

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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VOLUME 26

2002

WASHINGTON  
2012

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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-five volumes of opinions published covered the years 1977 through 2001. The present volume covers 2002. Volume 26 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of opinions issued during 2002 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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**OPINIONS**

OF THE

**OFFICE OF LEGAL COUNSEL**



## **Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949**

The President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war status under Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.

February 7, 2002

### MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our Office's views concerning the status of members of the Taliban militia under Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW"). Assuming the accuracy of various facts provided to us by the Department of Defense ("DoD"), we conclude that the President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war ("POW") status under GPW. First, we explain that the Taliban militia cannot meet the requirements of Article 4(A)(2), because it fails to satisfy at least three of the four conditions of lawful combat articulated in Article 1 of the Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Convention"), which are expressly incorporated into Article 4(A)(2). Second, we note that neither Article 4(A)(1) nor Article 4(A)(3) apply to militia, and that the four conditions of lawful combat contained in the Hague Convention also govern Article 4(A)(1) and (3) determinations in any case. Finally, we explain why there is no need to convene a tribunal under Article 5 to determine the status of the Taliban detainees.

#### I.

Article 4(A) of GPW defines the types of persons who, once they have fallen under the control of the enemy, are entitled to the legal status of POWs. The first three categories are the only ones relevant to the Taliban. Under Article 4(A)(1), individuals who are "members of the armed forces of a Party to the conflict," are entitled to POW status upon capture. Article 4(A)(3) includes as POWs members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

Article 4(A)(2) includes as POWs members of "other militias" and "volunteer corps," including "organized resistance movements" that belong to a Party to the conflict. In addition, members of militias and volunteer corps must "fulfill" four conditions: (a) "being commanded by a person responsible for his subordinates"; (b) "having a fixed distinctive sign recognizable at a distance"; (c) "carrying arms openly"; and (d) "conducting their operations in accordance with the laws and customs of war." Those four conditions reflect those required in the 1907 Hague

Convention IV. See *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War 49* (Red Cross 1952) (“*Red Cross Commentary*”) (“[D]uring the 1949 Diplomatic Conference . . . there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations.”).

Should “any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4,” GPW Article 5 requires that these individuals “enjoy the protections of” the Convention until a tribunal has determined their status.

Thus, in deciding whether members of the Taliban militia qualify for POW status, the President must determine whether they fall within any of these three categories. Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation. Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001). This includes, of course, the power to apply treaties to the facts of a given situation. Thus, the President may interpret GPW, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of POW. A presidential determination of this nature would eliminate any legal “doubt” as to the prisoners’ status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals.

We believe that, based on the facts provided by the Department of Defense, see Rear Admiral L.E. Jacoby, U.S. Navy, J-2, Information Paper, *Subject: Background Information on Taliban Forces* (Feb. 6, 2002), the President has reasonable grounds to conclude that the Taliban, as a whole, is not legally entitled to POW status under Article 4(A)(1) through (3).

## II.

As the Taliban have described themselves as a militia, rather than the armed forces of Afghanistan, we begin with GPW’s requirements for militia and volunteer corps under Article 4(A)(2). Based on the facts presented to us by DoD, we believe that the President has the factual basis on which to conclude that the Taliban militia, as a group, fails to meet three of the four GPW requirements, and hence is not legally entitled to POW status.

First, there is no organized command structure whereby members of the Taliban militia report to a military commander who takes responsibility for the actions of his subordinates. The Taliban lacks a permanent, centralized communications infrastructure. Periodically, individuals declared themselves to be “commanders”

and organized groups of armed men, but these “commanders” were more akin to feudal lords than military officers. According to DoD, the Taliban militia functioned more as many different armed groups that fought for their own tribal, local, or personal interests.

Moreover, when the armed groups organized, the core of the organization was often al Qaeda, a multinational terrorist organization, whose existence was not in any way accountable to or dependent upon the sovereign state of Afghanistan. We have previously concluded, as a matter of law, that al Qaeda members are not covered by GPW. See Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, *Re: Applications of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002). After October 7, when the United States armed forces began aerial bombing of al Qaeda and Taliban targets in Afghanistan, the distinction between Taliban and al Qaeda became even more blurred as al Qaeda assumed the lead in organizing the defense.

DoD’s facts suggest that to the extent the Taliban militia was organized at all, it consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures. According to DoD, the Taliban lacked the kind of organization characteristic of the military. The fact that at any given time during the conflict the Taliban were organized into some structured organization does not answer whether the Taliban leaders were responsible for their subordinates within the meaning of GPW. Armed men who can be recruited from other units, as DoD states, through defections and bribery are not subject to a commander who can discipline his troops and enforce the laws of war.

Second, there is no indication that the Taliban militia wore any distinctive uniform or other insignia that served as a “fixed distinctive sign recognizable at a distance.” DoD has advised us that the Taliban wore the same clothes they wore to perform other daily functions, and hence they would have been indistinguishable from civilians. Some have alleged that members of the Taliban would wear black turbans, but apparently this was done by coincidence rather than design. Indeed, there is no indication that black turbans were systematically worn to serve as an identifying feature of the armed group.

Some of the Taliban militia carried a tribal flag. DoD has stated that there is no indication that any individual members of the Taliban wore a distinctive sign or insignia that would identify them if they were not carrying or otherwise immediately identified with a tribal flag. Moreover, DoD has not indicated that tribal flags marked only military, as opposed to civilian, groups.

Third, the Taliban militia carried arms openly. This fact, however, is of little significance because many people in Afghanistan carry arms openly. Although Taliban forces did not generally conceal their weapons, they also never attempted to distinguish themselves from other individuals through the arms they carried or the manner in which they carried them. Thus, the Taliban carried their arms

openly, as GPW requires military groups to do, but this did not serve to distinguish the Taliban from the rest of the population. This fact reinforces the idea that the Taliban could neither be distinguished by their uniforms and insignia nor by the arms they carried from Afghani civilians.

Finally, there is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of, the Geneva Conventions or any other body of law. Indeed, it is fundamental that the Taliban followed their own version of Islamic law and regularly engaged in practices that flouted fundamental international legal principles. Taliban militia groups have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities. They have killed for racial or religious purposes. Furthermore, DoD informs us of widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war.

Based on the above facts, apparently well known to all persons living in Afghanistan and joining the Taliban, we conclude that the President can find that the Taliban militia is categorically incapable of meeting the Hague conditions expressly spelled out in Article 4(A)(2) of GPW.

### **III.**

One might argue that the Taliban is not a “militia” under Article 4(A)(2), but instead constitutes the “armed forces” of Afghanistan. Neither Article 4(A)(1), which grants POW status to members of the armed forces of a state party, nor Article 4(A)(3), which grants POW status to the armed forces of an unrecognized power, defines the term “armed forces.” Unlike the definition of militia in Article 4(A)(2), these two other categories contain no conditions that these groups must fulfill to achieve POW status. Moreover, because GPW does not expressly incorporate Article 4(A)(2)’s four conditions into either Article 4(A)(1) or (3), some might question whether members of regular armed forces need to meet the Hague conditions in order to qualify for POW status under GPW.

We conclude, however, that the four basic conditions that apply to militias must also apply, at a minimum, to members of armed forces who would be legally entitled to POW status. In other words, an individual cannot be a POW, even if a member of an armed force, unless forces also are: (a) “commanded by a person responsible for his subordinates”; (b) “hav[e] a fixed distinctive sign recognizable at a distance”; (c) “carry[] arms openly”; and (d) “conduct[] their operations in accordance with the laws and customs of war.” Thus, if the President has the factual basis to determine that Taliban prisoners are not entitled to POW status under Article 4(A)(2) as members of a militia, he has the grounds to also find that they are not entitled to POW status as members of an armed force under either Article 4(A)(1) or Article 4(A)(3).

Article 4(A)'s use of the phrase "armed force," we believe, incorporated by reference the four conditions for militia, which originally derived from the Hague Convention IV. There was no need to list the four Hague conditions in Article 4(A)(1) because it was well understood under preexisting international law that all armed forces were already required to meet those conditions. As would have been understood by the GPW's drafters, use of the term "armed forces" incorporated the four criteria, repeated in the definition of militia, that were first used in the Hague Convention IV.

The view that the definition of an armed force includes the four criteria outlined in Hague Convention IV and repeated in GPW is amply supported by commentators. As explained in a recently-issued Department of the Army pamphlet, the four Hague conditions are

arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. Should a member of the regular armed forces do so, it is likely that he would lose his claim to immunity and be charged as a spy or as an illegal combatant.

Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be Or Not To Be, That Is The Question": Contemporary Military Operations and the Status of Captured Personnel*, Army Law., June 1999, at 1, 14 n.127 (citation omitted). One scholar has similarly concluded that "[u]nder the Hague Convention, a person is a member of the armed forces of a state only if he satisfies the [four enumerated] criteria." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 184 n.140 (2000). See also Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications For the Law of Armed Conflict*, 19 Mich. J. Int'l L. 1051, 1078 (1998) ("[U]nder the Regulations annexed to Hague Convention IV, combatants were those who were members of the regular armed forces (or formal militia), were commanded by a person responsible for their conduct, wore a fixed distinctive emblem (or uniform), carried their weapons openly, and conducted operations in accordance with the law of war. The 1949 Geneva Convention on Prisoners of War extended this status to members of an organized resistance movement which otherwise complied with the Hague IV requirements.").

Further, it would be utterly illogical to read "armed forces" in Article 4(A)(1) and (3) as somehow relieving members of armed forces from the same POW requirements imposed on members of a militia. There is no evidence that any of the GPW's drafters or ratifiers believed that members of the regular armed forces ought to be governed by *lower standards* in their conduct of warfare than those

applicable to militia and volunteer forces. Otherwise, a sovereign could evade the Hague requirements altogether simply by designating all combatants as members of the sovereign's regular armed forces. A sovereign, for example, could evade the status of spies as unlawful combatants simply by declaring all spies to be members of the regular armed forces, regardless of whether they wore uniforms or not. Further, it would make little sense to construe GPW to deny some members of militias or volunteer corps POW protection for failure to satisfy the Hague conditions (under Article 4(A)(2)), while conferring such status upon other members simply because they have become part of the regular armed forces of a party (under Article 4(A)(1)).

This interpretation of "armed force" in GPW finds direct support in the International Committee of the Red Cross ("ICRC"), the non-governmental organization primarily responsible for, and most closely associated with, the drafting and successful completion of GPW. After the Conventions were established, the Committee started work on a Commentary on all of the Geneva Conventions. In its discussion of Article 4(A)(3) of GPW, the ICRC construed both Article 4(A)(1) and (3) to require all regular armed forces to satisfy the four Hague IV (and Article 4(A)(2)) conditions:

[t]he expression "members of regular armed forces" denotes armed forces which differ from those referred to in sub-paragraph (1) of this paragraph in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the conflict. These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).

*Red Cross Commentary* at 62-63 (emphasis added).

Numerous scholars have similarly interpreted GPW as applying the four conditions to Article 4(A)(1) and (3) as well as to Article 4(A)(2). As Professor Howard S. Levie, a leading expert on the laws of war and the Geneva Conventions in particular, has explained in his authoritative treatise:

This enumeration [of the four conditions] does not appear in subparagraph 1, dealing with the regular armed forces. This does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his activities prior to and at the time of capture have not met these



requirements. The member of the regular armed forces wearing civilian clothes who is captured while in enemy territory engaged in an espionage or sabotage mission is entitled to no different treatment than that which would be received by a civilian captured under the same circumstances. Any other interpretation would be unrealistic as it would mean that the dangers inherent in serving as a spy or saboteur could be immunized merely by making the individual a member of the armed forces; and that members of the armed forces could act in a manner prohibited by other areas of the law of armed conflict and escape the penalties therefore, still being entitled to prisoner-of-war status.

Howard S. Levie, 59 *International Law Studies: Prisoners of War in International Armed Conflict* 36-37 (Naval War College 1977). Oxford Professor Ingrid Detter has similarly concluded that, under the 1949 Geneva Conventions,

to be a combatant, a person would have to be:

- (a) commanded by a person responsible for his subordinates;
- (b) having a fixed distinctive sign recognizable at a distance;
- (c) carrying arms openly;
- (d) conducting their operations in accordance with the laws and customs of war.

The same requirements as apply to irregular forces are presumably also valid for members of regular units. However, this is not clearly spelt out: there is no textual support for the idea that members of regular armed forces should wear uniform. On the other hand, there is ample evidence that this is a rule of law which has been applied to a number of situations to ascertain the status of a person. Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant. "Unlawful" combatants may thus be either members of the regular forces or members of resistance or guerilla movements who do not fulfil the conditions of lawful combatants.

Ingrid Detter, *The Law of War* 136-37 (Cambridge 2d ed. 2000) (footnotes omitted). See also Christopher C. Burris, *The Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. Int'l L. & Com. Reg. 943, 987 n.308 (1997) ("I am using Article 4A(2)'s four criteria because the armed forces of the Palestinian Authority, over

30,000 men under arms organized into roughly ten or more separate para-military units, are more characteristic of militia units than the regular armed forces of a state. This is because these units are organized as police/security units, not exclusive combat units. *See* Graham Usher, *Palestinian Authority, Israeli Rule*, *The Nation*, Feb. 5, 1996, at 15, 16. Whether the Palestinian Authority's forces are considered militia or members of the armed forces, they still must fulfill Article 4A(2)'s four criteria.”<sup>1</sup>

Therefore, it is clear that the term “armed force” includes the four conditions first identified by Hague Convention IV and expressly applied by GPW to militia groups. In other words, in order to be entitled to POW status, a member of an armed force must (a) be “commanded by a person responsible for his subordinates”; (b) “hav[e] a fixed distinctive sign recognizable at a distance”; (c) “carry[] arms openly”; and (d) “conduct[] their operations in accordance with the laws and customs of war.” We believe that the President, based on the facts supplied by DoD, has ample grounds upon which to find that members of the Taliban have failed to meet three of these four criteria, regardless of whether they are characterized as members of a “militia” or of an “armed force.” The President, therefore,

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<sup>1</sup> The only federal court we are aware of that has addressed this issue denied Article 4(A)(3) status to defendants because they could not satisfy the Hague conditions. In *United States v. Buck*, 690 F. Supp. 1291 (S.D.N.Y. 1988), the defendants claimed that they were entitled to POW status as military officers of the Republic of New Afrika, “a sovereign nation engaged in a war of liberation against the colonial forces of the United States government.” *Id.* at 1293. That nation, it was contended, included “all people of African ancestry living in the United States.” *Id.* at 1296. The court refused to extend POW status to the defendants. After determining that GPW did not apply at all due to the absence of an armed conflict as understood under Article 2, the court alternatively reasoned that the defendants could not satisfy any of the requirements of Article 4. *See id.* at 1298 (stating that, even if GPW applied, “it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied”). The court first concluded that the defendants failed to meet the four Hague conditions expressly spelled out in Article 4(A)(2). The court then rejected POW status under Article 4(A)(3) “[f]or comparable reasons”:

Article 4(A)(2) requires that to qualify as prisoners of war, members of “organized resistance movements” must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. *For comparable reasons*, Article 4(3)'s reference to members of “regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power,” also relied upon by defendants, does not apply to the circumstances of this case.

*Id.* (emphasis added). The court reached this conclusion even though the Hague conditions are not explicitly spelled out in Article 4(A)(3). Nothing in the court's discussion suggests that it would have construed Article 4(A)(1) any differently.

may determine that the Taliban, as a group, are not entitled to POW status under GPW.

#### IV.

Under Article 5 of GPW, “[s]hould any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” As we understand it, DoD in the past has presumed prisoners to be entitled to POW status until a tribunal determines otherwise. The presumption and tribunal requirement are triggered, however, only if there is “any doubt” as to a prisoner’s Article 4 status.

Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation.\* We conclude, in light of the facts submitted to us by the Department of Defense and as discussed in parts II and III of this memorandum, that the President could reasonably interpret GPW in such a manner that none of the Taliban forces falls within the legal definition of POWs as defined by Article 4. A presidential determination of this nature would eliminate any legal “doubt” as to the prisoners’ status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals.

This approach is also consistent with the terms of Article 5. As the International Committee of the Red Cross has explained, the “competent tribunal” requirement of Article 5 applies “to cases of doubt as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4.” *Red Cross Commentary* at 77. Tribunals are thus designed to determine whether a particular set of facts falls within one of the Article 4 categories; they are not intended to be used to resolve the proper interpretation of those categories. The President, in other words, may use his constitutional power to interpret treaties and apply them to the facts, to make the determination that the Taliban are unlawful combatants. This would remove any “doubt” concerning whether members of the Taliban are entitled to POW status.

We therefore conclude that there is no need to establish tribunals to determine POW status under Article 5.

JAY S. BYBEE  
*Assistant Attorney General*  
*Office of Legal Counsel*

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\* Editor’s Note: We have deleted a footnote containing a citation to an earlier Office of Legal Counsel memorandum that was unnecessary to support the proposition in the text, because the cited memorandum no longer reflects the views of this Office.

## Application of 18 U.S.C. § 203 to Former Employee's Receipt of Attorney's Fees in Qui Tam Action

Title 18, section 203, U.S. Code, would not bar a former federal employee from sharing in attorney's fees in a qui tam action, provided that those fees, calculated under the lodestar formula, are prorated such that the former employee does not receive any fees attributable to his time in the government.

February 28, 2002

### MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL AND DESIGNATED AGENCY ETHICS OFFICIAL EXECUTIVE BRANCH DEPARTMENT\*

You have asked for our opinion whether, under 18 U.S.C. § 203 (1994), a former federal employee may share, on a prorated basis, in fees awarded to his firm for representational services in a qui tam action that was pending both during periods in which he was working for the federal government and during a period in which he was working for his firm. *See* Letter for Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Deputy General Counsel, Executive Branch Department, *Re: Request for Written Opinion on Former Employee's Receipt of Attorney's Fees* (June 6, 2001) ("Department Letter"). We conclude that, subject to the conditions set out below, the statute would not bar his receiving a prorated share of attorney's fees that are calculated under the lodestar method.<sup>1</sup>

### I. Background

A former employee of your agency is now a member of a law firm that represents relators in a qui tam action. The United States intervened in the action and settled it in April 2000, Department Letter at 1; *see* 31 U.S.C. § 3730(b)(2) (1994); and the relators have petitioned the court for an award of attorney's fees to be paid by the defendant to the law firm. *Id.* § 3730(d); *see United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 578 (9th Cir. 1996). The petition seeks "lodestar" fees calculated as "the product of reasonable hours times

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\* Editor's Note: We are not identifying in the published version of this opinion the Executive Branch department that employed the individual who is the subject of the opinion.

<sup>1</sup> As you suggest, *see* Department Letter at 3, 18 U.S.C. § 205 (1994 & Supp. II 1996) would not be implicated by the former employee's receipt of fees now, because that provision applies only to current federal employees. *See Application of 18 U.S.C. § 205 to Communications Between the National Association of Assistant United States Attorneys and the Department of Justice*, 18 Op. O.L.C. 212 (1994).

a reasonable rate.”<sup>2</sup> See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (defining “lodestar”); see also *City of Burlington v. Dague*, 505 U.S. 557, 560-61, 562, 565 (1992) (distinguishing fees calculated under the lodestar method from “certain” fees, which are “payable without regard to the outcome of the suit,” and from fees under “the contingent-fee model,” which “would make the fee . . . a percentage of the value of the relief awarded in the primary action”).

The former employee worked for the federal government during two separate periods when his current firm was working on the qui tam case. It was during the first of these periods, in November 1995, that the firm entered the case. The former employee left federal employment in June 1997 and worked for the firm from July 1997 until December 1999, during which time he took part in the firm’s efforts in the case. After a second period of federal employment from December 1999 until January 2001, he returned to the firm. Department Letter at 1. The fee petition covers the firm’s work from November 1995 through April 2000. The former employee seeks to share in the fees awarded, under a formula designed to identify the proportion of the fees attributable to the time he was not employed by the federal government:

He is seeking only his partnership share of the fees attributable to the actual hours worked by the law firm during the 2½-year period in which he was not in Federal service. For example, if the law firm worked 100 hours in total on the case, 25 hours of which occurred during that 2½-year period, the Employee would receive only his partnership share of the attorneys’ fees attributable to the 25 hours.

Department Letter at 4.

This formula is designed to comply with 18 U.S.C. § 203(a), which, among other things, subjects to criminal penalties anyone who,

otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another—

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<sup>2</sup> Here, the firm has sought an upward adjustment through a multiplier of the lodestar. Our opinion should not be read as addressing the former employee’s receipt of a share in any such adjustment, should the court grant it.

