportation program, the intelligence program, the investigations program, and the inspections program . . . \$1,107,429,000 . . . *Provided further*, That none of the funds available to the Immigration and Naturalization Service [“INS”] shall be available to pay any employee overtime pay in an amount in excess of \$30,000 during the calendar year beginning January 1, 2000.

We understand this provision to be an internal cap, and thus to have prohibited the Department of Justice from using any funds available to the INS under any appropriation to pay any individual employee more than \$30,000 in overtime during calendar year 2000. There are, of course, a variety of other ways in which Congress sets limits in appropriations. For example, Congress often earmarks funds for specific purposes. *See, e.g.*, Department of Transportation and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-205, 110 Stat. 2951, 2951-52 (1996) (appropriating “for necessary expenses for conducting transportation planning, research, systems development, and development activities . . . \$3,000,000”). Congress also imposes ceilings within particular appropriations acts. *See id.*, 110 Stat. at 2952 (providing that “none of the funds in *this* Act shall be available for the implementation or execution of programs in excess of \$25,900,000 for the Payments to Air Carriers program in fiscal year 1997”) (emphasis added). For purposes of this opinion, we employ a narrow definition of “conditions” and “internal caps,” which does not include these other types of limits, and do not address the applicability of the Antideficiency Act to these other types of limitations.<sup>1</sup>

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<sup>1</sup> Our opinion, therefore, does not address situations where purpose restrictions apply to some—but not all—funds available to an agency, or where those restrictions are not found in appropriations acts. Nor does our opinion address whether the Department may use statutory “reprogramming” or transfer authority, *see, e.g.*, Department of Justice Appropriation Act, 2000, §§ 605, 107, 113 Stat. at 1501A-52 to 1501A-53, 1501A-19, to avoid the limitations of a condition or internal cap, or to cure retroactively expenditures that would, in the absence of a reprogramming of funds, violate the Antideficiency Act. We also do not consider what the legal effect might be of after-the-fact delegations or ratifications (by authorized officials) to cure obligations or expenditures made by persons acting without requisite legal authority. Finally, this memorandum does not address the situation in which a condition or internal cap within an appropriations act implicates another branch’s discharge of its constitutionally assigned functions. *Cf.* Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Independent Counsel Provisions of the Ethics in Government Act to Alleged Violations of the Boland Amendment and the Antideficiency Act* (Apr. 27,

By its terms, the Antideficiency Act prohibits any expenditure or obligation exceeding an amount “available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A) (emphases added). The question before us, therefore, is whether, when Congress has expressly prohibited the expenditure of any funds for a particular purpose, or of any funds in excess of a specific amount appropriated for that purpose, an agency’s expenditure of funds in violation of such a limit necessarily also “exceed[s] an amount available . . . for the expenditure,” even when there are sufficient unobligated funds otherwise available in an appropriation to cover the expenditure. The question whether violation of a “condition” or “internal cap” also violates the Antideficiency Act is a difficult issue of first impression for this Office.<sup>2</sup> Its importance is underscored by the availability of criminal felony sanctions against government officers and employees who knowingly and willfully authorize or make such expenditures. For the reasons set forth below, we conclude that a violation of a condition or internal cap within an appropriation would generally constitute a violation of the Antideficiency Act.<sup>3</sup>

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1984) (“Olson Memorandum”) (alleged violation of Boland Amendment, which implicated President’s foreign affairs powers, could not reasonably be construed as a federal crime under Antideficiency Act due to justiciability concerns based on political question doctrine, lack of specific manageable standards, and vagueness of the Amendment); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5-7 (1981) (President’s obligational authority may be strengthened in connection with initiatives grounded in peculiar institutional powers and competency of the President; Antideficiency Act not necessarily dispositive in such circumstances); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (noting that Congress may not “impair the President’s pardon power by denying him appropriations for pen and paper”); see also J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989) (arguing that certain appropriations riders raise separation of powers concerns and conflict with the President’s constitutional duty to make recommendations to Congress); Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1352 (1988) (noting that “Congress may not completely frustrate the exercise of the President’s constitutional duties”).

<sup>2</sup> Cf. Olson Memorandum (assuming without discussion that alleged violation of Boland Amendment, which imposed a condition within an appropriation, would violate Antideficiency Act absent separation of powers concerns).

<sup>3</sup> There may be circumstances in which determining the precise scope of a condition or internal cap raises difficult issues. Congress may, for example, enact a law in the middle of a fiscal year stating that previously available funds may no longer be used for a particular, previously authorized, purpose. After the effective date of such a law, previously available and unobligated funds could no longer be obligated for the proscribed purpose. However, a construction of such a law that would preclude, after the effective date, expenditure of funds that had been obligated prior to the effective date for services rendered prior to the effective date could cause the government to breach certain contracts or to violate federal personnel laws. These considerations, along with the general presumption that statutes should not be given retroactive effect, *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), might reasonably justify the conclusion that such a law should be construed, if possible, not to prohibit the payment of such obligations. There may be other circumstances where determining the legal availability of funds under a condition or internal cap poses similarly difficult interpretive questions that we cannot, and therefore do not, address.

## **I. Language and Structure of the Act**

As in all cases of statutory interpretation, we begin with the language of the Act itself. See *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Section 1341(a)(1) prohibits any “expenditure or obligation exceeding an amount *available* in an appropriation or fund *for the expenditure or obligation.*” 31 U.S.C. § 1341(a)(1)(A) (emphasis added). The scope of the Act’s coverage thus turns, to a significant degree, on the meaning of the term “available” in this context. Webster’s Third New International Dictionary defines “available” to mean “valid”; “such as may be availed of: capable of use for the accomplishment of a purpose: immediately utilizable”; or “that is accessible or may be obtained.” *Webster’s Third New International Dictionary* 150 (1993). Similarly, Black’s Law Dictionary defines the term “available” to mean either “[s]uitable; useable; accessible; obtainable; present or ready for immediate use,” or “[h]aving sufficient force or efficacy; effectual; valid.” *Black’s Law Dictionary* 135 (6th ed. 1990). These definitions reflect two distinct concepts. To the extent the word “available” means “present or ready for immediate use,” it appears to require only that funds be accessible or obtainable in a practical sense—i.e., unobligated. So understood, the Act would generally prohibit only those expenditures that exceed the total amount of funds Congress has provided within a particular account—i.e., those expenditures that result in so-called “coercive deficiencies” because they effectively obligate Congress to appropriate additional funds. On the other hand, to the extent that “available” also incorporates the concept of “validity,” it suggests an additional requirement of legal permissibility. On this reading, if Congress provides that “no funds made available under this or any other appropriation shall be available to pay in excess of \$30,000 for overtime,” only \$30,000 is “available,” within the meaning of the Antideficiency Act, for that purpose. Any expenditure in excess of that sum on overtime, accordingly, is an “expenditure or obligation exceeding an amount available in an appropriation,” regardless of whether such an expenditure would cause an agency or office to exceed its overall appropriation. Although the statute is not entirely free from ambiguity on this point, we conclude that the second reading better comports with the Act’s language and structure.

Various arguments may be mustered from the text and structure of the statute and related provisions to support the view that “available” in the context of section 1341(a)(1) simply means “unobligated.” For example, because subsection (a)(1)(B) sets forth a clearly temporal limitation on contracting or otherwise obligating federal funds—i.e., no spending “before an appropriation is made”—it might be argued that the parallel proscription of subsection (a)(1)(A) should likewise be understood as a temporal limitation—i.e., no spending “after funds are exhausted.” In other words, the Act reflects Congress’s concern with preventing spending that creates deficiencies, rather than with enforcing restrictions on

spending for particular purposes. This interpretation draws support from other provisions of the Act (codified at 31 U.S.C. §§ 1511-1519) that require federal agencies to apportion their funds throughout the fiscal year. Section 1512(a) provides generally that, except as otherwise provided, “an appropriation available 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.”<sup>4</sup> The responsible agency official may make such apportionments by “(A) months, calendar quarters, operating seasons, or other time periods; (B) activities, functions, projects, or objects; or (C) a combination of the ways referred to in clauses (A) and (B),” as the official considers appropriate. 31 U.S.C. § 1512(b)(1). Section 1517(a) makes it unlawful for an officer or employee of a federal agency or the District of Columbia government to “make or authorize an expenditure or obligation exceeding . . . an apportionment.” The penalties for violating this prohibition are essentially identical to those mandated for violations of section 1341(a): reporting of violations to the President and Congress, *see* 31 U.S.C. § 1517(b), “appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office,” 31 U.S.C. § 1518, and, in the case of “knowing[] and willful[]” violations, criminal sanctions that may include a fine of up to \$5000, imprisonment for up to two years, or both, 31 U.S.C. § 1519. *Cf.* 31 U.S.C. §§ 1349(a), 1350, 1351. These provisions highlight the degree to which Congress sought in the Antideficiency Act to prevent government agencies from exceeding their appropriated funds in a given fiscal year.<sup>5</sup>

Congress’s obvious concern with overall deficiencies caused by expenditures in excess of appropriated funds does not, however, exclude the possibility that it also intended through the Antideficiency Act to enforce its appropriations power by exercising control over the *purposes* for which agencies may use their appropriated funds. Indeed, there is considerable textual evidence to support a reading of the term “available” that incorporates a “legal permissibility” component as well as the basic requirement that sufficient funds be unexpended or “unobligated.” In section 1341(a)(1)(A) itself, the word “available” is modified by the phrase “for

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<sup>4</sup> Certain exceptions to this requirement are set out in 31 U.S.C. § 1515.

<sup>5</sup> This reading is also arguably supported by another provision in chapter 13 of title 31 (the chapter entitled “Appropriations,” which also includes section 1341(a)), in which Congress appears to have used the term “available” to mean simply unobligated. In section 1344(a)(1), Congress referred to “available” funds, then separately specified a limitation on the permissible use of such funds. *See* 31 U.S.C. § 1344(a)(1) (“Funds available to a Federal agency, by appropriation or otherwise, may be expended . . . for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes.”). *Cf. Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (relying on slight differences in language in “nearby sections of Title 28” to construe the term “jurisdiction”). *But see infra* pp. 38-39 (discussing other uses of term “available” in title 31).

the expenditure or obligation,” which suggests a more restrictive intent.<sup>6</sup> If Congress had intended to address solely the problem of overall deficiency spending, this phrase would appear somewhat superfluous. Congress could have simply prohibited any expenditure or obligation “exceeding an amount available in an appropriation.” The fact that Congress did not simply prohibit expenditures in excess of total appropriations suggests that the term “available” should be construed more broadly to encompass the concept of legal permissibility. Nor does the temporal focus of subsection (a)(1)(B) compel the conclusion that subsection (a)(1)(A) has a similarly limited focus. It is just as logical to conclude that these separate prohibitions were aimed at separate problems, only one of which had a purely temporal dimension.

As noted above, Congress often uses the term “available” in its appropriations acts in a manner that clearly connotes legal permissibility. *See, e.g.*, Pub. L. No. 101-516, 104 Stat. 2155, 2157 (1990) (“none of the funds in this or any other Act shall be *available* for the implementation or execution of programs in excess of \$26,600 for the Payments to Air Carriers program”) (emphasis added). Similarly, Congress has used “available” in this sense in numerous other provisions of chapters 13 and 15 of title 31. Section 1343(d), for example, provides that an appropriation “is available to buy, maintain, or operate an aircraft only if the appropriation specifically authorizes the purchase, maintenance, or operation.” 31 U.S.C. § 1343(d). Section 1346 provides that “public money and appropriations are not available to pay” certain expenses related to commissions, councils, boards, and similar groups, but that the “[a]ppropriations of an executive agency are available for the expenses of an interagency group conducting activities of interest common to executive agencies when the group includes a representative of the agency.” *Id.* § 1346(a), (b). Section 1348 provides that “[e]xcept as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences,” but that the “[a]ppropriations of an agency are available to pay charges for a long-distance call if required for official business,” provided “the head of the agency . . . certifies that the call is necessary in the interest of the Government.” *Id.* § 1348(a)(1), (b). In each of these statutes, Congress used the term “available” in a manner that is not dependent on whether funds are actually “unobligated,” and that instead limits the permissible purposes for which funds may be spent. *See also* 31 U.S.C. § 1502(a) (“The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title.”)

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<sup>6</sup> *See infra* pp. 39-40 (discussing changes in text made by 1982 recodification of title 31, which Congress did not intend to have substantive effect).

An argument can be made, however, that the current language of section 1341(a)(1) should be read more narrowly in view of the fact that it was enacted as part of the 1982 general recodification of title 31, which was not intended to make any substantive change in the law. *See* H.R. Rep. No. 97-651, at 1-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1896 (describing purpose of bill “to revise, codify, and enact without substantive change certain general and permanent laws related to money and finance as title 31, United States Code, ‘Money and Finance,’” and to simplify language); *see also* *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (when enacted without substantive comment, change during codification of legislation is generally held not to have been intended to alter statute’s scope); *cf.* *Interpretation of the Grandfather Clause in 18 U.S.C. § 709—Use of Word “Federal” in Name of Insurance Company*, 1 Op. O.L.C. 60, 61 (1977) (“the relevant law is not strictly” criminal statute as revised in 1948, but rather its predecessor). The previous version of the Antideficiency Act, as enacted in 1950 (the last occasion on which Congress made substantive changes to this section), provided:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

31 U.S.C. § 655(a) (1976). Notably, in the first clause of the pre-1982 statute, the word “available” is not modified by the phrase “for the expenditure or obligation,” but rather by the term “therein.” Indeed, only the second clause, which concerns obligations in advance of appropriations, contains express purpose-restrictive language. Arguably, therefore, the 1950 statute did not use the term “available” to capture the concept of “legal permissibility,” and the language added by the 1982 recodification should not be read to incorporate that concept either, because the legislative history of the recodification indicates only an intent to standardize and simplify statutory language within the title.

Ultimately, however, we do not find this argument persuasive. Congress’s statement that the recodification worked no substantive change in the law is perfectly consistent with the conclusion that the language added in 1982 did nothing more than confirm that the word “available” in the Act had always incorporated the concept of legal permissibility. The express prohibition in the 1950 law on obligations incurred in advance of appropriations “made for such purpose” supports this view. It seems highly unlikely that Congress would have intended to adopt a legal-availability approach to the second clause of the 1950

law, but not to the first clause. Indeed, as we explain below, this understanding of the 1950 version is consistent with the fact that, when Congress amended the law that year, it deleted the phrases “in any one fiscal year” and “for that fiscal year” from the statute, thereby broadening the statutory focus beyond an apparent concern with overall deficiencies.<sup>7</sup>

We have also considered whether the “Purpose Statute,” 31 U.S.C. § 1301(a), provides any basis for a narrowing construction of the Antideficiency Act. The Purpose Statute, which predates the Antideficiency Act and carries no criminal penalties, provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” *Id.* Although, as the Supreme Court has observed, “it is hardly a novel proposition that [two statutes] ‘prohibit some of the same conduct,’” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 778 (1979), and referring to overlap of 1933 and 1934 securities laws), a construction of one statute that renders another wholly superfluous should generally be avoided. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“If there is a big hole in the fence for the big cat, need there be a small hole for the small one?”). If the Purpose Statute prohibits nothing more than expenditures and obligations that are illegal under the Antideficiency Act, then the civil prohibition of the Purpose Statute would have no independent function. This is not the case, however, because the Purpose Statute may be violated in circumstances where no violation of the Antideficiency Act occurs. For example, the Comptroller General has consistently found that “deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates [the Purpose Statute].” 1 General Accounting Office, *Principles of Federal Appropriations Law* 4-4 (2d ed. 1991) (“*Federal Appropriations Law*”) (citing 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934)). In such circumstances, funds are “available” under the broader construction of that term in the Antideficiency Act, because funds are both “on deposit” and may legally be obligated or expended for the purpose in question; thus, although the expenditure would not run afoul of the broader reading of the Antideficiency Act, it violates the Purpose Statute’s requirement that funds be “applied only to the objects for which the [charged] appropriation[] [was] made.” *See* 63 Comp. Gen. 422, 424 (1984) (“Even though an expenditure may have been charged to an improper source, the Antideficiency Act’s prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure.”). Although the legal interpretations of the Comptroller General are

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<sup>7</sup> As discussed below, this reading of the text is consistent with interpretations of the pre-1982 versions of the Act by the Supreme Court, the Comptroller General, and members of Congress.

not binding on the Executive Branch, *see Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986), we find this interpretation of the Purpose Statute persuasive.<sup>8</sup> Accordingly, because we find that the Purpose Statute may apply in circumstances where, even under a broad reading, the Antideficiency Act would not, the existence of the Purpose Statute provides no basis for narrowly construing the language of the Antideficiency Act.

Similarly, we do not believe that the “rule of lenity” justifies a construction of the Act that equates the terms “available” and “unobligated.” To be sure, the Supreme Court has “instructed that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,’ . . . and that ‘when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.’” *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971), and *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), respectively). The degree of ambiguity in the Antideficiency Act, however, is insufficient to warrant invocation of this rule. As the Court has explained, “[l]enity applies only when the equipoise of competing reasons cannot otherwise be resolved.” *Johnson v. United States*, 120 S. Ct. 1795, 1807 n.13 (2000). Thus, the rule of lenity applies “‘only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended,’” *Holloway v. United States*, 526 U.S. 1, 12 n.14 (1999) (quoting *Muscarello v. United States*, 524 U.S. 125, 138 (1999)) (additional quotations and citations omitted), or where “there is a “‘grievous ambiguity or uncertainty’” in the statute,” *Muscarello*, 524 U.S. at 139 (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991))). *See also* 3 Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 59.03 (5th ed. 1992) (“In fact, it has been said that the rule of lenity is a tie breaker when there is an otherwise unresolved ambiguity.”). Although the language of the Antideficiency Act admits of some ambiguity, there is by no means a “grievous ambiguity or uncertainty in the statute,” nor complete equipoise between the competing interpretations we have identified. Rather, as we have explained, we believe that the text of section 1341(a)(1) is best read to apply to violations of conditions and internal caps within appropriations acts. Moreover, “everything from which aid can be derived,” *Holloway v. United States*, 526 U.S. at 12 n.14, serves to clarify and confirm this reading, rather than requiring us to “make no more than a guess as to what Congress intended.” *Id.* Thus, as we

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<sup>8</sup> For purposes of resolving the question before us, we need not consider any other interpretations of the Purpose Statute that the Comptroller General has rendered, and should not be understood generally to embrace the substantial body of opinions the Comptroller General has issued with respect to this statute. *See generally* 1 *Federal Appropriations Law* ch. 4.

explain below, the Act's legislative history, relevant court decisions, decisions of the Comptroller General, and scholarly commentary all support our conclusion that the Act applies to expenditures that violate conditions and internal caps within appropriations acts.

## **II. History and Evolution of the Act**

Our examination of the historical record confirms our view that, except in those circumstances in which an internal cap or condition would prevent another branch from discharging its constitutionally assigned functions, *see supra* note 1, the text of the Antideficiency Act is best read to prohibit an expenditure in excess of such a condition or internal cap. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”).

What is now known as the Antideficiency Act arose during the nineteenth century from Congress's increasing frustration with the failure of Executive Branch agencies to stay within the budgets Congress allocated to them. At least as early as 1809, members of Congress complained of budgetary abuses and misapplication of funds by the War and Navy departments, and in that year Congress passed legislation requiring that “the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other.” Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, 535; *see also* 19 Annals of Cong. 1551-55, 1560-61, 1575 (1809).<sup>9</sup> In 1820, Congress enacted additional legislation providing that, with certain exceptions for obtaining subsistence and clothing, “no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment.” Act of May 1, 1820, ch. 52, § 6, 3 Stat.

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<sup>9</sup> This precursor of the present-day “Purpose Statute” (31 U.S.C. § 1301(a) (1994)) permitted the President to authorize a transfer of funds from one “branch of expenditure” within a particular department to another “branch of expenditure” within the same department. *See* 2 Stat. at 235. Congress repealed that authority in 1868, amending the 1809 Act to provide that “all acts or parts of acts authorizing such transfers of appropriations be and the same are hereby repealed, and no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated.” Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35, 36. The Act was subsequently codified as section 3678 of the Revised Statutes, which provided: “All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.” Rev. Stat. § 3678 (2d ed. 1878), 18 Stat. pt. 1, at 723 (repl. vol.). The current version of the Purpose Statute (as recodified in 1982) provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a).

567, 568.<sup>10</sup> In 1868, Congress passed a statute providing that “no contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement . . . which shall bind the government to pay a larger sum of money than the amount in the treasury *appropriated for the specific purpose*.” Act of July 25, 1868, ch. 233, § 3, 15 Stat. 171, 177 (codified at Rev. Stat. § 3733 (2d ed. 1878), 18 Stat. pt. 1, at 736-37) (repl. vol.)) (emphasis added). The 1868 Act established criminal penalties of up to two years imprisonment and a \$2000 fine for “knowing” violations. *Id.* (codified at Rev. Stat. § 5503 (2d ed. 1878), 18 Stat. pt 1, at 1066 (repl. vol.)).<sup>11</sup>

In 1870, Congress again expressed its frustration with Executive Branch over-spending by enacting general legislation making it unlawful “for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.” Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (codified at Rev. Stat. § 3679 (2d ed. 1878), 18 Stat. pt. 1, at 723 (repl. vol.)). This was the original version of the Antideficiency Act, which has since been amended on numerous occasions.<sup>12</sup> When asked why such legislation was needed, given that its prohibition was already “the law of the land,” the amendment’s sponsor replied: “Well they do not adhere to it. I want to put it in here, so that it shall have force and effect on every appropriation.” Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) (Remarks of Rep. Randall).

Despite these legislative efforts to enforce its fiscal prerogatives, Congress continued to find itself faced with situations in which federal agencies exceeded their budgets and then presented Congress with deficiencies, which Congress felt obliged to pay. In 1905, Congress attempted to address this problem by amending

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<sup>10</sup> This provision was subsequently codified as section 3732 of the Revised Statutes (2d ed. 1878), 18 Stat. pt. 1, at 736 (repl. vol.), and exists in a somewhat different form today as 41 U.S.C. § 11 (1994).

<sup>11</sup> This criminal offense is currently codified at 18 U.S.C. § 435 (1994) (“Whoever, being an officer or employee of the United States, knowingly contracts for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than *the specific sum appropriated for such purpose*, shall be fined under this title or imprisoned not more than one year, or both.”) (emphasis added); *see also* 41 U.S.C. § 12 (1994). The 1948 Reviser’s Note, 18 U.S.C. § 435, states that the applicable punishment was reduced because “[t]he offense described in this section involves no moral turpitude” and should not carry “the stigma of a felony.” We have been unable to find any discussion of the relationship between this statute and the Antideficiency Act, or any explanation of the discrepancy in their criminal sanctions.

<sup>12</sup> Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 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).

Rev. Stat. § 3679 in several significant ways. *See* Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257. The amended Antideficiency Act provided:

No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. . . . Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.

33 Stat. at 1257-58 (1905). The 1905 amendment also added restrictions on the acceptance of voluntary services and required that certain types of funds be apportioned over the course of the fiscal year, although it permitted heads of departments to waive or modify an apportionment in particular cases. *Id.* The purpose of the new apportionment requirement was “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.” *Id.* at 1258. In introducing the proposed amendment, Representative Hemenway (Chairman of the Appropriations Committee, which reported the bill) explained:

I call attention to this particular limitation because we seek by it to prevent deficiencies in the future. . . . 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); *see also id.* at 3689-92, 3780-82 (statements of other members of Appropriations Committee expressing frustration with deficiencies incurred by Executive Branch and then presented to Congress).

Although much of the legislative debate focused on the problem of overall deficiencies, several Committee members and other representatives emphasized the need to prevent Executive Branch departments from taking funds authorized for one purpose and using them for another, noting that such abuses were a significant cause of deficiencies. *See, e.g.*, 39 Cong. Rec. 3692 (statement of Rep. Livingston) (“some of the Departments of this Government have been absolutely taking lump sums appropriated for a particular purpose and promoting clerks and officers out of it”); *id.* at 3780 (statement of Rep. Underwood) (criticizing deficiencies “made by Department officers, who exceeded the law and used moneys appropriated for one purpose for a different purpose than Congress

intended”); *id.* at 3783 (statement of Rep. Underwood) (“if the officers of the Government had stayed within the law and only used their funds for the purpose they should have been used for the deficiency would not have occurred”). There was extensive discussion in the House of an incident in which a Navy official used funds appropriated for the maintenance of battleships in order to install two sights on guns for which only one sight had been authorized by Congress. *See id.* at 3781 (statement of Rep. Underwood) (“the money appropriated for the ordinary maintenance and care of the battle ships of the country has been used for other purposes; I will not say illegitimate purposes, but for purposes that the Navy Department should have come to Congress and asked the authority of the Naval Committee to do”). Another example concerned a State Department official’s “misapplication of the fund” appropriated for ordinary printing in order to print a book that Congress had not authorized. *Id.* at 3781 (“Mr. Littlefield. Will the amendment which the committee have proposed . . . reach a case like this? Mr. Underwood. It will.”). Representative Underwood, who was also a member of the committee that reported the bill, repeatedly asserted, without contradiction, that the proposed bill would “stop” such abuses and “prevent this thing being done in the future.” *Id.* at 3780, 3781; *see also id.* at 3691 (statement of Rep. Livingston) (“if you permit this clause to remain in this bill there will be no more expenditure of money without authority”).<sup>13</sup> Indeed, Representative Underwood stated the goal of the antideficiency provision in broad constitutional terms:

This is only one illustration. It shows how the money that we appropriate . . . is misapplied, and it demonstrates conclusively how necessary it is for Congress to pass some legislation such as we propose in this bill to check that evil and retain the power of appropriation in the hands of Congress. We are getting farther and farther away from it every day. The great power that was intended to be exercised by the legislative branch of the Government is being taken away from it by departmental officers creating deficiencies for purposes that are not authorized under the law.

*Id.* at 3782.

Within a year, Congress again sought to strengthen its control over appropriations by amending the Act to prohibit department heads from modifying apportionments except in “extraordinary emergenc[ies] or unusual circumstance[s]” that could not have been anticipated when the appropriated funds were apportioned. *See* 34 Stat. 27, 48-49 (1906). Representative Littauer, the sponsor of the amendment, reiterated the need for the House to “regain its control over appropria-

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<sup>13</sup> The primary reason identified for lack of compliance with existing law was the lack of any penalty for violation of the statute. *See* 39 Cong. Rec. at 3690, 3780, 3781.

tions . . . in order that the Departments may understand that such moneys, and such moneys alone as we appropriate, will be at their service to carry on the work of the Government.” 40 Cong. Rec. 1275 (1906). Again, various members of the House indicated their understanding that the Act applied not just to expenditures in excess of total appropriations, but rather also to expenditures inconsistent with the express terms of the appropriations. Thus, Representative Fitzgerald identified one cause of deficiencies as “officials spending money in defiance of the action of Congress in refusing to appropriate money for the purpose for which they estimated,” and stated that “[i]t is necessary for Congress to impress upon the men in the administrative offices of the Government that Congress means just what it says in the law, and that if these men do not comply with it they will not only be dismissed from the public service, but they shall be punished as this law provides.” *Id.* at 1289-90. Similarly, Representative Burton emphasized the duty of the people’s representatives “to determine *for what objects* expenditures shall be made and *how much* shall be expended,” and asserted that members of Congress must “scrutinize the public expenditures and make sure that they are applied to purposes which approve themselves to our judgment and to the judgment of the people.” *Id.* at 1298 (emphasis added).<sup>14</sup> A particular example of conduct the 1906 amendment sought to prevent was the Attorney General’s use of the Justice Department’s miscellaneous expenditures account to commission a portrait. *See id.* at 1274-75; *see also id.* at 1275 (Rep. Gaines) (“[T]he law should not have been evaded . . . by taking public funds that were not appropriated to do this particular thing.”). In response to a question as to whether “Congress should deprive the heads of these Departments of all discretion . . . and allow them to expend no money for any purpose except that specifically appropriated for that particular purpose,” Representative Brundidge responded: “that is practically the law now.” *Id.* at 1276 (noting the exception for emergencies).

As the foregoing history reveals, although the language of the statute at that time—which merely prohibited expenditures “in any one fiscal year” in an amount “in excess of appropriations made by Congress for that fiscal year”—appeared designed primarily to prevent overall deficiencies, a number of members of Congress asserted (without opposition) that the 1905 and 1906 amendments would also enforce Congress’s constitutional authority to control the objects on which funds were to be spent. Indeed, the remarks cited above indicate that proponents of the legislation believed that unauthorized spending—that is, spending on projects that Congress had failed to authorize, or spending more money on projects than Congress had authorized—was a primary *cause* of overall deficiencies. These

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<sup>14</sup> Representative Burton also stated with respect to the Act’s penalty provisions that, “unless the law is very severe,” executive officers would spend funds on particular items they had recommended that were rejected by Congress. “It is fit and proper that by the severest penalties we should provide against that possibility.” *Id.* at 1298.

proponents, therefore, presumably would not have perceived any inherent tension between the goal of barring coercive deficiencies and the goal of barring spending in excess of conditions or internal caps; any statutory focus on the former goal, therefore, does not necessarily demonstrate that Congress did not intend to achieve the latter as well.

In subsequent years, Congress continued to modify the Act in an attempt to rein in overspending by the Executive Branch and retain control of the federal fisc in the hands of Congress. In 1950, Congress amended the first portion of the statute to read:

Sec. 3679. (a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Pub. L. No. 81-759, 64 Stat. 595, 765.<sup>15</sup> Notably, the 1950 amendment eliminated the phrases “in any one fiscal year” and “for that fiscal year,” thereby changing the focus of the Act’s language from overall spending to spending out of particular appropriations, and also introduced the term “available” for the first time in the Act’s history. *See* 96 Cong. Rec. at 6835 (“subsection (a) would prohibit the making or authorizing of expenditures in excess of *the amount available in any appropriation or fund*”) (emphasis added). The legislative history provides little explanation for these changes. The House Report merely noted that the existing statute was “antiquated” and needed redrafting in light of the increasing complexity of the government, *see* H.R. Rep. No. 81-1797, at 9 (1950), while the legislative debates once again focused on the problem of deficiencies. Representative Norrell, a committee member and sponsor of the amendment, stated: “The entire effort is to try to discourage, if not entirely eliminate, supplementals and deficiencies.” 96 Cong. Rec. at 6726; *see also id.* at 6729 (purpose of amendment is to restore “proper control over appropriations” to Congress) (remarks of Rep. Taber and Rep. Wigglesworth). Yet Congress also seems to have been concerned with fiscal

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<sup>15</sup> Congress also increased the maximum penalty for “knowing[] and willful[]” violations of this provision of the Act to a \$5000 fine and two years imprisonment, and for all other violations required “appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office.” § 3679(i), 64 Stat. at 768; *see also* 96 Cong. Rec. 6835, 6837 (1950) (section-by-section analysis) (amendment designed to supply “more practicable penalties, which can be gaged with reference to the seriousness of the offense”). Finally, the amended Act required agencies to report certain violations of the statute, and the actions taken, to the President and Congress. § 3679(i), 64 Stat. 768.

control in a broader sense. The House Report admonished the Executive Branch that “[a]ppropriation of a given amount *for a particular activity* constitutes only a *ceiling* upon the amount which should be expended *for that activity*.” H.R. Rep. No. 81-1797, at 9 (emphasis added). Moreover, as noted above, Congress added specific language to the second clause of the section, dealing with obligations in advance of appropriations, which appears to presuppose that obligations are limited to the particular purposes Congress has authorized.

Between 1950 and 1982, Congress made only a few minor and technical amendments (not relevant here) to the Antideficiency Act. The Act achieved essentially its current form in 1982, as part of the general recodification of title 31 of the United States Code.<sup>16</sup> See H.R. Rep. No. 97-651, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895 (describing purpose of bill “to revise, codify, and enact without substantive change certain general and permanent laws related to money and finance as title 31, United States Code, ‘Money and Finance’”). The new section 1341(a) differed in several ways from its predecessor. In describing unlawful expenditures and obligations, for example, the revisers changed the phrase “under any appropriation or fund in excess of the amount *available therein*” to “exceeding an amount *available* in an appropriation or fund *for the expenditure or obligation*.” 31 U.S.C. § 1341(a) (emphasis added). In the second clause, the phrase “for the payment of money for any purpose, in advance of appropriations made for such purpose” became “for the payment of money before an appropriation is made.” The House Report specified, however, that the bill made no substantive change in the law. See H.R. Rep. No. 97-651, at 1-3; 1982 U.S.C.C.A.N. at 1896. Accordingly, we understand these changes simply to have clarified the longstanding meaning of the Act. See H.R. Rep. No. 97-651, at 1 (“simple language has been substituted for awkward and obsolete terms”).

Although the legislative history of the Antideficiency Act manifests particular congressional concern with the problem of overall deficiencies, we believe that history indicates that the Act’s proponents sought not only to prohibit government agencies from spending funds in excess of their total annual appropriations (i.e., creating a deficiency), but also to enforce Congress’s control over the uses to which public funds are put. This broader view of the Act’s goals was expressed when the Act took its modern form in 1905 and 1906, and was reinforced when the 1950 amendments to the statutory language focused the Act’s prohibition on expenditures in excess of any single appropriation or fund instead of expenditures within a fiscal year. Indeed, the legislative history from 1905 on indicates a

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<sup>16</sup> In 1990, Congress added sections 1341(a)(1)(C) and (D) in conformity with the Balanced Budget and Emergency Deficit Control Act of 1985. Congress also clarified that the exception allowing the acceptance of voluntary or personal services in time of emergencies (see 31 U.S.C. § 1342 (1994)) may be applied only in the face of an imminent threat to life or property. See H.R. Rep. No. 101-964, at 1170 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2875.

congressional intent to enforce the full extent of Congress's constitutionally mandated control over public spending. To be sure, in denouncing unauthorized spending, members typically focused only on examples that resulted in overall deficiencies, such as the excess spending on naval gun sights that depleted funds available for ship maintenance. But the comments of Representatives in 1905 and 1906 and the 1950 House Report are not so limited, and reflect a desire to prohibit *all* expenditures on particular projects in excess of authorized levels. *See, e.g.*, 39 Cong. Rec. at 3780 (Rep. Underwood criticizing use of "moneys appropriated for one purpose for a different purpose than Congress intended"); 40 Cong. Rec. at 1298 (Rep. Burton emphasizing Congress's right "to determine for what objects expenditures shall be made and how much shall be expended," and asserting that Congress must ensure that public funds "are applied to purposes which approve themselves to our judgment and to the judgment of the people"); H.R. Rep. No. 81-1797, at 9 ("Appropriation of a given amount *for a particular activity* constitutes . . . a *ceiling* upon the amount which should be expended *for that activity*." (emphasis added)).

The legislative history thus reinforces our conclusion that the Antideficiency Act prohibits not only expenditures or obligations in excess of overall appropriations, but also expenditures in excess of internal caps or conditions within particular appropriations acts. In our view, this reading of the Act better reflects its full history and evolution, and is more consistent with its purpose. As this Office has stated previously, "[t]he manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the government's money is to be spent and how much for each purpose." *Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation*, 4A Op. O.L.C. 16, 19-20 (1980). *See also Appropriation—Construction of New York Dry Dock*, 28 Op. Att'y Gen. 466, 466 (1910) (Secretary of the Navy may not borrow funds "from appropriations not strictly applicable" to meet the payments on a contract for the erection of a dry dock where funds specifically appropriated for that purpose have been exhausted).

### **III. Judicial, Administrative, and Scholarly Interpretations of the Act**

Our understanding of the Act's prohibitions is further supported by the purposes of the Constitution's Appropriations Clause, the decisions of the Supreme Court and the Comptroller General, and the views of scholars who have addressed the subject. The Antideficiency Act itself is unquestionably intended to enforce Congress's authority under the Appropriations Clause. As the Supreme Court has explained, that Clause is intended "to assure 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 Pers. Mgmt. v. Richmond*, 496 U.S. at

428. The “letter of the difficult judgments reached by Congress as to the common good” is very often reflected in the conditions and internal caps included in appropriations laws. Accordingly, a construction of the Antideficiency Act that prohibits expenditures that do not necessarily result in overall deficiencies but that nevertheless frustrate difficult congressional judgments about the appropriate level of spending on a particular purpose ensures that Congress is able to exercise its full constitutional authority over public spending.

The Supreme Court has applied these principles on the rare occasions it has had to interpret any of the various versions of the Antideficiency Act. In *Hooe v. United States*, 218 U.S. 322 (1910), the Court held that, under the 1870 version of the Act and other similar enactments, the Civil Service Commission was legally incapable of incurring an obligation to pay more rent for a building it occupied than Congress had specifically appropriated for that purpose, and that any implied contractual obligation to pay fair market rental value in excess of the appropriated amount was a nullity. The relevant appropriations acts expressly stated that the sum of \$4000 would be “in full compensation” for each year’s use of the building. *Id.* at 332. The Court pointed out that “[i]t is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation.” *Id.* at 333. The agency could not contract for rent in excess of that amount, “particularly where . . . Congress had taken care to say . . . that the appropriation shall be in *full* compensation for the specific purpose named in the appropriation act.” *Id.*; *see also Sutton v. United States*, 256 U.S. 575, 580-81 (1921) (under 1906 version of Act, Secretary of War could not obligate the government to pay more than the \$23,000 appropriated for improving a channel); *Bradley v. United States*, 98 U.S. 104 (1878) (where Congress appropriated only \$1800 for payment of third year’s rent under a contract for annual rent of \$4200, lessor could not recover anything beyond that amount). Because none of these cases involved situations in which officers or agencies drew upon other appropriated funds and made expenditures in excess of the amount (or limits) Congress had specified for the purpose in question, the Court did not squarely address whether such expenditures violate the Act. In addition, the Court was applying versions of the Act that did not use the term “available.” Nevertheless, in each case the Court treated the limitation in the relevant appropriation as an internal cap, and cited the Act for the proposition that federal officials were legally incapable of obligating the government to exceed that cap. These holdings thus appear to support our conclusion that, when Congress uses an internal cap or condition to limit the amount of money that can be used for a particular purpose, only the amount of money specified in the cap or condition is “available,” within the meaning of the Antideficiency Act, for that purpose, and any expenditure in excess of that amount is an “expenditure or obligation exceeding an amount available in an appropriation.”

More recently, the Federal Circuit has held that “[s]ection 1341(a)(1)(A) makes it clear that an agency may not spend more money for a program than has been appropriated for that program.” *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.) (emphasis added), cert. denied, 516 U.S. 820 (1995). On this basis, the court rejected the argument that, while Congress had failed to appropriate sufficient earmarked money to fund certain entitlements under the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (1950), the Department of Education should have redirected funds from other programs in order to cover the shortfall, and concluded that, if the Department had transferred money from other appropriations, “it would have been spending more money than Congress had appropriated for [those] entitlements, in violation of § 1341(a)(1)(A).” *Id.* Similarly, in *Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75 (1988), the Court of Claims held that if Congress has not appropriated funds for a particular purpose, it would violate the Antideficiency Act for officials to expend other funds for that purpose. The court denied the claim of the Eastern Band of Cherokee Indians that the Department of the Interior should have given them increased funds for their school under a statutory provision that provides for equivalent funding for schools operated by the Bureau of Indian Affairs, as compared with public schools. *Id.* at 76. At the time of the tribe’s request, no appropriations had been made for the Set-Aside Fund from which the payments were required to be made by the Department’s implementing regulations. *Id.* Although the tribe argued that the Department could have made payments from other accounts, the court held that such an action would violate the Antideficiency Act. *Id.* at 79. These cases are consistent with this Office’s conclusion that “there is no presumption that Congress has made funds available for every authorized purpose in any given fiscal year.” *Anti-Lobbying Restrictions Applicable to Community Services Administration Grantees*, 5 Op. O.L.C. 180, 184 (1981).<sup>17</sup>

One district court, however, has found that the expenditure of funds in violation of a prohibition within an appropriation does not violate the Antideficiency Act. The case, *Southern Packaging & Storage Co. v. United States*, 588 F. Supp. 532 (D.S.C. 1984), involved a “buy American” restriction in the Department of Defense’s appropriations.<sup>18</sup> The court held that, although the Department’s acquisition of food items produced in Canada from ingredients obtained from within the United States violated this restriction, it did not violate the

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<sup>17</sup> As noted above, we take no position on whether earmarks of the type involved in these cases operate as internal caps, or whether the Department’s transfer or reprogramming authority would, in some contexts, be available to permit spending in excess of an earmark.

<sup>18</sup> The appropriation stated: “No part of any appropriation contained in *this Act* . . . shall be available for the procurement of any article of food . . . not grown, reprocessed, reused, or produced in the United States or its possessions . . .” Pub. L. No. 97-114, § 723, 95 Stat. 1565, 1582 (1981) (emphasis added). It thus did not bar the use of *any* funds for that purpose.

Antideficiency Act because there was “no evidence [that the Department] authorized expenditures beyond the amount appropriated by Congress for the procurement of” the ready-to-eat meals. *Id.* at 550. The court did not explain this holding or suggest that there was another appropriation from which the Department could obtain funding for the meals. We disagree with the court’s apparent conclusion that, even though the appropriation forbade the purchase of non-American food items, there remained funds “available” in *that* appropriation for such purchases within the meaning of the Antideficiency Act. The district court’s unexplained decision is inconsistent with the Antideficiency Act’s legislative history and evolution and with the rest of the (limited) caselaw.<sup>19</sup>

Our interpretation of the Act is also consistent with that of the Comptroller General, including Comptroller General decisions applying the pre-1982 version of the Act. *See, e.g.*, 60 Comp. Gen. 440 (1981) (incurring an obligation to pay overtime to employees in excess of a ceiling in an agency’s appropriation violates the Antideficiency Act where no other funds are available for that purpose); 42 Comp. Gen. 272, 275 (1962) (Antideficiency Act reflects congressional intent to keep departments within limits and purposes of appropriations annually provided) (quoted with approval in *Authority to Use Funds from Fiscal Year 1990 Appropriations to Cover Shortfall from Prior Year’s Pell Grant Program*, 14 Op. O.L.C. 68, 77 (1990)); *see generally* 2 *Federal Appropriations Law* at 6-43 to 6-45 (2d ed. 1992).<sup>20</sup> The Department of Defense has also adopted this interpretation of the Act. *See* Dep’t of Defense, Dir. 7200.1, Administrative Control of Appropriations (May 4, 1995) (Antideficiency Act violation occurs when disbursements are made that exceed statutory or regulatory limitations on amounts of an appropriation that may be used for a particular purpose); Dep’t of Defense, Accounting Manual, DoD 7220.9-M at 21-6 (Feb. 1988) (expenditure in excess of a statutory limitation

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<sup>19</sup> The General Accounting Office (“GAO”), moreover, has expressly criticized the *Southern Packaging* decision. *See* 2 *Federal Appropriations Law* at 6-45 to 6-46 (2d ed. 1992) (discussing the *Southern Packaging* decision and suggesting that, while not every unauthorized expenditure—*e.g.*, an unauthorized long-distance telephone call—should be held to violate the Antideficiency Act, where Congress has expressly prohibited the use of appropriated funds for a particular expenditure, “it seems clear” that there are no funds “available” for that item). This Opinion does not address, or foreclose future consideration of, the possibility that the Act may incorporate a de minimis exception for inadvertent or negligible violations, such as that suggested by GAO in its discussion of the *Southern Packaging* decision, or recognized by the Comptroller General and this Office with respect to the Purpose Statute, 31 U.S.C. § 1301(a). *Cf.* 64 Comp. Gen. 370, 380-81 (1985) (permitting nonreimbursable interagency details that have a negligible impact on the loaning agency’s appropriations); Memorandum for Margaret C. Love, Associate Deputy Attorney General, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Deputation of Interior Department Inspector General Personnel* (Apr. 11, 1990) (concluding that nonreimbursable detail involving 280 man-hours would satisfy de minimis exception to Purpose Statute).

<sup>20</sup> As we explained above, the opinions and legal interpretation of the Comptroller General and the GAO are not binding upon departments, agencies, or officers of the Executive Branch.

that legally limits the availability of funds constitutes a violation of the Antideficiency Act).

Finally, our conclusion that a violation of a condition or an internal cap in an appropriation violates the Antideficiency Act is supported by the views of a number of legal scholars. As one commentator has explained, “the plain terms of the Act broadly codify the [constitutional] Principle of Appropriations Control,” a principle “that is broader than the particular concern that led to its enactment.” See Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. at 1374-75; *id.* at 1375 & n.157 (arguing that the Act permits the Executive to spend funds only for the objects authorized by Congress, and noting Comptroller General’s view that “the Anti-Deficiency Act prohibits expenditure in some cases where ‘coercive deficiencies’ are not threatened”); see also Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1587 (1974) (“The House Appropriations Committee proposed [the Antideficiency Act] to end abuses that had continued for many years—the use of monies appropriated for one purpose for a different purpose and the use of coercive deficiencies to obtain mid-year increases in financing.”). J. Gregory Sidak, for example, has suggested that “[i]f Congress expressly prohibits the spending of any funds to examine a particular policy, then even the expenditure of a dollar by the President to recommend the prohibited policy to Congress would ‘exceed[] an amount available in an appropriation’ and thus violate the Antideficiency Act.” J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. at 2101 (arguing, however, that application of the Act to appropriations riders of this type would violate the Recommendation Clause). William C. Banks and Peter Raven-Hansen have argued that violation of an appropriation rider such as the Boland Amendment, which prohibited the expenditure for certain purposes of any funds available to the Central Intelligence Agency and the Department of Defense, also violates the Antideficiency Act.<sup>21</sup> *National Security Law and the Power of the Purse* 139 (1994); see also Kathryn R. Sommerkamp, *Commanders’ Coins: Worth Their Weight in Gold?*, Army Law. 6, 13 & n.70 (Nov. 1997) (exceeding a limitation in an appropriation violates the Antideficiency Act); Paul D. Hancq, *Violations of the Antideficiency Act: Is the Army Too Quick to Find Them?*, Army Law. 30, 34 (July 1995) (Antideficiency Act violated when an agency exceeds an “absolute ceiling” in an appropriation because there are no proper funds “available” for the excess).

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<sup>21</sup> See also S. Rep. No. 100-216, at 411-12 (1987) (Iran-Contra Investigation Report) (implying that use of private and foreign funds to circumvent Boland Amendment violated Antideficiency Act); Olson Memorandum.

#### **IV. Conclusion**

In sum, given the underlying purpose of the Antideficiency Act—control by Congress of both the amount and objects of Executive Branch spending—we conclude that when Congress has explicitly prohibited an agency’s use of any funds for a particular purpose by placing a condition in an appropriations act, no funds are legally “available” for that purpose within the meaning of the Act. Similarly, when Congress has expressly limited an agency’s use of any funds in excess of a particular amount for a certain purpose by means of an internal cap, there remain no legally “available” funds for that purpose once the statutory limit has been reached. Therefore, subject to the various reservations noted above, we conclude that any expenditure of funds in violation of a condition or internal cap in an appropriations act would violate the Antideficiency Act.<sup>22</sup>

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

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<sup>22</sup> Although all violations of sections 1341(a) and 1342 of title 31 must be reported to Congress, *see* 31 U.S.C. § 1351 (1994), we offer no view as to the applicability of the criminal and civil penalties imposed by the Act. In contemplating the availability of any sanction, very difficult considerations, such as fair warning and desuetude, would have to be evaluated. *See generally United States v. Lanier*, 520 U.S. 259, 267 (1997) (in construing a criminal statute “the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal”). We note that, to our knowledge, no criminal or civil penalties have been sought under the Act in the almost 95 years that such penalties have been available. Indeed, one member of Congress stated in 1906 that there were “not likely to be any” prosecutions under the Act, suggesting that Congress should instead withhold deficiency appropriations where the Act had been violated. *See* 40 Cong. Rec. at 1276 (1906) (Rep. Brundidge). *See also Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriation*, 4A Op. O.L.C. at 20 (“This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress’s subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.”)

## Authority to Solicit Gifts

The express statutory authority to accept gifts, contained in section 403(b)(1) of the Office of Government Ethics Authorization Act of 1996, includes the implied authority to solicit gifts.

January 19, 2001

### MEMORANDUM OPINION FOR THE DIRECTOR OFFICE OF GOVERNMENT ETHICS

This memorandum responds to your request for our opinion whether section 403(b)(1) of the Office of Government Ethics Authorization Act of 1996 authorizes the Office of Government Ethics (“OGE”) to solicit gifts. We conclude that the express statutory authority contained in section 403(b)(1) to accept gifts includes the implied authority to solicit gifts.

Section 403(b)(1) provides that “[t]he Director is authorized to accept and utilize on behalf of the United States, any gift, donation, bequest, or devise of money, use of facilities, personal property, or services for the purpose of aiding or facilitating the work of the Office of Government Ethics.” Pub. L. No. 104-179, 110 Stat. 1566 (1996) (codified as amended at 5 U.S.C. app. § 403(b) (Supp. IV 1998)). You have asked “whether this express authority to ‘accept and utilize’ a gift implies the authority to solicit a gift.” Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, Office of Government Ethics at 1 (July 30, 1999).

#### I.

We have previously considered this basic question in connection with our issuance of two written opinions. The opinions did not resolve the question, however. Although we concluded in each opinion that the relevant agency had the authority to solicit gifts, we based our conclusions on the language and structure of the particular statutes in question, which contained specific additional language—beyond the general gift acceptance language of a provision like section 403(b)(1)—supporting the existence of solicitation authority. *See* Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Authority to Solicit Gifts* (Dec. 9, 1993) (“Nussbaum Opinion”) (solicitations by National Endowment for the Arts and National Endowment for the Humanities); *Establishment of the President’s Council for International Youth Exchange*, 6 Op. O.L.C. 541 (1982) (solicitation by United States Information Agency).<sup>1</sup> The General Accounting

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<sup>1</sup> You cited the Nussbaum Opinion in your letter. In that opinion, we concluded that the gift acceptance provision in the National Foundation on the Arts and the Humanities Act of 1964, which

Office has viewed this implied solicitation authority question as unsettled. *See* General Accounting Office, 2 *Principles of Federal Appropriations Law* 6-147 (2d ed. 1992) (“[a] question which appears to have received little attention is whether an agency with statutory authority to accept gifts may use either appropriated funds or donated funds to solicit the gifts”).

Although no written opinion of this Office has resolved the question whether express statutory authority to accept gifts includes the implied authority to solicit gifts, we did provide oral advice on this question in 1997 in connection with gift acceptance language in 28 U.S.C.A. § 524(d)(1) (West Supp. 1997) that was very similar to section 403(b)(1). Section 524(d)(1) provided that “[t]he Attorney General may accept, hold, administer, and use gifts, devises, and bequests of any property for the purpose of aiding or facilitating the work of the Department of Justice.” We determined in 1997 that, as of 1996, when Congress enacted the Justice Department provision, a number of other federal agencies had been operating for many years under substantially the same general statutory language and had interpreted the language to contain an implicit grant of authority to solicit gifts. We confirmed this longstanding administrative construction by discussing the subject with attorneys in the general counsel offices of the Departments of State, Treasury, and Commerce—agencies that had all engaged in the solicitation of gifts on the basis of general gift acceptance provisions that say no more than that the agency “may accept gifts,” and that in the case of Treasury and Commerce were virtually identical to the Justice provision.<sup>2</sup> We also learned that these provisions were all enacted well before the Justice Department provision.<sup>3</sup>

The State Department’s interpretation that its gift acceptance authority includes the authority to solicit gifts is reflected in Department regulations, *see* 2 FAM 960 (“Official Gifts to the Department of State”); 2 FAM 965 (“Solicitation”), and

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did not explicitly authorize solicitation, nonetheless authorized the National Endowment for the Arts and the National Endowment for the Humanities to solicit gifts. In reaching that conclusion, we relied on two rationales: (1) the solicitation authority might be inferred from the need for coordination of public and private support for the Endowments that was made clear by the text and structure of the statute; and (2) the longstanding administrative construction of the statute by the Endowments had been that it included solicitation authority. In the circumstances, we did not need to consider whether a broader rationale was available.

<sup>2</sup> *See* 22 U.S.C. § 2697(a) (1994) (“The Secretary of State may accept on behalf of the United States gifts made . . . for the benefit of the Department of State . . . or for the carrying out of any of its functions.”); 31 U.S.C.A. § 321(d)(1) (West Supp. 1997) (“The Secretary of the Treasury may accept, hold, administer, and use gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of the Treasury.”); 15 U.S.C. § 1522 (1994) (“The Secretary of Commerce is hereby authorized to accept, hold, administer, and utilize gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of Commerce.”).

<sup>3</sup> *See* Foreign Service Act of 1980, Pub. L. No. 96-465, § 2201, 94 Stat. 2071, 2153 (most recent enactment); Deficit Reduction Act of 1984, Pub. L. No. 98-369, div. A, § 445, 98 Stat. 494, 816; Commerce Dept. Gift Acceptance Act, Pub. L. No. 88-611, § 1, 78 Stat. 991, 991 (1964).

State informed us that it has long engaged in solicitation, including an active fundraising campaign in the 1980s by its Fine Arts Committee to raise funds to renovate State's diplomatic reception rooms. We learned from the Treasury Department that under gift acceptance authority conferred by statute in 1984, its Committee for the Preservation of the Treasury Building engaged in a fundraising campaign in 1986-1987. Treasury provided us with Treasury memoranda from 1986 that outline its solicitation plans and record its consultations with State about its solicitation practices over the years. Finally, we learned from the Commerce Department that it had an unwritten policy of soliciting gifts. Commerce once solicited funds for a particular program through a Federal Register notice, and Congress responded by enacting an appropriations rider prohibiting solicitation for that program where there would be a conflict of interest. That rider did not challenge the basic proposition that Commerce had the general authority to solicit gifts.

In summary, we determined in the course of our 1997 review of this issue that the Departments of State, Treasury, and Commerce had long understood their general statutory authority for gift acceptance to include the authority to solicit gifts. We concluded as a legal matter that Congress's enactment of the Justice Department's gift acceptance provision in 1996 should be interpreted against the background of this longstanding and publicly available administrative construction of substantially the same statutory language. We therefore concluded that the Justice Department's express authority to accept gifts also included the implicit authority to solicit gifts.<sup>4</sup>

## II.

We reach the same conclusion with respect to the OGE statutory provision. Like the Justice Department provision, it was enacted in 1996 and should be interpreted against the background of the longstanding administrative construction of similar gift acceptance statutory language. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . . So too, where, as 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.") (citations omitted). The statutory provision authorizing the OGE Director to "accept and utilize" gifts is substantially the same as the Justice Department provision authorizing the Attorney General to "accept . . . and use" gifts, as well as the provisions concerning the Departments of State, Treasury,

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<sup>4</sup> This interpretation is reflected in a Department of Justice order. *See* DOJ Order 2400.2, Solicitation and Acceptance of Gifts to the Department (Sept. 2, 1997).

and Commerce that are discussed above. The legislative history of the OGE provision does not discuss the question of soliciting gifts, and we have found nothing in that legislative history that suggests a basis for not following the longstanding Executive Branch administrative construction of gift acceptance legislation.

When Congress passed OGE's gift provision in 1996, the Executive Branch's consideration of similar provisions had been, as explained above, the basis for quite public solicitation efforts by federal agencies. Congress's enactment of OGE's provision should be interpreted in light of those public efforts.

Accordingly, for the foregoing reasons, we conclude that OGE's statutory authority to accept and utilize gifts includes the implied authority to solicit gifts.

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

## “Communications” Under 18 U.S.C. § 207

A former high-ranking government official proposed establishing a consulting firm—as a sole proprietorship, a partnership, or a corporation—in which he would be one of a very few employees, or perhaps even the sole employee. If, as hypothesized, the consulting firm prepares a report on behalf of certain clients, which is submitted directly to his former agency by the consulting firm or, with the former official’s knowledge, by his client with the report bearing the consulting firm’s name, and it is expected by the former official that his identity as the author of the report may be commonly known throughout the industry and at his former agency, he would be making a communication prohibited by 18 U.S.C. § 207(c).

January 19, 2001

### MEMORANDUM OPINION FOR THE DIRECTOR OFFICE OF GOVERNMENT ETHICS

The Office of Government Ethics (“OGE”) has asked for our opinion about the application of 18 U.S.C. § 207(c) to the activities of a former high-level official at a federal agency. Section 207(c) provides criminal penalties for a “senior [official] of the executive branch and independent agencies”<sup>1</sup> who:

within 1 year after the termination of his or her service or employment as such officer or employee, *knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency* in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency. . . .

18 U.S.C. § 207(c)(1) (1994) (emphasis added).

At the time of its request,<sup>2</sup> OGE anticipated that a former official would establish a consulting firm—as a sole proprietorship, a partnership, or a corporation—in which he would be one of a very few employees, or perhaps even the sole employee. OGE’s request anticipated that the consulting firm would prepare a report on behalf of certain clients and that the report would be submitted to the former official’s agency in one of two possible ways. First, the consulting firm might submit the report directly to the agency and would indicate, on the report itself, that the firm had prepared it. Alternatively, the firm’s clients might, with the former official’s knowledge, submit the report bearing the consulting firm’s name

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<sup>1</sup> See 18 U.S.C. § 207(c)(2) (1994 & Supp. IV 1998) (identifying personnel within this category).

<sup>2</sup> See Letter for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, Office of Government Ethics (Oct. 4, 1996) (“Potts Letter”).

to the agency. OGE indicated that the individual “expects” that “his identity as the author of the report may be commonly known throughout the industry and at [his former agency],” and has asked whether, in light of these facts, the former official “would be making a prohibited ‘communication’ to or ‘appearance’ before his former agency.” Potts Letter at 3. Accepting OGE’s assumption that all other elements of the offense would be satisfied, *see id.* at 4 & n.3, we conclude that the former official could properly be found liable under section 207(c) based on the facts OGE has presented.

## I.

Although section 207(c)(1) bans “communication[s]” and “appearance[s],” the statute does not define these terms. Regulations interpreting section 207 state that “[a]n appearance occurs when a former employee . . . submits a brief in an agency administrative proceeding in his own name,” and they further explain that “[a] communication is broader than an appearance and includes for example, correspondence, or telephone calls.” 5 C.F.R. § 2637.201(b)(3) (2000) (Example 1).<sup>3</sup> Therefore, even if, as the regulations state, a former official who submits a brief bearing only his firm’s name has not made a formal “appearance” in a proceeding, he may still have made a “communication.”<sup>4</sup>

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<sup>3</sup> As OGE notes in its letter, 5 C.F.R. part 2637 contains regulations written with respect to § 207 as it existed prior to its amendment in 1989, but OGE has continued to rely on these regulations when interpreting those portions of the 1989 amendments that made no substantive change to the statute. *See* Potts Letter at 4 n.2. We believe such reliance is appropriate here because the 1989 amendments did not make a change in any aspect of section 207(c) with which we are concerned. Rather, Congress amended section 207 to respond to the decision of the District of Columbia Circuit in *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989). The *Nofziger* court held that section 207(c) requires that a defendant have knowledge of each element of his offense, *see* 878 F.2d at 454, including that his appearance before or communication with an agency relate to a “particular matter . . . which is pending before such . . . agency or in which such . . . agency has a direct and substantial interest.” Beth Frensilli, *Statutory Interpretation of Ambiguous Criminal Statutes: An Analysis of Title 18, Section 207(c) of the United States Code*, 58 Geo. Wash. L. Rev. 972, 992 (1990) (“Frensilli”) (quoting 18 U.S.C. § 207(c) (1988) (amended 1989)). Congress responded by eliminating the requirement that a matter be “pending” or of “direct and substantial interest” to an agency and by broadening the prohibition to cover “any matter on which such person seeks official action.” 18 U.S.C. § 207(c). In addition, section 207(c) previously prohibited “any oral or written communication,” and barred certain “appearances” in a separate clause. The majority and dissenting opinions in *Nofziger* disputed whether this language created separate offenses with different *mens rea* requirements. Congress changed the language of section 207(c), which now bars “any communication to or appearance before” the agency, to clarify that the *mens rea* requirement is the same regardless of whether a person makes a “communication” or “appearance.” *See* Frensilli, 58 Geo. Wash. L. Rev. at 991.

<sup>4</sup> We thus agree with OGE that this example in the regulations implies that, if a former official submits a brief that does not use his own name, he has not made an “appearance.” *See* Potts Letter at 4. We also agree that “absent physical presence before an agency employee, the distinction between a communication and an appearance is not entirely clear.” *Id.* at 3. For purposes of this opinion, we focus on the broader term “communication,” and thus find it unnecessary to attempt to unravel the distinction between an “appearance” and a “communication.”

Standing alone, the term “communication” is quite broad. It includes “the act or action of imparting or transmitting,” “facts or information communicated,” and any “instance of written information.” *Webster’s Third New International Dictionary* 460 (1993). At its broadest, therefore, section 207(c) could be read to prohibit a former official from imparting any information to agency officials, whether or not that information is attributable to the former official. There is at least some support in the legislative history for such a sweeping prohibition. Congress intended to prevent former officials from using “information”—as well as influence and access—“acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with th[eir] department or agency.” S. Rep. No. 95-170, at 33 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4249. The “one-year ‘cooling-off’ period” that section 207(c) prescribes, moreover, may be designed, at least in part, to ensure that former officials are not able to trade on current “inside” information concerning non-public policies, theories or ideas that their former agencies are actively considering.

We think it clear, however, that section 207(c) does not reach all situations in which a former official is involved in conveying information to agency officials. The language of section 207(c)—which bans “any communication . . . or appearance”—is narrower than that of other subsections of the Ethics in Government Act. *See Crandon v. United States*, 494 U.S. 152, 166-67 (1990) (looking to the statute as a whole in interpreting section 209). Notably, sections 207(b)(1) and 207(f)(1) not only prohibit former officials from communicating or appearing on behalf of persons or entities with respect to matters in which the former officials “personally and substantially participated” during their government service, these provisions also prohibit former officials from “aid[ing] or advis[ing]” persons or entities on such matters. 18 U.S.C. § 207(b)(1), (f)(1)(B) (1994) (emphasis added). The prohibition on “aid[ing],” “advis[ing]” and “communicat[ing]” in these provisions demonstrates that section 207(c)’s prohibition on “communication” alone does not reach behind-the-scenes work on matters that are before a former official’s department or agency. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This understanding of the provision is confirmed by the statute’s legislative history, and has been adopted in regulations and administrative interpretations of the provision. *See* S. Rep. No. 95-170, at 49, *reprinted in* 1978 U.S.C.C.A.N. at 4265 (“The former official is free to aid and assist and consult on matters covered by subsection (c), as long as there is no contact by the former official with his former agency.”); 5 C.F.R. § 2637.204(f) (Example 4) (A former official may “consult and assist in the preparation of briefs to be filed with the Administration” but “should not sign briefs or other communications or take any other action that

might constitute an appearance.”); Office of Government Ethics, *Applicability of 18 U.S.C. § 207(c) to Detailee from State University*, Informal Advisory Op. 96x14, at 4 (Aug. 2, 1996), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited May 24, 2012) (“Section 207(c) has long been interpreted to permit so-called ‘behind-the-scenes’ assistance.”); Letter for Whitney North Seymour, Office of Independent Counsel, from Charles J. Cooper, Assistant Attorney General, Office Legal Counsel at 6 (Apr. 29, 1987) (section 207(c) bars former officials from signing briefs but not from “aiding and assisting in a ‘behind the scenes’ fashion”).

Although, as OGE notes, section 207(c) does not expressly require that a former official “be identified as the source of a post-employment communication,” Potts Letter at 6, we believe an element of attribution is implicit in the distinction the statute and regulations draw between permissible behind-the-scenes advice and assistance, on the one hand, and impermissible telephone calls, signed pleadings and direct contact, on the other hand. In light of this distinction, we conclude that a “communication” is the act of imparting or transmitting information with the intent that the information be attributed to the former official. This construction, we believe, is confirmed by section 207(c)(1)’s requirement that a “communication” be made “with the intent to influence” a department or agency, and is consistent with Congress’s desire to prevent the use of “influence[] and access acquired during government service at public expense, for improper and unfair advantage in dealings with [a] department or agency.” S. Rep. No. 95-170, at 33, reprinted in 1978 U.S.C.C.A.N. at 4249. In order to use influence gained while a high-ranking government official, a former official must intend that information or views conveyed to her former agency be attributed to her.<sup>5</sup>

As the regulations and interpretive guidance make clear, a former official who submits a signed pleading, meets in person with agency officials, or calls those officials directly necessarily intends to be identified as the source of the information she conveys. Cf. *Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party*, 17 Op. O.L.C. 37, 43 (1993) (“Koffsky Memorandum”) (a finding of intent to influence is “unavoidable” where an attorney files briefs or makes an oral argument) (internal quotations and citation omitted). But these are not the only forms of communication that the statute proscribes. A high-ranking official who aggressively publiciz-

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<sup>5</sup> We do not believe that the attribution element implicit in the term “communication” requires that the recipient of the information “actually recognize” the former official as the source of that information. Potts Letter at 7. Just as a former official who intends to influence his former agency need not actually succeed in that endeavor in order to violate section 207(c), so too one who intends to be identified as the source of information need not succeed in being so identified. We note, however, that, as a practical matter, an agency employee’s identification of the former official as the source of a submission would likely form a very significant part of the circumstantial evidence demonstrating that the former official intended to be identified.

es the fact that he is leaving an agency to start a one-man consulting firm, then submits a report to the agency shortly thereafter under the name of that firm, almost certainly intends that the report will be attributed to him. Similarly, a former official who is not introduced by name, but participates on a conference call with his former agency colleagues, almost certainly intends that his colleagues will recognize his voice. We see no meaningful distinction between these two situations and the submission of a signed pleading. The conduct in all three cases implicates the core concerns underlying the statute because it enables the former official to use influence acquired during government service for improper and unfair advantage, and creates the appearance that the agency’s decision might be affected by the use of the former official’s prior government position. *Cf. United States v. Coleman*, 805 F.2d 474, 480 (3d Cir. 1986) (upholding the district court’s construction of the term “representation” in section 207(b)(i) as including an appearance on behalf of a client “with or without speaking for the client but so that the connection of th[e] former employee with the client is appreciated by the agency”) (internal quotations and citations omitted).