(B) at a time when such person is an officer or employee . . . of the United States in the executive . . . branch of the Government, or in any agency of the United States,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission.

## **II. Discussion**

As your letter notes, section 203, at the least, forbids the former employee from sharing in fees covering the firm's work performed while the former employee was in the federal government. Department Letter at 2. The United States was a party to the *qui tam* case, and section 203 reaches payments for representational services, whether performed personally or by another, in such a matter. Further, section 203 extends to compensation received after an employee leaves federal service, if the payment is for representational services performed during the period of federal employment: "18 U.S.C. § 203 prohibits a former government employee from receiving any share of a fee earned by others for work they performed [before an agency or court] at the time he was a federal employee. This section requires a law firm which a former government lawyer joins to ensure that the lawyer does not receive any share of the firm's fee attributable to work it performed [before such a forum] at the time the lawyer was with the Federal Government." Memorandum for Lovida H. Coleman, Jr., Special Assistant to the Deputy Attorney General, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Ethics Act Restrictions to United States Trustees and Supervisors of Trustees* at 5 (July 5, 1979). *See also* Memorandum, *Re: Statutory and Ethical Restrictions on Former Non-Legal Government Officers and Employees of the White House Staff* at 5 (Feb. 10, 1971) ("The section makes it unlawful for a former official to share in any fees received by the firm for services in a matter covered by the statute and performed by the firm at any time during the period of his government employment."); H.R. Rep. No. 87-748, at 20 (1961) (section 203 corrects the omission of the predecessor statute, which did not cover post-employment receipt of compensation for services rendered during the period of government employment).

The question here is whether, under the proposed formula for prorating an award of attorney's fees calculated under the lodestar method, the former employee would be receiving compensation for services that were rendered at a time when he was a federal employee. We have not previously addressed the applica-

tion of section 203 in circumstances where a fee would be calculated under the lodestar method and would cover some periods during which a former employee worked in the federal government and some periods during which he did not. We must decide whether to follow, in this context, the usual interpretation of section 203's application to awards under the contingent fee model. Under that interpretation, for example, it has been "the longstanding view of the Office of Legal Counsel that § 203 prohibits an individual entering government employment from maintaining a contingent interest in fees recoverable in a proceeding involving the United States." *Application of 18 U.S.C. § 203 to Maintenance of Contingent Interest in Expenses Recoverable in Litigation Against the United States*, 22 Op. O.L.C. 1, 2 (1998) ("1998 Opinion"); *see also* Office of Government Ethics, *Compensation Arrangements for Former Federal Government Employees and 18 U.S.C. § 203*, Informal Advisory Op. 93x31 (Oct. 26, 1993), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited Aug. 4, 2012) (applying interpretation to receipt of contingency fee by former employee). We observed in the 1998 Opinion that "the rationale underlying this longstanding interpretation has never been articulated with clarity" but that "[a] rule against retaining a contingent interest in fees reflects that a contingent fee covers the entire representation up to the payment, the amount remains uncertain until then, and the fee thus compensates, in part, for representational services performed after the employee began working for the United States." 22 Op. O.L.C. at 2 n.2. If fees under the lodestar method are like fees under the contingent fee model, each dollar of lodestar fees might be seen as compensating for the entire representation, including (in a case like the present one) that part of the representation when the former employee was with the federal government. In that event, section 203 would bar a former employee from receiving any part of the lodestar award.

We do not believe that this treatment of contingent fees should be extended to lodestar awards. Under the contingent fee model, because the fee is for the whole representation, no part of the fee is assigned to any particular time. By contrast, under the lodestar model, the fees are segregated by time. The value of work during any particular period is fixed, according to the hours worked, multiplied by the reasonable rate. A lawyer who receives only fees generated during the time he was not with the government thus does not receive "any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another . . . at a time when such person is an officer or employee" of the United States. 18 U.S.C. § 203(a).

To be sure, without the work that took place here during the time of the employee's service in the federal government, the *qui tam* action would not have succeeded, and it might therefore be argued that, in receiving a portion of the firm's fees, the employee necessarily would be compensated for representational services performed during that time. But our 1998 Opinion, which examined reimbursement for expenses in contingent cases, concluded that the statutory

language “compensation for representational services” would not support such an argument:

[T]he use of the word “for” makes clear that § 203 embodies an element of exchange . . . . [T]he fact that a government officer or employee receives a monetary payment or something else of value will not alone trigger a violation of § 203. Nor is it sufficient that an officer or employee receives something of value *because* a representational service occurred during his or her government tenure. The provision requires that the officer or employee receive something of value *in exchange for* the representational services performed on the client’s behalf during the officer’s or employee’s government tenure.

22 Op. O.L.C. at 3 (emphasis added).<sup>3</sup> Here, under the same reasoning, the hours worked by others while the employee was with the government were necessary to the successful outcome resulting in the firm’s entitlement to receive any fees, but that fact means only that the former employee would receive fees *because of* work done while he was a federal employee, not that he would receive a share of fees paid *in exchange for* that work.

In the 1998 Opinion, we noted that the interpretation of section 203 as applicable to contingent fees was “consistent with a view of § 203 as primarily seeking to prevent the actual or apparent influence of an officer or employee over a proceeding involving the government by virtue of the individual’s pecuniary interest in the proceeding’s outcome.” 22 Op. O.L.C. at 2 n.2 (citation omitted). In that opinion, we concluded that the statute did not reach a contingent arrangement for the recovery of expenses, as opposed to fees, but we conceded that, to the extent the statute’s purpose was to guard against the influence that might be exercised by a government employee with an interest in a proceeding, the statute arguably should receive a broader interpretation than we were giving it. There, as here, it could have been said that “the official’s incentive to influence the outcome of a proceeding, the danger that an adjudicator would be affected by the knowledge that the official possesses an interest in the proceeding’s outcome, or the possibility that the interest would cause the official to be biased in other government matters,” *id.* at 6, would be just as strong as in the paradigm case of a contingent fee for services. Nevertheless, we did not find ourselves “free to interpret § 203 without regard for its textual boundaries.” *Id.*

Our analysis here rests on the critical assumptions that the fees in question will be awarded under the lodestar method, *see United States ex rel. John Doe I v. Pennsylvania Blue Shield*, 54 F. Supp.2d 410, 414 (M.D. Pa. 1999) (applying

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<sup>3</sup> We made the additional argument that the repayment of expenses was not “compensation” for “representational services” under the statute. 1998 Opinion at 3.



method to fee calculation in qui tam action), and that the lodestar amount will not be enhanced or otherwise adjusted (e.g., based on the special value of services provided by the firm when the former employee was working for the federal government) in ways that render our analysis inapplicable. Moreover, the details of the formula in the present case for computing the former employee's share, which we do not know, could raise issues under section 203. The formula, as described in general terms by your letter, is based on the firm's hours devoted to the case while the former employee worked there, divided by the firm's total hours in the whole case. However, unless the formula takes account of the other factor in the lodestar calculation—the billing rates on which the fee award is based—this calculation may not completely separate the fees attributable to the time that the former employee was in the government from the other fees in the case. Particular periods may be tied to higher or lower payments for the same hours, to the extent reasonable billing rates for those hours differ. A similar attribution problem might arise if the court disallows inclusion in the lodestar amount of a number of billed hours but fails to make clear for which periods those hours were billed.

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## Role of Legal Guardians or Proxies in Naturalization Proceedings

Section 504 of the Rehabilitation Act requires the Immigration and Naturalization Service as a reasonable accommodation to permit a legal guardian or proxy to represent a mentally disabled applicant in naturalization proceedings.

March 13, 2002

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL IMMIGRATION AND NATURALIZATION SERVICE

You have asked for our opinion whether the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1994 & Supp. IV 1998), requires the Immigration and Naturalization Service (“INS”) as a reasonable accommodation to permit a legal guardian or other proxy to represent a mentally disabled applicant in naturalization proceedings.<sup>1</sup> For the reasons set forth below, we conclude that the Rehabilitation Act does require such accommodation.

#### I. Background

In response to earlier requests from your office, this Office issued two opinions in 1997 concluding that the oath of allegiance required under section 337 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1448, could neither be waived by the INS nor satisfied by a guardian or proxy. We concluded that, under the statutory scheme established by Congress, the oath requirement was a fundamental and essential part of the naturalization process and that permitting a legal guardian or proxy to fulfill this central requirement thus would not constitute a reasonable accommodation under the Rehabilitation Act. *See* Letter for David A. Martin, General Counsel, Immigration and Naturalization Service, from Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Personal Satisfaction of Immigration and Nationality Act Oath Requirement* (Apr. 18, 1997) (“April 1997 Opinion”); Letter for David A. Martin, General Counsel, Immigration and Naturalization Service, from Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Waiver of Oath of Allegiance for Candidates for Naturalization* (Feb. 5, 1997).

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<sup>1</sup> Memorandum for Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Bo Cooper, General Counsel, Immigration and Naturalization Service, *Re: Request for Advisory Legal Opinion on the Role of Legal Guardians or Proxies in Naturalization Proceedings* (Aug. 6, 2001). You have asked, in the alternative, whether section 337 of the Immigration and Nationality Act, 8 U.S.C. § 1448 (2000), should be construed to enable the INS to permit a proxy to play this same role. In light of our response to your Rehabilitation Act question, we find it unnecessary to address this question.

In 2000, Congress amended section 337 to allow the Attorney General to “waive the taking of the oath by a person if in the opinion of the Attorney General the person is unable to understand, or to communicate an understanding of, its meaning because of a physical or developmental disability or mental impairment.” Pub. L. No. 106-448, 114 Stat. 1939 (2000) (codified at 8 U.S.C. § 1448(a)). The amended statute further provides that “[i]f the Attorney General waives the taking of the oath by a person under the preceding sentence, the person shall be considered to have met the requirements of section 1427(a)(3) of this title with respect to attachment to the principles of the Constitution and well disposition to the good order and happiness of the United States.” 8 U.S.C. § 1448(a).

## **II. Discussion**

The 2000 amendment to section 337 removes the oath requirement as an obstacle to naturalization for certain individuals with disabilities. You ask further whether the Rehabilitation Act requires the INS to permit a legal guardian or other proxy to represent an individual with a mental disability throughout the naturalization process, from the filing of an application through the interview.

Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.” 29 U.S.C. § 794(a). This Office has previously advised that all INS programs and activities, including naturalization proceedings, are covered by this prohibition. *See* April 1997 Opinion at 1; Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Section 504 of the Rehabilitation Act of 1973* (Feb. 2, 1983).

The question, therefore, is whether a person who, as a result of a disability, is personally unable to file an application or participate in an interview may be considered “otherwise qualified” for naturalization. Department of Justice regulations implementing section 504 for federally conducted programs define a “[q]ualified handicapped person” as one “who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature.” 28 C.F.R. § 39.103 (2001). These regulations are based on, and should be construed consistent with, a series of Supreme Court decisions interpreting section 504 in the context of programs receiving federal financial assistance. The Court first interpreted section 504 in *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), stating that “[a]n otherwise qualified person is one who is able to meet all of a program’s

requirements in spite of his handicap.” The Court held that an applicant with a serious hearing disability was not “otherwise qualified” under section 504 for admission to a nursing program where the ability to understand speech during the clinical phase of the program was considered essential to patient safety. The Court declined to require the college to accommodate the applicant by making “a fundamental alteration in the nature of [its] program.” *Id.* at 410. The Court noted, however, that “situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.” *Id.* at 412-13.

In subsequent cases, the Court has elaborated on the types of situations where modifications in a program may be required. In the employment context, the Court has advised that “[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. . . . [T]hey cannot deny an employee alternative employment opportunities reasonably available under the employer’s existing policies.” *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987). In *Arline*, the Court defined “an otherwise qualified person” as “one who can perform ‘the essential functions’ of the job,” but explained that “[w]hen a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any ‘reasonable accommodation’ by the employer would enable the handicapped person to perform those functions.” *Id.* at 287 n.17 (quoting 45 C.F.R. § 84.3(k) (1985)). The Court distinguished, however, between reasonable accommodations and those that would require fundamental changes in a program. “Accommodation is not reasonable if it either imposes ‘undue financial and administrative burdens’ on a grantee . . . or requires ‘a fundamental alteration in the nature of [the] program.’” *Arline*, 480 U.S. at 287 n.17 (citations omitted) (alteration in original); *see also Alexander v. Choate*, 469 U.S. 287, 300 (1985) (“while a grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones”); *id.* at 299 n.19 (“the question of who is ‘otherwise qualified’ and what actions constitute ‘discrimination’ under [section 504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped”).

Thus, in determining whether a person is “otherwise qualified” for a particular program, courts do not take an existing program as fixed. Instead, they ask whether the disabled person could meet a program’s requirements if the program were revised to make reasonable accommodations for the disabled person. If permitting a legal guardian or other proxy to file an application and participate in an interview on behalf of a mentally disabled applicant does not eliminate essential requirements of, or otherwise fundamentally alter, the naturalization program, then a mentally disabled individual who meets all other requirements is “otherwise qualified” for naturalization.

We conclude that permitting a legal guardian or other proxy to play such a role on behalf of a mentally disabled applicant would not fundamentally alter the naturalization process and therefore is required by section 504. The INS may not “utilize criteria or methods of administration the purpose or effect of which would . . . [d]efeate or substantially impair accomplishment of the objectives of [the naturalization program] with respect to handicapped persons.” 28 C.F.R. § 39.130(b)(3). Congress has already expressly provided that individuals with severe disabilities need not fulfill a number of significant statutory prerequisites for naturalization. By amending the INA to permit the Attorney General to waive the oath of allegiance for persons unable to comprehend its meaning, Congress has superseded our previous conclusion that mentally disabled applicants must personally fulfill that statutory requirement. Moreover, any person who receives such a waiver is also considered to have met the requirements of section 316 of the INA with respect to being “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.” 8 U.S.C. § 1427(a)(3) (2000). In addition, Congress in 1994 amended section 312 of the INA, which requires applicants for naturalization to demonstrate understanding of the English language and the history and government of the United States, to exempt “any person who is unable because of physical or developmental disability or mental impairment to comply therewith.” 8 U.S.C. § 1423(b)(1) (2000); *see* Pub. L. No. 103-416, § 108(a)(4), 108 Stat. 4305, 4309-10 (1994).

The only significant remaining substantive prerequisites for naturalization under the INA are (1) at least five years of continuous residence in the United States after being lawfully admitted for permanent residence, and (2) “good moral character” during that period. INA § 316, 8 U.S.C. § 1427. There is no question that a mentally disabled individual can satisfy the residency requirement and establish proof of residency through documentary evidence and the testimony of others. Whether a mentally disabled individual can establish “good moral character” might be facially less obvious, especially in the case of mental disabilities so severe that they render the individual not morally responsible for his actions. We note, however, that the INA essentially defines the term “good moral character” as the absence of bad moral character, as it specifies various circumstances that preclude a finding that a person is of “good moral character.” *See* INA § 101(f), 8 U.S.C. § 1101(f) (2000) (“For the purposes of this chapter—[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established,” has been “a habitual drunkard,” has been convicted of certain crimes, has derived income principally from gambling activities or been convicted of two or more gambling offenses, has given false testimony to obtain immigration benefits, has been confined after conviction to a penal institution for 180 days or more, or has at any time been convicted of an aggravated felony.). The INS regulation states that the

determination of good moral character will be based on the elements listed in the statute and “the standards of the average citizen in the community of residence.” 8 C.F.R. § 316.10(a)(2) (2000). The regulation includes additional prohibitive factors beyond those contained in the statute, specifying, for example, that in the absence of extenuating circumstances an applicant will be found to lack good moral character who has “[w]illfully failed or refused to support dependents” or “[h]ad an extramarital affair which tended to destroy an existing marriage,” *id.* § 316.10(b)(3)(i), (ii), but does not impose any positive requirements for establishing good moral character. We therefore see no barrier to a mentally disabled applicant establishing the requirement of good moral character, *accord Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1222, 1224 (D. Utah 1999) (finding it undisputed that applicant with mental capacity of 18-month-old child met all requirements for naturalization other than ability to take oath of allegiance, including good moral character), *aff’d on other grounds*, 246 F.3d 680 (10th Cir. 2001) (table), and we conclude that permitting an applicant to do so through the testimony of others would not fundamentally alter the naturalization process.

We thus find nothing in the naturalization process prescribed by the INA that requires a mentally disabled applicant personally to file an application or testify at an interview. While the Supreme Court has noted that “it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect,” *INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (quoting *Berenyi v. Dist. Dir., INS*, 385 U.S. 630, 637 (1967)); *see also* INA § 316(e), 8 U.S.C. § 1427(e) (directing Attorney General to determine “whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship”), the means of carrying that burden may vary in particular cases. Indeed, the statute and regulations already make certain accommodations for persons with disabilities. *See* INA § 334(a), 8 U.S.C. § 1445(a) (2000) (“An applicant for naturalization shall make and file with the Attorney General a sworn application in writing, signed by the applicant in the applicant’s own handwriting *if physically able to write.*”) (emphasis added); 8 C.F.R. § 103.2(a)(2) (2001) (“legal guardian” may sign application “for a mentally incompetent person”). *Cf.* 8 C.F.R. § 341.2(a)(2) (2001) (incompetent applicant for certificate of citizenship “must have a parent or guardian apply, appear, and testify for the applicant”). The statute expressly grants the Attorney General discretion to “make such rules and regulations as may be necessary to carry into effect the provisions of this part [dealing with naturalization]” and “to prescribe the scope and nature of the examination of applicants for naturalization as to their admissibility to citizenship.” INA § 332(a), 8 U.S.C. § 1443(a) (2000).

We therefore conclude that mentally disabled individuals who cannot testify in their own behalf or fill out an application without the assistance of a legal guardian

or other proxy may still be “otherwise qualified” for naturalization, and that section 504 of the Rehabilitation Act thus requires such an accommodation.<sup>2</sup>

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<sup>2</sup> Our conclusion is consistent with the legislative history of the 2000 amendment to section 337 of the INA. Proponents of that legislation expressed the view that the oath of allegiance was the sole remaining barrier to naturalization for individuals with severe mental disabilities. *See, e.g.*, 146 Cong. Rec. 12,994 (2000) (statement of Sen. Hatch) (“such persons are able to fulfill all other requirements of naturalization, *or it is clear that the Attorney General can waive them*”) (emphasis added); *id.* (statement of Sen. Dodd) (1994 amendment “le[ft] the oath as the only barrier to citizenship for such individuals”); 146 Cong. Rec. 21,935 (2000) (statement of Rep. Smith) (bill will allow “disabled applicants who cannot understand the oath . . . to overcome this last obstruction to becoming a United States citizen”).

## Centralizing Border Control Policy Under the Supervision of the Attorney General

In general, the President may not transfer the functions of an agency statutorily created within one Cabinet department to another Cabinet department without an act of Congress.

The President may not delegate his presidential authority to supervise and control the executive departments to a particular member of the Cabinet where no statutory authority exists to do so.

The President may exercise his own power to establish a comprehensive border control policy for the federal government and direct a single Cabinet member to lead and coordinate the efforts of all Cabinet agencies to implement that policy.

March 20, 2002

### LETTER OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked us to provide our views concerning what actions the President can take unilaterally and without congressional consent towards centralizing border control policy for the United States Government under the supervision of the Attorney General of the United States.

Under current law,\* the federal government's control over the flow of people and goods into and out of the United States is divided among several agencies in different Cabinet departments, rather than centralized in a single department. The Immigration and Naturalization Service ("INS") is statutorily housed in the Department of Justice, the U.S. Customs Service in the Department of the Treasury, and the U.S. Coast Guard in the Department of Transportation. Thus, each agency is headed by a different Cabinet secretary, each of whom, as principal officers of the federal government, reports directly to the President.

In general, the President may not transfer the functions of an agency statutorily created within one Cabinet department to another Cabinet department without an act of Congress. We likewise believe that the President may not effectuate that very same transfer simply by delegating his presidential authority to supervise and control the executive departments to a particular member of the Cabinet, at least where no statutory authority exists to do so. However, the President may exercise his own power to establish a comprehensive border control policy for the federal

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\* Editor's Note: The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, established the Department of Homeland Security ("DHS") as a Cabinet-level department and reorganized the allocation of statutory duties respecting border control policy that were the subject of this opinion. See 6 U.S.C. § 111(a) (Supp. II 2002) (establishing DHS); *id.* § 202(2)-(6) (listing DHS's border control responsibilities); *id.* § 211(a) (establishing within DHS the United States Customs Service); *id.* § 251 (transferring to DHS certain functions of the Immigration and Naturalization Service); *id.* § 291(a) (abolishing the Immigration and Naturalization Service); *id.* § 468(b) (transferring to DHS the functions of the Coast Guard).



government, and then direct a single Cabinet member to lead and coordinate the efforts of all Cabinet agencies to implement that policy.