We recognize that our construction of the term “communication” does not provide former officials with bright line rules to guide their conduct during the one year “cooling off” period. Instead, whether a former official could be found criminally liable for conduct that falls outside the safe harbor of behind-the-scenes assistance, but falls short of direct and open contact with agency personnel, will vary depending upon the facts and the strength of the circumstantial evidence that the former official intended to be identified as the source of any information or views conveyed to the agency. As the examples above demonstrate, however, any attempt to draw bright line rules would inevitably create artificial distinctions between equally pernicious types of conduct.

We also recognize that, in the absence of bright-line rules, the threat of criminal penalties may induce former officials to refrain from submitting information in a certain form or manner even where the submission might not actually violate section 207(c). For example, a very small firm with a former agency official might refrain from submitting a report in the firm’s name even where the official had no role in preparing the report, because the former official might fear that the submission would be viewed as evidence that she intended to be identified as the author of the report. We do not believe, however, that this possibility militates against our construction of the statute. In light of the safe harbor provided by the “behind-the-scenes” assistance rule, former officials can sell their expertise to interested clients, and their clients can present all substantive information or views they wish to federal agencies. An attribution standard, therefore, will not “chill” any substantive speech.<sup>6</sup> Instead, as the example we have identified indicates, such

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<sup>6</sup> The fact that a report conveys a particular view that a former official is “well-known” for espousing could not, in our view, be used as evidence that the former official intended to be identified as the

a standard may, at worst, discourage certain forms of presenting information because former officials might be concerned that a particular form or manner of presentation would mistakenly suggest to agency officials that a former high-ranking official is affiliated with a particular submission. This consequence of an attribution standard, however, is a permissible by-product of a statute designed to protect both the integrity of, and public confidence in, government decisionmaking. *See* S. Rep. No. 95-170, at 32, *reprinted in* 1978 U.S.C.C.A.N. at 4248 (“public confidence in government has been weakened by a widespread conviction that federal officials use public office for personal gain, particularly after they leave government service”).<sup>7</sup>

## II.

Applying this construction of the term “communication” to the facts set forth in OGE’s letter, we believe the former official could properly be found liable for violating section 207(c) under the circumstances OGE describes. To be sure, OGE’s letter does not set forth direct evidence that the former official in question intends to be identified as the author of the report he will prepare. But direct evidence of such an intent, such as an admission, is not essential. *See* W. LaFave & A. Scott, *Criminal Law* 226 (2d ed. 1986) (intent “must be gathered from [a defendant’s] words (if any) and actions in light of all the surrounding circumstances”). OGE states, for example, that the former official will submit the report under the name of his small consulting company “knowing that . . . [he] will very possibly be recognized as the report’s author.” Potts Letter at 1. Elsewhere, OGE indicates that a cover letter prepared by the former official’s client “might

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source of the report. Potts Letter at 7 n.9. Such a rule would effectively nullify the advice-and-assistance safe harbor, because former officials would never know whether, despite their efforts to work entirely behind the scenes, they might be identified as the source of a particular view. In addition, because many people can hold a particular view, presentation of that view is not uniquely identifying in the same way that a signature is or a company name can be.

<sup>7</sup> It is conceivable that the form or manner of presenting substantive views may have some communicative value. In our example of the small firm with the former agency official who had no involvement in preparing a particular report, it may be that the client would wish to identify the firm because the firm’s outstanding reputation will give the report greater persuasive force. The government’s “undeniably powerful” interest in ensuring “that federal officers not misuse or appear to misuse power,” *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 472 (1995), however, is more than sufficient to justify any chilling effect that an attribution standard might have on such speech. *See Hill v. Colorado*, 530 U.S. 703, 729 (2000) (prophylactic statute properly prohibited all unwelcome demonstrators from approaching closer than eight feet to abortion clinic patient even though, “by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless”); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (“The governmental interest in preventing both actual corruption and the appearance of corruption” are sufficient to sustain prophylactic measures that trench on First Amendment rights.); *cf. Nat’l Treasury Employees Union*, 513 U.S. at 473 (striking down restriction on First Amendment rights that applied to “an immense class of [federal] workers with negligible power to confer favors”).

expressly state [that the former official’s] company was the source of the paper,” and that, in light of this identification, the former official “expects that, although not explicitly mentioned in either his papers or documents submitting them to [his former agency], his identity as the author may be commonly known throughout the industry and at [his former agency].” *Id.* at 3 (internal quotation marks and citations omitted). Given these facts, a decision by the former official to submit the report in the name of his company would create a very strong inference that he intends the report to be attributed to him.

The factual variables OGE identifies in its letter do not alter our conclusion. OGE notes, for example, that the former official might establish a firm in which he is the only principal or partner, or, alternatively, that his firm might include a handful of principals. If the former official is the sole principal, the inference that he intends a report submitted in the name of that firm to be attributed to him is particularly compelling. OGE’s letter indicates, however, that even if he is not the sole principal, the former official still “expects that . . . his identity as the author may be commonly known throughout the industry and at [his former agency].” *Id.* at 3 (internal quotation marks and citations omitted). Accordingly, modest changes in the structure and composition of the consulting company itself would not preclude a finding of criminal liability.<sup>8</sup> Similarly, we do not think he could avoid criminal liability by knowingly permitting his client to submit a report under the name of his firm, rather than submitting the report himself in the name of his firm. OGE’s letter suggests that the former official would expect agency officials to recognize him as the author of such a report in either case. *See id.*

As the foregoing discussion makes clear, the determination of whether a former official has knowingly made a communication will depend on the facts of each case. Therefore, we invite OGE to consult with us on future cases as they may arise.

JOSEPH R. GUERRA  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>8</sup> We have no occasion to address here the difficult questions that may arise where a former official joins, or establishes, a large firm. As we explained in a 1993 opinion, a former official does not necessarily violate section 207(c) when his firm sends a report to his former agency printed on law firm letterhead that includes his name, because the submission would not be “from a specific attorney.” Koffsky Memorandum, 17 Op. O.L.C. at 43 n.6. Because a violation of section 207(c) will typically turn on a fact-intensive inquiry, the size of the former official’s firm is but one of many relevant factors that may affect the strength of any inference that the former official intended to be identified as the author of a particular report or submission.

## **Investment of Federal Trust Funds for Cheyenne River and Lower Brule Sioux**

Congress intended the term “interest” in title VI of the Water Resources Development Act of 1999 to have its usual and customary meaning: the coupon rate of the debt obligation.

The universe of “available obligations” under title VI of the Water Resources Development Act of 1999 includes obligations of government corporations and government-sponsored entities whose charter statutes provide that their obligations are lawful investments for federal trust funds.

The fiduciary duty owed pursuant to a federal trust fund is defined and limited by the terms of the statute creating the trust.

January 19, 2001

### **MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF THE TREASURY**

You have asked for our opinion concerning the Secretary of the Treasury’s investment responsibilities for the Cheyenne River Sioux Tribe and Lower Brule Sioux Tribe Terrestrial Wildlife Habitat Restoration Trust Funds (“the Sioux Trusts” or “the Trusts”) under section 604(c) of the Water Resources Development Act of 1999 (“the Act”), in light of the federal government’s trust responsibilities for Indian tribes. Specifically, you have inquired whether section 604(c)(2) of the Act requires Treasury to invest the Trusts’ monies in obligations bearing the highest rate of interest, even when those obligations do not have the highest yields for the Trusts. You have also asked whether the universe of “available obligations” under section 604(c)(2) includes obligations of government corporations and government-sponsored entities (“GSEs”) with provisions in their charter statutes making their securities lawful investments for all federal trust funds, notwithstanding the provision in section 604(c)(1) limiting the Secretary’s investment of Trust monies to interest-bearing obligations of the United States or obligations guaranteed by the United States as to both principal and interest.

We conclude that, even if the Act requires the Secretary to assume the strictest of fiduciary duties when making investment decisions for the Sioux Trusts—a question we do not decide—this duty is defined and limited by the terms of the Sioux Trusts established in the Act itself. Under the Act, the Secretary must invest the Trust monies in the obligations with the highest rate of interest, not the highest yield, among available obligations. Furthermore, the universe of available obligations under the Act includes obligations of government corporations and GSEs whose charter statutes provide that their obligations are lawful investments for federal trust funds.

## I.

Title VI of the Water Resources Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 269, 385-97, designates the Department of the Treasury as the program agency for managing trust funds for two South Dakota Sioux Indian tribes. The funds are to be used to finance the restoration of terrestrial wildlife habitat loss resulting from flooding related to certain federal water projects. Under the Act, the Secretary is required to transfer \$5,000,000 from the general fund of the Treasury to the Sioux Trusts “for the fiscal year during which this Act is enacted and each fiscal year thereafter” until the aggregate amount in the Trusts is equal to at least \$57,400,000. *Id.* § 604(b)(1). Of the total amount deposited, 74 percent must be deposited in the Cheyenne River Trust Fund, and 26 percent must be deposited in the Lower Brule Fund. *Id.* § 604(b)(2).

Section 604(c) of the Act governs the investment of the two Sioux Trusts. It provides:

### (c) INVESTMENTS.—

(1) IN GENERAL.—The Secretary of the Treasury shall invest the amounts deposited under subsection (b) only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.

(2) INTEREST RATE.—The Secretary of the Treasury shall invest amounts in the Funds in obligations that carry the highest rate of interest among available obligations of the required maturity.

Paragraph (1) is a relatively common description of permitted investments for federal trust funds.<sup>1</sup> By contrast, paragraph (2)’s direction that the Secretary invest the Trust monies in the obligations with “the highest rate of interest among available obligations” is apparently unique among federal trust funds. We have been unable to identify a similar provision enacted by Congress, and your Office has informed us that it has never encountered such a provision.

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<sup>1</sup> See, e.g., 16 U.S.C. § 1606a(c)(2)(A) (Reforestation Trust Fund); 42 U.S.C. § 401(d) (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. § 1104(b) (Unemployment Trust Fund); 42 U.S.C. § 1395i(c) (Federal Hospital Insurance Trust Fund); 42 U.S.C. § 1395t(c) (Federal Supplementary Medical Insurance Trust Fund).

## II.

Our interpretation of the investment provision of the Trusts must be considered in the context of the federal government's unique relationship with the Indian tribes. The federal government's trust responsibility to the Indians is a concept that has evolved over time. Although its origins can be found in an early Supreme Court opinion describing a tribe's relationship to the federal government as that "of a ward to his guardian,"<sup>2</sup> it has subsequently been applied by courts to establish and protect rights of Indian tribes and individuals in their dealings with the government. See Felix S. Cohen, *Handbook of Federal Indian Law* 220-28 (1982). The Supreme Court has on several occasions recognized what it has termed a "general trust relationship" between the United States and Indian tribes and people. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (noting "the undisputed existence of a general trust relationship between the United States and the Indian people" independent of statutes and regulations); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the federal government] has charged itself with moral obligations of the highest responsibility and trust."<sup>3</sup>)

As part of this responsibility to the Indians, Congress has established statutory trusts serving a wide variety of purposes. While acknowledging the existence of a general trust obligation between the government and the Indians, the Supreme Court has held that only certain statutory trusts impose affirmative fiduciary obligations on the United States. In *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), the Supreme Court concluded that the language of the General Allotment Act, which required the United States to hold land "in trust for the sole use and benefit of the [allottee]," did not impose any fiduciary management duties on the United States or render it answerable for a breach of any such duties: "The [General Allotment] Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 541, 542 (quotation marks and internal citations omitted). The Court

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<sup>2</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). This case involved a suit filed by the tribe in the Supreme Court to enjoin enforcement of state laws on lands guaranteed to the tribe by various treaties. In concluding that the Court lacked original jurisdiction over tribal matters, Justice Marshall characterized the tribes as "domestic dependent nations" which "look to our government for protection; rely upon its kindness and its power; and appeal to it for relief to their wants; and address the President as their great father." *Id.*

<sup>3</sup> This unique relationship is further demonstrated by a line of cases that hold that any ambiguities in statutes or treaties dealing with Indian tribes are to be interpreted in favor of the tribes. See *DeCoteau v. Dist. County Ct.*, 420 U.S. 425, 444 (1975); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

further noted that Congress included the trust language “not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.” *Id.* at 544. In a second case, *United States v. Mitchell*, 463 U.S. 206 (1983) (“*Mitchell II*”), the Court reconsidered and elaborated on whether the United States had assumed fiduciary obligations as trustee with regard to the management of timber on tribal allotted lands. The Court concluded that the series of statutes and regulations governing the management of Indian lands was sufficient to create a fiduciary relationship where the Allotment Act by itself did not: “In contrast to the bare trust created by the General Allotment Act, the statutes and regulations [managing timber resources] clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” *Id.* at 224.

Lower courts have applied and elaborated upon the distinction between “bare” trusts and trusts giving rise to full fiduciary responsibilities. For example, in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), the Federal Circuit held that a statutory scheme asserting control by the Secretary of the Interior over commercial leasing of allotted lands constituted more than a limited trust and thereby gave rise to enforceable fiduciary obligations under *Mitchell II*. The court reiterated the *Mitchell II* criteria for imposition of fiduciary duties and observed that an express reference to a fiduciary duty was not necessary: “[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” *Id.* at 1560 (quoting *Mitchell II*, 463 U.S. at 225). In an application of *Mitchell I*, the District of Columbia Circuit held that the establishment of an explicit trust as a mere funding mechanism and without significant governmental management duties would not impose any fiduciary responsibilities to those who may benefit from the trust. *Nat’l Ass’n of Counties v. Baker*, 842 F.2d 369 (D.C. Cir. 1988). There, the court considered the State and Local Government Fiscal Assistance Trust Fund, created under the Revenue Sharing Act to provide “nongovernmental financial assistance to local governmental units in the form of annual entitlements.” *Id.* at 372. Associations of local governments brought suit asserting that the Act created a federal fiduciary responsibility under *Mitchell II* to the local governments that were beneficiaries of the trust. The court held, however, that the trust was only a funding mechanism and did not include the type of control or management scheme that gives rise to fiduciary obligations:

While it is true that the Revenue Sharing Act establishes a Trust Fund and names the Secretary as the trustee, we believe the Act creates only a limited trust relationship similar to the trust discussed in [*Mitchell I*]. . . . We do not think that when Congress created this Trust Fund and made the Secretary trustee Congress did so with the intent that the trustee would be subject to money damages for breaches of fiduciary duties. Rather, Congress created the Trust Fund in order to ensure constant funding for the Revenue Sharing Programs. . . . By creating the Trust Fund Congress was able to appropriate funds in advance, for the life of the program, thus enabling the local governments to budget their programs in advance.

*Id.* at 375, 376.

The Sioux Trusts at issue here have qualities of both the *Mitchell I* and the *Mitchell II* trusts. On the one hand, the Trusts can be viewed as a funding mechanism for money appropriated by Congress—money that will ultimately be disbursed after capitalization to the tribes for their use in wildlife habitat restoration. Thus, one might conclude that the Trusts do not constitute federal “control or supervision over tribal monies or properties” in the sense contemplated by *Mitchell II*, but rather are bare trusts or appropriation tools akin to those discussed in *Mitchell I* or *Baker*. On the other hand, the statutory scheme is intended to compensate the tribes for losses incurred to their lands as a result of flooding related to a federal water project, and the Act contains very specific federal controls and limitations on the tribes’ spending of the monies transferred for their use. *See* Pub. L. No. 106-53, § 604(d)(3), 113 Stat. at 390.

Even assuming, however, that the Act requires the federal government to assume the strictest of fiduciary obligations to the tribes, that responsibility is still defined by the terms of the statute itself. Indeed, in *Mitchell II*, the Court concluded that the statutes and regulations giving the federal government responsibility to manage Indian resources and land for the benefit of the Indians both “establish a fiduciary relationship *and define the contours of the United States’ fiduciary responsibilities.*” 463 U.S. at 224 (emphasis added). Courts that have found a fiduciary obligation akin to that in *Mitchell II* have similarly held that the statutory scheme creating a government trust both defines and limits the nature of the government’s duties. *See Brown*, 86 F.3d at 1563 (quoting *Mitchell II* and holding that the validity of a tribe’s breach of trust claim must be measured against the terms of the statute creating the trust and its accompanying regulations); *Short v. United States*, 50 F.3d 994, 998-99 (Fed. Cir. 1995) (statute dictating interest rate for Indian Money, Proceeds for Labor trust accounts controls payment of interest on trust funds held by the United States for the benefit of Indians); *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1393 (Ct. Cl. 1975) (holding that tribes’ suit for breach of fiduciary duty based on the United

States' breach of its duties as trustee to tribes would be determined by reference to the statutory scheme governing Indian trust funds deposited in the Treasury). Thus, even assuming that the United States owes the Sioux tribes the strictest of fiduciary obligations in administering the Trusts (in addition to its general obligations of good faith and fair dealing with the Indian tribes), the specifics of that obligation are found in the statute creating the trust: "Whatever the scope of the government's legal duties under the [Indian] trust, the source is statutory law. The extent of a trustee's duties and powers is determined by the trust instrument and the rules of the law which are applicable. Accordingly, even though the trust is a trust as that term is used in *Mitchell II*, plaintiffs must point to rights granted by statute if they are to be enforced against the government." *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30 (D.D.C. 1999) (citations and internal quotation marks omitted).

### III.

With this principle in mind, we turn to the specific questions of statutory interpretation. First, we consider whether section 604(c)(2), which directs the Secretary to invest the Sioux Trusts in obligations "that carry the highest rate of interest among available obligations of the required maturity," requires the Secretary to invest the trust funds in obligations with the highest coupon rate, or those obligations with the highest yield. We understand that this distinction has significant investment consequences. The coupon rate of a security is the stated annual rate of interest on the face value of a debt security. Barron's Financial Guides, *Dictionary of Financial and Investment Terms* 116 (4th ed. 1995). For instance, one might purchase a \$1000 bond with a 10 percent coupon rate, earning \$100 per year. In contrast, the "yield" of a security is a way of describing an investor's percentage return on his investment. *Id.* at 663-64. A \$1000 bond with a 10 percent coupon rate that is purchased for \$1000 offers a 10 percent current yield or "effective rate." *Id.* at 159. Yet that same \$1000 bond with a 10 percent coupon rate, but purchased for \$500, would offer an investor a 20 percent yield. When the price of a bond falls, its yield rises, and vice versa.

In *Old Colony Railroad Co. v. Comm'r*, 284 U.S. 552 (1932), the Supreme Court considered a tax statute that permitted companies to deduct from their income "all interest paid or accrued within the taxable year" to holders of its bonds. *Id.* at 554. Old Colony sold its bonds at a premium and sought to deduct the amount of the interest payments (the coupon rate) on those bonds from its gross income. The government argued that Old Colony could not do so because the statute that authorized the deduction of "all interest paid or accrued" actually referred to the effective rate (or the yield) of the bond, not the coupon rate. Because Old Colony sold its bonds at a premium, the government argued that it could only deduct the lower effective rate, not the rate on the face of the coupon. The Supreme Court disagreed and held that when Congress uses the word

“interest” without further explanation, it intends the usual meaning of the word, which is the coupon rate:

[A]s respects “interest,” the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. He who pays and he who receives payment of stipulated amount conceives that the whole is interest. In the ordinary affairs of life no one stops for refined analysis of the nature of a premium, or considers that the periodic payment universally called “interest” is in part something wholly distinct—that is, a return of borrowed capital. . . . We cannot believe that Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term, or that it was acquainted with the accountants’ phrase “effective rate” of interest and intended that as the measure of the permitted deduction.

*Id.* at 560-61.<sup>4</sup>

In an opinion interpreting the Second Liberty Bond Act, the Attorney General likewise concluded that the term “interest” was unambiguous. *See Second Liberty Bond Act, As Amended—Bonds Issued at Discount—Effective Rate of Interest or Cost to Treasury*, 42 Op. Att’y Gen. 27 (1961). There, the Attorney General considered whether the Secretary of the Treasury could sell discounted bonds at a coupon rate of 4¼ percent, thereby resulting in a greater yield or effective rate, where the Bond Act limited the “rate or rates of interest” on United States bonds to 4¼ percent. *Id.* at 29. Citing *Old Colony*, the Attorney General concluded that the limitation on interest rate referred to the coupon rate, and could not be read as a limit on the effective rate or yield of the bond: “[W]hen Congress uses the term ‘interest’ in connection with bonds without further explanation, it refers to the coupon or stated rate, the usual meaning of that term, and not to the accountants’ concept of effective rate.” *Id.*

We recognize, of course, that any ambiguities in statutes dealing with Indian tribes are to be construed in favor of the tribes. *See supra* note 3 (citing cases). But, like the Supreme Court in *Old Colony* and the Attorney General in his 1961 opinion construing the terms of the Second Liberty Bond Act, we conclude that the term “interest” is unambiguous. As the Court and the Attorney General explained, the term “interest” in the Water Resources Development Act has its usual and customary meaning—i.e., the coupon rate of the obligation. The

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<sup>4</sup> The Court noted that, “[i]f there were doubt as to the connotation of the term, and another meaning *might* be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer.” *Id.* at 561 (emphases added). The opinion makes clear, however, that the Court did not believe the term “interest” was ambiguous.

conclusion that Congress intended this ordinary meaning when it used the term in connection with the Sioux Trusts is buttressed by the rule that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute,” and to adopt that interpretation when it “adopts a new law incorporating sections of a prior law.” *Lorillard v. Pons*, 434 U.S. 575, 580, 581 (1978). Here, Congress has employed a term with a long-established judicial and administrative interpretation, and there is nothing in the legislative history of the Act indicating that Congress intended the term to have a different meaning in section 604(c)(2).

Accordingly, under the Act, the Secretary is required to invest the Sioux Trust fund monies in the obligations carrying the highest coupon rate, regardless of whether such investments offer the highest yield. To the extent that the Secretary has a fiduciary obligation to the Sioux tribes by virtue of the trust fund mechanism, this duty is defined by, and thus requires compliance with, the investment criteria set forth explicitly in the Act. Although investing in securities offering the highest yield might maximize the amount of income to the Funds, it is not what Congress instructed the Secretary to do. *Cf. Pawnee v. United States*, 830 F.2d 187, 191 (Ct. Cl. 1987) (no valid claim for breach of a fiduciary duty is stated where “the claim is simply that the Interior Department is compelled to go contrary to and beyond the [controlling] regulations and the leases in order to fulfill its alleged fiduciary obligation”).

#### IV.

Your second question is whether the universe of “available obligations” that must be considered in determining the obligations “carry[ing] the highest rate of interest” under section 604(c)(2) includes securities of government corporations and government-sponsored entities (“GSEs”) that have provisions in their charter statutes making their securities lawful investments for all federal trust funds, notwithstanding the provision in section 604(c)(1) of the Act limiting Sioux Trust investments to interest-bearing obligations of the United States or obligations guaranteed as to both principal and interest by the United States.

The charter statutes of various government corporations and GSEs whose obligations are explicitly *not* guaranteed by the United States as to principal and interest include a provision similar or identical to the following:

Obligations issued . . . shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the

investment or deposit of which shall be under the authority or control of any officer or agency of the Government of the United States.<sup>5</sup>

In accordance with several opinions of the Department of Justice, federal case law, and a Comptroller General opinion, we conclude that securities issued by entities whose charters include such “trust fund eligibility” language are appropriate investments for federal trust funds, even where those trust fund statutes specifically limit the investment of funds to federal government obligations or obligations guaranteed by the United States.

In 1996, our Office considered whether the Secretary of the Treasury could invest Civil Service Retirement and Disability Fund (“CSRDF”) monies in debt obligations issued by the United States Postal Service (“USPS”) and the Tennessee Valley Authority (“TVA”). *Transactions Between the Federal Financing Bank and the Department of the Treasury*, 20 Op. O.L.C. 64 (1996) (“1996 Opinion”). The relevant statutes of the CSRDF trust fund and the GSEs were virtually identical to those at issue here. In what the 1996 Opinion termed “boilerplate” language governing the investment of government-managed trust funds, *id.* at 68, the CSRDF statute authorized the Secretary to invest in “interest-bearing obligations of the United States, or obligations guaranteed as to both principal and interest by the United States.” 5 U.S.C. § 8348(e).<sup>6</sup> The USPS and TVA statutes indicated, as they do now, that their debt obligations were not guaranteed by the United States as to principal and interest, *see* 39 U.S.C. § 2005(d)(5); 16 U.S.C. § 831n-4(b), yet they were lawful for trust fund investments under the authority or control of any United States officer or agency, *see* 39 U.S.C. § 2005(d)(3); 16 U.S.C. § 831n-4(d). Ultimately, we relied upon federal case law, “the longstanding practice and understanding of the Treasury and Justice Departments,” and a 1985 Comptroller General opinion in determining the relationship between the boilerplate trust investment instructions and the trust fund eligibility language of the government corporations and GSEs. 1996 Opinion, 20 Op. O.L.C. at 69. We concluded that the CSRDF monies could be invested in the USPS and TVA obligations. *Id.* at 68.

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<sup>5</sup> 39 U.S.C. § 2005(d)(3) (investment eligibility provision for United States Postal Service obligations). *See also* 16 U.S.C. § 831n-4(d) (investment eligibility provision for Tennessee Valley Authority bonds); 12 U.S.C. § 1452(g) (investment eligibility provision for Federal Home Loan Mortgage Corporation).

<sup>6</sup> The relevant portion of the CSRDF statute states that the Secretary shall “invest in interest bearing securities of the United States such currently available portions of the Fund as are not immediately required for payments from the Fund.” 5 U.S.C. § 8348(c). It further directs that the Secretary purchase “public-debt obligations” with certain maturities, *id.* § 8348(d), and specifies that the Secretary “may purchase other interest-bearing obligations of the United States, or obligations guaranteed as to both principal and interest by the United States . . . if he determines that the purchases are in the public interest,” *id.* § 8348(e).

In the 1996 Opinion, we relied upon *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1244-45 (N.D. Cal. 1973), a federal district court opinion concluding that the TVA trust fund eligibility language, as well as the language in several other GSE charter statutes, rendered TVA obligations eligible for Indian trust fund investments, notwithstanding language in the particular Indian trust fund statute, 25 U.S.C. § 162(a), limiting investments to United States public debt obligations and other obligations guaranteed as to principal and interest by the United States. The court specifically noted that its conclusion regarding the effect of the broad trust fund eligibility language was “in accord with the intent of Congress.” 363 F. Supp. at 1245. The 1996 Opinion also cited two prior instances where the Department opined that trust fund eligibility language authorized investment in obligations of government corporations or GSEs where the specific trust fund statute at issue did not expressly authorize it. First, in a 1966 opinion concerning the obligations of federal land banks and banks for cooperatives which considered trust fund eligibility language different from that discussed here, our Office noted in passing that language identical to the TVA trust fund eligibility provision<sup>7</sup> “presents no problems of construction and plainly permits investments of the various Government trust funds in the affected securities whether or not the statutes creating the trust themselves do so.” Letter for Fred B. Smith, General Counsel, Department of the Treasury, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel at 2 (Oct. 7, 1966). Second, in a 1934 opinion by Attorney General Homer Cummings, the Department advised that government-managed postal savings funds could be invested in bonds issued under the Federal Farm Mortgage Corporation Act because of the Act’s trust fund eligibility language, even though the Postal Savings Act creating the trust fund only specified authority to invest in “bonds or other securities of the United States.” *Investment of Postal Savings Funds in Bonds of Federal Farm Mortgage Corporation*, 37 Op. Att’y Gen. 479, 480 (1934). In addition to these prior statements by the Department of Justice, the 1996 Opinion cited “Treasury’s longstanding practice to invest monies contained in government-managed trust funds . . . in public debt obligations or other obligations that have been authorized by Congress as legal investments for all government-managed trust funds,” 20 Op. O.L.C. at 70, as well as a 1985 Comptroller General opinion supporting the investment of CSRDF trust funds in Federal Financing Bank obligations which were not public debt obligations, but were eligible for federal trust fund investment pursuant to the Federal Financing Bank statute.<sup>8</sup>

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<sup>7</sup> According to the 1996 Opinion, the language of the statute at issue provided: “[Obligations issued] shall be lawful investments and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof.” 20 Op. O.L.C. at 69 n.9 (quoting statute).

<sup>8</sup> Memorandum for the Honorable John J. LaFalce, Chairman, Subcommittee on Economic Stabilization, House Committee on Banking, Finance, and Urban Affairs, from the Comptroller General of the

Finally, in addition to relying upon the foregoing authority, the 1996 Opinion applied the principle of statutory construction dictating that statutes on the same subject should be read in harmony with one another, 2B Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 51.02, at 121-22 (5th ed. 1992). Thus, the opinion concluded that

[b]ecause the CSRDF statute’s investment provisions do not purport to supersede other statutes establishing that obligations issued thereunder are eligible investments for government-managed trust funds and the relevant USPS and TVA statutes demonstrate Congress’s intention that obligations issued thereunder be eligible investments for all government-managed trust funds, the better interpretation is that the relevant USPS and TVA statutes have the effect of expanding the universe of authorized CSRDF investments.

20 Op. O.L.C. at 69 n.7.<sup>9</sup>

The weight of this authority leads us to conclude that the obligations available for investment under the Water Resources Development Act must include obligations of those government corporations and GSEs whose charter statutes include the federal trust fund eligibility language. Federal case law, OLC opinions, and a Comptroller General opinion, as well as past practice, all indicate that the trust fund eligibility language found in GSE charter statutes is best read as expanding the universe of available obligations set forth in the “boilerplate” provisions of the statutes governing the investments of government-managed trust funds. Congress enacted the Sioux Trust provisions against this backdrop of federal law and governmental practice and, accordingly, we conclude that Congress intended to make government corporation and GSE obligations available for investment by the Secretary for these trusts. See *Lorillard*, 434 U.S. at 581 (noting that it may be appropriate to presume Congress to be “aware of an administrative or judicial interpretation of a statute” when it “adopts a new law incorporating sections of a prior law”).

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United States (Oct. 30, 1985), reprinted in *The Federal Financing Bank and the Debt Ceiling, Hearing Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong. 31, 32 (1985). The opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues. However, they are not binding upon departments, agencies, or officers of the Executive Branch. See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986).

<sup>9</sup> While our 1996 Opinion mentions that the TVA and USPS statutes with the trust fund eligibility language were enacted several years after the CSRDF trust fund statute, 20 Op. O.L.C. at 67, that fact is neither mentioned nor relied upon by *Manchester Band* or the Department of Justice or Comptroller General authority discussed herein. Accordingly, we do not believe the temporal relationship between the two statutory schemes to be essential to our prior conclusion, and we interpret the reference in the 1996 Opinion to be an additional point reinforcing the outcome.

*Investment of Federal Trust Funds for Cheyenne River and Lower Brule Sioux*

For the reasons set forth above, we conclude that the Secretary, in fulfilling the government's responsibilities to the Sioux tribes under the Act, must consider obligations of government corporations and GSEs whose charter statutes include trust fund eligibility language when determining which obligations carry the highest coupon rate of interest.

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Office of Legal Counsel*

## NOAA Corps Eligibility for Professional Liability Insurance Costs Reimbursement

Members of the NOAA Commissioned Corps may constitute qualified employees eligible for professional liability insurance cost reimbursement under a federal appropriations statute, if they otherwise satisfy the statutory definition for “law enforcement officer,” “supervisor,” or “management official.”

January 19, 2001

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF COMMERCE

This responds to the Department of Commerce’s letter of May 15, 2000, requesting our opinion as to whether members of the National Oceanic and Atmospheric Administration’s (“NOAA”) Commissioned Corps (“Corps”) constitute “qualified employees” eligible for reimbursement for professional liability insurance costs authorized by the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 477 (1999). *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew J. Pincus, General Counsel, Department of Commerce (May 15, 2000) (“DOC Letter”). We conclude that NOAA Corps members who otherwise satisfy the statutory definitions for law enforcement officers, supervisors, or management officials constitute “qualified employees” who are eligible for such reimbursement. While we conclude that being a member of the uniformed services as defined in 5 U.S.C. § 2103(3) does not preclude eligibility for this benefit, we do not reach the application of this statute to the Armed Forces as defined in 5 U.S.C. § 2101(2).

#### I.

In 1996, as part of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Congress enacted legislation authorizing the reimbursement of “qualified employee[s]” of the government for up to one-half the costs incurred by such employees for professional liability insurance. Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, div. A, sec. 101(f), § 636(a), 110 Stat. 3009, 3009-314, 3009-363 (1996) (“Treasury Act”).<sup>1</sup> As

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<sup>1</sup> For brevity and clarity, we will sometimes refer to the reimbursement provisions in section 636 of the Treasury Act, as amended, as the “Reimbursement Law” or “the statute.”

Editor’s Note: For the book edition of this memorandum opinion, this footnote was moved forward and some naming conventions and citations were adjusted to make the presentation of sources more precise.

subsequently amended—including an amendment making reimbursement mandatory rather than permissive—the statute now provides in relevant part:

Notwithstanding any other provision of law, amounts appropriated by this Act (or any other Act for fiscal year 1997 or any fiscal year thereafter) for salaries and expenses shall be used to reimburse any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance.

*Id.* § 636(a) (as amended by Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 642(a), 113 Stat. 430, 477 (1999)). These provisions were not enacted in the form of an amendment or addition to title 5, U.S. Code, although their text is set out as an uncodified note under subchapter IV (“Miscellaneous Allowances”) of chapter 59 of title 5.

The statute provides that a “‘qualified employee’ means an agency employee whose position is that of—(1) a law enforcement officer; or (2) a supervisor or management official.” Treasury Act § 636(b). It defines the term “agency” to mean an “Executive agency” as defined by 5 U.S.C. § 105 (1994); “any agency or court in the Judicial Branch”; or “any agency of the Legislative Branch of Government including any office or committee of the Senate or the House of Representatives.” Treasury Act § 636(c)(1) (as amended by Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, div. A, sec. 101(h), § 644(1), 112 Stat. 2681, 2681-480, 2681-526 (1998)). The basic term “employee,” however, is not separately defined under the statute.

Your inquiry presents the question whether members of the NOAA Commissioned Corps would constitute “qualified employee[s]” under the foregoing statute if they otherwise fall within the covered work categories (i.e., law enforcement officers, supervisors, or management officials).

The NOAA Corps, which succeeded to the authorities and responsibilities previously held in turn by the officers of the Coast and Geodetic Survey and the Environmental Science Services Administration, *see* 33 U.S.C.A. § 851 historical note (West Supp. 2000), consists of roughly 250 to 300 commissioned officers, with a rank system corresponding to that of the Navy. *See id.* § 853a. The duties and functions of the NOAA Corps include operating NOAA’s fleet of research and survey vessels and aircraft and extend to such matters as hydrographic and topographic surveys, tide and current observations, geodetic-control surveys, field surveys for aeronautical charts, and other scientific investigations and observations that fall within the responsibility of the Secretary of Commerce and NOAA. *See* 33 U.S.C. § 883a (1994); Department of Commerce, *NOAA Commissioned Corps History*, <http://www.noaacorps.noaa.gov/history.html> (last visited Oct. 16, 2004). Officers of the NOAA Corps may be transferred to the service of the military departments when the President determines that a sufficient national emergency

exists and that such transfer is in the best interests of the nation. *See* 33 U.S.C. § 855. Like members of the Armed Forces, NOAA Corps officers do not have the freedom to terminate their commissions at any time of their choosing—rather, they are required to tender their resignations at least six months in advance and their approved date of separation is “determined by the [NOAA] Director based on the needs of the Service and may be either sooner or later than the date requested.” *See* DOC Letter at 8 n.17; NOAA Corps Regulations § 08202.<sup>2</sup> For purposes of veterans benefits administered by the Secretary of Veterans Affairs, moreover, active service with the NOAA Corps is treated the same as active service with the military services. *See* 33 U.S.C. § 857 (1994). On the other hand, the NOAA Corps is not itself considered a part of the Armed Forces of the United States, which include only the Army, Navy, Air Force, Marine Corps, and Coast Guard. *See* 10 U.S.C. § 101(a)(4) (1994); 5 U.S.C. § 2101(2) (1994). Members of the NOAA Corps, moreover, are not subject to the Uniform Code of Military Justice, except “when assigned to and serving with the armed forces.” *See* 10 U.S.C. § 802(a)(8) (1994).

Together with military personnel of the Armed Forces (including the Coast Guard) and members of the Commissioned Corps of the U.S. Public Health Service, members of the NOAA Corps are part of the “uniformed services” of the United States, as distinguished from the civilian “civil service” for various statutory purposes. *See* 5 U.S.C. §§ 2101(1), (3), 2105(a)(1) (1994). Of particular relevance here, members of the uniformed services do not constitute members of the “civil service,” and therefore do not constitute “employees” as defined for purposes of the general provisions of title 5, U.S. Code, governing federal government organizations and employees.<sup>3</sup>

Because the Reimbursement Law neither expressly defines the term “employee” nor expressly incorporates by cross-reference the title 5 definition of that term, you have inquired whether the term “qualified employee” as used in the insurance reimbursement provisions encompasses members of the uniformed services, such

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<sup>2</sup> In this respect, NOAA Corps members may differ from officers of the Public Health Service, the only other uniformed service that is not part of the Armed Forces. *See* DOC Letter at 8 n.17; *Milbert v. Koop*, 830 F.2d 354, 359 (D.C. Cir. 1987) (asserting that, unlike members of the Armed Forces, “a commissioned officer of the PHS is free unilaterally to terminate his status as a commissioned officer of the PHS”).

<sup>3</sup> Part III of title 5, U.S. Code, governs “Employees” of the federal government and provides the following definition for “employees” as that term is used in title 5:

*For the purpose of this title*, “employee,” except as otherwise provided by this section or when specifically modified, means an officer and an individual who is . . . appointed in the civil service . . . .

5 U.S.C. § 2105 (emphasis added). That definition would not encompass members of the NOAA Corps because they are members of the uniformed service and, as such, are not “appointed in the civil service.” *See* 5 U.S.C. § 2101(1) (defining “civil service” to include all appointive positions in the Executive, Judicial, or Legislative Branches “except positions in the uniformed services”).

as members of the NOAA Corps, as well as “civilian” federal employees in the civil service.

After considering a number of alternative approaches to determining the meaning of the term “employee” as used in the Reimbursement Law, the DOC letter to this Office states: “The title 5 definition of ‘employee’ best fits the broader statute under review and thus should be consulted to determine who is eligible for professional liability insurance reimbursement under Pub. L. No. 104-208.” DOC Letter at 10. That interpretation would exclude NOAA Corps members and all other members of the uniformed services from coverage as “qualified employee[s]” eligible for reimbursement under the Reimbursement Law. Acknowledging that this interpretation of the issue “is certainly not free from doubt,” however, your office has submitted the question to this Office for our legal opinion. *Id.*

Having considered the views of your department and the other concerned departments,<sup>4</sup> we conclude that members of the NOAA Commissioned Corps who otherwise satisfy the statutory definitions for “law enforcement officers,” “supervisors,” or “management officials” may constitute “qualified employees” eligible for reimbursement under the Reimbursement Law, even though they are excluded from the definition of “employee” for purposes of title 5, U.S. Code. *See* 5 U.S.C. § 2105.

## II.

In considering whether NOAA Corps members constitute “qualified employee[s]” eligible for coverage under the Reimbursement Law, the Department of Commerce letter places considerable emphasis on the fact that the statute contains no separate definition for the term “employee.” *See* DOC Letter at 3. In the absence of such a statutory definition, your office seeks to ascertain the meaning of that term by examining the “broader context” of the enactment, citing the Supreme Court’s opinion in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997).<sup>5</sup> Reasoning that the subject matter of the Reimbursement Law fits well

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<sup>4</sup> We invited and received submissions of their views from the Department of Defense (containing the three military departments), the Department of Health and Human Services (containing the U.S. Public Health Service), and the Department of Transportation (containing the U.S. Coast Guard). *See* Letter for Vicki Jackson, Deputy Assistant Attorney General, Office of Legal Counsel, from Douglas A. Dworkin, General Counsel, Department of Defense (Aug. 11, 2000) (“DoD Letter”); Letter for Vicki Jackson, Deputy Assistant Attorney General, Office of Legal Counsel, from Timothy M. White, Associate General Counsel, Department of Health and Human Services (July 14, 2000) (“HHS Letter”); Letter for Vicki Jackson, Deputy Assistant Attorney General, Office of Legal Counsel, from Nancy E. McFadden, General Counsel, Department of Transportation (July 19, 2000) (“DOT Letter”).

<sup>5</sup> As the DOC letter also points out, one line of cases has taken the position that “when Congress . . . [uses] the term ‘employee’ without defining it, we . . . [conclude] that Congress intend[s] to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (citations omitted); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). As your letter also properly notes,

within the general framework of title 5, U.S. Code, and noting that it expressly incorporates other significant definitions from title 5, the DOC letter suggests that it is therefore appropriate to apply the title 5 definition of “employee” to limit the class of persons who constitute “qualified employee[s]” for purposes of the insurance reimbursement coverage in issue. DOC Letter at 10. Such a limitation would exclude members of the NOAA Corps (as well as all other members of the uniformed services) from coverage because members of the uniformed services are excluded from title 5’s definition of “employee.” Although this approach is not without merit, we decline to adopt it because we conclude that an individual who otherwise satisfies the Reimbursement Law’s express definition of a “qualified employee” (which incorporates the additional definitions of “law enforcement officer,” “supervisor,” or “management official”) need not also satisfy another statute’s definition of the term “employee” in order to be eligible for the reimbursement benefit.

A.

We consider it significant that the Reimbursement Law expressly defines those terms that Congress apparently considered important to define—“qualified employee,” “agency,” “law enforcement officer,” “supervisor,” and “management official”—either with original statutory definitions or by express cross-reference to existing definitions in other statutes. The Reimbursement Law defines the term “agency” by express cross-reference to the definition for the term “Executive agency” contained in the general definitions for title 5, U.S. Code (a definition that encompasses all of the executive departments employing uniformed service personnel). *See* 5 U.S.C. § 105. Although not dispositive, Congress’s failure to cross-reference expressly title 5’s definition of “employee” to govern the Reimbursement Law is noteworthy. Congress’s failure to include reference to that title 5 definition in the context of this statute suggests that the statute’s express definitions of “qualified employee,” “agency,” and other defined terms were deemed adequate to describe and limit the class of persons Congress intended to be eligible for the reimbursement benefit.

The critical operative term in the Reimbursement Law for purposes of eligibility for reimbursement is “qualified employee,” and the statute does provide a detailed definition of *that* term. If a person is an “agency employee” serving in the position of a “law enforcement officer,” “supervisor,” or “management official,” then he is a “qualified employee” eligible for reimbursement. *See* Treasury Act

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however, those cases focus on the distinct question of whether a particular individual is an employee as distinguished from an *independent contractor*, rather than whether a particular category of federal government personnel constitutes government “employees” for a particular statutory purpose. DOC Letter at 4.

§ 636(b). Members of the NOAA Corps are employed in the Department of Commerce, which is an “agency” as that term is defined under the Reimbursement Law. *See* 5 U.S.C. §§ 101, 105 (1994). For reasons discussed below, we do not believe that an individual’s status as a member of a uniformed service is somehow inherently incompatible with status as an “agency employee.”<sup>6</sup> Thus, we think that eligibility under the Reimbursement Law depends on whether that individual satisfies the statutory definition for either “law enforcement officer,” “supervisor,” or “management official,” regardless of whether he or she also conforms to some definition of “employee” contained in another statute, such as 5 U.S.C. § 2105, that is not incorporated by reference in the Reimbursement Law. We believe that these rather detailed statutory provisions can be interpreted on their own terms, without reaching out to other statutes to “borrow” limiting definitions that Congress did not incorporate expressly in this statute.

In reaching this conclusion, we have considered whether service in the uniformed services is in some way inherently incompatible with being considered an “employee” of the United States for purposes of a statute such as the Reimbursement Law. We do not believe that it is. First (leaving aside the express definitions that the Reimbursement Law does include), we see nothing in the Reimbursement Law that would draw or require a distinction between civilian and uniformed government personnel (e.g., if the benefit conferred by the statute were separately or differently provided to uniformed services personnel).<sup>7</sup> *Cf. Feres v. United States*, 340 U.S. 135, 144-45 (1950) (noting the existence of a separate scheme for compensation of injured armed services personnel in holding Federal Tort Claims Act remedy unavailable to serviceman suffering injuries arising in course of or incident to military service). Nor, as discussed below, can we discern any general principle in federal statutory law that would invariably require the conclusion that members of the uniformed services are not “employees” for purposes of particular statutory provisions. Finally, we see no way in which the Reimbursement Law

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<sup>6</sup> The Department of Defense (“DoD”), while taking no position as to the coverage of NOAA Corps members under the Reimbursement Law, strongly urges that members of the Armed Forces (i.e., the Air Force, Army, Marine Corps, Navy, and Coast Guard, *see* 5 U.S.C. § 2101(2) (1994)) are not covered by the term “employee” as used in statutes directed at the federal workforce in the absence of express language to that effect or another affirmative expression of such congressional intent. *See* DoD Letter at 2. The Department of Transportation, in contrast, does not take the position that Coast Guard personnel, who are also members of the Armed Forces, are excluded from coverage under the Reimbursement Law for that reason. *See* DOT Letter at 1-2. Members of the NOAA Corps and officers of the U.S. Public Health Service are members of the uniformed services, but are not members of the Armed Forces. For this reason, it is unnecessary for us to opine on, and we do not decide, the distinct issue as to whether the Reimbursement Law also covers members of the Armed Forces.

<sup>7</sup> We also note that dictionary definitions of “employee” would not on their face exclude uniformed service personnel. *See, e.g., Black’s Law Dictionary* 471 (5th ed. 1979) (defining employee as “[o]ne who works for an employer; a person working for salary or wages.”); *The American Heritage Dictionary of the English Language* 428 (New College Ed. 1976) (“A person who works for another in return for financial or other compensation.”).

would implicate considerations (such as the unique nature of military discipline, hierarchy, and command arrangements) that sometimes have been found to demand distinctive treatment of members of the uniformed as compared to the civil services.

In construing the Reimbursement Law's use of the term "employee" in the defined term "qualified employee," we have considered whether federal statutory law uniformly and consistently excludes uniformed service members from treatment or coverage as government "employees." We find no such pattern. The Federal Tort Claims Act, for example, includes "members of the military or naval forces of the United States" under its definition of "Employee of the government." 28 U.S.C. § 2671 (1994). Other federal statutes that encompass uniformed services personnel within their definition of "employee" or "employee of the United States" include 5 U.S.C. § 7342(a)(1)(D) (1994) (receipt and handling of foreign gifts and decorations); *id.* § 7905(a)(1) (program to encourage car-pooling by federal employees by, *inter alia*, providing subsidized mass transit passes); *id.* § 8311(1) (provisions governing forfeiture of annuities and retired pay); 22 U.S.C. § 2403(j) (1994) (foreign assistance general provisions); *id.* § 3902(5) (foreign service general provisions); and Pub. L. No. 105-264, § 2, 112 Stat. 2350 (1998) (federal employees' travel charge card). These statutes demonstrate that service in the uniformed services is not always incompatible with the status of an "employee" of the federal government for various statutory purposes, including federal employee benefit provisions.<sup>8</sup>

A number of judicial decisions likewise recognize that uniformed service personnel are not invariably excluded from coverage as "employees" under federal statutes that do not expressly provide for such exclusion. As noted in your letter, for example, two federal courts have held that commissioned officers of the PHS (who, like officers of the NOAA, are members of the uniformed services, but not members of the Armed Forces) are protected employees for purposes of the employment discrimination provisions of Title VII of the Civil Rights Act of 1964. *See Milbert v. Koop*, 830 F.2d at 358-59; *Carlson v. United States Dep't of Health and Human Servs.*, 879 F. Supp. 545, 548 (D. Md. 1995). *But see Salazar v. Heckler*, 787 F.2d 527 (10th Cir. 1986) (holding to the contrary).<sup>9</sup>

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<sup>8</sup> We note, moreover, that a number of federal statutes using the term "employee" contain provisions expressly *excluding* members of the uniformed services from the scope of that term. *See, e.g.*, 3 U.S.C. § 411(c)(1)(C); 5 U.S.C. § 7103(a)(2)(ii); 5 U.S.C. § 7322(1). It is thus apparent that there is no uniform pattern governing the treatment of uniformed services members under federal statutes using the term "employee"—some statutes expressly include, others expressly exclude, and others are silent. But we do not believe an inference either of inclusion or exclusion of uniformed services employees can necessarily be drawn when a statute, such as the Reimbursement Law, simply uses the term "employee." Whether uniformed services personnel are included in that term would depend on the particular statutory context. *See also Robinson v. Shell Oil*, 519 U.S. at 343.

<sup>9</sup> We note that numerous federal courts of appeals have held that members of the Armed Forces are not protected "employees" for purposes of Title VII of the Civil Rights Act of 1964. *See, e.g., Roper v.*

Further, application of the Reimbursement Law to the uniformed services would not present any special risk of interference with their duties or functions. Some courts, for example, have viewed Title VII as posing the threat of inappropriate interference with the disciplinary and command arrangements that are unique to the military services. *See, e.g., Mier v. Owens*, 57 F.3d 747, 749-51 (9th Cir. 1995); *Roper*, 832 F.2d at 248. The Reimbursement Law, however, does not regulate intra-agency employee relations as Title VII does. Rather, it simply extends a benefit to qualified employees of partial reimbursement for liability insurance should they seek to purchase it.<sup>10</sup> In this respect, this statute is more analogous to miscellaneous employee benefit statutes such as the Federal Employees Clean Air Incentive Act, 5 U.S.C. § 7905, which authorizes subsidized transit passes for commuting federal employees, including those in the uniformed services, *see id.* § 7905(a)(1).

In light of the foregoing considerations, we conclude that if a member of the NOAA Corps otherwise satisfies the Reimbursement Law’s requirements for a “qualified employee”—including the functional definitions of “law enforcement officer,” “supervisor,” or “management official”—it is irrelevant whether he or she also satisfies the definition of “employee” set forth at 5 U.S.C. § 2105. As we read the Reimbursement Law, a NOAA Corps member is employed in an “agency” as defined in 5 U.S.C. § 105—i.e., the Department of Commerce—and thus constitutes a “qualified employee” eligible for reimbursement benefits as long as he or she satisfies the requirements for any one of those three functional categories of service.

## B.

In reaching this conclusion, we acknowledge that the contrary arguments made by DOC are not without merit. As DOC points out in applying the “broader context” approach of *Robinson v. Shell Oil*, the Reimbursement Law could be said to fall within the general body of laws codified in title 5 covering government organization and employees, although Congress did not choose to enact it as an amendment or addition to title 5 that would be incorporated and codified as part of

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*Dep’t of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Gonzalez v. Dept. of the Army*, 718 F.2d 926, 928 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir. 1978). Only one federal district court opinion appears to have held to the contrary. *See Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986).

<sup>10</sup> We note that, because the Reimbursement Law requires reimbursement of only up to *one-half* of the cost of professional liability insurance, it seems unlikely that large numbers of uniformed services personnel who do not have genuine concerns regarding potential liability would be willing to absorb the expense of paying one-half the cost of a policy and thus qualify for the reimbursement benefit. This consideration reduces the likelihood that the applicability of the Reimbursement Law to uniformed services personnel would open the floodgates to substantial unanticipated expenditures under the provision.

the actual text of title 5. See DOC Letter at 6. Absent some contrary indication of congressional intent, it may sometimes be appropriate to fill in the definitional gaps of statutes dealing with federal personnel matters by “borrowing” the appropriate title 5 definition on the reasonable assumption that Congress clearly intended that definition to apply and simply considered it unnecessary to make that intention explicit.<sup>11</sup> Here, however, we cannot say that Congress left a manifest definitional “gap” that requires cross-reference to extraneous statutes in order to make the Reimbursement Law “work” or make sense. On the contrary, the Reimbursement Law contains a rather elaborate series of *functionally*-related definitions which appear to set forth adequately the intended reach and limits of the reimbursement benefit. The statutory scheme indicates that Congress intended to extend this benefit to federal personnel working in the described functional categories—law enforcement, supervision, and management—because it considered those categories to be most in need of the liability insurance reimbursement benefit in question. And we find nothing in the statute indicating that Congress viewed persons working in federal law enforcement, supervisory, or management capacities as falling outside the beneficial purposes of the statute merely because they happen to be in the uniformed, rather than the civil, service.<sup>12</sup>

The Reimbursement Law’s emphasis on these functional criteria in defining a “qualified employee” distinguishes this matter from a prior opinion where we interpreted the term “employee” as used in an executive order to exclude appointed members of the Regional Fishery Management Councils (“RFM Councils”). See *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. O.L.C. 150 (1993). The executive order in question set forth ethical standards for Executive Branch employees and defined the term “employee” as “any officer or employee of an agency, including a special Government employee.” It further defined the term “agency” by reference to the title 5 definitions of executive departments, Government corporations, and independent establishments in the Executive Branch. See *id.* at 152. We concluded that the term “employee” as used in the executive order was identical in scope and

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<sup>11</sup> For an example of a court employing this line of reasoning, see *Salazar v. Heckler*, 787 F.2d at 530 (relying on the exclusion of Public Health Service officers from title 5 definition of “employee” in concluding that they are not “employees” for purposes of Title VII); but cf. *Milbert v. Koop*, 830 F.2d at 358-59 (concluding that “military exception” to Title VII and Rehabilitation Act did not preclude Public Health Service officers from bringing suit); *Carlson*, 879 F. Supp. at 548 (to the same effect).

<sup>12</sup> We agree with your assertion that the legislative history on the Reimbursement Law is “scant” and contains “nothing that addresses whether officers of the NOAA Corps may be ‘qualified employees.’” DOC Letter at 9. Although the Department of Defense’s submission cites certain statements by Senator Warner mentioning various categories of federal employees he hoped would benefit from the 1999 amendment to the Reimbursement Law (making reimbursement mandatory rather than discretionary), and notes that the Senator did not refer to organizations representing the interests of military personnel, see DoD Letter at 4-5, these statements simply do not address the question whether uniformed services personnel may constitute “qualified employees” under the statute.

meaning to that term as defined in title 5, *see* 5 U.S.C. § 2105, and that such term excluded appointed members of the RFM Councils. 17 Op. O.L.C. at 153. Among the three considerations on which we relied in reaching this conclusion was that “although the Order does not expressly adopt title 5’s definition of an ‘employee,’ it does adopt that title’s definition of an ‘agency.’” We further explained that “[w]e think it unlikely that the Order was intended to cover personnel who were employed by ‘agencies’ within the meaning of title 5 but who were not themselves ‘employees’ within the same title.” *Id.* at 154. We believe the Reimbursement Law is distinguishable from the executive order addressed in our 1993 opinion because the Reimbursement Law’s functional definition of “qualified employee” demonstrates that Congress was focusing upon specific criteria (distinct from title 5’s definition of “employee”) in deciding who would be eligible for the reimbursement benefit—providing functional definitions lacking in the executive order.

We also note that one prominent federal court of appeals decision has expressly declined to “borrow” the title 5 definition of “employee” in construing a statute that explicitly incorporated title 5’s definition of “agency” but not its definition of “officer” and “employee.” Although the issues resolved in that case are not precisely analogous to that presented here, they nonetheless indicate that close construction of the particular statute under consideration, rather than routine incorporation of the title 5 definition, is a more appropriate approach to statutory interpretation in this context. In *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), the issue was whether the First Lady constituted a “full-time officer or employee of the federal government” for purposes of a provision of the Federal Advisory Committee Act, 5 U.S.C. app. 2 (“FACA”), exempting from FACA’s coverage any committee composed wholly of full-time officers or employees of the federal government. The district court, in holding that the First Lady did not constitute such a federal government employee and that the FACA exemption therefore did not apply, had “quite reasonably turned to title 5 of the U.S. Code to find a definition.” 997 F.2d at 903. But the Court of Appeals reversed, holding that the title 5 definitions of “officer” and “employee” do not govern the question whether the First Lady is a federal officer or employee for purposes of FACA. *See id.* at 915. The court instead applied the definition of “officer” in title 1, U.S. Code, in concluding that the First Lady was an “officer” for the purposes in question. In explaining its refusal to adopt the title 5 definitions of officer or employee, the court explained:

Nevertheless, it is true, as the government insists, that Congress did not adopt explicitly all of Title 5’s definitions in FACA. FACA is not part of Title 5, which was enacted six years before FACA’s passage, but, instead is only temporarily housed there as an appendix. Typically, when Congress wishes to add a statute to Title 5, it amends the Title. It did not do so when it passed FACA, but at that

time it specifically did adopt certain Title 5 definitions. For example, adjacent to the definition of an advisory committee is FACA's definition of any agency, which incorporates the definition in Title 5: "agency" has the same meaning as in section 551(1) of title 5, United States Code." But Congress actually deleted from the Senate version of FACA definitions of "officer" and "employee" that paralleled those of sections 2104 and 2105.

*Id.* at 904 (internal citations omitted). The statutory framework addressed by the court in *Clinton* is quite similar in key respects to that presented here—e.g., a statute not codified in title 5 that expressly incorporates title 5's definition of "agency," but omits its definition of "employee"—and the reasons underlying that court's refusal to borrow the title 5 definitions of "employee" and "officer" are consistent with our conclusion on this issue.

### C.

Finally, we have considered whether there is any manifest incongruity in applying the Reimbursement Law's definitions of law enforcement, supervisor, or management personnel to the NOAA Corps that would cast doubt on our interpretation. We conclude that there is not.

To begin with, the statute's definition of "law enforcement officer" provides:

[T]he term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, prosecution, detention, or supervision of individuals suspected or convicted of offenses against the criminal laws of the United States, including any law enforcement officer under section 8331(20) or 8401(17) of such title 5, or under section 4823 of title 22, United States Code.

Treasury Act § 636(c)(2) (as amended by Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, div. A, sec. 101(h), § 644(2), 112 Stat. 2681, 2681-480, 2681-526 (1998)). This definition, unlike the definitions for "supervisor" and "management official" discussed below, applies only to one who is "an employee." For reasons explained above, however, we do not believe that members of the uniformed services are excluded from the term "employee" for purposes of this particular statute.<sup>13</sup> The statute's language directs attention to whether the government personnel in question are employed by a covered executive agency and perform the functions that Congress had in mind when it

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<sup>13</sup> As pointed out by the Supreme Court in *Robinson v. Shell Oil Co.*, 519 U.S. at 344 n.4, the term "employee" does not have some "intrinsic plain meaning."

authorized reimbursement benefits for professional liability insurance. Insofar as members of the NOAA Commissioned Corps hold positions whose duties are “primarily the investigation, apprehension, prosecution, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States,” we conclude that they would be entitled to insurance reimbursement as authorized by the Reimbursement Law.

This Office, however, lacks sufficient factual knowledge of NOAA personnel assignments, or those of the other uniformed services, to assess which particular positions would satisfy the criteria for the “law enforcement officer” classification. Such determinations must be made by the particular employing agency, based on its knowledge of its own personnel and their assignments. *See infra* note 14.

The Reimbursement Law also authorizes reimbursement coverage for qualified employees who are “supervisors.” The statute provides that “supervisor” has the same meaning given it by 5 U.S.C. § 7103(a), which provides:

“[S]upervisor” means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority.

*Id.* § 7103(a)(10). Although this definition does not require that an individual be a title 5 “employee” in order to be a supervisor, it *does* require that a supervisor serve in a position authorizing him or her to perform the enumerated activities with respect to “employees.” For purposes of section 7103 and all other sections of chapter 71 of title 5, the term “employee” expressly excludes all members of the uniformed services. *See* 5 U.S.C. § 7103(a)(2)(ii). Accordingly, we conclude that while members of the uniformed services are not excluded from qualifying as supervisors under the Reimbursement Law, only those who exercise at least one of the enumerated supervisory activities with respect to *civilian* employees (i.e., employees who are *not* members of the uniformed services) may qualify for reimbursement as supervisors under the statute. *Cf. Plowman v. U.S. Dept. of the Army*, 698 F. Supp. 627 (E.D. Va. 1988) (Army colonel who supervised civilian employees named as co-defendant in suit for breach of contract and privacy violations).

As with “supervisor[s],” the Reimbursement Law defines “management official” by direct incorporation of the definition of that term provided by 5 U.S.C. § 7103(a), which provides:

“[M]anagement official” means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.

*Id.* § 7103(a)(11). This definition does not exclude persons who fail to conform to the title 5 definition of “employee,” nor does it otherwise exclude personnel of the uniformed services.<sup>14</sup> The application of this definition to particular positions in a uniformed services is a matter to be determined in the first instance by the department employing persons in those positions. We conclude here only that members of the uniformed services who otherwise qualify as “management officials” are not excluded from eligibility for reimbursement because they do not constitute “employees” as that term is defined in 5 U.S.C. § 2105 or other statutory definition of that term.

### III.

For all of the foregoing reasons, we conclude that members of the NOAA Commissioned Corps may constitute “qualified employees” under the Reimbursement Law if they otherwise satisfy the statutory definitions for law enforcement officers, supervisors, or management officials. While we conclude that being a member of the uniformed services as defined in 5 U.S.C. § 2101(3) does not preclude eligibility for this benefit, we do not reach the application of this statute to the Armed Forces as defined in 5 U.S.C. § 2101(2).

VICKI C. JACKSON  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>14</sup> Our conclusion that the functional categories for qualified employees under the Reimbursement Law are not incongruous when applied to members of the uniformed services is fortified by the Department of Health and Human Services’ statement with regard to commissioned officers of the PHS:

Commissioned officers do perform duties that fall within the duties describing supervisors and management officials in title 5. Also, some Public Health Service officers are detailed to the Bureau of Prisons, Immigration and Naturalization Service and the Marshals’ Service and may be considered “law enforcement officers” for purposes of the provision in question. These officers, in particular, are often sued in their individual capacities.

HHS Letter at 1.

## **General Services Administration Use of Government Funds for Advertising**

Section 632 of the Treasury, Postal Service, Executive Office of the President, and General Government Appropriations Act of 2000, which prohibits the use of appropriated funds for “publicity or propaganda purposes,” does not prohibit the General Services Administration from using appropriated funds to support a reasonable and carefully-controlled advertising campaign that serves the goal of informing other federal agencies about the products and services it offers.

The principles set forth in some opinions of the Comptroller General addressing limitations on advertising by federal agencies beyond the “publicity or propaganda” rider would not prohibit the GSA’s advertisements to other agencies.

January 19, 2001

### MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL GENERAL SERVICES ADMINISTRATION

You have asked whether section 632 of the Treasury, Postal Service, Executive Office of the President, and General Government Appropriations Act of 2000, Pub. L. No. 106-58, § 632, 113 Stat. 430, 473 (1999) (“General Government Appropriations Act of 2000”), which prohibits the use of appropriated funds for “publicity or propaganda purposes,” disables the General Services Administration (“GSA”) from expending money for advertising and promoting the services and programs it offers to other federal agencies. We believe that GSA may use appropriated funds for such advertising. The advertisements, however, must be aimed at providing information about GSA’s offerings rather than aggrandizing or unduly emphasizing GSA’s importance.<sup>1</sup> You have also asked whether, even apart from the “publicity or propaganda” rider, principles identified in opinions of the Comptroller General limiting advertising by federal agencies would prohibit the GSA’s advertisements.

#### I.

We understand that the advertisements in question give information to other federal agencies about the services and products that GSA offers. GSA “provides Federal agencies a myriad of supplies and services ranging from building construction and leasing of office space to providing personal property for virtually all agency needs.” Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from George N. Barclay, Acting General Counsel, GSA at 2 (Nov. 12, 1998) (“GSA Letter”). In addition, the Federal Property and Administrative Services Act (“FPASA”) charges GSA with the responsibility for

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<sup>1</sup> We do not address the legality of any specific advertisements, which must be evaluated individually.

procuring services and supplies for federal agencies in a manner it determines to be “advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned.” 40 U.S.C. § 481(a) (1994). These statutory duties include overseeing the provision of information technology services, *id.* § 757, procuring federal property, *id.* § 756, operating the federal motor vehicle fleet, *id.* § 491, and disposing of surplus property, *id.* § 484. GSA asserts that “[i]n order to demonstrate to Federal agencies the benefits of a single, centralized procurement activity and to fulfill the mandate expressed in the [FPASA], GSA believes that it is necessary and appropriate to educate, promote and advertise its activities to its federal customers.” GSA Letter at 2. GSA argues, therefore, that

the Administrator of General Services has the discretion to determine if advertising will further any of these statutorily authorized missions, thereby constituting a necessary and proper use of appropriated funds. . . . If the Administrator determines that certain forms of advertising or publicity are reasonable, necessary and proper in communicating the availability and advantages of GSA’s programs, appropriated funds should be available for this purpose.

Letter for Emily C. Hewitt, General Counsel, General Services Administration, from George Barclay, Associate General Counsel, Personal Property Division, and Eugenia D. Ellison, Associate General Counsel, General Law Division, General Services Administration, *Re: Publicity and Propaganda Prohibition Clause Contained in Agency Appropriations Acts* at 2 (Nov. 6, 1998) (“GSA General Counsel Memorandum”).

## II.

Section 632 of the General Government Appropriations Act of 2000, provides that “[n]o part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by Congress.” A similar provision, in essentially the same form, has applied to GSA since 1989. *See, e.g.*, Treasury, Postal Service, Executive Office of the President, and Certain Independent Agencies Appropriations Act, 1989, Pub. L. No. 100-440, § 513, 102 Stat. 1721 (Sept. 22, 1988).<sup>2</sup>

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<sup>2</sup> The analogous statutory provision in the 1998 GSA appropriations act was section 601 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998). A similar provision has been in other appropriations acts since 1952. *See, e.g.*, Labor-Federal Security Appropriation Act, Pub. L. No. 82-134, § 702, 65 Stat. 209, 223 (1951).

Congress has enacted a number of statutes that restrict agencies' authority to spend funds for "publicity or propaganda" or lobbying.<sup>3</sup> All of these statutes raise substantial difficulties of interpretation. A "publicity or propaganda" rider such as section 632 creates the special difficulty that its language gives scant guidance about the line between what is permitted and what is forbidden. The Comptroller General, for example, has "consistently expressed [the] belief" that the language used in such riders "does not provide adequate guidelines under which to judge the activities of an agency, especially when balanced against the agency's legitimate interest in communicating with the public and with members of Congress for permissible purposes." *Rep. Benjamin S. Rosenthal*, B-184,648, 1975 WL 9457, at \*6 (Comp. Gen. Dec. 3, 1975). The principal sources of guidance for construing this rider and other "publicity or propaganda" provisions are prior administrative interpretations, which are based largely upon general concepts about the structure of government.

Our Office's work in this general area has primarily focused on the Anti-Lobbying Act, 18 U.S.C. § 1913 (1994), and our "published opinions do not set out a detailed, independent analysis of 'publicity or propaganda' riders" in the appropriations statutes. See Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Anti-Lobbying Act Guidelines* at 3 (Apr. 14, 1995). Nevertheless, one distinction that runs through our Office's opinions in this general field bears particularly on the question you have asked. We have "sought to draw a distinction . . . between activities that are intended to 'give . . . information as to the work of [a] department,' and activities that seek to 'extol and exploit the virtues of [a] department.'" *Establishment of the President's Council for International Youth Exchange*, 6 Op. O.L.C. 541, 547 (1982) ("*International Youth Exchange*") (quoting 50 Cong. Rec. 4411 (1913) (remarks of Rep. Lever on precursor to 5 U.S.C. § 3107)). We have focused on whether the activity in question provides important information about the agency and the discharge of its statutory mandate or instead serves to aggrandize the agency or its officials. See, e.g., Memorandum for the Deputy Attorney General from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Hiring of Media Consultants to Advise Department Attorneys With Respect to Their Dealings with the Press* at 3 (Jan. 24, 1985) ("*Media Consultants*") (approving use of appropriated funds to support hiring media consultants if reasonably necessary to assist agency in performing its legitimate functions with

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<sup>3</sup> See, e.g., Pub. L. No. 106-58, § 627, 113 Stat. 430, 472 (1999) ("No part of any funds appropriated in this or any other Act shall be used . . . for publicity or propaganda purposes . . . designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."); 5 U.S.C. § 3107 (1994) ("Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."); 18 U.S.C. § 1913 (1994) ("No part of the money appropriated by any enactment of Congress shall . . . be used . . . to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress . . .").

respect to press; cautioning, however, that consultants “should not and cannot be employed in any effort to emphasize unduly or aggrandize the accomplishments of the Department or its officials. . . . [W]hether a particular activity falls within this general area can be determined only on the facts of each case.”<sup>4</sup>

To be sure, “[t]he line between information and ‘publicity’ is almost impossible to draw, since any information about an agency’s activity will publicize the agency, and almost all publicity will contain information about the government or about government programs.” Memorandum for Joseph F. Dolan, Assistant Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Request of House Subcommittee for Interpretation of 5 U.S.C. § 54* at 3 (Mar. 1, 1963) (discussing predecessor to 5 U.S.C. § 3107). “Publicity or propaganda” riders, however, require attempts at drawing that line.

In attempting to do so here, we can take some guidance from the opinions of the Comptroller General and the General Accounting Office (“GAO”).<sup>5</sup> Noting the vagueness of the language of “publicity or propaganda” riders in appropriations acts and the absence of legislative history shedding much light on their meaning, *see, e.g., Rep. Jack Brooks*, 66 Comp. Gen. 707, 709 (1987); *Sen. David Pryor*, B-229,257, 1988 WL 227903, at \*4 (Comp. Gen. June 10, 1988); *Sen. Lowell Weicker, Jr.*, B-223,098, 1986 WL 64325, at \*6 (Comp. Gen. Oct. 10, 1986);

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<sup>4</sup> *See also* Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Television Pilot/Series on the Drug Enforcement Administration* at 5-6 (Sept. 14, 1984) (upholding use of appropriated funds to cooperate with development of television series on Drug Enforcement Administration (“DEA”), in part because agency’s activities “would be limited to the provision of accurate information concerning the DEA’s activities, reviewing the accuracy and fairness of any subsequent dramatization of these stories, guarding against the misuse of the Department’s seals or identity, and safeguarding, to the extent necessary, information in Department files,” activities which would not “amount to the aggrandizement that is prohibited by statute.”); Memorandum for Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Office of Justice Assistance, Research, and Statistics* at 3 (Jan. 6, 1983) (permitting agency to use appropriated funds to support crime prevention advertising campaign but deeming significant the fact that advertisements in question would not make reference to the Federal government or its activities; therefore, advertisements were not produced “for the purpose of reflecting credit upon an activity or upon the officials charged with its administration.”); *International Youth Exchange*, 6 Op. O.L.C. at 548, 549 (concluding that a “limited use of appropriated funds [by the United States Information Agency (“USIA”)] to support a reasonable and carefully controlled advertising campaign by the [President’s Council on International Youth Exchange]” in support of youth exchange programs was proper in part because USIA has specific statutory authority to promote such activities by the private sector, but “the proposed USIA advertising campaign should be carefully tailored and scrutinized so that it does not unduly emphasize the accomplishments of the USIA or aggrandize the agency or its officials.”).

<sup>5</sup> The Comptroller General is an officer of the Legislative Branch, *see Bowsyer v. Synar*, 478 U.S. 714, 727-32 (1986), and, historically, the Executive Branch has not considered itself bound by the Comptroller General’s legal opinions if they conflict with the legal opinions of the Attorney General or this Office. Nonetheless, the Comptroller General’s opinions can provide guidance on certain technical matters.

Rosenthal, B-184,648, 1975 WL 9457, at \*6, the Comptroller General has construed the language to prohibit (among other things) “publicity of a nature tending to emphasize an agency’s own importance, which [he has] labeled as ‘self-aggrandizement.’” *Pryor*, B-229,257, 1988 WL 227903, at \*5.<sup>6</sup> His interpretations of “publicity or propaganda” riders have acknowledged, however, that agencies have significant legitimate interests in publicizing their activities and programs. Recognizing that “every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities,” 1 General Accounting Office, *Principles of Federal Appropriations Law* at 4-162 (2d ed. 1991) (“*Federal Appropriations Law*”), the GAO has stated that it is “reluctant to find a violation where the agency can provide a reasonable justification for its activities,” *id.* at 4-165; *see also Sen. Thomas F. Eagleton*, B-178,528, 1978 WL 10850, at \*2 (Comp. Gen. July 27, 1978). As the GAO’s *Federal Appropriations Law* textbook states, “[i]n evaluating whether a given action violates a ‘publicity or propaganda’ provision, GAO will rely heavily on the agency’s administrative justification. In other words, the agency gets the benefit of any legitimate doubt.” 1 *Federal Appropriations Law* at 4-163.

Accordingly, in its most recent construction of such an appropriations rider, the Comptroller General determined that a report issued by the Department of Housing and Urban Development (“HUD”) criticizing proposed congressional cuts in HUD programs did not violate the rider. *See Application of Anti-Lobbying Restrictions to HUD Report Losing Ground*, B-284,226.2, 2000 WL 1193462, at \*3 (Comp. Gen. Aug. 17, 2000) (noting that “[p]ublic officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies.”). Similarly, in its first construction of the ban, the Comptroller General concluded that some press releases issued by the National Labor Relations Board Division of Information (“NLRB”) did not violate the rider because the rider does not prohibit “those functions [of the NLRB press office] which deal with dissemination to the general public, or to particular inquirers, of information reasonably necessary for the proper administration of the laws the duty for the enforcement of which falls upon [the NLRB],” *Appropriations—Limitations—Publicity And Propaganda Prohibition—Labor—Federal Security Appropriation Act, 1952*, 31 Comp. Gen. 311, 314 (1952), but rather was intended, like other statutory provisions similarly limiting appropriations expenditures, “to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question,” *id.* at 313; *Sen. Barry Goldwater*, B-194,776, 1979 WL 12361, at \*1 (Comp. Gen. June 4, 1979) (“[T]his provision prohibits agency

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<sup>6</sup> The Comptroller General has also construed the language to prohibit “covert propaganda activities carried on by covered agencies,” *Pryor*, B-229,257, 1988 WL 227903, at \*4, and certain grass-roots activities clearly designed to enlist the public in efforts to lobby Congress, *see, e.g., Rep. Glenard P. Lipscomb*, B-136,762, 1958 WL 2169, at \*2 (Comp. Gen. Aug. 18, 1958). Neither of these interpretations is at issue here.

officials from using funds, subject to this restriction, solely for publicity of a nature tending to emphasize the importance of the agency or a particular agency activity.”); *see also HUD Report Losing Ground*, B-284,226.2, 2000 WL 119346, at \*3 (“The restriction is directed typically toward activities whose obvious purpose is ‘self-aggrandizement’ and ‘puffery.’”); *Eagleton*, B-178,528, 1978 WL 10850, at \*3 (finding that mass mailing by Republican National Committee of excerpts from newspapers praising president, transmitted with letter prepared by member of White House staff on State Department letterhead, did not violate similar prohibition, because “[i]n this case the expenditure of appropriated funds was not for the aggrandizement of the Department of State.”).<sup>7</sup>

### III.

In light of the interpretation given to “publicity or propaganda” riders by our Office as well as by the Comptroller General, we believe that GSA would not be prohibited from using appropriated funds to support a reasonable and carefully-controlled advertising campaign that serves the goal of informing other federal agencies about the products and services available from GSA. The “publicity or propaganda” rider does not forbid an agency from providing information about its programs and activities, as long as the agency is not aggrandizing itself. Providing information is one means by which an agency achieves its mission. In this instance, moreover, the mission of the agency justifies presenting information in the form of advertising. Because of GSA’s statutory mandate to procure services

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<sup>7</sup> Our 1985 *Media Consultants* opinion cited only two cases in which the Comptroller General had found agency activity to violate a ban on unauthorized publicity. *Id.* at 4. In the first case, the Comptroller General concluded that because a speech by the Deputy Assistant Secretary of Defense was “clearly designed to enlist the aid” of an industry association in lobbying for defense programs, it went “far beyond the established practice of government agencies to keep the public informed of the aims and achievements of authorized government programs,” and therefore violated the publicity and propaganda restriction. *Lipscomb*, B-136,762, 1958 WL 2169, at \*2. The second case, *Federal Housing Administration—Conventions and Gatherings—Statutory Construction*, 14 Comp. Gen. 638 (1935), predated the inclusion of the rider in general appropriations statutes. In that case, the Comptroller General found that a campaign by the Federal Housing Authority to promote home owner improvements violated a specific statutory provision prohibiting it from sponsoring campaigns and conventions not otherwise authorized. *Id.* at 641. *See also Weicker*, B-223,098, 1986 WL 64325, at \*1, \*6 (noting that “suggested editorials” supporting Administration policies prepared by Small Business Administration for distribution to newspapers violate rider because they “are misleading as to their origin and reasonably constitute ‘propaganda’ within the common understanding of that term”); 1 *Federal Appropriations Law* at 4-161 to 4-179 (citing additional examples).

Editor’s Note: The version of this opinion originally published online stated that the *Federal Appropriations Law* textbook cited only two cases in which the Comptroller General found activity to violate a ban on unauthorized publicity. Strictly speaking, it was the *Media Consultants* opinion that made this representation, regarding an outdated version of the GAO textbook, and not the second edition of *Federal Appropriations Law* that is discussed in the text of the opinion. This footnote has accordingly been revised to make clear that there are more examples than just the two identified in the *Media Consultants* opinion.

and supplies for federal agencies in a manner that it determines is “advantageous to the Government in terms of economy, efficiency, or service,” 40 U.S.C. § 481(a), GSA’s mission includes being a provider of goods and services to federal agencies. GSA advertisements that reasonably deal with the efficiency, economy, or quality of GSA products would carry out that mission and would not violate the “publicity or propaganda” ban. However, like the USIA advertising campaign, *see International Youth Exchange*, 6 Op. O.L.C. at 549, the proposed GSA advertising campaign should be carefully tailored so that it does not unduly emphasize the accomplishments of GSA or aggrandize the agency, its functions, or its officials, but rather provides information reasonably within GSA’s statutory mandate. Proposed advertisements should inform potential customers about the qualities of GSA’s products and services and offer the sort of information about GSA’s capabilities that could affect potential customers’ decisions regarding suppliers.<sup>8</sup>

#### IV.

Finally, we do not believe that the principles set forth in some opinions of the Comptroller General addressing limitations on advertising by federal agencies beyond the “publicity or propaganda” rider would prohibit the GSA’s advertisements to other federal agencies. The available opinions concern the use of appropriations to advertise to the general public, not to other agencies. Even assuming the standards set forth in these opinions would apply, GSA would apparently be permitted to advertise in order to inform other federal agencies about its products and services. The GAO has stated generally that

[w]hether an agency’s appropriations are available for advertising, like any other expenditure, depends on the agency’s statutory authority. Whether to advertise and, if so, how far to go with it are determined by the precise terms of the agency’s program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds such as the various anti-lobbying statutes.

1 *Federal Appropriations Law* at 4-188; *see also Mr. Byrne A. Bowman*, B-114,874.30, 1976 WL 10445, at \*2 (Comp. Gen. Mar. 3, 1976) (concluding that U.S. Postal Service’s statutory mandate to “provide philatelic services” and “promote[] and provide adequate and efficient postal services at fair and reasonable rates” implies authority to advertise sale of stamps) (quoting 39 U.S.C. §§ 404(5) & 403(a)). Given GSA’s statutory responsibility to ensure the procure-

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<sup>8</sup> Even if GSA would get the benefit of any legitimate doubt about whether its advertisements are consistent with this limitation, the Administrator, as shown above, would not have unfettered discretion over the content of these advertisements.

ment of products and services for federal agencies in an economical and efficient manner, advertisements that inform other federal agencies of these products and services would seem to be a “necessary expense,” as long as they do not violate other statutory limitations, such as the “publicity or propaganda” bar.

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## Applicability of APA Notice and Comment Procedures to Revocation of Delegation of Authority

The Secretary of Commerce may revoke a delegation to the Director of the Census without submitting the revocation to the notice and comment procedures of the Administrative Procedure Act, notwithstanding the fact that the Secretary voluntarily elected to follow those procedures in issuing the delegation.

February 14, 2001

### MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF COMMERCE

You have asked whether the Secretary of Commerce (“Secretary”) must comply with the notice and comment provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553 (1994), in order to revoke his delegation of authority to the Director of the Census to make the final determination on the methodology to be used in calculating the tabulations of population reported to the States and localities under 13 U.S.C. § 141(c) (1994). *See* 65 Fed. Reg. 59,713, 59,716 (2000) (to be codified at 15 C.F.R. § 101.1). The regulation at issue also establishes an executive steering committee, composed of employees of the Bureau of the Census, which is to prepare a report to the Director of the Census recommending a methodology. *Id.* § 101.1(b). Although we have found no case definitively establishing the proposition, we believe that the Secretary may revoke this delegation of authority, including the establishment of a steering committee, without submitting the revocation to the notice and comment procedures of the APA.

Section 553(a)(2) of the APA, which generally requires rulemaking to provide for notice and comment, “applies, according to the provisions thereof, except to the extent that there is involved—a matter relating to agency management or personnel . . . .” An internal delegation of administrative authority, such as the one in 15 C.F.R. § 101.1(a) vesting authority in the Director of the Census, does not adversely affect members of the public and involves an agency management decision that is exempt from the notice and comment rulemaking procedures of the APA. *See United States v. Saunders*, 951 F.2d 1065, 1068 (9th Cir. 1991) (delegations of authority have “no legal impact on, or significance for, the general public,” and therefore “simply effect[] a shifting of responsibilities wholly internal to the Treasury Department”); *Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990) (“APA does not require publication of [rules] which internally delegate authority to enforce the Internal Revenue laws”); *United States v. Goodman*, 605 F.2d 870, 887-88 (5th Cir. 1979) (unpublished delegation of authority from Attorney General to Acting Administrator of the DEA did not violate APA); *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970) (where

taxpayer would not be adversely affected by the internal delegations of authority from the Attorney General, APA does not require publication). The portion of the regulation that provides for a committee, composed of Census Bureau employees, which makes a recommendation to the Director of the Census, 15 C.F.R. § 101.1(b), is also an internal delegation of the Secretary's statutory authority under 13 U.S.C. § 141(c) to determine the methodology to be used in calculating the tabulations. Therefore, like subsection (a) of 15 C.F.R. § 101.1, it is an internal rule relating to agency management, ordinarily exempt from the notice and comment rulemaking procedures of the APA.

Despite the statutory exemption in 5 U.S.C. § 553(a)(2), the Secretary elected to comply with the notice and comment provisions of the APA in issuing this delegation. *See* 65 Fed. Reg. 38,370-71 (2000) (proposed rule and commentary); 65 Fed. Reg. 59,713-16 (2000) (comments and responses, final rule); 65 Fed. Reg. 73,643 (2000) (final rule effective). The question here is whether the promulgation of a new rule revoking the Secretary's delegation must also comply with the notice and comment procedures of the APA.<sup>1</sup> Because a rule regarding the Secretary's delegation or reservation of his authority is a matter of internal management that is exempt from the notice and comment provisions of the APA, the Secretary is not required to follow the notice and comment procedures for later delegations or revocations of delegations, unless his decision to submit the original delegation of authority to the APA process is a waiver of the applicability of the exemption to future delegations of this nature.<sup>2</sup>

We have found no support for the proposition that the Secretary, having voluntarily complied with the APA notice and comment provisions in promulgating a particular rule, but expressing no commitment to do so in the future, must continue to comply with those provisions in the issuance of later rules affecting the existing one. To be sure, there is a line of cases holding that an agency that has waived the exemption found in section 553(a) of the APA is required to comply with the APA procedures in rulemaking as long as the waiver is effective. *See, e.g., Buschmann v. Schweiker*, 676 F.2d 352, 356 n.4 (9th Cir. 1982) (policy statement requiring HHS to use notice and comment provisions of APA acts as a waiver of exemption); *Rodway v. U.S. Dep't of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975) (USDA regulation making procedural requirements of section 4 of the APA

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<sup>1</sup> We note that, although validly promulgated regulations have the full force and effect of law, *Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975), section 101.1 may not even be enforceable as to the Secretary. 3 Jacob A. Stein et al., *Administrative Law* § 13.03[2] (2000) ("The rule [that a valid regulation has the force and effect of law] does not apply to agency violations that are intended to regulate internal agency procedures rather than to protect any interest of the objecting party."). *Cf. Garner v. Jones*, 529 U.S. 244, 256 (2000) (court presumed, in a case involving an internal rule that affected the rights of prisoners, that an agency follows its internal policies) (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954)).

<sup>2</sup> We are aware of no law that otherwise requires regulations published in the Code of Federal Regulations to be repealed or revoked only by notice and comment.

applicable to all of its rulemaking relating to benefits bound the agency to comply thereafter with the notice and comment procedures of the APA). However, in these cases, the agency had issued a valid rule committing itself to following the notice and comment provisions of the APA. *Id.* The courts' holdings, therefore, rest on the principle that an agency is bound to follow validly issued administrative regulations. *Id.* Here, the Secretary has made no such commitment, either informally or formally. On the contrary, the regulation itself expressly provides that:

Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation.

15 C.F.R. § 101.1(a)(5).

To require the Secretary to use a notice and comment process in repealing or amending section 101.1 plainly would “diminish[]” his authority to dictate the management processes of his Department. Subsection (a)(5) was added in response to a comment that expressed concern that section 101.1 would divest the Secretary of his statutory responsibility, and, in the words of the Secretary, was intended to “erase any doubt that the delegation of authority is not a divestiture of obligations or responsibility by the Secretary.” 65 Fed. Reg. at 59,715. The additional text was intended to make explicit “that nothing in the rule diminishes the authority of the Secretary of Commerce to revoke this delegation of authority . . . .” *Id.*<sup>3</sup> Moreover, binding agencies to continue to comply with the APA's notice and comment procedures with respect to rules for which they have voluntarily sought public comment, but which do not affect even the procedural rights of persons outside the agencies, might actually discourage them from seeking the public's view because of a reluctance to limit their future flexibility to amend or repeal such a rule. We believe, therefore, that the Secretary is free to issue a new rule revoking his prior delegation without subjecting that rule to the notice and comment procedures of the APA. *Cf. Nolan v. United States*, 44 Fed. Cl. 49, 57 n.5 (1999) (acknowledging that Secretary of Transportation's internal memorandum delegating authority to a subordinate without notice and comment may have superseded the regulation reserving that authority to the Secretary until the next

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<sup>3</sup> The Secretary's response to this comment also states that: “It is unassailable that a rule revoking the delegation would be effective, if it satisfied the requirements of the Administrative Procedure Act and other applicable legal standards.” *Id.* In light of both the overall context of the Secretary's response and his addition of the language found in subsection (5), we do not read this statement as a waiver of the exemption provided under subsection (a)(2) of section 553. Rather, it appears to be a general statement of the law, which is that any rulemaking by the Secretary must be consistent with the provisions of the APA and other provisions of law. In this case, the rule falls within the APA's exemption for internal rulemaking and therefore is not subject to the notice and comment provisions of the APA.

annual issuance of that reservation in the Code of Federal Regulations). Although the Secretary's delegation of authority is now embodied in a valid regulation, the APA does not require the issuance of rules relating to delegations of this sort to be subject to notice and comment.<sup>4</sup>

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<sup>4</sup> At least as a prudential matter, we would suggest that any rule revoking or amending section 101.1 be published in the Federal Register. There is some authority for the proposition that a published regulation, even if it is a delegation that would not ordinarily be required to be published, can only be revoked by a published revocation. *See Nolan*, 44 Fed. Cl. at 58-59. This view is based on 44 U.S.C. § 1510(e) (1994), which provides that publication in the Federal Register and Code of Federal Regulations of codified documents is prima facie evidence that they are in effect on and after the date of publication, as well as the concept that a failure to publish notice of the change of policy could adversely affect members of the public. *Id.* Although we do not believe that failure to publish a revocation here would have an adverse impact on the public, publication of the revocation would promote the notice function of the Federal Register and Code of Federal Regulations, upon which the public relies.

## **Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director**

The President has the authority to remove the Staff Director of the United States Commission on Civil Rights and to appoint an Acting Staff Director.

March 30, 2001

### MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have requested our opinion whether the President has the authority to remove the Staff Director of the United States Commission on Civil Rights (“Commission”) and to appoint an Acting Staff Director. We conclude that the President has the authority to undertake both actions.

The Commission consists of eight members, four of whom are appointed by the President alone and four by Congress. 42 U.S.C. § 1975(b) (1994). The President may remove a commissioner only for cause. *Id.* § 1975(e). The statute establishing the Commission grants the President the authority to appoint the Staff Director, with the concurrence of a majority of the Commissioners. *Id.* § 1975b(a)(1)(B). It withholds from the Commissioners any authority, other than concurrence, with respect to appointment of the Staff Director. It is silent as to removal of the Staff Director and appointment of an Acting Staff Director.<sup>1</sup>

#### I.

A fundamental principle of the general law on removal authority is that, absent a clear indication to the contrary, the power to remove attends the power to appoint. *See, e.g., Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896-97 (1961); *Myers v. United States*, 272 U.S. 52, 110, 119 (1926); *Keim v. United States*, 177 U.S. 290, 293 (1900); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); Memorandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights* at 2 n.2 (Jan. 13, 1994) (“*Acting Staff Director*”). As the Supreme Court has noted, this principle states “a rule of constitutional and statutory construction.” *Myers*, 272 U.S. at 119.

Here, the statute grants the President the authority to appoint the Staff Director, and neither the statute nor its legislative history gives any indication that Congress meant to provide any unusual rules for the Staff Director’s removal. Accordingly,

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<sup>1</sup> The Commission has the authority to appoint other personnel. 42 U.S.C. § 1975b(a)(2).

a straightforward application of the general principle that the power to remove attends the power to appoint yields the conclusion that the President has the power to remove the Staff Director. *See Acting Staff Director* at 2 n.2 (treating as straightforward the proposition that the power to remove attends the power to appoint, and relying in part on the proposition to conclude that the President's appointment of an Acting Staff Director had the effect of validly removing the incumbent Acting Staff Director). That the President's power to appoint a Staff Director is conditioned on the concurrence of a majority of the members of the Commission does not alter this conclusion. In *Myers*, for example, the Court held that the President had the exclusive authority to remove certain postmasters, even though the President had appointed them by and with the advice and consent of the Senate. *See* 272 U.S. at 106.

Our conclusion is supported by the additional practical consideration that, for positions such as the Staff Director, the power to remove must reside somewhere. Unless someone has the power to remove an appointed official, the official might serve indefinitely in his position. Such indefinite service is "a status disfavored under normal understandings of tenure of office in the United States." Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power to Remove the Members of the Commission on Civil Rights* at 5 (June 21, 1983). If, as here, a statute contains no express provision for the removal of the official concerned, the general principle that an appointed official may be removed by the appointing authority helps to protect against the generally disfavored status of indefinite service. *Id.*<sup>2</sup>

## II.

In 1994, we concluded that the Constitution vests the President with the authority to appoint an Acting Staff Director. *See Acting Staff Director*. In reaching that conclusion, we noted that "[t]he Department of Justice has long taken the position that the President possesses authority to make appointments in order to 'keep[] the Government running,'" *id.* at 2 (quoting *Appointment of Interim Officers*, 2 Op. O.L.C. 405, 409-10 (1978)), and that this authority "derives from the President's obligation to 'take Care that the Laws be faithfully executed,'" *id.* (quoting U.S. Const. art. II, § 3). Recognizing that "[t]he President's take care authority to make temporary appointments rests in the twilight area where the President may act so

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<sup>2</sup> We note that Congress has declined to enact bills that would have given the Commission the power to remove the Staff Director. In 1996, for example, the House Committee on the Judiciary reported favorably a bill providing that "the Staff Director may, at any time, be removed from office by a majority vote of the Commissioners." H.R. Rep. No. 104-846, at 14 (1996). It is reasonable to infer that the members of the House Judiciary Committee understood that, in the absence of the amendment, the Commission did not have the power to remove the Staff Director.

long as Congress is silent, but may not act in the face of congressional prohibition,” *id.* at 3, we found that Congress had not divested the President of that authority with regard to the Staff Director.

After we issued the 1994 *Acting Staff Director* opinion, the District Court for the District of Columbia reached a contrary conclusion, holding that the President does not have the authority to appoint an Acting Staff Director. *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C. 1994). That decision was subsequently vacated as moot by the D.C. Circuit. *George v. Ishimaru*, 1994 WL 517746 (D.C. Cir. Aug. 25, 1994) (per curiam). Despite the vacating of this decision, we have studied the district court’s opinion in *George* with care. Respectfully, we disagree with it. The district court stated only that it “reject[ed] the argument that the President has ‘inherent’ appointment authority under the Take Care Clause of Article II of the Constitution to appoint persons to positions like this one, where Congress has unlimited authority to vest the appointment power in whomever it chooses,” and that “[n]o court has ever recognized that the President has such inherent authority.” *George*, 849 F. Supp. at 71-72. To be sure, because the Staff Director is not an “Officer of the United States,” Congress may indeed have broad (although not unlimited) authority to select the means of appointment. Here, however, Congress has not addressed the means of designating an Acting Staff Director. We cannot agree with the district court that the inclusion of the statutory reference to a “Staff Director” means that the statute is not silent as to an Acting Staff Director. *See id.* at 71. Given this silence, the Constitution places in the President the duty, and the corresponding power, to ensure the continued operation of the government. We adhere to the conclusion of our 1994 opinion that the President may appoint an Acting Staff Director.<sup>3</sup>

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<sup>3</sup> We do not believe that the power of the President is any less where his decision to remove the Staff Director has created the vacancy. Otherwise, the continued operation of the government would suffer whenever the responsible exercise of the President’s power called on him to remove this official. Such a circumstance would constitute an undue burden, which should not be inferred, on the President’s power of removal.

## Regulation of an Inmate's Access to the Media

So long as the Bureau of Prisons' decision to regulate an inmate's access to the news media is reasonably related to the legitimate penological interests articulated in the applicable regulations, the Bureau of Prisons may bar face-to-face media interviews or videotaped media interviews with an inmate, or place other reasonable conditions and restrictions on such interviews.

April 13, 2001

### MEMORANDUM OPINION FOR THE COUNSELOR TO THE ATTORNEY GENERAL

You have asked for our view on the extent to which the Attorney General or the warden of a federal prison may regulate an inmate's right to communicate with the news media. This memorandum records, and elaborates on, oral advice given to you on April 11, 2001.

Two sets of regulations speak directly to regulation of an inmate's contact with the media.<sup>1</sup> The broadest of these provisions is 28 C.F.R. § 501.3(a) (2000), which provides that the Attorney General or the Director of the Bureau of Prisons may authorize the warden of a federal prison "to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury." Such procedures may be implemented upon the determination that "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." *Id.* The procedures may include "limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism." *Id.*

In addition, 28 C.F.R. § 540.62(c) (2000) permits the warden of a prison to suspend all media visits during an institutional emergency and for a reasonable time after the emergency, and 28 C.F.R. § 540.63(g)(4) (2000) permits a warden to deny a request for a media interview of an inmate if "[t]he interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or

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<sup>1</sup> Although these regulations specifically address the issue of inmate contact with the news media, we note that wardens of federal prisons also have flexibility, embodied in broader grants of authority, to take action reasonably necessary to protect individuals, and the security, discipline, and good order of the institution. *See, e.g.*, 28 C.F.R. § 501.1 (2000) (institutional emergency permits suspension of the operation of the rules of chapter 28); *id.* § 501.2 (special administrative measures to prevent disclosure of classified information permitted); *id.* § 540.12 (flexibility in correspondence procedures required by size, complexity, and security level of institution, the degree of sophistication of the inmates confined and other variables); *id.* § 540.40 (warden may restrict visiting when necessary to ensure the security and good order of the institution); *id.* § 540.100 (in addition to procedures set forth in subpart, inmate telephone use is subject to those limitations that the warden determines are necessary to ensure the security and good order, including discipline, of the institution or to protect the public).

would probably cause serious unrest or disturb the good order of the institution.” Similarly, a warden is permitted to “[l]imit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution.” *Id.* § 540.63(h)(4).

The Supreme Court established definitively in *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989), that prison regulations affecting prisoner’s First Amendment rights should be analyzed under the reasonableness standard set out in *Turner v. Safley*, 482 U.S. 78, 89 (1987), and such regulations, therefore, will be found valid as long as they are “reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89. In fact, in three separate contexts, the Supreme Court has upheld prison regulations that prevented the media from conducting interviews with inmates. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (upholding denial of media requests for a special inspection of facilities and interview of inmates); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (upholding regulations that limited media selection of particular inmate for interview); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding regulations prohibiting the media from conducting face-to-face interviews with specific inmates).

Moreover, the United States Court of Appeals for the District of Columbia Circuit has held that, to the extent the policy in 28 C.F.R. § 540.62 “may impinge on a prisoner’s first amendment rights, it is nevertheless valid as ‘reasonably related to legitimate penological interests.’” *Kimberlin v. Quinlan*, 6 F.3d 789, 791-92 n.6 (D.C. Cir. 1993) (quoting *Turner*, 482 U.S. at 89). Analogously, in *Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993), the United States Court of Appeals for the Tenth Circuit held that state prison officials were permitted to deny television news personnel access to their prison to conduct a face-to-face interview with the inmate. The prison officials had determined that providing such access would cause a disruption to the orderly operation of the facility. Because there were alternative means for communicating with the media (the inmate was free to communicate through the mail and telephone), the Court held that there was no violation of the inmate’s First Amendment rights.<sup>2</sup>

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<sup>2</sup> Nor does the media itself have any special or enhanced right of access to an inmate. Although the right of the press to gather news and information is protected by the First Amendment, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally,” *id.* at 684. In this regard, the Supreme Court has held that the press has “no constitutional right of access to prisons or their inmates beyond that afforded the general public.” *Pell*, 417 U.S. at 834.

Further, the analysis employed by the courts to determine the validity of regulating an inmate’s access to the media is the same regardless of whether the media is asserting a First Amendment right to have access to the inmate or the inmate is asserting a First Amendment right to have access to the media. Compare *Johnson* (media sought access) with *Kimberlin* (inmate sought access). See also *Thornburgh*, 490 U.S. at 410 n.9 (rejecting any attempt to apply a separate standard for cases implicating the rights of outsiders versus prisoners).

Likewise, when the United States Court of Appeals for the Second Circuit upheld a district court's imposition of conditions on an inmate's sentence that included restrictions on his ability to associate and communicate, the court cited the special administrative measures provision of 28 C.F.R. § 501.3(a) in concluding that these restrictions were reasonably related to a legitimate penological goal. See *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (upholding restrictions based on the fact that goal of preventing inmate from ordering the killings and beatings of additional individuals, within the prison system or outside, is unquestionably a legitimate penological interest); accord *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir.), cert. denied, 531 U.S. 881 (2000) (upholding pretrial restrictions on defendants' communications as being reasonably related to legitimate security concerns).

Therefore, as long as the Bureau of Prisons' decision to regulate an inmate's access to the media is reasonably related to the legitimate penological interests articulated in the regulations, the Bureau of Prisons may bar face-to-face interviews or videotaped interviews with an inmate, or place other reasonable conditions and restrictions on such interviews.<sup>3</sup>

In making the case-by-case determination whether, based on the assertion of a legitimate penological interest, an application of any of these prison regulations impinging on an inmate's constitutional rights is valid, the courts will look to: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest offered as the basis to justify it; (2) whether there are alternative means of exercising rights that remain open to the inmate; (3) whether accommodation of the prisoner's asserted rights would have a ripple effect on fellow inmates or prison staff; and (4) whether there is a ready alternative to the regulation that would fully accommodate the prisoner's rights at minimal cost to the valid penological interest. *Turner*, 482 U.S. at 89-91. Included in this assessment is whether the regulation is "an 'exaggerated response' to prison concerns." *Id.* at 90. Moreover, in the First Amendment context, the Supreme Court also has stated that "[w]e have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.*

In *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974), the Supreme Court explained that:

The "normal activity" to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of

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<sup>3</sup> Even in the context of media access to court proceedings, in which courts have held that the First Amendment protects the rights of the press and the public to observe certain governmental proceedings, see, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trials), the courts have upheld restrictions on videotaping, photographing, televising, or recording such proceedings. E.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) (no right to broadcast trial).

whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security. Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.

The Court has also noted that “prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison.” *Thornburgh*, 490 U.S. at 407. “So long as [a] restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the ‘appropriate rules and regulations’ to which ‘prisoners necessarily are subject,’ and does not abridge any First Amendment freedoms retained by prison inmates.” *Pell*, 417 U.S. at 828 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

Thus, denial of an interview or of the taping or recording of an interview with an inmate, as long as it is based on legitimate prison security concerns rather than on the content of the speech itself, is permissible. To the extent there is legitimate concern about the effect that an inmate’s speech would have on the conduct of others, and the resulting harm that could flow from that effect, 28 C.F.R. § 501.3(a) may be available to assert an even broader restriction on the inmate’s communications with the media. The legitimacy of such a restriction, however, would depend on the strength and clarity of the evidence supporting a determination that there is a “substantial risk” that communications will result in “death or serious bodily injury.” This determination differs from the penological security concerns associated with “the good order of the institution” and “disruption within the institution” contained in 28 C.F.R. § 540.63. Indeed, to the extent that the determination focuses on effects outside the prison, it is not settled that the courts will give *Turner* deference to the application of the regulation.

DANIEL L. KOFFSKY  
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## Obligation to Sell Governors Island

The statutory requirement that the Administrator of General Services sell Governors Island at fair market value continues to apply notwithstanding the President's subsequent reservation of Governors Island as a national monument under the Antiquities Act.

April 24, 2001

### MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL GENERAL SERVICES ADMINISTRATION

This memorandum confirms oral advice provided on January 19, 2001, in connection with President Clinton's designation of Governors Island, New York, as a national monument, *see* Proclamation No. 7402, 66 Fed. Reg. 7855 (2001). We were asked whether section 9101 of Public Law 105-33, 111 Stat. 251, 670 (1997), which requires the Administrator of General Services ("Administrator") to sell at fair market value "no earlier than fiscal year 2002 . . . all rights, title, and interests of the United States in and to the land of, and improvements to, Governors Island, New York," would continue to require the Administrator to sell the property after the President's designation of the property as a national monument under section 2 of the Antiquities Act, 16 U.S.C. § 431 (1994). As we advised, we believe that section 9101 would continue to require the sale.<sup>1</sup>

The Antiquities Act authorizes the President to

declare by public proclamation historic landmarks, historic and pre-historic structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. § 431. The Antiquities Act thus confers upon the President the power to take federal lands out of the public domain by reserving them as national monuments in order to protect the objects of scientific and historic interest located on those lands.

We have previously observed that, "[a]s a general rule, land that has been withdrawn from the public domain is no longer subject to laws governing the

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<sup>1</sup> Our memorandum approving the form and legality of the proclamation designating the property as a national monument indicated that the proclamation was subject to existing law, including section 9101. Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Presidential Proclamation Entitled "Establishment of the Governors Island National Monument"* (Jan. 19, 2001).

disposition or sale of public lands.” *Federal “Non-Reserved” Water Rights*, 6 Op. O.L.C. 328, 340 (1982). For example, a general statute affecting public lands enacted after the President’s reservation of lands for a federal purpose will not be interpreted to apply to the reserved lands. *See, e.g., United States v. Minnesota*, 270 U.S. 181, 206 (1926) (noting the “familiar rule” that “lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent laws”). The general rule, however, is subject to the exception that a particular area of reserved land will be governed by a statute that specifically requires the disposition of that land. *See, e.g., id.* (noting that the “familiar rule” only applies when the subsequent law “do[es] not specially disclose a purpose to include [the reserved lands]”); *Scott v. Carew*, 196 U.S. 100, 109 (1905) (“[W]henever a statute is passed containing a general provision for the disposal of public lands, it is, *unless an intent to the contrary is clearly manifest by its terms*, to be held inapplicable to lands which for some special public purpose have been in accordance with law taken full possession of by and are in the actual occupation of the Government.”) (emphasis added); *Missouri, K&T Ry. Co. v. Roberts*, 152 U.S. 114, 119 (1894) (“[A] tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and . . . no subsequent law or proclamation will be construed to embrace or operate upon it . . . Congress cannot be supposed to grant [reserved lands] in a subsequent law, general in its terms. *Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.*”) (emphasis added) (internal quotation marks omitted). Although here (unlike the situation in the cited cases) the statute specifically requiring sale of the land was enacted before the President’s reservation of the land under a general reservation statute, we believe that the principle of following the more specific statute still applies. A statute that specifically requires the sale or some other disposition of a particular area of land will continue to apply even if the land is later reserved under a general reservation statute.

Section 9101, enacted in 1997, requires the Administrator to “dispose of by sale at fair market value all rights, title, and interests of the United States in and to the land of, and improvements to, Governors Island, New York.” Pub. L. No. 105-33, § 9101(a). The statute further provides that “[b]efore a sale is made under subsection (a) to any other parties, the State of New York and the city of New York shall be given the right of first offer to purchase all or part of Governors Island at fair market value as determined by the Administrator . . .” *Id.* § 9101(b). Because section 9101 shows Congress’s intent to require the Administrator to sell Governors Island, the statute applies, under the principle explained above, even after the President’s reservation of the land under the Antiquities Act on January 20, 2001. If there were any doubt that the specific terms of section 9101 apply regardless of the reservation of the land under the Antiquities Act, the first clause of subsection (a) of section 9101, which requires the Administrator to sell the

property “[n]otwithstanding any other provision of law,” makes it clear that section 9101’s requirements survive the designation of Governors Island as a national monument.

The proclamation designating Governors Island as a national monument explicitly recognizes the Administrator’s continuing obligation to sell the land. The paragraph providing for the withdrawal of federal lands from sale, leasing, or other disposition under the public land laws begins with the proviso that such withdrawal is “[s]ubject to existing law, including Public Law No. 105-33, Title IX, section 9101(a), 111 Stat. 670 (Aug. 5, 1997).” 66 Fed. Reg. at 7856. This proviso tracks what the law already requires—namely, that section 9101, because it specifically mandates the sale of Governors Island, applies despite the President’s reservation of that land as a monument under the Antiquities Act.

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## Emoluments Clause and World Bank

An international organization in which the United States participates, such as the International Bank for Reconstruction and Development, is not a “foreign State” under the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8.

May 24, 2001

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL SMITHSONIAN INSTITUTION

This responds to your request for our opinion whether the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, bars Smithsonian Institution employees from performing special projects under contracts for the International Bank for Reconstruction and Development (“World Bank”). As we have advised orally on several occasions over the past few years, we do not believe that an international organization such as the World Bank in which the United States participates is a “foreign State” under the Clause. *Id.* Therefore, the Emoluments Clause would not forbid this type of arrangement.

#### I.

As we understand the arrangements in question, Smithsonian employees enter into contracts to perform special projects with the World Bank. The World Bank is an international organization of member states, which was created by the Articles of Agreement drawn up at a conference in Bretton Woods, New Hampshire in 1944. The United States joined the World Bank by accepting the Articles of Agreement in the Bretton Woods Agreements Act of 1945, 22 U.S.C. §§ 286-286nn (1994 & Supp. IV 1999). *See also* Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134. The United States has undertaken, with the consent of Congress, a prominent role in the organization’s management and decisionmaking. The United States governor appointed for the International Monetary Fund, another creation of the Bretton Woods Agreement, “shall also serve as a governor of the Bank,” 22 U.S.C. § 286a(a); and the President appoints an executive director for the Bank, *id.* Moreover, by tradition, the World Bank’s President is a national of the United States, which is the World Bank’s largest shareholder. *See* World Bank Group at a Glance, <http://www.worldbank.org> (last visited Mar. 6, 2001).

The Emoluments Clause provides that no person holding an 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.” *Id.* The clause was designed to protect foreign ministers and other officers of the United States from undue influence and corruption by

foreign governments. *See, e.g., 2 The Records of the Federal Convention of 1787* 389 (Max Farrand ed., rev. ed. 1966) (remarks of Mr. Pinkney); 3 *id.* at 327 (remarks of Governor Randolph); *see also Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 15 (1994).

Our Office has concluded that the prohibitions of the Emoluments Clause apply not only to constitutional officers—those officials who must be appointed pursuant to the Appointments Clause because they exercise “significant authority pursuant to the laws of the United States,” *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam)—but also to government employees, “lesser functionaries” who are subordinate to officers, *id.* *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158 (1982) (“*Application of the Emoluments Clause*”) (“Even though the Framers may have had the example of high officials such as ‘foreign Ministers’ in mind when discussing the clause, . . . its policy would appear to be just as important as applied to subordinates. The problem of divided loyalties can arise at any level.”). The Emoluments Clause thus would cover Smithsonian employees.<sup>1</sup>

We have also long found that contractual relationships such as those in question here give rise to “Emoluments” within the meaning of the Emoluments Clause. *See, e.g., Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* at 8 (Oct. 4, 1954) (“[T]he term ‘emolument’ . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.”); *see also Letter for James A. Fitzgerald, Assistant Attorney General, United States Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel* (Mar. 24, 1986) (same). Absent the consent of Congress, the Emoluments Clause would, therefore, bar an employee of the Smithsonian from entering into such a contractual employment relationship with the World Bank if the World Bank is a “foreign State” under the Emoluments Clause.

In recent years, this Office in oral advice has consistently construed the terms “King, Prince, or foreign State” to exclude international and multinational

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<sup>1</sup> This Office on previous occasions has given opinions to the Smithsonian Institution. *See, e.g., Immunity of Smithsonian Institution from State Insurance Laws*, 21 Op. O.L.C. 81 (1997). In doing so, we have observed that “the unique, hybrid nature of the Smithsonian” raises questions about its legal or governmental status. *Id.* at 86 n.7. As we have noted before, the Smithsonian Institution itself, as well as its structure, organization, oversight, and management, are established by federal statute. *Id.* at 81. Both this Office and federal courts have “recognized the Smithsonian’s status as an establishment, agency, or authority of the federal government, at least in certain contexts.” *Id.* at 82. Furthermore, “[t]he Smithsonian receives a substantial portion of its funding from federal appropriations, and a majority of its employees are from the federal civil service.” *Id.* at 81. Given this background, we assume, as you do, that Smithsonian personnel are covered by the Emoluments Clause.

organizations in which the United States participates. However, our few formal written opinions, going back to the 1950s, have not shown the same consistency.

In our first statements on the issue in the early 1950s, we advised that the Emoluments Clause would not prohibit a federal judge from serving on the International Law Commission under the auspices of the United Nations. *See* Memorandum for the Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Membership of Judge Parker on the International Law Commission* (Nov. 27, 1953) (“1953 Rankin Memorandum”); Memorandum for Herzel H.E. Plaine, from D.C. Stephenson, *Re: Article I, Section 9, Clause 8 of the Constitution—Its Meaning* (Nov. 13, 1953) (“1953 Stephenson Memorandum”). At that time, we noted that because international organizations such as the United Nations were unknown when the Constitution was adopted, the framers of the Constitution could not have had in mind service on such organizations when considering the Emoluments Clause. Giving weight to the purposes behind the Clause, we concluded that it would not apply to international organizations such as the United Nations. *See* 1953 Rankin Memorandum at 4-5; 1953 Stephenson Memorandum at 10. Later, although not expressly reversing these earlier opinions, we voiced some doubt about this conclusion, at least with regard to the United Nations, noting that “employment by the United Nations Secretariat does contain elements comparable to accepting an office from a foreign government,” including “duties and responsibilities” owed to the organization comparable to that owed by an officer or employee of a government. *See* Memorandum for the Attorney General, from W. Wilson White, Assistant Attorney General, Office of Legal Counsel, *Re: Appointments to Civil Rights Commission* at 17 (Oct. 15, 1957) (“Accordingly, there is some basis for regarding United Nations employment as coming within the spirit if not the letter of the prohibition of Article I, Section 9, Clause 8 of the Constitution.”); *cf. Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 & n.4 (1987) (suggesting that “concerns expressed by the Framers in the Emoluments Clause would still be applicable” to government employee’s proposed service on international commission even if commission were established by international body, and noting inclusion of “any international or multinational organization” in definition of “foreign government” in Foreign Gifts Act; nevertheless, in case at issue, commission was established and funded by Austrian government).

## II.

The conclusion that the World Bank is not a “foreign State” under the Emoluments Clause follows, first, from the language of the Clause. It would hardly be a natural use of the words to say that the United States is a member of a “foreign

State.” See 22 U.S.C. § 286.<sup>2</sup> The World Bank has neither a defined territory nor a permanent population under its control.

Because international organizations such as the World Bank were unknown when the Constitution was adopted, and because the framers of the Constitution thus did not contemplate service on such organizations when considering the Emoluments Clause, we have in the past looked to the purposes of the Clause in order to determine whether such an international organization is a “foreign State.” On that score, we believe that our first examinations of the question in the early 1950s were correct. See 1953 Rankin Memorandum; 1953 Stephenson Memorandum. Although the interests of the organization and the United States are not identical, the United States has determined that the organization plays an important role in carrying out our foreign policy. The United States accordingly participates in the governance of the organization and undertakes a leadership role in its decisionmaking. Because of the role played by the United States in the World Bank as approved by Congress, employment of government employees by the organization would not directly raise the concerns about divided loyalty that the Emoluments Clause was designed to address.

To be sure, the Foreign Gifts and Decorations Act (“Foreign Gifts Act”), which generally prohibits employees from requesting or otherwise encouraging the tender of a gift or decoration given by a foreign government or from accepting or retaining such a gift of more than minimal value, defines “foreign government” to include international organizations. See 5 U.S.C. § 7342(a)(2)(B) (1994). Although the Foreign Gifts Act only covers gifts and decorations and does not apply to payment for services, see, e.g., *Application of the Emoluments Clause*, 6 O.L.C. at 157 (“It seems clear that this Act only addresses itself to gratuities, rather than compensation for services actually performed . . .”), the Foreign Gifts Act arguably is relevant here if it reflects Congress’s understanding about the scope of the term “foreign State” in the Emoluments Clause. It is far from clear, however, that the definition of “foreign government” was intended to reflect Congress’s understanding of the *constitutional* definition of “foreign State.” The Foreign Gifts Act was originally enacted in 1966; international organizations were added to the definition of “foreign government” over a decade later in the 1977 amendments, see Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, 91 Stat. 844, 863 (1977). The legislative history contains no indication that the addition was intended to correct a perceived gap between the existing

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<sup>2</sup> Furthermore, although not dispositive, the definition of “state” under international law is instructive:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) of Foreign Relations Law of the United States § 201 (1987).

coverage of the Foreign Gifts Act and the scope of the Emoluments Clause. *See, e.g., Report on Foreign Relations Authorization Act, Fiscal Year 1978*, S. Rep. No. 95-194 (1977), reprinted in 1977 U.S.C.C.A.N. 1625; *Report on Foreign Relations Authorization Act, Fiscal Year 1978*, H.R. Rep. No. 95-537, at 40 (1977) (Conf. Rep.), reprinted in 1977 U.S.C.C.A.N. 1670. In the absence of any evidence that constitutional concerns motivated this change, it seems likely that the expansion of the scope of the Foreign Gifts Act to reach international organizations was motivated by policy concerns as opposed to constitutional ones.<sup>3</sup>

We conclude that the World Bank is not a “foreign State” for purposes of the Emoluments Clause. The Clause therefore would not prohibit a Smithsonian employee from performing a special project under contract for the World Bank.

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*Acting Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>3</sup> At any rate, even if Congress had interpreted the constitutional phrase, we would not view that construction as necessarily controlling.

## **Authority of State Officials to Share Motor Vehicle Record Information with the Department of Defense or Its Contractors**

The Drivers' Privacy Protection Act permits state Department of Motor Vehicles offices to release covered information in motor vehicle records to both the Department of Defense and private entities acting on DoD's behalf, provided that the records are used for a statutorily approved purpose of DoD, such as military recruitment.

May 24, 2001

### MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF DEFENSE

This memorandum responds to your request for our opinion whether the Drivers' Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725 (1994 & Supp. V 1999), precludes state officials from providing certain information related to motor vehicle records to the Department of Defense ("DoD") or its contractors in conjunction with military recruiting efforts.

According to your memorandum, the Joint Recruiting Advertising Program ("JRAP") in the DoD conducts military recruiting. *See* Letter for Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, from Douglas A. Dworkin, General Counsel, Department of Defense at 1 (Nov. 6, 2000). To facilitate this effort, JRAP provides lists of names and contact information of prospective recruits to the military services which in turn use these lists as the basis for direct mail advertising in support of military recruitment. *Id.* Pursuant to contract, a private organization, Bates Advertising USA, Inc., provides the lists to JRAP. *Id.* Bates Advertising prepares these lists based on information contained in lists it purchases from another private organization, American Students Lists ("ASL"), which acquires its information from a variety of sources, including information from state Department of Motor Vehicles ("DMV") offices. *Id.* Recently, some state DMV offices have refused to make this information available to ASL because of concern that the DPPA "prohibits them from selling or giving personal information to ASL and JRAP."<sup>1</sup> *Id.*

The DPPA provides generally as follows:

Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or

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<sup>1</sup> JRAP sometimes purchases information from those state DMV offices that have not provided the information to ASL. *Id.*

entity personal information about any individual obtained by the department in connection with a motor vehicle record.

18 U.S.C. § 2721(a).<sup>2</sup> One of the exceptions contained in subsection (b) provides that the covered personal information may be disclosed “[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.” *Id.* § 2721(b)(1).

Because military recruitment is a function of the DoD, a government agency, the plain language of this statutory exception—sanctioning the release of covered information to government agencies carrying out agency functions—permits state officials to release such information to the DoD for military recruiting purposes. The statutory exception by its terms also permits the release of protected information to private entities acting on the behalf of government agencies in carrying out government agency functions. Thus, the DPPA permits State DMV offices to release protected information to both the DoD and private entities acting on the DoD’s behalf, as long as the requesters will use the covered information for a permissible purpose such as military recruitment.<sup>3</sup> The DPPA further provides that “[a]n authorized recipient of personal information . . . may resell or redisclose the information only for a use permitted” under the statute. *See* 18 U.S.C. § 2721(c). Thus, once the DoD and the private entities receive such information, both entities must be careful to use the information only for a statutorily approved purpose. *See id.* § 2721(b)(1)-(14) (setting forth permissible uses of information).

SHELDON BRADSHAW  
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*Office of Legal Counsel*

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<sup>2</sup> Persons who knowingly violate any provision of the DPPA are subject to criminal fines, *see* 18 U.S.C. § 2723(a), and a state DMV that has “a policy or practice of substantial noncompliance” is subject to a civil penalty by the Attorney General, *see id.* § 2723(b).

<sup>3</sup> Whether a particular private entity is in fact acting on the DoD’s behalf under the terms of this statute would require an analysis of the application of criminal and agency law to the set of facts in question, an inquiry which is beyond the scope of this opinion.

## **Applicability of Post-Employment Restrictions in 18 U.S.C. § 207 to a Former Government Official Representing a Former President or Vice President in Connection with the Presidential Records Act**

Title 18, section 207, U.S. Code, would not prohibit a former government official from representing a former President or former Vice President in connection with his role under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994).

June 20, 2001

### **MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT**

You have requested our opinion whether 18 U.S.C. § 207 (1994 & Supp. II 1996) would prohibit a former government official from representing a former President in connection with his role under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994) (“PRA”), and whether it would prohibit such a person from representing a former Vice President in a similar capacity. We conclude that 18 U.S.C. § 207 would not prohibit such representation.<sup>1</sup>

#### **I.**

Title 18, section 207 imposes restrictions on the ability of former federal employees to represent third parties on certain matters before certain federal agencies and other entities. Specifically, 18 U.S.C. § 207(a)(1) prohibits

[a]ny person who [was] an officer or employee (including any special Government employee) of the executive branch of the United States . . . [from] knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United

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<sup>1</sup> On January 19, 2001, Counsel to the President Beth Nolan asked our opinion on this same question, limited to the representation of a former President. At that time, we orally advised Ms. Nolan that if the individual representing the former President were employed under the Presidential Transition Act, 3 U.S.C. § 102 note (1994) (“PTA”), and did not receive compensation for the representation from any source other than the transition, he or she would not be barred by 18 U.S.C. § 207 from providing such representation during the six months covered by the PTA (i.e., six months following the change in presidential administrations). That advice was based upon a 1988 opinion of this Office. *See* Letter for Hon. Frank Q. Nebeker, Director, Office of Government Ethics, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Nov. 18, 1988). You have now requested our opinion whether 18 U.S.C. § 207 permits a former government official to represent a former President in connection with his advisory role under the PRA even after the six-month period covered by the PTA. You have also asked us to address the same question with regard to representation of a former Vice President.

States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) in which the person participated personally and substantially as such officer or employee, and
- (C) which involved a specific party or specific parties at the time of such participation.

Under 18 U.S.C. § 207(c), certain senior personnel face an additional prohibition. Specifically, a person falling within categories set out in section 207(c)(2) may not,

within 1 year after the termination of his or her service or employment . . . knowingly make[], with the intent to influence, any communication or appearance before any officer or employee of the department or agency in which [the] person served . . . , on behalf or any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency.<sup>2</sup>

Section 207 also specifies an exception to its various prohibitions that is particularly relevant here: It provides that “[t]he restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States.” *Id.* § 207(j)(1).

Under the PRA, the Archivist of the United States is directed to restrict public access to prior presidential administrations’ records that meet certain criteria defined by the statute. *See* 44 U.S.C. § 2204(a)-(b)(1). The PRA further provides that “[d]uring the period of restricted access . . . the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted

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<sup>2</sup> Section 207(d) may also be relevant. That section establishes further restrictions on the post-employment activities of certain “very senior personnel” of the Executive Branch and independent agencies. Specifically, it prohibits a person (defined in section 207(d)(1)(A)-(C)), within one year following the termination of his or her service, from communicating on behalf of any other person (except the United States) with any officer or employee of the agency or department where the covered person previously served in the year before his or her service terminated, and with any person appointed to an executive position listed in 5 U.S.C. §§ 5312, 5313, 5314, 5315, or 5316 (Supp. V 1999). Those subject to section 207(d) include persons appointed by the President under 3 U.S.C. § 105(a)(2)(A) (1994) or by the Vice President under 3 U.S.C. § 106(a)(1)(B).

shall be made by the Archivist, in his discretion, after consultation with the former President.” *Id.* § 2204(b)(3).<sup>3</sup> In the case of Vice-Presidential records, the PRA provides that they “shall be subject to the provisions of [the PRA] in the same manner as Presidential records,” and that “[t]he duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter with respect to Presidential records.” *Id.* § 2207.

Regulations implementing the PRA anticipate that former Presidents may designate representatives in matters relating to their consultative role under the PRA. *See* 36 C.F.R. § 1270.46(a) (2001) (“The Archivist or his designee shall notify a former President or his designated representative(s) before any Presidential records of his Administration are disclosed.”); *see also* Exec. Order No. 12667 (Jan. 18, 1989) (providing that the Archivist shall notify a former President “or his designated representative” of the Archivist’s decision whether to honor the former President’s assertion of executive privilege).<sup>4</sup> During the Clinton Administration, the White House Counsel’s Office expressed the view that a former President would require legal advice in order to consult effectively with the Archivist as contemplated by the PRA, and that an attorney advising a former President on such matters would need to communicate on the former President’s behalf not just with the Archivist, but with the current White House and possibly other federal agencies as well. The question here is whether, under section 207’s post-employment restrictions, an attorney could engage in such communications on the former President’s behalf if the attorney had served in the White House Counsel’s Office or elsewhere in the federal government during the former President’s administration. The same question applies to representation of a former Vice President in connection with the PRA. The National Archives and Records Administration (“NARA”) states that although the designated representatives of former Presidents Reagan and Bush are former officials from their respective administrations, “concern about this issue was simply never contemplated by NARA, OGE, DOJ, or any incumbent or former President or Vice President or designated representative prior to the end of the Clinton Administration.” *See* Letter for Robert W. Cobb, Associate Counsel to the President, from Gary M. Stern, General Counsel, National Archives and Records Administration at 1 (May 3, 2001) (“Stern Letter”).

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<sup>3</sup> The PRA also specifies that none of its provisions is to be construed to “confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.” 44 U.S.C. § 2204(c)(2).

<sup>4</sup> Similarly, the PRA itself recognizes that former Presidents may, in certain limited circumstances, be represented by third parties for purposes of the PRA. Specifically, the PRA provides that, “[u]pon the death or disability of a . . . former President, any discretion or authority the . . . former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the . . . former President in a written notice to the Archivist.” 44 U.S.C. § 2204(d).

## II.

The key question is whether an individual who communicates with federal agencies on behalf of a former President or Vice President in these circumstances is, within the meaning of section 207, acting “on behalf of any other person (except the United States or the District of Columbia).”<sup>5</sup> 18 U.S.C. § 207(a); *see id.* § 207(c). If so, section 207’s prohibitions apply. If, however, such an individual is “carrying out official duties on behalf of the United States,” *id.* § 207(j)(1), or is otherwise not acting “on behalf of any other person (except the United States . . .),” section 207’s prohibitions do not apply. For the reasons discussed below, we conclude that section 207’s prohibitions do not apply to this sort of representation.

This Office has previously concluded that in using the phrase “on behalf of” in section 207, “Congress intended . . . to reach only communications made as a representative of another, not communications that merely support another or another’s position.” Memorandum for Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 207(a) to Pardon Recommendation Made by Former Prosecutor* at 3 (Oct. 17, 1990) (“Luttig Memorandum”). Typically, the hallmark of such a relationship is “at least some degree of control by the principal over the agent who acts on his or her behalf.” *Id.* at 6; *see* Restatement (Second) of Agency § 1(1) (1958). An attorney representing a former President in connection with the President’s consultative role under the PRA would be acting “on behalf of” the former President as defined in section 207. *See Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168, 172 (D.C.

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<sup>5</sup> In at least three circumstances, we could conclude that at least some of section 207 would not apply, without reaching the “on behalf of” issue. None of these circumstances, however, allows us to avoid the “on behalf of” issue here. First, we assume that the attorney representing the former President or Vice President would be a former employee of the White House or Vice President’s Office, respectively, and that the kind of communications being contemplated here would include communications with either the White House or Vice President’s Office. If this were not the case, then section 207(c) would not apply, since it covers only appearances before and communications with the federal agency in which the person was previously employed. Section 207(a) would apply, however, since it covers appearances before and communications with any federal agency or department. As to some former officials, moreover, section 207(d) would apply if the communications at issue were with either the White House or any official appointed to an Executive Branch position listed in 5 U.S.C. § 5312, 5313, 5314, 5315, or 5316.

Second, we assume that at least some of the contemplated communications would take place within one year of the attorney’s departure from the government. If this were not the case, sections 207(c) and (d) would again not apply, this time because they each establish only a one-year ban on communications. Section 207(a) would still apply, however, since it imposes a lifetime ban.

Third, we assume that the contemplated communications might involve “matter[s] in which [the attorney concerned] participated personally and substantially” while in the government. 18 U.S.C. § 207(a)(1)(B). If this were not the case, section 207(a) would not apply. Sections 207(c) and 207(d) would still apply, however, since their prohibitions are not so confined.

Cir. 1997) (describing attorneys employed by former Presidents in connection with their consultative roles under the PRA as having “served solely in a representative capacity”). The same is true for an attorney representing a former Vice President in such a capacity. Whether the attorney is thereby acting on behalf of the United States or on behalf of “any other person” turns on whether, in the unique circumstances of the PRA, a former President or Vice President is viewed as retaining at least some aspects of his official role rather than as occupying solely the position of a private person.

As this Office has previously explained, Congress’s “only concern” in passing and amending section 207 “was with preventing government employees from so-called ‘revolving door’ representation of *private parties* before the government.” Luttig Memorandum at 4 (citing S. Rep. No. 95-170, at 32 (1977)) (emphasis added). We have found no evidence that Congress thought of former Presidents fulfilling their role under the PRA as “private parties.” On the contrary, “the former President in this context can hardly be viewed as an ordinary private citizen.” *Public Citizen*, 111 F.3d at 170. Rather, the PRA assigns former Presidents a special, quasi-official role because, in certain circumstances, they may be uniquely situated to address the interests of the United States. Typically, those circumstances involve questions of executive privilege. *See id.* (In the context of the PRA, a former President “retains aspects of his former role—most importantly . . . the authority to assert the executive privilege regarding Presidential communications.”). When the Archivist is called upon to determine whether certain presidential records created during a former President’s administration ought to be released, considerations of executive privilege may inform that determination. And although the privilege belongs to the Presidency as an institution and not to any individual President, the person who served as President at the time the documents in question were created is often particularly well situated to determine whether the documents are subject to a claim of executive privilege and, if so, to recommend that the privilege be asserted and the documents withheld from disclosure. *Cf. id.* at 171 (“The former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration.”). In providing advice to the Archivist on such matters, a former President helps to support the institution of the Presidency and the constitutionally-based executive privilege.

The Supreme Court reached a similar conclusion in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In that case, the Court addressed the issue whether a former President may assert executive (sometimes styled “Presidential”) privilege as to certain documents relating to his term as President and held by the current administration. Because the current administration did not support the former President’s assertion of privilege, the Court recognized that the case involved an “assertion of a privilege against the very Executive Branch in whose name the privilege is invoked.” *Id.* at 447-48. The Court acknowledged that, to the

extent effective communication between a sitting President and his advisers might be chilled by the disclosure of documents relating to a prior administration, an incumbent may decide to assert a privilege as to “confidences of a predecessor when he believes that the effect [of disclosure] may be to discourage candid presentation of views by his contemporary advisers.” *Id.* at 448. Nevertheless, a sitting President is not the only one competent to assert the privilege:

Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President’s tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore, the privilege survives the individual President’s tenure.

*Id.* at 448-49 (quoting, and adopting, Brief for the Solicitor General on Behalf of Federal Appellees). Thus, because protection of the executive privilege is “for the benefit of the Republic,” and because a former President is in a special position to determine the propriety of asserting that privilege regarding records produced during his tenure, former Presidents are competent to assert the privilege as to such records. Indeed, in asserting this privilege, a former President speaks not only for “the benefit of the Republic” but also in the “name” of the Executive Branch. *Id.* at 448.<sup>6</sup> Accordingly, an individual who represents a former President in this context is not engaged in the kind of representation of a purely private entity at which section 207’s prohibitions are aimed.

Moreover, prohibiting a former government official from representing a former President in connection with his consultative role under the PRA would not further the underlying policy aims of section 207. The problems of undue influence and divided loyalties that characterize most representational relationships prohibited by section 207 are absent in this context. Here, Congress has expressly defined a consultative role for former Presidents. In faithfully advising and representing the

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<sup>6</sup> That a former President and a current President may differ as to the propriety of disclosing certain presidential documents from the former President’s administration does not alter this conclusion. In *Nixon* itself, President Nixon’s attempted assertion of executive privilege was not supported by either President Ford or President Carter. *See* 433 U.S. at 449. But that did not prevent the Court from concluding that President Nixon was competent to assert the privilege as to certain documents from his time in office. Moreover, it is not uncommon for different agencies or departments of the Executive Branch to take different public positions on certain legal questions, each one claiming to speak on behalf of the United States. *See generally* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 *Wm. & Mary L. Rev.* 893 (1991).

former President as he fulfills that role, an attorney would simply be helping the President to effectuate a special role expressly approved by Congress.

Our conclusion accords with practice. As NARA notes, former Presidents Reagan and Bush have both been represented by former government officials in connection with their consultative roles under the PRA. Stern Letter at 1. Although it appears that the representation in both cases was undertaken without any explicit consideration of section 207's possible application, *see id.*, this practice lends some support to our conclusion that section 207 simply does not apply to representation provided to a past President in connection with his role under the PRA.

We reach the same conclusion with respect to the representation of former Vice Presidents. In directing that "Vice-Presidential records shall be subject to the provisions of [the PRA] in the same manner as Presidential records," 44 U.S.C. § 2207, the PRA establishes a consultative role for former Vice Presidents so that they, like former Presidents, may identify the interests of the United States at stake in the record disclosure process. And while it is true that only a President or former President is competent to assert executive privilege, a former Vice President may make recommendations to incumbent or former Presidents whether to assert the privilege in particular cases. We see no basis in the text or legislative history of the PRA for concluding that an individual representing a former Vice President in connection with the PRA should be subject to the strictures of section 207 any more than if he were representing a former President.