## I.

The Constitution expressly provides that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1, cl. 1. He alone is charged with the power to nominate the principal officers, *id.* art. II, § 2, cl. 2, and to “take Care that the Laws be faithfully executed,” *id.* art. II, § 3. It is thus well established that the President is “not only the depository of the executive power, but the responsible executive minister of the United States.” *Relation of the President to the Executive Departments*, 7 Op. Att’y Gen. 453, 463 (1855).

The scope of the President’s executive power is limited, however, by the terms of all valid acts of Congress. Under the Constitution, it is Congress, not the President, that “make[s] all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18.

Accordingly, Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President. The executive power confers upon the President the authority to supervise and control that official in the performance of those duties, but the President is not constitutionally entitled to perform those tasks himself. It has long been established that, “[i]f the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.” *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823). Instead the President may control the officer through various means such as the threat of removal. *See, e.g., The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482, 489 (1831) (although the President “could only act through his subordinate officer . . . who is responsible to him, and who holds his office at his pleasure,” the power of “removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law”).

We therefore conclude that the President may not transfer the statutory duties and functions of a bureau in one Cabinet department to another Cabinet department without an act of Congress. This Office has long held that transfers of statutory authority from one department to another “may normally be accomplished only by legislation or by executive reorganization under the Reorganization Act.” *Litigating Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System*, 4B Op. O.L.C. 820, 823 (1980); *see also Department*

*of Labor Jurisdiction to Investigate Certain Criminal Matters*, 10 Op. O.L.C. 130, 132 (1986) (same). The Reorganization Act, 5 U.S.C. §§ 901 *et seq.*, once provided the President with a mechanism for instituting “executive reorganization” plans, subject to congressional veto, but Congress retired that authority at the end of 1984, *see* 5 U.S.C. § 905(b).

## II.

It has been suggested that the President might reorganize government operations without running afoul of the law simply by delegating to a particular individual the President’s own constitutionally based executive power to supervise and control certain executive functions. Under this theory, the President could effectively transfer power over a particular matter from one Cabinet department to another by delegating to the head of that department the President’s power to supervise and control the actions of a subCabinet official in another department, and to enforce that control through the removal power.

We believe that courts could well decide, however, that the President’s delegation powers do not extend so far because some “specific things must be done by the President himself.” *Executive Departments*, 7 Op. Att’y Gen. at 464. Moreover, we caution that an unlawful delegation of power could present serious consequences for law enforcement in future cases. *See, e.g., United States v. Soto-Soto*, 598 F.2d 545, 549-50 (9th Cir. 1979) (where FBI agent was not authorized by statute to search trucks at border, customs authority had not been delegated to agent, and agent conducted search to discover if truck was stolen rather than to enforce importation law, agent’s warrantless search of truck was improper and evidence seized from search was inadmissible under exclusionary rule).

With regard to the President’s *statutory* duties, “it is well settled that there exists in the President an inherent right of delegation.” Memorandum for the Files, Office of Legal Counsel, *Re: Delegation of Presidential Functions* at ii (Sept. 1, 1955) (“1955 Memo”). As stated in *Myers v. United States*, 272 U.S. 52 (1926), “[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.” *Id.* at 117; *see also* 3 U.S.C. § 301 (authorizing President to delegate “any function which is vested in the President by law” or “any function which [an] officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President”).

Generally speaking, however, “acts performable by the President[] *as prescribed by the Constitution* are not susceptible of delegation.” 1955 Memo at ii (emphasis added). As the Supreme Court has noted,

[t]here are, undoubtedly, official acts which the Constitution and laws require to be performed by the President personally, and the performance of which may not be delegated to heads of departments, or to other officers in the executive branch of the Government.

*McElrath v. United States*, 102 U.S. 426, 436 (1880). Thus, the Executive Branch has always understood that the President may not delegate his pardon power to “another man, the Attorney General or anybody else.” *Executive Departments*, 7 Op. Att’y Gen. at 464-65. Nor can the President delegate his power to appoint and remove Executive Branch officials. *See id.* at 465; 1955 Memo at 1-2 (listing “[o]rders removing Government Officials from office” among those “actions not delegable”).

To be sure, “[w]hether a particular act belongs to one or the other of these classes may sometimes be very difficult to determine.” *McElrath*, 102 U.S. at 436. We think it likely, however, that the President’s authority to control and supervise Executive Branch officials in one Cabinet department could not be delegated to a separate Cabinet department. After all, such authority rests substantially on the President’s removal power, a power that has long been understood not to be delegable. In addition, further support for our conclusion is found in our earlier opinion in which we raised doubts about the President’s ability to delegate his power to issue “Directives and Memorandums to Heads of Executive Departments and Agencies.” In that opinion, we stated that “[i]t is certainly questionable whether any one [sic] but the President personally could issue such a directive.” 1955 Memo at \*65-66. Likewise, we have opined that, where “the head of a department or agency is authorized to take [a particular action] by law but . . . does not wish to take the action . . . without the President’s approval or advice[,] the situation is one that normally calls for the personal attention of the President” and is therefore nondelegable. *Id.* at \*67.\* We see no meaningful difference between these presidential authorities and the supervisory power over executive departments sought to be delegated in the present circumstance.

### III.

We believe that there are other ways, however, for the President to take steps to centralize and coordinate the border control policy of the United States or to direct

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\* Editor’s Note: We refer here to star pages in the 1955 Memo because the original memo preserved in our day books is missing some pages at the end. The star pages that we cite in text are from a digitized copy that we used to replace the missing pages in our day books.

It should be noted that the 1955 Memo does not appear to have been a formal opinion or advice issued to a client but an internal reference. The Memo was also equivocal in its bottom-line assessment of whether the head of a department could actually delegate a statutory authority to the President. The question, the Memo said, was “too indefinite in nature to permit any conclusion to be made.” *Id.*

the Attorney General to lead that effort. That the President's constitutional authority to supervise all Executive Branch agencies engaged in border control operations is probably not subject to delegation does not necessarily mean that the President may not formally and publicly designate certain Cabinet officers to assist him in that effort.

The President may tap advisers within the White House or even outside the Executive Office of the President to work on his behalf. See Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* at 2 (Aug. 11, 1977) ("1977 Memo") (unlike "heads of departments or agencies," who "have statutory obligations" and "can and do act independently" of the President, the "sole function" of certain White House advisers "is to advise the President relative to his statutory and constitutional responsibilities," and such advisers only "act at the direction of the President"). Although they carry no formal legal authority, in practice such advisers may exercise substantial authority over Executive Branch officials if it is well understood that they speak on behalf of the President. Cf. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993) (recognizing "[t]he President's implicit authority to enlist his spouse in aid of the discharge of his federal duties").

The President similarly may designate Cabinet officers to advise him on his execution of nondelegable presidential duties. We have previously noted that individuals "who . . . have statutory obligations" as "heads of departments or agencies" may also be called upon to "advise the president and act at his direction." 1977 Memo at 2. See also *Am. Physicians*, 997 F.2d at 908 (noting that "Presidents have created advisory groups composed of . . . Government officials . . . to meet periodically and advise them . . . on matters such as the conduct of a war").

Thus, the President may designate the Attorney General to serve as his chief adviser on issues relating to border control and instruct all other departments that the Attorney General speaks for him with respect to such policies. To be sure, the Attorney General could not exercise any nondelegable, presidential *legal* power over such agencies. For example, an official of that agency would not be subject to removal by the Attorney General. But the President could inform the heads of relevant agencies that he has directed the Attorney General to coordinate the implementation of specific border policies that the President has developed upon the advice of the Attorney General.

There is precedent for formalizing such informal arrangements through the issuance of an executive order. Such orders make no explicit delegations of legal power, but instead implicitly announce allocations of authority by designating a particular Cabinet official as a presidential adviser or leader and coordinator of presidential policy. Executive Order 12250 of November 2, 1980, styled "Leadership and Coordination of Nondiscrimination Laws," delegated certain statutory

presidential powers to the Attorney General. *Id.* § 1-1. But the Order also directed the Attorney General to “coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions” contained in federal law, in order to further the President’s policy of “consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal Financial assistance.” *Id.* § 1-201, pmb1. The Order further directed all agencies to cooperate with the Attorney General and to issue only regulations that are “consistent with the requirements prescribed by the Attorney General pursuant to this Order” to the extent permitted by law. *Id.* § 1-402.

Another model is Executive Order 13228 of October 8, 2001, which established the Office of Homeland Security within the Executive Office of the President. Although that office has no statutory approval, the President directed the office to “develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks” and to “work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy.” *Id.* §§ 2, 3(a). Moreover, the order expressly states that it “does not alter the existing authorities of United States Government departments and agencies.” *Id.* § 7. These orders thus merely create informal arrangements through which presidential policies are developed; they do nothing to disturb the statutory allocation of authorities amongst different agencies. *Cf. Proposed Executive Order Entitled “Federal Regulation,”* 5 Op. O.L.C. 59, 63 (1981) (approving executive order authorizing Director of the Office of Management and Budget to take certain oversight actions with regard to the administrative process and noting that “[t]he order does not empower the Director . . . to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions”).

Accordingly, the President could issue an executive order that announces the President’s intention to develop a comprehensive national strategy to control the flow of people and goods across United States borders. This order would be undertaken to protect the national security and promote enforcement of federal law. The order could state the President’s intention to develop and maintain his border control policy only in close consultation with the Attorney General. The order could further require the Attorney General to lead and coordinate the effort of all federal agencies to comply with the President’s evolving policy, and direct all agencies to cooperate with the Attorney General.

Such an order would not vest the Attorney General with *legal* authority to control the actions of, for example, the Customs Service. The Customs Service would still take its orders from the Secretary of the Treasury, who in turn would receive policy direction from the President, acting through the Attorney General. If the Commissioner of the Customs Service or the Treasury Secretary were to refuse to carry out a specific directive from the Attorney General, the Attorney General

would have no authority to remove them or otherwise compel their acquiescence. At the same time, however, they would be contravening a presidential order and could be subject to presidential removal or other sanction. We believe that if the Commissioner or the Treasury Secretary disagreed with a policy communication from the Attorney General, the more likely course of action would be to appeal to the President to seek a clarification or modification of policy.

Finally, we note the existence of certain statutory authorities for improving coordination between border control agencies which the order might direct the Attorney General to utilize. For example, under 8 U.S.C. § 1103(a)(6), the Attorney General may, with the consent of the head of another department, use an employee of that department to assist in performing the border control functions of the INS. The order thus could direct certain agencies to consent to such an arrangement. Similarly, 14 U.S.C. § 141 authorizes the Coast Guard both to lend its services and facilities to other agencies, and to avail itself of the resources of other agencies. The order might direct such cooperation between the Coast Guard and the Attorney General. We are not aware of any such authorities with respect to the Customs Service, however.

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## Authority of the Chemical Safety and Hazard Investigation Board to Delegate Power

Although the Chemical Safety and Hazard Investigation Board may not name an “Acting Chairperson,” it may delegate administrative and executive authority to a single member while the position of chairperson is vacant.

April 19, 2002

### LETTER OPINION FOR THE U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

You have asked whether the Chemical Safety and Hazard Investigation Board (“Board”) may delegate executive and administrative authority, previously exercised by its chairperson, to a single member while the position of chairperson is vacant. We believe that it may, as long as it does not purport to name that member the “Acting Chairperson.”

The Board’s five members, including a chairperson, are appointed by the President with the advice and consent of the Senate. 42 U.S.C. § 7412(r)(6)(B) (1994). The chairperson “shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.” *Id.* For more than two years now, the Board has been without a chairperson. The issue here is what action the Board may take to maintain its operations until a new chairperson is appointed.

We do not believe that the Board may formally name an acting chairperson. Here, as in an earlier instance where we determined a board could not take such action, “[t]here is no suggestion in any provision of the [statute] that the Board has any authority or role in determining who will be the chairperson or in designating an acting chairperson.” Memorandum for Christopher D. Coursen, Advisory Board for Cuba Broadcasting, from Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Advisory Board for Cuba Broadcasting to Act in the Absence of a Presidentially Designated Chairperson* at 5 (Jan. 4, 2000). “In the absence of any such specific provision, it should be assumed that the power to designate an [a]cting [c]hair[person] remains in the President,” *Federal Home Loan Bank Board—Chairman—Vacancy—Reorganization Plan No. 3 of 1947 (5 U.S.C. App. 1), Reorganization Plan No. 6 of 1961 (5 U.S.C. App.)*, 3 Op. O.L.C. 283, 283 (1979). To be sure, the principal statutory means by which the President may fill vacancies on an acting basis, the Vacancies Reform Act, is not available here, because it does not apply to “any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that . . . is composed of multiple members; and governs an independent establishment.” 5 U.S.C. § 3349c(1) (2000). The Board is a multi-member body governing an “independent establishment,” 5 U.S.C. § 104 (2000), and the position of its chairperson is thus

within this exclusion from the Vacancies Reform Act. Nevertheless, as our earlier opinions suggest, the President might well have authority to name an acting chairperson, based on his statutory role in appointing the chairperson and on the Take Care Clause of the Constitution, U.S. Const. art. II, § 3, even if no express statutory authority to name an acting chairperson is available.

Even without being able to name an acting chairperson, however, the Board may provide for the discharge of its administrative and executive duties when the position of chairperson is vacant. Although the chairperson “shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board,” 42 U.S.C. § 7412(r)(6)(B), we believe that the statute gives the Board as a whole an area of executive and administrative responsibility in which it can act in the present circumstances.

We previously have analyzed the division of authority between the chairperson and the Board as a whole. Memorandum for Paul-Noel Chretien, General Counsel, Chemical Safety and Hazard Investigation Board, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Division of Powers and Responsibilities Between the Chairperson and Chemical Safety and Hazard Investigation Board and the Board as a Whole* (June 26, 2000) (“2000 Opinion”). As we noted, “[t]he terms ‘Chief Executive Officer’ and ‘executive and administrative functions,’” by which the Board’s organic statute describes the duties of the chairperson, “are decidedly vague, and nowhere does the [statute] define them.” 2000 Opinion at 3. We pointed out that the statute gives the Board as a whole the authority to “establish such procedural and administrative rules as are necessary to the exercise of its functions and duties,” 42 U.S.C. § 7412(r)(6)(N), and that the legislative history recognizes that “[t]he chair’s conduct of the executive function is subject to oversight by the Board as a whole,” S. Rep. No. 101-228, at 229 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3613. We also stated that “[o]ur past opinions addressing governance issues raised by multi-member boards and commissions have repeatedly recognized that basic and well-established principles of corporate common law make clear ‘that the basic premise governing deliberative bodies is that the majority rules.’” 2000 Opinion at 4 (quoting Letter for Mason H. Rose V, Chairperson, United States Architectural and Transportation Barriers Compliance Board, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 17, 1981)). We concluded that “day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole” and that “[i]n disputes over the allocation of authority in specific instances, the Board’s decision controls, as long as it is not arbitrary or unreasonable.” 2000 Opinion at 2. In this regard, we observed that although “the statutory assignment of the Board’s executive and administrative functions to the chairperson necessarily vests the chairperson with a degree of managerial autonomy,” “any number of Board activities or day-to-day aspects of Board business, while at least in part administra-



tive and even seemingly mundane, may involve or affect the Board's duties and functions in ways that are of legitimate concern to the Board as a whole." *Id.* at 4.

The considerations that go into drawing this indistinct line between the Board's duties and the chairperson's duties necessarily change when the position of chairperson is vacant. In those circumstances, actions that might otherwise have been within the chairperson's autonomous authority will "involve or affect the Board's duties and functions in ways that are of legitimate concern to the Board as a whole." 2000 Opinion at 4. The unavailability of a chairperson may mean that action necessary to the continued operation of the Board is in danger of not being performed at all. In our view, therefore, the Board acts within its area of administrative authority when, in these circumstances, it takes the steps necessary to maintain its operations.

The Board may proceed in a variety of ways. It may perform the necessary administrative actions itself or may delegate the authority to take these actions to one or more of its members. *See* S. Rep. No. 101-228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613 ("The Board . . . may (by vote) delegate responsibilities to the chairperson or other member[s]. . ."). It may use its authority to "establish . . . procedural and administrative rules" to provide for performance of the administrative actions. 42 U.S.C. § 7412(r)(6)(N). And to the extent the authority to take the action in question could be delegated to staff, either the Board as a whole or an individual member who is initially assigned the responsibility by the Board may make such a delegation.

We recognize that if all of the administrative authorities at issue are united in a single Board member, that Board member might appear to be an "Acting Chairperson." As a matter of law, however, we do not believe that the Board would be naming an acting chairperson if it conferred administrative responsibilities on a single member. The member could not use the title "Acting Chairperson"; and while the use of a title may be primarily a formal matter, it is a formal matter of some significance. The title would suggest a measure of the status and prestige associated with the position of chairperson—a position that can be conferred only by the President with (except in the case of a recess appointment) the advice and consent of the Senate. Further, conferral of the title by the Board might bring into question *the President's* authority to name an acting chairperson. By itself, the assignment of duties and powers to a single member would not raise these concerns.

We therefore conclude that, during the vacancy in the position of Chairperson, the Board may assign its executive and administrative authority to a single member.

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## Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service

Conflict of interest rules first apply when an appointee begins the duties of his office.

May 8, 2002

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion whether the principal conflict of interest rules of the Executive Branch apply to a person who has been appointed to an office by the President with the advice and consent of the Senate but has not yet begun the duties of that office.<sup>1</sup> We determine that the conflict of interest rules do not apply by virtue of the appointment alone but instead apply only after the appointee has begun the duties of his office.

#### I.

The principal conflict of interest restrictions that govern the Executive Branch are found in the criminal conflict of interest laws, 18 U.S.C. §§ 202-209 (2000); the directives in Executive Order No. 12674, Principles of Ethical Conduct for Government Officers and Employees, 3 C.F.R. 215 (1989); and the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635 (2002) (“Standards of Ethical Conduct”). In each case, the reach of the restrictions depends on the meaning of the terms “officer” and “employee.”

By their terms, the potentially relevant criminal statutes cover “officers” and “employees.” For example, 18 U.S.C. § 203(a)(1)(B) forbids, among other things, a person’s receipt of compensation for certain representational services rendered “at a time when such person is an officer or employee . . . in the executive . . . branch of the government.” Under 18 U.S.C. § 205(a), “[w]hoever, being an officer or employee of the United States in the executive . . . branch of the Government” acts as an agent or attorney for anyone before an agency or court is guilty of a crime. And 18 U.S.C. § 209(a) bars receipt of a salary or supplement to a salary “as compensation for . . . services as an officer or employee of the executive branch of the United States Government.”

Because title 18 sets out no definition of “officer” or “employee,” we have looked to the definitions in title 5 as “‘the most obvious source of a definition’ for title 18 purposes.” *Applicability of Executive Order No. 12674 to Personnel of*

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<sup>1</sup> Letter for M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics (Jan. 8, 2002) (“OGE Letter”). We earlier gave informal advice reaching the same conclusion as in the present opinion.

*Regional Fishery Management Councils*, 17 Op. O.L.C. 150, 154 (1993) (“*Fishery Management Councils*”) (quoting *Conflict of Interest—Status of an Informal Presidential Advisor as a “Special Government Employee,”* 1 Op. O.L.C. 20 (1977) (“*Informal Presidential Advisor*”). Under 5 U.S.C. § 2104 (2000), an “officer” is defined to mean someone who is (1) “required by law to be appointed in the civil service by [the President, a court of the United States, the head of an Executive agency, or the Secretary of a military department] acting in an official capacity,” (2) “engaged in the performance of a Federal function under authority of law or an Executive act,” and (3) “subject to the supervision” of the President or the head of an Executive agency or military department. Section 2105 defines “employee” to include not only an “officer,” but also anyone in a larger class of persons who, like “officers,” are engaged in federal functions, but are appointed and supervised by specified federal officials other than those able to appoint and supervise “officers.”