Finally, we note that to the extent it remains unclear whether section 207's prohibitions apply in this context, the rule of lenity requires that any remaining ambiguity in the statute be construed so as to narrow, not broaden, the statute's prohibitions. That rule "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see Liparota v. United States*, 471 U.S. 419, 427 (1985) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting *Rewis v. United States*, 401 U.S. 807, 812 (1971)); Luttig Memorandum at 5 (invoking the rule of lenity as one justification for a narrow reading of "on behalf of" as used in section 207).

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## **Indirect Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001**

The Establishment Clause of the First Amendment does not necessitate that the charitable choice provisions of H.R. 7, the Community Solutions Act, require faith-based organizations receiving indirect payments of federal money to segregate such funds into an account separate from the organizations' general operating accounts.

June 22, 2001

### MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether the charitable choice provisions set forth in section 1994A of H.R. 7, the Community Solutions Act (“the Act”), must, consistent with the Establishment Clause, require faith-based organizations (“FBOs”) receiving indirect payments of federal money to segregate such funds into an account separate from the FBO’s general operating account. We conclude that the Establishment Clause does not require such segregation to preserve the Act’s constitutionality.

The Supreme Court distinguishes, as a threshold matter, between direct and indirect aid.<sup>1</sup> For any given program, charitable choice allows, at the government’s option, for direct or indirect forms of funding, or both.<sup>2</sup> Indirect aid is where the ultimate beneficiary is given a coupon or voucher, or some other means of payment, such that he or she has the power to select from among qualified providers at which the coupon or voucher may be “redeemed” and the services rendered. In a series of cases, and in more recent commentary contrasting indirect aid with direct aid cases, the Supreme Court has consistently upheld the constitutionality of mechanisms providing for indirect means of aid distributed without regard to religion.<sup>3</sup>

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<sup>1</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 841-44 (2000) (O’Connor, J., concurring in the judgment).

<sup>2</sup> Charitable choice typically provides for both direct and indirect forms of aid to FBOs. See, e.g., 42 U.S.C. § 604a(a)(1) (Supp. II 1996). This is most apparent in H.R. 7 by comparing the subparts of section 1994A(g).

<sup>3</sup> See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (providing special education services to Catholic high school student not prohibited by Establishment Clause); *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student who elected to use the grant to obtain training as a youth pastor); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state income tax deduction for parents paying school tuition at religious schools); see also *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 878-79 (1995) (Souter, J., dissenting) (distinguishing cases upholding indirect funding to individuals, admitted to be the law of the Court, from direct funding to religious organizations).

As Justice O'Connor recently noted in *Mitchell v. Helms*, the Supreme Court has approved the indirect payment of federal money to religious organizations for services so long as “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” *Mitchell v. Helms*, 530 U.S. at 841 (O'Connor, J., concurring in judgment) (ellipses in original; citation omitted). In the quoted passage, Justice O'Connor explained why the Court declined to find a violation of the Establishment Clause in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (holding plaintiff could use vocational training grant to become a minister), and *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state tax deduction for educational expenses such as parochial school tuition). Indeed, because indirect aid to an FBO is “akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution,” *Mitchell v. Helms*, 530 U.S. at 841, such aid is permissible under the Establishment Clause and need not be segregated into a separate account.<sup>4</sup>

SHELDON BRADSHAW  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>4</sup> The Child Care and Development Block Grant Program of 1990, *see* 42 U.S.C. §§ 9858-9858q (1994), for example, has been providing low-income parents indirect aid for child care via “certificates” redeemable at, *inter alia*, churches and other FBOs. The Act has never been so much as even challenged in the courts as unconstitutional.

## **Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001**

Congress may, consistent with the Establishment Clause, extend the religious exemptions under Title VII of the Civil Rights Act of 1964 to faith-based organizations receiving direct payments of federal money under the charitable choice provisions set forth in section 1994A of H.R. 7, the Community Solutions Act of 2001.

The fact that a faith-based organization is organized as a tax-exempt, nonprofit entity under section 501(c)(3) of the Internal Revenue Code does not affect the organization's ability to invoke the religious exemptions under sections 702(a) and 703(e)(2) of the Civil Rights Act of 1964.

June 25, 2001

### MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether Congress may, consistent with the Establishment Clause, U.S. Const. amend. I, extend the religious exemptions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1, 2000e-2(e)(2) (1994), to faith-based organizations ("FBOs") receiving direct payments of federal money under the charitable choice provisions set forth in section 1994A of H.R. 7, the Community Solutions Act of 2001 ("the Act"). If so, you have also asked whether an FBO organized as a tax-exempt, nonprofit entity under section 501(c)(3) of the Internal Revenue Code is entitled to the Title VII exemption. We conclude, for the reasons set forth more fully below, that an FBO receiving direct federal aid may make employment decisions on the basis of religion without running afoul of the Establishment Clause, and that an FBO organized under section 501(c)(3) may invoke the Title VII exemption and employ staff on a religious basis.

#### I.

Section 201 of H.R. 7 would create a new 42 U.S.C. § 1994A. Proposed section 1994A(e)(2) would provide that "[t]he exemption of a religious organization provided under section 702 or 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-1, 2000e-2(e)(2)) regarding employment practices shall not be affected by the religious organization's provision of assistance under, or receipt of funds from, a program described in subsection (c)(4)." It is our understanding that this provision is intended not to alter or amend any provision of Title VII of the Civil Rights Act of 1964, but, instead, simply to specify and to emphasize that, if an organization is otherwise entitled to a religious exemption provided in section 702 or 703 of Title VII, that organization's receipt of funds pursuant to one of the designated programs will not affect the organization's eligibility for the Title VII

exemption. In this respect, the provision is similar to provisions included in at least three other recent statutes.<sup>1</sup> You have asked us to consider the constitutionality of the Title VII religious exemptions as applied to qualifying nonprofit employers in general, and, more specifically, as applied to the employment decisions of nonprofit religious organizations that would receive government funding under one of the specified programs.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), generally prohibits employers from engaging in employment discrimination on the basis of an individual's race, color, religion, sex, or national origin.<sup>2</sup> One of several exemptions to Title VII's prohibitions is found in section 702(a), 42 U.S.C. § 2000e-1(a), which provides as follows:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

As first enacted in 1964, the section 702 exemption for religious discrimination extended only to persons employed to perform work "connected with the carrying on by such [religious] corporation, association, or society of its religious activities." Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964) (emphasis added). In 1972,

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<sup>1</sup> See, e.g., 42 U.S.C. § 604a(f) (Supp. II 1996) ("A religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section."); 42 U.S.C. § 9920(b)(3) (Supp. IV 1998) ("A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)."); 42 U.S.C.A. § 290kk-1(e) (2001) ("A religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program.").

<sup>2</sup> That section provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, *religion*, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's* race, color, *religion*, sex, or national origin.

*Id.* (emphasis added). In addition, section 704 of Title VII, 42 U.S.C. § 2000e-3, prohibits certain forms of retaliation against employees who raise claims or questions concerning alleged Title VII violations.

Congress substantially broadened section 702 by deleting the word “religious,” which had modified “activities,” so that the exemption applies to persons employed to perform work “connected with the carrying on by such [religious] corporation, association, or society of its activities.” Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972).<sup>3</sup> Accordingly, Title VII does not prohibit “a religious corporation, association, educational institution, or society” from discriminating in favor of employees “of a particular religion.”<sup>4</sup> A similar exemption is found in section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2), which provides that Title VII does not prohibit an educational institution from hiring employees “of a particular religion” if that institution is wholly or partly supported “by a particular religion or by a particular religious corporation, association, or society.”<sup>5</sup>

The section 702(a) and 703(e)(2) exemptions create express rights for certain religious employers,<sup>6</sup> permitting them to avoid Title VII liability for conduct (employment discrimination on the basis of an individual’s religion) that all other employers must forego. In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, the Supreme Court sustained the constitutionality of the religious exemption in section 702(a) as applied to “secular” employment positions of qualifying nonprofit religious corporations, reasoning that the exemption as so applied was “rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” 483 U.S. 327, 339 (1987). The plaintiffs in *Amos* argued that, as applied to employees who were

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<sup>3</sup> That amendment also added “religious . . . educational institutions” to the list of exempt religious organizations in section 702, while deleting a broader, separate “educational institution” exemption that originally had appeared in section 702 as enacted in 1964. *See id.*

<sup>4</sup> By its terms, section 702(a) applies only “with respect to the employment of individuals of a particular religion.” In other words, that exemption “merely indicates that [qualifying] institutions may choose to employ members of their own religion without fear of being charged with religious discrimination.” *Boyd v. Harding Academy of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996). Furthermore, the legislative history manifests congressional intent that section 702(a) would not exempt qualifying organizations from other forms of discrimination that Title VII proscribes, such as discrimination on the basis of race and sex.

<sup>5</sup> When Congress enacted Title VII, it included this additional exemption because it understood that not all such educational institutions would be able to take advantage of the “religious corporation, association or society” exemption then found in section 702 (or of the additional “educational institution” exemption that initially was included in section 702). *See EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988) (discussing legislative history).

<sup>6</sup> An employer is eligible for the section 702(a) exemption if either (1) the employer is a church, or an entity owned, controlled or operated by a church, *see, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.3 (1987), or (2) the employer’s purpose and character are “primarily religious,” based on an examination of all significant religious and secular characteristics of the organization, *see, e.g., Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993); *Townley Eng’g & Mfg. Co.*, 859 F.2d at 618.

involved exclusively in their employer's secular (rather than religious) activities, the Title VII exemption did not relieve any burden on the employer's religious exercise, and thus could not be viewed as a permissible religious accommodation. The Court did not take issue with plaintiffs' contention that confining such employment positions to coreligionists would not directly assist the organizations in fulfilling their religious missions. The Court explained, however, that Congress's 1972 extension of the exemption to all of a qualifying employer's employees did, indeed, alleviate a "significant burden" on religious exercise—in that case, the burden of requiring an organization, "on pain of substantial liability, to predict *which* of its activities a secular court will consider religious." *Id.* at 336 (emphasis added). The Court further explained why this burden of "prediction" was "significant": "The line [between the organization's secular and religious activities] is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.* (footnote omitted). Moreover, the broader exemption alleviated serious entanglement concerns by "avoid[ing] the kind of intrusive inquiry into religious belief" by the government that would be necessary if the exemption were limited to an organization's "religious" activities. *Id.* at 339.<sup>7</sup>

The decision in *Amos* provides the framework for evaluating whether application of section 702(a) to employees of a government-funded program would be a permissible accommodation. We believe that FBOs receiving direct aid can demonstrate that Title VII's prohibition on religious discrimination would impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.

Many religious organizations and associations engage in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular—in the sense that it does not include religious teaching, proselytizing, prayer or ritual—the religious organization's performance of such functions is likely to be "infused with a religious purpose." *Amos*, 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities "often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster." *Id.* at 344 (footnote omitted). In other words, the provision of "secular" social services and charitable works that do not involve "explicitly religious content" and are not

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<sup>7</sup> Although there are no appellate decisions directly on point, the reasoning of *Amos* explains why the section 703(e)(2) exemption, too, is constitutional as applied to qualifying nonprofit educational institutions that are wholly or partly supported "by a particular religion or by a particular religious corporation, association, or society."

“designed to inculcate the views of a particular religious faith,” *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), nevertheless may well be “religiously inspired,” *id.*, and play an important part in the “furtherance of an organization’s religious mission.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

A religious organization may have good reason for preferring that individuals similarly committed to its religiously motivated mission operate such secular programs, for such collective activity can be “a means by which a religious community defines itself.” *Id.* Indeed, such collective activity not only can advance the organization’s own religious objectives, but also can further the religious mission of the individuals who constitute the religious community: “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” *Id.* Accordingly, the selection of coreligionists in particular social-service programs will ordinarily advance a religious organization’s religious mission, facilitate the religiously motivated calling and conduct of the individuals who are the constituents of that organization, and fortify the organization’s religious tradition. Where an organization makes such a showing, the Title VII prohibition on religious discrimination would impose “significant governmental interference” with the ability of that organization “to define and carry out [its] religious mission[],” *Amos*, 483 U.S. at 335, even as applied to employees who are engaged in work that is secular in content. Where that is the case, the section 702(a) exemption would be a permissible religious accommodation that “alleviat[es] special burdens,” *Board of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994).

In our opinion, this rationale provides a persuasive basis for the constitutionality of the Title VII exemptions as applied to employees of FBOs in programs that are direct recipients of government funding.<sup>8</sup>

## II.

You have also asked whether an FBO organized as a tax-exempt, nonprofit entity under section 501(c)(3) of the Internal Revenue Code is entitled to the Title VII exemption. So long as a religious organization otherwise satisfies the requirements of the section 702(a) or the section 703(e)(2) Title VII exemption, the mere

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<sup>8</sup> We note, further, that the same constitutional question is already present whenever direct government funds are used to employ persons subject to the Title VII exemptions. The provision in proposed section 1994A(e)(2) that “[t]he exemption of a religious organization provided under section 702 or 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1, 2000e-2(e)(2)) regarding employment practices shall not be affected by the religious organization’s provision of assistance under, or receipt of funds from, a program described in subsection (c)(4)” does not raise any constitutional questions that are not already present when the Title VII exemptions are applied to employees in such a program.

fact that the entity is a tax-exempt, nonprofit entity under section 501(c)(3) of the Internal Revenue Code should not affect the organization's ability to invoke that exemption. *See, e.g., Amos*, 483 U.S. at 330 n.3 (noting that appellees did not contest that corporations organized under state law to perform various activities on behalf of the unincorporated Church of Jesus Christ of Latter-Day Saints, which were tax-exempt, nonprofit religious entities under section 501(c)(3), were covered religious organizations for purposes of section 702(a)).

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# Whether Physician-Assisted Suicide Serves a “Legitimate Medical Purpose” Under DEA Regulations

A physician’s assisting in a patient’s suicide, even in a manner permitted by state law, is not a “legitimate medical purpose” within the meaning of a Drug Enforcement Agency regulation, and accordingly dispensing controlled substances for this purpose violates the Controlled Substances Act, which the DEA regulation implements.

June 27, 2001

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

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You have asked for our opinion whether a physician who assists in a patient’s suicide by prescribing a controlled substance has a “legitimate medical purpose” within the meaning of a regulation of the Drug Enforcement Administration (“DEA”), 21 C.F.R. § 1306.04(a) (2000),<sup>1</sup> if the physician is immune from liability

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<sup>1</sup> The DEA regulation was promulgated pursuant to a delegation of the Attorney General’s broad authorities under the Controlled Substances Act, 21 U.S.C. §§ 801-971 (1994 & Supp. II 1996) (the CSA or Act), to “promulgate rules and regulations . . . relating to the registration and control of the manufacture, distribution and dispensing of controlled substances and to the registration and control of regulated persons and of regulated transactions,” 21 U.S.C. § 821, and to “promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this [title].” *Id.* § 871(b). *See also id.* § 871(a) (authority of Attorney General to delegate CSA functions); 28 C.F.R. § 0.100 (2000) (delegation to DEA); *Touby v. United*

under a state law such as the Oregon “Death with Dignity Act” for assisting in a suicide in such a manner.<sup>2</sup> In our view, assisting in suicide, even in a manner permitted by state law, is not a “legitimate medical purpose” under the DEA regulation, and accordingly dispensing controlled substances for this purpose violates the Controlled Substances Act, which the DEA regulation implements.\*

## I. Background

The Oregon “Death with Dignity Act,” which legalized physician-assisted suicide under certain circumstances, was originally approved by Oregon voters on November 8, 1994, and went into effect on October 27, 1997.<sup>3</sup> Prior to the effective date of the Oregon law, Representative Henry J. Hyde, Chairman of the House Judiciary Committee, and Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, wrote to the Administrator of the DEA, Thomas A. Constantine, requesting a determination whether the CSA prohibits the use of controlled substances for the purpose of assisting in a suicide.<sup>4</sup>

Administrator Constantine replied on November 5, 1997, concluding “that delivering, dispensing or prescribing a controlled substance with the intent of assisting a suicide would not be under any current definition a ‘legitimate medical purpose’” and thus would violate the CSA.<sup>5</sup>

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*States*, 500 U.S. 160, 169 (1991) (upholding Attorney General’s authority to delegate CSA functions to DEA).

<sup>2</sup> The “Death with Dignity Act” is codified at 3 Oregon Revised Statutes (O.R.S.) §§ 127.800-127.995 (1999).

\* Editor’s Note: Relying upon the analysis set forth in this memorandum opinion, the Attorney General subsequently promulgated an interpretive rule, which provided that “assisting suicide is not a ‘legitimate medical purpose’ within the meaning of 21 C.F.R. § 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act.” 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001). In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court held that the Attorney General was not statutorily authorized to issue the interpretive rule. *Id.* at 274-75.

<sup>3</sup> On the circumstances surrounding the adoption of the Oregon “Death with Dignity Act” and a description of its provisions, see generally Mark C. Siegel, *Lethal Pity: The Oregon Death With Dignity Act, Its Implications for the Disabled, and the Struggle for Equality in an Able-Bodied World*, 16 *Law & Ineq.* 259, 270-76 (1998).

<sup>4</sup> Letter for Thomas A. Constantine, Administrator, Drug Enforcement Administration, from Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives, and Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate (July 25, 1997), reprinted in S. Rep. No. 105-372, at 7 n.6 (1988) (“Hyde Letter”) (“In our view, assisting in a suicide by prescribing or filling a prescription for a controlled substance cannot be a ‘legitimate medical purpose’ under DEA regulations, especially when the practice is not reasonable and necessary to the diagnosis and treatment of disease and injury, legitimate health care, or compatible with the physician’s role as healer.”).

<sup>5</sup> Letter for Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate, from Thomas A. Constantine, Administrator, Drug Enforcement Administration at 1-2 (Nov. 5, 1997), reprinted in S. Rep. No. 105-372, at 8 n.9 (1998) (“Constantine Letter”).

Within a month, the Oregon Deputy Attorney General, David Schuman, wrote to the United States Department of Justice on December 3, 1997, arguing that “the CSA is addressed to the problems of the abuse and trafficking of controlled substances. In enacting and later amending the CSA, Congress had no intention of regulating medical practices that are legal under state law and that have no relation to drug abuse or trafficking.”<sup>6</sup> Deputy Attorney General Schuman concluded that the DEA had no authority to regulate medical practices authorized by state law and unrelated to drug abuse or trafficking.

On June 5, 1998, Attorney General Janet Reno reversed the interpretation of DEA Administrator Constantine, concluding that “the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.” Specifically, Attorney General Reno stated: “There is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice.”<sup>7</sup>

## **II. Physicians Are Regulated Under the Controlled Substances Act**

The basic domestic drug trafficking provision of the CSA, 21 U.S.C. § 841, governs physicians’ prescriptions of controlled substances. Section 841(a)(1) makes it unlawful for “any person knowingly or intentionally . . . to . . . dispense, a controlled substance.” The term “dispense” is defined to “mean[] to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner . . .” 21 U.S.C. § 802(10). A “practitioner” includes a “physician . . . licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to . . . dispense . . . a controlled substance in the course of professional practice.” *Id.* § 804(21).

Although section 841(a)(1) generally prohibits the dispensing of controlled substances, the statute does permit such action if “authorized by this subchapter.” 21 U.S.C. § 841(a). One such form of authorization is found in the CSA’s provisions dealing with physician “registration.” See *id.* § 822(b) (“Persons registered by the Attorney General . . . to . . . dispense controlled substances . . . are authorized to . . . dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.”).

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<sup>6</sup> Letter for Jonathan Schwartz, Principal Associate Deputy Attorney General, United States, from David Schuman, Deputy Attorney General, Oregon at 7 (Dec. 3, 1997) (“Oregon Deputy Attorney General Letter”).

<sup>7</sup> Letter for Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives, from Janet Reno, Attorney General at 1 (June 5, 1998), *reprinted in* S. Rep. No. 105-372, at 9 n.10 (1998) (“Reno Letter”) (“Adverse action against a physician who has assisted in a suicide in full compliance with the Oregon Act would not be authorized by the [CSA]”).

Physicians may apply to the DEA (which acts here as the Attorney General's delegate) for registration permitting them to prescribe and administer controlled substances. Section 823(b) provides that the DEA shall register qualified applicants unless it "determines that . . . such registration is inconsistent with the public interest." This determination is to be based on any of five factors identified in the statute, including "such other factors as may be relevant to and consistent with the public health and safety." *Id.* § 823(b)(5).

"[T]he scheme of the [CSA], viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority to the course of his 'professional practice.' . . . Implicit in the registration of a physician is the understanding that he is authorized only to act 'as a physician.' . . . [R]egistration is limited to the dispensing and use of drugs 'in the course of professional practice or research.' Other provisions throughout the Act reflect the intent of Congress to confine authorized medical practice within accepted limits." *United States v. Moore*, 423 U.S. 122, 140-42 (1975). Although section 841(a) does not, in terms, state that a physician is authorized to dispense controlled substances only for a legitimate medical purpose, that limitation appears to be implicit in the statute, *see Moore*, 423 U.S. at 137 n.13, and has been made explicit by DEA regulation.<sup>8</sup> The relevant regulation reads:

A prescription issued for a controlled substance to be effective must be issued *for a legitimate medical purpose* by an individual practitioner acting in the usual course of his professional practice . . . . An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. § 1306.04(a) (emphasis added).

Where a physician dispenses controlled substances without a "legitimate medical purpose" under 21 C.F.R. § 1306.04(a), the physician violates several provisions of the CSA, including sections 829 and 841(a)(1). If such dispensing without a legitimate medical purpose is proven in a criminal case, the physician may be subject to criminal penalties under 21 U.S.C. §§ 841(a)(1) (felony) and 842(a)(1)

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<sup>8</sup> The courts have found no distinction between the statutory phrase "in the course of professional practice" and the regulatory phrase "legitimate medical purpose." *See United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir. 1975), *cert. denied*, 423 U.S. 1031 (1975); *cf. United States v. Kirk*, 584 F.2d 773, 784 (6th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1978); *United States v. Plesons*, 560 F.2d 890, 897 n.6 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

(misdemeanor). *See Moore*, 423 U.S. at 131 (holding that registered physician can be prosecuted and convicted under section 841(a)(1) for dispensing controlled substances outside the usual course of professional practice). Even without a criminal prosecution or conviction, the DEA may initiate administrative proceedings to suspend or revoke the registration of a physician based on evidence that the physician dispensed controlled substances without a legitimate medical purpose under 21 C.F.R. § 1306.04(a). In an administrative proceeding, the government must prove, by a preponderance of the evidence, that the physician dispensed in violation of section 1306.04(a), and that, as a result, the physician’s continued registration would be inconsistent with the public interest. *See* 21 U.S.C. § 824(a)(4) (applying public interest standard of section 823(f) to administrative proceedings for suspension or revocation of registration granted under section 823); *see generally Robert G. Hallermeier, M.D., Continuation of Registration with Restrictions*, 62 Fed. Reg. 26,818 (1997) (administrative proceeding in which DEA sought revocation of physician’s federal registration).<sup>9</sup> Nothing in the language of the CSA or of the relevant DEA regulations requires that the physician be shown to have violated state law in order to be subject to criminal sanctions under sections 829 or 841(a), or to suspension or revocation of federal registration under section 824(a)(4). Indeed, of the five separate grounds listed in section 824(a)(4) for adverse administration action, only two directly concern state law sanctions.<sup>10</sup> Further, as we shall discuss in detail below, Congress added the “public interest” standard in section 824(a)(4) in order to permit the Attorney General to take adverse administrative action against a registrant in cases in which the registrant’s wrongful conduct might not have been sanctioned or sanctionable under state law.

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<sup>9</sup> We note that practitioners have lost or been denied federal registrations necessary to prescribe controlled substances because they have prescribed controlled substances used in suicides and other lethal overdoses. *See, e.g., Hugh I. Schade, M.D., Denial of Application*, 60 Fed. Reg. 56,354 (1995); *José R. Castro, M.D., Denial of Application*, 62 Fed. Reg. 16,189 (1997); *Samuel Fertig, M.D., Denial of Application*, 49 Fed. Reg. 6577 (1984); *Murray J. Walker, M.D., Revocation of Registration*, 55 Fed. Reg. 5306 (1990); *see also Townwood Pharmacy, Revocation of Registration*, 63 Fed. Reg. 8477 (1998).

<sup>10</sup> Section 824(a)(2) authorizes the Attorney General to suspend or revoke a registration upon a finding that the registrant “has been convicted of a felony under . . . any . . . law . . . of any State, relating to any . . . controlled substance,” while section 824(a)(3) authorizes such action if the registrant “has had his State license or registration suspended, revoked, or denied . . . and is no longer authorized by State law to engage in . . . dispensing . . . controlled substances . . . or has had the suspension, revocation, or denial of his registration recommended by competent State authority.”

### **III. Dispensing Controlled Substances to Assist in Suicide Does Not Serve a “Legitimate Medical Purpose”**

We understand that physician-assisted suicide typically involves the use of a lethal dose of a combination of drugs, including controlled substances. First, the patient is sedated using either a barbiturate (e.g., sodium pentothal), or an opiate (e.g., morphine). Then, one or more drugs are used to paralyze the muscles and/or to stop the heart. The sedatives involved in these procedures are controlled substances under the CSA. Most lawfully available opiates and barbiturates are in Schedule II of the CSA, the most strictly regulated category of substances available for non-research purposes. *See* 21 C.F.R. § 1308.12(b), (c), (e) (2000).

In our opinion, assisting in suicide is not a “legitimate medical purpose” within the meaning of 21 C.F.R. § 1306.04(a) that would justify a physician’s dispensing controlled substances. That interpretation, which the DEA itself originally adopted before being overruled by Attorney General Reno, is the best reading of the regulatory language: it is firmly supported by the case law, by the traditional and current policies and practices of the federal government and of the overwhelming majority of the states, and by the dominant views of the American medical and nursing professions.

#### **A. Case Law**

The case law demonstrates that the CSA forbids dispensing controlled substances except in the course of accepted medical practice, and that physician-assisted suicide is outside the boundaries of such practice.

In *Moore*, the Supreme Court in effect approved a jury instruction under which a physician would be held criminally liable for dispensing controlled substances in violation of 21 U.S.C. § 841(a) unless the physician was acting “in the usual course of professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States.” *Moore*, 423 U.S. at 139. The lower courts have followed *Moore* in requiring that a physician’s actions conform to standards “generally recognized and accepted” throughout the nation. For example, in *United States v. Vamos*, 797 F.2d 1146, 1153 (2d Cir. 1986), the court stated that:

To permit a practitioner to substitute his or her views of what is good medical practice for standards generally recognized and accepted in the United States would be to weaken the enforcement of our drug laws in a critical area. As the Supreme Court noted in *Moore*, “Congress intended the CSA to strengthen rather than weaken the prior drug laws.”

As the courts have found, physician-assisted suicide has never been, and is not now, a generally recognized and accepted medical practice in the United States. On the contrary, the American legal system and the American medical profession alike have consistently condemned the practice in the past and continue to do so.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court upheld a state prohibition against causing or aiding a suicide against a challenge that, as applied to physicians assisting terminally ill, mentally competent patients, the prohibition offended the requirements of substantive due process. *See id.* at 709 n.6 (describing holding). The Court began its analysis by examining “our Nation’s history, legal traditions, and practices,” *id.* at 710. The Court found that “[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.” *Id.* (footnote omitted).<sup>11</sup> After tracing “the Anglo-American common law tradition” that “for over 700 years” “has punished or otherwise disapproved of both suicide and assisted suicide,” *id.* at 711, the Court referred to the Oregon “Death With Dignity Act,” which legalized physician-assisted suicide for competent, terminally ill adults. The Court’s discussion made plain that the Oregon statute represented an exceptional case, contrary both to longstanding historical practices and to contemporary trends in the law:

Since the Oregon vote, many proposals to legalize assisted-suicide laws have been and continue to be introduced in the States’ legislatures, but none has been enacted. And just last year [*i.e.*, 1996], Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. . . . Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide.

*Id.* at 717-18 (citations and footnotes omitted). Further, the Court discussed the “serious, thoughtful examinations of physician-assisted suicide and other similar issues” now going on in the states. *Id.* at 719. It referred in particular to the work of New York State’s Task Force on Life and the Law, a commission composed of doctors, ethicists, lawyers, religious leaders and interested laymen charged with recommending public policy on issues raised by medical advances. The Court noted that after studying physician-assisted suicide, the Task Force had unanimously concluded that “[l]egalizing assisted suicide and euthanasia would pose

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<sup>11</sup> *Accord Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 280 (1990) (“As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.”).

profound risks to many individuals who are ill and vulnerable. . . . [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved.” *Id.* (internal quotation marks and citation omitted; ellipses in original).

Summarizing its review of the American legal tradition’s view of assisted suicide, the Court said:

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition.

*Id.*

## **B. State and Federal Policy**

As detailed in *Washington v. Glucksberg*, state law and policy, with the sole exception of Oregon’s, emphatically oppose assisted suicide. Assisted suicide has long been prohibited at common law, *see Glucksberg*, 521 U.S. at 711,<sup>12</sup> and at least forty states and territories have laws explicitly prohibiting the practice.<sup>13</sup> “In the two hundred and five years of our [national] existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.” *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1995) (Noonan, J.), *rehearing en banc granted*, 62 F.3d 299 (9th Cir. 1995); *vacated*, 79 F.3d 790 (9th Cir. 1996) (en banc) (Reinhardt, J.) (state could not constitutionally prohibit physician-assisted suicide in cases of terminally ill competent adults), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997). The only state supreme court to decide the matter has rejected recognition of an enforceable right to assisted suicide under that state’s constitution. *Krischer v. McIver*, 697 So.2d 97 (Fla. 1997).

State statutes banning assisted suicide trace back a century or more in many cases. They have not been kept on the books through oversight or neglect:

Many jurisdictions have expressly reconsidered these laws in recent years and reaffirmed them. In 1980, the American Law Institute conducted a thorough review of state laws on assist[ed] suicide in the United States and acknowledged the continuing widespread

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<sup>12</sup> *See generally* Thomas J. Marzen, Mary K. O’Dowd, Daniel Crone & Thomas J. Balch, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 71-75 (1985).

<sup>13</sup> *See* Christine Neylon O’Brien & Gerald A. Madek, *Physician-Assisted Suicide: New Protocol for a Rightful Death*, 77 Neb. L. Rev. 229, 275 n.314 (1998).

support for criminalization. Accordingly, it endorsed two criminal provisions of its own. In the 1990s, both New York and Michigan convened blue-ribbon commissions to consider the possibility of legalizing assisted suicide and euthanasia. The New York commission issued a thoughtful and detailed report unanimously recommending the retention of existing laws against assisting suicide and euthanasia. The Michigan panel divided on the issue, but the state legislature subsequently chose to enact a statute strengthening its existing common law ban against assisted suicide. . . . Meanwhile, repeated efforts to legalize the practice—in state legislatures and by popular referenda—have met with near-total failure.

Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J. L. & Pub. Pol’y 599, 639-41 (2000) (“Gorsuch”) (footnotes omitted).

Federal policy fully accords with the views that prevail in every state except Oregon. As noted in *Glucksberg*, the Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23, was signed into law on April 30, 1997. The Act was approved in the House of Representatives by a 398-to-16 vote and in the Senate by a 99-0 vote. The Act bans federal funding of assisted suicide, euthanasia, or mercy killing through Medicaid, Medicare, military and federal employee health plans, the veterans health care system, or other federally funded programs. In the “Findings” preceding the Act’s substantive restrictions, Congress stated that “[a]ssisted suicide, euthanasia, and mercy killing have been criminal offenses throughout the United States and, under current law, it would be unlawful to provide services in support of such illegal activities.” *Id.* § 2(a)(2). Then, after taking note that the Oregon “Death With Dignity Act” might soon become operative, *see id.* § 2(a)(3), Congress determined that it would “not provid[e] Federal financial assistance in support of assisted suicide, euthanasia, and mercy killing and intends that Federal funds not be used to promote such activities.” *Id.* § 2(a)(4). In general, Congress stated that its purpose was “to continue current Federal policy by providing explicitly that Federal funds may not be used to pay for items and services (including assistance) the purpose of which is to cause (or assist in causing) the suicide, euthanasia, or mercy killing of any individual.” *Id.* § 2(b).

Even before the enactment of the Assisted Suicide Funding Restriction Act of 1997, it was the policy of the federal government not to recognize physician-assisted suicide as a legitimate medical practice. As Acting Solicitor General Walter Dellinger noted in 1996 in the United States brief in *Glucksberg*:

The United States owns and operates numerous health care facilities which . . . do not permit physicians to assist patients in committing suicide by providing lethal dosages of medication. The Department

of Veterans Affairs (VA), which operates 173 medical centers, 126 nursing homes, and 55 in-patient hospices, has a policy manual that . . . forbids “the active hastening of the moment of death.” . . . The military services, which operate 124 centers, the Indian Health service, which operates 43 hospitals, and the National Institutes of Health, which operate a clinical center, follow a similar practice . . . . No federal law . . . either authorizes or accommodates physician assisted suicide.<sup>14</sup>

Other federal agencies have taken similar views in the past. The Hyde Letter noted that “[t]he Health Care Financing Administration has stated that physician-assisted suicide is not ‘reasonable and necessary’ to the diagnosis and treatment of disease or injury and is therefore barred from reimbursement under Medicare.” Hyde Letter, *supra* note 4, at 1. Administrator Constantine’s reply stated that a review of “a number of cases, briefs, law review articles and state laws relating to physician-assisted suicide” and “a thorough review of prior administrative cases in which physicians have dispensed controlled substances for other than a ‘legitimate medical purpose’” demonstrated “that delivering, dispensing or prescribing a controlled substance with the intent of assisting a suicide would not be under any current definition a ‘legitimate medical purpose.’”<sup>15</sup>

Finally, federal medical policy *since* the enactment of the Assisted Suicide Funding Restriction Act also supports the conclusion that physician-assisted suicide is not a legitimate medical practice. In 1999, the Surgeon General sought to classify suicide as a serious public health problem and to intensify suicide prevention efforts, especially among high risk groups such as the sick and elderly, who often suffer from undiagnosed depression and inadequately treated pain.<sup>16</sup> Dispensing controlled substances to assist the suicides of some of the most

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<sup>14</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 1-2, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) (“United States Brief in *Glucksberg*”).

<sup>15</sup> Constantine Letter, *supra* note 5, at 1-2. Also relevant to the past practice of federal agencies is *United States v. Rutherford*, 442 U.S. 544 (1979), which involved a challenge by terminally ill cancer patients to the determination of the Food and Drug Administration (“FDA”) that Leatril constituted a “new drug” for purposes of the Federal Food, Drug and Cosmetic Act because it was not generally regarded as safe or effective. In upholding the FDA’s determination, the Court rejected the plaintiffs’ argument that an implied exception from the Act was justified because the safety and effectiveness standards could have no reasonable application to terminally ill patients. It pointed out that “the FDA has never made exception [from the FDA’s safety standards] for drugs used by the terminally ill.” *Id.* at 553.

<sup>16</sup> See generally U.S. Public Health Service, Dep’t of Health and Human Services, *The Surgeon General’s Call to Action to Prevent Suicide* (1999), available at <http://www.surgeongeneral.gov/library/calls/index.html> (last visited Aug. 3, 2012); see also *Improving Palliative Care for Cancer: Summary and Recommendations* (Kathleen M. Foley & Hellen Gelbard, eds., 2001) (finding depression common among terminally ill cancer patients, and recommending greater emphasis on palliative care).

vulnerable members of American society is manifestly inconsistent with the Surgeon General’s policy.<sup>17</sup>

### **C. Views of the Medical and Nursing Professions**

The leading organizations of the American medical profession have repeatedly, and recently, expressed the profession’s condemnation of physician-assisted

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<sup>17</sup> See United States Brief in *Glucksberg* at 19. Medical evidence suggests that many terminally ill patients who seek death do so not as a result of rational deliberation, but rather because of depression or mental illness. Moreover, given modern palliative care techniques, pain-avoidance cannot justify the general practice of assisted suicide. See Susan R. Martyn and Henry J. Bourguignon, *Now Is The Moment to Reflect: Two Years of Experience With Oregon’s Physician-Assisted Suicide Law*, 8 Elder L.J. 1, 14-16 (2000) (footnotes omitted) (“First, the rate of depression among terminally ill patients appears to be ‘much higher than would be expected in the general population.’ Recent studies indicate that fully two-thirds of those requesting assisted suicide suffer from depression. Second, seriously ill patients often require powerful medications which can distort the patient’s thoughts and feelings. ‘For many patients, the progression of disease will result in the impairment of decisionmaking capacity, either from the effects of the disease itself or those of drug treatment.’ Third, seriously ill patients may also suffer physical and mental disability, have short attention spans, or find it difficult to concentrate. They may have difficulty hearing or thinking through complex subjects. . . . Physicians, psychiatrists, and psychologists, like anyone else who deals with a seriously ill, mentally or physically disabled patient can all too easily conclude that the patient’s request for assisted suicide is reasonable and therefore competent. The greatest threat is that persons with mental or physical disabilities or depression, especially those who burden others, will readily be found competent to request assistance in suicide. . . . Depression, the major precursor of suicidal intent, often worms its way into serious illnesses and, especially among the elderly, can remain undiagnosed and untreated. In fact, clinical studies now indicate that depression is the only factor that predicts suicidal intent or ideation. Indeed, Oregon physicians report that they recognized symptoms of depression in twenty percent of patients who sought suicide assistance.”); *id.* at 38-43 (describing significant recent innovations in palliative care, noting that states are increasingly enacting intractable pain legislation to assure physicians that adequate pain control is legally and medically required, and suggesting that legalizing physician-assisted suicide may inhibit advances in such care); New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 11, 13 (1994) (“Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death. Depression, accompanied by symptoms of hopelessness and helplessness, is the most prevalent condition among individuals who commit suicide. . . . In one study of terminally ill patients, of those who expressed a wish to die, all met diagnostic criteria for major depression.”); Brief for American Geriatrics Soc. as Amicus Curiae at 7-9, *Vacco v. Quill*, 521 U.S. 793 (1997), *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-100) (1996) (hospice and palliative care programs relieve pain and other severe symptoms for those near death and should be preferred treatment options; also noting high correlation between cognitive or emotional dysfunctioning such as depression and suicide inquiries); Leon R. Kass and Nelson Lund, *Physician-Assisted Suicide, Medical Ethics and the Future of the Medical Profession*, 35 Duq. L. Rev. 395, 406 (1996) (“Kass & Lund”) (“Because the quick-fix of suicide is easy and cheap, it will in many cases replace the use of hospice and other humanly-engaged forms of palliative care, for there will be much less economic incentive to continue building and supporting social and institutional arrangements for giving humane care to the dying.”); Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. Detroit Mercy L. Rev. 735, 744 (1995) (“Although pain is notoriously undertreated in this country, ‘according to experts in the field of pain control, almost all terminally ill patients can experience adequate relief with currently available treatments.’”) (footnotes omitted); Gorsuch at 691.

suicide. The American Medical Association (“AMA”), joined by the American Nurses Association (“ANA”), the American Psychiatric Association, and 43 other national medical organizations, filed a brief in the *Glucksberg* case declaring that “[t]he ethical prohibition against physician-assisted suicide is a cornerstone of medical ethics” and that physician-assisted suicide is “fundamentally incompatible with the physician’s role as healer.”<sup>18</sup> More specifically, the AMA’s Brief said:

The power to assist in intentionally taking the life of a patient is antithetical to the central mission of healing that guides both medicine and nursing. It is a power that most physicians and nurses do not want and could not control. Once established, the right to physician-assisted suicide would create profound danger for many ill persons with undiagnosed depression and inadequately treated pain, for whom physician-assisted suicide rather than good palliative care could become the norm. At greatest risk would be those with the least access to palliative care—the poor, the elderly, and members of minority groups.

*Amici* acknowledge that many patients today do not receive proper treatment for their pain, depression, and psychological distress. Nevertheless, physician-assisted suicide is not the right answer to the problem of inadequate care. Although for some patients it might appear compassionate intentionally to cause death, institutionalizing physician-assisted suicide as a medical treatment would put many more patients at serious risk for unwanted and unnecessary death.

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The ethical prohibition against physician-assisted suicide is a cornerstone of medical ethics. Its roots are as ancient as the Hippocratic oath that a physician “will neither give a deadly drug to anybody if asked for it, nor . . . make a suggestion to this effect,” and the merits of the ban have been debated repeatedly in this nation since the late nineteenth century. Most recently, the AMA has reexamined and reaffirmed the ethical prohibition against physician-assisted suicide in 1977, 1988, 1991, 1993, and 1996.<sup>19</sup>

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<sup>18</sup> Brief for American Medical Association et al. as *Amici Curiae* at 5, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) (1996).

<sup>19</sup> *Id.* at 2-5.

As the Court noted in *Glucksberg*, 521 U.S. at 731, the AMA’s Code of Ethics condemns physician-assisted suicide as fundamentally incompatible with the physician’s role as a healer. AMA, *Code of Ethics* § 2.211 (1994); see also Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992). Largely on the basis of the AMA’s position, the Court found that the State of Washington had “an interest in protecting the integrity and ethics of the medical profession” when it prohibited physician-assisted suicide. *Glucksberg*, 521 U.S. at 731; see also *Compassion in Dying*, 49 F.3d at 592 (citation omitted) (“From the Hippocratic Oath with its promise ‘to do no harm,’ . . . to the AMA’s code, the ethics of the medical profession have proscribed killing.”).

The AMA took the same unequivocal position in hearings before Congress on the subject of assisted suicide. See *Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, United States House of Representatives*, 104th Cong. 309-11 (1996) (statement of Lonnie L. Bristow, M.D., Pres., AMA). Dr. Bristow testified:

The AMA believes that physician-assisted suicide is unethical and fundamentally inconsistent with the pledge physicians make to themselves to healing and to life. . . . AMA takes seriously its role as a leader in issues of medical and professional ethics. The AMA’s “code of ethics” serves as the profession’s defining document as to what is right versus what is wrong in medical practice, and such are critical to our professionalism and our role as healers. My primary obligation as a physician is to first be an advocate for my patient. If my patient is understandably apprehensive or afraid of his or her own mortality, I need to provide information, support, and comfort, not help them avoid the issues of death.

*Id.* at 310.

The American Nurses Association (“ANA”), a national organization representing 2.2 million registered nurses, submitted written testimony to Congress at the same hearing. See *id.* at 438-50. Included in the ANA’s submission was the organization’s Position Statement on Assisted Suicide (1994). The Position Statement succinctly summarizes the ANA’s view of nurse-assisted suicide as follows:

The American Nurses Association (ANA) believes that the nurse should not participate in assisted suicide. Such an act is in violation of the *Code for Nurses with Interpretive Statements (Code for Nurses)* and the ethical traditions of the profession.

*Id.* at 443. The “Rationale” in the Position Statement sets forth comprehensively the basis of the ANA’s view. It states in part:

- The profession of nursing is built upon the Hippocratic tradition “do no harm” and an ethic of moral opposition to killing another human being. The ethical framework of the profession as articulated through the *Code for Nurses* explicitly prohibits deliberately terminating the life of any human being.

- Nursing has a social contract with society that is based on trust and therefore patients must be able to trust that nurses will not actively take human life. . . . Nurse participation in assisted suicide is incongruent with the accepted norms and fundamental attributes of the profession. . . .

- While there may be individual patient cases that are compelling, there is high potential for abuses with assisted suicide, particularly with vulnerable populations such as the elderly, poor and disabled. These conceivable abuses are even more probable in a time of declining resources. The availability of assisted suicide could foreseeably weaken the goal of providing quality care for the dying.

*Id.* at 445.

Scholars have observed that the norms of the medical and nursing professions with respect to physician-assisted suicide, which reflect the experience and the reflection of centuries, are more compelling now than ever. *See* Kass & Lund, *supra* note 17, at 423 (“Given the great pressures threatening medical ethics today—including, among other factors, a more impersonal practice of medicine, the absence of a lifelong relationship with a physician, the push toward managed care, and the financially-based limitation of services—a bright line rule regarding medically-assisted suicide is a bulwark against disaster.”); *see also* Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 *Am. U. L. Rev.* 803, 841 (1995) (“Particularly with the emergence of cost controls and managed care in the United States, the danger of tempting health care providers to persuade chronic patients to minimize costs by ending it all painlessly is no fantasy.”).

To be sure, it has been claimed that physician-assisted suicide has become a common, if also usually clandestine, practice.<sup>20</sup> But the claim is questionable. The American Geriatrics Society, for example, has stated that the Society’s leadership “is unfamiliar with situations in which this is true, and it seems unlikely. Three-

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<sup>20</sup> *See, e.g., Compassion in Dying*, 79 F.3d at 811.

quarters of all deaths happen in institutions where a regularized endeavor would require the collusion of a large number of persons, which seems implausible. Little reliable evidence characterizes the rate and nature of actual instances of [physician-assisted suicide].” Brief for American Geriatrics Soc. as Amicus Curiae at 10, *Vacco v. Quill*, 521 U.S. 793 (1997), *Washington v. Glucksberg*, 521 U.S. 702 (1997). Moreover, even if there were reliable evidence that unacknowledged physician-assisted suicide was not infrequent, that fact would hardly invalidate the *normative* judgments of the AMA and other medical groups that emphatically condemn the practice. By parity of reasoning, if it could be shown that physicians violated traditional medical canons of ethics more often than is usually supposed, e.g., by engaging in sexual relations with their patients or disclosing patient confidences, it would follow that the evidence of such deviations overturned the professional standards prohibiting such misconduct.

Thus, the overwhelming weight of authority in judicial decisions, the past and present policies of nearly all of the states and of the federal government, and the clear, firm and unequivocal views of the leading associations within the American medical and nursing professions, establish that assisting in suicide is not an activity undertaken in the course of professional medical practice and is not a legitimate medical purpose. Indeed, we think it fair to say that physician-assisted suicide should not be considered a *medical* procedure at all. Here we follow an *amicus* brief filed in *Glucksberg* by a group of fifty bioethics professors, who declared that physician-assisted suicide “is not a medical procedure, and medicalizing an act runs the risk of making an otherwise unacceptable act appear acceptable.” Brief for Bioethics Professors as Amici Curiae Supporting Petitioners at 27, *Vacco v. Quill*, 521 U.S. 793 (1997), *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-100). As this brief points out, assisted suicide does not require any medical knowledge whatever, nor does it necessarily depend on access to any prescribed drugs or to medical services. Indeed, the country’s most prominent partisan of assisted suicide, Jack Kevorkian, has often used the entirely non-medical method of carbon monoxide poisoning. See George J. Annas, *Physician Assisted Suicide—Michigan’s Temporary Solution*, 20 Ohio N.U.L. Rev. 561, 568 (1994). It is plainly a fallacy to assume that a procedure must be “medical” because it is performed by a physician rather than, say, by a family member, or because it involves the use of a drug that a physician has prescribed.<sup>21</sup>

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<sup>21</sup> The Oregon Deputy Attorney General’s Letter assumes, uncritically, that physician-assisted suicide, if authorized by state law, *must* be considered a “medical” practice that serves a “medical” purpose. See Oregon Deputy Attorney General Letter, *supra* note 6, at 7 (“[T]he CSA is addressed to the problems of the abuse and trafficking of controlled substances, [not to] regulating medical practices that are legal under state law and that have no relation to drug abuse or trafficking”). As we have argued above, it is far from obvious (to say no more) that assisting an individual to kill himself or herself *must* be considered a “medical” procedure.

Accordingly, we conclude that assisting in suicide is not a “legitimate medical purpose” that would justify a physician’s dispensing controlled substances consistent with the CSA.

#### **IV. The Existence of a State Law Permitting Physician-Assisted Suicide Does Not Immunize a Physician from the General Requirements of the CSA**

The CSA establishes a uniform, nation-wide statutory scheme for regulating the distribution of controlled substances. Notwithstanding the traditional role of the states in regulating the practice of medicine,<sup>22</sup> state law cannot abrogate the CSA or supersede its provisions in the event of conflict.<sup>23</sup> Thus, the fact that assisting in suicide may be permitted in some cases for Oregon physicians under local law does not entail that they should be held immune from criminal prosecution or adverse administrative action under the CSA if they dispense a controlled substance when rendering that assistance. It is simply wrong to suggest, as the Deputy Attorney General of Oregon did, that the CSA does not reach “practices that are engaged in by physicians in accordance with state law.”<sup>24</sup>

The Supreme Court’s very recent decision in the so-called “medical marijuana” case, *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001), demonstrates the fallacy of attempting to read an implied immunity into the CSA for physicians who dispense controlled substances to assist suicides in a state in which such conduct is consistent with local law. In *Oakland Cannabis Buyers*, the Supreme Court addressed the question whether there was an implied “medical necessity” exception to the CSA’s general prohibition in 21 U.S.C. § 841(a)(1) on manufacturing and distributing marijuana. Marijuana is a “schedule I” controlled substance. For drugs on that schedule, there is but one express statutory exception, and that exception is available only for government-approved research projects. See 21 U.S.C. § 823(f); *Oakland Cannabis Buyers*, 532 U.S. at 491.<sup>25</sup> Notwithstanding the fact that it did not fall within the sole express statutory exception, the defendant Cooperative argued that the statute should be read to include another, implied exception for “medical necessity.” The Supreme Court refused to read such an exception into the CSA.

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<sup>22</sup> See, e.g., *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001); *Gade v. Nat’l Solid Wastes Management Ass’n*, 505 U.S. 88, 108 (1992).

<sup>23</sup> See, e.g., *Rosenberg*, 515 F.2d at 198 n.14.

<sup>24</sup> See Oregon Deputy Attorney General Letter, *supra* note 6, at 6.

<sup>25</sup> The controlled substances usually used in physician-assisted suicide are, as we have noted, schedule II substances, and accordingly are governed by a different regulatory regime from schedule I substances. In particular, registered practitioners may “dispense” schedule II, but not schedule I, substances. See 21 U.S.C. § 824(f). This distinction does not, however, affect the relevance of *Oakland Cannabis Buyers* to the questions considered in this memorandum.

Because of the passage in a 1996 voter initiative of the Compassionate Use Act of 1996, Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), California laws prohibiting the possession and cultivation of marijuana now include an exception for a patient or primary caregiver who possesses or cultivates marijuana for the patient’s medical purposes upon the recommendation or approval of a physician. In the wake of the voter initiative, “medical cannabis dispensaries” were organized to meet the needs of qualified patients. The defendant was one such organization, and distributed marijuana to those it accepted as members. The United States sued the defendant in 1998, arguing that, “whether or not the Cooperative’s activities are legal under California law, they violate” section 841(a) of the CSA. *Oakland Cannabis Buyers*, 532 U.S. at 487. Despite being enjoined from distributing marijuana, the defendant continued to do so, and the United States accordingly initiated contempt proceedings. In defense, it was “contended that any distributions were medically necessary. Marijuana is the only drug, according to the Cooperative, that can alleviate the severe pain and other debilitating symptoms of the Cooperative’s patients.” *Id.* (citation omitted). The district court found the defendant in contempt, and declined to modify its injunction so as to permit marijuana distributions that were asserted to be medically necessary. Although the defendant’s appeal of the contempt order was mooted, its motion to modify the injunction presented a live controversy, and the court of appeals accepted the defendant’s argument that medical necessity was a legally cognizable defense under the CSA. The United States sought certiorari to review the court of appeals’ decision, and the Supreme Court granted the petition because the appellate decision below “raise[d] significant questions as to the ability of the United States to enforce the Nation’s drug laws.” *Id.* at 489.

The Supreme Court flatly rejected the defendant’s claim of an implied medical necessity exception. “[T]o resolve the question presented, we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.” *Id.* at 491 (footnote omitted).

The question whether Oregon physicians may dispense controlled substances to assist in a suicide without violating the CSA is similar to (although it is of course not the same as) the question decided in *Oakland Cannabis Buyers*. In effect, the argument that such physicians do *not* violate the CSA depends on the assumption that because assisting suicide in that manner is permissible under state law, the CSA must be interpreted so that such dispensing is done “in the course of professional practice,” 21 U.S.C. § 802(21), and the DEA’s regulations must be read so that such actions serve “a legitimate medical purpose,” 21 C.F.R. § 1306.04(a). But a state cannot, by its unilateral action, take its physicians’ conduct out of the scope of otherwise nationally applicable prohibitions on the dispensing of controlled substances. The CSA contains no express immunity for

such conduct in states in which physicians may assist suicides compatibly with local law, and it should not be construed in a manner that implies such an immunity.<sup>26</sup>

## **V. The CSA Contemplates Concurrent Federal and State Regulation of Medical Practices Involving Controlled Substances**

Like the Court in *Oakland Cannabis Buyers*, we share the concern for “‘showing respect for the sovereign States that comprise our Federal Union.’” *Oakland Cannabis Buyers*, 532 U.S. at 494 n.7 (quoting Stevens, J., concurring in judgment). But we think it shows no disrespect for the principles of federalism to conclude that the states cannot, by their unilateral actions, shelter their physicians from the federal narcotics code. Although the states are the *primary* regulators of the practice of medicine, they are not its *exclusive* regulators: since the Harrison Narcotics Act of 1914, the federal government has regulated the practice of medicine insofar as it involved the dispensing of controlled drugs.<sup>27</sup> Physicians were often prosecuted under the Harrison Act for prescribing drugs in a manner that did not comport with federal statutory requirements or that fell outside the course of professional practice as determined by the federal courts.<sup>28</sup> Further, the Supreme Court repeatedly upheld the authority of federal prosecutors to bring such cases against physicians over the objection that the Harrison Act impermissibly encroached on a regulatory power exclusively reserved to the states.<sup>29</sup> The CSA

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<sup>26</sup> We note that the Reno Letter, *supra* note 7, at 3-4, expressly recognized that its conclusion was “limited to these particular circumstances” in Oregon (and, should any other State follow Oregon, such a State), and affirmed that “[a]dverse action under the CSA may well be warranted in other circumstances: for example, where a physician assists in a suicide in a state that has not authorized the practice under any conditions.” Construing the CSA and its regulations as Attorney General Reno did would accordingly cause the Act’s prohibitions to apply differently from one state to another, and would in effect grant the states the power to immunize their physicians from liability under otherwise generally applicable federal law.

<sup>27</sup> See *Moore*, 423 U.S. at 132 (“Physicians who stepped outside the bounds of professional practice could be prosecuted under the Harrison Act (Narcotics) of 1914, 38 Stat. 785, the predecessor of the CSA.”); *id.* at 139 (“Under the Harrison Act physicians who departed from the usual course of medical practice were subject to the same penalties as street pushers with no claim to legitimacy.”).

<sup>28</sup> See, e.g., *United States v. Behrman*, 258 U.S. 280 (1922) (sustaining conviction of physician over dissent’s argument that defendant should have been assumed to have given drugs in the regular course of his practice and in good faith); *Jin Fuey Moy v. United States*, 254 U.S. 189, 194 (1920) (sustaining conviction; Court states that “[m]anifestly the phrases ‘to a patient’ and ‘in the course of his professional practice only’ are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician’s . . . practice.”); *Webb v. United States*, 249 U.S. 96, 99-100 (1919) (holding that to call the defendant’s order for the use of morphine a “physician’s prescription” would “be so plain a perversion of meaning that no discussion of the subject is required.”).

<sup>29</sup> See *Nigro v. United States*, 276 U.S. 332, 353-54 (1928) (upholding constitutionality of Harrison Act as revenue measure despite claim that it infringed on states’ police power to regulate intrastate purchases of commodities); *Linder v. United States*, 268 U.S. 5, 18 (1925) (prosecution of physician

was intended “to strengthen rather than to weaken the prior drug laws.”<sup>30</sup> Consequently, dispensing controlled substances has been an aspect of medical practice that the federal government has regulated concurrently with the states for some eighty-seven years.<sup>31</sup>

Both in enacting the CSA in 1970 and in amending it in 1984, Congress was well aware that enforcement of the federal law would unavoidably necessitate federal regulation of medicine concurrent with, and in some circumstances designedly superseding, state regulation. In the House Report on what is now 42 U.S.C. § 257a,<sup>32</sup> the Committee on Interstate and Foreign Commerce noted the difficulty but found it inescapable:

Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of the practice of medicine, *it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecution of physicians whose methods of prescribing narcotic drugs have not conformed to the opinion of Federal prosecutors of what constitutes appropriate methods of professional practice.*

H.R. Rep. No. 91-1444, pt. 1, at 15 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4581 (emphasis added).

Further, Congress revisited the CSA in 1984 in order to add amendments that expanded federal authority at the expense of the states and were specifically directed against the misuse of federally regulated prescription drugs (that otherwise have legitimate medical uses) in a manner that did not violate state law. The expanded federal authority was accomplished by adding “inconsistency with the public interest” as a ground for denying, suspending, or revoking federal registration. *See* 21 U.S.C. § 823(f) (“The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest.”); *id.* § 824(a)(4) (DEA may revoke registration of any physician who has committed acts “inconsistent with the public interest.”). Previously, the federal government lacked the authority under the CSA to deny a physician’s registration application when the physician possessed a

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under Harrison Act; Court states that while “direct control of medical practice in the States is beyond the power of the Federal Government,” “[i]ncidental regulation of such practice by Congress through a taxing act” may be permitted); *United States v. Doremus*, 249 U.S. 86, 93-94 (1919).

<sup>30</sup> *Moore*, 423 U.S. at 139.

<sup>31</sup> *Cf. Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41 (1921) (state law regulating physicians’ furnishing or prescribing narcotic drugs held compatible with Harrison Act).

<sup>32</sup> This provision was originally enacted as section 4 of title I of the Comprehensive Drug Abuse and Control Act of 1970, 84 Stat. 1236, 1241 (1970); title II comprised the CSA. Hence the legislative history of the provision is highly relevant to the CSA.

license from the state to practice medicine and had no felony drug conviction. *See* S. Rep. No. 98-225, at 262 (1984) (footnote omitted) (“the Attorney General must presently grant a practitioner’s registration application unless his State license has been revoked or he has been convicted of a felony drug offense, even though such action may clearly be contrary to the public interest”).<sup>33</sup>

Supporters of the 1984 amendments explained that the most serious threat to “public health and safety” prompting this legal change was the frequency with which prescription drugs were involved in “drug-related deaths” and overdoses that threatened life.<sup>34</sup> Representative Hamilton Fish, a sponsor of the 1984 amendments, said that giving flexibility to the federal government was necessary because states often did not respond adequately to abuses: “State policing of these activities . . . ha[s] not been [an] adequate control measure[.]. State laws regarding the dispensing of controlled substances are also inadequate.” 130 Cong. Rec. at 25,849. At a hearing before the House Commerce Subcommittee on Health and the Environment, the DEA called the expanded federal authority to revoke practitioner registrations “one of the most important sections of the bill,” not only because states were often ill-equipped to enforce their own drug laws but also because “[m]any controlled drug violations involving prescription drugs are not felonies under state law and therefore cannot be used in a DEA revocation action” under then-existing law.<sup>35</sup> Members of Congress also explained that the 1984 amendments were intended to “expand[] the standards for practitioner registration beyond the current exclusive reliance upon authorization by the practitioner’s own jurisdiction.”<sup>36</sup>

Congress intended, therefore, that the “inconsistent with the public interest” standard be more demanding than the standard of a physician’s licensing state. The 1984 amendments authorized the DEA to enforce the CSA against medical practitioners who prescribed controlled substances in a manner that “endangers public health or safety” contrary to the “public interest,” notwithstanding the nature or content of state law or regulation. Consistent with Congress’s purpose,

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<sup>33</sup> *See also* 130 Cong. Rec. 25,852 (1984) (statement of Rep. Rangel); *see generally Moore*, 423 U.S. at 140-41 (“In the case of a physician th[e] scheme [of the registration provision of the then-existing CSA] contemplates that he is authorized by the State to practice medicine and to dispense drugs in connection with his professional practice. The federal registration . . . follows automatically.”).

<sup>34</sup> *Dangerous Drug Diversion Act of 1984: Hearing on H.R. 5656 Before House Comm. on Health and the Environment*, 98th Cong. 365 (1984) (testimony of Rep. Waxman) (“[d]rugs legally manufactured for use in medicine are responsible for a substantial majority of drug-related deaths and injuries”); *see also* 130 Cong. Rec. 25,851 (statement of Rep. Rodino) (“prescription drugs are responsible for close to 70 percent of the deaths and injuries due to drug abuse”).

<sup>35</sup> *Dangerous Drug Diversion Control Act of 1984: Hearing on H.R. 5656 Before Subcomm. on Health and the Environment of House Comm. on Energy and Commerce*, 98th Cong. 403-04 (1984) (statement of Gene R. Haislip, Deputy Assistant Administrator, Drug Enforcement Administration).

<sup>36</sup> 130 Cong. Rec. 1586 (1984) (statement of Sen. Laxalt); *see also* 130 Cong. Rec. at 25,851-52 (statement of Rep. Rangel).

the public interest standard incorporated in section 824(f) is best understood to authorize suspension or revocation of the federal registration of a practitioner who dispenses controlled substances to assist in a suicide, even if such conduct is permitted under state law.

## **VI. The CSA’s Preemption Provision Is Consistent with This Interpretation**

The CSA itself includes a provision designed to narrow possible federal preemption of state law. The provision is found at 21 U.S.C. § 903. Section 903 plainly does not require the Department of Justice to accept Oregon’s determination of what is a “legitimate medical purpose.”

Section 903 reads as follows:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

For at least two reasons, we do not think that section 903 affects the conclusion that assisting in a suicide is not a legitimate medical purpose that would justify a physician’s dispensing a controlled substance.

First, if section 841(a) and other pertinent parts of the CSA are read and applied in accordance with the DEA’s regulation, 21 C.F.R. § 1306.04(a), and the interpretation of it here, it would certainly not follow that the CSA was being understood to “occupy the field” of regulating the medical profession to the “exclusion of any State law.”<sup>37</sup> On the contrary, as we have just shown, the states remain free to regulate that profession *concurrently* with the federal government, as they have done since 1914. Federal regulation of the profession under the CSA would reach only the dispensing of controlled substances, which is hardly the

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<sup>37</sup> Congress’s intent to preempt all state law in a particular area may be inferred “where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation” or “where the field is one in which ‘the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (citations omitted). Interpreting the CSA and its regulations to reach the conduct of physicians who dispense drugs to assist suicide does not require the assumption that Congress intended to occupy the field of regulation of the medical profession.

whole field of medical practice. Moreover, states would remain free to regulate that activity as well, as long as such regulation did not conflict with federal law.

Second, even if our interpretation would make it harder as a practical matter for Oregon physicians to assist in suicides, the CSA and its regulations as we read them do not *preempt* Oregon's Death With Dignity Act.<sup>38</sup> Oregon physicians remain free under that law to assist in suicides, provided of course that they follow the procedures that Oregon imposes. All that our interpretation does is to affirm that *dispensing controlled substances in connection with such an assisted suicide* will cause an Oregon physician to be in violation of the CSA. Any method of assisting in suicides in which an Oregon physician does *not* dispense a controlled substance entails *no* violation of the CSA. The Attorney General's interpretation forecloses one, but only one, method of assisting suicide in a manner consistent with Oregon law.

We respectfully disagree with the contrary opinion of the Oregon Deputy Attorney General. *See* Oregon Deputy Attorney General Letter, *supra* note 6, at 7-8. That Letter argues, in part, that the CSA should not be construed to enable the Attorney General to regulate the practice of medicine, which is said to be an area traditionally reserved to the states. We consider that argument to be mistaken.

First, as we have shown, the federal government has regulated the dispensing of controlled substances by physicians continuously since the Harrison Act of 1914, and in enacting the CSA in 1970, Congress clearly intended that the Attorney General continue to do so.<sup>39</sup>

Second, as we have also shown, the legislative history of the 1984 amendments to the CSA demonstrates that Congress intended the Attorney General to have regulatory authority with respect to the conduct of physicians even in circumstances in which that conduct was not sanctionable under state law.

Third, the activity of assisting in suicide should not, in our view, be considered a "medical" practice solely because it is undertaken by a physician: as we have shown, physician-assisted suicide has been condemned by the overwhelming majority of the states and by the leading professional associations of medical and nursing practitioners. On the theory of the Oregon Deputy Attorney General's Letter, an act that was performed by doctors, despite being forbidden by ordinary professional standards or even punishable elsewhere as a crime, could be transformed into a "medical" practice if a single state were to decide to deem it so; and that state's unilateral decision would presumptively place the act beyond the reach of federal regulation. It would follow that if a state authorized physicians to

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<sup>38</sup> *Cf. Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (state law preempted only to the extent that it "actually conflicts" with federal law) (citation omitted); *Pharmaceutical Society of State of New York v. Lefkowitz*, 586 F.2d 953, 958 (2d Cir. 1978) (no preemption because no actual conflict).

<sup>39</sup> *See Moore*, 423 U.S. at 132-33.

perform involuntary euthanasia on severely handicapped or mentally retarded persons, and thus “medicalized” that procedure, the state law could place the procedure beyond federal regulatory power pursuant to the CSA even if controlled substances were used. Equally, it would follow that if a state authorized physicians to prescribe controlled substances to addicts in order to enable them to maintain their customary use and so avoid discomfort, the federal government would be unable to prosecute those physicians or to revoke their registrations under the CSA. We cannot accept these consequences of the theory: no state has the power to determine unilaterally what practices count as “medical” for purposes of the CSA.

### **VII. The DEA Had the Authority to Promulgate and Interpret a Regulation Concerning Whether Dispensing a Controlled Substance Has a “Legitimate Medical Purpose”**

Finally, we consider the basis of the Attorney General’s authority to determine that dispensing a controlled substance to assist in a suicide in a state that permits such conduct on the part of a physician does not serve a “legitimate medical purpose” under 21 C.F.R. §1306.04 (a).

We address this question because of an apparent ambiguity in the Reno Letter, *supra* note 7. The Letter could be understood, not as controverting DEA’s interpretation of the CSA and the DEA’s own regulations, but rather as making the *jurisdictional* claim that the DEA lacked statutory authority to find that a physician’s prescription of controlled substances to assist a suicide in Oregon went beyond “the course of professional practice,” 21 U.S.C. § 802(21), and did not serve a “legitimate medical purpose,” 21 C.F.R. § 1306.04(a). *See* Reno Letter at 3 (“[T]here is no evidence that Congress, in the CSA, intended to assign DEA the novel role of resolving ‘the earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide,’ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997), simply because that procedure involves the use of controlled substances.”). We do not understand the Reno Letter to be making a jurisdictional point, but rather to be offering its own interpretation of the CSA and the DEA’s regulations. If, however, the Letter were understood to be putting forward a jurisdictional claim, we think it would be both misleading and mistaken.

First, it is misleading to raise the question whether Congress assigned responsibility for interpreting and enforcing the CSA to *the DEA*. It is clear that Congress assigned that responsibility to *the Attorney General*, not to the DEA. *See* 21 U.S.C. § 821 (“*The Attorney General* is authorized to promulgate rules and regulations . . . relating to the . . . dispensing of controlled substances . . . and control of regulated persons and of regulated transactions”) (emphasis added); *id.* § 871(b) (“*The Attorney General* may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the

efficient execution of his functions under this subchapter.”) (emphasis added). The Attorney General is authorized to delegate his or her CSA responsibilities to “any officer or employee of the Department of Justice,” *id.* § 871(a), and the Attorney General determined to delegate those functions to the DEA. *See Touby*, 500 U.S. at 169. Thus, if the Reno Letter were construed to be questioning the DEA’s authority to interpret, for example, what the CSA means by “the course of professional practice,” 21 U.S.C. § 802(21), it would necessarily be questioning the authority of *the Attorney General* to interpret that provision. Such a conclusion would plainly be at odds with the broad language of the CSA’s authorizing provisions, *id.* §§ 821, 871(b).

Second, it is also misleading to say that Congress did not intend to assign to the DEA the role of resolving the national debate over physician-assisted suicide. Of course Congress did not intend to do that. What Congress plainly *did* intend to do was to give the Attorney General (and, accordingly, his or her delegate, the DEA) the authority to “promulgate rules and regulations . . . relating to the . . . dispensing of controlled substances and control of regulated persons.” *Id.* § 821. That is precisely what the DEA did when it promulgated 21 C.F.R. § 1306.04(a); and it was well within the scope of DEA’s authority to determine how that regulation was to be applied to the use of controlled substances in physician-assisted suicides.

Third, the DEA did not undertake to “*resolve*” the national debate over physician-assisted suicide and should not be faulted for having attempted to do so. The DEA acts pursuant to delegated authority under an Act of Congress. Congress remains free to alter the terms on which the DEA acts: it could, for example, carve out an exception for the use of controlled substances by physicians to assist suicide. Moreover, the DEA has no power to control the ability of the states to enact laws permitting (or forbidding) physician-assisted suicide. What DEA could, and did, properly resolve was that the dispensing of controlled substances by a physician to assist a suicide did not have a “legitimate medical purpose” within the meaning of its own regulation, notwithstanding the fact that a single state chose to legalize physician-assisted suicide. In *no* way did the DEA preclude open and vigorous debate in the legislative process on the merits of physician-assisted suicide.

Fourth, the Reno Letter suggests that the DEA—and, by necessary implication, the Attorney General—had no authority to adopt an interpretation that addressed “fundamental questions of morality and public policy.” Reno Letter, *supra* note 7, at 3. If that were so, it would follow that the Attorney General had no authority to decide whether dispensing controlled substances to assist in suicide served a “legitimate medical purpose” under 21 C.F.R. § 1306.04(a), because in deciding that question—one way or the other—the Attorney General would unavoidably be

addressing such moral and policy questions.<sup>40</sup> Indeed, it would seem to follow that that regulation was itself *ultra vires*—which is clearly a mistaken view.

The truth is that, far from being outside the Attorney General’s mission under the CSA, addressing such questions is inherent in that mission. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (“The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy . . .”) (internal quotation marks, internal ellipses and citation omitted). If the CSA is to be administered effectively, the Attorney General *must* interpret its provisions so as to decide, for example, whether prescribing of controlled substances in a particular class of cases takes place within the “course of professional practice,” 21 U.S.C. § 802(21), whether a physician’s conduct involving such substances “may threaten the public health and safety,” *id.* § 823(f)(5), and whether issuing a registration to an applicant would be “inconsistent with the public interest,” *id.* § 823(f). Of course such administrative determinations will require a judgment about public policy.<sup>41</sup> So do, for example, administrative determinations as to what constitute “excessive profits” on government contracts, *see Lichter v. United States*, 334 U.S. 742, 778-86 (1948), when commodity prices are “fair and equitable,” *see Yakus v. United States*, 321 U.S. 414, 426-27 (1944), when rates for the sale of a commodity are “just and reasonable,” *see Federal Power Comm’n v. Hope Gas Co.*, 320 U.S. 591, 600-02 (1944), when voting power has been “unfairly or inequitably” distributed among security holders, *see American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946), when broadcast licensing is in the “public interest,” *see National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943), or when a new drug poses an “imminent hazard to the public safety,” *see Touby*, 500 U.S. at 165. *See generally Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 472 (2001).<sup>42</sup> As a matter of administrative practice, there was nothing unusual or unauthorized in the fact that the DEA’s interpretation implicated questions of public policy or morality.

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<sup>40</sup> We note that the Reno Letter was *itself* an administrative interpretation that assumed a particular view of public policy.

<sup>41</sup> Indeed, one of the primary reasons why an agency’s construction of a statute it administers may be entitled to judicial deference is that it is more appropriate for an agency to make “policy choices” than it is for the courts. *Chevron*, 467 U.S. at 865.

<sup>42</sup> The Department of Justice may also be required to interpret statutes implicating judgments about policy or morality when bringing criminal prosecutions or when instituting deportation proceedings. *See, e.g., Jordan v. DeGeorge*, 341 U.S. 223, 231 & n.15 (1951) (deportation proceeding based on alien’s commission of asserted “crime involving moral turpitude;” Court finds that phrase “presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court”); *see also Kay v. United States*, 303 U.S. 1, 3 n.1, 7 (1938) (rejecting argument that statute making it criminal in some contexts willfully to “overvalue[] any security” was unconstitutionally vague).

Accordingly, if the Reno Letter were construed as denying the Attorney General (or the DEA) the statutory authority to reach the question whether prescribing controlled substances to assist suicide is consistent with the CSA and its implementing regulations in a state that had legalized physician-assisted suicide, the Letter would be clearly mistaken as a matter of law.

### **VIII. Conclusion**

Based on the foregoing considerations, the conclusion that a physician's assisting suicide through the dispensing of a controlled substance does not serve a "legitimate medical purpose" within the meaning of 21 C.F.R. § 1306.04 is the best reading of that regulation.

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## Constitutionality of the Rohrabacher Amendment

The Rohrabacher Amendment, which imposes a funding restriction on the Justice Department's ability to litigate matters relating to the Treaty of Peace with Japan, violates established separation of powers principles and, therefore, is unconstitutional.

July 25, 2001

### MEMORANDUM OPINION FOR THE SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT AND LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL

You have asked for the Office of Legal Counsel's views on the constitutional issues posed by Representative Dana Rohrabacher's amendment ("Rohrabacher Amendment") to H.R. 2500, the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, FY 2002 (commonly referred to as "CJS Bill"). For the reasons set forth more fully below, we conclude that the Rohrabacher Amendment violates established separation of powers principles and, therefore, is unconstitutional.

#### I. Introduction

The Rohrabacher Amendment passed the House of Representatives on July 18, 2001, by a 395-33 vote, *see* 147 Cong. Rec. H4195 (daily ed. July 18, 2001), and is set forth in section 801 of title VIII ("Additional General Provisions") of the CJS Bill. The Rohrabacher Amendment reads as follows:

Sec. 801. None of the funds made available in this Act may be used by the Department of Justice or the Department of State to file a motion in any court opposing a civil action against any Japanese person or corporation for compensation or reparations in which the plaintiff alleges that, as an American prisoner of war during World War II, he or she was used as slave or forced labor.

*Id.* at H4168.

#### II. General Constitutional Principles

The Rohrabacher Amendment is a restraint on spending, and thus is an exercise of Congress's power of the purse—a legislative authority central to the Constitution's scheme of separated powers.<sup>1</sup> Indeed, in a very early debate in the House of

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<sup>1</sup> The Constitution delegates to Congress the power to raise revenue and to appropriate it for the activities of the federal government, U.S. Const. art. I, § 8, cl. 1, and it expressly prohibits federal expenditures except "in Consequence of Appropriations made by Law," *id.* art. I, § 9, cl. 7. The Supreme Court has emphasized the breadth and significance of these core congressional powers. *See*,

Representatives, James Madison described Congress's power of the purse as "the great bulwark which our Constitution had carefully and jealously established against Executive usurpations." 3 Annals of Cong. 938 (Mar. 1, 1793); *see also The Federalist* No. 58, at 327 (James Madison) (Clinton Rossiter ed., 1999) (the power of the purse is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people"). The Executive Branch has accordingly long recognized that even where the President has the independent constitutional authority to take some action, the availability of funds depends on the existence of a relevant appropriations provision.<sup>2</sup> "Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use."<sup>3</sup>

On the other hand, even with due recognition of Congress's broad spending powers, the Executive Branch has also insisted that those powers may not be used to subvert the basic constitutional scheme for allocating federal powers among the three branches of the government. *See Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507, 530 (1960) ("[T]he Constitution does not permit any indirect encroachment by Congress upon th[e] authority of the President through resort to conditions attached to appropriations.")<sup>4</sup> The Executive Branch's insistence on this principle is long-standing. In 1860, President Buchanan issued a signing statement denying Congress's power to interfere with his authority to issue orders to military officers through the device of a condition on the availability of appropriated funds. The

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*e.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *see also The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676-77 (1868) (Executive may not supply army through advances of payments to military contractors without statutory authorization). Congress's control over public spending has centuries-old legal and constitutional roots: "The histories of parliaments are largely the accounts of how representative assemblies of the people, or some strata of the people, came to terms with kings and lords and priests by gradually acquiring control over the disposition of their own and the nation's wealth." James Burnham, *Congress and the American Tradition* 207 (1959).

<sup>2</sup> *See, e.g., Expense of Presents to Foreign Governments—How Defrayed*, 4 Op. Att'y Gen. 358, 359 (1845) (in "the conduct of our foreign relations," the Executive "cannot exceed the amount . . . appropriated").

<sup>3</sup> *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933).

<sup>4</sup> *See also Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 61 ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution."); William H. Taft, *The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government*, 25 Yale L.J. 599, 612 (1916) (discussing incident during President Taft's Administration in which the President instructed his subordinates to disregard an appropriations limitation as an unconstitutional interference with the President's responsibilities); David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. Chi. L. Rev. 1, 22 (2000) (footnote omitted) (the fact that "the appropriation power was intended as a check on Presidential authority does not prove it can be used to compel the President to take action he has discretion to decline").

President therefore construed the statute at issue not to work such an interference. See Signing Statement of President Buchanan to the House of Representatives (1860), reprinted in 7 *A Compilation of the Messages and Papers of the Presidents* 3128 (James D. Richardson ed., 1897).<sup>5</sup> Since that time, the Executive Branch has consistently denied the binding effect of appropriations conditions that violate the constitutional separation of powers or that usurp the President's constitutional authority. See, e.g., *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 125 (1995) ("Jerusalem Opinion") (bill conditioning spending authority on relocation of embassy was unconstitutional where it would "trammel the President's constitutional authority" over negotiation and recognition).

Of particular relevance here, the Executive Branch has found that funding prohibitions denying it any ability to communicate to the federal courts its views on legal questions central to its responsibilities may give rise to "serious constitutional problems." *The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief*, 14 Op. O.L.C. 13, 19 (1990).<sup>6</sup> Accordingly, we must examine the Rohrabacher Amendment carefully in order to determine whether it is an impermissible, albeit indirect, violation of separation of powers principles.

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<sup>5</sup> The views expressed in the signing statement were subsequently reviewed and endorsed by an opinion the President requested from Attorney General Black. The Attorney General wrote that "[i]f Congress had really intended to [interfere with the President's command authority], that purpose could not be accomplished in this indirect manner any more than if it was attempted directly." *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469 (1860).

<sup>6</sup> As Representative Christopher Cox pointed out during the House debate over the Rohrabacher Amendment, "[d]uring the Reagan Administration, the Department of Justice regularly advised Congress of its constitutional concerns over the so-called Rudman Amendment, a funding bar annually added by Congress that purported to bar the President from spending appropriated funds to advocate in court the view that the antitrust laws did not bar vertical non-price restraints. The Justice Department believed that the Rudman Amendment represented an attempt to accomplish indirectly through the appropriations power that [which] Congress could not, consistent with the Constitution, accomplish directly through legislation—namely, to tell the President how to 'take Care that the laws (in this case, the antitrust laws) be faithfully executed.'" 147 Cong. Rec. at H4170 (remarks of Rep. Cox). Representative Cox added that the Rohrabacher Amendment "appears to raise a still more serious constitutional question, because in addition to attempting to use the appropriations power indirectly to control the executive branch's interpretation of statutes pursuant to the Take Care Clause, it also attempts indirectly to use the appropriations power to control the President's exercise of the Foreign Affairs Power—a power he enjoys directly under the Constitution, and not by grant of delegated legislative authority." *Id.*

The views of the Justice Department relating to antitrust enforcement to which Representative Cox referred are set forth in, e.g., Memorandum for William F. Baxter, Assistant Attorney General, Antitrust Division, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Scope of Limitation Imposed by Appropriations Act Provision Relating to Resale Price Maintenance* (Dec. 2, 1983). In a signing statement dated November 28, 1983, President Ronald Reagan expressed "strong reservations about the constitutional implications" of the funding restriction. Statement on Signing a Fiscal Year 1984 Appropriations Bill, 2 *Pub. Papers of Pres. Ronald Reagan* 1627, 1627 (Nov. 28, 1983).

### **III. The Rohrabacher Amendment**

The Rohrabacher Amendment is addressed to particular consolidated cases brought in United States courts by former members of the United States Armed Services against Japanese nationals and corporations, based on claims that the plaintiffs were used for slave labor or forced labor during the Second World War while they were prisoners of war of Japan. The claims arise despite the fact that the Treaty of Peace with Japan appears to bar them. *See* Treaty of Peace with Japan art. 14, Sept. 8, 1951, 3 U.S.T. 3169, 3180-83 (the “Peace Treaty” or “Treaty”). Article 14(a) of the Peace Treaty establishes the terms of Japan’s reparations to the Allied Powers “for the damage and suffering caused by it during the war.” After prescribing how such reparations are to be paid, Article 14(b) of the Peace Treaty provides as follows (emphases added):

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers *and their nationals* arising out of any actions taken by Japan *and its nationals* in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

In a recent decision rejecting the claims to compensation by Americans who were prisoners of war of Japan, a federal district court held:

The treaty by its terms adopts a comprehensive and exclusive settlement plan for war-related economic injuries which, in its whole-sale waiver of prospective claims, is not unique. . . . The waiver provision of Article 14(b) is plainly broad enough to encompass the plaintiffs’ claims in the present litigation.

*In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000).

Pursuant to the Executive Branch’s constitutional responsibilities to interpret and uphold treaties, to conduct foreign relations, and to execute the law, the federal government filed “Statements of Interest” at various times in this litigation. *See, e.g.*, Statement of Interest of United States of America (Aug. 17, 2000), *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL-1347), *available at* <http://www.state.gov/s/l/c8185.htm> (last visited May 23, 2012). The government took the position that

[t]he United States must honor its international agreements, including the Peace Treaty with Japan. There is, in our view, no basis for the U.S. or Allied citizens to reopen the question of international

commitments and obligations under the 1951 Treaty. It is the United States' position that the claims of the United States, its nationals and Allied nationals against Japan and its nationals arising out of their conduct during the war were finally settled by the Treaty of Peace with Japan in 1951.

*Id.* at 2-3.

The intent of the Rohrabacher Amendment is apparently to prevent the Executive Branch from expressing to the courts its view of the Peace Treaty in the consolidated cases captioned *In re World War II Era Japanese Forced Labor Litigation*. Thus, Representative Rohrabacher stated, "I would hope that we can put this type of restriction into this bill that would prevent the State Department from using any funds that we authorize and appropriate today in order to prevent our POWs from suing the Japanese corporations that used them as slave labor in the Second World War." 147 Cong. Rec. at H4169.

#### **IV. Analysis**

In our opinion, there are at least two interlinked kinds of separation of powers problems in the Rohrabacher Amendment—the first kind relating to its effect on the Judiciary, the second kind to its effect on the Executive.

First, the Rohrabacher Amendment impermissibly impairs the ability of the federal courts to perform the judicial functions of interpreting the Peace Treaty and of adjudicating claims that appear to be barred by the waiver in Article 14(b) of that Treaty. It does this by attempting to prevent the Executive Branch from articulating to the courts its understanding of a treaty—an understanding on which the courts traditionally rely, and to which they characteristically give great deference. As we shall show, the courts' reliance on, and deference to, Executive Branch treaty interpretations is constitutionally grounded, and reflects the constitutionally assigned roles of the two branches with respect to foreign affairs. By preventing the courts from hearing the Executive's interpretation of the Peace Treaty, therefore, the Rohrabacher Amendment would force the courts to decide a case that implicates sensitive questions of our relationship with a major ally and treaty partner without having the benefit of the Executive's guidance and special expertise. The outcome at once impedes the courts from performing their constitutional role of adjudicating cases or controversies, and accords the courts a role in foreign policy decisionmaking that they do not properly have.

Second, the Rohrabacher Amendment impermissibly impairs the Executive Branch's ability to carry out the core constitutional responsibilities relating to treaties, while also seeking to direct and control the Executive in the performance of its exclusive functions. In particular, it prevents the Executive from articulating

and defending its interpretation of the Peace Treaty, while also attempting to induce the Executive and the courts to accept Congress's preferred interpretation.

Underlying both types of separation of powers problems is the basic constitutional principle of presidential primacy in the conduct of foreign affairs—a principle that the Supreme Court has repeatedly recognized. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *accord Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976); *United States v. Louisiana*, 363 U.S. 1, 35 (1960). The President's constitutional primacy in this area follows from specific textual grants of authority in Article II, including those that make him "Chief Executive, U.S. Const. Art. II, § 1, cl. 1, and . . . Commander in Chief, *id.*, art. II, § 2, cl.1." *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982). It follows as well from the "unique position" that the President occupies in the constitutional structure. *Id.* at 749.

Of greatest relevance here, the President's foreign relations power includes a broad range of authority with respect to treaties. These include, *inter alia*, responsibility for treaty interpretation and enforcement, and the authority to place the United States in breach of a treaty or even to terminate it, should the President find that advisable.<sup>7</sup> Moreover, the President's authority with respect to treaties intersects with his responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In consequence, the President's responsibility to take care that the laws be faithfully executed "is, if possible, more imperative" with respect to the execution of treaties than statutes, "since the execution of treaties being connected with public and foreign relations, is devolved upon the executive branch" in a unique manner. *United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 571-72 (1841).<sup>8</sup> It is this special presidential responsibility with respect to treaties that constitutes the basic premise of the analysis that follows.

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<sup>7</sup> *See* John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, The Separation of Powers, and Treaty Interpretation*, 89 Cal. L. Rev. 851, 873-74 (2001) ("Yoo").

<sup>8</sup> *See also Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (President has "duty to execute [treaty] provisions"); *Collins v. Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir. 1983) (President has "primary responsibility" for the "[i]nterpretation, clarification and implementation" of international agreements); *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 17 (1986) ("It is indisputable that treaties are among the laws to be executed by the President."); *International Load Line Convention*, 40 Op. Att'y Gen. 119, 123 (1941) ("Attention to the observance of treaties is an executive responsibility"); Restatement (Third) of the Foreign Relations Law of the United States § 112, cmt. c (1990).

Despite the fact that Article II does not enumerate a presidential power to interpret treaties, this function has been recognized from the beginning as belonging to the President. When the question arose concerning the proper interpretation of the 1778 Treaty of Alliance with France, President Washington issued the 1793 Neutrality Proclamation construing the Treaty not to require United States entry into the European wars on France's side. Alexander Hamilton defended President Washington's authority to interpret the Franco-American Treaty by arguing that this power stemmed from his control

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As the Supreme Court has repeatedly acknowledged, the Executive Branch's interpretations of treaties must be accorded substantial judicial deference. *See, e.g., El Al Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).<sup>9</sup> Such judicial deference is a reflection of the general constitutional principle discussed above—that the primary responsibility for upholding and enforcing treaties, and more generally for conducting foreign policy, lies with the President. *See United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (Selya, J., concurring) (deference to Executive's treaty interpretation is owed in part because “when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice”). Reliance on the Executive Branch's interpretation of a treaty serves at least four constitutionally significant purposes: (1) it helps the courts to avoid becoming the unwitting causes of friction between the United States and its treaty partners (or other nations); (2) it averts the embarrassments to the United States that would ensue if different branches of our government spoke with contradictory voices on crucial questions of treaty interpretation;<sup>10</sup> (3) it helps to ensure consistency and uniformity of interpretations within the Judicial Branch itself; and (4) it provides the courts with the Executive's expertise on legal or diplomatic views or practices with which courts may well be unfamiliar.<sup>11</sup> All four of these considerations supporting judicial reliance on the Executive in treaty cases derive ultimately from the Constitution's allocation of responsibilities within the federal government and the specific institutional competences that the Framers designed each branch to develop.<sup>12</sup>

The Rohrabacher Amendment would, however, effectively silence the Executive Branch if it attempted to articulate its interpretation of the Peace Treaty in

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over the treaty process and the general vesting of the executive power in Article II, Section 1. *See* Alexander Hamilton, Pacificus No. 1 (1793), reprinted in 15 *The Papers of Alexander Hamilton* 32 (Harold C. Syrett et al. eds., 1969); *see also* Yoo, 89 Cal. L. Rev. at 895-901.

<sup>9</sup> *See also* *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Mendara v. World Bank*, 717 F.2d 610, 620 (D.C. Cir. 1983).

<sup>10</sup> *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>11</sup> Thus, the courts recognize that although they “are well equipped to resolve questions of domestic law,” they “venture into unfamiliar territory” when interpreting treaties negotiated with foreign governments. *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 472 (5th Cir. 1992).

<sup>12</sup> *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (the Act of State doctrine has “‘constitutional’ underpinnings” because it “arises out of the basic relationships between branches of government in a system of separation of powers” and “concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations”).

cases in which the courts were adjudicating claims that the Treaty appears to bar. Apart from its effects on the *Executive's* constitutional functions (which we discuss in Part IV.B below), the provision would impair the *Judiciary's* ability to fulfill its "primary mission" of interpreting the law in the cases or controversies before it. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001). In *Velazquez*, a First Amendment case involving a funding restriction on the activities of the Legal Services Corporation ("LSC"), the Court stressed that the bar on the LSC's ability to present certain types of claims and arguments operated to impair the courts' ability to adjudicate cases as "[a]n informed, independent judiciary." *Id.* The Court stated that, under the challenged restriction, "cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity . . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.*

In view of the traditional reliance of the courts on the Executive Branch's interpretation of treaties—a reliance that, as we have shown, is dictated by the Constitution's allocation of responsibilities to the two branches—we think that the Rohrabacher Amendment, like the funding restriction invalidated in *Velazquez*, impermissibly impairs "the proper exercise of the judicial power."

Paradoxically, the Rohrabacher Amendment not only *weakens* the Judiciary's ability to perform its primary constitutional function, but also *augments* the Judiciary's power in a manner that is incompatible with the Constitution's distribution of governmental powers. As a general proposition, it is fair to say that the courts will frequently decline to decide questions involving foreign relations, or will defer to the Executive Branch when they do decide them, in order to avoid embarrassing the Executive Branch in the conduct of foreign policy.<sup>13</sup> That is to say, the courts themselves are aware that the over-judicialization of foreign policy disputes may cause the United States to speak to foreign nations with contradictory voices, and so undermine the Executive Branch's ability to conduct foreign relations. Under the Rohrabacher Amendment, however, the courts would be deciding a question of the utmost importance to the relations between the United States and Japan, despite the fact that the Executive Branch would be barred from informing them of its views of the Treaty of Peace with Japan or of the consequences of our breaching it. To invite the courts to play such a role, without the benefit of hearing the Executive Branch's view, is to disrupt the "proper distribu-

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<sup>13</sup> See, e.g., *Baker v. Carr*, 369 U.S. at 211-14; see also *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam) (instructing lower courts "not [to] pronounce upon the relative constitutional authority of Congress and the Executive branch [in a case involving national security] unless [they] find[] it imperative to do so"); *Goldwater v. Carter*, 444 U.S. at 1003 (Rehnquist, J., concurring in judgment) (question whether unilateral treaty termination power belonged to President was non-justiciable in part because "it involves foreign relations").

tion of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.” *Sabbatino*, 376 U.S. at 427-28.

## B.

As well as impairing the courts’ ability to exercise judicial power, the Rohrabacher Amendment also impermissibly impairs the Executive Branch’s performance of core constitutional functions with respect to treaties, while at the same time seeking to aggrandize Congress’s authority over the same area. Either type of interference—preventing a coordinate branch from performing a function that the Constitution assigns to it, or seeking to direct and control another branch in the performance of such a function—is a violation of separation of powers doctrine.<sup>14</sup>

The Rohrabacher Amendment would prohibit the Executive Branch from informing the courts of its interpretation of the Peace Treaty, but only if the Executive “oppos[es]” the plaintiffs in the covered civil actions. In effect, therefore, Congress would be requiring the Executive Branch either to present *no* interpretation of the Treaty to the courts, or else to advocate the plaintiffs’—i.e., *Congress’s*—interpretation of it. Forcing the Executive to choose between these alternatives is a violation of separation of powers principles. Insofar as Congress is silencing the Executive Branch, it is *impairing* the Executive’s ability to perform a central constitutional function. And insofar as Congress is seeking to direct the Executive Branch to advocate *Congress’s* interpretation of the treaty, it is *usurping* a constitutional power that does not belong to it.<sup>15</sup> True, Congress may *abrogate* treaties,<sup>16</sup> but it has no constitutional power whatever to insist, through legislation,

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<sup>14</sup> Interferences by one branch with another branch’s functioning in violation of separation of powers can take one of two basic forms. First, “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, where the Legislative or Executive Branch attempts to usurp power constitutionally committed to the other, the attempt is invalid. Second, “[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” *Id.*

<sup>15</sup> The fact that the Rohrabacher Amendment is an exercise of the *spending* power does not shelter it from these separation of powers objections: It has long been recognized that Congress may not invade the President’s foreign affairs powers by conditioning funding on the President’s exercising his discretionary constitutional powers in a particular manner. Representative Daniel Webster, for example, voiced such arguments in 1826, when opponents of the Panama Congress sought to attach such conditions to the appropriation for the United States mission. See Edward S. Corwin, *The President: Offices and Powers* 387-88 n.49 (1940).

<sup>16</sup> “It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country.” *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); see also *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring in part and in the judgment) (“[I]f Congress does not like the interpretation [of] a treaty [that] has been given by the courts or by the President, it may abrogate or amend it as a matter of internal law by simply enacting inconsistent legislation.”).

that the other branches advocate or adopt Congress's preferred construction of them.<sup>17</sup> The function of interpreting treaties belongs *only* to the Executive (as well, of course, to the courts when cognizable cases or controversies arise). *Cf. Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986). Thus, whether viewed as an impairment of the Executive's ability to perform its constitutional function of treaty interpretation, or as a usurpation by the Legislative Branch of the interpretative authority belonging solely to the other branches, the Rohrabacher Amendment appears to violate separation of powers principles.<sup>18</sup>

Further, the President's treaty powers also include the authority to enforce a treaty or, should he deem it advisable, to breach or to terminate it.<sup>19</sup> The Rohrabacher Amendment, however, while not abrogating the Peace Treaty, prevents the Executive Branch from upholding the Treaty by defending it in the courts. At the same time, the Amendment also encroaches on the President's authority to breach or terminate the Peace Treaty (again, without deploying Congress's power of abrogation) by seeking to cause an outcome in the litigation over the Treaty that would place the United States in violation of it. For these reasons as well, the Rohrabacher Amendment impermissibly impairs the Executive's constitutional power, while aggrandizing that of Congress.

In sum, then, we conclude that the Rohrabacher Amendment violates established separation of powers principles and is unconstitutional.

SHELDON BRADSHAW  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

ROBERT J. DELAHUNTY  
*Special Counsel*  
*Office of Legal Counsel*

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<sup>17</sup> It is clear that the Rohrabacher Amendment does not *abrogate* the Peace Treaty. It seems to presuppose that the courts may consider Treaty-based defenses to the claims of former prisoners of war (and thus that the Treaty remains in effect). But it denies to the Executive Branch the ability to present its views of the Treaty, should they conflict with the views of the plaintiffs.

<sup>18</sup> The constitutional problem we see here is thus similar to the problem we discerned in the Jerusalem Opinion. There, a conditional funding constraint would in effect have forced the President to choose between having no appropriations for embassies or situating the United States embassy to Israel in a place (Jerusalem) which *Congress* rather than the President had designated. To the extent that the provision would have precluded the Executive from maintaining embassies abroad, it constituted an impermissible impairment of the Executive's constitutional power; to the extent that it would have directed the choice of Jerusalem rather than Tel Aviv as the site of the embassy in Israel, it usurped the Executive's sole recognition power, and hence was an impermissible legislative aggrandizement.

<sup>19</sup> See Yoo, 89 Cal. L. Rev. at 873-74; John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673, 1725-29 (2000); *cf. The Paquete Habana*, 175 U.S. 677, 700 (1900).

## The President's Authority to Remove the Chairman of the Consumer Product Safety Commission

The Chairman of the Consumer Product Safety Commission serves at the pleasure of the President and the President has the constitutional authority to remove her for any reason.

July 31, 2001

### MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion concerning the power of the President to remove the Chairman of the Consumer Product Safety Commission ("CPSC"). We conclude that the Chairman of the CPSC serves at the pleasure of the President, and that the President has the constitutional authority to remove her for any reason.

#### I.

Section 2053 of title 15 of the U.S. Code provides that the CPSC shall consist of "five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 2053(a). The President shall appoint a Chairman from among the members of the Commission, by and with the advice of the Senate, *id.* § 2053(a), and the members of the Commission annually elect a Vice Chairman to act in case of a vacancy in the office of the Chairman, *id.* § 2053(d). Members of the Commission serve seven-year terms. *Id.* § 2053(b)(1). The President may remove "[a]ny member of the Commission" for "neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

The current Chairman of the Commission, Ann Brown, sworn in on March 10, 1994, serves as both a member of the Commission and its seventh Chairman. In June 1999, President Clinton nominated Brown to her second term, which expires in October 2006. The Commission's other members include Mary Sheila Gall, who was nominated by President Bush in July 1991 and renominated by President Clinton in May 1999. Her current term expires in October 2005. Thomas Hill More was nominated by President Clinton to complete a term that expired in October 1996. In August 1996, he was confirmed for his current full term, which expires in October 2003. According to the Commission's Office of Public Affairs, the Commission elected More to a one-year term as Vice Chairman in June 2001. The other two positions on the Commission are currently vacant.

#### II.

The President's ability to remove subordinates is one of his most important constitutional powers. As head of the Executive Branch, the President has the duty

to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. In order to fulfill this responsibility, the Chief Executive must be able to supervise subordinate officials and to coordinate Executive Branch policies and positions. *See generally Myers v. United States*, 272 U.S. 52 (1926). The power to remove is the power to control. As a result, the Supreme Court and the Executive Branch<sup>1</sup> have consistently recognized that the Constitution restricts congressional efforts to limit the President’s removal authority, so as to preserve the President’s ability to enforce the laws. *Morrison v. Olson*, 487 U.S. 654, 690-91 (1988). As reflected in the great debate over removal in the very first Congress, the Framers rejected a legislative role in removal in favor of plenary presidential power over officers appointed by the President with the advice and consent of the Senate. *See Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986); *Myers*, 272 U.S. at 111-44. Indeed, the power to remove should be seen as a necessary component of the vesting of all of the federal executive power in one President in Article II, Section 1 of the Constitution.

To be sure, the Court has refused to invalidate all limitations on presidential authority over all Executive Branch officials. In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a for-cause removal provision over members of the Federal Trade Commission due to the Commission’s “quasi-legislative or quasi-judicial” functions. *Id.* at 628. In *Wiener v. United States*, 357 U.S. 349 (1958), the Court inferred the existence of a for-cause limitation on removal, but again because the official in question, a member of the War Claims Commission, performed a quasi-judicial function. Most recently, in *Morrison v. Olson*, the Court upheld a for-cause removal provision for an independent counsel who performed investigatory and prosecutorial functions. The Court allowed a limitation on removal, however, only because the inferior officer involved performed a narrow, sharply limited, and highly unusual role that addressed the difficult issue of investigating the conduct of high-ranking Executive Branch officials. The *Morrison* Court further found that the limitation on the removal power did not unconstitutionally infringe on the President’s Article II powers, due to the Attorney General’s continuing ability to control and supervise the independent counsel.

In light of these cases, it is clear that the Constitution generally reserves to the President alone the power to remove officials within the Executive Branch, subject to certain narrow exceptions. Even the congressional efforts that were upheld in *Humphrey’s Executor*, *Wiener*, and *Morrison* were recognized by the Court as raising serious constitutional problems due to the possible infringement of the President’s powers under Article II of the Constitution. At a minimum, therefore,

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<sup>1</sup> *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 166-70 (1996); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 252-53 (1989).

this Office believes that Congress must state explicitly its intention to challenge the President's authority to remove subordinate officials. Indeed, unless Congress signals a clear intention otherwise, a statute should be read to preserve the President's removal power, so as to avoid any potential constitutional problems. *Cf. Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (construing statute to avoid unconstitutional infringement on executive powers); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 906-11 (D.C. Cir. 1993) (same).

Here, the statute establishing the CPSC does not include any limitation on the President's power to remove the Chairman. In the absence of such a provision, the statute is best read as not interfering with the President's plenary power to remove Executive Branch officials. Constitutional problems would arise if such a provision were to be implied; even section 2053(a)'s for-cause removal provision for Commissioners itself could prove to be unconstitutional. For example, none of the factors that led the *Morrison* Court to uphold the independent counsel law—that the independent counsel was an inferior officer, that her jurisdiction and powers were narrowly limited, and that the Attorney General still had supervisory authority over the independent counsel—is present here. In order to avoid the difficult constitutional questions that would arise concerning the President's Article II powers, section 2053 must be interpreted as creating no restrictions on the President's ability to remove the CPSC Chairman.

One might argue that *Wiener*—the sole Supreme Court case inferring a for-cause provision in the face of statutory silence—suggests a different outcome. It is clear, however, that the *Wiener* Court believed such protections necessary because the official in question performed purely adjudicatory duties affecting the rights of private individuals. 357 U.S. at 354-56. The CPSC's powers do not remotely approach the discrete dispute-resolution functions of *Wiener's* War Claims Commission, which heard claims by Americans who suffered personal injury or property damage at the hands of the enemy during World War II. Instead, the CPSC's main responsibilities include conducting research and collecting data on product safety, 15 U.S.C. § 2054, promulgating product safety regulations, *id.* § 2056, banning hazardous products, *id.* § 2057, and the right to bring civil suits in federal court, *id.* § 2071. The CPSC has no adjudicatory functions, certainly none that resembles the pure claims-settlement role of the War Claims Commission.<sup>2</sup>

Conversely, the War Claims Commission had no rulemaking or law-enforcement functions like those of the CPSC. Indeed, the CPSC more closely resembles the structure of the FTC, whose for-cause removal provision was upheld

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<sup>2</sup> While the CPSC has issued regulations that discuss its "adjudicative proceedings," see 16 C.F.R. § 1025.1, these rules appear to apply to hearings that the Commission conducts in connection with the exercise of its regulatory duties, rather than the adjudication of private rights similar to that performed by courts. In fact, private parties who suffer harm from CPSC rules, and suits by those injured by noncompliant products, must file lawsuits directly in federal court. See 15 U.S.C. §§ 2060(a), 2072, 2073.

in *Humphrey's Executor*. Even then, however, the Court required an explicit provision restricting the President's removal authority, which is not present here. No for-cause removal protection for the CPSC Chairman can be inferred from the CPSC's statutory duties.<sup>3</sup>

The Chairman's specific functions further reinforce this interpretation. The CPSC's statute provides that the Chairman "shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission." *Id.* § 2053(f)(1). Thus, by statute, the Chairman is differentiated from those of the other Commissioners solely by her executive duties. The *Wiener* Court's willingness to infer a limit on the President's removal power, therefore, would be even less appropriate here. The purely executive functions of the Chairman qua Chairman also help explain why Congress would intend different conditions for the removal of the Chairman as opposed to removal of the Commissioners generally.

### III.

This reading is further bolstered by other parts of the CPSC's statutory text. Section 2053(a) seeks to limit the President's authority to remove Commission members by establishing a for-cause requirement. Under standard canons of statutory construction, the inclusion of a provision in one part of a statute, and its absence in another part, indicates that the first provision does not apply in the latter context. *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 326-30 (1997) (applying canon of *expressio unius*); *Cipollone v. Liggett Group, Inc.*, 515 U.S. 504, 517 (1992) (same). Specification of grounds for the removal of a Commission member, and the failure to address the removal of the Chairman, demonstrate Congress's intention not to limit the President's removal powers over the Chairman. The Chairman serves at the pleasure of the President.

Legislative history further confirms this reading of the text. In 1978, Congress amended the law establishing the CPSC to make clear that the Chairman served at the pleasure of the President. As originally enacted in 1972, the Consumer Product Safety Act had stated that:

An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as Chairman. The Chairman, when so des-

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<sup>3</sup> In other contexts, this Office has questioned whether *Wiener's* rationale makes sense and whether the case remains good law. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. at 168 n.115.

igned shall act as Chairman until the expiration of his term of office as Commissioner. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (1972) (emphasis added). It was thought that this provision did not make clear whether the Chairman served at the pleasure of the President, or whether he held the chairmanship as long as his term as a Commissioner. One might construe the Act as requiring that in order to remove a Chairman, the President would have to remove him as a Commissioner as well. Because the statute limited the removal of commissioners, the original version of the Act thus might have been understood as limiting the President's removal power over the Chairman.

In amending the statute in 1978, Congress clarified the CPSC removal provisions. While Congress decided to subject the selection of the Chairman to senatorial advice and consent, it also made clear that the Chairman served at the pleasure of the President. The statutory language was changed to:

An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the Members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

Pub. L. No. 95-631, § 2(a), 92 Stat. 3742, 3742 (1978) (emphasis added). The statute removed the provision that had tied the term of the chairmanship to the term of the commissioner appointed to the post. This had the additional effect of delinking the conditions of the Chairman's removal, if there had been any, from the conditions under which the President could remove Commissioners.<sup>4</sup>

Congress fully appreciated the importance of the new language. In its report on the 1978 Act, the Senate Commerce Committee observed that this change made clear that the "chairman of the agency shall serve at the pleasure of the President."

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<sup>4</sup> The 1990 amendments to the Act added the following sentence: "In making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission." Pub. L. No. 101-608, § 102, 104 Stat. 3110, 3110 (1990). This part of section 2053(a) is not involved in this matter.

S. Rep. No. 95-889, at 10 (1978). In introducing the bill on the floor, Senator Ford declared that “[t]his legislation amends the act to provide that the Commission Chairman serve at the pleasure of the President with the advice and consent of the Senate.” 124 Cong. Rec. 24,362 (1978). In introducing the House version, Representative Eckhardt stated that the legislation “would provide that the Chairman of the Commission serve at the pleasure of the President and be appointed with the advice and consent of the Senate.” 124 Cong. Rec. 38,620 (1978). In agreeing to the House version, which contained the same language on removal as the Senate’s bill, Senator Ford told the Senate that the legislation continued to provide “that the Chairman of the Commission serve at the pleasure of the President with Senate advice and consent.” 124 Cong. Rec. 37,646 (1978). It seems clear that Senator Ford’s references to the Senate’s advice and consent role relate to the appointment of the Chairman (as it is settled that the Senate cannot condition removal of executive officials on its own advice and consent), while his discussion of the service of the Chairman at the pleasure of the President refers to removal. The Senate Report and Representative Eckhardt’s description of the 1978 amendments made clear the new change: that the appointment of the Chairman would require the Senate’s advice and consent, but that otherwise he would serve at the pleasure of the President.

#### IV.

We conclude that the President has the authority to remove the Chairman of the CPSC for any reason. Upon her removal, she will still continue to serve as a Commissioner. Under 15 U.S.C. § 2053(d), the Vice Chairman of the Commission will assume the post of Chairman.

JOHN C. YOO

*Deputy Assistant Attorney General  
Office of Legal Counsel*

## Designation of Acting Associate Attorney General

Phil Perry, who has already been designated as the first assistant to the office of the Associate Attorney General by virtue of his appointment as the Principal Deputy Associate Attorney General, may, consistent with the Vacancies Reform Act of 1998, serve as the Acting Associate Attorney General even though he was not the first assistant when the vacancy occurred.

Because the President has not designated another person as the Acting Associate Attorney General under the Vacancies Reform Act, Mr. Perry, as the Principal Deputy, is required to perform the functions and duties of the office of the Associate Attorney General in an acting capacity.

August 7, 2001

### MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether Phil Perry, the Principal Deputy Associate Attorney General, can, consistent with the Vacancies Reform Act of 1998 (“the Act”),<sup>1</sup> serve as the Acting Associate Attorney General. For the reasons set forth more fully below, we conclude that unless the President designates another person as the Acting Associate Attorney General under the Act, Mr. Perry, as the Principal Deputy, is actually required to perform the functions and duties of the office of the Associate Attorney General in an acting capacity.

#### I.

On January 20, 2001, Daniel Marcus, the Associate Attorney General resigned. Two days after the vacancy in the Associate Attorney General’s office occurred, Mr. Perry arrived at the Department of Justice (“the Department”) as part of the new administration’s transition team. On July 16, 2001, Mr. Perry was officially appointed the Principal Deputy Associate Attorney General. As of this date, the President has not yet publicly announced who he intends to nominate as Associate Attorney General. It is our understanding, however, that the President intends to nominate someone other than Mr. Perry for the position.

#### II.

The Act, which took effect on November 20, 1998, replaced the old Vacancies Act and altered the manner in which vacancies in presidentially appointed, Senate-confirmed offices within the Executive Branch could be “filled” on a temporary basis. Under the Act, any one of three categories of individuals is eligible to serve in such an office in an acting capacity:

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<sup>1</sup> Pub. L. No. 105-277, § 151(b), 112 Stat. 2681-611 (1998) (codified at 5 U.S.C. §§ 3345-3349d (Supp. IV 1998)).

(a) If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

5 U.S.C. § 3345(a). Only the first of those categories is relevant in this case.<sup>2</sup> Moreover, unlike the other two categories, which require presidential action, that category is triggered automatically once a vacancy is created; the Act provides in relevant part that “the first assistant to the office of [the officer who resigned] *shall* perform the functions and duties of the office temporarily in an acting capacity.” *Id.* § 3345(a)(1) (emphasis added).

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<sup>2</sup> Mr. Perry does not currently serve in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, *see* 5 U.S.C. § 3345(a)(2), and he did not previously serve in the Department (for any period of time, much less the required 90 days) during the 365-day period preceding the resignation of Mr. Marcus, *see id.* § 3345(a)(3)(A). Accordingly, only 5 U.S.C. § 3345(a)(1) is at issue in this case.

### III.

As a threshold matter, we must determine whether the Principal Deputy Associate Attorney General is, for purposes of the Act, the “first assistant” to the Associate Attorney General. The Act itself does not define “first assistant.” We believe, however, that the phrase is a term of art that refers to the top deputy of a presidentially appointed, Senate-confirmed officer. Under this interpretation, the Principal Deputy would generally qualify as the “first assistant.” In any event, this Office has taken the position previously that designation of a first assistant by regulation, if an agency’s governing statute does not do so, is sufficient under the Act. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (1999) (“*VRA Guidance*”). Under Justice Department regulations, the “Principal Deputy” within an office run by a presidentially appointed, Senate-confirmed officer is the “First Assistant” for purposes of the Act. *See* 28 C.F.R. § 0.132 (2000).<sup>3</sup> Accordingly, we conclude that Mr. Perry is the “first assistant” to the Associate Attorney General for purposes of section 3345(a)(1).

Next, we must ascertain the scope of section 3345(a)(1). In particular, we must determine whether subsection (a)(1) applies to someone who, like Mr. Perry, was designated as first assistant after the vacancy occurred. In a memorandum—prepared in question and answer format—intended to provide agency general counsels with general guidance on the Act, this Office tentatively answered that very question:

Q13. 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?

A. 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.

*VRA Guidance*, 23 Op. O.L.C. at 63-64. As the brevity of our answer makes clear, we did not thoroughly consider (or definitively resolve) the issue. Indeed, our initial understanding was offered without explanation or, more importantly, any analysis of the Act’s text or structure. Having now specifically considered the question in light of both the Act’s text and structure, we conclude that our initial understanding was erroneous.

First, the Act expressly applies to “the first assistant *to the office* of [the officer who resigned].” 5 U.S.C. § 3345(a)(1) (emphasis added). In concluding that the

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<sup>3</sup> If no principal deputy position exists in an office, then the Attorney General may designate the first assistant in writing. *See* 28 C.F.R. § 0.132.

first assistant must be in place at the time of the vacancy, we necessarily construed the Act as applying to “the first assistant of [the officer who resigned].” Such a reading, however, renders the words “to the office” meaningless. *See Moskal v. United States*, 498 U.S. 103, 109-10 (1990) (stressing that a statute must be construed in such a fashion that gives every word some operative effect). This is particularly troublesome given that the Act specifically modified the old Vacancies Act by replacing the phrase “to the officer” with the phrase “to the office.” *See* 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) (noting that the term “to the officer” had been part of the old Vacancies Act since 1868). Under the most natural reading of the Act, an individual need only be the first assistant to the office of the presidentially appointed, Senate-confirmed officer who resigned. And, unlike our initial interpretation, such a reading does not require that the first assistant be in place at the time the vacancy occurred to be the acting officer by virtue of being the first assistant.

Second, our initial interpretation of subsection (a)(1), if correct, would also render subsection (b)(1)(A)(i) superfluous. *See Freytag v. Comm’r*, 501 U.S. 868, 877 (1991) (stressing that courts should not interpret statutory provisions so as to render superfluous other provisions within the same enactment). Notwithstanding subsection (a)(1), subsection (b)(1) places several obstacles in the way of a first assistant from serving as an acting officer if the President submits the nomination of that person to the Senate for appointment to the office in question.<sup>4</sup> One of the obstacles set forth in subsection (b)(1) provides, in pertinent part, as follows:

if . . . during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person . . . did not serve in the position of first assistant to the office of such officer.

5 U.S.C. § 3345(b)(1)(A)(i). In other words, an individual who was not the first assistant during the 365-day period preceding the vacancy may not serve in an acting capacity if the President has also nominated that person to the Senate for appointment to the vacant position. Of course, Congress’s enactment of subsection (b)(1)(A)(i) was meaningless if an individual who was not the first assistant when the vacancy occurred is already flatly prohibited from serving in an acting capacity pursuant to subsection (a)(1), as we previously concluded. Indeed, the enactment of subsection (b)(1)(A)(i) was necessary *only* if an individual who becomes first assistant after a vacancy occurs could otherwise serve in an acting capacity pursuant to subsection (a)(1). If subsection (b)(1)(A)(i) is to be given operative effect, which it must, our initial understanding of subsection (a)(1) must give way. *Cf.* 2A Norman Singer, *Sutherland on Statutes and Statutory Construction* § 46.06,

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<sup>4</sup> Because the President intends to nominate a person other than Mr. Perry to the office of the Associate Attorney General, these obstacles to service do not apply to him.

at 181-86 (6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”) (footnote omitted).

Given the Act’s text and structure, we now believe that the better understanding is that an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant. Accordingly, Mr. Perry, who has already been designated as the first assistant to the office of the Associate Attorney General by virtue of his appointment as the Principal Deputy, may serve as the Acting Associate Attorney General even though he was not the first assistant when the vacancy occurred.<sup>5</sup> Moreover, because the President has not designated another person as the Acting Associate Attorney General under the Act, Mr. Perry, as the Principal Deputy, is required to perform the functions and duties of the office of the Associate Attorney General in an acting capacity.

SHELDON BRADSHAW  
*Deputy Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>5</sup> We note that the Act imposes time limits on service in an acting capacity. An acting officer may serve “for no longer than 210 days beginning on the date the vacancy occurs.” 5 U.S.C. § 3346(a)(1). If the vacancy exists during the 60-day period after a President is sworn into office, the 210-day clock is extended an additional 90 days. *Id.* § 3349a(b). Accordingly, because the vacancy in this case occurred on January 20, 2001, Mr. Perry may serve under this provision at least until November 16, 2001. In addition, once a nomination for the office is submitted to the Senate, the acting officer may serve “from the date of such nomination for the period that the nomination is pending in the Senate.” *Id.* § 3346(a)(2). The Act specifies the applicable term of service should the nomination be rejected, withdrawn, or returned. *Id.* § 3346(b).

## The President's Authority to Make a Recess Appointment to the National Labor Relations Board

The President may make a recess appointment to the National Labor Relations Board of a person whose term as a Senate-confirmed member expired during the current recess of the Senate.

August 31, 2001

### MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the President may make a recess appointment to the National Labor Relations Board (“NLRB” or “Board”) of a person whose term as a Senate-confirmed member expired during the current recess of the Senate. We believe that the President may make this recess appointment.

Members of the NLRB are appointed to five-year terms by the President, with the Senate’s advice and consent. 29 U.S.C. § 153(a) (2000). As we understand the facts, the member in question had been serving under such an appointment for a term that ended August 27, 2001.

The Constitution provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. Here, the member’s term has expired, and the office he previously occupied is vacant. And because there is no bar on reappointment and indeed the statute declares that “[e]ach member of the Board . . . shall be eligible for reappointment,” 29 U.S.C. § 154(a), no question about eligibility to serve is raised by the recess appointment of someone who has been appointed before.

The Senate, moreover, is in “recess.” It adjourned August 3, 2001, and will return September 4, 2001. 147 Cong. Rec. 16,196 (2001). “The longstanding view of the Attorneys General has been that the term ‘recess’ includes intrasession recesses if they are of substantial length.” *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15 (1992) (“*Intrasession Recess Appointments*”). The seminal 1921 opinion by Attorney General Daugherty affirmed the President’s power to make a recess appointment in an intrasession recess of twenty-eight days. *Executive Power—Recess Appointments*, 33 Op. Att’y Gen. 20, 24 (1921). Since then, Presidents have acted on the conclusion that even much shorter intrasession recesses were sufficiently substantial to allow recess appointments. *See, e.g., Intrasession Recess Appointments*, 16 Op. O.L.C. at 16 (discussing appointments during recesses of fifteen and eighteen days). Although there is scant judicial authority on the President’s power to make recess appointments during intrasession recesses, *see Gould v. United States*, 19 Ct. Cl. 593, 595 (1884) (accepting such an appointment), the Executive Branch precedents establish that the current recess of thirty-two days could amply support a recess appointment.

Finally, the Pay Act, 5 U.S.C. § 5503 (2000), by which Congress has sought to bar the pay of recess appointees in some circumstances, would not apply here. Because the statute applies only “if the vacancy existed while the Senate was in session,” *id.* § 5503(a), it does not reach a vacancy that first arises during a recess and is filled before the Senate returns. *See* Memorandum for the Attorney General, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* at 7-8 (July 7, 1988); Memorandum for the Attorney General, from Ralph E. Erickson, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* at 3 (Dec. 21, 1971).

DANIEL L. KOFFSKY  
*Acting Assistant Attorney General*  
*Office of Legal Counsel*

## Post-Employment Restriction of 12 U.S.C. § 1812(e)

A Director of the Office of Thrift Supervision who resigns at the President's request is not subject to the two-year restriction, under 12 U.S.C. § 1812(e), against working for an insured depository institution or a depository institution holding company.

September 4, 2001

MEMORANDUM OPINION FOR THE GENERAL COUNSEL  
DEPARTMENT OF THE TREASURY  
AND  
THE CHIEF COUNSEL  
OFFICE OF THRIFT SUPERVISION

You have asked for our opinion whether the Director of the Office of Thrift Supervision ("OTS"), Department of the Treasury, will be subject to a two-year restriction against working for an insured depository institution or a depository institution holding company, when her resignation, which she offered at the President's request, takes effect. 12 U.S.C. § 1812(e)(1)(A)(ii) (1994). *See* Letter for Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Carolyn J. Buck, Chief Counsel, Office of Thrift Supervision (July 24, 2001) ("July 24, 2001 Letter"). We believe that the two-year restriction would not apply.

The possible restriction arises from the OTS Director's position on the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC"). That Board consists of three members appointed to the Board by the President, with the Senate's advice and consent; the Comptroller of the Currency; and the Director of OTS. 12 U.S.C. § 1812(a)(1). For two years after leaving the Board, former members are barred from "any office, position, or employment in any insured depository institution or any depository institution holding company"; but the bar does not apply "to any member who has ceased to serve on the Board . . . after serving the full term for which such member was appointed." *Id.* § 1812(e)(1)(A)-(B).

In a letter to the President, the Director of OTS stated that the President had asked her to resign and that she therefore was tendering her resignation, effective upon the confirmation and appointment of a successor. Letter for the President, from the Director of the Office of Thrift Supervision at 1 (July 3, 2001) ("July 3, 2001 Letter"). The issue here is whether, having resigned in these circumstances, the Director of OTS has "serv[ed] the full term for which [she] was appointed." 12 U.S.C. § 1812(e)(1)(B).

A similar issue arose in 1961, when the Comptroller of the Currency resigned at the request of President Kennedy. At that time, the General Counsel of the Treasury concluded that "resignation at the request of the President is equivalent

to removal” and that “service until removal by receipt of a requested resignation constitutes service for a full term of office as Comptroller of the Currency.” Letter for Erle Cocke, Sr., Chairman, FDIC, from Robert M. Knight, General Counsel, Department of the Treasury at 1 (Nov. 7, 1961). Relying on these judgments, the Chairman of the FDIC, on the advice of his General Counsel, determined that the two-year post-employment restriction would not apply. *See* Letter for Robert M. Knight, General Counsel, Department of the Treasury, from Erle Cocke, Sr., Chairman, FDIC at 1 (Nov. 7, 1961).

According to a memorandum in the files of the Treasury Department, that Department’s General Counsel showed Assistant Attorney General Nicholas Katzenbach, then the head of our Office, the letter from the Treasury General Counsel and a draft of the reply later sent by the FDIC Chairman, and Mr. Katzenbach “expressed his concurrence with the two letters.” Memorandum for the Files, from Robert M. Knight, General Counsel, Department of the Treasury (Nov. 7, 1961). We have located no confirmation of this approval in our Office’s files, but a letter sent to the Comptroller of the Currency in 1964 by Norbert Schlei, then the Assistant Attorney General for our Office, stated:

I am aware of the case of your immediate predecessor in office, who resigned at the request of President Kennedy before completing the five-year term authorized by section 325 of the Revised Statutes, as amended (12 U.S.C. § 2). I agree with the conclusion reached by the General Counsel of the Treasury Department, and concurred in by the Chairman of the [FDIC], that a resignation under those circumstances marked the end of a full term for the purposes of the exception to the employment restriction in 12 U.S.C. § 1812 and left open to your predecessor the possibility of immediate employment with an insured bank.

Letter for the Comptroller of the Currency, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel at 1 (Sept. 2, 1964). Two years later, our Office reached the same conclusion again. Letter for Fred B. Smith, General Counsel, Department of the Treasury, from Frank Wozencraft, Assistant Attorney General, Office of Legal Counsel (Nov. 10, 1966). An internal memorandum prepared a few weeks earlier laid the groundwork for the letter. Memorandum for the Files, from Nathan Siegel, Office of Legal Counsel, *Re: Eligibility of a Comptroller of the Currency for Employment in an Insured Bank Under 12 U.S.C. § 1812* (Sept. 21, 1966) (“1966 Memorandum”).

The rationale for this view of the statute, which is not an obvious interpretation of the language, was never explained at length, but it appears to have consisted of a two-step argument. First, a Comptroller of the Currency *removed* by the President has served a full term. He has served as long as the law—given the

President's action—would permit, *see id.* at 3-4; and application of the post-employment restriction, in those circumstances, would not serve the statute's purpose, which is to prevent an official from (intentionally) exploiting a short stay in office to make contacts that lead to private employment. *Id.* at 2. Second, "when the holder of the office responds to the President's request to resign it is in substance a forced separation from office" and so equivalent to a removal. *Id.* at 3.

These prior opinions, without more, might seem to settle the issue whether the Director of OTS, whose office (like that of the Comptroller of the Currency) entails service on the FDIC Board, will have served her full term when her resignation at the President's request becomes effective. In two respects, however, the situation here might differ from the one we previously considered.

First, under 12 U.S.C. § 2 (1994), the Comptroller of the Currency "shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate." This provision could be read as expressly defining a term that ends either in five years or upon removal of the President. By contrast, the Director of OTS "shall be appointed for a term of 5 years." *Id.* § 1462a(c)(2). Because the language of this provision could not be said expressly to define a term that ends upon removal by the President, a Director of OTS who is removed or resigns at the President's request arguably would not have served a full term.

It is far from evident that our earlier opinions rested in any way on an argument that the statutory language defined the Comptroller of the Currency's term by reference to the President's power of removal. At any rate, drawing this distinction would lead to a serious anomaly. Of the members of the Board, only the Comptroller of the Currency serves under a statute that contains the "unless sooner removed by the President" language. Thus, if a distinction were made on the basis of this language, the distinction would give a special benefit to the Comptroller of the Currency that would be unavailable to the other members of the FDIC's Board: only the Comptroller of the Currency would be relieved of the two-year bar when the President removed him or he resigned at the President's request.

We would not infer that Congress intended such an anomaly. On the contrary, the legislative history suggests that the Comptroller of the Currency and the other members of the Board were to be subject to the same post-employment restrictions. Until 1950, when the Board consisted of the Comptroller of the Currency and two appointed members, the two-year bar was absolute as to the Comptroller of the Currency, and only the appointed members gained exemption from the bar by serving their full terms. *See* 12 U.S.C. § 264(b) (1946). In 1950, Congress repealed the absolute bar that had applied to the Comptroller of the Currency, "thereby placing him in *the same position* in that respect as the two appointive members of the Board." H.R. Rep. No. 81-2564, at 5 (1950) (emphasis added); *see also* 1966 Memorandum at 2-3 (citations omitted). But if the exception for officials who have served a "full term" is available to a Comptroller of the

Currency removed from office only because his term is “five years unless sooner removed,” and if that exception is unavailable to the other members of the Board because the statutes applicable to them do not contain that language, the 1950 amendment, rather than placing the Comptroller of the Currency in the same position as the appointed members, would have put him in an appreciably better position.

Second, the Director of OTS’s letter of resignation suggests, without actually asserting, that the Director of OTS might not serve at the pleasure of the President. *See* July 3, 2001 Letter at 2. Such an assertion would be in tension with the view that the President, by asking for the Director of OTS’s resignation, had effectively removed her from office and that she thus had served the full term allowed by the law under the circumstances.

We do not endorse the view that tenure protection for the Director should be inferred under the statute here. The statute gives no express protection. Furthermore, as the Director of OTS observes, *see* July 24, 2001 Letter at 1, OTS is within the Treasury Department, and the Secretary of the Treasury has “general oversight” power over the Director. 12 U.S.C. § 1462a(b)(1). At any rate, it is sufficient for present purposes to note that the Director of OTS did not actually claim that the President would have lacked authority to remove her. Therefore, under the approach of our prior opinions and for purposes of the question here, her resignation “is in substance a forced separation from office.” *See* 1966 Memorandum at 3.

We therefore do not believe that the present case should be distinguished from our earlier opinions. Because the Director of OTS resigned at the President’s request, she has served a “full term” within the meaning of the statute as our Office has interpreted it, and she may claim the benefit of the exception to the two-year post-employment bar.

DANIEL L. KOFFSKY  
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*Office of Legal Counsel*

## The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them

The President has broad constitutional power to take military action in response to the terrorist attacks on the United States on September 11, 2001. Congress has acknowledged this inherent executive power in both the War Powers Resolution and the Joint Resolution passed by Congress on September 14, 2001.

The President has constitutional power not only to retaliate against any person, organization, or state suspected of involvement in terrorist attacks on the United States, but also against foreign states suspected of harboring or supporting such organizations.

The President may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

September 25, 2001

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT\*

You have asked for our opinion as to the scope of the President's authority to take military action in response to the terrorist attacks on the United States on September 11, 2001. We conclude that the President has broad constitutional power to use military force. Congress has acknowledged this inherent executive power in both the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541-1548 (the "WPR"), and in the Joint Resolution passed by Congress on September 14, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001). Further, the President has the constitutional power not only to retaliate against any person, organization, or state suspected of involvement in terrorist attacks on the United States, but also against foreign states suspected of harboring or supporting such organizations. Finally, the President may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

Our analysis falls into four parts. First, we examine the Constitution's text and structure. We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States. Second, we confirm that conclusion by reviewing the executive and judicial statements and decisions interpreting the Constitution and the

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\* Editor's Note: For the book edition of this memorandum opinion, some of the internet citations have been updated or replaced with citations of equivalent printed authorities.

President's powers under it. Third, we analyze the relevant practice of the United States, including recent history, that supports the view that the President has the authority to deploy military force in response to emergency conditions such as those created by the September 11, 2001 terrorist attacks. Finally, we discuss congressional enactments that, in our view, acknowledge the President's plenary authority to use force to respond to the terrorist attack on the United States.

Our review establishes that all three branches of the federal government—Congress, the Executive, and the Judiciary—agree that the President has broad authority to use military force abroad, including the ability to deter future attacks.

## I.

The President's constitutional power to defend the United States and the lives of its people must be understood in light of the Founders' express intention to create a federal government "cloathed with all the powers requisite to [the] complete execution of its trust." *The Federalist* No. 23, at 122 (Alexander Hamilton) (Charles R. Kesler ed., 1999). Foremost among the objectives committed to that trust by the Constitution is the security of the Nation.<sup>1</sup> As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency." *Id.*<sup>2</sup>

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981)

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<sup>1</sup> "As Lincoln aptly said, '[is] it possible to lose the nation and yet preserve the Constitution?'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring in judgment).

<sup>2</sup> See also *The Federalist* No. 34, at 207 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (federal government is to possess "an indefinite power of providing for emergencies as they might arise"); *id.* No. 41, at 256 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it must be effectually confided to the federal councils."). Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of the "the circumstances which may affect the public safety," and that the federal government's powers are correspondingly broad. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President "exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal"); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934) (federal government's war powers are "well-nigh limitless" in extent); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870) ("The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.").

(citation omitted). Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the Nation and its interests in accordance “with the realistic purposes of the entire instrument.” *Lichter v. United States*, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to actions necessary for “victories in the field.” *Application of Yamashita*, 327 U.S. 1, 12 (1946). The authority over national security “carries with it the inherent power to guard against the immediate renewal of the conflict.” *Id.*

We now turn to the more precise question of the President’s inherent constitutional powers to use military force.

*Constitutional Text.* The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to use military force in situations of emergency. Article II, Section 2 states that the “President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” U.S. Const. art. II, § 2, cl. 1. He is further vested with all of “the executive Power” and the duty to execute the laws. U.S. Const. art. II, § 1. These powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States.<sup>3</sup> During the period leading up to the Constitution’s ratification, the power to initiate hostilities and to control the escalation of conflict had been long understood to rest in the hands of the Executive Branch.<sup>4</sup>

By their terms, these provisions vest full control of the military forces of the United States in the President. The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President. It has long been the view of this Office that the Commander-in-Chief Clause is a substantive grant of authority to the President and that the scope of the President’s authority to commit the armed forces to combat is very broad. *See, e.g.,* Memorandum for Charles W. Colson, Special Counsel to the President, from

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<sup>3</sup> *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces “abroad or to any particular region”); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (“As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . . .”); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The “inherent powers” of the Commander in Chief “are clearly extensive.”); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President “may direct any revenue cutter to cruise in any waters in order to perform any duty of the service”); *Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has “power as Commander-in-Chief to station forces abroad”); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992).

<sup>4</sup> *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 196-241 (1996).

William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970) (the "Rehnquist Memo"). The President's complete discretion in exercising the Commander-in-Chief power has also been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, the Court explained that, whether the President "in fulfilling his duties as Commander in-Chief" had met with a situation justifying treating the southern States as belligerents and instituting a blockade, was a question "to be decided by him" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."<sup>5</sup>

Some commentators have read the constitutional text differently. They argue that the vesting of the power to declare war gives Congress the sole authority to decide whether to make war.<sup>6</sup> This view misreads the constitutional text and

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<sup>5</sup> See *Prize Cases*, 67 U.S. at 670 ("He must determine what degree of force the crisis demands."); see also *Eisenstrager*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated by* 471 U.S. 1113 (1985); *Ex parte Vallandigham*, 28 F. Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Hefleblower v. United States*, 21 Ct. Cl. 228, 238 (Ct. Cl. 1886) ("The responsibility of declaring what portions of the country were in insurrection and of declaring when the insurrection came to an end was accorded to the President; when he declared a portion of the country to be in insurrection the judiciary cannot try the issue and find the territory national; conversely, when the President declared the insurrection at an end in any portion of the country, the judiciary cannot try the issue and find the territory hostile."); cf. *United States v. Chemical Found., Inc.*, 272 U.S. 1, 12 (1926) ("It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war.").

<sup>6</sup> See, e.g., Louis Fisher, *Presidential War Power* 185-206 (1995); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 3-5 (1993); Michael J. Glennon, *Constitutional Diplomacy* 80-84 (1990); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 109 (1990); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 158-61 (1990); Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (2d ed. 1989).