The Executive Order similarly imposes certain restrictions on “employees,” defined to mean “any officer[s] or employee[s] of an agency.” Exec. Order No. 12674, § 503(b). Although the Executive Order does not define “officer” or “employee,” we previously have concluded that the terms “are identical in scope and meaning with the terms ‘officer’ and ‘employee’ as used in 5 U.S.C. §§ 2104 and 2105.” *Fishery Management Councils*, 17 Op. O.L.C. at 153. We rested this conclusion on three grounds. First, we noted that we had turned to the title 5 definitions for guidance in interpreting the criminal conflict of interest laws, and “[b]ecause the objectives of the Order and its implementing regulations are closely related to those of the conflicts statutes, we [thought] it reasonable to look to title 5’s definition of ‘employee’ when elucidating the Order.” *Id.* at 154 (citation omitted). Second, the Executive Order adopts the definition of “agency” from title 5, with certain exceptions, Exec. Order No. 12674, § 503(c); and “[w]e [thought] 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.” 17 Op. O.L.C. at 154. Third, while the Executive Order states generally that it is based on the authority vested in the President “by the Constitution and laws of the United States,” Exec. Order No. 12674, pmb., but does not specify the authorizing statutes, “the most obvious statutory source of authority” is the President’s power under title 5 to “prescribe regulations for the conduct of employees in the executive branch,” 5 U.S.C. § 7301 (2000), and this authority brings into play the definition of “employee” in title 5. 17 Op. O.L.C. at 154.

The Standards of Ethical Conduct carry out the Executive Order, and we therefore applied our conclusion in *Fishery Management Councils* about the applicable definitions both to the Executive Order and to these implementing regulations. 17 Op. O.L.C. at 150 n.2, 158. In addition, we note that some of the particular rules in the Standards of Ethical Conduct rest on specific statutory provisions in title 5 that

use the term “employee” and so invoke the title 5 definition. The rules about gifts to superiors, for example, derive in part from 5 U.S.C. § 7351 (2000), which bars “[a]n employee” from receiving or making certain gifts.<sup>2</sup> The reach of the Standards of Ethical Conduct thus depends, too, on the meaning of the terms “officer” and “employee” in title 5.

## II.

### A.

The OGE Letter argues that the three parts of the title 5 definitions—appointment by a federal official, engagement in a federal function, and federal government supervision—need not “be applied invariably or formalistically in every case where the application of federal ethics requirements is at issue.” OGE Letter, *supra* note 1, at 2. In particular, the OGE Letter cites two opinions of our Office—one in which we quoted a previous opinion for the proposition that the title 5 definition of employee “is not necessarily conclusive for conflicts purposes,” *Fishery Management Councils*, 17 Op. O.L.C. at 154 n.12, and one in which we concluded that “an identifiable act of appointment may not be absolutely essential for an individual to be regarded as an officer or employee in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed,” *Informal Presidential Advisor*, 1 Op. O.L.C. at 21. Therefore, the OGE Letter argues, satisfaction of only the first part of the title 5 definitions—appointment by a federal official—ought to suffice to render an individual subject to the federal conflict of interest laws.

We do not agree. First, as stated above, we have previously opined that the terms “officer[s]” and “employee[s]” in the Executive Order and the Standards of Ethical Conduct “are identical in scope and meaning with the terms ‘officer’ and ‘employee’ as used in 5 U.S.C. §§ 2104 and 2105.” *Fishery Management Councils*, 17 Op. O.L.C. at 153. We have, in short, concluded that the three parts of the title 5 definitions must be applied invariably in these contexts. Second, with respect to the criminal conflict of interest laws, we do not read our opinions as suggesting any general flexibility to depart from the three-part test, much less to simply disregard two of the three parts. Indeed, particularly in view of the rule of lenity, *see 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, 221-222 (1952)), we would be loath to dilute the

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<sup>2</sup> The statutory provision that underlies the rules on gifts from outsiders, 5 U.S.C. § 7353 (2000), has its own definition of “officer or employee”—“an individual holding an appointive or elective position in the executive, legislative, or judicial branch of Government, other than a Member of Congress.” *Id.* § 7353(d)(2). This definition, however, is congruent with the analysis we set out below.

three-part test. In this regard, our statement that the title 5 definition of employee “is not necessarily conclusive for conflicts purposes” might more sensibly be read to mean that, in some circumstances, even satisfaction of the three-part test might not conclusively establish that a person is an officer or employee for purposes of the criminal prohibitions. We further note that our conclusion that “an *identifiable act* of appointment may not be absolutely essential for an individual to be regarded as an officer or employee,” *Informal Presidential Advisor*, 1 Op. O.L.C. at 21 (emphasis added), does not mean that we concluded that the *requirement* of appointment by a federal official was not necessary. On the contrary, it presupposes the requirement and merely leaves open the possibility that an individual could be shown to have satisfied the requirement—i.e., to have been appointed—even in the absence of an identifiable act of appointment, if a “formal relationship” had been established between the individual and the government. *Id.*

We therefore look to the statutory definitions of “officer” and “employee” in title 5 in deciding whether the conflict of interest restrictions apply to a person who has been appointed to office by the President with the Senate’s advice and consent but has not yet begun the duties of office. We conclude that a person in these circumstances would not meet at least two of the three statutory tests—engagement in a federal function and federal government supervision—and that the conflict of interest restrictions therefore would not apply to him.

Chief Justice Marshall explained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803), that “when a commission has been signed by the president, the appointment is made.” In the circumstances here, an appointment in the constitutional sense would thus be complete. Whether the signing of a commission would constitute an “appointment” for purposes of 5 U.S.C. §§ 2104 and 2105 may be less clear. The United States Court of Appeals for the Federal Circuit has held, for example, that appointment under the statute requires “action by the appointee denoting acceptance” and that “[a]cceptance is important, as membership in the civil service imports burdens as well as benefits.” *Watts v. OPM*, 814 F.2d 1576, 1580 (Fed. Cir. 1987). We need not resolve this issue here, however; we instead assume *arguendo* that the first part of the test would be met when the President signed the commission.

Nevertheless, status as an employee under 5 U.S.C. § 2105 (2000) or an officer under 5 U.S.C. § 2104 requires more than an appointment: “One may be an appointee and never achieve the status of employee. There are three elements to the statute and all must be complied with to achieve the status of an employee.” *McCarley v. MSPB*, 757 F.2d 278, 280 (Fed. Cir. 1985).<sup>3</sup> In *McCarley*, the

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<sup>3</sup> On the question whether the Merit Systems Protection Board or the agency taking the underlying action should be the respondent, which is not at issue here, *McCarley* was overruled by *Hagmeyer v. Dep’t of Treasury*, 852 F.2d 531 (Fed. Cir. 1988). Congress then amended the statute to clarify this question. See *Amin v. MSPB*, 951 F.2d 1247, 1251-54 (Fed. Cir. 1991).

petitioner had been appointed, but had not entered upon the duties of the position. The Merit Systems Protection Board dismissed his claim for lack of jurisdiction, because jurisdiction depended upon his being an employee. The Federal Circuit affirmed, explaining that relief is unavailable “to an appointee who has not qualified as an employee by performing a federal function subject to the supervision of a federal employee.” *Id.*; see also *Miller v. MSPB*, 794 F.2d 660 (Fed. Cir. 1986).

Your question concerns appointees, like the petitioner in *McCarley*, who have not entered upon the duties of their offices and have therefore not yet performed a federal function, under the supervision of a federal official. Under 5 U.S.C. §§ 2104 and 2105, they are not yet officers or employees and thus are not yet subject to conflict of interest restrictions.

The reasoning by which we conclude that the conflict of interest restrictions do not become applicable upon appointment, without more, is not novel. In *Marbury*, Chief Justice Marshall carefully distinguished between the President’s act of appointment and the appointed officer’s subsequent acceptance of that appointment: “The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept.” 5 U.S. at 161; see *id.* at 162 (“the person appointed . . . has the absolute, unconditional power of accepting or rejecting [the appointment]”). Thus, it is plain under *Marbury* that the act of appointment does not *ipso facto* make the appointed person an officer or employee. See also *Acceptance of a Promotion*, 12 Op. Att’y Gen. 229, 229 (1867) (“a person cannot be made an incumbent without his consent, and, of course, this he must manifest by some adequate token of his intention”; “a formal acceptance is the evidence which, in the public service generally, it has been customary to require”).

Assistant Attorney General William H. Rehnquist used parallel reasoning when he concluded that a United States Attorney would not become subject to a particular rule grounded in conflict of interest principles, where that person had been appointed as a federal judge but had not yet taken the oath of judicial office or begun his judicial duties. See Memorandum for Harlington Wood, Jr., Associate Deputy Attorney General, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Delay in Induction of Judge into Office Following His Confirmation by the Senate* (Nov. 27, 1970) (“Rehnquist Opinion”). According to the Rehnquist Opinion, “the offices of judge and of prosecutor in the same court are incompatible”: it would be “improper as a matter of public policy if the same person carried out their functions,” with the “impropriety deriv[ing] from such considerations as conflicts of interest or the rule that no person shall be a judge in his own cause.” *Id.* at 5. The appointee in question wished to complete a criminal prosecution before becoming a judge, but the President had already signed his commission and sent it to him. Because “the assumption by an officer

of a new office which is incompatible with the one he is holding has the effect of vacating the first office,” *id.* (citation omitted), the issue was “whether a federal official vacates his office at the time when the President executes and forwards a commission appointing him to an office incompatible with the one which the officer is holding, or whether the *vacation* of the office takes place at a later date, *e.g.*, when the officer accepts it, or enters upon duty.” *Id.* The Rehnquist Opinion concluded that although the appointment is made with the signing of the commission, that signing “is not the last step in the investiture of an officer,” *id.* at 6, and “an appointment must be accepted in order to have [the] effect” of vacating an office already held, *id.* at 7. As the Rehnquist Opinion explained, “[t]he rule that an incumbent vacates his office only upon acceptance and exercise of an incompatible office, rather than upon appointment to it, is obviously designed to prevent the appointing power from removing an inconvenient officeholder or even a member of the legislature by appointing him to an incompatible office.” *Id.* at 8.

## B.

The OGE Letter also argues that “the underlying purposes of the ethical requirements are better served by the view that officer or employee status commences with a personnel appointment.” OGE Letter at 2. For example, an appointee might defer his first day of work in order to represent a client before the agency to which he had already been appointed. *Id.* We do not dispute that the rule that conflict of interest restrictions do not apply immediately upon appointment may indeed open the possibility of some abuses. We note, however, that such a rule also enables an appointee to wind up his private affairs in an orderly manner (presumably in consultation with the Administration) and therefore may be critical to recruiting qualified appointees in the first place. Moreover, in the event of any real abuse, the President could remove the appointee from the office to which he had been appointed, even before he began work.

The position advocated in the OGE Letter invites its own set of abuses. If a person were to be subject to conflict of interest restrictions merely upon appointment, the appointing authority “might prejudice the appointee,” Rehnquist Opinion at 7, and even subject him to the threat of criminal liability, by appointing him to an office he did not want and would not undertake. Even in the case of voluntary office-seekers, while it would be highly unusual for an appointee, having undertaken the rigors of the appointment process, to refuse his office, such a decision is far from implausible. Our files reveal, for example, that in 1971 a presidential appointee decided not to serve after the President signed his commission, because he recently had been elected to Congress. *See* Memorandum for the Honorable Daniel Kingsley, Special Assistant to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Effect of Appointment as a Member of the Air Quality Advisory Board* (June 3, 1971).

A similar decision might be made by someone appointed at the time of a presidential election lost by the incumbent's party.

On balance, were we to decide which rule better promoted the underlying purposes of the conflict of interest rules, we doubt very much that we would adopt the rule advocated by the OGE Letter. But, for the reasons stated above, the choice is not ours to make.

### C.

The OGE Letter further states that “[o]ver the years [OGE has] advised numerous agencies, White House officials, and nominees for Senate-confirmed (PAS) positions that an individual becomes subject to the various ethical requirements upon appointment.” OGE Letter at 1. We note that it appears that OGE has not always had this view. In 1984, we issued an opinion concluding that a statutory bar against outside employment by commissioners of the International Trade Commission applied as of the commencement of duties, rather than as of appointment. Memorandum for Fred F. Fielding, Counsel to the President, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of New Members to the International Trade Commission* (Mar. 22, 1984) (“ITC Opinion”). In the course of this opinion, we noted that “OGE has indicated that as a general matter, it does not apply similar ethical and conflict of interest standards to employees until the time when they actually begin their employment and receive federal pay.” *Id.* at 10. Although our opinion may require a departure from OGE’s more recent practice, we are persuaded that OGE’s earlier view of the matter was the better one.

### D.

Finally, the OGE Letter expresses concerns about practical application of our conclusion. For example, the letter asks whether an officer starts work when he takes the oath of office or performs some official action.<sup>4</sup> We believe that a Senate-confirmed official becomes an “officer” in the relevant sense when, upon or after accepting his appointment, he actually begins his duties. At that point, the appointee is performing a federal function, under the supervision of the President or the agency head. To meet this test, it is not necessary that he take any particular “official action” in his position. It suffices that he has begun the work of that office.<sup>5</sup>

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<sup>4</sup> In an analogous situation involving a judicial office, the Rehnquist Opinion found it unnecessary to choose between “the time when [the appointee] takes the . . . oath, or when he actually begins to exercise his . . . office.” Rehnquist Opinion at 8.

<sup>5</sup> If the official is a “special government employee” under 18 U.S.C. § 202(a) because he is expected to work no more than 130 days in the next year, the first day that, under usual principles,



The question when an official begins the duties of his office is a familiar one that must, irrespective of the conflict of interest prohibitions, be addressed and answered for each official. Specifically, an official is entitled to the salary of his office at the time he enters upon the duties of office, *see* ITC Opinion at 9-10; *Interstate Commerce Commission*, 19 Op. Att’y Gen. 47, 48 (1887), not at the time of appointment or at the time of the oath of office, *see United States v. Flanders*, 112 U.S. 88, 91 (1884); *Leave for Transferred Employee*, 39 Op. Att’y Gen. 304, 305-06 (1939) (Jackson, Acting A.G.). A determination of the time when the conflict of interest rules begin to apply is identical to, and should therefore be no more difficult to make than, the routine determination of the time when the official begins to accrue his salary.

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*Office of Legal Counsel*

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counts toward the 130-day limit should be considered the day on which he enters upon his duties. *See* Office of Government Ethics, *Summary of Ethical Requirements Applicable to Special Government Employees*, Informal Advisory Op. 00x1, at 5-6 (Feb. 15, 2000), *available at* <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited July 12, 2012). The OGE Letter asks whether a special government employee who is reappointed would be subject to conflict of interest restrictions during the period after reappointment but before the next day on which he actually works. This question seems to concern special government employees who are not appointed by the President with the advice and consent of the Senate but are reappointed annually, either by the President or by another officer. OGE Letter at 3. We believe that the reappointments of such employees do not place them in the same position as the Senate-confirmed appointees we address in this opinion. In many instances, as a matter of practice, special government employees are employed continuously, and the successive one-year appointments are primarily a means of enabling the appointing officer to assess whether the work anticipated in the next year will exceed 130 days and require an end to the designation as a special, rather than ordinary, government employee. *See* Office of Government Ethics, *Special Government Employees and 18 U.S.C. §§ 202, 203, and 205*, Informal Advisory Op. 81x24, at 2-3 (July 23, 1981), *available at* <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited July 12, 2012). We believe that the conflict of interest restrictions would apply continuously to a special government employee, until he resigns or the agency notifies him that he has not been reappointed.

## Applicability of Ineligibility Clause to Appointment of Congressman Tony P. Hall

The Ineligibility Clause of the Constitution would not bar the President from appointing Congressman Tony P. Hall as United States Representative to the United Nations Agencies for Food and Agriculture, with the rank of Ambassador.

May 30, 2002

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

You have asked for our opinion whether the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, would bar the President from appointing Congressman Tony P. Hall as United States Representative to the United Nations Agencies for Food and Agriculture, with the rank of Ambassador. As we previously advised you orally, we believe that the Ineligibility Clause would not bar the appointment.

Under the Ineligibility Clause, “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.” U.S. Const. art. I, § 6, cl. 2. Congressman Hall’s current term began January 3, 2001, *see* U.S. Const. amend. XX, § 1; 146 Cong. Rec. D1228 (Dec. 15, 2000), and he thus cannot be appointed to an office “the Emoluments whereof” were raised after that date.<sup>1</sup>

The office of United States Representative to the United Nations Agencies for Food and Agriculture was created under 22 U.S.C. § 287(d) (2000), a section of the United Nations Participation Act providing that the President may appoint “such . . . persons as he may deem necessary to represent the United States in organs and agencies of the United Nations.” Under 22 U.S.C. § 287(g), “[a]ll persons appointed in pursuance of authority contained in this section shall receive compensation at rates determined by the President upon the basis of duties to be performed but not in excess of rates authorized . . . for chiefs of mission, members of the Senior Foreign Service, and Foreign Service officers occupying positions of equivalent importance.” The President has delegated to the Secretary of State his authority to fix this compensation, *see* Memorandum for the Secretary of State, from President William J. Clinton, *Re: Delegation of Authority on Rates of Compensation for U.S. Representatives to the United Nations*, 62 Fed. Reg. 18,261 (Apr. 15, 1997), and the Secretary of State in turn has delegated such “manage-

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<sup>1</sup> We do not address here whether a rollback of a salary increase can satisfy the Ineligibility Clause. Compare *Appointment of Member of Congress to a Civil Office*, 3 Op. O.L.C. 286, 289-90 (1979) (accepting the validity of such rollbacks), with Memorandum for the Counselor to the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987) (“1987 Opinion”) (rejecting the validity of such rollbacks).

ment-related functions” to the Under Secretary of State for Management, *see* Delegation of Authority No. 198 (Sept. 16, 1992).

The last occupant of the office was former Senator George S. McGovern, who left the position on September 27, 2001.<sup>2</sup> At the beginning of Senator McGovern’s service, the responsible official at the State Department assessed the “duties to be performed” by Senator McGovern and determined that he should receive the pay of a “Minister-Counselor” in the Senior Foreign Service compensated at a rate equivalent to Level 5 of the Executive Schedule (“FE-MC 5,” which is equivalent to “ES 5”). *See* Exec. Order No. 12293, § 4, 3 C.F.R. § 137 (1982), *reprinted in* 22 U.S.C. § 3901 note (2000). On two recent occasions, Presidents have exercised their authority under 5 U.S.C. § 5382 to raise the salary specified for Level 5 of the Executive Schedule, to which the FE-MC 5 pay is tied. The first increase was ordered December 23, 2000, and took effect January 14, 2001, Exec. Order No. 13182, 3 C.F.R. § 330 (2001); the second was ordered December 28, 2001, and took effect January 13, 2002, Exec. Order No. 13249, 3 C.F.R. § 832 (2002). We will assume that one or both of these increases should be deemed to have occurred during the time for which Congressman Hall was elected.<sup>3</sup> If the “Emoluments” of the office of United States Representative to the United Nations Agencies for Food and Agriculture include an FE-MC 5 salary, then that office is one “the Emoluments whereof . . . have been encreased” during the time for which Congressman Hall was elected.

We do not believe, however, that the FE-MC 5 pay or any other salary can properly be seen as the emoluments *of* this office. On the contrary, the office itself has no fixed emoluments. The President or his delegate is free to set *any* level of pay he deems suitable for the duties he expects the particular appointee to perform, as long as the pay does not exceed the statutory ceilings. Therefore, if appointed, Congressman Hall will not necessarily succeed to the same compensation that Senator McGovern was receiving. Indeed, the instrument that directed how much Senator McGovern was to be paid was a “Notification of Personnel Action,” which was personal to him, rather than an order referring generally to the pay of the office. Section 287(g) calls for the President or his delegate to set the pay of

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<sup>2</sup> As we understand the facts, only one other person—Millicent Fenwick, during the 1980s—has held the position of United States Representative to the United Nations Agencies for Food and Agriculture, with the Senate-confirmed rank of Ambassador. We understand that the paperwork showing how her pay was fixed no longer exists. For the facts set out in this memorandum, we rely on the Department of State.

<sup>3</sup> Arguably, the relevant date for the first increase was the date on which the President issued his order, which preceded Congressman Hall’s current term. *But cf. Member of Congress—Appointment to Civil Office Prior to Pay Increase*, 42 Op. Att’y Gen. 381 (1969) (under a statute providing for an effective date after a report to Congress and a waiting period to allow congressional action, the relevant date was the date on which the increase took effect). Moreover, because the office was vacant at the time of the second increase and because (as explained below) the pay of the office must be set each time a new appointee assumes the office, arguably the pay of the office was not tied to the FE-MC 5 rate, or any other rate, at the time of the second increase.

“[a]ll persons appointed in pursuance of authority contained in” section 287, and this compensation pertains to the “person[],” not to the office.