Other scholars, however, have argued that the President has the constitutional authority to initiate military hostilities without prior congressional authorization. See, e.g., Edward S. Corwin, *The President: Office and Powers 1787-1984* (5th ed. 1984); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's "War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath,"* 92 Mich. L. Rev. 1364 (1994); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 Wash. U.L.Q. 693 (1990); Henry P. Monaghan, *Presidential War-Making*, 50 B.U.L. Rev. 19 (1970); W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 Yale J. Int'l L. 203 (1991); Eugene V. Rostow, "Once More unto the Breach": *The War Powers Resolution*

misunderstands the nature of a declaration of war. Declaring war is not tantamount to making war—indeed, the Constitutional Convention specifically amended the working draft of the Constitution that had given Congress the power to make war. An earlier draft of the Constitution had given to Congress the power to “make” war. When it took up this clause on August 17, 1787, the Convention voted to change the clause from “make” to “declare.” 2 *The Records of the Federal Convention of 1787*, at 318-19 (Max Farrand ed., rev. ed. 1966). A supporter of the change argued that it would “leav[e] to the Executive the power to repel sudden attacks.” *Id.* at 318. Further, other elements of the Constitution describe “engaging” in war, which demonstrates that the Framers understood making and engaging in war to be broader than simply “declaring” war. *See* U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”). A state constitution at the time of the ratification included provisions that prohibited the governor from “making” war without legislative approval, S.C. Const. art. XXVI (1776), *reprinted in* 6 *The Federal and State Constitutions* 3247 (Francis Newton Thorpe ed., 1909).<sup>7</sup> If the Framers had wanted to require congressional consent before the initiation of military hostilities, they knew how to write such provisions.

Finally, the Framing generation well understood that declarations of war were obsolete. Not all forms of hostilities rose to the level of a declared war: during the seventeenth and eighteenth centuries, Great Britain and colonial America waged numerous conflicts against other states without an official declaration of war.<sup>8</sup> As Alexander Hamilton observed during the ratification, “the ceremony of a formal denunciation of war has of late fallen into disuse.” *The Federalist* No. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Instead of serving as an authorization to begin hostilities, a declaration of war was only necessary to “perfect” a conflict under international law. A declaration served to fully transform the international legal relationship between two states from one of peace to one of war. *See* 1 William Blackstone, *Commentaries* \*249-50. Given this context,

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*Revisited*, 21 Val. U. L. Rev. 1 (1986); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673 (2000); Yoo, 84 Cal. L. Rev. 167.

<sup>7</sup> A subsequent version made clear “that the governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty” without legislative approval. S.C. Const. art. XXXIII (1778), *reprinted in* 6 *The Federal and State Constitutions* 3255 (Francis Newton Thorpe ed., 1909).

<sup>8</sup> Of the eight major wars fought by Great Britain prior to the ratification of the Constitution, war was declared only once before the start of hostilities. *See* Yoo, 84 Cal. L. Rev. at 214-15. *See also* W. Taylor Reveley, III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* 55 (1981) (“[U]ndeclared war was the norm in eighteenth-century European practice, a reality brought home to Americans when Britain’s Seven Years’ War with France began on this continent.”); William Michael Treanor, *Fame, The Founding, and The Power to Declare War*, 82 Cornell L. Rev. 695, 709 (1997).

it is clear that Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force.

*Constitutional Structure.* Our reading of the text is reinforced by analysis of the constitutional structure. First, it is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number." *The Federalist* No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch. As Hamilton noted, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." *Id.* at 423. This is no less true in war. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Id.* No. 74, at 447 (Alexander Hamilton).<sup>9</sup>

Second, the Constitution makes clear that the process used for conducting military hostilities is different from other government decisionmaking. In the area of domestic legislation, the Constitution creates a detailed, finely wrought procedure in which Congress plays the central role. In foreign affairs, however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action. Rather, the Constitution vests the two branches with different powers—the President as Commander in Chief, Congress with control over funding and declaring war—without requiring that they follow a specific process in making war. By establishing this framework, the Framers expected that the process for warmaking would be far more flexible, and capable of quicker, more decisive action, than the legislative process. Thus, the President may use his Commander-in-Chief and executive powers to use military force to protect the Nation, subject to congressional appropriations and control over domestic legislation.

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<sup>9</sup> James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, in 4 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 107 (2d ed. 1987). See also 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1485 (1833) ("Story") (in military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power").

Third, the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature—such as the power to conduct military hostilities—must be resolved in favor of the Executive Branch. Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States.” U.S. Const. art. II, § 1. By contrast, Article I’s Vesting Clause gives Congress only the powers “herein granted.” *Id.* art. I, § 1. This difference in language indicates that Congress’s legislative powers are limited to the list enumerated in Article I, Section 8, while the President’s powers include inherent executive powers that are unenumerated in the Constitution. To be sure, Article II lists specifically enumerated powers in addition to the Vesting Clause, and some have argued that this limits the “executive Power” granted in the Vesting Clause to the powers on that list. But the purpose of the enumeration of executive powers in Article II was not to define and cabin the grant in the Vesting Clause. Rather, the Framers unbundled some plenary powers that had traditionally been regarded as “executive,” assigning elements of those powers to Congress in Article I, while expressly reserving other elements as enumerated executive powers in Article II. So, for example, the King’s traditional power to declare war was given to Congress under Article I, while the Commander-in-Chief authority was expressly reserved to the President in Article II. Further, the Framers altered other plenary powers of the King, such as treaties and appointments, assigning the Senate a share in them in Article II itself.<sup>10</sup> Thus, the enumeration in Article II marks the points at which several traditional executive powers were diluted or reallocated. Any other unenumerated executive powers, however, were conveyed to the President by the Vesting Clause.

There can be little doubt that the decision to deploy military force is “executive” in nature, and was traditionally so regarded. It calls for action and energy in execution, rather than the deliberate formulation of rules to govern the conduct of private individuals. Moreover, the Framers understood it to be an attribute of the executive. “The direction of war implies the direction of the common strength,” wrote Alexander Hamilton, “and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.” *The Federalist* No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As a result, to the extent that the constitutional text does not explicitly allocate the power to initiate military hostilities to a particular branch, the Vesting Clause provides that it remain among the President’s unenumerated powers.

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<sup>10</sup> Thus, Article II’s enumeration of the Treaty and Appointments Clauses only dilutes the unitary nature of the Executive Branch in regard to the exercise of those powers, rather than transforming them into quasi-legislative functions. See *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 17 (1986) (“Nothing in the text of the Constitution or the deliberations of the Framers suggests that the Senate’s advice and consent role in the treaty-making process was intended to alter the fundamental constitutional balance between legislative authority and executive authority.”).

Fourth, depriving the President of the power to decide when to use military force would disrupt the basic constitutional framework of foreign relations. From the very beginnings of the Republic, the vesting of the executive, Commander-in-Chief, and treaty powers in the Executive Branch has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington Administration, “[t]he constitution has divided the powers of government into three branches [and] has declared that the executive powers shall be vested in the president, submitting only special articles of it to a negative by the senate.” Thomas Jefferson, *Opinion on the Powers of the Senate* (1790), *reprinted in 5 The Writings of Thomas Jefferson* at 161 (Paul L. Ford ed., 1895). Due to this structure, Jefferson continued, “[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly.” *Id.* In defending President Washington’s authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President’s foreign affairs powers. According to Hamilton, Article II “ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power.” Alexander Hamilton, *Pacificus No. 1* (1793), *reprinted in 15 The Papers of Alexander Hamilton* at 33, 39 (Harold C. Syrett et al. eds., 1969). As future Chief Justice John Marshall famously declared a few years later, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations . . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation . . . .” 10 *Annals of Cong.* 613-14 (1800). Given the agreement of Jefferson, Hamilton, and Marshall, it has not been difficult for the Executive Branch consistently to assert the President’s plenary authority in foreign affairs ever since.

On the relatively few occasions where it has addressed foreign affairs, the Supreme Court has agreed with the Executive Branch’s consistent interpretation. Conducting foreign affairs and protecting the national security are, as the Supreme Court has observed, “‘central’ Presidential domains.” *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982). The President’s constitutional primacy flows from both his unique position in the constitutional structure, and from the specific grants of authority in Article II that make the President both the Chief Executive of the Nation and the Commander in Chief. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982). Due to the President’s constitutionally superior position, the Supreme Court has consistently “recognized ‘the generally accepted view that foreign policy [is] the province and responsibility of the Executive.’” *Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. at 293-94). “The Founders in their wisdom made [the President] not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs,” possessing “vast

powers in relation to the outside world.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). This foreign affairs power is exclusive: it is “the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Conducting military hostilities is a central tool for the exercise of the President’s plenary control over the conduct of foreign policy. There can be no doubt that the use of force protects the Nation’s security and helps it achieve its foreign policy goals. Construing the Constitution to grant such power to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs. Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that we should not construe legislative prerogatives to prevent the Executive Branch “from accomplishing its constitutionally assigned functions.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

## II.

*Executive Branch Construction and Practice.* The position we take here has long represented the view of the Executive Branch and of the Department of Justice. Attorney General (later Justice) Robert Jackson formulated the classic statement of the Executive Branch’s understanding of the President’s military powers in 1941:

Article II, section 2, of the Constitution provides that the President “shall be Commander in Chief of the Army and Navy of the United States.” By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in time of peace as well as in time of war.

. . . .

Thus the President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.

*Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61-62 (1941).<sup>11</sup> Other Attorneys General have defended similar accounts of the President's constitutional powers and duties, particularly in times of unforeseen emergencies.

Attorney General William P. Barr, quoting the opinion of Attorney General Jackson just cited, advised the President in 1992 that "[y]ou have authority to commit troops overseas without specific prior Congressional approval 'on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.'" *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (citation omitted).

Attorney General (later Justice) Frank Murphy, though declining to define precisely the scope of the President's independent authority to act in emergencies or states of war, stated that:

the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

*Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War,"* 39 Op. Att'y Gen. 343, 347-48 (1939).

Attorney General Thomas Gregory opined in 1914 that "[i]n the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty, [the President's] powers are broad." *Censorship of Radio Stations*, 30 Op. Att'y Gen. 291, 292 (1914).

Finally, in 1898, Acting Attorney General John K. Richards wrote:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. . . . In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over

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<sup>11</sup> At the time Attorney General Jackson delivered his opinion, the United States was a neutral, and thus his conclusions about the President's powers did not rest on any special considerations that might apply in time of war. Although he stated that he was "inclined to the opinion" that a statute (the Lend-Lease Act) authorized the decision under review, Jackson expressly based his conclusion on the President's constitutional authority. 40 Op. Att'y Gen. at 61.

its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. [The President] must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.

*Foreign Cables*, 22 Op. Att’y Gen. 13, 25-26 (1898). Acting Attorney General Richards cited, among other judicial decisions, *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890), in which the Supreme Court stated that the President’s power to enforce the laws of the United States “include[s] the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution.”

*Opinions of the Office of Legal Counsel*. Our Office has taken the position in recent Administrations, including those of Presidents Clinton, Bush, Reagan, Carter, and Nixon, that the President may unilaterally deploy military force in order to protect the national security and interests of the United States.

In 1995, we opined that the President, “acting without specific statutory authorization, lawfully may introduce United States ground troops into Bosnia and Herzegovina . . . to help the North Atlantic Treaty Organization . . . ensure compliance with the recently negotiated peace agreement.” *Proposed Deployment of United States Armed Forces in Bosnia and Herzegovina*, 19 Op. O.L.C. 327, 327 (1995) (the “Bosnia Opinion”). We interpreted the WPR to “lend[] support to the . . . conclusion that the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances.” *Id.* at 335.

In *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994), we advised that the President had the authority unilaterally to deploy some 20,000 troops into Haiti. We relied in part on the structure of the WPR, which we argued “makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.” *Id.* at 175-76. We further argued that “in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed.” *Id.* at 177. We also cited and relied upon the past practice of the Executive Branch in undertaking unilateral military interventions:

In 1940, after the fall of Denmark to Germany, President Franklin Roosevelt ordered United States troops to occupy Greenland, a Danish possession in the North Atlantic of vital strategic interest to the United States. . . . Congress was not consulted or even directly informed. . . . Later, in 1941, the President ordered United States troops to occupy Iceland, an independent nation, pursuant to an

agreement between himself and the Prime Minister of Iceland. The President relied upon his authority as Commander in Chief, and notified Congress only after the event. . . . More recently, in 1989, at the request of President Corazon Aquino, President Bush authorized military assistance to the Philippine government to suppress a coup attempt.

*Id.* at 178.

In *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992), our Office advised that the President had the constitutional authority to deploy United States Armed Forces into Somalia in order to assist the United Nations in ensuring the safe delivery of relief to distressed areas of that country. We stated that “the President’s role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas.” *Id.* at 8. Citing past practice (further discussed below), we pointed out that

[f]rom the instructions of President Jefferson’s Administration to Commodore Richard Dale in 1801 to “chastise” Algiers and Tripoli if they continued to attack American shipping, to the present, Presidents have taken military initiatives abroad on the basis of their constitutional authority. . . . Against the background of this repeated past practice under many Presidents, this Department and this Office have concluded that the President has the power to commit United States troops abroad for the purpose of protecting important national interests.

*Id.* at 9 (citations omitted).

In *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 275 (1984), we noted that “[t]he President’s authority to deploy armed forces has been exercised in a broad range of circumstances [in] our history.”

In *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980), we stated that

[o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the

few legal benchmarks that exist, evidences the existence of broad constitutional power.

In light of that understanding, we advised that the President had independent constitutional authority unilaterally to order “(1) deployment abroad at some risk of engagement—for example, the current presence of the fleet in the Persian Gulf region; (2) a military expedition to rescue the hostages or to retaliate against Iran if the hostages are harmed; (3) an attempt to repel an assault that threatens our vital interests in that region.” *Id.* at 185-86. *See also Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115, 121 (1979) (“It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad. This understanding is reflected in judicial decisions . . . and recurring historic practice which goes back to the time of Jefferson.”).

Finally, in the Rehnquist Memo, we concluded that the President as Commander in Chief had the authority “to commit military forces of the United States to armed conflict . . . to protect the lives of American troops in the field.” *Id.* at 8.

*Judicial Construction.* Judicial decisions since the beginning of the Republic confirm the President’s constitutional power and duty to repel military action against the United States through the use of force, and to take measures to deter the recurrence of an attack. As Justice Joseph Story said long ago, “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.” *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the “power [to] the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.” *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, the courts have affirmed that it is his constitutional responsibility to respond to that threat with whatever means are necessary, including the use of military force abroad. *See, e.g., Prize Cases*, 67 U.S. at 635 (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.”); *Kahanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) (“Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity” for emergency measures); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is “the duty . . . of the executive magistrate . . . to

repel an invading foe”);<sup>12</sup> *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973) (“there are some types of war which without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack”);<sup>13</sup> *see also Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J. concurring) (“[T]he President has independent authority to repel aggressive acts by third parties even without specific statutory authorization.”), *cert. denied*, 531 U.S. 815 (2000); *id.* at 40 (Tatel, J., concurring) (“[T]he President, as Commander in Chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval.”); Story, *supra* note 9, § 1485 (“[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion” are executive powers).

### III.

The historical practice of all three branches confirms the lessons of the constitutional text and structure. The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled.<sup>14</sup> Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.” *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: “the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.” *Mistretta v. United States*, 488 U.S. 361,

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<sup>12</sup> Justice Paterson went on to remark that in those circumstances “it would I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy’s own country.” 27 F. Cas. at 1230.

<sup>13</sup> The court further observed that “in a grave emergency [the President] may, without Congressional approval, take the initiative to wage war. . . . In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive.” 488 F.2d at 613-14. *Accord Massachusetts v. Laird*, 451 F.2d at 31 (“[t]he executive may without Congressional participation repel attack”).

<sup>14</sup> As the Supreme Court has noted, “the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases.” *Dames & Moore*, 453 U.S. at 661. In particular, the difficulty the courts experience in addressing “the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive” with respect to foreign affairs and national security makes the judiciary “acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case.” *Id.* at 660-61. Historical practice and the ongoing tradition of Executive Branch constitutional interpretation therefore play an especially important role in this area.

381 (1989) (citation omitted). In addition, governmental practice enjoys significant weight in constitutional analysis for practical reasons, on “the basis of a wise and quieting rule that, in determining . . . the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.” *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

The role of practice is heightened in dealing with issues affecting foreign affairs and national security, where “the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions.” *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994). “The persistence of these controversies (which trace back to the eighteenth century), and the nearly complete absence of judicial decisions resolving them, underscore the necessity of relying on congressional precedent to *interpret* the relevant constitutional provisions.” *Id.* at 236. Accordingly, we give considerable weight to the practice of the political branches in trying to determine the constitutional allocation of warmaking powers between them.

The historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President. As the Supreme Court has observed, “[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). On at least 125 such occasions, the President acted without prior express authorization from Congress. *See* Bosnia Opinion, 19 Op. O.L.C. at 331. Such deployments, based on the President’s constitutional authority alone, have occurred since the Administration of George Washington. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. Chi. L. Rev. 775, 816 (1994) (“[B]oth Secretary [of War] Knox and [President] Washington himself seemed to think that this [Commander-in-Chief] authority extended to offensive operations taken in retaliation for Indian atrocities.”) (quoted in Bosnia Opinion, 19 Op. O.L.C. at 331 n.4). Perhaps the most significant deployment without specific statutory authorization took place at the time of the Korean War, when President Truman, without prior authorization from Congress, deployed United States troops in a war that lasted for over three years and caused over 142,000 American casualties. *See* Bosnia Opinion, 19 Op. O.L.C. at 331-32 n.5.

Recent deployments ordered solely on the basis of the President’s constitutional authority have also been extremely large, representing a substantial commitment of the Nation’s military personnel, diplomatic prestige, and financial resources. On at least one occasion, such a unilateral deployment has constituted full-scale war. On March 24, 1999, without any prior statutory authorization and in the absence of an attack on the United States, President Clinton ordered hostilities to be initiated against the Republic of Yugoslavia. The President informed Congress that, in the

initial wave of air strikes, “United States and NATO forces have targeted the [Yugoslavian] government’s integrated air defense system, military and security police command and control elements, and military and security police facilities and infrastructure. . . . I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 *Pub. Papers of Pres. William J. Clinton* 459, 459-60 (Mar. 26, 1999). Bombing attacks against targets in both Kosovo and Serbia ended on June 10, 1999, seventy-nine days after the war began. More than 30,000 United States military personnel participated in the operations; some 800 U.S. aircraft flew more than 20,000 sorties; more than 23,000 bombs and missiles were used. As part of the peace settlement, NATO deployed some 50,000 troops into Kosovo, 7,000 of them American.<sup>15</sup> In a News Briefing on June 10, 1999, Secretary of Defense William S. Cohen summarized the effects of the campaign by saying,

[t]hree months ago Yugoslavia was a heavily armed country with a significant air defense system. We reduced that defense system threat by destroying over 80 percent of Yugoslavia’s modern aircraft fighters and strategic surface-to-air missiles. NATO destroyed a significant share of the infrastructure Yugoslavia used to support[] its military with, we reduced [its] capacity to make ammunition by two-thirds, and we eliminated all of its oil refining capacity and more than 40 percent of its military fuel supplies. Most important, we severely crippled the military forces in Kosovo by destroying more than 50 percent of the artillery and more than one-third of the armored vehicles.<sup>16</sup>

General Shelton of the Joint Chiefs of Staff reported that “about half of [Yugoslavia’s] defense industry has either been damaged or destroyed. . . . [A]viation, 70 percent; armored vehicle production, 40 [percent]; petroleum refineries, 100 percent down; explosive production, about 50 percent; and 65 percent of [its] ammunition. . . . For the most part Belgrade is a city that’s got about probably 70

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<sup>15</sup> See *Campbell v. Clinton*, 203 F.3d at 40 (Tatel, J., concurring) (quoting testimony of Secretary of Defense Cohen that “[w]e’re certainly engaged in hostilities [in Yugoslavia], we’re engaged in combat”); Exec. Order No. 13119, 64 Fed. Reg. 18,797 (Apr. 16, 1999) (designating March 24, 1999, as “the date of the commencement of combatant activities” in Yugoslavia); John C. Yoo, *UN Wars, US War Powers*, 1 *Chi. J. Int’l L.* 355 (2000).

<sup>16</sup> Office of the Assistant Secretary of Defense (Public Affairs), *DoD News Briefing* (June 10, 1999, 4:05 PM) (remarks of Secretary of Defense Cohen), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=487> (last visited Apr. 27, 2012).

percent without [electrical] power.”<sup>17</sup> A report by General Ryan, Air Force Chief of Staff, stated that

Serbia’s air force is essentially useless and its air defenses are dangerous but ineffective. Military armament production is destroyed. Military supply areas are under siege. Oil refinement has ceased and petroleum storage is systematically being destroyed. Electricity is sporadic, at best. Major transportation routes are cut.

NATO aircraft are attacking with impunity throughout the country.<sup>18</sup>

Estimates near the time placed the number of Yugoslav military casualties at between five and ten thousand.<sup>19</sup> In recent decades, no President has unilaterally deployed so much force abroad.

Other recent unilateral deployments have also been significant in military, foreign policy, and financial terms. Several such deployments occurred in the Balkans in the mid-1990s.<sup>20</sup> In December 1995, President Clinton ordered the deployment of 20,000 United States troops to Bosnia to implement a peace settlement. In February 1994, sixty United States warplanes conducted airstrikes against Yugoslav targets. In 1993, United States warplanes were sent to enforce a no-fly zone over Bosnia; in the same year, the President despatched United States troops to Macedonia as part of a United Nations peacekeeping operation.

Major recent deployments have also taken place in Central America and in the Persian Gulf. In 1994, President Clinton ordered some 20,000 United States troops to be deployed into Haiti, again without prior statutory authorization from Congress, in reliance solely upon his Article II authority. *See Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994). On August 8, 1990, in response to the Iraqi invasion of Kuwait and the consequent threat to Saudi Arabia, President Bush ordered the deployment of substantial forces into Saudi Arabia in Operation Desert Shield. The forces were equipped for combat and included two squadrons of F-15 aircraft and a brigade of the 82d Airborne Division; the deployment eventually grew to several hundred thousand. The President informed Congress that he had taken these actions “pursuant to my constitutional authority to conduct our foreign relations and as Commander in Chief.” Letter to Congressional Leaders on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East, 2 *Pub. Papers of Pres.*

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<sup>17</sup> *Id.* (remarks of General Shelton).

<sup>18</sup> General Michael E. Ryan, *Air Power Is Working in Kosovo*, Wash. Post, June 4, 1999, at A35.

<sup>19</sup> See Nick Cook, *War of Extremes*, Jane’s Defence Weekly, July 7, 1999, at 21.

<sup>20</sup> See Yoo, *UN Wars*, 1 Chi. J. Int’l L. at 359.

*George Bush* 1116, 1116 (Aug. 9, 1990). President Bush also deployed some 15,000 troops into Panama in December, 1990, for the purpose (among others) of protecting Americans living in Panama. See Address to the Nation Announcing United States Military Action in Panama, 2 *Pub. Papers of Pres. George Bush* 1722 (Dec. 20, 1989); see generally Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 *Colum. J. Transnat'l L.* 281 (1991).

Further, when Congress has in fact authorized deployments of troops in hostilities, past Presidents have taken the position that such legislation, although welcome, was not constitutionally necessary. For example, in signing Public Law 102-01, 105 Stat. 3 (1991), authorizing the use of military force in Operation Desert Storm against Iraq, President Bush stated that "my request for congressional support did not, and my signing this resolution does not, constitute any change in the longstanding positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution." Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 *Pub. Papers of Pres. George Bush* 40, 40 (Jan. 14, 1991).<sup>21</sup> Similarly, President John F. Kennedy stated on September 13, 1962, that congressional authorization for a naval blockade of Cuba was unnecessary, maintaining that "I have full authority now to take such action." The President's News Conference of September 13, 1962, *Pub. Papers of Pres. John F. Kennedy* 674, 674 (1962). And in a report to the American people on October 22, 1962, President Kennedy asserted that he had ordered the blockade "under the authority entrusted to me by the Constitution *as endorsed by* the resolution of the Congress." Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, *Pub. Papers of Pres. John F. Kennedy* 806, 807 (Oct. 22, 1962) (emphasis added).<sup>22</sup> Thus, there is abundant

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<sup>21</sup> Further, in a press conference on January 9, 1991, President Bush was asked if he believed that he needed congressional authorization in order to begin offensive operations against Iraq. He answered, "I don't think I need it. I think Secretary Cheney expressed it very well the other day. There are different opinions on either side of this question, but Saddam Hussein should be under no question on this: I feel that I have the authority to fully implement the United Nations resolutions." The President's News Conference on the Persian Gulf Crisis, 1 *Pub. Papers of Pres. George Bush* 17, 20 (Jan. 9, 1991).

<sup>22</sup> An unsigned, unaddressed opinion in this Office's files, entitled *Blockade of Cuba*, states that "the President, in the exercise of his constitutional power as Commander-in-Chief, can order a blockade without prior Congressional sanction and without a declaration of war by Congress." *Id.* at 9 (Oct. 19, 1962). Thus, the writers of the memorandum (presumably, either this Office or the State Department's Office of the Legal Adviser) determined that no congressional authorization either existed or was necessary for the blockade ordered by President Kennedy.

Editor's Note: Prior to the book publication of this opinion, we consulted with officials at the Department of State to determine whether they had any record or evidence of authorship of the *Blockade of Cuba* memorandum. Although they were unable to locate a copy of the memorandum itself, they pointed us to declassified records of a meeting held on October 19, 1962 (the same date as the memorandum) and attended by a number of top-level administration officials (including Secretary of State Dean Rusk, Attorney General Robert Kennedy, and National Security Advisor McGeorge

precedent, much of it from recent Administrations, for the deployment of military force abroad, including the waging of war, on the basis of the President's sole constitutional authority.

Several recent precedents stand out as particularly relevant to the situation at hand, where the conflict is with terrorists. The first and most relevant precedent is also the most recent: the military actions that President William J. Clinton ordered on August 20, 1998, against terrorist sites in Afghanistan and Sudan. The second is the strike on Iraqi Intelligence Headquarters that President Clinton ordered on June 26, 1993. The third is President Ronald Reagan's action on April 14, 1986, ordering United States armed forces to attack selected targets at Tripoli and Benghazi, Libya.

#### A.

On August 20, 1998, President Clinton ordered the Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan "because of the threat they present to our national security." Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 *Pub. Papers of Pres. William J. Clinton* 1460, 1460 (Aug. 20, 1998). The President stated that the purpose of the operation was "to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today." Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 *Pub. Papers of Pres. William J. Clinton* 1460, 1460 (Aug. 20, 1998). The strike was ordered in retaliation for the bombings of United States Embassies in Kenya and Tanzania, in which bin Laden's organization and groups affiliated with it were believed to have played a key role and which had caused the deaths of some 12 Americans and nearly 300 Kenyans and Tanzanians, and in order to deter later terrorist attacks of a similar kind against United States nationals and others. In his remarks at Martha's Vineyard, President Clinton justified the operation as follows:

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Bundy). See U.S. Dep't of State, *Foreign Relations of the United States, 1961-1963: Volume XI, Cuban Missile Crisis and Aftermath*, doc. 31 (Edward C. Keefer et al., eds., 1998), available at <http://history.state.gov/historicaldocuments/frus1961-63v11/d31> (last visited Aug. 3, 2012) (notes of October 19, 1962 meeting). These records suggest that the memorandum may have been prepared by Leonard Meeker, Deputy Legal Adviser for the Department of State, perhaps in consultation with Nicholas Katzenbach, Deputy Attorney General and former Assistant Attorney General for the Office of Legal Counsel. Mr. Meeker kept notes of the October 19 meeting, which indicate that he presented legal analysis paralleling that in the *Blockade of Cuba* memorandum and concluding that the President could respond militarily to the Soviet missile threat without a declaration of war. Mr. Katzenbach also spoke at the meeting and concurred with Mr. Meeker that "the President had ample constitutional and statutory authority to take any needed military measures." *Id.*

I ordered this action for four reasons: first, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.

Remarks in Martha's Vineyard, 2 *Pub. Papers of Pres. William J. Clinton* at 1460 (1998). In his Address to the Nation on the same day, the President made clear that the strikes were aimed not only at bin Laden's organization, but at other terrorist groups thought to be affiliated with it, and that the strikes were intended as retribution for other incidents caused by these groups, and not merely the then-recent bombings of the two United States embassies. Referring to the past acts of the interlinked terrorist groups, he stated:

Their mission is murder and their history is bloody. In recent years, they killed American, Belgian, and Pakistani peacekeepers in Somalia. They plotted to assassinate the President of Egypt and the Pope. They planned to bomb six United States 747's over the Pacific. They bombed the Egyptian Embassy in Pakistan. They gunned down German tourists in Egypt.

Address to the Nation, 2 *Pub. Papers of Pres. William J. Clinton* at 1460-61 (1998). Furthermore, in explaining why military action was necessary, the President noted that "law enforcement and diplomatic tools" to combat terrorism had proved insufficient, and that "when our very national security is challenged . . . we must take extraordinary steps to protect the safety of our citizens." *Id.* at 1461. Finally, the President made plain that the action of the two targeted countries in harboring terrorists justified the use of military force on their territory: "The United States does not take this action lightly. Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens." *Id.*

The terrorist incidents of September 11, 2001, were surely far graver a threat to the national security of the United States than the 1998 attacks on our embassies (however appalling those events were). The President's power to respond militarily to the later attacks must be correspondingly broader. Nonetheless, President Clinton's action in 1998 illustrates some of the breadth of the President's power to act in the present circumstances.

First, President Clinton justified the targeting of particular groups on the basis of what he characterized as "convincing" evidence of their involvement in the

embassy attacks. While that is not a standard of proof appropriate for a criminal trial, it is entirely appropriate for military and political decisionmaking. Second, the President targeted not merely one particular group or leader, but a network of affiliated groups. Moreover, he ordered the action not only because of particular attacks on United States embassies, but because of a pattern of terrorist activity, aimed at both Americans and non-Americans, that had unfolded over several years. Third, the President explained that the military action was designed to deter *future* terrorist incidents, not only to punish past ones. Fourth, the President specifically justified military action on the territory of two foreign states because their governments had “harbor[ed]” and “support[ed]” terrorist groups for years, despite warnings from the United States.

## **B.**

On June 26, 1993, President Clinton ordered a Tomahawk cruise missile strike on Iraqi Intelligence Service (the “IIS”) headquarters in Baghdad. The IIS had planned an unsuccessful attempt to assassinate former President Bush in Kuwait in April, 1993. Two United States Navy surface ships launched a total of 23 missiles against the IIS center.

In a letter to Congress, the President referred to the failed assassination attempt and stated that “[t]he evidence of the Government of Iraq’s violence and terrorism demonstrates that Iraq poses a continuing threat to United States nationals.” Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 940, 940 (June 28, 1993). He based his authority to order a strike against the Iraqi government’s intelligence command center on “my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief,” as well as on the Nation’s inherent right of self-defense. *Id.*

President Clinton’s order was designed in part to deter and prevent future terrorist attacks on the United States—and most particularly future assassination attempts on former President Bush. Although the assassination attempt had been frustrated by the arrest of sixteen suspects before any harm was done, “nothing prevented Iraq from directing a second—possibly successful—attempt on Bush’s life. Thus, the possibility of another assassination plot was ‘hanging threateningly over [Bush’s] head’ and was therefore imminent. By attacking the Iraqi Intelligence Service, the United States hoped to prevent and deter future attempts to kill Bush.”<sup>23</sup>

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<sup>23</sup> Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 *Cornell Int’l L.J.* 569, 609 (1995) (citation omitted).

C.

On April 14, 1986, President Ronald Reagan, acting on his independent authority, ordered United States armed forces to engage in military action against the government of Colonel Gadhafi of Libya.<sup>24</sup> Thirty-two American aircraft attacked selected targets at Tripoli and Benghazi, Libya. Libyan officials reported thirty-seven people killed and an undetermined number injured. More than sixty tons of ordnance were used during the attack.

For some time Libya had supported terrorist groups and organizations and indeed had itself ordered direct terrorist attacks on the United States.

Under Gaddafi, Libya has declared its support of “national liberation movements” and has allegedly financed and trained numerous terrorist groups and organizations, including Palestinian radicals, Lebanese leftists, Columbia’s M-19 guerrillas, the Irish Republican Army, anti-Turkish Armenians, the Sandinistas in Nicaragua, Muslim rebels in the Philippines, and left-wing extremists in Europe and Japan.<sup>25</sup>

It had harbored a variety of terrorists, including Abu Nidal and the three surviving members of the Black September group that had killed eleven Israeli athletes at the 1972 Munich Olympic Games.<sup>26</sup> Libya’s attacks on the United States included the murder of two United States diplomats in Khartoum (1973), the attempted assassination of Secretary of State Kissinger (1973), the burning of the United States Embassy in Tripoli (1979), the planned assassination of President Reagan, Secretary of State Haig, Secretary of Defense Weinberger, and Ambassador to Italy Robb (1981), and the hijacking of T.W.A. flight 847 (1985).<sup>27</sup> Libya had also been linked to terrorist events close to the time of the April, 1986, airstrike in which Americans and others had lost their lives. In January, 1986, American intelligence tied Libya to the December 27, 1985, bombings at the Rome and Vienna airports in which nineteen people, including 5 Americans, had died, and one hundred and twelve persons had been injured.

The particular event that triggered the President’s military action had occurred on April 5, 1986, when a bomb exploded in the “Labelle,” a Berlin discotheque frequented by U.S. military personnel. The blast killed three people (two Americans) and injured two hundred and thirty others (including seventy-nine Ameri-

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<sup>24</sup> See generally Wallace F. Warriner, U.S.M.C., *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 *Naval L. Rev.* 49 (1988); Teplitz, 28 *Cornell Int'l L. J.* at 583-86.

<sup>25</sup> Teplitz, 28 *Cornell Int'l L. J.* at 583 n.112.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 583 n.113.

cans). Intelligence reports indicated that the bombing was planned and executed under the direct orders of the Government of Libya. The United States Ambassador to the United Nations stated that there was “direct, precise, and irrefutable evidence that Libya bears responsibility” for the bombing of the discotheque; that the Labelle incident was “only the latest in an ongoing pattern of attacks by Libya” against the United States and its allies; and that the United States had made “repeated and protracted efforts to deter Libya from its ongoing attacks,” including “quiet diplomacy, public condemnation, economic sanctions and demonstrations of military force.” U.N. SCOR, 2674th mtg. at 13, 14, U.N. Doc. S/PV.2674 (prov. ed. Apr. 15, 1986).

Like the two unilateral presidential actions discussed above, President Reagan’s decision to use armed force in response to a terrorist attack on United States military personnel illustrates that the President has independent constitutional authority to use such force in the present circumstances.

#### IV.

Our analysis to this point has surveyed the views and practice of the Executive and Judicial Branches. In two enactments, the War Powers Resolution and the recent Joint Resolution, Congress has also addressed the scope of the President’s independent constitutional authority. We think these two statutes demonstrate Congress’s acceptance of the President’s unilateral war powers in an emergency situation like that created by the September 11 incidents.

Furthermore, the President can be said to be acting at the apogee of his powers if he deploys military force in the present situation, for he is operating both under his own Article II authority and with the legislative support of Congress. Under the analysis outlined by Justice Jackson in *Youngstown Sheet & Tube Co.* (and later followed and interpreted by the Court in *Dames & Moore*), the President’s power in this case would be “at its maximum,” 343 U.S. at 635 (Jackson, J., concurring), because the President would be acting pursuant to an express congressional authorization. He would thus be clothed with “all [authority] that he possesses in his own right plus all that Congress can delegate,” *id.*, in addition to his own broad powers in foreign affairs under Article II of the Constitution.

*The War Powers Resolution.* Section 2(c) of the WPR, reads as follows:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) *a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.*

50 U.S.C. § 1541(c) (2000) (emphasis added).

The Executive Branch consistently “has taken the position from the very beginning that section 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.” *Overview of the War Powers Resolution*, 8 Op. O.L.C. at 274.<sup>28</sup> Moreover, as our Office has noted, “even the defenders of the WPR concede that this declaration [in section 2(c)]—found in the ‘Purpose and Policy’ section of the WPR—either is incomplete or is not meant to be binding.” *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. at 176; *accord* *Bosnia Opinion*, 19 Op. O.L.C. at 335 (“The executive branch has traditionally taken the position that the President’s power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution.”); *Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. at 121 (“[T]he Resolution’s policy statement is not a comprehensive or binding formulation of the President’s powers as Commander-in-Chief.”). Nonetheless, section 2(c)(3) correctly identifies *one*, but by no means the only, presidential authority to deploy military forces into hostilities.<sup>29</sup> In the present circumstances, the statute signifies Congress’s recognition that the President’s constitutional authority alone would enable him to take military measures to combat the organizations or groups responsible for the September 11 incidents, together with any governments that may have harbored or supported them.

Further, Congress’s support for the President’s power suggests no limits on the Executive’s judgment whether to use military force in response to the national emergency created by those incidents. Section 2(c)(3) leaves undisturbed the President’s constitutional authority to determine both when a “national emergency” arising out of an “attack against the United States” exists, and what types and levels of force are necessary or appropriate to respond to that emergency. Because the statute itself supplies no definition of these terms, their interpretation must depend on longstanding constitutional practices and understandings. As we have shown in parts I-III of this memorandum, constitutional text, structure and practice demonstrate that the President is vested with the plenary power to use military

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<sup>28</sup> Thus, the State Department took the view, in a letter of November 30, 1973, that section 2(c) was a “declaratory statement of policy.” 8 Op. O.L.C. at 274. Further, in 1975, the Legal Adviser to the State Department listed six (non-exclusive) situations, not enumerated in section 2(c), in which the President had independent constitutional authority to deploy troops without either a declaration of war or specific statutory authorization. *See id.* at 274-75.

<sup>29</sup> We note that section 2(c) cannot itself qualify as a statutory authorization to act in national emergencies. It is rather a congressional acknowledgment of the President’s *nonstatutory*, Article II-based powers. Section 8(d)(2) of the WPR, 50 U.S.C. § 1547(d)(2) (2000), specifically provides that nothing in the WPR “shall be construed as granting any authority to the President . . . which authority he would not have had in the absence of this [joint resolution].”

force, especially in the case of a direct attack on the United States. Section 2(c)(3) recognizes the President's broad authority and discretion in this area.

Given the President's constitutional powers to respond to national emergencies caused by attacks on the United States, and given also that section 2(c)(3) of the WPR does not attempt to define those powers, we think that that provision must be construed simply as a recognition of, and support for, the President's pre-existing constitutional authority. Moreover, as we read the WPR, action taken by the President pursuant to the constitutional authority recognized in section 2(c)(3) cannot be subject to the substantive requirements of the WPR, particularly the interrelated reporting requirements in section 4 and the "cut off" provisions of section 5, 50 U.S.C. §§ 1543-1544.<sup>30</sup> Insofar as the Constitution vests the power in the President to take military action in the emergency circumstances described by section 2(c)(3), we do not think it can be restricted by Congress through, e.g., a requirement that the President either obtain congressional authorization for the action within a specific time frame, or else discontinue the action. Were this not so, the President could find himself unable to respond to an emergency that outlasted a statutory cut-off, merely because Congress had failed, for whatever reason, to enact authorizing legislation within that period.

To be sure, some interpreters of the WPR take a broader view of its scope. But on *any* reasonable interpretation of that statute, it must reflect an explicit understanding, shared by both the Executive and Congress, that the President may take *some* military actions—including involvement in hostilities—in response to emergencies caused by attacks on the United States. Thus, while there might be room for disagreement about the scope and duration of the President's emergency powers, there can be no reasonable doubt as to their *existence*.

*The Joint Resolution of September 14, 2001.* Whatever view one may take of the meaning of section 2(c)(3) of the WPR, we think it clear that Congress, in enacting the "Joint Resolution [t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States," Pub. L. No. 107-40, 115 Stat. 224 (2001), has confirmed that the President has broad constitutional authority to respond, by military means or otherwise, to the incidents of September 11.

First, the findings in the Joint Resolution include an express statement that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* This authority is in

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<sup>30</sup> True, the reporting requirement in section 4(a)(1) purports to apply to any case in which U.S. armed forces are introduced into hostilities "[i]n the absence of a declaration of war." 50 U.S.C. § 1543(a)(1). Further, the "cut off" provisions of section 5 are triggered by the report required by section 4(a)(1). Thus, the language of the WPR indicates an intent to reach action taken by the President pursuant to the authority recognized in section 2(c)(3), if no declaration of war has been issued. We think, however, that it would be beyond Congress's power to regulate the President's emergency authority in the manner prescribed by sections 4(a)(1) and 5.

addition to the President's authority to respond to *past* acts of terrorism. In including this statement, Congress has provided its explicit agreement with the Executive Branch's consistent position, as articulated in Parts I-III of this memorandum, that the President has the plenary power to use force even before an attack upon the United States actually occurs, against targets and using methods of his own choosing.

Second, Congress also found that there is a "threat to the national security and foreign policy of the United States posed by the[] grave acts of violence" on September 11, and that "such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy" of this country. Insofar as "the President's independent power to act depends upon the gravity of the situation confronting the nation," *Youngstown Sheet & Tube*, 343 U.S. at 662 (Clark, J., concurring in judgment), these findings would support any presidential determination that the September 11 attacks justified the use of military force in response. Further, they would buttress any presidential determination that the nation is in a state of emergency caused by those attacks. The Constitution confides in the President the authority, independent of any statute, to determine when a "national emergency" caused by an attack on the United States exists.<sup>31</sup> Nonetheless, congressional concurrence is welcome in making clear that the branches agree on the seriousness of the terrorist threat currently facing the Nation and on the justifiability of a military response.

Third, it should be noted here that the Joint Resolution is somewhat narrower than the President's constitutional authority. The Joint Resolution's authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states, which cannot be determined to have links to the September 11 attacks. Nonetheless, the President's broad constitutional power to use military force to defend the Nation, recognized by the Joint Resolution itself, would allow the President to take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters.

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<sup>31</sup> See *Prize Cases*, 67 U.S. at 670 (whether a state of belligerency justifying a blockade exists is to be decided by the President); see also *Sterling v. Constantin*, 287 U.S. 378, 399 (1932) ("By virtue of his duty to 'cause the laws to be faithfully executed', the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen."); *Moyer v. Peabody*, 212 U.S. 78, 83 (1909) ("[T]he governor's declaration that a state of insurrection existed is conclusive of that fact."); *Campbell*, 203 F.3d at 26-27 (Silberman, J., concurring) (The Court in the *Prize Cases* "made clear that it would not dispute the President on measures necessary to repel foreign aggression."); cf. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (President had unreviewable discretion to determine when "emergency" existed under statute enabling him to call up militia).

V.

In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the Executive Branch, and the express affirmation of the President's constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas.<sup>32</sup> In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.

JOHN C. YOO

*Deputy Assistant Attorney General  
Office of Legal Counsel*

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<sup>32</sup> We of course understand that terrorist organizations and their state sponsors operate by secrecy and concealment, and that it is correspondingly difficult to establish, by the standards of criminal law or even lower legal standards, that particular individuals or groups have been or may be implicated in attacks on the United States. Moreover, even when evidence sufficient to establish involvement is available to the President, it may be impossible for him to disclose that evidence without compromising classified methods and sources, and so damaging the security of the United States. See, e.g., *Chicago & Southern Air Lines*, 333 U.S. at 111 ("The President . . . has available intelligence services whose reports are not and ought not to be published to the world."); see also Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 Yale J. Int'l L. 559, 568-74 (1999) (analyzing difficulties of establishing and publicizing evidence of causation of terrorist incidents). But we do not think that the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the President from taking such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable.

## Checking Names of Prohibited Persons Against Records in the NICS Audit Log Concerning Allowed Transfers

The Federal Bureau of Investigation may check whether names of individuals known to be prohibited from purchasing a firearm under 18 U.S.C. § 922(g)(5) appear in records concerning allowed transfers in the audit log of the National Instant Criminal Background Check System in the course of auditing the performance of the NICS, and may share the results of such searches with the Bureau of Alcohol, Tobacco, and Firearms.

October 1, 2001

### MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL OFFICE OF LEGAL POLICY

This memorandum records and explains oral advice our Office gave you recently. You asked whether it is permissible for the Federal Bureau of Investigation (“FBI”) to check whether the names of individuals known to be prohibited from purchasing a firearm under 18 U.S.C. § 922(g)(5) appear in records concerning allowed transfers in the audit log of the National Instant Criminal Background Check System (“NICS”) and, if so, whether the FBI may share the results of its searches with the Bureau of Alcohol, Tobacco, and Firearms (“ATF”). For the reasons set forth more fully below, we answered both parts of your question in the affirmative.

Section 922 of title 18 sets out the categories of persons prohibited from purchasing a firearm. Section 922(g)(5) provides that among those prohibited from doing so is anyone

who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act).

18 U.S.C. § 922(g)(5).<sup>1</sup>

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<sup>1</sup> Subsection (y)(2) carves out certain narrow exceptions to the prohibition in section 922(g)(5)(B). It provides:

Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is—

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

Section 102(b) of the Brady Act provides:

If receipt of a firearm would not violate section 922(g) or (n) [of title 18] or State law, the [NICS] shall—

(A) assign a unique identification number to the transfer,

(B) provide the licensee with the number; and

(C) *destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.*

18 U.S.C. § 922(t)(2) (emphasis added). The regulations governing the NICS provide:

The NICS Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. Searches may be conducted on the Audit Log by time frame, *i.e.*, by day or month, or by a particular state or agency. *Information in the NICS Audit Log pertaining to allowed transfers may be accessed directly only by the FBI for the purpose of conducting audits of the use and performance of the NICS. Permissible uses include extracting and providing information from the NICS Audit Log to ATF in connection with ATF's inspections of FFL [Federal Firearms Licensee] records, provided that ATF destroys the information about allowed transfers within the retention period for such information set forth in paragraph (b)(1) of this section and maintains a written record certifying the destruction. Such information, however, may be retained as long as needed to pursue cases of identified misuse of the system.*

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(B) an official representative of a foreign government who is—

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

18 U.S.C. § 922(y)(2).

28 C.F.R. § 25.9(b)(2) (2001) (emphasis added); *see* 66 Fed. Reg. 6470 (Jan. 22, 2001). The accompanying Privacy Act notice establishes a number of “routine uses” that permit the FBI to share information from the NICS audit log in ways that are compatible with the requirements of the NICS regulations. Routine use “C” provides:

If, during the course of any activity or operation of the system authorized by the regulations governing the system (28 CFR, part 25, subpart A), any record is found by the system which indicates, either on its face or in conjunction with other information, a violation or potential violation of law (whether criminal or civil) and/or regulation, the pertinent record may be disclosed to the appropriate agency/organization/task force (whether Federal, State, local, joint, or tribal) and/or to the appropriate foreign or international agency/organization charged with the responsibility of investigating, prosecuting, and/or enforcing such law or regulation, *e.g.*, disclosure of information from the system to the ATF, United States Department of Treasury, regarding violations or potential violations of 18 U.S.C. 922(a)(6). (This routine use does not apply to the NICS Index.)

63 Fed. Reg. 65,223, 65,226-27 (Nov. 25, 1998).

Thus, the NICS regulations allow the FBI to examine records in the audit log pertaining to allowed transfers to “conduct[] audits of the use and performance of the NICS.”<sup>2</sup> The question here appears to turn on whether checking the audit log to see whether names of particular persons known to be prohibited from buying a gun under 18 U.S.C. § 922 appear constitutes “conducting [an] audit[] of the use and performance of the NICS” within the meaning of 28 C.F.R. § 25.9(b)(2). We believe it is reasonable to interpret the regulations in this way.

This interpretation fits with the common meaning of the term “audit.” One leading dictionary defines an “audit” as “[a] formal or official examination and verification of accounts, vouchers, and other records.” *Webster’s New International Dictionary of the English Language* 180 (2d ed. 1958). Checking names of known prohibited persons against the audit log (as well as running them through the system) provides one check on the accuracy of the responses being given by

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<sup>2</sup> The regulations also allow the FBI to “extract[] and provid[e] information from the NICS Audit Log to ATF in connection with ATF’s inspections of FFL records.” 28 C.F.R. § 25.9(b)(2). We understand the rationale for the permission to share information with ATF to be that ATF inspections of FFLs are designed, among other things, to uncover instances in which FFLs have misused the NICS, and thus that those inspections constitute an indirect carrying out of the FBI’s responsibility to conduct audits of the use and performance of the NICS. Because the circumstances you have asked us about do not involve ATF inspections of FFLs, that portion of the regulation does not appear to be directly relevant to question before us.

the system and thus constitutes an “examination and verification” of the system’s records and the accuracy with which they are being handled. We gather that the FBI has been using this method (among others) to audit the NICS since it began, though with prohibited persons drawn from several of the classes defined in section 922, not just with persons prohibited under section 922(g)(5). This consistent administrative interpretation, embodied in practice, also supports the reasonableness of the interpretation of the governing regulations approved here.

We recognize, of course, that mere administrative practice (in the absence of legislative ratification) cannot by itself establish the reasonableness of an administrative interpretation of a regulation. Nonetheless, we consider that practice of particular significance in addressing one possible objection to the interpretation approved here. We gather that although the checking of names the FBI has in mind will serve the purpose of auditing the NICS, the more immediate purpose is assisting the investigation of the September 11, 2001 terrorist attacks. Assisting criminal investigations generally is not one of the purposes for which the NICS regulations authorize the FBI to use audit log records. Nonetheless, we see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system. That the NICS has been using this method of auditing the system all along suggests to us that this method is more than simply a cover for using audit log records for a purpose other than those authorized by the NICS regulations.

Because checking the names of prohibited persons constitutes “support[ing] audits of the use of the system” within the meaning of 28 C.F.R. § 25.9(b)(2), it also constitutes an “activity or operation of the system authorized by the regulations governing the system” within the meaning of the Privacy Act notice. Thus, if the FBI finds a record showing an allowed transfer to a prohibited person, that record indicates a potential violation of the law, and the FBI may share it with the appropriate law enforcement agency. ATF would be the appropriate law enforcement agency to attempt to retrieve a gun the prohibited person may have acquired.

In approving the reasonableness of the interpretation of the NICS regulations you have advanced, we made several cautionary points. First, the checking of names must genuinely be used to audit the use of the NICS. Second, only the names of individuals known to be prohibited may be used. It is not enough to suspect or have some reason to believe that an individual is prohibited. Unless the government knows that an individual is prohibited, running the individual’s name through the NICS and checking the audit log cannot serve as a reliable method of auditing the system. Third, the FBI may not use names of individuals who are known to have violated the law unless those violations make the individuals prohibited from purchasing a firearm. Again, the NICS regulations limit the uses which may be made of audit log records. They may not be used simply for general

law enforcement. Only when a known violation creates a bar to buying a firearm can the individual's name serve as an effective tool for auditing the NICS.

SHELDON BRADSHAW  
*Deputy Assistant Attorney General  
Office of Legal Counsel*

## Disclosure of Conflicts of Interest of Members of FDA Advisory Panels

Special government employees who serve as members of a Food and Drug Administration advisory panel and who seek waivers of conflicts of interest must publicly disclose any conflicts of interest they may have that relates to the work to be undertaken by the panel. The FDA may not waive a panel member's conflict until the panel member makes the public disclosure.

The FDA has considerable discretion to determine how detailed the panel member's disclosure must be, so long as such disclosure is adequate to inform the public of the nature and magnitude of the conflict.

October 5, 2001

### MEMORANDUM OPINION FOR THE CHIEF COUNSEL FOOD AND DRUG ADMINISTRATION

You have asked for our opinion whether the Food and Drug Administration ("FDA"), in granting conflict of interest waivers to special government employees serving as members of FDA advisory panels on new drugs and biological products ("drug advisory panels"), must require panel members to disclose publicly their conflicts of interest. You have further informed us that the FDA's current practice with respect to waivers of such conflicts of interest is to disclose the fact that a particular panel member has been granted a waiver of a conflict, but not to identify the nature of the conflict or provide any further details. *See* Memorandum for Daniel Troy, Chief Counsel, from Matthew Eckel, Associate Chief Counsel, Food and Drug Administration, *Re: Request for Advice from Office of Legal Counsel, Department of Justice Concerning Disclosure of Advisory Committee Member Conflicts of Interest* (Sept. 17, 2001) ("FDA Memorandum").

As discussed below, we conclude that special government employees who serve as members of an FDA drug advisory panel and who seek waivers of conflicts of interest must publicly disclose any conflicts of interest they may have that relate to the work to be undertaken by the panel.<sup>1</sup> The FDA may not waive a panel member's conflict until the panel member makes the public disclosure. The FDA has considerable discretion to determine how detailed the panel member's disclosure must be, so long as such disclosure is adequate to inform the public of the nature and magnitude of the conflict.

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<sup>1</sup> We have not been asked to, and do not, opine on whether a drug advisory panel member must publicly disclose a conflict of interest that the member may have with a matter to be undertaken by the panel if the member, instead of seeking a waiver, chooses not to take part at all in the matter.

## **I. Panel Members Must Publicly Disclose Their Conflicts of Interest**

Section 355(n) of title 21 provides that “[f]or the purpose of providing expert scientific advice and recommendations to the Secretary [of Health and Human Services] regarding a clinical investigation of a drug or the approval for marketing of a drug under section 355 of this title [(new drugs)] or section 262 of Title 42 [(biological products)], the Secretary shall establish panels of experts or use panels of experts established before November 21, 1997, or both.” 21 U.S.C. § 355(n)(1) (Supp. III 1997). Within 90 days after a drug advisory panel makes its recommendations, the FDA must review the panel’s conclusions and recommendations and notify the affected persons of any final decision. *Id.* § 355(n)(8).

Section 355(n)(4) sets out specific conflict of interest requirements for members of drug advisory panels:

Each member of a panel shall publicly disclose all conflicts of interest that member may have with the work to be undertaken by the panel. No member of a panel may vote on any matter where the member or the immediate family of such member could gain financially from the advice given to the Secretary. The Secretary may grant a waiver of any conflict of interest requirement upon public disclosure of such conflict of interest if such waiver is necessary to afford the panel essential expertise, except that the Secretary may not grant a waiver for a member of a panel when the member’s own scientific work is involved.

*Id.* § 355(n)(4). Thus, the plain terms of section 355(n)(4) require that each member of a drug advisory panel “publicly disclose all conflicts of interest . . . with the work to be undertaken by the panel” and that the Secretary not waive any such conflicts before public disclosure has occurred.

You have asked, however, whether various other statutes relating to conflict of interest requirements for government employees should be read to negate or limit the obligation that section 355(n)(4) imposes.

Pursuant to section 107(a)(1) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. §§ 101-111 (2000) (“EGA”), the FDA requires each member of a drug advisory panel to file a confidential financial disclosure report. *See* FDA Memorandum at 2. Section 107(a)(2) in turn provides that “[a]ny information required to be provided by an individual under this subsection shall be confidential and shall not be disclosed to the public.” 5 U.S.C. app. § 107(a)(2). You further note that the Office of Government Ethics (“OGE”) has advised that even with the consent of the individual filer, the agency is barred by section 107(a)(2) from publicly releasing information on the filer’s financial disclosure report. *See Privacy of SF 450 Financial Disclosure Information and Waivers Issued to Advisory Committee Members under 18 U.S.C. § 208(b)(3)*, Informal

Advisory Op. 93x34, at 4 (Nov. 16, 1993), available at <http://www.oge.gov/OG-Advisories/Legal-Advisories/Legal-Advisories/> (last visited May 24, 2012) (“OGE Letter”).<sup>2</sup> You therefore raise the question how section 107(a)(2) is to be read together with the plain language of section 355(n)(4).

We believe that section 107(a)(2) has no impact on how section 355(n)(4) should be read. Section 355(n)(4) imposes a disclosure obligation not on the FDA, but only on individuals who choose to be members of a drug advisory panel. The OGE Letter provides only that the filer’s consent does not enable the *agency* to release the filer’s financial disclosure report. The OGE Letter does not remotely suggest that section 107(a)(2) bars the *filer* from publicly releasing his own financial disclosure report. (Indeed, any such bar, apart from having no evident purpose, would likely violate the First Amendment.) We therefore see no conflict between section 107(a)(2) and section 355(n)(4).

Because section 107(a)(2) and section 355(n)(4) do not conflict, FDA regulations that would implement section 355(n)(4)’s command that drug advisory panel members publicly disclose their conflicts of interest would likewise not violate section 107(a)(2). We note further that section 355(n)(4) could reasonably be read to contemplate that panel members use FDA resources to make public disclosure of their conflicts; in the event that the FDA so reads section 355(n)(4), we believe that such an FDA role in facilitating panel members’ disclosure would not violate section 107(a)(2).

You present an argument that the federal criminal conflict of interest statute, 18 U.S.C. § 208 (1994), permits an agency to grant a special government employee an exemption from its prohibitions in certain circumstances, *see id.* § 208(b)(3); that an agency, in providing the public a copy of any determination granting such an exemption, may withhold from disclosure any information that would be exempt from disclosure under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2000), *see* 18 U.S.C. § 208(d)(1); that FOIA exempts from its mandatory disclosure requirements any information specifically exempted from disclosure by another statute, *see* 5 U.S.C. § 552(b)(3); and that the FDA, in granting a drug

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<sup>2</sup> The OGE Letter further advises that “[t]he agency must observe the [section 107(a)(2)] constraint against release of the information on the form, even if the individual filer has discussed the same or similar information in another forum or the nature of certain of the filer’s holdings may be known in his or her industry or community.” *Id.* at 5. Read broadly, this advice might mean that an agency may never disclose information if that information happens to be contained in a financial disclosure report, even if the agency relied on an independent source to obtain the information. Under such a broad reading, an agency would be barred, for example, from disclosing a filer’s business address if that business address were contained in the filer’s financial disclosure report, even if the agency relied on other records to determine the filer’s business address (or even if that business address were in the phone book). Alternatively, the OGE advice may mean only that under section 107(a)(2) an agency may not release a financial disclosure report or information obtained from that report but may still release information from independent sources, even if that information is also contained in the financial disclosure report. We have not been asked to, and need not, decide which is the better reading of section 107(a)(2).

advisory panel member an exemption under 18 U.S.C. § 208(b)(3) from the application of the criminal conflict of interest prohibitions, is therefore authorized not to disclose information exempted from disclosure under section 107(a)(2) of the EGA. *See* FDA Memorandum at 3-7. We see no need to address the merits of this argument, for we do not believe that, even if correct, it is in any respect in tension with the plain language of section 355(n)(4). Just as we conclude above that a bar on the FDA's disclosure of a drug advisory panel member's financial disclosure report filed pursuant to the EGA is entirely consistent with section 355(n)(4)'s requirement that the member publicly disclose all conflicts of interest before obtaining a waiver, so we conclude here that the FDA's permissive authority not to disclose the member's report would be consistent with that same requirement.

We therefore conclude that none of the other statutory provisions you raise negates or limits the application of section 355(n)(4).

## **II. The FDA Has Discretion to Determine the Scope of the Required Disclosure**

You have also requested our opinion concerning the scope of any disclosure required under section 355(n)(4)—in particular, the amount of background financial information a panel member must disclose with respect to a particular conflict of interest. *See* FDA Memorandum at 9, 12. The language of the statute provides little guidance in interpreting the phrase “publicly disclose all conflicts of interest,” and thus appears to leave the agency some discretion in determining how best to implement the statutory mandate. Indeed, just as the statute explicitly gives the Secretary discretion to decide when the need for an individual's expertise justifies waiving a conflict of interest, we believe that it implicitly permits the Secretary, in developing administrative guidelines for disclosure, to consider the competing public interests at stake.

In enacting section 355(n)(4), Congress clearly sought to promote the strong public interest in knowing whether individuals involved in the approval of new drugs and biological products are potentially biased by conflicting financial interests. Accordingly, any regulations implementing section 355(n)(4) must require an advisory panel member, before receiving a waiver of any conflict of interest, to provide meaningful public disclosure that would adequately enable a reasonable person to understand the nature of the conflict and the degree to which it could be expected to influence the recommendations the member would make. Mere identification of the conflicting interest may be insufficient to meet this standard; it will often be necessary also to provide information concerning the magnitude of a particular financial interest (e.g., whether it consists of a few shares of stock or a controlling interest in a company). On the other hand, Congress surely did not intend that the disclosure requirement should be so

intrusive or onerous as to make many individuals unwilling to serve on advisory panels, as such a result would deprive the FDA of the “essential expertise” Congress intended the advisory panels to provide. The FDA may therefore tailor the scope of the requirement so that it does not impose a greater burden than necessary to achieve the statute’s goal.

M. EDWARD WHELAN III  
*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

## **Duration of the Term of a Member of the Civil Rights Commission**

A member of the Civil Rights Commission, appointed when a predecessor died before the end of his term, serves only the remainder of her predecessor's term.

October 31, 2001

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked for our opinion whether a member of the United States Commission on Civil Rights ("Commission"), appointed when her predecessor died before the expiration of his term, serves only the remainder of her predecessor's term or has her own full term. We believe that the member serves only the remainder of her predecessor's term.

#### I.

The Commission, among other things, investigates alleged discrimination on the basis of "color, race, religion, sex, age, disability, or national origin." 42 U.S.C. § 1975a(a)(1)(A) (1994). It consists of eight members, of whom four are appointed by the President, two by the President pro tempore of the Senate (upon the recommendations of the majority and minority leaders), and two by the Speaker of the House of Representatives (also upon the recommendations of the majority and minority leaders). *Id.* § 1975(b). Not more than four members may be of the same political party, and each of the two appointed by the President pro tempore of the Senate, as well as each of the two by the Speaker of the House, must be of different parties. *Id.* According to the statute, the "President may remove a member of the Commission only for neglect of duty or malfeasance in office." *Id.* § 1975(e). Members serve terms of six years. *Id.* § 1975(b), (c).

These provisions, enacted with the Commission's reauthorization in 1994, are very similar to those that had been in effect during the previous eleven years. Before 1994, as after, the members served six-year terms, but under the pre-1994 statute the President had designated four of the first members (two presidential appointees and two congressional appointees) for three-year terms, so that the terms of the Commission's members would not all expire at the same time but instead would be staggered. 42 U.S.C. § 1975(b)(2) (1988). The "initial membership" of the Commission under the 1994 amendments consisted of those members in office on September 30, 1994, and the terms of those members were to "expire on the date such term would have expired as of September 30, 1994." 42 U.S.C. § 1975(c) (1994).

One change made by Congress in 1994 leads directly to the present question. Before 1994, the statute provided that "any member appointed to fill a vacancy

shall serve for the remainder of the term for which his predecessor was appointed.” 42 U.S.C. § 1975(b)(2) (1988). In 1994, Congress deleted this provision. As we understand the facts here, A. Leon Higginbotham was thereafter appointed to a six-year term expiring on November 29, 2001. He died in December 1998, and President Clinton appointed Victoria Wilson on January 14, 2000. The question is whether Ms. Wilson’s term will expire at the end of Judge Higginbotham’s term or continue until January 2006.

## II.

### A.

Before the 1994 amendments, the principles for ascertaining the terms of Commission members would have been straightforward. The members served systematically staggered six-year terms. If a member had been appointed *after* the expiration of a predecessor’s term, the six years would be calculated from the expiration of his predecessor’s term, in order to preserve the staggering required by statute. *See* 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) (“1994 Opinion”); 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) (“1990 Opinion”); *see also* Memorandum for G. Timothy Saunders, Executive Clerk, from Daniel Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Term of a Member of the Mississippi River Commission* at 1 (May 27, 1999). If a member had been appointed to fill a vacancy occurring *before* the expiration of a predecessor’s term, the statute then provided that “any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed.” 42 U.S.C. § 1975(b)(2) (1988).

Like the pre-1994 statute for the Commission, the statutes at issue in our 1990 and 1994 opinions in this area expressly stated that a member appointed to fill a vacancy occurring before the predecessor’s term expired would serve only the remainder of that term, but were silent on the question whether a member appointed after his predecessor’s term expired would serve a full term of years. *See* 1990 Opinion at 2; 1994 Opinion at 1. Both opinions used the express provision to support the conclusion that Congress wished to retain the staggered terms. *See* 1990 Opinion at 2; 1994 Opinion at 2-3.

Here, Congress deleted the express provision governing appointment before a predecessor’s term expires. We nevertheless conclude that a member appointed to

fill a vacancy occurring before the end of a predecessor's term serves only the remainder of that term.

**B.**

Our 1994 Opinion states that, “[a]bsent express statements of congressional intent to the contrary . . . we normally begin with the presumption that a term of years on a collegial board begins at the expiration of the prior term.” 1994 Opinion at 2. Under this presumption, a member who is appointed to fill a vacancy occurring before the end of a predecessor's term necessarily would serve only the remainder of the predecessor's term. The occurrence of the vacancy would not be at the end of a term; and because the beginning of service by the successor would take place before the expiration of the immediate predecessor's term, the only logical “prior term” whose end would mark the beginning of the term in question would be the last term that had actually expired. The question here, therefore, is whether there is good reason to depart from the presumption that would “normally” apply. We believe that there is no such reason.

In our view, the 1994 amendments maintained the systematically staggered terms of Commission members. The amendments reauthorized the Commission and declared that the “initial membership of the Commission shall be the members of the United States Commission on Civil Rights on September 30, 1994.” 42 U.S.C. § 1975(b) (1994). The term of each initial member was to “expire on the date such term would have expired as of September 30, 1994.” *Id.* § 1975(c). Because the existing terms were staggered, the effect of this provision was, at least at the outset, to preserve the staggering of the terms.