This is not a case in which the President raised the pay for a class of offices, in which the office in question was included. *Cf. Appointment of Member of Congress to a Civil Office*, 3 Op. O.L.C. at 286-87 (judicial salaries); 1987 Opinion, *supra* note 1, at 1 n.1 (same); *Member of Congress—Appointment to Civil Office Prior to Pay Increase*, 42 Op. Att’y Gen. 381 (1969) (salaries of cabinet officers). Nor even is it a case in which the statute calls on the President to set the salary for a specified office. *Cf. Memorandum for the Files, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Appointment of Congressman to the Office of Director of the Office of Economic Opportunity* at 1 (Apr. 14, 1969) (“1969 Memorandum”) (third attachment to Letter for Edward L. Morgan, Deputy Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (Apr. 14, 1969)) (the statute required the President to fix the salary of the Director). Instead, the President is to fix the salary of a “person[]” appointed to an office that the President largely defines. Under the statute here, the President or his delegate is to set a salary each time a person is appointed.

To be sure, it would not be an unnatural reading of the Ineligibility Clause if the salary paid to Senator McGovern were considered the emoluments of the office of United States Representative, within the meaning of the Clause. That salary was, after all, actually paid for Senator McGovern’s work in the office. Nevertheless, we believe that, on the better view of the Ineligibility Clause, this salary does not constitute the emoluments *of* the office because the office does not continue to carry that salary after Senator McGovern’s resignation. The President or his delegate will have to act affirmatively to set a salary when Senator McGovern’s successor is appointed and will have the discretion to set the salary for the next occupant of the office at any rate that does not exceed the salary cap.<sup>4</sup> The Ineligibility Clause was designed to limit the danger that offices might be created or their emoluments increased “in order to gratify some members” of Congress, 1 *The Records of the Federal Convention of 1787*, at 380 (Max Farrand ed., rev. ed. 1966) (statement of James Madison), but this danger, insofar as it arises from action taken with respect to an office before a member’s appointment, exists only if the prior action would carry over to the office when the member assumes it. Here, although prior action raising Senator McGovern’s salary arguably might

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<sup>4</sup> In our 1969 Memorandum, the President was to fix the compensation of the Director of the Office of Economic Opportunity (“OEO”) at a level not exceeding that for the Director of the Bureau of the Budget. The Budget Director’s salary had been raised during the time for which a prospective Director of OEO had been elected to Congress, and the 1969 Memorandum found that if the Director of the OEO received a salary at the new ceiling, the Ineligibility Clause would be violated. *Id.* at 1-2. We take it, however, that once the President had set a salary for the office of OEO Director, that salary would have continued to apply to successors in the office, unless the President acted to change his earlier decision.

lead to some expectations about the salary to be paid to Congressman Hall, *see* 119 Cong. Rec. 38,331 (1973) (letter of then-Professor Stephen G. Breyer, arguing that past salary increases, even if not given to an appointee, make future increases likely), this expectation is, in the end, a matter of speculation. Until the President acts or his delegate acts, there are no emoluments attached to the office in question.

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*Assistant Attorney General*  
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## Authority of Federal Judges and Magistrates to Issue “No-Knock” Warrants

Federal judges and magistrates may lawfully and constitutionally issue “no-knock” warrants where circumstances justify a no-knock entry, and federal law enforcement officers may lawfully apply for such warrants under such circumstances.

Although officers need not take affirmative steps to make an independent re-verification of the circumstances already recognized by a magistrate in issuing a no-knock warrant, such a warrant does not entitle officers to disregard reliable information clearly negating the existence of exigent circumstances when they actually receive such information before execution of the warrant.

June 12, 2002

### MEMORANDUM OPINION FOR THE CHIEF COUNSEL DRUG ENFORCEMENT ADMINISTRATION

This responds to your memorandum seeking this Office’s opinion whether federal judges and magistrate judges have legal authority to issue so-called “no-knock” warrants.<sup>1</sup> In addition to considering the information and analysis contained in your memorandum, we have also solicited and received the views of the Department’s Criminal Division, which has both interest and experience in this area.<sup>2</sup>

After giving full consideration to these submissions, and having reviewed the pertinent statutes and case law, we conclude that federal district court judges and magistrates may lawfully and constitutionally issue no-knock warrants—i.e., warrants authorizing officers to enter certain premises to execute a warrant without first knocking or otherwise announcing their presence where circumstances (such as a known risk of serious harm to the officers or the likelihood that evidence of crime will be destroyed) justify such an entry. It follows that federal law enforcement officers may lawfully apply for such warrants based on information showing such circumstances to be present. We further conclude that the issuance of a no-knock warrant by a neutral magistrate, while not conclusive on the issue, will generally reinforce the admissibility of evidence obtained through no-knock entries executed pursuant to such warrants under *Leon*’s good-faith exception to the exclusionary rule<sup>3</sup> and by fortifying the objective reasonableness of the police conduct. Even when authorized by such a no-knock warrant, however, a no-knock

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<sup>1</sup> See Memorandum for M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, from Cynthia R. Ryan, Chief Counsel, Drug Enforcement Administration, *Re: Authority of Federal Judges to Issue “No-Knock” Warrants* (Oct. 26, 2001) (“DEA Memorandum”).

<sup>2</sup> See Memorandum for M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, from Patty Stemler, Chief, Appellate Section, Criminal Division (Dec. 11, 2001) (“CRM Memorandum”).

<sup>3</sup> See *United States v. Leon*, 468 U.S. 897 (1984).

entry might nonetheless violate the Fourth Amendment if the officers have actual knowledge that the circumstances that justified the no-knock authorization no longer exist at the time the warrant is executed.

## I.

Your inquiry notes that it is the present practice of some United States Attorneys’ offices to seek “no-knock” search warrants and recognizes that some federal magistrate judges issue such warrants. DEA Memorandum, *supra* note 1, at 2. Your memorandum also states that components of the Criminal Division have advised federal prosecutors that it is appropriate to seek no-knock warrants when the facts supporting a no-knock entry are known to exist at the time the warrant is sought. *Id.*; *see also* CRM Memorandum, *supra* note 2, at 1 (stating that the Criminal Division “recommends that we continue to seek such warrants on appropriate facts”). You also note that various States have enacted statutes that explicitly authorize judges to issue no-knock warrants, whereas a previous federal statutory authorization for the issuance of such warrants in controlled substances cases was repealed in 1974.

You advise that DEA has assisted state and local police in the execution of state no-knock warrants and that DEA has been requested by a United States Attorney’s office to participate in the execution of a number of federal no-knock warrants. You further explain, however, that current DEA policy, as reflected in section 6653.2.C of the DEA Agents Manual, is based on the contrary premise that “Federal law does not allow for the issuance of a ‘no-knock’ warrant.” DEA Memorandum at 3. Your memorandum therefore expresses concern regarding the legal accuracy of DEA’s current policy. You have requested that we address that concern in this opinion.

In response to our request for its views, the Criminal Division has submitted a memorandum supporting the legality and constitutionality of no-knock warrants and recommending “that we continue to seek such warrants on appropriate facts.” CRM Memorandum at 1. In the Division’s view, the issue presented here “ultimately turns on the following question: Can an issuing magistrate sanction a constitutional manner of executing a warrant in the absence of a statute or rule that gives him authority to address the question?” *Id.* at 5. The Division answers that question in the affirmative, and further endorses the view expressed by the Eighth Circuit in *United States v. Moore*, 956 F.2d 843, 849 n.8 (8th Cir. 1992), that “the fact that a no-knock entry has been authorized by a neutral magistrate in a warrant required by statute can hardly be irrelevant to the reasonableness of that entry under the Fourth Amendment.”

## II.

### A.

As recognized in your memorandum, the Fourth Amendment imposes restrictions on the authority of federal law enforcement officers to enter a residence even when they have a valid search warrant based upon probable cause. As the Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. In applying the Fourth Amendment, the Supreme Court has held that, even when they are conducting a search lawfully authorized by a warrant, officers must generally knock and announce their identity and purpose before entering a private residence to execute the warrant. *See Wilson v. Arkansas*, 514 U.S. 927 (1995). The Court has stressed, however, that this general principle “was never stated as an inflexible rule requiring announcement under all circumstances.” *Id.* at 934. On the contrary, there are well-established exceptions to the “knock-and-announce” requirement, primarily in situations where exigent circumstances make it necessary for officers to enter the premises without prior announcement for reasons of physical safety or in order to prevent the imminent destruction of evidence or contraband. *See id.* at 936.

Apart from the Constitution, 18 U.S.C. § 3109 (2000) also addresses certain aspects of the execution of search warrants by federal officers. That section provides as follows: “The officer may *break open* any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.” *Id.* (emphasis added).<sup>4</sup> The Supreme Court has made it clear, however, that the requirements and restrictions of 18 U.S.C. § 3109 are subject to the same well-recognized exceptions that apply under the Fourth Amendment. *See United States v. Ramirez*, 523 U.S. 65 (1998) (holding that section 3109 “includes an

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<sup>4</sup> Another statute regulating the execution of warrants is 21 U.S.C. § 879 (2000), which provides: “A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate judge issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.” This statute plainly does not prohibit the issuance of no-knock warrants, but merely provides specific authorization for judges and magistrates to issue warrants that may be executed at any time of day or night.



exigent circumstances exception” and that the constitutional standard and section 3109’s standard are the same). The Court’s decision in *Ramirez* also emphasized that, by its own terms, 18 U.S.C. § 3109 prohibits nothing. It is an authorizing statute, not one of prohibition. *See* 523 U.S. at 72.

The general authority for the issuance of search warrants by federal magistrates and federal district judges is found in Rule 41 of the Federal Rules of Criminal Procedure.<sup>5</sup> Rule 41 does not address whether, or to what extent, officers must knock or otherwise announce their presence and purpose before executing a warrant authorized by the rule. *See* Fed. R. Crim. P. 41.

Finally, another pertinent factor giving rise to this inquiry is the above-referenced provision in the DEA Agents Manual, which includes the following statements:

Federal law does not contain a provision for a “no knock” warrant. Although some states still issue “no knock” warrants, DEA Agents need to recognize that such warrants are actually no different than a normal warrant with respect to the duty to knock and announce. The duty to knock and announce before entering a residence is a matter of Federal constitutional law, and the duty can be excused only by showing that exigent circumstances actually existed at the time of the search. DEA Agents must not under any circumstances participate in a search warrant execution that fails to comply with the knock and announce requirement unless they are aware of specific facts that demonstrate that their safety will be compromised or evidence will likely be destroyed if they do not effect an immediate, unannounced entry to the residence.

DEA Agents Manual § 6653.2.C. This language suggests that DEA agents have an independent responsibility to evaluate the circumstances existing at the time of

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<sup>5</sup> Rule 41(a) provides in relevant part:

(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district.

Fed. R. Crim. P. 41(a). Although Rule 41(a)’s authorization refers only to “federal magistrate judge[s],” courts have “uniformly assumed” that the authorization extends to U.S. District Judges as well. *See United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984).

execution of *every* warrant to determine whether any emergency exists to justify entry without knocking. They may not, in other words, simply rely on the issuance of a no-knock warrant itself, according to the guidance of the Agents Manual.

## **B.**

We first address whether it is constitutionally permissible for courts or magistrates to issue no-knock warrants.

The Supreme Court first addressed no-knock warrants in *Richards v. Wisconsin*, 520 U.S. 385 (1997). There, the Court addressed the legality of a search conducted pursuant to a warrant (not a no-knock warrant) where the officers executing the warrant determined that the situation required a no-knock entry. The Court held that the Fourth Amendment does not permit a “blanket exception” to the knock-and-announce requirement in the case of all warrants executed in felony drug investigations. At the same time, the Court upheld the constitutionality of the particular no-knock entry at issue. More importantly for present purposes, the Court in dicta specifically expressed its approval of state court magistrates issuing no-knock warrants when they are authorized to do so under state law. As the Court explained:

A number of States give magistrate judges the authority to issue “no-knock” warrants if the officers demonstrate ahead of time a reasonable suspicion that entry without prior announcement will be appropriate in a particular context. *The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time.* But, as the facts of this case demonstrate, a magistrate’s decision not to authorize a no-knock entry should not be interpreted to remove the officers’ authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed.

*Id.* at 396 n.7 (emphasis added). In holding that the magistrate’s refusal to include “no-knock” authorization in the warrant did not itself render the officers’ subsequent no-knock entry constitutionally unreasonable, the *Richards* Court emphasized that, for Fourth Amendment purposes, “the reasonableness of the officers’ decision . . . must be evaluated as of the time they entered” the premises to be searched, *id.* at 395.

Following *Richards*, there is extensive federal case authority supporting the constitutionality of the issuance and use of no-knock warrants. In *United States v. Ramirez*, for example, the Supreme Court upheld the execution of a no-knock warrant obtained by *federal officers* against claims that the executing officers had violated both the Fourth Amendment and federal statutory restrictions. 523 U.S.

at 65. In so holding, the Court gave no suggestion that the issuance and use of the no-knock warrant was inappropriate or invalid. Numerous other federal cases have expressly cited and relied upon the above-quoted statement from *Richards v. Wisconsin* in upholding the constitutionality and legality of searches conducted pursuant to no-knock warrants. See, e.g., *United States v. Tisdale*, 195 F.3d 70, 72 (2d Cir. 1999) (“*Richards* approved the issuance of no-knock warrants.”);<sup>6</sup> *United States v. Spry*, 190 F.3d 829, 833 (7th Cir. 1999) (upholding search conducted pursuant to no-knock warrant), cert. denied, 528 U.S. 1130 (2000); *United States v. Mattison*, 153 F.3d 406, 409 n.1 (7th Cir. 1998) (“A ‘no-knock’ search warrant allows the police to enter the residence without knocking and announcing their presence and purpose before entering the residence.”); *United States v. Winters*, No. 2:00-CR-590C, 2001 WL 670924 (D. Utah May 9, 2001) (issuance of a no-knock search warrant did not violate the Fourth Amendment); *United States v. Penman*, No. 2:00-CR-192C, 2001 WL 670922 (D. Utah May 3, 2001) (same); *United States v. Mack*, 117 F. Supp. 2d 935 (W.D. Mo. 2000) (upholding the validity of a search performed pursuant to a Missouri no-knock warrant based upon an affidavit establishing exigent circumstances for the search; the court also specifically held that the no-knock provision of the search warrant was constitutionally supported by reasonable suspicion).<sup>7</sup>

In light of the clear authority in *Richards v. Wisconsin* and ensuing cases, we conclude that nothing in the Fourth Amendment prohibits federal magistrates from issuing, and law enforcement officers from seeking, a no-knock warrant when there are reasonable grounds to believe that circumstances justifying no-knock entry will exist at the time the warrant is to be executed.

### C.

Although *Richards* and ensuing cases confirm that the Fourth Amendment places no constitutional prohibition on no-knock warrants as a general proposition, they do not specifically address whether federal courts are authorized or permitted to issue such warrants under the powers assigned to them by federal law. The precedents discussed above generally involve warrants issued by state courts or

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<sup>6</sup> In *Tisdale*, the court also held that, even assuming that the exigent circumstances required for a no-knock search warrant were *not* present, the police officers’ reliance on the no-knock provision of the warrant was not objectively unreasonable, thus precluding suppression of the evidence seized during the no-knock search. See 195 F.3d at 71.

<sup>7</sup> Other federal court decisions recognized the constitutionality of no-knock warrants prior to the *Richards* opinion. See, e.g., *United States v. Singer*, 943 F.2d 758, 759 & n.1 (7th Cir. 1991) (no-knock warrants held permitted under Wisconsin law because no statute specifically prohibited them).

magistrates,<sup>8</sup> and do not address whether, or to what extent, federal statutes authorize or permit the issuance of no-knock warrants by federal magistrates.

1. *18 U.S.C. § 3109.* We first consider whether 18 U.S.C. § 3109's provisions authorizing officers to "break open any outer or inner door or window of a house" in executing warrants under certain defined circumstances should be construed to prohibit (by negative implication) the issuance or use of federal no-knock warrants in circumstances not encompassed by section 3109. Section 3109 expressly limits its door-and-window-breaking authorization to circumstances where either (a) the officers have been refused admittance after announcing their authority and purpose; or (b) forcible entry is necessary to "liberate" the officers or those assisting them in the execution of the warrant. We do not believe this statute's particularized *authorization* for officers to break open doors and windows is properly construed as a prohibition against warrants authorizing no-knock entries. As the Supreme Court emphasized in *United States v. Ramirez*, section 3109 "by its terms prohibits nothing. It merely authorizes officers to damage property in certain instances." 523 U.S. at 72.<sup>9</sup> As further held in *Ramirez*, moreover, to the extent that section 3109 might be construed to include an implied prohibition or restriction, it should also be construed as subject to the same "exigent circumstance" exceptions applicable with respect to Fourth Amendment restrictions. *Id.* at 73. *See also United States v. Tisdale*, 195 F.3d at 73 (standards governing section 3109 and constitutional Fourth Amendment standards are the same). It follows that since the Fourth Amendment does not bar the issuance and use of no-knock warrants where exigent circumstances (defined under the standard adopted in *Richards*, *see* 520 U.S. at 394) are established, neither does 18 U.S.C. § 3109.

2. *21 U.S.C. § 879.* Both DEA's and the Criminal Division's submissions note that an earlier version of the "24-hour drug search" statute, 21 U.S.C. § 879, had expressly authorized the issuance and use of warrants authorizing officers to break open doors and outer windows without prior announcement of authority or purpose in certain searches for illegal drugs. *See Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub. L. No. 91-513, § 509, 84 Stat. 1236, 1274, previously codified at 21 U.S.C. § 879(b) (1970). However, subsection (b) of the earlier statute, the portion that expressly authorized issuance of no-knock warrants and door-breaking authority under enumerated circumstances, was repealed in 1974 by a Senate amendment to an appropriations bill. *See* Pub. L. No.

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<sup>8</sup> In *United States v. Ramirez*, neither the Supreme Court's opinion nor that of the Ninth Circuit specifies whether the warrant issued to the Deputy U.S. Marshal was issued by a federal or state court.

<sup>9</sup> The Seventh Circuit made a similar point in *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984). In upholding a federal district court's power to issue a warrant authorizing television surveillance of terrorist "safehouses" despite the lack of explicit statutory authority to do so, the court observed: "It does not follow, however, that because Title III does not authorize warrants for television surveillance, it forbids them. The motto of the Prussian state—that everything which is not permitted is forbidden—is not a helpful guide to statutory interpretation." *Id.* at 880.

93-481, § 3, 88 Stat. 1455 (1974). As pointed out in the DEA Memorandum, there is some indication in the legislative history of this repeal provision that at least its Senate sponsor intended the repeal to prohibit the issuance of no-knock warrants. *See* 120 Cong. Rec. 19,910, 19,911 (1974) (remarks of Sen. Ervin).<sup>10</sup>

This raises the question whether congressional removal of the special authorization for the execution of certain drug-search warrants contained in former 21 U.S.C. § 879(b) (1970) should be equated with a general *prohibition* against no-knock warrants. We reject such an interpretation. Former section 879(b) was a narrow and carefully framed authorization respecting the execution of search warrants, limited to offenses involving controlled substances, that included authority to break open doors and windows under certain described circumstances. Like 18 U.S.C. § 3109, as recognized by the Supreme Court in *Ramirez*, section 879(b) was an authorizing statute that by its terms “prohibit[ed] nothing.” 523 U.S. at 72. Given that fact, and particularly in light of the specialized and restricted nature of that statutory provision, we do not conclude that its repeal can be equated with, or construed as, a general statutory prohibition on no-knock search warrants. *Cf. United States v. Torres*, 751 F.2d at 880.

The actual issue, instead, is whether an express statutory authorization is even required for federal magistrates to include constitutionally permitted “no-knock” provisions in search warrants they are otherwise authorized to issue.

Existing judicial authority does not appear to specifically address this point. In *United States v. Ramirez*, for example, the Supreme Court upheld the execution of a no-knock warrant that was “sought and received” by a Deputy United States Marshal, *see* 523 U.S. at 68, but did not address the question of federal statutory authority for a court to issue such a no-knock warrant. In *United States v. Singer*, 943 F.2d 758 (7th Cir. 1991), the court upheld the issuance and execution of a no-knock warrant issued by a state court. Although the court applied federal law because the case was a federal prosecution, it suggested that no-knock warrants were permitted under Wisconsin law because no statute prohibited them. *Id.* at 759 & n.1 (“while the language of the [Wisconsin] statute does not specifically authorize no-knock warrants, it does not prohibit them either”). There would seem to be no apparent reason why a different rule of statutory construction would apply with regard to federal law. Similarly, in *United States v. Mack*, 117 F. Supp. 2d 935, 941 (W.D. Mo. 2000), the court acknowledged that there was no Missouri statute expressly authorizing no-knock search warrants. Nonetheless, the court proceeded to uphold the validity of the no-knock provisions of a search warrant issued by a Missouri judge on the grounds that it was fully compliant with

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<sup>10</sup> The House Conference Report on the legislation also stated that it would “repeal the authority of a judge or magistrate to issue a search warrant (relating to offenses involving controlled substances) which authorizes, under certain circumstances, an officer to break and enter a building in the execution of the search warrant without giving notice of his authority and purpose.” H.R. Rep. No. 93-1442, at 4 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5974, 5976.