The structure of the statute, moreover, indicates that Congress intended the staggering to continue even after the “initial” members had served their terms. The amendments maintained the political balance requirements of the prior statute, along with the division of appointment authority between the President and the congressional leadership; and the statute continued to declare members protected against removal, except for cause, 42 U.S.C. § 1975(e) (1994). Provisions for political balance on a multi-member board and for tenure protection of the members, appearing together, are typically and perhaps even invariably associated with staggered terms. *See, e.g.*, 15 U.S.C. § 2053(a)-(b) (1994) (Consumer Product Safety Commission); 42 U.S.C. § 7171(b) (1994) (Federal Energy Regulatory Commission); Reorganization Plan No. 7 of 1961, § 102, *reprinted as note to* 46 U.S.C. app. § 1111 (1994) (Federal Maritime Commission); 15 U.S.C. § 41 (1994) (Federal Trade Commission); 49 U.S.C. § 701 (Supp. II 1996) (Surface Transportation Board); 42 U.S.C. § 5841(a)-(c), (e) (1994) (Nuclear Regulatory Commission); 39 U.S.C. §§ 3601, 3602 (1994) (Postal Rate Commission). Like political balance requirements and tenure protection, staggered terms seem in part designed

to guard against any appointing official's being able to exercise "undue" political influence.

If the 1994 amendments do not overturn the systematic staggering of terms, the term of a member appointed to fill a vacancy occurring before the end of his predecessor's term must be calculated from the beginning of the predecessor's term, so that the member serves out only the unexpired balance of the predecessor's term. Otherwise, the staggering of terms could easily be disrupted. A term for Ms. Wilson ending six years after her appointment, by itself, would significantly alter this arrangement. If any future appointees served six years after appointment in similar circumstances, the staggering could become seriously distorted.

Furthermore, the principle that service as a member would last for a full six years in these circumstances would open up the possibility of serious abuse. If a member whose term would expire after the current President would leave office could be induced to resign shortly before the end of the President's term, a successor could then be appointed to serve a full six years—in a position that the statute declares to have protected tenure. Through this means, the statute could be manipulated to allow a departing President to cut down the power of his successor to make appointments. No such manipulation, of course, occurred here, but the principle, if applicable to vacancies created by death, would be equally applicable to vacancies created by resignation.

Our interpretation might be argued to conflict with the statutory language that "[t]he term of office of each member of the Commission shall be 6 years." 42 U.S.C. § 1975(c) (1994). We believe, however, that it no more conflicts with the language than the well-accepted interpretation that when a member is appointed *after* the expiration of his predecessor's term, the six years are to be calculated from the expiration of the prior term, so that the member serves, in fact, less than six years. Here, similarly, we would calculate the term from the beginning of the predecessor's term. Although this interpretation would entail the somewhat anomalous result that the predecessor and successor in office would have been appointed to the *same* term, we do not believe that the language of the statute precludes this result.<sup>1</sup>

We therefore conclude that Ms. Wilson's term will end on November 29, 2001.

M. EDWARD WHELAN III  
*Acting Assistant Attorney General*  
*Office of Legal Counsel*

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<sup>1</sup> Indeed, to preserve staggering of terms, our Office has even read a statute against its literal terms, applying a provision covering "any member of the Merit Systems Protection Board ['MSPB'] serving on the effective date of this Act" to a slot on the MSPB that was vacant at that time. *Merit Systems Protection Board—Term of Office—Statutory Construction—5 U.S.C. § 1202*, 3 Op. O.L.C. 351, 352, 354-55 (1979).

## Application of 18 U.S.C. § 208 to Trustees of Private Trusts

Although a trustee of a private trust, solely by virtue of his capacity as a trustee, should not be deemed to have a personal financial interest in the property of the trust, a trustee of a private trust may have such an interest under certain circumstances. Further, a trustee of a private trust also should be considered to be serving in the capacity of a “trustee” of an “organization” for purposes of 18 U.S.C. § 208(a).

November 2, 2001

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion whether, under 18 U.S.C. § 208 (1994), a trustee of a private trust inevitably has a personal financial interest in the trust and whether the trustee of a private trust serves in an “organization” within the meaning of section 208(a). We believe that, in general and with the qualifications discussed in more detail below, a government officer or employee will not have a personal financial interest in a matter, as defined in section 208(a), as a result of his position as trustee of a private trust. We believe, however, that a trustee of a private trust is a “trustee” serving in an “organization” for purposes of section 208(a).

#### **I. Personal Financial Interest of a Trustee**

You ask, first, whether a trustee has a personal financial interest under 18 U.S.C. § 208 in all particular matters affecting the trust property. Section 208(a) disqualifies an officer or employee of the Executive Branch or any independent agency from participating in a particular matter

in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . . .

18 U.S.C. § 208(a). We have previously noted that “the statute recognizes and gives effect to two distinct types of disqualifying ‘financial interest’—personal and organizational.” Memorandum for Fred F. Fielding, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Interpretation of the Financial Interest Requirement of 18 U.S.C. 208 as Applied to a Spouse Trustee* at 2 (Jan. 6, 1986). Because of this separate treatment by the statute, we concluded that “Congress did not intend a personal ‘financial interest’

in an organization to arise solely from one's status as trustee of the organization." *Id.* As we observed, "[i]ndeed, a contrary conclusion would render entirely redundant the express language of section 208 that bars an official's participation in matters affecting the financial interest of an organization in which the official serves as a trustee." *Id.*<sup>1</sup> See also *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (interpretations of statutes that render language superfluous are disfavored). We adhere to this conclusion. We, therefore, agree with the analysis set forth in your March 30, 2001 letter, that:

If . . . the trustee has no beneficial interest, receives no fees affected by the performance of trust investments, and there are no facts suggesting any potential fiduciary liability as a direct and predictable result of the particular matter, then one would not necessarily find any real potential for gain or loss to the trustee personally.

Letter for Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics at 6 (Mar. 30, 2001) ("Glynn Letter"). We note that those types of trustee interests giving rise to a personal financial interest on the part of a trustee (e.g., certain fee arrangements, a beneficial interest in the trust property or potential fiduciary liability of the trustee) could be identified by regulation.

## **II. Trustees Serving in an Organization**

Your second question is whether the trustee of a private trust serves as "trustee" "in" an "organization" for purposes of section 208(a). You suggest that the term "trustee" might best be construed only "to describe a position on the governing body or board of an organization, particularly, but not exclusively, a non-profit organization." Glynn Letter at 8. You also suggest that a private trust might not be an "organization." *Id.* at 10-11.

The plain and ordinary meaning of the term "trustee" encompasses the trustee of a private trust. *E.g.*, *Webster's Third New International Dictionary* 2457 (1993) (a trustee is "one to whom something is entrusted: one trusted to keep or administer something"). You propose an alternative reading under which the term "trustee" would be confined to a member of an organization's board of trustees. Such a reading, you contend, would render "trustee" more compatible with the terms that immediately precede it—"officer" and "director"—both of which positions are typically present in organizations that have boards of trustees. Glynn Letter at 8-9. We find this argument unpersuasive. The term that immediately

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<sup>1</sup> As we also noted in that memorandum, this does not mean that "there are no conceivable circumstances in which a spouse's status as a trustee of an organization could in fact give rise to a personal financial interest, thus triggering the disqualification requirement of section 208." *Id.* at 3 n.2.

follows “trustee”—“general partner”—is not typically associated with organizations that have boards of trustees. We therefore find far more compelling your alternative suggestion that what these terms have in common is that they identify persons who “have certain fiduciary duties to the organizations in which they serve.” *Id.* at 8. In any event, we find nothing in the terms “officer” and “director” to suggest that the term “trustee” should be confined to a member of a board of trustees.

On the issue whether a private trust is an “organization,” we first note that we have long held that a private trust is an “organization” for purposes of section 208. See Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Conflict of Interest Review: H. Gregory Austin* at 3 (Nov. 26, 1975) (“Ulman Memorandum”).

You correctly point out that 18 U.S.C. § 18 (1994) defines the term “organization” to mean “a person other than an individual.” Based on this definition, you question whether a trust in which the beneficiary is an individual can be an “organization.” This question, we believe, conflates a trust with the beneficiaries of the trust. As the comment to section 2 of the Restatement (Third) of Trusts (Tentative Draft No. 1, 1996) explains, “[i]ncreasingly, modern common law and statutory concepts and terminology tacitly recognize the trust as a legal ‘entity,’ consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries.” *Id.* § 2, cmt. a. In any event, whether or not the trust is a legal entity, it is distinct from its beneficiaries. See G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 1 (rev. 2d ed. 1984) (“A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.”) Therefore, the fact that the beneficiary or beneficiaries may be individuals has no bearing on whether the trust satisfies the definition of “organization” in section 18.

Although the legal term “person” in isolation is often ambiguous on whether or not it includes unnatural persons (i.e., persons other than individual human beings), the plain terms of section 18 dispel any such ambiguity. In suggesting that a trust is not “a person other than an individual” for purposes of section 208, you note that the Dictionary Act definition of “person” contained in 1 U.S.C. § 1 does not specifically include “trusts.” We find this omission insignificant in this context. Section 1, by its very terms, is illustrative, not exhaustive: in identifying various things that the word “person” “include[s],” it does not thereby exclude other things from qualifying as persons. Moreover, section 1 expressly provides that its definition applies “unless the context indicates otherwise.” 1 U.S.C. § 1 (2000). Because inclusion of a private trust within the meaning of the term “organization” would promote the conflict of interest objectives of section 208, we see no reason to disturb our longstanding position that a private trust is an “organization.”

You also raise the question whether, consistent with the language of section 208, a trustee can fairly be said to be serving “in” a trust. Glynn Letter at 9, 10. You suggest that the awkwardness of this phrasing supports the conclusion that the trustee of a private trust is not a “trustee” and that a private trust is not an “organization” for purposes of section 208. We do not believe, however, that it is any more awkward to speak of a trustee serving “in” a trust than to speak of—to use two examples indisputably within the scope of section 208—a general partner serving “in” a general partnership or an officer serving “in” a corporation. We therefore do not believe that the preposition “in” sheds meaningful light on the terms “trustee” and “organization.”

For the above reasons, we conclude that a trustee of a private trust is a “trustee” serving in an “organization” for purposes of section 208(a).

We believe that the courts would come to the same conclusion that we do. The Supreme Court has explained that “we begin with the understanding that Congress ‘says in a statute what it means and means . . . what it says there,’” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)), and that, in construing a statutory provision, “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,’” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). For the reasons discussed above, a court would conclude that reading the terms “trustee” and “organization” to include the trustee of a private trust accords those terms their plain meaning and is neither absurd nor in conflict with Congress’s objective in enacting section 208(a).

Even if a court were to find that the statutory language, context, and purpose were insufficient to enable it to determine the meaning of the terms “organization” and “trustee,” its conclusion would not change. Where the language of a term contained in a statutory provision is ambiguous, courts may look to the legislative history of that provision, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 511 (1989), and construe the provision in a manner that furthers the purpose of the statute, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 56 (1983). We have previously examined the legislative history of section 208 for indications as to what types of entities Congress intended to encompass within that term. See, e.g., *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, 98-99 (1997). Here, a court would find sufficient legislative history to guide it in the proper construction of the term “organization.”

In analyzing the precise issue of whether section 208’s use of the term “organization” includes the trustee of a private trust, we previously concluded that the legislative history shows that section 208 does apply to the trustee of a private

trust. Ulman Memorandum at 3. In the Ulman Memorandum, we observed that 18 U.S.C. § 434, the predecessor “conflict of interest” provision to section 208, was viewed as being broad enough to include an estate even though it spoke in terms of a “business entity,” and therefore we viewed it as also capable of embracing a testamentary trust. *Id.* at 2 (citing B. Manning, *Federal Conflict of Interest Law* 118 (1964)). We noted the absence of any indication that the use of the term “organization” in section 208 was intended to narrow the scope of the earlier provision. We also noted that one of the primary substantive changes made in enacting section 208 in 1962 was to remove the references to “business” or “corporation” that were contained in section 434, thereby making it clear that the new section restricts the activities of employees who are trustees or officers in non-profit corporations or foundations not engaged in commercial activities. *Id.* at 3. We then concluded that “[t]he fiduciary responsibilities of . . . [a] trustee for a private trust are analogous to those of an officer in a non-profit organization and could cause the same kind of divided loyalty on governmental policy questions that section 208 was intended to prevent.” *Id.*

The final point of our 1975 Ulman Memorandum was that, in his analysis of the proposed bill before Congress in 1961, Nicholas Katzenbach, then the Assistant Attorney General for the Office of Legal Counsel, asserted that section 208, in its substantive prohibitions, was “almost the counterpart” of section 3 of H.R. 3050, which was the proposed bill based on recommendations prepared by the New York City Bar Association. Ulman Memorandum at 3 (citing *Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong. (1961) (“House Hearings”). We regarded this as significant because section 3 of H.R. 3050 contained language making its prohibition expressly applicable to a government employee who was the trustee of an ordinary trust. *Id.* (citing House Hearings at 6-7). Section 3 of H.R. 3050 provided that:

No Government employee shall participate in a transaction involving the Government in the consequences of which he has a substantial economic interest of which . . . to his actual knowledge, any of the following persons has a direct and substantial economic interest . . .  
(3) Any person of which he is an officer, director, *trustee*, partner, or employee . . . .

House Hearings at 7 (emphasis added). “Person” was defined in section 2(h)(i)(2) of that bill as including any “trust.” House Hearings at 6. Furthermore, that the definition of “person” listed “individuals” and “trusts” as distinct categories of “person” demonstrates an assumption on the part of the drafters of that legislation that a “trust” was something different from an “individual.” *Compare* H.R. 3050, § 2(h)(i)(1) *to id.* § 2(h)(i)(2); *see* House Hearings at 6.

Moreover, in asserting that section 208, “in its substantive prohibitions is almost the counterpart of section 3 of H.R. 3050,” Assistant Attorney General Katzenbach explained his use of the term “almost” by adding the qualification “with the exception that under the latter bill a ‘substantial economic interest’ would be defined by Presidential regulations and the President could provide for exemptions.” House Hearings at 41. This distinction has nothing to do with the scope of the term “organization” or “person.”

Mr. Katzenbach’s view was communicated again to Congress in a letter he wrote, as Deputy Attorney General, to Senator Henry Jackson, the chairman of the Senate Armed Services Subcommittee examining divestment of securities by civilians nominated to statutory positions in the Department of Defense. Deputy Attorney General Katzenbach concluded that

only in an exceptional case would a financial interest of a spouse or child be deemed to be a disqualifying financial interest within the purview of section 208. Ownership by a spouse of a controlling interest in a corporation transacting business with the Department of Defense could not, perhaps, be ignored. Also, in a situation in which the nominee *exercises legal control over the property of the spouse*, the interest of the spouse could be considered a financial interest within the contemplation of section 208 unless excluded by the exception of nonsubstantial interests.

*Conflicts of Interest: Hearing on H.R. 8140 Before the Senate Comm. on the Judiciary*, 87th Cong. 98 (1962) (“Senate Hearings”) (emphasis added). In responding to Senator Jackson’s inquiry concerning when a spouse’s property interest would be considered to fall within scope of section 208, Deputy Attorney General Katzenbach’s explanation specifically relies on a trustee-like relationship between the government official and the property at issue as the type of relationship that would fall within the ambit of the statute.<sup>2</sup>

Moreover, including the trustee of a private trust within the scope of section 208 is consistent with, and furthers the purpose of, the Act. As one of the authors of the bill passed by the House, Representative John V. Lindsay, explained in testimony before the Senate Judiciary Committee, the Act’s purposes included ensuring that “[p]ersons occup[y]ing a position inside Government must not be

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<sup>2</sup> Although the Supreme Court has cautioned that “[w]e ought not to attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal,” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001), in this case the statements were made by the Department of Justice, which was involved in drafting and sponsoring the legislation in question and was testifying in that capacity at the time. In *Circuit City*, the statement at issue had been made by a private special interest group that was criticizing a particular provision of the proposed legislation. *Id.*

allowed to help an individual or entity on the outside, where the latter is seeking to make the wheels of government move in a particular way.” Senate Hearings at 41. The policy behind such a concern applies to the trustee of a private trust where his decision, as a government official or employee, could affect the value or profitability of the trust assets to which he owes a fiduciary duty. As the Supreme Court has explained:

To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with “uncompromising rigidity.” A fiduciary cannot contend “that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.”

*NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (citations omitted).

Therefore, even if a court were to look to the legislative history of the Act, we believe that it would hold that trustees of private trusts are included within the scope of the provision prohibiting officers and employees of the federal government from participating in matters in which an organization in which they serve has a financial interest.

### **III. Conclusion**

Although a trustee of a private trust, solely by virtue of his capacity as a trustee, should not be deemed to have a personal financial interest in the property of the trust, a trustee of a private trust may have such an interest under certain circumstances. Further, a trustee of a private trust also should be considered to be serving in the capacity of a “trustee” of an “organization” for purposes of 18 U.S.C. § 208(a).

M. EDWARD WHELAN III  
*Acting Assistant Attorney General*  
*Office of Legal Counsel*

## **Authority of the Deputy Attorney General Under Executive Order 12333**

The Deputy Attorney General has authority to approve searches for intelligence purposes under section 2.5 of Executive Order 12333.

November 5, 2001

### MEMORANDUM OPINION FOR THE ASSOCIATE DEPUTY ATTORNEY GENERAL

You have asked for our opinion whether the Deputy Attorney General has the authority to grant approvals under section 2.5 of Executive Order 12333, 3 C.F.R. § 200 (1981). We believe that he does.

Executive Order 12333 addresses the conduct of intelligence activities. Section 2.5 provides:

The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such technique shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978 [“FISA”], shall be conducted in accordance with that Act, as well as this Order.

Under the Department’s regulations, the Deputy Attorney General “is authorized to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally.” 28 C.F.R. § 0.15(a) (2000). That regulation rests on the Attorney General’s statutory authority to “make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.” 28 U.S.C. § 510 (1994). Consequently, the Deputy Attorney General may exercise the Attorney General’s power under section 2.5 of the Executive Order, unless by law the Attorney General must exercise that power personally.

No statute reserves to the Attorney General the power to grant approvals under section 2.5, although one statute arguably is relevant to the question. Under 3 U.S.C. § 301 (2000), the President may delegate any “function which is vested in the President by law” to the head of any department or agency in the Executive Branch or to any official of a department or agency required to be appointed with Senate confirmation. When the President uses this statute to delegate a function,

we have concluded that the power may be redelegated only to officials who occupy Senate-confirmed positions and would also qualify under the statute to receive delegations directly from the President. See Memorandum for Richard W. McLaren, Assistant Attorney General, Antitrust Division, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Revision of Proclamation 3279 (Oil Import Controls) and Implementing Regulations* at 1 (Jan. 4, 1971). It is far from clear that the President's delegation under section 2.5 is pursuant to 3 U.S.C. § 301. Section 301, according to 3 U.S.C. § 302 (2000), does not "limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law," and Executive Order 12333, which touches on many aspects of the President's constitutional power over national security, does not cite 3 U.S.C. § 301 as authority. In any event, even if 3 U.S.C. § 301 applies, the Deputy Attorney General occupies an office requiring Senate confirmation, and he may receive the redelegation of a presidential power.

Nor do we believe that Executive Order 12333 itself limits the Attorney General's ability to delegate to the Deputy Attorney General the power to give approvals under section 2.5. The Supreme Court has observed that "[t]he complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *Barr v. Matteo*, 360 U.S. 564 (1959)). As we have explained, "[i]t is clear . . . as a 'general proposition' of administrative law, that 'merely vesting a duty in [a cabinet officer] . . . evinces no intention whatsoever to preclude delegation to other officers in the [cabinet officer's agency] . . .'" *Delegation of Cabinet Member's Functions as Ex Officio Members of the Board of Directors of the Solar Energy and Energy Conservation Bank*, 6 Op. O.L.C. 257, 258 (1982) (quoting *United States v. Giordano*, 416 U.S. 505, 513 (1974)) (footnote omitted). Here, the argument for an implied limitation under the Executive Order would be that the function in question is exceedingly sensitive and that, by referring to FISA's provisions on electronic surveillance, the Executive Order incorporates FISA's limitation that only the Attorney General, Acting Attorney General, or Deputy Attorney General may perform functions vested in the Attorney General by the statute. 50 U.S.C. §§ 1801(g) (1994). Even assuming the validity of this reasoning, it would at most show that the Attorney General's authority under section 2.5 could not be delegated to an official below the Deputy Attorney General. It does not conflict with the Deputy Attorney General's exercise of power under the delegation in 28 C.F.R. § 0.15(a).

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# Legality of the Use of Military Commissions to Try Terrorists

The President possesses inherent authority under the Constitution, as Chief Executive and Commander in Chief of the Armed Forces of the United States, to establish military commissions to try and punish terrorists captured in connection with the attacks of September 11 or in connection with U.S. military operations in response to those attacks.

November 6, 2001

## MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

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You have asked us to consider whether terrorists captured in connection with the attacks of September 11 or in connection with ongoing U.S. operations in response to those attacks could be subject to trial before a military court. The Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. §§ 801-946, authorizes military commissions to try “offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821 (2000). The Supreme Court has interpreted identical language (then included in Article 15 of the

Articles of War in effect during World War II) to incorporate customary practice and to authorize trial by military commission<sup>1</sup> of any person subject to the laws of war for any offense under the laws of war. See *Ex parte Quirin*, 317 U.S. 1, 30 (1942).

We conclude that under 10 U.S.C. § 821 and his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks.\* As we outline in Part I, ample precedent establishes that military commissions may be used to try and punish (even with death) offenders under the laws of war. The President both has inherent authority as Commander in Chief to convene military commissions and has received authorization from Congress for their use to the full extent permitted by past executive practice. In Part II, we explain that determining whether the laws of war apply in this context is a political question for the President to determine in his role as Commander in Chief. In addition, we outline factors that may be considered, based on past precedents, in determining whether the laws of war are applicable in the present conflict with terrorist forces. We explain that a declaration of war is not required to create a state of war or to subject persons to the laws of war, nor is it required that the United States be engaged in armed conflict with another nation. The terrorists' actions in this case are sufficient to create a state of war *de facto* that allows application of the laws of war.

Part III addresses briefly some representative offenses that might be charged under the laws of war. We will address more thoroughly the charges that could be brought before a military commission and the procedures that would be required before such a commission in a subsequent memorandum.

## **I. Background**

A military commission is a form of military tribunal typically used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared

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<sup>1</sup> Section 821 refers to four forms of military tribunal: courts-martial, military commissions, provost courts, and "other military tribunals." *Id.* § 821. In this memorandum, we address military commissions, because that is the form of tribunal suited to hearing the charges contemplated here.

\* Editor's Note: After this opinion was issued, the Supreme Court concluded in *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006), that military commissions established pursuant to a November 13, 2001 presidential order were inconsistent with the UCMJ and common Article 3 of the Geneva Conventions. Following *Hamdan*, Congress expressly authorized a system of military commissions pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (as amended by the Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574).

and the civil courts are closed. *See generally* William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920) (“Winthrop”). The commission is convened by order of a commanding officer and consists of a board of officers who sit as adjudicators without a jury. *See id.* at 835. The commission’s decision is subject to review by the convening authority and is not subject to direct judicial review.

Military commissions have been used throughout U.S. history to prosecute violators of the laws of war. “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts.” *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Military commissions have tried offenders drawn from the ranks of aliens and citizens alike charged with war crimes arising as early as the Revolutionary War, the Mexican-American War, and the Civil War, and as recently as World War II. *See Quirin*, 317 U.S. at 32 n.10, 42 n.14. President Lincoln’s assassins and their accomplices were imprisoned and even executed pursuant to convictions rendered by military commissions. Their offenses were characterized not as criminal matters but rather as acts of rebellion against the government itself. *See Military Commissions*, 11 Op. Att’y Gen. 297 (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899). Such use of military commissions has been repeatedly endorsed by federal courts, including as recently as this year. *See Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001).

Military commissions are not courts within Article III of the Constitution, nor are they subject to the jury trial requirements of the Fifth and Sixth Amendments of the Constitution. *See Quirin*, 317 U.S. at 40. Unlike Article III courts, the powers of military commissions are derived not from statute, but from the laws of war. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249-53 (1863). That is, their authority derives from the Constitution’s vesting of the power of Commander in Chief in the President. “Neither their procedure nor their jurisdiction has been prescribed by statute.” *Madsen*, 343 U.S. at 347. Instead, “[i]t has been adapted in each instance to the need that called it forth.” *Id.* at 347-48. “In general . . . [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war.” *Id.* at 346 n.9 (quoting Winthrop at 831).

## **II. Military Commissions May Be Used to Try All Offenses Against the Laws of War**

The Uniform Code of Military Justice (“UCMJ”) expressly addresses the use of military commissions in Article 21. *See* 10 U.S.C. § 821. Because that provision contains an explicit congressional authorization for military commissions, we begin by examining in Part II.A the scope of that authorization. We conclude that

section 821 is quite broad and, by endorsing the customary uses of military commissions in U.S. military practice, authorizes military commission jurisdiction to try all offenses against the laws of war. Next, in part II.B, we explain that even if Congress had not sanctioned the use of military commissions to try all offenses against the laws of war, the President, exercising his authority as Commander in Chief, could order the creation of military commissions to try such offenses. Indeed, military commissions were created under presidential authority before they had any sanction in statutory law. Finally, in Part II.C, we examine constitutional objections that might be raised against the use of military commissions, particularly potential claims that they violate constitutional guarantees for trial by jury and a grand jury indictment. We conclude, as has the Supreme Court, that offenses charged under the laws of war before military commissions are outside the provisions of Article III and the Fifth and Sixth Amendments and thus that the rights to grand jury indictment and jury trial do not apply to such offenses.

### **A. Congress Has Sanctioned the Broad Jurisdiction of Military Commissions to Try All Offenses Against the Laws of War**

The UCMJ addresses the jurisdiction of military commissions in Article 21, which is section 821 of title 10 of the United States Code. Section 821 is phrased somewhat unusually, because it does not *create* military commissions and define their functions and jurisdiction. Instead, it refers to military commissions primarily to acknowledge their existence and to *preserve* their existing jurisdiction. As explained more fully below, military commissions had been created under the authority of the President as Commander in Chief and used to try offenses against the laws of war before there was any explicit statutory sanction for their use. Section 821, which is entitled “Jurisdiction of courts-martial not exclusive,” thus states that “[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821 (emphasis added). The jurisdictional provision for courts-martial that is cross-referenced is 10 U.S.C. § 818 (2000), which defines the jurisdiction of general courts-martial to include “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal.” By its terms, section 821 takes the existence of military commissions as a given and clarifies that the establishment of broad jurisdiction in courts-martial will not curtail the powers of military commissions.

By expressly preserving the jurisdiction of military commissions, section 821 necessarily provides a congressional authorization and sanction for their use. Indeed, the Supreme Court has concluded that identical language in the predecessor provision to section 821—Article 15 of the Articles of War—“*authorized* trial of offenses against the laws of war before such commissions.” *Quirin*, 317 U.S. at

29 (emphasis added). *See also id.* at 28 (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war . . .”).

The fact that section 821 acknowledges and endorses the jurisdiction of an existing tribunal is important for properly understanding the scope of the authorization it contains. By its terms, the provision incorporates by reference the role of military commissions under the customary “law of war.” Thus, the section states that military commissions have jurisdiction over all “offenders or offenses that by statute or by the law of war may be tried by military commissions.” The apparent circularity of the language is explained by the fact that the section is endorsing the existing use of military commissions under military practice.

The history of the provision also makes it abundantly clear that its purpose was to express congressional approval for the traditional use of military commissions under past practice. When the language now codified in section 821 was first included in the Articles of War in 1916, it was explicitly intended to acknowledge and sanction the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The new Article 15 stated (like current section 821) that the “provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.” Act of August 29, 1916, 39 Stat. 619, 653. Judge Advocate General of the Army Crowder, the proponent of the new article, explained in testimony before the Senate that the military commission “is our common-law war court,” and that “[i]t has no statutory existence.” S. Rep. No. 64-130, at 40 (1916). The new Article 15 thus was not *establishing* military commissions and defining their jurisdiction. Rather, as General Crowder explained, it was recognizing their existence and preserving their authority: “It just saves to these war courts the jurisdiction they now have and makes it concurrent with courts-martial . . .” *Id.*; *see also* S. Rep. No. 63-229, at 53 (1914) (testimony of Judge Advocate General Crowder before the House Committee on Military Affairs) (noting that the military commission “has not been formally authorized by statute” and explaining that the new Article 15 was designed to make clear that, through the expansion of the jurisdiction of courts-martial, the military commissions’ “common law of war jurisdiction was not ousted”).

In explaining the history of the provision now codified in section 821, the Supreme Court has described the testimony of Judge Advocate General Crowder as “authoritative.” *Madsen*, 343 U.S. at 353. The Court thus determined that the effect of this language was to preserve for such commissions “the *existing* jurisdiction which they had over such offenders and offenses” under the laws of

war. *Id.* at 352 (emphasis added). As the Court noted, because the statute simply *recognized* the existence of military commissions, “[n]either their procedure nor their jurisdiction has been prescribed by statute.” *Id.* at 347. As explained below, the fact that military commissions were used long before any reference to them appeared in the Articles of War demonstrates that the President has authority as Commander in Chief to create them without authorization (and free from any restriction) of Congress.

Given the text and history of section 821, the provision must be read as preserving the broadest possible sweep for the traditional jurisdiction exercised by military commissions before they were expressly mentioned in statutory law. The statute, in other words, simply endorses and incorporates by reference Executive Branch practice. The Supreme Court has adopted precisely this understanding of the section and has thus explained that “[b]y . . . recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction . . . to *any* use of the military commission contemplated by the common law of war.” *In re Yamashita*, 327 U.S. 1, 20 (1946) (emphasis added); *see also id.* at 7 (stating that Congress “recognized the ‘military commission’ appointed by military command, as it had previously existed in United States Army Practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war”). Similarly, the Court has explained that “Congress has incorporated by reference, as within the jurisdiction of military commissions, *all* offenses which are defined as such by the law of war.” *Quirin*, 317 U.S. at 30 (emphasis added); *see also id.* at 35 (relying on the “long course of practical administrative construction by [the] military authorities”).<sup>2</sup> Congress did not “attempt[] to codify the law of war or to mark its precise boundaries.” *Yamashita*, 327 U.S. at 7. Instead, it simply adopted by reference “the system of military common law.” *Id.* at 8.

Indeed, if section 821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President’s express constitutional powers as Commander in Chief. *Cf. Quirin*, 317 U.S. at 47 (declining to “inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents” by restricting use of military commissions); *id.* (declining also to “consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures”). A clear statement of congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 466 (1989).

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<sup>2</sup>The use of military commissions for members of the U.S. armed forces may be restricted by separate provisions in the UCMJ, and we do not address that issue here.

The congressional sanction for the use of military commissions is a permissible exercise of Congress's powers under the Constitution. Congress has authority not only to "declare War," but also to "raise and support Armies," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 11, 12, 14. To the extent military commissions are used for enforcing discipline within the armed forces of the United States, Congress has authority to sanction their use. In addition, Congress has authority to "define and punish . . . Offences against the Law of Nations." *Id.* art. I, § 8, cl. 10. Authorizing the use of military commissions to enforce the laws of war—which are considered a part of the "Law of Nations"—is certainly a permissible exercise of these authorities. *See, e.g., Yamashita*, 327 U.S. at 7 (explaining that congressional sanction for military commissions was an "exercise of the power conferred upon it by Article I, § 8, cl. 10 of the Constitution to 'define and punish . . . Offenses against the Law of Nations . . . ' of which the law of war is a part") (alteration in original); *id.* at 16 ("Congress in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.")<sup>3</sup> Or, to be more precise, it is permissible at least so long as any congressional regulations do not interfere with the President's authority as Commander in Chief. *Cf. Quirin*, 317 U.S. at 47 (declining to address "whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" through regulations on military commissions); *cf. also Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (stating that the "President alone" is "constitutionally invested with the entire charge of hostile operations"). Given that section 821 simply gives sanction to the existing practice of the Executive in making use of military commissions, it does not on its face place any such restriction on the use of commissions.

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<sup>3</sup> *See also Quirin*, 317 U.S. at 28 ("Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning . . . the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."); *cf. Madsen*, 343 U.S. at 346 n.9 ("[I]t is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. . . . The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.") (quoting Winthrop at 831).

**B. Even If Congress Had Not Authorized Creation of Military Commissions, the President Would Have Authority as Commander in Chief to Convene Them**

The congressional authorization for military commissions in 10 U.S.C. § 821 endorses sufficiently broad jurisdiction for the commissions that there will likely be no need to rely solely on the President's inherent authority as Commander in Chief to convene commissions in the present circumstances. As noted above, Congress has endorsed the pre-existing practice of permitting military commissions to try "all offenses which are defined as such by the law of war." *Quirin*, 317 U.S. at 30. It is important, nevertheless, to note that the President has inherent authority as Commander in Chief to convene such tribunals even without authorization from Congress.

The Commander in Chief Clause, U.S. Const. art. II, § 2, cl. 1, vests in the President the full powers necessary to prosecute successfully a military campaign. It has long been understood that the Constitution provides the federal government all powers necessary for the execution of the duties the Constitution describes. As the Supreme Court explained in *Johnson v. Eisentrager*, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." 339 U.S. 763, 788 (1950) (citation omitted); see also *Lichter v. United States*, 334 U.S. 742, 780 (1948) ("The powers of Congress and the President are only those which are to be derived from the Constitution but . . . the primary implication of a war power is that it shall be an effective power to wage the war successfully."); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (stating that "the war power of the federal government" is "a power to wage war successfully"). One of the necessary incidents of authority over the conduct of military operations in war is the power to punish enemy belligerents for violations of the laws of war. The laws of war exist in part to ensure that the brutality inherent in war is confined within some limits. It is essential for the conduct of a war, therefore, that an army have the ability to enforce the laws of war by punishing transgressions by the enemy.<sup>4</sup>

It was well recognized at the time of the Founding, moreover, that one of the powers inherent in military command was the authority to institute tribunals for punishing violations of the laws of war by the enemy. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continen-

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<sup>4</sup> Cf. *Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War,"* 39 Op. Att'y Gen. 343, 347-48 (1939) ("It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance.").

tal Army appointed a “Board of General Officers” to try the British Major André as a spy. See *Quirin*, 317 U.S. at 31 n.9; *Proceedings of a Board of General Officers, Held by Order of His Excellency Gen. Washington, Commander in Chief of the Army of the United States of America, Respecting Major John André, Adjutant General of the British Army, September 29, 1780* (Philadelphia, Francis Bailey 1780), as reprinted in *Proceedings of a Board of General Officers Respecting Major John André* (New York 1867), available at <http://archive.org/details/proceedingsofboa00andr> (last visited May 22, 2012). At the time, there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying. See George B. Davis, *A Treatise on the Military Law of the United States* 308 n.1 (1913) (“Davis”) (explaining that the tribunal used to try André cannot properly be considered a court-martial, because under the then-existing Articles of War, courts-martial could not try members of the enemy forces for the offense of spying); Winthrop at 961 (reprinting American Articles of War of 1776). The term “Commander in Chief” was understood in Anglo-American constitutional thought as incorporating the fullest possible range of power available to a military commander. See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 252-54 (1996). In investing the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The history of military commissions bears out this conclusion, because as a matter of practice military commissions have been created under the President’s inherent authority as Commander in Chief without any authorization from Congress. In April, 1818, for example, General Andrew Jackson convened military tribunals to try two English subjects, Arbuthnot and Ambrister, for inciting the Creek Indians to war with the United States. See Winthrop at 464, 832. The subjects were convicted and executed accordingly. *Id.* As one author explained, General Jackson “did not find his authority to convene [these tribunals] in the statutory law, but in the laws of war.” William E. Birkhimer, *Military Government and Martial Law* 353 (3d ed. 1914) (“Birkhimer”). Similarly, in the Mexican American War in 1847, General Winfield Scott appointed tribunals called “council[s] of war” to try offenses under the laws of war and tribunals called “military commission[s]” to serve essentially as occupation courts administering justice for occupied territory. See, e.g., Winthrop at 832-33; Davis at 308. There was no statutory authorization for these tribunals, and they were thus instituted by military command (necessarily under authority derived from the

President's authority as Commander in Chief) without sanction from Congress.<sup>5</sup> In later practice, both functions (that is, the role of war courts and courts of occupation) were performed by tribunals known as "military commission[s]." Thus, after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war, *see* Davis at 308 n.2, and under the general orders drafted for the governance of the Army in 1862, commanders were authorized to convene military commissions to try offenses against the laws of war, *see* Winthrop at 833. It was not until 1863 that military commissions were even mentioned in a statute enacted by Congress. In that year, Congress authorized the use of military commissions to try members of the military for certain offenses committed during time of war. *See* Act of Mar. 3, 1863, § 30, 12 Stat. 731, 736. The statute, moreover, did not purport to *create* military commissions. Rather, it acknowledged that they could be used as alternatives to courts-martial in some cases.

As explained above, the current provision in section 821 of the UCMJ also does not *create* military commissions or define exhaustively their authority. Instead, its history shows that it was adopted to preserve the jurisdiction of what was recognized as a pre-existing tribunal. Precisely because it confirms that military commissions existed before any express congressional authorization, the history of section 821 also supports the conclusion that the President has constitutional authority to convene commissions even without legislation authorizing them.

Subsequent discussions of the use of military commissions by the Supreme Court reflect the same understanding that the use of military tribunals is a necessary part of the tools of a commander conducting a military campaign. For example, as the Court explained in *Yamashita*, "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." 327 U.S. at 11. Although the Court was addressing a situation in which Congress had recognized this power in the commander of armed forces, the logic of the Court's explanation suggests that the power to convene military commissions is an inherent part of the authority the Constitution confers upon the President by naming him Commander in Chief of the armed forces.<sup>6</sup>

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<sup>5</sup> *See* Davis at 308 (explaining that military commissions "are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law, and cannot be extended to include certain classes of offenses, which in war would go unpunished in the absence of a provisional forum for the trial of the offenders").

<sup>6</sup> *See also* Winthrop at 57 ([T]he "President is invested with a general and discretionary power to order statutory courts-martial for the army, by virtue of his constitutional capacity as Commander-in-chief, independently of any article of war or other legislation of Congress."); *id.* at 835 ("The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial."); Birkhimer at 357 ("Military commissions may be appointed either under provisions of law in certain instances, or under that clause of the Constitution vesting the power of commander-in-

Similarly, the same conclusion is buttressed by the reasoning Justice Douglas advanced in support of the President's authority to establish the international war crimes tribunals after World War II without any authorization from Congress. As Justice Douglas explained:

The Constitution makes the President the "Commander in Chief of the Army and Navy of the United States . . ." Art. II, § 2, Cl. 1. His power as such is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war.

*Hirota v. MacArthur*, 338 U.S. 197, 207-08 (1948) (Douglas, J., concurring) (alteration in original, citations omitted); *see also id.* at 215 ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). As the Supreme Court recognized in *Hirota*, the President's power as Commander in Chief extended to the novel creation of new, multinational tribunals to try the enemy for war crimes. Given that broad authority, the President's power surely extends to the appointment of military commissions consisting solely of American officials.

An opinion of the Attorney General issued at the end of the Civil War supports the same conclusion. In 1865, Attorney General Speed addressed the use of military commissions to try those accused in the plot to assassinate President Lincoln and explained that even if Congress had not provided for the creation of military commissions, they could be instituted by military commanders as an inherent incident of their authority to wage the military campaign:

[M]ilitary tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war.

*Military Commissions*, 11 Op. Att'y Gen. at 305. The Attorney General thus concluded that "in default of Congress defining . . . the mode of proceeding to ascertain whether an offense [against laws of war] has been committed," the

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chief in the President, who may exercise it either directly or through subordinate commanders.") (footnote omitted).

commander of the armed forces could institute tribunals to undertake the task. *Id.* at 310.

The Supreme Court has never squarely addressed the question whether the President may convene military commissions wholly without congressional authorization. In *Quirin*, the Court expressly declined to decide “to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.” 317 U.S. at 29. And in later cases the Court has remained uncommitted. Thus, in *Madsen*, for example, the Court stated that “[i]n the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.” *Madsen*, 343 U.S. at 348. At the same time, however, the Court cautioned that the “policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.” *Id.* at 348-49.

For the reasons outlined above, we conclude that the best understanding of the Constitution is that the President does have the power, as Commander in Chief, to create military commissions to try enemy belligerents for offenses against the laws of war even in the absence of the congressional sanction for their use in section 821.

### **C. The Use of Military Commissions to Inflict Punishments Without the Procedures Provided for Criminal Trials Under Article III, Section 2 and the Fifth and Sixth Amendments Is Constitutionally Permissible**

The most likely constitutional issue to be raised concerning military commissions would be an objection to the denial of the rights to trial by jury in criminal cases and grand jury indictment as provided in Article III, Section 2 and the Fifth and Sixth Amendments.<sup>7</sup> Such objections would most likely be raised with respect to military commissions convened within the territorial United States, and we address them in that context. We believe that if a particular use of military commissions to try offenses against the laws of war is constitutionally permissible within the United States, it follows *a fortiori* that such a use is permissible to deal with enemy belligerents overseas, where many constitutional protections would not apply in any event.

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<sup>7</sup> Article III, Section 2 provides: “The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . .” The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . .” The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”

It has long been settled that the guarantees to trial by jury in criminal cases contained in the Constitution were not intended to *expand* the rights to these procedures beyond those that existed at common law. *See, e.g., Callan v. Wilson*, 127 U.S. 540, 549 (1888). As Justice Story explained in his Commentaries, in these provisions, the Constitution “does but follow out the established course of the common law in all trials for crimes,” Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1791 (1833), and thus the provisions in Article III and the Sixth Amendment are “to be taken as a declaration of what those rules were.” *Callan*, 127 U.S. at 549. To the extent that certain offenses, even if technically deemed “criminal,” could be tried without indictment and without a jury at common law, the Supreme Court has consistently held that they may be tried without a jury under the Constitution. Thus, petty offenses triable at common law without a jury may be tried without a jury under the Constitution, *see Schick v. United States*, 195 U.S. 65, 68-70 (1904), as can criminal contempts, *see, e.g., In re Terry*, 128 U.S. 289, 303 (1888). *See also Lewis v. United States*, 518 U.S. 322, 325 (1996) (“It is well established that the Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and that ‘there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.’”) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)). The Fifth Amendment right to grand jury indictment similarly arises out of the common law. *See Smith v. United States*, 360 U.S. 1, 9 (1959) (“The use of indictments in all cases warranting serious punishment was the rule at common law” and “[t]he Fifth Amendment made the rule mandatory”) (citations omitted); *Ex parte Wilson*, 114 U.S. 417, 423 (1885) (“The fifth amendment, declaring in what cases a grand jury should be necessary, . . . in effect, affirm[ed] the rule of the common law upon the same subject”).

At the time of the Founding, it was well settled that offenses under the laws of war were a distinct category of offense, unlike criminal offenses against the civil law, and were subject to trial in military tribunals without the benefits of the procedures of the common law enshrined in the Constitution. The Articles of War of 1776, for example, made it clear that courts-martial could be convened to try offenders under the Articles without a jury or grand jury. *See* Winthrop at 967 (reproducing Articles). Similarly, as noted above, a “Board of General Officers” was used in 1780 to try the British Major André on the offense of spying. *See Quirin*, 317 U.S. at 31 n.9. Indeed, throughout the Revolutionary War, military tribunals were used to try offenders without a jury. *See id.* at 42 n.14. The text of the Constitution itself makes the distinct nature of military tribunals clear, as the Fifth Amendment expressly excludes “cases arising in the land or naval forces” from the guarantee of a grand jury indictment. U.S. Const. amend. V. *Cf. Middendorf v. Henry*, 425 U.S. 25, 49-50 (1976) (Powell, J., concurring) (“Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers. The procedures in such

courts were never deemed analogous to, or required to conform with, procedures in civilian courts.”). Precisely because military discipline was viewed as wholly apart from the ordinary criminal law and the provisions in the Constitution relating to it, the Supreme Court has long recognized that military commissions do not exercise judicial power under Article III and are not subject to judicial review. *See, e.g., Vallandigham*, 68 U.S. 243. Thus, under the settled understanding that the rights to jury trial and grand jury indictment do not extend beyond the cases where they were available at common law, those rights simply do not extend to trials before military tribunals for offenses against the laws of war. Such trials never included indictment or jury trial at the time of the Founding.

The Supreme Court endorsed precisely this reasoning to reject constitutional challenges to the use of military commissions to try and execute violators of the laws of war during and after World War II. In *Quirin*, for example, eight German saboteurs were apprehended in the United States by the FBI, turned over to the military, tried by military commission, and sentenced to death. *See* 317 U.S. at 18-24. In addressing a petition for habeas corpus, the Supreme Court addressed precisely the question at issue—“whether it is within the constitutional power of the National Government to place [these defendants] upon trial before a military commission”—without the protections of Article III and the Fifth and Sixth Amendments. *Id.* at 29.

The Court concluded that there was no constitutional barrier to use of the military commission. As the Court explained, the guarantees in Article III and the Fifth and Sixth Amendments must be understood in light of the common law at the time of the Founding. Military tribunals, the Court noted, “are not courts in the sense of the Judiciary Article,” and juries had never been part of their procedures. *Id.* at 39. In particular, the Court pointed to a statute of 1806 concerning trials for spies as reflective of the contemporary understanding of the constitutional guarantees. That statute imposed the death penalty on alien spies “according to the law and usage of nations, by sentence of a general court martial.” Act of Apr. 10, 1806, ch. 20, § 2, 2 Stat. 359, 371. As the Court explained, this “enactment must be regarded as a contemporary construction of both Article III, Section 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the laws of war committed by enemies not in or associated with our Armed Forces.” 317 U.S. at 41. Thus, the Court concluded that offenses cognizable under the laws of war in military tribunals at the time of the Founding could continue to be tried before such tribunals under the Constitution: “In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the laws of war not triable by jury at common law be tried only in the civil courts.” *Id.* at 40.

The Court reaffirmed that conclusion in subsequent cases. See *Yamashita*, 327 U.S. 1 (trial by U.S. military commission of Japanese military governor of the Philippines for various war crimes committed under his command); *Johnson v. Eisinger*, 339 U.S. 763, 787-90 (1950) (trial of German officers in China by U.S. military commission for aiding Japanese after Germany's surrender); *id.* at 786 ("The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long established."); *cf.* *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946) (referring to the "well-established power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war").<sup>8</sup>

As the *Quirin* and *Yamashita* Courts explained, their decisions rested upon long-established practice throughout the history of the United States—extending back to the Founding and before—demonstrating that any enemy belligerent charged with a violation of the laws of war may be tried by military tribunal. The Court traced the history of military commissions explained above and noted, among others, the use of boards functionally equivalent to military commissions in the Revolutionary War, see *Quirin*, 317 U.S. at 31 n.9, the Mexican-American War, see *id.* at 32 n.10, and during and after the Civil War, *id.* Military commissions, in fact, were used to try those charged with the assassination of President Lincoln. See *Military Commissions*, 11 Op. Att'y Gen. 297; *Mudd*, 17 F. Cas. 954.

The primary support for constitutional arguments to restrict the use of military commissions would be based on the Supreme Court's decision in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). There, the Court held that a military commission could not be used to try a U.S. citizen in the United States for alleged violations of the laws of war, except in areas where martial law has been proclaimed and the civil courts are closed. See *id.* at 121-22. In *Milligan*, a U.S. citizen resident in Indiana was arrested by the military, charged with providing aid and comfort to the Confederacy, tried by military commission, and sentenced to death. See *id.* at 107-08. In addressing a petition for a writ of habeas corpus, the Court rejected the suggestion that the President had full authority to use military commissions to the extent permitted by the "laws and usages of war." *Id.* at 121. The Court refused even to inquire into what those usages might be, because "they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.*; see also *id.* at 123 (noting that persons in military service are subject to military tribunals, but "[a]ll other persons, citizens of states where the courts are open . . . are guaranteed the inestimable privilege of trial by jury"); *id.* at 121-22 ("[N]o

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<sup>8</sup> After World War II, entirely apart from the trials before the International Military Tribunal at Nuremberg, U.S. military commissions in Germany tried 177 Nazi officials and sentenced 12 to death. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 Okla. City U. L. Rev. 349, 381 (1996) ("Crona & Richardson").

usage of war could sanction a military trial there [in Indiana, where courts were always open] for any offence whatever of a citizen in civil life, in nowise connected with the military service.”). In the Court’s view, the constitutional guarantees to trial by jury and indictment by grand jury in a capital case could not be denied by resort to a military commission. The Court held open the possibility that military commissions could be used to try citizens if martial law had properly been declared in the area, which could happen in times of invasion when the area in question was actually in the theater of military operations. As the Court put it, the “necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.” *Id.* at 127.

We believe that the broad pronouncements in *Milligan* do not accurately reflect the requirements of the Constitution and that the case has properly been severely limited by the later decision in *Quirin*. As explained above, the *Quirin* Court set out a clear constitutional analysis under which it concluded that offenses triable by military commission under the laws of war were not within the commands of constitutional provisions guaranteeing certain procedures for criminal trials. As a result, the Court placed little or no significance on most of the factors cited in *Milligan*. The Court gave no weight to the fact that the civil courts were open where the German saboteurs had been captured. 317 U.S. at 23-24, 45. In addition, it rejected the idea that military jurisdiction would attach only if the defendants had entered the “theatre or zone of active military operations,” *id.* at 38, and even declined to resolve arguments about whether one of the German saboteurs was a citizen (he claimed he had been a naturalized citizen, and therefore invoked *Milligan*) because it concluded that even if the defendant were a citizen, *Milligan* would not preclude his trial by military commission. The Court instead ruled that the decision in *Milligan* must be understood “as having particular reference to the facts” of that case. *Id.* at 45. The particular facts that the Court found significant appear to have been that the saboteur in *Quirin* had engaged in acts that made him a belligerent, while *Milligan*, “not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war.” *Id.* The *Quirin* Court thus repeatedly emphasized that citizenship would not protect a person “from the consequences of a belligerency which is unlawful.” *Id.* at 37; *see also id.* (“Citizens who associate themselves with the military arm of the enemy government” are properly subject to trial by military commission). Citizens who engaged in belligerent acts, thus, could be tried by military commission. *See also Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (“[T]he petitioner’s citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war.”). To explain the limitations on *Milligan*, two scenarios merit consideration here: (1) the use of military commissions to try U.S. citizens seized in the United States, and (2) the use of military commissions to try enemy aliens seized in the United States.

## 1. U.S. Citizens

*Quirin* clearly establishes that U.S. citizens who act as belligerents may be tried by military commission for violations of the law of war. Nonetheless, as explained below, we caution that there may be some risk that there will be ambiguity concerning the application of *Quirin* and the distinction the *Quirin* Court drew between the case before it and *Milligan*.

As outlined above, the analysis employed in *Quirin* exempted offenses against the laws of war from the scope of the constitutional guarantees for trial by jury and grand jury indictment for crimes. The *Milligan* Court had relied on the same constitutional guarantees to hold that a military commission lacked jurisdiction and suggested that the facts that Milligan was a U.S. citizen and not in military service particularly compelled preserving his right to jury trial. *See* 71 U.S. at 119 (“[I]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law.”); *id.* at 118 (emphasizing that Milligan was “not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service”). The logic of the rationale in *Quirin*, however, suggests that even a citizen could be tried by military commission if he were properly charged with any violation of the laws of war. It was the nature of the offense—an offense against the laws of war—that removed it from the scope of constitutional provisions for jury trial and grand jury indictment. Thus, the Court noted that it was not status as an alien or citizen that was critical for making the use of a military commission constitutionally permissible. Rather, “offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war.” 317 U.S. at 44. In fact, *Quirin* made it explicit that U.S. citizenship alone does not suffice to invoke any limitation from *Milligan* on the jurisdiction of military commissions. The Court explained that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents” and may be tried under the laws of war. *Id.* at 37-38. As a result, the Court declined even to resolve the claim that one of the eight German saboteurs was actually a U.S. citizen. *See id.* at 45.

We believe that, properly understood, the constitutional analysis in *Quirin* demonstrates that any person properly charged with a violation of the laws of war, regardless of citizenship or membership in the armed forces (of this country or another power), may be tried by military commission. The critical point for constitutional analysis is that a person properly charged with an offense against the laws of war has no right to an indictment or trial by jury under Article III or the Fifth and Sixth Amendments. Citizenship and membership in the military are not determinative factors for constitutional purposes. A person can properly be chargeable of an offense against the laws of war (such as spying), after all, without

being in the armed forces of a belligerent nation. The critical distinction is the nature of the offense. *See United States v. Tiede*, 86 F.R.D. 227, 254 (U.S. Ct. Berlin 1979) (“*Quirin* holds that whether an individual is entitled to a jury trial is determined by the nature of the crime with which he is charged.”). Offenses triable by the laws of war are not within the constitutional protections attached to criminal trials. As one district court recently held, “[u]nder *Quirin*, citizens and non-citizens alike—whether or not members of the military, or under its direction or control, may be subject to the jurisdiction of a military commission for violations of the law of war.” *Mudd v. Caldera*, 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001); *see also Colepaugh*, 235 F.2d at 432 (“[T]he petitioner’s citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war.”).

The Supreme Court, however, did not go so far as to hold in *Quirin* that its constitutional rationale undermined *Milligan* entirely. Instead, the Court declined to “define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals,” 317 U.S. at 45-46, and stated simply that the holding in *Milligan* should be construed as “having particular reference to the facts” in that case, *id.* at 45. The facts that were particularly relevant appear to have been that the saboteur in *Quirin* who claimed citizenship had engaged in acts that made him a belligerent. *Milligan*, in contrast, was not in military service, and the Court stressed that he was not an “enemy belligerent” and, “not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the laws of war.” *Id.* at 45; *see also Milligan*, 71 U.S. at 121-22 (emphasizing that *Milligan* was “a citizen in civil life, in nowise connected with the military service”). Thus, the line that the Court ultimately drew in *Quirin* to distinguish *Milligan* may be read to suggest that a citizen (not in the U.S. military) can be tried by military commission *when he acts as a belligerent*. *See* 317 U.S. at 37. That condition was most clearly met where citizens “associate themselves with the military arm of the enemy government.” *Id.* The distinction suggests that *Milligan* can be explained on the basis that the actions charged in *Milligan* did not amount to acts of belligerency. Even under this approach to *Quirin*, we conclude that in the context of the current conflict, any actions by U.S. citizens that amount to hostile acts against the United States or its citizens (and certainly participation in biological attacks, the attacks of September 11, or similar attacks) would make a person a “belligerent” subject to trial by military commission under *Quirin*.

We caution, however, that applying this standard may raise some ambiguities. The *Milligan* decision holds out at least the possibility that some charges that may be articulated under the law of war (such as the charge of giving aid and comfort to the enemy used in *Milligan*) may not, in some circumstances, amount to acts of belligerency triable by military commission. Exactly which acts place a person in the category of an “enemy belligerent” under *Quirin* thus may be a subject of

litigation. In addition, it might be argued that *Quirin* should be read as imposing a brighter-line test under which citizens are triable by military commission when they “associate themselves with the military arm of the enemy government.” 317 U.S. at 37. That standard, it could be claimed, is difficult to apply here because there are no organized armed forces of another belligerent nation facing the United States. For the reasons outlined above, we conclude that such an approach does not reflect the proper constitutional analysis and is not the proper reading of *Quirin*. Nonetheless, it raises a potential source of litigation risk.

In short, although we conclude that a U.S. citizen found to have engaged in actions that are properly chargeable as offenses under the laws of war could constitutionally be tried by military commission in the United States, we caution that in some circumstances there could be litigation risks involved in establishing the exact application of the Supreme Court’s decisions.

## **2. Enemy Aliens Seized in the United States**

Even if *Milligan* might raise litigation risks for the use of military commissions to try citizens, it should not raise the same difficulties for trying *aliens* charged with violations of the law of war. The *Milligan* Court repeatedly stressed the importance of citizenship in describing Milligan’s rights, and even though the Supreme Court has extended many constitutional protections to aliens within the United States, the distinction between the rights of citizens and aliens, especially in times of war, retains vitality today. As the Supreme Court explained in *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), whatever protections may be extended to aliens in time of peace, “[i]t is war that exposes the relative vulnerability of the alien’s status.”<sup>9</sup> Since the Alien Enemy Act of 1798, 1 Stat. 577 (codified as amended at 50 U.S.C. § 21), it has been established that in times of declared war, the President may seize enemy aliens and intern or deport them. This “Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.” *Eisentrager*, 339 U.S. at 774. As the Court in *Eisentrager* explained, since an alien citizen of an enemy nation may constitutionally be deprived of liberty by Executive action solely on the basis of his citizenship during time of war, “no reason is apparent why an alien enemy charged with having committed a crime should have greater

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<sup>9</sup> It is well established that during war enemy aliens are not entitled to the same constitutional rights as citizens. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (“The government’s power to terminate its hospitality [to aliens] has been asserted and sustained by this Court since the question first arose. War, of course, is the most usual occasion for extensive resort to the power.”); *Ex parte Colonna*, 314 U.S. 510, 511 (1942) (noting “the principle recognized by Congress and by this Court that war suspends the right of the enemy plaintiffs to prosecute actions in our courts.”); *Cummings v. Deutsche Bank und Discontogesellschaft*, 300 U.S. 115, 120 (1937) (“By exertion of the war power, and untrammelled by the due process or just compensation clause, Congress enacted laws directing seizure, use, and disposition of property in this country belonging to subjects of the enemy.”).

immunities from Executive action.” *Id.* at 784. As the Court concluded, the “Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” *Id.* at 785. Although there is no “government at war” with the United States in the current scenario, we believe that the same constitutional analysis would surely apply to aliens who have entered the United States to carry on a terrorist war at the behest of any foreign power.<sup>10</sup>

There is some authority for the view that *Milligan* provides a broad standard guaranteeing the right to jury trial for both citizens and aliens for offenses that might be charged as crimes wherever the civil courts are open, as long as the offenses did not take place in the field of military operations or other peculiarly military territory. An opinion of the Attorney General issued at the end of World War I took this approach. In 1918, Attorney General Gregory relied on *Milligan* to advise President Wilson that a military commission would not properly have jurisdiction to try a Russian national seized at the Mexican border as he attempted to enter the United States to conduct acts of sabotage in the service of the German government. *See Trial of Spies by Military Tribunals*, 31 Op. Att’y Gen. 356, 357 (1918) (the “1918 Opinion”). The opinion reasoned that the guarantee of a jury trial in criminal matters in Article III, Section 2 and the guarantees of the Fifth and Sixth Amendments should be read to constrain the use of military commissions. It concluded that “military tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory.” *Id.* at 361. Attorney General Gregory proceeded from that premise to conclude that the offense of spying—made triable by military commission—must be narrowly construed to involve actually passing through an enemy’s lines of defenses in an area of military operations. *See id.*; *see also id.* at 357 (emphasizing that defendant “had not entered any camp, fortification or other military premises of the United States”).<sup>11</sup>

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<sup>10</sup> We do not intend to address exhaustively here the Supreme Court’s decisions extending constitutional protections to aliens within the United States. We note, however, that the Court has explained such protections by stating that they extend to aliens who are *lawfully* in the United States and who have “developed substantial connections with this country,” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), or as the Court recently put it, have “accepted some societal obligations,” *id.* at 273. It seems unlikely, to say the least, that terrorists here on long-term missions to plot hostile acts could satisfy both of these conditions.

<sup>11</sup> Specifically, the Attorney General addressed Article 82 of the Articles of War, which stated that “Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.” 31 Op. Att’y Gen. at 358. He concluded that, because of constitutional constraints, the term “or elsewhere” could not be read to permit the trial by military commission of a defendant who was not seized in peculiarly military territory. *Id.* at 361.

We believe that the 1918 Opinion is best understood as an attempt to articulate the current state of the law under then-existing Supreme Court decisions and that it does not reflect the best constitutional analysis. *See, e.g., id.* at 359 (stating that *Milligan* is “authoritative” concerning “application of these Constitutional provisions to the question of the scope of military jurisdiction”). Indeed, the rationale in the 1918 Opinion has been thoroughly undermined by the Court’s later decision in *Quirin*. First, in *Quirin*, the Court explained at length that Article III, Section 2 and the Fifth and Sixth Amendments do not apply to trials by military commission for offenses against the laws of war and were not intended to expand the right to jury trial that existed at common law at the time of the Founding. *See* 317 U.S. at 39-43. *Quirin* thus rejected precisely the constitutional rationales upon which the Attorney General relied. Second, Attorney General Gregory relied on those constitutional rationales to *expand Milligan* to preclude the trial of aliens as well as citizens by military commission. He gave no particular rationale for extending those protections to aliens charged with hostile acts in time of war. In *Quirin*, moreover, the Court took the opposite route and concluded that, despite *Milligan*, even citizens were properly triable by military commission if they engaged in a belligerency unlawful under the laws of war. *See id.* at 37-38, 45.

Finally, *Quirin* can be read as rejecting even Attorney General Gregory’s specific approach to requiring some particular nexus between the offense and “peculiarly military territory,” even for the particular offense of spying under the Articles of War. As noted above, to preserve the jurisdiction of civil courts, the 1918 Opinion reached the specific conclusion that spying required the defendant to have crossed into “the field of military operations” or “other peculiarly military territory.” 31 Op. Att’y Gen. at 361; *see also id.* at 357 (noting that the accused “had not, so far as appears, been in Europe during the war, so had not come through the fighting lines or field of military operations”). The saboteurs in *Quirin* relied expressly on that opinion to argue that they had not crossed through any military lines, had not been seized in military territory, and thus should not be subject to trial before a military commission. *See* Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 152-54 (1943) (summarizing briefs before Supreme Court).<sup>12</sup> In addressing charges under the same Article of War, the *Quirin* Court, without citing the 1918 Opinion, rejected these claims: “Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.” 317 U.S. at 38; *see also id.* at 36-37 (“[E]ntry upon our territory in time of war by enemy belligerents . . . for the

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<sup>12</sup> *See also Eisentrager*, 339 U.S. at 780 (noting arguments in *Quirin*: “None of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations, were not under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction”).

purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents.”). The saboteurs in *Quirin* were seized in Chicago and New York (not “peculiarly military territory”) before they had completed any acts of sabotage, yet they were still chargeable as spies and subject to trial before a military commission.<sup>13</sup> We believe that *Quirin* more accurately reflects the law. *Milligan* does not provide a substantial basis for precluding the trial of aliens by military commission for offenses against the laws of war even where the courts are open in the United States.<sup>14</sup>

In any event, the particular circumstances addressed in the 1918 Opinion will likely have little relevance to the current crisis. First, many terrorists that come into U.S. custody will likely be apprehended overseas and will plainly be triable by military commission for violations of the laws of war under *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Constitutional concerns related to the use of military commissions within the United States thus will not arise. Second, the 1918 Opinion addressed the unusual factual scenario of a defendant seized at the border “the moment he touched foot upon United States territory,” 31 Op. Att’y Gen. at 357, who had not completed any acts of espionage or sabotage, and who had never even approached a military base. It was in addressing that fact pattern under the particular offense of spying under Article 82 of the Articles of War that the Attorney General concluded that there must be some connection to the field of operations or particularly military territory. One year later, Attorney General Palmer made clear that the particular facts were critical as he concluded, upon learning different facts in the same case, that a military court properly *did* have jurisdiction to try the *same defendant*. See *Trial of Spy by Court Martial*, 40 Op. Att’y Gen. 561 (1919). He explained that, where the defendant had “crossed into our territory” and was arrested “about a mile distant from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side,” *id.*, a military court properly had jurisdiction.<sup>15</sup> In the current situation, a scenario similar to that addressed in the 1918 Opinion likely will not arise. Aliens apprehended in the United States would likely be charged in connection with completed hostile acts of unlawful belligerency or

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<sup>13</sup> In setting out the background of the case, the Court did note in a footnote that both of the beaches on which the saboteurs landed were within areas designated the “Eastern Sea Frontier” and the “Gulf Sea Frontier” by the military, *see* 317 U.S. at 20 n.1, but it did not rely on these facts in its decision.

<sup>14</sup> We also note that the 1918 opinion might have been influenced by the fact that it was issued on November 25, 1918, two weeks after the armistice with Germany had been signed.

<sup>15</sup> Because Attorney General Palmer based his decision entirely on the changed facts (which brought the defendant within particularly military territory) and explicitly stated that “[t]his expression of my views should not be treated as overruling the opinion of my predecessor,” we believe it is still necessary to address the legal analysis of the 1918 Opinion, as we have above.

conspiracy related to those acts. There would be no credible argument that the definitions of the offenses under the laws of war should be construed narrowly so as not to include deliberate acts of mass murder that took approximately 3,000 lives.\*

### **III. The President May Conclude That the Laws of Armed Conflict Apply to the Terrorist Attacks**

As explained above, 10 U.S.C. § 821 sanctions the full uses of the military commission established by custom and Executive practice in the United States military. That practice, as noted above, has permitted military commissions to try all offenses against the laws of war. *See, e.g., Quirin*, 317 U.S. at 30 (“Congress has incorporated by reference, as within the jurisdiction of military commissions, *all* offenses which are defined as such by the law of war.”) (emphasis added); *Yamashita*, 327 U.S. at 20 (“Congress gave sanction . . . to any use of the military commission contemplated by the common law of war.”). The critical question for determining whether military commissions can properly be used here, therefore, is whether the terrorist attacks have created a situation to which the laws of war apply.<sup>16</sup> That is, are the terrorist acts subject to the laws of war at all, or are they solely criminal matters to be treated under the municipal criminal law of the United States or a particular State?

As outlined below, it would be difficult—or impossible—to articulate any precise multi-pronged legal “test” for determining whether a particular attack or set of circumstances constitutes “war” justifying application of the laws of war—or to use the modern terminology, whether it is an “armed conflict” justifying use of the “laws of armed conflict.” As the Supreme Court recognized long ago, determining whether a “war” exists depends largely on pragmatic considerations. As the Court put it in evaluating whether President Lincoln could properly invoke the laws of war by imposing a blockade on the southern states at the beginning of the Civil War, a conflict “becomes [a war] by its accidents—the number, power, and organization of the persons who originate and carry it on.” *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862). Precisely because it is a question that rests on pragmatic judgments that critically affect the national defense and vital matters of foreign policy, it is a determination that is properly left to the political branches, and particularly to the President. We explain in Part III.A below that the courts should defer to a presidential determination that the laws of armed conflict apply.

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\* Editor’s Note: When this opinion was issued, this sentence referenced the taking of “over 4,500 lives,” which was based on the information known at that time.