Missouri law and federal constitutional requirements. *Id.* at 942-43. As the Criminal Division points out, however, state courts are divided on the issue of whether judges or magistrates may issue no-knock warrants without explicit statutory authority.<sup>11</sup>

Although we find no federal opinions resolving this precise issue, we conclude that a federal judge's or magistrate's general authority to issue warrants under Rule 41 of the Federal Rules of Criminal Procedure is sufficiently flexible to encompass no-knock authorizations. Indeed, there is substantial support in existing case law for such an understanding of the flexible authority provided by Rule 41.

In *United States v. New York Telephone Company*, 434 U.S. 159 (1977), the Supreme Court held that a federal district court had the power to authorize the installation of pen registers (used to record the numbers dialed on a telephone without overhearing conversations) even though neither Rule 41(b) nor Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifically authorized such measures. After reciting Rule 41(b)'s express (but limited) authorizations for the search and seizure of property and contraband, the Court explained:

This authorization is broad enough to encompass a "search" designed to ascertain the use which is being made of a telephone suspected of being employed as a means of facilitating a criminal venture and the "seizure" of evidence which the "search" of the telephone produces. Although Rule 41(h) defines property "to include documents, books, papers and any other tangible objects," it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. Indeed, we recognized in *Katz v. United States*, which held that telephone conversations were protected by the Fourth Amendment, that Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause.

Our conclusion that Rule 41 authorizes the use of pen registers under appropriate circumstances is supported by Fed. Rule Crim. Proc. 57(b), which provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

434 U.S. at 169-70 (citations and footnotes omitted).<sup>12</sup>

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<sup>11</sup> Compare *State v. Cleveland*, 348 N.W.2d 512, 518-19 (Wis. 1984) (no-knock warrants may be issued without express statutory authority), with *State v. Bamber*, 630 So. 2d 1048, 1050-51 (Fla. 1994) (no-knock warrants must be expressly authorized).

<sup>12</sup> Rule 57(b), as invoked by the Court in *New York Telephone* in support of a federal court's power to authorize procedures (such as the use of pen registers) not expressly authorized by the applicable

A similarly flexible construction of the scope of judicial authority to issue special warrant provisions was adopted by the Seventh Circuit (per Judge Posner) in *United States v. Torres*. In *Torres*, the court held that a federal district court had authority to issue a warrant authorizing television surveillance of terrorist “safehouses” despite the absence of express statutory authority for that procedure in Rule 41 or federal statutes such as Title III. Noting that Congress’s overhaul of the federal criminal code in 1948 left the matter of search warrants “to be governed by rule of court,” the Seventh Circuit stated: “This broad delegation suggests that Congress views the issuance of federal search warrants as standing on a plane with other procedural powers that courts traditionally have exercised without explicit legislative direction.” 751 F.2d at 879. Although the court cautioned that it “shall not pretend greater certainty than we feel” on the issue, the court concluded that federal courts may issue warrants for television surveillance and other “new types of search” without express statutory authorization. *Id.*

Although the issue is not entirely free from doubt, we believe the foregoing holdings and principles support the view that express statutory authority is not required for federal magistrates to issue search warrants authorizing no-knock entries when the government makes an adequate showing of exigent circumstances.

#### D.

Finally, we consider an additional question suggested by your inquiry and by the provisions of the DEA Agents Manual—namely, to what degree, if any, does the issuance of a no-knock warrant relieve officers of the necessity of determining whether the circumstances that justified inclusion of the no-knock provision still exist at the time of actual execution? As noted above, the DEA Agents Manual essentially takes the view that the issuance of no-knock warrants has no effect on an officer’s obligation to knock and announce before execution of a warrant unless the officer independently determines that circumstances existing at the time of execution satisfy constitutional prerequisites for an unannounced entry.

In *United States v. Singer*, 943 F.2d 758 (7th Cir. 1991), where the court upheld a no-knock entry undertaken pursuant to a state no-knock warrant, the court framed and addressed this issue as follows:

Singer maintains that the officers’ execution of the warrant was unconstitutional because the police officers were aware of facts sug-

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rule, has been slightly amended since that decision and now provides: “A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district.” Fed. R. Crim. P. 57(b). Rule 57(b) provides further support for federal no-knock warrant authority in that such authority appears to be “consistent with federal law”—i.e., consistent with the numerous federal court opinions upholding the constitutionality of no-knock warrants.

gesting that no exigent circumstances existed to justify their unannounced entry. To support this argument, he makes much of what the officers did not encounter when they arrived at his home to conduct the search. . . . As our previous discussion concluded, the officers' no-knock entry was permissible because Singer's possession of firearms posed a threat to the safety of the officers. *If, during the intervening period between the warrant's issuance and execution, the police received reliable information that Singer no longer possessed any firearms, then they would have been required to reevaluate their plan to forcibly enter Singer's home without first knocking and announcing.*

*Id.* at 763 (emphasis added).<sup>13</sup>

Although the *Singer* opinion indicates that the force of a no-knock warrant may be undercut by the police's actual receipt of reliable information negating the existence of exigent circumstances, it does not follow that officers in possession of such warrants must necessarily and invariably undertake an independent re-investigation of those circumstances prior to execution of the warrant. Thus, in *United States v. Spry*, the Seventh Circuit held that "the district court correctly determined that *the law does not require officers, after obtaining a no-knock warrant, to make an independent determination of the exigent circumstances at the time of entry.*" 190 F.3d at 833 (emphasis added). Other cases emphasize that officers are generally entitled to rely on the validity of a warrant authorizing no-knock entry, including its underlying finding that exigent circumstances exist. See *United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) ("The matter was submitted to the judgment of a judicial officer who passed upon facts submitted, the existence of which has not been questioned. Under these circumstances the executing officers were clearly entitled to rely on the validity of the warrant.") (citing *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Mack*, 117 F. Supp. 2d 935, 942 (W.D. Mo. 2000) (observing that "[t]he issuance of a no-knock search warrant potentially insulates the police against a subsequent finding that exigent circumstances, as defined by *Richards*, did not exist"); *United States v. Rivera*, No. CRIM. 00-6-B-C, 2000 WL 761976 (D. Me. May 15, 2000) ("The

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<sup>13</sup> See also *State v. Cleveland*, 348 N.W.2d at 519, where the court stated:

But such prior authorization is in effect conditional; a magistrate cannot absolutely authorize no-knock entry. A search warrant may be executed within five days after issuance. Circumstances which justify noncompliance with the rule of announcement when the warrant was obtained might change after the judge's evaluation and before the officer's entry. If the warrant authorizes a no-knock entry, officers may forego announcement unless between the time of the issuance of the warrant and its execution new information has come to the officers' attention that would obviate the need to enter without complying with the rule of announcement.



First Circuit has held that when a judicial officer issues a no-knock warrant, *Leon* is applicable. See *United States v Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998). Specifically, the Court will not exclude evidence discovered pursuant to a no-knock warrant if the executing officers are objectively reasonable in their reliance on such a warrant, even if the judicial officer should have required a more particularized showing of exigent circumstances.”).

Although it might be argued that there is some tension between the above-quoted holdings in *Singer* (a no-knock warrant’s authority can be vitiated by the officers’ intervening receipt of reliable information that the factual basis for exigent circumstances no longer exists) and *Spry* (officers are not obligated to make an independent determination of exigent circumstances when they execute a no-knock warrant), we think the decisions are easily reconcilable and that the distinctions drawn by the cases are reasonably clear. Although officers need not take affirmative steps to make an independent re-verification of the circumstances already recognized by a magistrate in issuing a no-knock warrant, such a warrant does not entitle officers to disregard reliable information clearly negating the existence of exigent circumstances when they actually receive such information before execution of the warrant.<sup>14</sup>

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<sup>14</sup> Our conclusion is consistent with the Supreme Court’s observations in *Leon* regarding an officer’s permissible reliance on a magistrate’s determination of probable cause when executing a search warrant. As the Court stated: “In the ordinary case, an officer cannot be expected to question the magistrate’s probable cause determination . . . [O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.” 468 U.S. at 921 (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976)). The Court added, however, that the officer’s reliance on the magistrate’s probable cause determination must be “objectively reasonable” for purposes of the good-faith exception to the exclusionary rule. *Id.* at 922.

# Survey of the Law of Expatriation

Expatriating a U.S. citizen subject to the Citizenship Clause of the Fourteenth Amendment on the ground that, after reaching the age of 18, the person has obtained foreign citizenship or declared allegiance to a foreign state generally will not be possible absent substantial evidence, apart from the act itself, that the individual specifically intended to relinquish U.S. citizenship. An express statement of renunciation of U.S. citizenship would suffice.

An intent to renounce citizenship can be inferred from the act of serving in the armed forces of a foreign state engaged in hostilities against the United States.

June 12, 2002

## MEMORANDUM OPINION FOR THE SOLICITOR GENERAL

You have asked us for a general survey of the laws governing loss of citizenship, a process known as “expatriation” (also known within the specific context of naturalized citizens as “denaturalization”). *See, e.g., Perkins v. Elg*, 307 U.S. 325, 334 (1939) (“Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.”). Part I of this memorandum provides a general description of the expatriation process. Part II notes the relative difficulty of expatriating a person on the grounds that he has either obtained naturalization in, or declared allegiance to, a foreign state, absent evidence of a specific intention to relinquish U.S. citizenship apart from the act of naturalization or declaration itself. Part III analyzes the expatriation of a person who serves in a foreign armed force engaged in hostilities against the United States.<sup>1</sup>

### I. Law of Expatriation

It is now well settled that anyone may renounce his United States citizenship.<sup>2</sup> “In 1794 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship. By 1818, however, almost no one doubted the existence of the right of voluntary expatriation . . .” *Afroyim v. Rusk*, 387 U.S. 253, 258 (1967) (footnote omitted).<sup>3</sup> In 1868, Congress declared that “the right of

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<sup>1</sup> Editor’s Note: The original footnote 1 has been removed in order to preserve the confidentiality of internal government deliberations.

<sup>2</sup> Hundreds of American citizens renounce their citizenship every year. *See* Richard A. Westin, *Expatriation and Return: An Examination of Tax-Driven Expatriation by United States Citizens, and Reform Proposals*, 20 Va. Tax Rev. 75, 98 (2000) (listing annual renunciation rates for 1980-1994).

<sup>3</sup> *See also Right of Expatriation*, 9 Op. Att’y Gen. 356, 358 (1859) (“the general right, in one word, of expatriation, is incontestible”); *Savorgnan v. United States*, 338 U.S. 491, 497 (1950) (“Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people.”); *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958) (Black, J., concurring) (“Of course a citizen has the

expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.” Act of July 27, 1868, ch. 249, pmb., 15 Stat. 223, 223; *see also* 8 U.S.C. § 1481 note (2000) (quoting Rev. Stat. § 1999 (2d. ed. 1878), 18 Stat. pt. 1, at 350 (repl. vol.)) (same). That declaration further stated that “any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.” 15 Stat. at 224. Similarly, the Burlingame Treaty of 1868 between the United States and China recognized “the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of . . . free migration and emigration . . . for purposes of curiosity, of trade, or as permanent residents.” U.S.-China, art. 5, July 28, 1868, 16 Stat. 739, 740. Congress provided specific legislative authority for nullifying citizenship when, in 1907, it enacted the predecessor of the modern federal expatriation statute. *See* Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228. As the Supreme Court has noted, such acts of Congress “are to be read in the light of [Congress’s 1868] declaration of policy favoring freedom of expatriation which stands unrepealed.” *Savorgnan v. United States*, 338 U.S. 491, 498-99 (1950).

By virtue of its express power “[t]o establish an uniform Rule of Naturalization,” U.S. Const. art. I, § 8, cl. 4, Congress has an implied power to set the terms of U.S. citizenship, including the power to expatriate.<sup>4</sup> But that power is limited by

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right to abandon or renounce his citizenship . . .”); *Lozada Colon v. Dep’t of State*, 2 F. Supp. 2d 43, 45 (D.D.C. 1998) (assuming that “an individual has a fundamental right to expatriate”).

<sup>4</sup> It was once thought that, because the Naturalization Clause contained no express provision for congressional power to expatriate a U.S. citizen against his will, no such authority existed. U.S. Const. art. I, § 8, cl. 4. As Chief Justice Marshall stated in dictum in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), “[a] naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.” *Id.* at 827. In *Perez v. Brownell*, 356 U.S. 44 (1958), the Court found an inherent federal power, beyond the express terms of the Constitution, to forcibly expatriate U.S. citizens, as a necessary attribute of sovereignty. *Id.* at 57 (concluding that power to expatriate necessarily arose out of federal power to conduct foreign relations (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936))). That view was abrogated, however, in *Afroyim*, 387 U.S. at 257 (“This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. . . . Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.”).

Under the Court’s current jurisprudence, the Naturalization Clause empowers Congress to expatriate U.S. citizens without obtaining their consent, but only with respect to naturalized citizens who fall outside the protection of the Citizenship Clause of the Fourteenth Amendment. Individuals not protected by the Citizenship Clause acquire U.S. citizenship, if at all, solely by an act of Congress enacted pursuant to the Naturalization Clause, and not pursuant to the Constitution itself. *See Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (Citizenship Clause does “not touch[] the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always

the Citizenship Clause of the Fourteenth Amendment. That provision states that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1.<sup>5</sup> As that clause has been construed by the Supreme Court at least since 1967, the United States may not deprive a person “born or naturalized in the United States” of his U.S. citizenship “‘unless he voluntarily relinquishes it.’” *Vance v. Terrazas*, 444 U.S. 252, 260 (1980) (quoting *Afroyim*, 387 U.S. at 262).<sup>6</sup> Forced expatriation has also been thought to violate other provisions of the Constitution. See *Trop v. Dulles*, 356 U.S. 86, 101, 102, 103 (1958) (plurality opinion) (“[U]se of denationalization as a punishment is barred by the Eighth Amendment. . . . The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . . [T]he Eighth Amendment forbids Congress to punish by taking away citizenship . . . .”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963) (striking down as unconstitutional “the sanction of deprivation of nationality as a punishment . . . without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments”). Accordingly, at least since the Supreme Court’s ruling in *Afroyim v. Rusk*, 387 U.S. 253 (1967), it is no longer constitutionally sufficient that a person who was born or naturalized in the United States has voluntarily engaged in conduct deemed by law to be an act of expatriation. The person must also undertake such an act with the specific intention to relinquish his U.S.

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been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization”) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898)); see also *infra* note 6. With respect to such individuals, Congress’s power under the Naturalization Clause includes the power to set conditions subsequent to naturalization, failure of which may result in expatriation without consent. See *Bellei*, 401 U.S. at 834 (“it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress [in exercising its authority under the Naturalization Clause] may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent”).

<sup>5</sup> By its express terms, the Citizenship Clause does not protect persons who acquire U.S. citizenship by virtue of being born abroad to parents, at least one of whom is a U.S. citizen, because such persons are not “born or naturalized in the United States.” U.S. Const. amend. XIV, § 1 (emphasis added). See *Rogers v. Bellei*, 401 U.S. 815, 827 (1971).

<sup>6</sup> Prior to *Afroyim*, the Court had held precisely the opposite view—namely, that nothing in the Constitution prevents U.S. citizens from forfeiting their citizenship, against their will, for voluntarily engaging in certain kinds of conduct, such as voting in a foreign election. That view was restated most recently in *Perez v. Brownell*, 356 U.S. 44 (1958). See, e.g., *id.* at 58 n.3; *id.* at 61; see also *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915); *Savorgnan*, 338 U.S. at 499-500. Three justices who dissented in *Perez*, however, concluded that the Citizenship Clause prohibits expatriation absent the citizen’s assent. See *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting). In 1967, the Court expressly overruled *Perez* by a 5-4 vote in *Afroyim*. See *Afroyim*, 387 U.S. at 257 (“we reject the idea expressed in *Perez* that . . . Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent”); *id.* at 262-63 (noting that primary purpose of the Citizenship Clause was to prevent Congress from stripping blacks of U.S. citizenship). Not a single justice suggested a return to *Perez* when the Court revisited the issue of expatriation in 1980. See *Vance v. Terrazas*, 444 U.S. 252 (1980).

citizenship. See *Terrazas*, 444 U.S. at 263 (requiring that “the expatriating act [be] accompanied by an intent to terminate United States citizenship”). “[B]ecause of the precious nature of citizenship, it can be relinquished only voluntarily, and not by legislative fiat.” *Jolley v. INS*, 441 F.2d 1245, 1248 (5th Cir. 1971).

Under current federal law, any party claiming that a person has abandoned his U.S. citizenship must establish three elements. See 8 U.S.C. § 1481 (2000). First, the person must take one of the statutorily enumerated acts of expatriation, such as “obtaining naturalization in” or “taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state” after reaching the age of 18, “entering, or serving in, the armed forces of a foreign state . . . engaged in hostilities against the United States,” or formal renunciation before an appropriate United States official. 8 U.S.C. § 1481(a).<sup>7</sup> Second, he must act “voluntarily.” *Id.* See also *Nishikawa*, 356 U.S. at 133 (“no conduct results in expatriation unless the conduct is engaged in voluntarily”). Third, he must act “with the intention of relinquishing United States nationality.” 8 U.S.C. § 1481(a).<sup>8</sup> Expatriation occurs “at the time the expatriating acts were committed, not at the time his alienage was judicially determined.” *United States ex rel. Marks v. Esperdy*, 315 F.2d 673, 676 (2d Cir. 1963), *aff’d by an equally divided court*, 377 U.S. 214 (1964); see also 8 U.S.C. § 1488 (2000) (“The loss of nationality under this part shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this part.”).

Formal renunciation<sup>9</sup> is therefore not the only way in which a U.S. citizen may express his “intention of relinquishing United States nationality.” 8 U.S.C.

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<sup>7</sup> The statute’s list of acts of expatriation appears to be exhaustive. See 8 U.S.C. § 1488 (2000) (“The loss of nationality under this part shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this part.”). But see *Kawakita v. United States*, 343 U.S. 717, 731-32 (1952) (declining to resolve whether other acts of expatriation may be available).

<sup>8</sup> Additional restrictions on expatriation, not apparently relevant here, are enumerated in 8 U.S.C. § 1483 (2000). First, “[e]xcept as provided in paragraphs (6) and (7) of section 1481(a) of this title, no national of the United States can lose United States nationality under this chapter while within the United States or any of its outlying possessions, but loss of nationality shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this Part if and when the national thereafter takes up a residence outside the United States and its outlying possessions.” 8 U.S.C. § 1483(a). Second, “[a] national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have lost United States nationality by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (3) and (5) of section 1481(a) of this title.” 8 U.S.C. § 1483(b).

<sup>9</sup> Federal law establishes two separate mechanisms through which an individual may formally renounce U.S. citizenship. First, a citizen may make a formal renunciation of U.S. nationality “before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.” 8 U.S.C. § 1481(a)(5) (emphasis added). See also 22 C.F.R. § 50.50(a) (2001) (“A person desiring to renounce U.S. nationality under section 349(a)(5) of the Immigration and Nationality Act [8 U.S.C. § 1481(a)(5)] shall appear before a diplomatic or consular officer of the

§ 1481(a). An intention to abandon citizenship can also be manifested through various categories of conduct. *See Terrazas*, 444 U.S. at 260 (“intent to relinquish citizenship . . . [can be] expressed in words or . . . found as a fair inference from proved conduct”); *Expatriation—Effect of Afroyim v. Rusk*, 387 U.S. 253, 42 Op. Att’y Gen. 397, 400 (1969) (“‘Voluntary relinquishment’ of citizenship is not confined to a written renunciation . . . . It can also be manifested by other actions declared expatriative under the act . . . .”). Thus, although the performance of an expatriating act cannot be used as “the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen,” the Supreme Court has held that such conduct “may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.” *Terrazas*, 444 U.S. at 261 (quotations omitted). So long as “the trier of fact . . . conclude[s] that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship,” the statutory requirements for expatriation have been met. *Id.* Lower courts have similarly held that “specific subjective intent to

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United States in the manner and form prescribed by the Department.”). By its terms, renunciation under 8 U.S.C. § 1481(a)(5) can only occur outside the United States. For purposes of this provision,

[t]he State Department has issued a form, “Oath of Renunciation of the Nationality of the United States” (the “oath”) for the purpose of enabling formal renunciation to occur. The renunciant must sign the oath and swear to its contents. The renunciant must swear that “I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(5) of the Immigration and Nationality Act [8 U.S.C. § 1481(a)(5)] and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.” The oath is accompanied by a “Statement of Understanding” (the “statement”), which the renunciant must also sign. The statement declares, in part, that “Upon renouncing my citizenship I will become an alien with respect to the United States, subject to all the laws and procedures of the United States regarding entry and control of aliens,” that “If I do not possess the nationality of any country other than the United States, upon my renunciation I will become a stateless person and may face extreme difficulties in traveling internationally and entering most countries.” The statement also permits or invites the renunciant to “make a separate written explanation of my reasons for renouncing my United States citizenship.” The executed papers are then forwarded to the State Department together with a diplomatic or consular report.

Letter for Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, Department of State, from Todd David Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Voluntary Expatriation of Puerto Rican Nationalists* at 1-2 (Oct. 31, 1997).

Alternatively, a citizen may formally renounce “in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense.” 8 U.S.C. § 1481(a)(6). This provision appears to permit formal renunciation within the United States. Although there is currently no regulation for accepting a formal renunciation within the United States pursuant to this provision, we believe that no such regulation is necessary. The statute only states that the Attorney General shall prescribe a “form” for renunciation pursuant to 8 U.S.C. § 1481(a)(6). We see no reason why such a form could not be produced at the time a U.S. citizen seeks renunciation pursuant to that provision.

renounce United States citizenship . . . may [be] prove[d] . . . by evidence of an explicit renunciation, acts inconsistent with United States citizenship, or by affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality.” *King v. Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972) (citations and quotations omitted). “Specific intent may . . . be proven by evidence of what steps the alleged expatriate did or did not take in connection with his expatriating acts.” *United States v. Schiffer*, 831 F. Supp. 1166, 1194 (E.D. Pa. 1993), *aff’d without op.*, 31 F.3d 1175 (3d Cir. 1994).

The party claiming that a person has lost his U.S. citizenship has the burden to prove by a preponderance of the evidence the performance of an act of expatriation and the intention to relinquish citizenship. 8 U.S.C. § 1481(b); *Terrazas*, 444 U.S. at 268; *see also id.* at 264-67 (upholding preponderance of the evidence standard of proof against constitutional attack). Although any person who performs an act of expatriation is presumed to have done so voluntarily, that presumption can be rebutted with proof by a preponderance of the evidence that the act was performed involuntarily. 8 U.S.C. § 1481(b); *see also Terrazas*, 444 U.S. at 267-70 (upholding voluntariness presumption against constitutional attack).

Factual doubts in expatriation cases “are to be resolved in favor of citizenship.” *Bruni v. Dulles*, 235 F.2d 855, 856 (D.C. Cir. 1956). *See also Nishikawa*, 356 U.S. at 136 (“Rights of citizenship are not to be destroyed by an ambiguity.”) (quoting *Elg*, 307 U.S. at 337); *Nishikawa*, 356 U.S. at 136 (“evidentiary ambiguities are not to be resolved against the citizen”). In cases of legal ambiguity, we have previously concluded that the State Department has, as the agency charged with the implementation of the expatriation statute, the discretion to select from among reasonable interpretations of the statute. Letter for Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, Department of State, from Todd David Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Voluntary Expatriation of Puerto Rican Nationalists* at 3 (Oct. 31, 1997) (concluding that *Chevron* deference applies to State Department decisions “to apply the construction of the statute that it believes is most consistent with the policies underlying the statute”). *But see Savorgnan*, 338 U.S. at 498-99 (concluding that expatriation statutes “are to be read in the light of [Congress’s 1868] declaration of policy favoring freedom of expatriation which stands unrepealed”).

The issue of expatriation can arise in litigation in a number of different ways. “Since United States citizenship is considered by most to be a prized status, it is usually the government which claims that the citizen has lost it, over the vigorous opposition of the person facing the loss.” *United States v. Matheson*, 532 F.2d 809, 811 (2d Cir. 1976). Moreover, the Executive Branch need not seek a judicial determination that a particular individual has expatriated. It can simply treat that individual as an alien by denying him a right of U.S. citizenship and, if that action is challenged in court, defend that action on the ground that the individual is no

longer a U.S. citizen. For example, any individual who is issued a certificate of loss of citizenship by the State Department pursuant to 8 U.S.C. § 1501 (2000),<sup>10</sup> or who is denied a right or privilege of a U.S. citizen by a government agency (such as a U.S. passport, *see, e.g., Nishikawa*, 356 U.S. at 131) on the ground that he is not a citizen of the United States, may file a declaratory judgment action in federal court under 28 U.S.C. § 2201 for a declaration that he is in fact a national of the United States. 8 U.S.C. § 1503(a) (2000). *See, e.g., Terrazas*, 444 U.S. at 256 (section 1503 suit filed following issuance of certificate of loss of nationality). Alternatively, a person might claim U.S. citizenship through a petition for a writ of habeas corpus challenging, for example, a deportation action. *See, e.g., Marks*, 315 F.2d at 675.<sup>11</sup>

On the other hand, a U.S. citizen who is accused of treason might claim that he had renounced his U.S. citizenship before undertaking his allegedly treasonous acts and was therefore legally incapable of committing the crime of treason against

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<sup>10</sup> Under federal law, “[w]henver a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under [8 U.S.C. §§ 1481-1489], he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State [currently codified at 22 C.F.R. §§ 50.40(b)-(e), 50.50(b), 50.51 (2001)].” 8 U.S.C. § 1501 (2000). *See also* 22 C.F.R. §§ 50.40(c) (2001) (same).

For purposes of these provisions, a “consular officer” is “any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter [8 U.S.C. § 1401-1504] for the purpose of adjudicating nationality.” 8 U.S.C. § 1101(a)(9) (2000). The regulations governing the adjudication of nationality, 22 C.F.R. §§ 50.1 to 50.51, do not appear to define “consular officer.” According to the regulations governing the issuance of immigrant or nonimmigrant visas (which do not apply to the regulations governing the adjudication of nationality), the term “[c]onsular officer . . . includes commissioned consular officers and the Deputy Assistant Secretary for Visa Services, and such other officers as the Deputy Assistant Secretary may designate for the purpose of issuing nonimmigrant and immigrant visas, but does not include a consular agent, an attache or an assistant attache. . . . [T]he term ‘other officers’ includes civil service visa examiners employed by the Department of State for duty at visa-issuing offices abroad, upon certification by the chief of the consular section under whose direction such examiners are employed that the examiners are qualified by knowledge and experience to perform the functions of a consular officer in the issuance or refusal of visas. . . . The assignment by the Department of any foreign service officer to a diplomatic or consular office abroad in a position administratively designated as requiring, solely, partially, or principally, the performance of consular functions, and the initiation of a request for a consular commission, constitutes designation of the officer as a ‘consular officer’ within the meaning of [8 U.S.C. § 1101(a)(9)].” 22 C.F.R. § 40.1(d) (2001).

<sup>11</sup> In addition, any United States Attorney can file an action in federal court “for the purpose of revoking and setting aside the order admitting [a] person to citizenship and canceling the certificate of naturalization” previously granted to a person seeking U.S. citizenship. 8 U.S.C. § 1451(a) (2000). Such denaturalization actions are appropriate where “such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation,” and thus are not directly related to expatriation. *Id.* Nevertheless, expatriation issues have been squarely raised during the course of denaturalization proceedings, for example, to explain the circumstances causing a natural born citizen to seek naturalization in the first place. *See, e.g., Schiffer*, 831 F. Supp. at 1169.



the United States. The assertion of such a defense would require a court to determine whether or not the defendant had in fact renounced his citizenship. *See, e.g., Kawakita v. United States*, 343 U.S. 717, 722 (1952) (noting defense argument that acquittal on treason charge is required “since his duty of allegiance would have ceased with the termination of his American citizenship”). Similarly, one might claim loss of citizenship to avoid liability under U.S. tax laws. *See, e.g., Matheson*, 532 F.2d at 811 (“Here the estate of a wealthy deceased United States citizen seeks to establish over the government’s opposition that she expatriated herself. As might be suspected, the reason is several million dollars in tax liability, which the estate might escape if it could sustain the burden of showing that the deceased lost her United States citizenship.”).

## **II. Foreign Naturalization or Declaration of Foreign Allegiance**

Under federal law, a U.S. citizen can lose his nationality if he voluntarily “obtain[s] naturalization in a foreign state . . . after having attained the age of eighteen years.” 8 U.S.C. § 1481(a)(1). Likewise, a citizen of the United States could be expatriated if he voluntarily “tak[es] an oath or mak[es] an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years.” *Id.* § 1481(a)(2). In either case, however, no loss of citizenship may result unless the citizen acts “with the intention of relinquishing United States nationality.” *Id.* § 1481(a).

The most common obstacle to expatriation in cases involving foreign naturalization or declaration of foreign allegiance is sufficient proof of a specific intention to renounce U.S. citizenship. Intent need not be proved with direct evidence, to be sure. It can be demonstrated circumstantially through conduct. Thus, in some cases, such as service in a hostile foreign military at war with the United States, the act of expatriation itself may even constitute “highly persuasive evidence . . . of a purpose to abandon citizenship.” *Terrazas*, 444 U.S. at 261 (quotations omitted). *See generally infra* Part III. Because, however, both foreign naturalization and declaration of foreign allegiance are, with respect to U.S. citizenship, more ambiguous acts, they constitute weaker evidence of “a purpose to abandon citizenship.” *Terrazas*, 444 U.S. at 261 (quotations omitted).

Dual nationality, the Supreme Court has explained, is “a status long recognized in the law.” *Kawakita*, 343 U.S. at 723. *See also id.* at 734 (“Dual nationality . . . is the unavoidable consequence of the conflicting laws of different countries. One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it.”) (citation omitted); *Savorgnan*, 338 U.S. at 500 (although “[t]he United States has long recognized the general undesirability of dual allegiances[,] . . . [t]emporary or limited duality of citizenship has arisen inevitably from differences in the laws of the respective nations as to when naturalization and expatriation shall become effective”); *Elg*,

307 U.S. at 329 (“As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality.”). The mere assertion by an individual of citizenship in one country thus need not manifest an intention to relinquish citizenship in another country, for “[t]he concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other.” *Kawakita*, 343 U.S. at 723-24.

Current federal regulations thus establish an administrative presumption under which “U.S. citizens who naturalize in” or “take a routine oath of allegiance” to a foreign country “need not submit evidence of intent to retain U.S. nationality.” 22 C.F.R. § 50.40(a). In such cases, “intent to retain U.S. citizenship will be presumed.” *Id.* “In other loss of nationality cases,” by contrast, such as those involving service in a hostile foreign military, federal regulations erect no such presumption; instead, “the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.” *Id.*

Relevant case law reflects a similarly cautious attitude towards expatriation based on foreign naturalization or declaration of foreign allegiance. In a number of cases, courts have held that a declaration of foreign allegiance was alone insufficient to manifest an intention to renounce U.S. citizenship, because such assertions are frequently consistent with the maintenance of dual U.S.-foreign citizenship. In *Kawakita*, for example, the Supreme Court held that the defendant, a dual Japanese-U.S. national, had failed even to commit an act of expatriation, let alone manifest the requisite intention to renounce, even though he had expressed his allegiance to Japan. The Court noted that, because “all Japanese nationals, whether or not born abroad, are duty bound [under then-Japanese law] to Japanese allegiance,” the mere act of “registering in the Koseki [an official Japanese census register] is ‘not necessarily a formal declaration of allegiance but merely a reaffirmation of an allegiance to Japan which already exists.’” 343 U.S. at 724 (quoting expert deposition).<sup>12</sup>

Likewise, in *United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976), the Second Circuit affirmed the U.S. citizenship of the decedent, Dorothy Gould

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<sup>12</sup> Mr. Kawakita had been tried and convicted of treason for beating and inflicting other acts of cruelty upon American prisoners of war held in Japan. *Id.* at 737-40. The Supreme Court affirmed the conviction after rejecting Kawakita’s contention that he was no longer a U.S. citizen and therefore did not owe allegiance to the United States, one of the elements of a treason offense. *Id.* at 722. As noted above, Kawakita failed to persuade the Court that his expression of allegiance to Japan constituted grounds for expatriation. In addition, the Court rejected Kawakita’s argument that he had effectively “serv[ed] in the Japanese armed services,” another statutorily enumerated act of expatriation. *Id.* at 727 (quotations omitted). The Court instead found that Kawakita was merely an interpreter employed by a private Japanese company, and not a soldier in the Japanese army, for purposes of the expatriation statute. *Id.* (“Though petitioner took orders from the military, he was not a soldier in the armed services . . . His employment was as an interpreter for . . . a private company.”).

Burns, a U.S. natural born citizen who later became a Mexican citizen by virtue of her marriage to a Mexican national, even though she had sworn an oath stating that “I expressly renounce all protection foreign to said laws and authorities [of Mexico] and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic [of Mexico] any right inherent in my nationality of origin.” *Id.* at 816. The court first noted that “there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen.” *Id.* at 814. Applying that rule, the court concluded that Burns’s oath expressed “merely a subscription to a basic principle of international law governing dual nationality: that a national of one country (e.g., United States) may not look to it for protection while she is in another country (e.g., Mexico), of which she is also a national,” a principle that “has repeatedly been recognized by the Supreme Court of the United States.” *Id.* at 816. The court further noted that

[h]ad Mrs. Burns wished to expatriate herself she could simply have unequivocally stated that she renounced her American citizenship. Instead, she used language to the effect that as a Mexican national she could not claim her rights as a United States citizen ‘with respect to the Government of the Republic [of Mexico] . . . .’ This limited surrender did not preclude her from claiming rights as a United States citizen outside of Mexico. Indeed, once outside of Mexico she did not hesitate, consistent with this interpretation of her 1944 declaration, to invoke important rights and privileges inherent in her United States birthright. Thus we must conclude that the 1944 declaration amounted to nothing more than a statement of dual nationality.

*Id.* (citations omitted). The Ninth Circuit concluded in *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972), that Elihu King was no longer a U.S. citizen. The court noted that, “to obtain British naturalization, King took an oath of allegiance to Queen Elizabeth II.” *Id.* at 1189. That act “alone,” however, was “insufficient to prove renunciation,” although it did “provide[] substantial evidence of intent.” *Id.* To reach its ultimate conclusion that Mr. King had renounced his U.S. citizenship, the court relied on other statements in which he demonstrated that he considered himself no longer to be a U.S. citizen as the result of his British naturalization. *See id.* at 1190 (“These statements indicate that while King never formally renounced his United States citizenship, he intended to do so when he became a naturalized British subject, and that he would do so at any time to ‘simplify’ matters.”). *See also In re Balsamo*, 306 F. Supp. 1028, 1033 (N.D. Ill. 1969) (although “[n]early all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship,” the Constitution requires that one “voluntarily

abandon or relinquish his United States citizenship”); *cf. Baker v. Rusk*, 296 F. Supp. 1244, 1246 (C.D. Cal. 1969) (“It would seem evident that any time a person takes an oath of allegiance to the sovereign of the country in which he is then residing, he gives substantial indication that he considers himself to be a national of that country and that he has relinquished any prior citizenship. However, this is not inevitably so . . .”).

An oath of allegiance to a foreign country that includes an express statement of intention to renounce United States citizenship is likely to result in expatriation. For example, in *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981), the Seventh Circuit concluded that Laurence Terrazas, a U.S. natural born citizen who had also acquired Mexican citizenship at birth by virtue of his father’s Mexican citizenship, had adequately manifested an intention to renounce when, at age 22, he executed an application for a certificate of Mexican nationality. *Id.* at 286. That application, the court concluded, contained a statement not only asserting foreign nationality, but also expressly renouncing United States citizenship:

I therefore hereby expressly renounce \_\_\_\_ citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of \_\_\_\_, of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

*Terrazas*, 444 U.S. at 255 n.2. “The blank spaces in the statement were filled in with the words ‘Estados Unidos’ (United States) and ‘Norteamerica’ (North America), respectively.” *Id.* The court thus concluded that “there is abundant evidence that plaintiff intended to renounce his United States citizenship when he acquired the Certificate of Mexican Nationality willingly, knowingly, and voluntarily.” *Terrazas*, 653 F.2d at 288. In addition to the statement itself, the court noted, *inter alia*, the timing of Terrazas’s actions, which suggested that he was attempting to avoid U.S. military service. *Id.* at 288-89. Terrazas also never took steps to reverse his application, even after he had received his certificate of Mexican nationality, *id.* at 288, which also expressly recited his renunciation of any other citizenship, *id.* at 286.

In sum, expatriating an individual on the ground that, after reaching the age of 18, a person has obtained foreign citizenship or declared allegiance to a foreign state generally will not be possible absent substantial evidence, apart from the act itself, that the individual specifically intended to relinquish U.S. citizenship. An express statement of renunciation of U.S. citizenship would suffice.

### III. Service in a Hostile Foreign Armed Force

An individual who voluntarily “enter[s], or serv[es] in, the armed forces of a foreign state”<sup>13</sup> may be expatriated, “if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or non-commissioned officer.” 8 U.S.C. § 1481(a)(3). Nonetheless, no person may be expatriated unless he acts “with the intention of relinquishing United States nationality.” 8 U.S.C. § 1481(a). That said, although the performance of an expatriating act cannot be used as “the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen,” such conduct “may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.” *Terrazas*, 444 U.S. at 261 (quotations omitted).

Voluntary service in a foreign armed force that is engaged in hostilities against the United States has frequently been viewed as a particularly strong manifestation of an intention to abandon citizenship. As Attorney General Clark once opined, “it is highly persuasive evidence, to say the least, of an intent to abandon United States citizenship if one enlists voluntarily in the armed forces of a foreign government engaged in hostilities against the United States.” *Expatriation*, 42 Op. Att’y Gen. at 401. *See also* 22 C.F.R. § 50.40(a) (although “intent to retain U.S. citizenship will be presumed” when an individual “naturalize[s] in a foreign country” or “take[s] a routine oath of allegiance,” no such presumption is provided “[i]n other loss of nationality cases”).

Lower federal courts have expressed a similar view. It bears noting that most of the cases involving expatriation on the ground of service in a foreign armed force were decided prior to 1967,<sup>14</sup> when the Supreme Court announced in *Afroyim v. Rusk*, 387 U.S. 253 (1967), that the Citizenship Clause of the Fourteenth Amendment protects all individuals “born or naturalized in the United States” against expatriation absent a demonstration of specific intention to relinquish U.S. citizenship. In at least two relatively recent decisions, however, courts have concluded that the requisite intention to renounce U.S. citizenship can be *inferred* from the act of serving in an armed force engaged in hostilities against the United States.

In *United States v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993), *aff’d without op.*, 31 F.3d 1175 (3d Cir. 1994), the government brought a denaturalization action against Nikolaus Schiffer, a U.S.-born citizen who had previously been expatriated

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<sup>13</sup> Assuming that the Taliban represents the “armed forces” of Afghanistan for purposes of the Third Geneva Convention of 1949, the President has concluded that the Taliban does not satisfy at least three of the four requirements of lawful combat, and therefore that Taliban fighters are ineligible for treatment as prisoners of war under the Convention. *See Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, 26 Op. O.L.C. 1, 2-4 (2002).

<sup>14</sup> *See, e.g., United States ex rel. Marks v. Esperdy*, 315 F.2d 673 (2d Cir. 1963), *aff’d by an equally divided court*, 377 U.S. 214 (1964) (expatriation due to service in Fidel Castro’s Rebel Army).

for his service as a member of the Romanian army and a guard at concentration camps during World War II, but who subsequently and successfully sought naturalization. Schiffer was born in Philadelphia, Pennsylvania, to non-citizen parents in 1919, but in 1920 he moved with his parents to Moravitz, Romania, where he maintained dual U.S. and Romanian citizenship as a minor. In 1940, he voluntarily presented himself for registration for the Romanian Army, even though Romania did not permit United States citizens bearing dual Romanian citizenship to serve in the Romanian Army. In 1941, he reported for basic training for Romanian Army service and, like his fellow soldiers, swore an oath of allegiance to the Romanian monarch, King Carol II. That December, Romania declared war on the United States. The defendant served in the Romanian Army until 1943. 831 F. Supp. at 1169-71. In 1943, he volunteered to serve in the Waffen-SS Totenkopf Sturmabteilung (Death's Head Battalion), an elite Nazi force, and like his fellow SS members, swore an oath of allegiance to Adolf Hitler. In that capacity, the defendant served as a concentration camp guard until 1945. As a concentration camp guard, he never requested a transfer or refused any assignment. *Id.* at 1175-76. In 1945, he was captured and held by U.S. Armed Forces as a prisoner of war. The next year, he was discharged as a prisoner of war and arrested by U.S. authorities as a suspected war criminal. He was released in 1947. *Id.* at 1180-81. In 1952, the State Department executed a certificate of loss of citizenship to the defendant. The next year, he obtained an immigrant visa and was admitted to the United States accordingly. *Id.* at 1183-84. In 1958, he applied for naturalization. His application failed to disclose fully, however, his prior service and detention as a suspected war criminal. His naturalization application was approved on the basis of his misrepresentations, and a federal district court issued the defendant a certificate of naturalization. *Id.* at 1184-85.