<sup>16</sup> Because we conclude, as explained below, that the current conflict warrants application of the laws of war and thus justifies the use of military commissions under this standard, we need not and do not address whether the President’s inherent powers as Commander in Chief would extend further to permit the use of military commissions in other situations.

In Part III.B, we outline more specific principles that can be derived from precedents to demonstrate that the present attacks have created a set of circumstances that properly merit invocation of the laws of war.<sup>17</sup> The scale of these attacks, the number of deaths they have caused, and the massive military response they have demanded makes it virtually self-evident that the present situation can be treated as an armed conflict subject to the laws of armed conflict.

### **A. Determining Whether War Exists Is a Question for the Political Branches**

Part of the reason it is difficult to articulate any broadly applicable “test” for determining whether a war exists is that the courts have quite properly concluded that that question (and thus the triggering of the laws of war) is one for the political branches. Early in the Nation’s history the Supreme Court recognized that Congress has authority to acknowledge a state of war, and that its decision to do so, whether formally and fully or partially and by degrees, is not subject to judicial question. *See Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (“[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.”); *The Three Friends*, 166 U.S. 1, 63 (1887) (“[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and

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<sup>17</sup> We note that the Supreme Court’s decision in *Quirin* also demonstrates that, at least if those charged before a military commission are being held within the territorial United States, they would be able to file a petition for habeas corpus to have an Article III court test whether their cases fell within the jurisdiction of a military commission—that is, whether the offenses charged properly “set[] forth a violation of the law of war.” *Quirin*, 317 U.S. at 46; *see also id.* at 29 (suggesting that some acts, even if considered violations of the laws of war in some countries or by some authorities, “would not be triable by military tribunal here . . . because they are not recognized by our courts as violations of the law of war”) (emphasis added); *Yamashita*, 327 U.S. at 9 (“[T]he Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”); *Colepaugh*, 235 F.2d at 431 (holding that on habeas review court may inquire into “applicability of the law of war to a particular case”). *But cf. Johnson v. Eisentrager*, 339 U.S. 763, 787-90 (1950) (holding that the writ of habeas corpus is not available to aliens held outside United States territory).

It is unclear to what extent a court would inquire into the exact question here—namely, whether the current situation is a “war” permitting application of the laws of war. In *Quirin*, the existence of a war was definitively established by a congressional declaration of war, and the Court inquired solely into whether the specification of the charges against the saboteurs sufficiently “alleges violation of the law of war.” 317 U.S. at 36. In *Yamashita*, the Court addressed a question closer to the one here as it assessed a claim that military commissions could not be used after the cessation of hostilities—a claim it rejected. *See* 327 U.S. at 11-13. Although, as explained in text, determining whether the laws of war apply is properly a political question, it is possible that courts will not consider themselves bound by every determination of a political branch of the government that the laws of war apply. Thus, setting out the rationales that justify treating the current situation as “war” may be useful for this purpose as well.

intention expressed.”); *see also, e.g., 3 Cumulative Digest of United States Practice in International Law 1981-1988*, at 3444 (1995) (“*U.S. Practice*”) (“The Courts have also treated the fundamental issue of whether an armed conflict is taking place for purposes of international or domestic law as a question to be decided by the political branches.”) (collecting authorities); *Verano v. De Angelis Coal Co.*, 41 F. Supp. 954, 954 (M.D. Pa. 1941) (“It is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby.”) (quoting *Hamilton v. McLaughry*, 136 F. 445, 449 (C.C.D. Kan. 1905)); *The Ambrose Light*, 25 F. 408, 412 (S.D.N.Y. 1885) (where question of recognizing belligerent rights arises, courts “must follow the political and executive departments, and recognize only what those departments recognize”); *United States v. One Hundred and Twenty-Nine Packages*, 27 F. Cas. 284, 289 (E.D. Mo. 1862) (“[T]he status of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition.”).

We conclude that, even without any action by Congress to acknowledge a state of war, the President, in his constitutional role as Commander in Chief, and through his broad authority in the realm of foreign affairs, *see, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), also has full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war. In *The Prize Cases*, the Supreme Court explained that it was up to the President to determine that a state of war existed that warranted according to the southern States the “character of belligerents.” 67 U.S. at 670. The judiciary, the Court noted, would be bound by his determinations in evaluating whether the laws of war applied to the blockade the President had instituted:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed . . . .

*Id.*; *see also The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1871) (relying on presidential proclamations to determine start and end dates for the Civil War); *Salois v. United States*, 33 Ct. Cl. 326, 333 (1898) (stating that if the government

had treated a band of Indians as at war, “the courts undoubtedly would be concluded by the executive action and be obliged to hold that the defendants were not in amity”).

By making the President Commander in Chief of the armed forces, the Constitution must be understood to grant him the full authorities required for him to effectively defend the Nation in the event of an armed attack. Necessarily included among those powers must be the ability to determine whether persons responsible for an attack should be subject to punishment under the laws of war. We outlined above our conclusion that the President’s powers as Commander in Chief must include the authority to convene military commissions to enforce the laws of war. For largely the same reasons, the Commander in Chief’s power should include authority to determine when the armed forces are engaged in a conflict that merits application of the laws of war. Use of the laws of war, after all, can be a key component in a strategy for conducting and regulating a military campaign. The ability to apply the laws of war means the ability to punish transgressions by an enemy against those laws, and thereby to compel an enemy to abide by certain standards of conduct. There can be no basis for withdrawing from the Commander in Chief the authority to determine when the Nation has been subjected to such an attack as warrants the use of the laws of war to deal with the enemy.<sup>18</sup>

### **B. The Terrorist Attacks Have Created a Situation That Can Properly Be Considered War**

Although the determination whether the current situation merits application of the laws of war is properly committed to the discretion of the President as Commander in Chief, there are some standards that the President could take into account. Under principles that can be gleaned both from American precedents and sources addressing the international laws of armed conflict, these factors indicate that the laws of armed conflict are properly applicable here. As the Supreme Court put it in evaluating whether President Lincoln could properly invoke the laws of war by imposing a blockade on the southern states at the beginning of the Civil War, a conflict “becomes [a war] by its accidents—the number, power, and organization of the persons who originate and carry it on.” *The Prize Cases*, 67 U.S. at 666. Where an organized force is carrying on a campaign of violence that

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<sup>18</sup> It is a familiar principle that decisions made by the President in undertaking the defense of the Nation in his role as Commander in Chief are committed to his sole discretion and are not subject to review. See, e.g., *Martin v. Mott*, 25 U.S. 19, 30 (1827) (question whether circumstances require calling out the militia is committed to the discretion of the President: “[T]he authority to decide whether the exigency has arisen belongs exclusively to the President, and . . . his decision is conclusive upon all other persons.”); see also *Stewart v. Kahn*, 78 U.S. (1 Wall.) 493, 506 (1870) (“The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.”).

reaches a sufficient level of intensity, it may be deemed an “armed conflict” by the President, thereby justifying application of the laws of armed conflict, including trials for the violation of those laws.<sup>19</sup> As explained below, the terrorist attacks meet that test.

### **1. American Precedents**

The political branches of the government, in whom the Constitution vests all of the war power, have long recognized that formal requirements are not the touchstone for application of the laws of war.<sup>20</sup> Actions based on that understanding, moreover, have repeatedly been upheld by the Supreme Court. Thus, for example, in the Quasi War with France, Congress exercised its power to authorize the seizure of French vessels, effectively using the rights of war, without declaring war. The Supreme Court recognized that Congress could take precisely such steps to use principles of the laws of war without any formal declaration. *See, e.g., Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (“Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time.”);<sup>21</sup> *see also Existence of War with the Seminoles*, 3 Op. Att’y Gen. 307 (1838) (explaining that war may exist “although no formal declaration of war has been made” and can even exist “without the sanction of Congress”).<sup>22</sup>

In addition, it is well established in Executive practice that war can exist (and the laws of war can be applied) even if the hostile parties are not two independent

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<sup>19</sup> Acknowledging that the laws of armed conflict may be applied to the present conflict does *not* mean in any way acknowledging the terrorists as legitimate combatants with any rights under the laws of armed conflict. To the contrary, based on their actions to date, the terrorists are all unlawful combatants stripped of any protection under the laws of armed conflict and are subject to trial for their violation.

<sup>20</sup> Because most U.S. precedents addressing application of the laws of armed conflict date from World War II or before, they use the terminology of “law of war.” For consistency with the source material, we follow that terminology in this portion of the discussion.

<sup>21</sup> *See also* U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 1, ¶ 9 (July 1956, as updated) (“[A] declaration of war is not an essential condition to the application of this body of law.”).

<sup>22</sup> Similarly, courts have recognized that the conflict in Vietnam was a war for purposes of applying the laws of war, even though Congress never declared war. *See, e.g., United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968). Accordingly, violations of the laws of war during Vietnam could be prosecuted as war crimes by military tribunals. In court-martial proceedings arising out of the incidents at My Lai, the Army Court of Military Review stated that “all charges could have been laid as war crimes.” *United States v. Calley*, 46 C.M.R. 1131, 1138 (A.C.M.R. 1973); *see also 3 U.S. Practice* at 3451. The court explained why the defendant was charged under the Uniform Code of Military Justice by citing paragraph 507(b) of chapter 8 of the U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, which states that “the United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the laws of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.” *Calley*, 46 C.M.R. at 1138.

sovereigns. Thus, at the outbreak of the Civil War, President Lincoln ordered a blockade of the southern states—an action that effectively invoked the rules of war—without any declaration of war and without any sovereign state as an enemy. In *The Prize Cases*, the Supreme Court addressed this action in the context of determining whether certain ships seized for attempting to run the blockade were lawfully captured as prizes. They would be lawful prizes only if the laws of war applied. In concluding that the prizes were lawful, the Court explained: “The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States.” 67 U.S. at 666;<sup>23</sup> accord *United States v. Pacific R.R.*, 120 U.S. 227, 233 (1887).<sup>24</sup> The mere fact that the terrorists are non-state actors, therefore, poses no bar to applying the laws of war here.

American precedents also furnish a factual situation that is more closely analogous to the current attacks to the extent that they involve attacks by non-state actors that do not take place in the context of a rebellion or civil war. The analogy comes from the irregular warfare carried on in the Indian Wars on the western frontier during the nineteenth century. Indian “nations” were not independent, sovereign nations in the sense of classical international law, nor were Indian tribes rebels attempting to establish states. Cf. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (describing Indians tribes as “domestic dependent nations”). Nevertheless, the Supreme Court has explained that the conflicts between Indians and the United States in various circumstances were properly understood as “war.” Thus, in *Montoya v. United States*, 180 U.S. 261 (1901), the Court (for purposes of a compensation statute passed by Congress) examined whether certain attacks were carried out by Indians from tribes “in amity” with the United States, which the Court approached by determining whether the Indians were at “war.” The Court explained that the critical factor was whether the Indians’ attacks were undertaken for private gain or as a general attack upon the United States: “If their hostile acts are directed against the Government or against all settlers with whom they come in contact, it is evidence of an act of war.” *Id.* at 266; see also *id.* (critical factor is whether “their depredations are part

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<sup>23</sup> See also *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1013 (2d Cir. 1974) (“[W]ar can exist between quasi-sovereign entities.”).

<sup>24</sup> Similarly, in *Hamilton v. McClaghry*, 136 F. 445 (D. Kan. 1905), the court concluded that the Boxer Rebellion in China was a “war” sufficient to confer jurisdiction on a general court-martial to try a soldier for an offense “during time of war.” Even though the Boxers were not a government and could not be recognized as a sovereign nation, the court found that “there prevailed in China a condition of war” sufficient to justify a court-martial in applying punishments that apply during time of war. *Id.* at 451; see also *Arce v. State*, 202 S.W. 951, 951 (Tex. Crim. App. 1918) (holding that a “war” existed when a “force organized at Monterey [in Mexico] by the direction and under the authority of the Carranza de facto government”—an insurgent group—attacked U.S. troops sent into Mexico, and thus that prisoners seized in the engagement should not be tried in Texas courts for murder).

of a hostile demonstration against the Government or settlers in general, or are for the purpose of individual plunder”).

Similarly, after the Modoc Indian War of 1873, the Attorney General opined that prisoners taken during the war who were accused of killing certain officers who had gone to parley under a flag of truce were subject to the laws of war and could be tried by a military commission. *See The Modoc Indian Prisoners*, 14 Op. Att’y Gen. 249 (1873). The Attorney General acknowledged that “[i]t is difficult to define exactly the relations of the Indian tribes to the United States,” but concluded that “as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.” *Id.* at 253. Several Indian prisoners were tried by military commission and executed.

The Attorney General reached a similar conclusion in 1871 in addressing the conduct of persons who had sold ammunition and rifles to hostile Indians. By statute, trading with Indians without a license was already prohibited. The Attorney General concluded, however, that trading with Indians “in open and notorious hostility to the United States at the time” constituted an offense under the Articles of War and could be tried by military commission. *Unlawful Traffic with Indians*, 13 Op. Att’y Gen. 470, 471 (1871). He explained that he was assuming “such a state of hostility on the part of the Indians as amounts to war,” and acknowledged that “[t]his state, in our peculiar relations with Indian tribes, is perhaps not susceptible of an exact definition.” *Id.* at 472. He concluded:

It is not necessary to the existence of war that hostilities should have been formally proclaimed. When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our Territories, and the troops of the United States are engaged in repelling such attacks, this is war in such a sense as will justify the enforcement of the articles of war against persons who are engaged in relieving the enemy with ammunition, etc.

*Id.*

It is true that many situations involving application of the laws of war in the past have involved conflicts between sovereigns or quasi-sovereign entities (including, for example, rebel movements attempting to establish governments). But that fact should not be understood as in any way precluding application of the laws of armed conflict to widespread terrorist violence. In the past, usually only a sovereign or quasi-sovereign entity attempting to establish itself as a government over a substantial territory could have the resources to mount and sustain a series of attacks of sufficient intensity to raise the question of “war” or “armed conflict.”

The terrorist network now facing the United States has found other means to finance its campaign while operating from the territory of several different nations at once. That change, however, cannot be considered to somehow exempt terrorist networks from the standards demanded by the laws of armed conflict and the punishments that would apply when the terrorists undertake violent attacks in violation of those laws. Simply by operating outside the confines of the traditional concepts of nation-states, terrorists cannot shield themselves from the prohibitions universally commanded by the laws of armed conflict and trial for violations of those laws. The examples from the Indian Wars above here provide an apt analogy. Indian tribes did not fit into the western European understanding of nation states—a difficulty that Attorneys General acknowledged. But that posed no bar to applying the laws of war when the United States was engaged in armed conflict with them.

Moreover, there is nothing in the logic of the laws of armed conflict that in any way restricts them from applying to a campaign of hostilities carried on by a non-state actor with a trans-national reach. To the contrary, the logic behind the laws suggests that they apply here. Generally speaking, the laws are intended to confine within certain limits the brutality of armed conflict, which might otherwise go wholly unchecked. *Cf. The Prize Cases*, 67 U.S. at 667 (the laws of war “all tend to mitigate the cruelties and misery produced by the scourge of war”). The ability to punish violations of the laws of armed conflict is critical for deterring all foreign entities from undertaking any acts that violate those laws. If terrorists could somehow be exempt from being tried for violations of the laws of war simply because they do not need to rely upon a government—or a quasi-sovereign structure controlling territory—the purposes of the laws of war would be defeated.<sup>25</sup>

Under the precedents outlined above, the terrorist acts are plainly sufficient to warrant application of the laws of war. The attacks fit exactly the terms used in the

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<sup>25</sup> It also bears noting that the terrorists do share one significant characteristic with the case of rebels or insurgents. Rebels typically are attempting to establish a government to change the political order or enforce their political will on an existing government. Some definitions of war, indeed, describe it as the effort to impose political will by force. *See, e.g.,* Carl von Clausewitz, *On War* 101 (A. Rapoport ed., Pelican Classics 1968) (1832) (“War therefore is an act of violence intended to compel our opponents to fulfil our will.”); *id.* at 119 (“War is . . . a continuation of political commerce, a carrying out of the same by other means.”). The terrorist attacks share this characteristic: they are designed to enforce a political will by arms. The attacks were directed against the government and people of the United States in an effort to force the United States to alter its foreign policies by the application of armed force. That is a classic description of the objectives of war. Thus, even though Usama bin Laden does not have any territory that he controls and cannot be said to operate as a quasi-sovereign entity, he was in effect acting in the same manner as a foreign power in attempting to enforce his political will on the United States by force of arms. While that aspect of the terrorist campaign is certainly not *necessary* for the attacks to be deemed an armed conflict, it does demonstrate that the current terrorist attacks share much in common with more familiar examples of armed hostilities subject to the laws of armed conflict.

cases above (which, as explained below, also closely parallel standards applied in international sources addressing the laws of armed conflict). The terrorists have engaged in a “system of attacks upon” the United States, that are part of a “hostile demonstration against the government [and people] in general.” 13 Op. Att’y Gen. at 472. Usama bin Laden has made it abundantly clear that he has called Muslims worldwide to a “jihad against the U.S. government, because the U.S. government is unjust, criminal and tyrannical.” CNN Interview with Osama bin Laden, *Osama Bin Laden v. the U.S.: Edicts and Statements* (Mar. 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html> (last visited July 26, 2012); see also World Islamic Front Statement, *Jihad Against Jews and Crusaders* (Feb. 23, 1998), available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited July 26, 2012) (“The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it . . . . We—with Allah’s help—call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah’s order to kill the Americans and plunder their money wherever and whenever they find it.”).

In prosecuting this self-proclaimed war, the terrorists carried out a widespread and coordinated attack against military and civilian targets on September 11 that resulted in the loss of approximately 3,000 lives. That death toll surpasses that at Pearl Harbor, and rivals the toll at the battle of Antietam in 1862, one of the bloodiest engagements in the Civil War. The attacks, moreover, did not involve a single, isolated event. Rather, even if one looks solely to the events of September 11, they involved the coordinated hijacking in different parts of the country of four separate aircraft that were then used as guided weapons. And if one looks beyond September 11, the attacks appear to be the culmination of a lengthy and sustained campaign that also includes the bombings of the World Trade Center in 1993, the Khobar Towers in Saudi Arabia in 1996, the U.S. embassies in Kenya and Tanzania in 1998, and the U.S.S. Cole in 2000. Especially when viewed as part of that continuing series of attacks, the most recent events plainly rise to the level of a systematic campaign of hostilities that justifies application of the laws of armed conflict.<sup>26</sup>

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<sup>26</sup> Indeed, compared to previous incidents found by the Executive Branch to trigger the application of the laws of armed conflict, Al Qaeda’s terrorism campaign falls well within United States practice. On December 3, 1983, two unarmed U.S. navy planes flying regular, routine reconnaissance flights were fired upon by hundreds of Syrian anti-aircraft guns and surface-to-air missiles. The United States responded to the attack the following day with airstrikes on the Syrian positions from which the gunfire and missiles had come. Two U.S. planes were shot down, and one officer was taken prisoner. The United States declared that the officer was entitled to prisoner of war status. According to a State Department press guidance, under the Geneva Conventions of 1949, “[a]rmed conflict’ includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting and irrespective of whether a state of war exists between the two parties.” 3 *U.S. Practice* at 3456-57.

In addition, the “troops of the United States are engaged in repelling such attacks” on a massive scale. 13 Op. Att’y Gen. at 472. Days after the attacks, Congress swiftly exercised its war powers to pass a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>27</sup> The President has not only described the current situation as a “war,” he has also directed partial mobilization of the Ready Reserve (thus putting at his disposal one million members of the Ready Reserve and alerting 50,000 reservists so far), he has dispatched three carrier battle groups and dozens of additional aircraft to the region of Afghanistan, and he has launched air attacks against military targets in Afghanistan. In addition, fighter jets continue to patrol the skies over most major American cities. The level of the military response determined upon by the political branches of the government in itself, in our view, justifies the conclusion that the laws of war can be invoked.

Finally, a further factor is virtually conclusive in itself in establishing that the attacks rise to the level of an armed conflict. In response to the attacks, NATO has already taken the unprecedented step of invoking Article 5 of the North Atlantic Treaty, which provides that an “armed attack against one or more of [the parties] shall be considered an attack against them all.” North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *see also* Statement of NATO Secretary General Lord Robertson (Oct. 2, 2001), *available at* <http://www.nato.int/docu/speech/2001/s011002a.htm> (last visited May 17, 2012) (“it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty”). Thus, under the mechanism provided in a treaty (which is part of the “supreme Law of the Land” under Article 6 of the Constitution, U.S. Const. art. VI, § 2), it has already been determined by a unanimous vote (including the vote of the United States) that the terrorist acts are an “armed attack” warranting an international response. Indeed, at least one NATO member, Great Britain, has already participated with the United States in launching attacks in response to the terrorist acts, and others have pledged their participation for future military actions. Similarly, both the Organization of American States (“OAS”) and Australia and New Zealand have determined that parallel provisions in their mutual defense treaties applying to “armed attacks” have also been activated.<sup>28</sup>

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<sup>27</sup> Pub. L. No. 107-40, 115 Stat. 224 (Sept. 14, 2001). Such a resolution was not necessary for the President to order a military response under his authority as Commander in Chief, but we note that the resolution was clearly an exercise of Congress’s war power. The resolution itself acknowledges in the preamble that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” 115 Stat. at 224.

<sup>28</sup> *See* Security Treaty Between Australia, New Zealand and the United States of America art. 2, Sept. 1, 1951, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 86 (“ANZUS Pact”); White House, Fact Sheet,

These actions already demonstrate recognition by other nations that the events of September 11 constituted “armed attacks” necessitating a military response.

In short, the terrorist acts were not isolated acts of criminal violence; rather, they were an attack against the government and people of the United States. We believe that “this is war in such a sense as will justify the enforcement of the articles of war.” 13 Op. Att’y Gen. at 472.

## **2. International Law Standards**

The precedents under American law outlined above are sufficient to establish conclusively that at least as of September 11, terrorist attacks on the United States had created a situation that would justify a conclusion that the laws of war properly apply. We realize that if a decision is made to use military commissions, it will also be important to justify American actions to our allies and others internationally. We therefore explain below that under sources of international law there are also ample authorities that could be cited to support a decision to apply the laws of war to the current conflict.

There is, of course, no treaty to which the United States is a party that applies by its terms to the current conflict with a terrorist organization and that would subject terrorists to the laws of war—or as it is now more commonly referred to in international law, the “laws of armed conflict.” Our discussion, therefore, turns to some extent on principles reflective of “customary international law” concerning the breadth of the laws of armed conflict. Citation of such principles, however, should not be misunderstood to suggest that these principles are “law” in the sense that they bind the President as Commander in Chief. Rather, they are cited to demonstrate that, in the field of international law, certain principles have received sufficient recognition that they could be credibly cited as reflecting customary practice among nations. The President may choose to enforce these standards as a matter of policy (and may determine as a matter of policy to have the Armed

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*Operation Enduring Freedom Overview: Campaign Against Terrorism Results* (Oct. 1, 2001), available at <http://2001-2009.state.gov/s/ct/rls/fs/2001/5194.htm> (last visited Aug. 4, 2012) (noting that “Australia offered combat military forces and invoked Article IV of the ANZUS Treaty, declaring September 11 an attack on Australia”); Inter-American Treaty of Reciprocal Assistance art. 3(1), Sept. 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95 (“Rio Treaty”) (“an armed attack by any State against an American State shall be considered as an attack against all the American States”); Meeting of Consultation of Ministers of Foreign Affairs, Organization of American States, *Terrorist Threat to the Americas* (Sept. 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm> (last visited May 22, 2012) (resolving “[t]hat these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent”).

Forces of the United States adhere to similar standards), but they are not “law” that limits the President as Commander in Chief.

Many of the same standards distilled from the American precedents outlined above are also reflected in international law sources addressing application of the laws of armed conflict. It bears emphasis at the outset that the term “law of war” used in 10 U.S.C. § 821 refers to the same body of international law now usually referred to as the “laws of armed conflict.” *See, e.g., Quirin*, 317 U.S. at 30-31 (explaining that the “law of war” incorporates the “common law of war” and looking to “universal agreement and practice” and “practice here and abroad” in determining scope of the laws of war, including army manuals from Germany and Britain); *cf. International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Dusko Tadic*, Oct. 2, 1995, 35 I.L.M. 32, 60 (1996) (“*Prosecutor v. Tadic*”) (noting changes in terminology). That refinement in terminology is not without significance, because it is designed to reflect more accurately the substantive reach of the international law restraints (and potential punishments) placed upon the conduct of armed conflicts. The laws of armed conflict are not restricted to situations of declared war—or even undeclared war—between nation states. Certain standards apply to any situation involving armed hostilities that have reached a sufficient level of intensity to be considered “armed conflict.” Understanding the broader scope of this body of law is particularly important, because the fact that the terrorist attacks do not fit neatly into a classical concept of “war” may (improperly) pose an initial stumbling block hindering understanding of how the laws of armed conflict properly apply here.

To begin with, the major conventions that set out international law standards governing international conflicts between states are not limited by the formal concept of “war.” Rather, each of the four Geneva Conventions of 1949, for example, applies “to all cases of declared war *or of any other armed conflict* which may arise between two or more of the High Contracting Parties.” *See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War* art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 (emphasis added); *see also 3 U.S. Practice* at 3453 (“[T]here need be neither a formal declaration of war nor a recognized state of war in order for the 1949 Geneva Conventions to come into effect. The occurrence of *de facto* hostilities is sufficient.”). Thus, even in the context of hostilities between nations, it is the existence of a set of facts—hostilities that amount to armed conflict—that triggers application of the provisions of the Geneva Conventions.

It is true that the requirements in the Geneva Conventions apply by their terms solely to conflicts between states. Thus, those conventions are not triggered by a conflict solely with terrorists. But that does not mean that there are not principles of the laws of armed conflict that apply in other scenarios. The complete set of restrictions in those conventions is not the only source of the laws of armed

conflict that restrict the conduct of armed hostilities under international law.<sup>29</sup> For example, common Article 3 of the Geneva Conventions was expressly designed to provide a form of safety net to establish minimal standards of humanitarian conduct that would govern in certain conflicts not covered by the Conventions. Thus, while the Geneva Conventions were designed to address international armed conflict, common Article 3 sets out some basic standards of humanitarian conduct that the parties are bound to apply “[i]n the case of armed conflict not of an international character” occurring within the territory of a Party. *See e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, 6 U.S.T. at 3518.<sup>30</sup> Similarly, the 1996 Amended Protocol II to the 1980 U.N. Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons (to which the United States is a party) further elaborates some aspects of the laws of armed conflict that apply in such “internal” armed conflicts. S. Treaty Doc. No. 105-1, at 39 (1997). These provisions make it plain that the laws of armed conflict may apply to hostilities conducted by a non-state actor. They also illustrate that the trigger for applying these requirements is the crossing of a certain threshold of violence. The 1996 Amended Protocol II, for example, explains that it does not apply to “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,” because these are not “armed conflicts.” 1996 Protocol II, art. 1(2), *id.*<sup>31</sup> Where there is some coordinated or organized campaign of violent acts that crosses that threshold, however, the factual situation warrants the application of the laws of armed conflict.

The standards of common Article 3, moreover, are reflective of a minimal standard of conduct that some view as required in all armed conflicts. *Cf.* Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* 22 (1990) (“McCoubrey”) (“[I]t must be borne in mind that much of Conventional international humanitarian law forms a part of customary law . . .”). The United

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<sup>29</sup> We assume for purposes of this discussion that it has not been established that the terrorist network carrying out the attacks was acting effectively as an agent for another nation. If the terrorists were acting as agents for another state, or were sponsored and supported by a state, there could be no question that the attacks constituted an international conflict to which the laws of armed conflict apply.

<sup>30</sup> Common Article 3 extends only certain *prohibitions* under international law to covered internal conflicts. It does not extend prisoner of war status or immunity from domestic prosecution to rebels. *See 3 U.S. Practice* at 3448 (“Common Article 3 did not grant rebels the benefits of prisoner-of-war status and thus immunity from prosecution for combatant acts.”) (collecting authorities); *id.* at 3464 (“Article III does not provide any immunity from prosecution to individuals for engaging in combatant acts.”).

<sup>31</sup> This language is identical to that contained in the 1977 Protocol II to the Geneva Conventions. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* art. 1(2), June 8, 1977, 1125 U.N.T.S. 609, 611. The United States has signed Protocol II, but is not a party to it. President Reagan forwarded the Protocol to the Senate for advice and consent to ratification on January 29, 1987, but it has not been ratified. *See 3 U.S. Practice* at 3428-34.

States recognized that some such minimal principles could be enforced against enemies as long ago as 1945 when the International Military Tribunal at Nuremberg applied standards of the Geneva and Hague Conventions to German conduct on the Eastern Front even though the Soviet Union had expressly denounced the Geneva Conventions before the war. *See id.* at 22-23.<sup>32</sup> Since then, the United States has supported statements in the United Nations of minimal standards, reflective of the principles in common Article 3, that must be observed “by all governmental and other authorities responsible for action in armed conflict.” G.A. Res. 2444 (XXIII), ¶ 1, U.N. GAOR, 23d Sess., U.N. Doc. A/7433 (1968). This statement acknowledges that the laws of armed conflict can be applied to a broad range of situations involving non-state actors, for it addresses not only the actions of governments, but also “other authorities” responsible for “action in armed conflict.” The United States, in supporting this resolution, indicated that it “constituted a reaffirmation of existing international law.” U.N. GAOR, 3d Comm., 23d Sess., 1634th mtg. at 2, U.N. Doc. A/C.3/SR 1634 (1968); *see also* Letter for Sen. Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, from J. Fred Buzhardt, General Counsel, Department of Defense (Sept. 22, 1972), *reprinted in* 67 Am. J. Int’l L. 122, 124 (1973) (noting that Hague Conventions of 1907, Geneva Conventions of 1949, and G.A. Res. 2444 reflect existing international law).

A final source worth noting as reflective of some current theories of the scope of the laws of armed conflict is the decision of the International Criminal Tribunal for the Former Yugoslavia. That Tribunal concluded that certain standards of conduct must constrain all forms of armed conflict of whatever nature. The Tribunal was faced with arguments that certain constraints applied solely to international armed conflict and that only the minimal standards of common Article 3 of the Geneva Conventions could apply to “internal” conflicts. While acknowledging that a fuller set of restrictions would apply to inter-state conflicts, the Tribunal concluded that at least some standards (both articulated by common Article 3 and dictated by customary law) would apply to any situation of armed conflict and explained that an “armed conflict” triggering application of these rules “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadic*, 35 I.L.M. at 54. The critical factor was whether hostilities had “exceed[ed] the intensity requirement,” *id.* at 55, sufficiently to be considered an “armed conflict.” As the decision of the

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<sup>32</sup> *See also Quirin*, 317 U.S. at 30, 35 (explaining that by permitting trial of offenses against the “law of war,” Congress had incorporated by reference the “common law applied by military tribunals” and principles “recognized in practice both here and abroad”); FM 27-10 ch. 1, ¶ 4(b) (“Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.”).

Tribunal suggests, the laws of armed conflict provide some minimal standards for *any* armed conflict, regardless of the particular characteristics of the conflict as one between states, or states and non-state actors. Thus, the Tribunal suggested that certain “[p]rinciples and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts *of any kind.*” *Id.* at 70 (emphasis added).

It should be clear from the foregoing that there is sufficient authority in current sources under international law for the President to justify to the international community a decision that it will be the policy of the United States to apply the laws of armed conflict to terrorists in the current situation. The trigger for application of the laws does not depend on a formal concept of “war,” or on the political status of those engaged in the hostilities as sovereigns or states, but rather upon the fact of armed hostilities that have reached a certain level of intensity. If the attacks carried out by the terrorists meet the standards of initiating an “armed conflict,” therefore, the laws of armed conflict can be invoked. As one commentator summarized, “[f]or the purposes of bringing into operation the rules regulating the conduct of hostilities, it no longer matters whether those hostilities are characterized as war. It is the factual concept of armed conflict rather than the technical concept of war which makes those rules applicable.” C. Greenwood, *The Concept of War in Modern International Law*, 36 Int’l & Comp. L.Q. 283, 304 (1987); *see also* McCoubrey at 24 (“[War] has been deliberately abandoned as a definition of the circumstances of application of the *jus in bello* in general and of international humanitarian law in particular.”).<sup>33</sup>

In light of this analysis, two mistaken concepts that might be raised as a basis for denying the application of the laws of armed conflict to the terrorist attacks are worth addressing and dismissing here. First, some might point to statements in older texts that “war” is a condition that exists only between states and claim that there can be no war (and hence no application of the laws of war) here. *See, e.g.*, 2 L. Oppenheim, *International Law: A Treatise* § 54, at 202 (H. Lauterpacht ed., 7th ed. 1952) (“War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”); *id.* § 56, at 203 (“To be war, the contention must be *between States.*”).

There are several flaws in such an argument. To the extent it relies on the syllogism that, if a conflict is not between states it cannot be “war” and therefore the laws of war cannot apply, the conclusion is contradicted by the terms of the Geneva Conventions and consistent practice since World War II. As outlined

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<sup>33</sup> Based on rationales similar to those outlined here, multiple commentators have concluded that terrorist acts may properly trigger application of the laws of war. *See, e.g.*, Crona & Richardson, 21 Okla. City U.L. Rev. 349; Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 Ohio N.U.L. Rev. 117, 147-48 (1986); *Should the Laws of War Apply to Terrorists?*, 79 Am. Soc’y Int’l L. Proc. 109, 109-11 (1985).

above, it has long been recognized that formal concepts of “war” do not constrain application of the laws of armed conflict and that non-state actors are properly bound by certain minimum standards of international law when they engage in armed hostilities. In addition, the syllogism itself distorts what was meant by the statement that war “must be between States.” In making that assertion, authors such as Oppenheim were suggesting only that for a conflict to be *legitimate* warfare it must be between states. It does not follow from that proposition that, if there is a conflict that amounts to warfare and non-state actors are involved, *none* of the restrictions on armed conflict applies at all. To the contrary, as Oppenheim recognized, quite a different conclusion follows—namely, that non-state actors who engage in warfare are engaged in a form of warfare that is *illegitimate*. See, e.g., Oppenheim § 254, at 574. In other words, they do not *escape* the laws of war because they are non-state actors. Instead, they are unlawful belligerents. Finally, the absolutist proposition that rules restraining the conduct of armed conflict apply only to a war between two states was not accepted even by authors such as Oppenheim. The proposition thus would not even accurately reflect the analysis applied in the discussions of the laws of war on which it purports to rely. Oppenheim, for example, fully acknowledged that at least some aspects of the laws of war would properly apply in a conflict between a state and a non-state actor such as an insurgent group in a civil war. See *id.* § 59, at 209-10. Thus, even in older treatments of the subject, there is nothing talismanic about the involvement of states in a conflict for purposes of applying certain fundamental aspects of the laws of war.

A related mistaken idea would be the suggestion that a trans-national attack by a non-state actor is somehow less susceptible to treatment under the law of war than such an attack carried on internally within a given state. It is true that the trans-national aspect of the attacks carried out by a non-state organization presents a somewhat novel situation. Articulations of the laws of armed conflict concerning non-state actors have been most fully developed in the context of internal conflicts in the form of rebellions or civil wars within a particular state. But, as explained above, there is nothing in the logic of the laws of armed conflict that would restrict its application in the case of a trans-border attack by a private armed band.

The critical question for determining whether the laws of armed conflict apply here, therefore, is whether the terrorist attacks were a sufficiently organized and systematic set of violent actions that they crossed a sufficient level of intensity to be considered “armed conflict.” There can be no doubt that, whatever the “level of intensity” required to create an armed conflict, the gravity and scale of the violence inflicted on the United States on September 11 crossed that threshold. To use the words of the 1996 Amended Protocol II to the 1980 U.N. Convention on Conventional Weapons, which provides one guidepost for determining when an armed conflict exists, the attacks are not properly likened to mere “riots, isolated and sporadic acts of violence and other acts of a similar nature,” which do not

constitute “armed conflict.” Rather, as explained above, the terrorists have carried on a sustained campaign against the United States, culminating most recently with a devastating series of coordinated attacks resulting in a massive death toll.

In addition, the United States has determined that it is necessary to respond to the attacks with military force. That decision is significant because one element often cited for determining whether a situation involving a non-state actor rises to the level of an “armed conflict” (for example, for purposes of common Article 3 of the Geneva Conventions) is whether a state responds with its regular military forces. The United States has urged this position. *See 3 U.S. Practice* § 2, at 3443; *see also* G.I.A.D. Draper, *The Red Cross Conventions* 15-16 (1958) (under common Article 3, “armed conflict” exists when the government is “obliged to have recourse to its regular military forces”). Here, this criterion is overwhelmingly satisfied. As outlined above, the United States has found it necessary to respond with a massive use of military force. The current operations in Afghanistan and continuing preparations for a sustained campaign easily establish that the situation here involves an armed conflict for purposes of international law.

Finally, as noted above, NATO’s decision to invoke Article 5 of the North Atlantic Treaty by deeming the terrorist acts an “armed attack” conclusively demonstrates that standards under international law for identifying an “armed conflict” have been satisfied here.

#### **IV. Under the Laws of War, the Terrorists Are Unlawful Combatants Subject to Trial and Punishment for Violations of the Laws of War**

We stress at the outset that determining that the terrorist attacks can be treated under the rubric of the “laws of war” does *not* mean that terrorists will receive the protections of the Geneva Conventions or the rights that the laws of war accord to lawful combatants. To the contrary, as the U.S. Army Field Manual, *The Law of Land Warfare*, makes clear, persons who do not comply with the conditions prescribed for recognition as lawful combatants (which include wearing a fixed insignia and bearing arms openly) are not entitled to status as prisoners of war and may be punished for hostile acts in violation of the laws of armed conflict.<sup>34</sup> The Supreme Court made the same distinction clear in *Quirin*: “By universal agreement and practice the law of war draws a distinction between . . . those who are

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<sup>34</sup> FM 27-10, ch. 3, § 80 (“Persons, such as guerillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.”); *id.* § 81 (“Persons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.”); *id.* § 82 (“Persons in the foregoing categories who have attempted, committed, or conspired to commit hostile or belligerent acts are subject to the extreme penalty of death because of the danger inherent in their conduct.”).

lawful and unlawful combatants. . . . Unlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” 317 U.S. at 30-31.

We indicate here, based on preliminary research, some offenses that might be charged under the laws of war to establish the jurisdiction of military commissions. The list here is representative only and is not intended by any means to be exhaustive.<sup>35</sup>

As noted above, the terrorists involved in the attacks did not meet even the minimal conditions required to be recognized as lawful combatants. It is open to some doubt whether persons acting without authorization of a state could *ever* undertake hostile acts without violating the laws of war. But we need not reach that theory to conclude that the terrorists did not meet even the most basic requirements for complying with the laws of war as lawful combatants. They were not bearing arms openly and wearing fixed insignia. Thus, all of their hostile acts can be treated as violations of the laws of war. It is settled that any violation of the laws of war may be prosecuted as a “war crime.” The U.S. Army Field Manual, *The Law of Land Warfare*, provides that “[a]ny person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” FM 27-10, ch. 8, ¶ 498. “The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the laws of war is a war crime.” *Id.* ¶ 499.<sup>36</sup> Specific offenses here could include violations of the rule prohibiting “[u]se of civilian clothing by troops to conceal their military character,” *id.* ¶ 504(g),<sup>37</sup> the rule prohibiting “[f]iring on localities which are undefended and without military significance,” *id.* ¶ 504(d), and the rule prohibiting deliberate targeting of civilian populations.<sup>38</sup>

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<sup>35</sup> The substance of the laws of war, and of the offenses defined by the laws of war, can be determined by looking to past American practice, especially the codification of the laws of war compiled by the United States Army in *The Law of Land Warfare*, and to sources of international law defining the laws of war, *see, e.g., Quirin*, 317 U.S. at 30 (examining “universal agreement and practice” and sources from Great Britain and Germany, among other countries).

<sup>36</sup> The Manual further states that “[a]s the international law of war is part of the law of the land of the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. However, directives declaratory of international law may be promulgated to assist such tribunals in the performance of their function.” *Id.* ¶ 505(e).

<sup>37</sup> One precedent from a trial before a military commission in the Civil War provides a useful parallel to the terrorist attacks. In 1865 some confederate soldiers were tried for “violations of the laws and usages of civilized war” in that they “came on board a United States merchant steamer in the port of Panama ‘in the guise of peaceful passengers’ with the purpose of capturing the vessel and converting her into a Confederate cruiser.” *Quirin*, 317 U.S. at 32 n.10.

<sup>38</sup> *See, e.g.,* FM 27-10, ch. 2, ¶ 25 (“[I]t is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them . . . .”); *id.* ¶ 39 (“The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”). It is a commonly recognized principle under the customary laws of war

In addition, individuals can be prosecuted under the laws of armed conflict using standard theories of aiding and abetting and conspiracy. The U.S. Army Field Manual provides that “[c]onspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.” FM 27-10, ch. 8, ¶ 500. Commanders can also be held responsible for war crimes committed either under their orders or by those under their command.<sup>39</sup>

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that civilian populations should not be the deliberate, sole target of attack. Thus, G.A. Res. 2444, supported by the United States, noted that “it is prohibited to launch attacks against the civilian population as such.” *Id.* ¶ 1(b); *cf.* Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *Brit. Y.B. Int’l L.* 360, 369 (1952) (“[I]t is in [the] prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force.”).

<sup>39</sup> *See, e.g., The Law of Land Warfare*, FM 27-10, ch. 8, ¶ 501 (“In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. . . . Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the laws of war or to punish violators thereof.”); *see also Yamashita*, 327 U.S. at 14-18.

## **Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill**

A provision prohibiting the use of appropriated funds for United Nations peacekeeping missions involving the use of United States Armed Forces under the command of a foreign national unconstitutionally constrains the President's authority as Commander in Chief and his authority over foreign affairs.

A provision prohibiting the use of appropriated funds for cooperation with, assistance to, or other support for the International Criminal Court would be unconstitutional insofar as it would prohibit the President from providing support and assistance to the ICC under any and all circumstances, but it can be applied in a manner consistent with the President's constitutional authority in the area of foreign affairs.

November 28, 2001

### MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our views on four provisions in H.R. 2500, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for Fiscal Year 2002, 107th Cong. (2001) ("CJS appropriations bill"): sections 609 (participation in United Nations peacekeeping), 612 (Department of Justice anti-terrorism restructuring), 626 (removing foreign sovereign immunity in pending Iran hostages litigation), and 630 (support for International Criminal Court).

We conclude that section 626 does not raise constitutional concerns, but that section 609 unconstitutionally constrains the President's Commander-in-Chief and foreign affairs authority, section 612 represents the sort of legislative micromanagement of the Executive Branch that should be resisted on separation of powers policy grounds, and application of section 630 in certain circumstances would unconstitutionally interfere with the President's foreign affairs authority.

### **I. Section 609**

Section 609 provides that:

None of the funds made available by this Act may be used for any United Nations undertaking when it is made known to the Federal official having authority to obligate or expend such funds: (1) that the United Nations undertaking is a peacekeeping mission; (2) that such undertaking will involve United States Armed Forces under the command or operational control of a foreign national; and (3) that the President's military advisors have not submitted to the President a recommendation that such involvement is in the national security

interests of the United States and the President has not submitted to the Congress such a recommendation.

Section 609 thus prohibits the use of appropriated funds (by entities receiving appropriations under the CJS appropriations bill) for the participation of United States Armed Forces in a United Nations peacekeeping mission under foreign command, unless the President's military advisors have recommended such involvement and the President has submitted such recommendation to Congress. This provision first appeared in CJS appropriations bills in 1996. We have consistently taken the position that it is unconstitutional and have submitted signing statement language saying that the provision unconstitutionally constrains the President's Commander-in-Chief authority and that the President will apply it consistent with his constitutional responsibilities.

Our position has been based on the analysis that it is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President's exercise of his constitutional authority—as Commander in Chief and with respect to the conduct of diplomacy—to order United States military participation in a United Nations peacekeeping operation. Specifically, it is unconstitutional to require the President to satisfy the requirements set forth in section 609: that the President's military advisors have recommended that the involvement in the peacekeeping operation is in the national security interests of the United States and that the recommendation has been submitted to Congress.

Our analysis starts with the constitutional principle that responsibility for the conduct of foreign affairs and for protecting the national security are “‘central’ Presidential domains.” *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982). The President's constitutional responsibilities in both these areas flow from the specific grants of authority in Article II making him Chief Executive, U.S. Const. art. II, § 1, cl. 1, and Commander in Chief, *id.* art. II, § 2, cl.1, *see Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982), as well as from the “unique position” that the President occupies in the constitutional structure, *id.* at 749. The President's exclusive authority to conduct the Nation's diplomatic relations with other States derives primarily from the Vesting Clause and the Commander-in-Chief Clause, and is buttressed by the President's more specific powers to “make Treaties,” U.S. Const. art. II, § 2, cl. 2; to “appoint Ambassadors . . . and Consuls,” *id.*; and to “receive Ambassadors and other public Ministers,” *id.* art. II, § 3.

The Supreme Court has consistently “recognized ‘the generally accepted view that foreign policy [is] the province and responsibility of the Executive.’” *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (President is the nation's “guiding organ in the conduct of our foreign affairs”); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 235 (1839) (“As the executive magistrate of the country, he is the only functionary intrusted with the foreign relations of the

nation.”); Secretary of State Thomas Jefferson, Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions (Apr. 24, 1790), in *5 The Writings of Thomas Jefferson* 161 (Paul L. Ford ed., 1895); *The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 162 (1986) (“The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress.”).

It is vital to the President’s ability to conduct diplomatic relations that he should have the authority to deploy United States Armed Forces in the international arena, and be able to threaten credibly to do so.<sup>1</sup> Furthermore, the authority to deploy military force in the defense of the security and interests of the United States is expressly placed under the President’s authority by the Commander-in-Chief Clause, U.S. Const. art. II, § 2, cl. 1. The “inherent powers” of the President as Commander in Chief are “clearly extensive.” *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in the judgment). As Attorney General, later Justice, Robert Jackson explained:

Article II, section 2, of the Constitution provides that the President “shall be Commander in Chief of the Army and Navy of the United States.” By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in time of peace as well as in time of war. . . .

Thus the President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.

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<sup>1</sup> Longstanding historical practice supports the claim of presidential authority to deploy the armed forces as a tool of foreign policy. See, e.g., *Memorandum on the Authority of the President to Repel the Attack in Korea*, 23 Dep’t of State Bull. 173, 174 (1950) (historical practice supports use of United States forces “in the broad interests of American foreign policy”). The President has “authority to commit troops overseas without specific prior Congressional approval “on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.”” *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188, 197 (2001) (quoting *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (Barr, A.G.) (quoting *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941) (Jackson, A.G.))).

*Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61-62 (1941).

Congress cannot, in the manner set forth in section 609, place impediments on the President’s ability to deploy United States forces abroad for purposes he deems vital to the national security.<sup>2</sup> As we have noted, long historical practice supports the legitimacy of the President’s deploying military forces abroad in order to protect the nation’s security and to uphold its interests. Moreover, as Commander in Chief, the President must be able to determine, not only *whether* United States Armed Forces are to be deployed abroad, but also *under what conditions* they are to be deployed. Thus, the President has the authority to decide, within applicable constitutional limits, what command structures the forces deployed are to have, what tactics they are to adopt, what military objectives they are to pursue, and—most relevantly here—whether and how they are to cooperate with foreign or international forces in the same theater of operations. Such decisions implicate both military and diplomatic judgments which the President alone is constitutionally empowered to make. Taking account of military needs and of foreign relations, the President may well conclude, in particular circumstances, that it serves the nation’s security and foreign policy best to deploy our forces as part of a United Nations operation, rather than unilaterally (or not at all).<sup>3</sup> Congress is without power to prevent the President from acting on that conclusion.

The fact that in section 609 Congress is placing a condition on the President’s exercise of his constitutional authority indirectly, through the appropriations process, rather than as a direct mandate, does not change our conclusion. “Broad as the spending power of the Legislative Branch undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends.” *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act*, 20 Op. O.L.C. 253, 266 (1996). Of particular relevance in the present context is the principle that “Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control.” *Id.* (citation omitted).

The Executive Branch’s insistence on this principle is longstanding. In 1860, President Buchanan issued a signing statement denying Congress’s power to interfere with his authority to issue orders to military officers through the device of

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<sup>2</sup> None of Congress’s enumerated powers in Article I appears to provide a basis for limiting, in the manner proposed by the bill, the authority of the President to make the deployments in question. We do not see, for example, how the proposed prohibition on deployments could fairly be described as an exercise of Congress’s power to “declare War,” U.S. Const. art. I, § 8, cl. 11; of the power to “raise and support Armies,” *id.* cl. 12; or to “make Rules for the Government and Regulation of the land and naval Forces,” *id.* cl. 14.

<sup>3</sup> See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673, 1707-08 (2000) (explaining why multilateralism was preferable to unilateralism from the United States’ point of view in responding to crisis in Kosovo).

a condition on the availability of appropriated funds. The President therefore construed the statute at issue not to work such an interference. See Signing Statement of President Buchanan to the House of Representatives (1860), reprinted in 7 *A Compilation of the Messages and Papers of the Presidents* 3128 (James D. Richardson ed., 1897). The views expressed in the signing statement were subsequently reviewed and endorsed by an opinion the President requested from Attorney General Black. The Attorney General wrote that “[i]f Congress had really intended to [interfere with the President’s command authority], that purpose could not be accomplished in this indirect manner any more than if it was attempted directly.” *Memorial of Captain Meigs*, 9 Op. Att’y Gen. 462, 469 (1860). Since that time, the Executive has consistently denied the binding effect of appropriations conditions that violate the constitutional separation of powers or usurp the President’s constitutional authority.

Finally, we do not think that section 609’s authorization to participate in a peacekeeping operation if the President’s military advisors have recommended the participation and the recommendation has been submitted to Congress saves section 609 from unconstitutionality. Congress can exempt the President from a legislative restriction only if it has the authority to impose that restriction in the first place. For the reasons stated above, we do not think Congress has such power.

## **II. Section 612**

Section 612 addresses the subject of the organization of the Department of Justice with respect to combating terrorism. Subsection (a) of section 612 requires the President to

submit as part of the fiscal year 2003 budget to Congress a proposal to restructure the Department of Justice to include a coordinator of Department of Justice activities relating to combating domestic terrorism, including State and local grant programs subject to the authority of the Attorney General, and who will serve as the Department of Justice representative at interagency meetings on combating terrorism below the Cabinet level.

Viewed in isolation, subsection (a) appears to require the President to submit a legislative proposal to Congress, which would raise constitutional concerns under the Recommendations Clause, which provides that the President “shall from time to time . . . recommend to [Congress] . . . such Measures as he shall judge necessary and expedient.” U.S. Const. art. II, § 3. Under the Recommendations Clause, Congress cannot compel the President to submit legislative proposals to Congress.

When subsection (a) is read in conjunction with the remainder of section 612, however, it is apparent that section 612 does not require the President to submit a

legislative proposal. Rather, he is being given the choice of submitting a legislative proposal under subsection (a) or acquiescing in the congressional proposal set forth in the remainder of section 612. Subsection (b) provides that “[i]f the President does not submit a proposal as described in subsection (a), or if Congress fails to enact legislation establishing a new position described in subsection (a), by June 30, 2002, then effective on such date subsections (c) through (f) [the remaining provisions of section 612] shall take effect.” Those remaining subsections establish the position of Deputy Attorney General for Combating Domestic Terrorism.

Thus, the legislative proposal provision of subsection (a) is not a mandatory requirement for the President, but is merely part of a mechanism created by the entirety of section 612, under which the congressional enactment set forth in subsections (c) through (f) will go into effect if the President does not propose an alternative approach to restructuring the Department of Justice to deal with terrorism. The President is not required by section 612(a) to submit legislation to Congress because he has the choice of accepting the congressional approach set forth in the rest of section 612.

Although we do not believe that section 612 violates the Recommendations Clause, it does represent the sort of legislative micromanagement of the Executive Branch that we have objected to in the past. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 253-54 (1989) (stating that “Congress’ recent interest in determining the precise organizational structure of executive branch departments . . . seriously threatens the executive branch’s ability to effectively and efficiently fulfill its obligations”). By requiring that a particular executive officer coordinate specific policy and executive decisions, section 612 infringes upon the President’s constitutional authority to direct the activities of the Executive Branch. While Congress has broad authority to determine what laws the President must enforce, we do not believe that Congress has an entirely free hand in determining how the Executive Branch must be organized to enforce those laws. Indeed, if it did, the Executive Branch would be substantially controlled and administered by the Legislative Branch. Thus, on separation of powers policy grounds, we believe that Congress’s effort to restructure the Department of Justice should be vigorously resisted.

### **III. Section 626**

Subsection (c) of section 626 would amend provisions of the Foreign Sovereign Immunities Act (“FSIA”) that establish the circumstances in which foreign states are not immune from the jurisdiction of the courts of the United States in civil actions brought against them. Section 626(c) would amend section 1605(a)(7)(A) of the FSIA by specifying that any “act . . . related to” a designated case against the Government of Iran presently pending in the U.S. District Court for the District

of Columbia is not protected by foreign sovereign immunity under the FSIA. The case designated in the provision is *Roeder v. Islamic Republic of Iran*, No. 1:00CV03110(ESG) (D.D.C.). That case, we are advised, is based upon the Iranian Government's actions in connection with the detention and mistreatment of hostages in the U.S. Embassy in Teheran in 1979. The Civil Division advises that a default judgment has been entered against Iran in that case and proceedings to assess damages remain to be held in the U.S. District Court. The United States has filed a motion to intervene and a motion to vacate the judgment, which motions are presently pending.

We do not believe section 626(c) raises constitutional concerns. This provision would merely establish by statute that Iran does not have sovereign immunity in U.S. courts with respect to the acts related to the Iran hostage crisis that form the basis of the claim in *Roeder*—a claim that is the subject of ongoing litigation and which has not been reduced to final judgment. Nothing in the Constitution bars Congress from enacting such legislation. In particular, the provision does not violate the principles of the Supreme Court's precedents in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), or *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Under *Plaut*, Congress may not enact legislation that requires federal courts to reopen or otherwise alter *final judgments*. Because the *Roeder* case has not been reduced to final judgment, the *Plaut* principle is inapplicable. Even if the default judgment in question were a final judgment at this stage, section 626(c) would still not appear to violate *Plaut* because (by denying sovereign immunity) it appears to reinforce, rather than reopen, the validity of the judgment against Iran. *Klein*, on the other hand, is sometimes cited for the general proposition that Congress may not prescribe to the courts a rule of decision to dictate the court's interpretation of the law in a particular case. *Klein* does not, however, prohibit Congress from *changing the underlying law* that governs in a pending case, even if that case was still pending when the change in the law was made. As explained by the Supreme Court in *Plaut*, “[w]hatever the precise scope of *Klein*, . . . later decisions have made clear that its prohibition does not take hold when Congress ‘amend[s] applicable law.’” 514 U.S. at 218 (quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992)).

In addition, we do not believe that section 626(c) is constitutionally objectionable as an improper congressional interference with the President's foreign affairs powers. The Supreme Court has firmly upheld the constitutionality of the FSIA's regulation of foreign sovereign immunity as a valid exercise of Congress's power to regulate foreign commerce and as falling within the proper bounds of Congress's Article III powers as well. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983). Although the provisions of section 626(c) are very specific in their coverage, we cannot say that they exceed the proper scope of

legislative regulation upheld by the courts in granting or withholding sovereign immunity to foreign states in the courts of the United States.<sup>4</sup>

#### **IV. Section 630**

Section 630 provides that “[n]one of the funds appropriated or otherwise made available by this Act shall be available for cooperation with, or assistance or other support to, the International Criminal Court [“ICC”] or [its] Preparatory Commission [“Commission”].” We believe that section 630 would be unconstitutional to the extent that it would prohibit the President, through his subordinates, from providing support and assistance to the ICC or the Commission under any and all circumstances. Therefore, we have submitted signing statement language saying that the President will apply this provision consistent with his constitutional authority in the area of foreign affairs.

Section 630 can be given effect consistent with the Constitution. Prohibiting technical or ministerial cooperation with or assistance to the ICC or the Commission would generally not interfere with the President’s exercise of his constitutional authority, and therefore as applied to those circumstances section 630 would not be constitutionally problematic.

Serious as-applied constitutional difficulties would arise under section 630, however, if its prohibition were to apply to certain diplomatic activities or substantive positions the President might take with respect to or before the ICC or the Commission. The Constitution commits to the President the primary responsibility for conducting the foreign relations of the United States, *see, e.g., Dep’t of Navy v. Egan*, 484 U.S. at 529 (the Supreme Court has “recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive’”) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976) (“[T]he conduct of [foreign policy] is committed primarily to the Executive Branch.”), and the exclusive responsibility for formulating the position of the United States in international fora and for conducting negotiations with foreign nations, *see, e.g., United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is “the constitutional representative of the United States in its dealings with foreign nations”).

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<sup>4</sup> Two other issues have been raised by section 626. Subsections (a) and (b) purport to require the President to submit to Congress a detailed legislative proposal dictated by Congress and thus raise clear concerns under the Recommendations Clause. This issue is straightforward, and we have already addressed it in our comments to the Office of Management and Budget, which have included recommended language for the President’s signing statement. In addition, the National Security Council staff has submitted signing statement language indicating that the Executive Branch will act, and encourage the courts to act, with regard to subsection (c)’s removal of Iran’s sovereign immunity in the pending litigation, in a manner consistent with the obligations of the United States under the 1981 Algiers Accords that achieved the release of the hostages. This Office has cleared that language.

Thus, there might well be circumstances in which the President finds it necessary, in the exercise of his constitutional responsibilities, to order an executive agency to provide support or assistance to the ICC or the Commission. For example, the President might find that it served overriding United States national security and foreign policy interests to assist the ICC in investigating, capturing, or prosecuting a prominent foreign individual whose activities threaten American lives and interests. Failure to assist the ICC in such efforts by, for example, supplying intelligence information on the whereabouts or activities of such an individual could do serious and lasting harm to United States security and its international standing.

It will therefore be important in applying section 630 to interpret the terms “cooperation,” “assistance,” and “support” in a way that is consistent with the understanding that the provision cannot constitutionally limit the President’s exercise of his constitutional responsibilities. Properly understood, however, these terms should not unconstitutionally constrain the President. For example, in light of the President’s exclusive constitutional responsibilities for the conduct of diplomacy, we would not interpret the Executive Branch’s participation in negotiations concerning the ICC to constitute cooperation, assistance, or support.

Similarly, we do not believe the section 630 prohibition could constitutionally be applied to the sharing of intelligence information with the ICC concerning an alleged terrorist who has been brought before the ICC. As Chief Executive and Commander in Chief, the President has independent authority to gather intelligence and to control access to national security information. The Supreme Court has specifically recognized the President’s constitutional authority to control the disclosure of classified information:

The President . . . is the “Commander in Chief of the Army and Navy of the United States.” . . . His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government’s “compelling interest” in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

*Dep’t of Navy v. Egan*, 484 U.S. at 527. *See also New York Times Co. v. United States*, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring) (“If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the

degree of internal security necessary to exercise that power successfully.”). Implicit in the President’s authority to gather such information and to control access to it is the authority to disclose it to foreign nations or to international bodies if, in the exercise of his diplomatic responsibilities, he finds it proper to do so.

The President may well find it necessary or advisable in particular circumstances to disclose classified information to foreign nations or to international bodies in order to promote this nation’s diplomatic objectives or to guard its interests and security. Such disclosure is a legitimate—and often, an unavoidable—exercise of the President’s diplomatic and military responsibilities. For example, the President may find it necessary to disclose to a foreign government classified information about the identity or whereabouts of a foreign terrorist, or about the extent to which that government’s security has been compromised by a third country’s intelligence operations. Or the President may need to warn a potential enemy nation (even if the information disclosed is classified) about United States military planning and capabilities, in order to deter that country from acts of aggression.

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## **Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members**

The congressional-disclosure exception to the disclosure prohibition of the Privacy Act generally does not apply to disclosures to committee ranking minority members.

December 5, 2001

### LETTER OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF THE TREASURY

This letter responds to your request of November 13, 2001, for the opinion of this Office concerning whether information protected by the Privacy Act of 1974 (“Privacy Act” or “Act”), 5 U.S.C. § 552a (2000), may be disclosed to the ranking minority member of the Senate Finance Committee, pursuant to the Act’s congressional-disclosure exception, *id.* § 552a(b)(9). We understand that the ranking minority member, not the Finance Committee, requested this information.

The Privacy Act prohibits the disclosure of information subject to the protections of the Act without the consent of the individual to whom the information relates, unless one of the enumerated exceptions of the Act applies. *Id.* § 552a(b). One of those exceptions authorizes disclosure “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.” *Id.* § 552a(b)(9).

We conclude that the Privacy Act prohibits the disclosure of the Privacy Act-protected information to the ranking minority member. Except where the Senate or House exercises its investigative and oversight authority directly, as is the case with a resolution of inquiry adopted by the Senate or House, each House of Congress exercises its investigative and oversight authority through delegations of authority to its committees, which act either through requests by the committee chairman, speaking on behalf of the committee, or through some other action by the committee itself. As a general matter, ranking minority members are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee. We understand that the ranking minority member has not received such an authorization from the Finance Committee.

Thus, the essential analysis underlying our conclusion is that although the congressional-disclosure exception to the Privacy Act disclosure prohibition is available for disclosures to either House of Congress or to a committee of Congress, ranking minority members generally do not act on behalf of congressional committees. Accordingly, absent the unusual circumstance of a specific delegation to a ranking minority member from the Senate or House or a committee, a disclosure of Privacy Act information solely to a ranking minority member

is not a disclosure to the committee, and the congressional-disclosure exception is therefore unavailable. Of course, disclosure of the information to the ranking minority member would be authorized by the exception if the committee itself or its chairman authorizes the disclosure.

You also asked whether our conclusion would be any different if the information is delivered to the ranking minority member through the clerk of the committee rather than directly to the member. Our conclusion does not change in that circumstance because all that is different is the method of delivery. The disclosure still cannot be viewed as being made to the committee unless the disclosure has been authorized by the committee or its chairman.

Our conclusion that the Privacy Act's congressional-disclosure exception does not generally apply to disclosures to ranking minority members follows the longstanding Executive Branch practice on this question. Moreover, we note that the Congressional Research Service takes the same view as we do concerning the lack of authority of ranking minority members, as a general matter, to act on behalf of congressional committees:

The role of members of the minority party in the investigatory oversight process is governed by the rules of each House and its committees. . . . [N]o House or committee rules authorize ranking minority members or individual members on their own to institute official committee investigations, hold hearings or to issue subpoenas. Individual members may seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has recognized a right in an individual member, other than the chair of a committee, to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair.

Morton Rosenberg, Cong. Research Serv., Rpt. 95-464A, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* 56 (Apr. 7, 1995) (footnote omitted).

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## **Application of Federal Advisory Committee Act to Non-Governmental Consultations**

The Federal Advisory Committee Act does not apply to the consultations that the Department of Defense plans to conduct with various individuals from outside the government regarding the policies and procedures that DoD is developing for military commissions.

December 7, 2001

### **LETTER OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE**

You have asked for our opinion whether the Federal Advisory Committee Act (“FACA”), 5 U.S.C. app. (2000), applies to consultations that the Department of Defense (“DoD”) plans to conduct with various individuals from outside the Government regarding the policies and procedures that DoD is developing for military commissions. Based on your description of the consultations that are contemplated, we conclude that FACA does not apply to the consultations.

Our conclusion is based on the following facts, which you have provided to us. The Secretary of Defense or his representative will, from time to time, consult selected non-governmental individuals concerning the policies and procedures that DoD is developing for military commissions. These discussions will generally occur on an individual by individual basis, which will not involve participation by more than one individual being consulted. If, on occasion, the Secretary or his representative talks with more than one individual at a time, they will solicit comments from the individuals as individuals, and will not solicit comments from them collectively as a group. DoD will not provide any staffing for the individuals who are consulted, although DoD will provide the individuals with materials relating to the consultations. Any written views that the individuals may submit will be submitted individually, not as a group. As appropriate, DoD may make public the fact that it has consulted with the individuals.

The basic question when determining whether FACA applies to an agency’s non-governmental consultations is whether the agency has established or utilized a “committee, board, commission, council, conference, panel, task force, or other similar group” for the purpose of receiving advice or recommendations from the group. 5 U.S.C. app. § 3(2). To the extent that the consultations you contemplate are only with individuals on an individual basis, we do not believe there is any basis for concluding that FACA’s threshold requirement—the existence of a “group”—has been met.

Moreover, to the extent that these consultations take place with more than one non-governmental individual at a time, we note that FACA certainly does not apply to every situation in which executive officers meet with and receive advice from more than one person at a time. Rather, to fall within FACA, the group of

people with whom the officers meet must have the attributes of a “committee, board, commission,” etc., and its purpose must be to provide advice or recommendations as a group.

In other words, the group must have a collective function: It must have an advisory purpose as a group, not merely as a collection of individuals. By contrast, when an agency invites a number of individuals to a meeting in order to solicit the opinion of each person as an individual, FACA does not apply. *See Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (“a group is a FACA advisory committee when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals”); *Application of Federal Advisory Committee Act to Editorial Board of Department of Justice Journal*, 14 Op. O.L.C. 53, 53 (1990) (“the board would be subject to FACA if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave his own opinion about publication”); 41 C.F.R. § 102-3.40(e) (as amended by 66 Fed. Reg. 37,728, 37,735 (July 19, 2001)) (examples of groups that are not subject to FACA include “*Groups assembled to provide individual advice*. Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole”). This is true even where the government officers have more than one meeting with such individuals, so long as the purpose of each meeting is to receive the individual input of each person present.

Based on your description of the circumstances under which DoD may consult more than one individual at a time, we do not believe that those individuals could be viewed as having the attributes of a group, which is the threshold requirement for triggering FACA. Moreover, even if they could be viewed as a group, FACA would not apply because you intend to ask for the individual opinions of whoever is consulted and will not solicit the advice or recommendations of those individuals as a group.

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