In 1993, the same district court granted the government's request for an order canceling Schiffer's 1958 naturalization certificate. *Id.* at 1206. The court reasoned that the defendant, a natural born U.S. citizen, had relinquished his citizenship and then procured his naturalization through misrepresentation. Notably, the court justified its expatriation determination by noting that an intention to renounce U.S. citizenship could easily be inferred from the defendant's service in a hostile foreign army at war with the United States:

We find Schiffer's intent to renounce his United States citizenship was manifested by his conduct prior to and upon entering and serving in the Romanian army and swearing allegiance to King Carol II, his conduct upon voluntarily entering and serving in the *Waffen-SS* and swearing allegiance to Adolf Hitler, and his conduct immediately following the war.

At least from his teenage years, Schiffer knew that he was an American citizen and, as such, was exempt from military service. . . . Schiffer failed to take any action whatsoever despite knowing that Romania was at war with the United States. *We can think of no conduct more repugnant to an intent to retain American citizenship or more demonstrative of an intent to relinquish American citizenship than voluntary service in the armed forces of a country at war with the United States. . . . Schiffer's conduct in voluntarily joining the Romanian army is so obnoxious to an intent to retain United States citizenship that, in the absence of credible proof to the contrary, we can infer his intent to relinquish his United States citizenship.*

*Id.* at 1194-95 (emphasis added, citations omitted). The court's decision was affirmed on appeal without opinion. 31 F.3d 1175.

The Third Circuit took a similar view of service in a hostile foreign army in *Breyer v. Meissner*, 214 F.3d 416 (3d Cir. 2000). Like Schiffer, Johann Breyer joined the Death's Head Battalion during World War II. *See id.* at 418-19. The court first determined that Johann Breyer was entitled to citizenship at birth. Although he was born in Czechoslovakia in 1925, his mother was an American citizen. At the time, federal law granted citizenship at birth to children born abroad to fathers who are American citizens, but not to children born abroad to foreign fathers and mothers who are citizens of the United States. The court held the law unconstitutional and concluded that Breyer was entitled to citizenship at birth. *Id.* at 429. The court then remanded the case back to the district court to determine whether Breyer remained a U.S. citizen, in light of his activities during World War II. In doing so, the court expressly pointed out that Breyer's decision to join the Death's Head Battalion could constitute a renunciation of American citizenship, *regardless of whether he was even aware of his entitlement to U.S. citizenship at the time:*

[T]he knowing commitment made by a member of the Death's Head Battalion, during a period when Germany was at war with the United States, demonstrates a loyalty to the policies of Nazi Germany that is wholly inconsistent with American citizenship. Although when he took his oath of allegiance first to the Waffen SS and then to the Death's Head Battalion, Johann Breyer was not aware of his right to American citizenship, one could conclude that he voluntarily made a commitment that, had he known of this right, clearly would have repudiated it. . . . Johann Breyer may have made such a disclaimer of allegiance to the United States by a voluntary enlistment in the Waffen SS and then again in the Death's Head Battalion . . . .

... If these acts were voluntary, ... the court must determine whether they were performed with an intent to relinquish citizenship. *We conclude that a voluntary oath of allegiance to a nation at war with the United States and to an organization of that warring nation that is committed to policies incompatible with the principles of American democracy and the rights of citizens protected by the American constitution—an organization such as the Death’s Head Battalion—is an unequivocal renunciation of American citizenship whether or not the putative citizen is then aware that he has a right to American citizenship.*

*Id.* at 431 (emphasis added). Accordingly, the court remanded the case

to determine if [Breyer’s] actions constitute a voluntary and unequivocal renunciation of any possible allegiance to the United States of America, a renunciation made in a time of war against the United States that demonstrated an allegiance to Nazi Germany and a repudiation of any loyalty—citizen or not—to the United States. *Cf. Perez v. Brownell*, 356 U.S. 44, 68, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958) (Warren, C.J., dissenting and stating that *some actions “may be so inconsistent with the retention of citizenship as to result in loss of that status.”*). On remand, the District Court must determine whether Breyer’s acts constitute such a renunciation.

*Id.* (emphasis added). On remand, the district court denied Breyer’s motion for summary judgment on the issue of voluntariness. *Breyer v. Meissner*, No. CIV. A. 97-6515, 2001 WL 1450625 (E.D. Pa. Nov. 16, 2001). According to the last published court order in the case, trial was set for mid-May 2002. *Breyer v. Meissner*, No. CIV. A. 97-6515, 2002 WL 922160, at \*1 (E.D. Pa. May 7, 2002) (“a trial currently is scheduled in this matter for mid-May of this year so that the question of whether Breyer voluntarily relinquished his United States citizenship may be resolved”).

In summary, both the Third Circuit and the district court in *Schiffer* (which the Third Circuit affirmed without opinion) have determined that the act of serving in a foreign armed force engaged in hostilities against the United States may itself manifest a specific intention to relinquish U.S. citizenship.

Finally, we must point out that *involuntary* service in a hostile armed force does not constitute grounds for expatriation, because no person can lose his U.S. citizenship “unless he voluntarily relinquishes it.” *Terrazas*, 444 U.S. at 260 (quoting *Afroyim*, 387 U.S. at 262). As our Office has noted, “conscription into military service, particularly in a totalitarian country, may make such service and any attendant oath of allegiance involuntary, if the individual would otherwise face physical punishment, imprisonment, or economic deprivation.” *Voluntariness*



*of Renunciations of Citizenship Under 8 U.S.C. § 1481(a)(6)*, 8 Op. O.L.C. 220, 229 (1984) (collecting cases). Courts have thus found that certain individuals could not be expatriated on the basis of their conscripted service in a hostile armed force, on the grounds that such service was truly involuntary under the circumstances. *See, e.g., Nishikawa*, 356 U.S. at 136 (“petitioner showed that he was conscripted in a totalitarian country [Japan] to whose conscription law, with its penal sanctions, he was subject”); *Augello v. Dulles*, 220 F.2d 344, 346-47 (2d Cir. 1955) (“fact of the plaintiff’s conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary”). *See also Mandoli v. Acheson*, 344 U.S. 133, 135 (1952) (noting Attorney General’s conclusion that “[t]he choice of taking the oath or violating the law was for a soldier in the army of Fascist Italy no choice at all”) (quotations omitted).

The mere fact of conscription, alone, is not sufficient to defeat the statutory presumption of voluntariness, however. After all,

military service is frequently performed willingly, freely, even voluntarily, although technically there is no enlistment but conscription under a “compulsory” service law. We are not ready to believe that everyone inducted into an army, a navy, or an air force, performs his service solely because of the proximity of the court martial or the police station. Duress cannot be inferred from the mere fact of conscription.

*Acheson v. Maenza*, 202 F.2d 453, 458 (D.C. Cir. 1953) (footnote omitted). *See also United States v. Ciurinkas*, 148 F.3d 729, 734 (7th Cir. 1998) (holding that an individual who had served in the German Order Police during World War II had done so voluntarily, where there was no evidence that he had been conscripted, and where members of his battalion were permanently released from service upon a written request); *United States v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996) (same). As noted in Part I, the presumption of voluntariness must be rebutted with proof by a preponderance of the evidence that the act of expatriation was in fact performed involuntarily. 8 U.S.C. § 1481(b); *see also Terrazas*, 444 U.S. at 267-70 (upholding voluntariness presumption against constitutional attack).

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## **Federal Reserve Board Efforts to Control Access to Buildings and Open Meetings**

The Board of Governors of the Federal Reserve System may, consistent with its obligations under the Government in the Sunshine Act, place observers of an open meeting of the Board in a separate room to watch the meeting on closed-circuit television.

It is permissible under both the Sunshine Act and the Privacy Act for the Board to require disclosure of personal information and satisfaction of a security check as a condition of entering the Board's buildings for access to the separate room to observe an open meeting.

July 9, 2002

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

This memorandum responds to your request for our opinion regarding the permissibility, under the Government in the Sunshine Act ("Sunshine Act") and the Privacy Act, of certain actions that might be taken by the Board of Governors of the Federal Reserve System ("Board").<sup>1</sup> You have asked two questions: First, may the Board place all members of the public who wish to observe an open meeting of the Board in a room that is physically separate from the meeting room, where they can observe and listen to the meeting by closed-circuit television? Second, may the Board screen all members of the public seeking entrance to a Board building to observe an open meeting of the Board, by obtaining personal information and conducting a security check, and refuse admission to those who either refuse to give the information or fail the security check? We conclude that it would be permissible under both the Sunshine Act and the Privacy Act for the Board to engage in these actions.

#### I.

"Because of its status as the world's most important central bank, the prominence of its Chairman, and the hugely adverse consequences to the United States and world economies that could result from an attack on the Federal Reserve, the Board . . . has significant security needs." Board Letter at 2-3. These needs have led the Board to consider adopting the measures outlined above.

As part of its duties, the Board conducts open meetings to discuss the country's economic health and to determine what actions, if any, must be taken to address inflation, unemployment, or other economic concerns. The Board is considering

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<sup>1</sup> See Letter for Paul Colborn, Special Counsel, Office of Legal Counsel, from J. Virgil Mattingly, Jr., General Counsel, Board of Governors of the Federal Reserve System (Apr. 10, 2002) ("Board Letter").

adopting a policy of placing all members of the public who enter the Board's buildings to attend an open meeting of the Board in a room that is physically separate from the meeting room. In this room they can watch and listen to the meeting by closed-circuit television.

In addition, the Board is also considering screening all potential entrants to its buildings. The screening would require obtaining certain information from potential entrants and checking information with established law enforcement sources to evaluate possible security risks. The Board's security staff would solicit information such as name, date of birth, and social security number. The information would be solicited to the greatest extent possible under a pre-screening procedure, but also at the building's entrance. Consistent with current practice, potential entrants would be required to produce a photo ID at the door. Under the proposed plan, the Board would bar from the building any person who fails to provide the requested information or fails the security check.<sup>2</sup>

The first question we address is whether placing members of the public in a separate room to observe a Board meeting would be permissible under the Sunshine Act. We then turn to the permissibility of requiring members of the public to provide personal information and satisfy a security check before they may enter a Board building to observe a meeting. That question entails issues under both the Sunshine Act and the Privacy Act.

## II.

The Sunshine Act, 5 U.S.C. § 552b (2000), applies to agencies that are headed by a collegial body of two or more members. *Id.* § 552b(a)(1). The Act requires that covered agencies hold their deliberations on agency action in open meetings: "Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c) [providing for exceptions not relevant to the question presented here], every portion of every meeting of an agency shall be *open to public observation.*" *Id.* § 552b(b) (emphasis added). The contemplated Board action of providing for observation of the meeting in a separate room would be inconsistent with this open-meeting requirement only if the italicized language requires the Board to allow members of the public to enter the actual meeting room and observe the meeting there. We do not believe that the statute imposes such a requirement.

Under a straightforward reading of the "open to public observation" language of subsection (b), the Board may satisfy its statutory requirement by providing a separate room for members of the public to observe Board meetings by closed-circuit television. The Sunshine Act does not authorize members of the public to

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<sup>2</sup> The Board notes that the White House and the Treasury Department have similar clearance procedures to control access to their buildings. Board Letter at 2.

participate in meetings, nor does it permit them to disrupt meetings. See Barbara Allen Babcock, *Department of Justice Letter to Covered Agencies* (Apr. 19, 1977) (“DOJ Letter”), in Richard K. Berg & Stephen H. Klitzman, *Interpretive Guide to the Government in the Sunshine Act 121* (1978) (“*Interpretive Guide*”). Since the public is not authorized to participate in the meeting, there is nothing inherent in the concept of “open to public observation” that would obligate the Board to place members of the public in the same room as the Board. As long as the public can adequately see, hear, and understand what takes place in the meeting, the requirement will have been met because the meeting would be “open to public observation.”

The legislative history of the Sunshine Act is consistent with our view that “open to public observation” does not contain an implied requirement that members of the public be present in the actual meeting room in order to observe a meeting. The Sunshine Act “is founded on the proposition that the government should conduct the public’s business in public. [The Act] requires . . . all Federal agencies subject to the legislation to conduct their meetings in the open, rather than behind closed doors.” S. Rep. No. 94-354, at 1 (1975). In other words, the critical purpose of the Act is to ensure that the decisionmaking meetings of covered agencies be open, not closed. Thus, so long as the Board’s meetings are conducted “in the open” and the public can observe the meetings, this purpose would be satisfied.

The phrase “open to public observation” was adopted by the House of Representatives, and accepted by the conference committee, as a substitute for the “open to the public” formulation adopted by the Senate. The House committee gave the following rationale for the change: “The phrase ‘open to public observation,’ while not affording the public any additional right to participate in a meeting, is intended to guarantee that *ample space, sufficient visibility, and adequate acoustics* will be provided.” H.R. Rep. No. 94-880, pt. 1, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2190 (emphasis added); *see also* H.R. Rep. No. 94-1441, at 11 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2247 (“The phrase ‘open to public observation’ is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.”). Placing members of the public in a large enough separate room with adequate closed-circuit television capability would satisfy that purpose.

### III.

Whether the Board may deny individuals access to Board buildings to observe an open meeting turns on whether the Sunshine Act provides each individual member of the public with a right to observe an open meeting of a covered agency. Resolution of that question also determines the Privacy Act question that you have raised.

**A.**

The open meeting requirement of subsection (b) of the Sunshine Act—that meetings be “open to public observation”—is not stated in terms of granting a right to individuals to attend agency meetings, but rather is articulated in more general language obligating an agency to provide the public as a whole with the opportunity to observe meetings. Thus, we believe that the requirement is satisfied if members of the general public have the opportunity to attend the meeting. The language does not constitute a requirement that *all* members of the public, or any particular individuals, who wish to observe a meeting be allowed to do so.<sup>3</sup>

The Sunshine Act’s Declaration of Policy states that “[i]t is the purpose of this Act to provide the public with . . . information [about government decisionmaking] while protecting . . . the ability of the Government to carry out its responsibilities.” 5 U.S.C. § 552b note. Pursuant to other statutory authority, the Board has sole control of its buildings. *See* 12 U.S.C. § 243 (2000) (“The Board may maintain, enlarge, or remodel any building or buildings so acquired or constructed and shall have sole control of such building or buildings and space therein.”). Sole control of its buildings implies that the Board should be able to deny access to its buildings for reasonable reasons, such as the significant security concerns expressed by the Board, *see* Board Letter, *supra* note 1, at 1 (citing a desire to implement stronger security measures in controlling access to the buildings “in order to address increased concerns about attacks on its buildings”). Thus, reading the Board’s statutory control over its buildings together with the Sunshine Act’s open meeting requirement further reinforces our conclusion that although the public as a whole is entitled to observe Board meetings, particular individuals can be turned away.

The legislative history of the Sunshine Act comports with our reading. As discussed above, the Sunshine Act’s legislative history indicates that Congress’s purpose in enacting the open meeting requirement was to ensure that decisionmaking meetings be held in the open and not behind closed doors. That history does not reveal any congressional intent to create a right for every individual to attend the meetings. In addition, Congress used the phrase “open to public observation” to address logistical concerns: it wanted adequate space to accommodate meeting observers. The legislative history indicates that an agency is not required under the Act to guarantee that every person who seeks to attend a

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<sup>3</sup> Even the Sixth Amendment, which establishes for defendants a constitutional right to a “public trial,” does not give an individual member of the public the right to attend a trial. Rather, a trial open to the public in general satisfies the constitutional requirement. *See Estes v. Texas*, 381 U.S. 532, 588-89 (1965) (Harlan, J., concurring) (“Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the ‘public’ will be present in the form of those persons who did gain admission.”).

meeting may do so, so long as accommodation for a reasonable number of people is provided. *See* S. Rep. No. 94-354, at 19 (emphasis added) (“When a meeting must be open, the agency should make arrangements for a room large enough to accommodate a reasonable number of persons interested in attending. Holding a meeting in a small room, thereby denying access to most of the public, would violate this section and be contrary to its clear intent.”).<sup>4</sup>

## B.

As discussed above, we believe that the open meeting requirement of the Sunshine Act does not provide all individuals with the right to observe a covered agency’s meetings, but rather only imposes on the agency the obligation to hold open meetings—that is, meetings open to the public at large. We therefore concluded that it would be permissible under the Sunshine Act for the Board to require that individuals seeking to observe Board meetings provide personal information and satisfy a security check. It necessarily follows from that conclusion that such a practice by the Board would not violate section 7 of the Privacy Act, which makes it unlawful for an agency “to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.” Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909 (1974). This is so because the Sunshine Act’s open meeting requirement does not create an individual “right, benefit, or privilege” within the meaning of section 7 of the Privacy Act.

The legislative history regarding this provision of the Privacy Act supports the view that the provision’s reference to “right, benefit, or privilege” refers to individual rights granted by the Constitution or statutes. The Senate debates provide an example of what the provision was intended to cover: “[I]t will be unlawful to commence operation of a State or local government procedure that

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<sup>4</sup> We disagree with a portion of the 1977 DOJ Letter that bears on this question. The DOJ Letter states that “[o]f course, any person may attend a meeting without indicating his identity and/or the person, if any, whom he represents and no requirement of prior notification of intent to observe a meeting may be required.” *Interpretive Guide* at 121. We find nothing in the text of the Sunshine Act that precludes imposing such requirements, nor do we see anything in the legislative history that suggests such an effect. We note further that the DOJ Letter was signed by the head of the Civil Division, which is a litigation division of the Department of Justice, and not by the Office of Legal Counsel, which is the component of the Department responsible for providing legal advice. The broad interpretation of statutory terms throughout the DOJ Letter apparently reflects a desire to improve the government’s litigating position under the Sunshine Act. For example, the DOJ Letter recommends that agencies allow sound recordings, notes, and photography “in order to avoid needless litigation over issues which do not go to the heart of the Act.” *Id. See also id.* (“I suggest that you insure that the term ‘meeting’ is broadly defined in practice so that the statute of limitations can come into play and so that the potential for litigation can be reduced.”). Although we understand the practical interest in defining terms broadly to minimize litigation risk, we believe that the correct reading of “open to public observation” is that it is addressed only to the agencies as a requirement that the meeting be open to the public at large.

requires individuals to disclose their social security account number in order to register a motor vehicle, obtain a driver's license or other permit, or exercise the right to vote in an election." 120 Cong. Rec. 40,407 (1974) (statement of Sen. Ervin). Attending a meeting open to the public under the Sunshine Act is qualitatively different from receiving a driver's license or exercising the right to vote. Any individual who meets the necessary requirements may drive a car or vote in an election because the law gives each individual that right. Voting involves a core individual right. Driving a car is a daily activity engaged in by many individuals. Nothing in the Sunshine Act, however, provides any particular member of the public with a right to observe an agency meeting. All the Act does is require the agency to open its deliberative meetings to public observation. The denial of access to an individual who fails to provide a social security number or pass the security check may prevent that particular person from observing the meeting, but it does not foreclose the public observation of the meeting by other members of the public who provide their social security numbers and pass the security check.

#### **IV.**

We conclude that the Board may, consistent with its obligations under the Sunshine Act, place observers of an open meeting of the Board in a separate room to watch the meeting on closed-circuit television. We also conclude that it is permissible under both the Sunshine Act and the Privacy Act for the Board to require disclosure of personal information and satisfaction of a security check as a condition of entering the Board's buildings for access to the separate room to observe the open meeting.

**M. EDWARD WHELAN III**

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**Effect of the Patriot Act on Disclosure to the  
President and Other Federal Officials of Grand  
Jury and Title III Information Relating to  
National Security and Foreign Affairs**

The Patriot Act amendments to the confidentiality provisions in Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 2517 (part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968) did not change this Office’s prior opinions that these provisions are subject to an implied exception where disclosure of information is necessary to permit the President to discharge his constitutional responsibilities for national security under Article II.

The decision to disclose such information to other Executive Branch officials is a matter for the President himself to determine. He may delegate that authority to others—including by an oral direction—but officials such as the Attorney General may not exercise an inherent constitutional power of the President to disclose such information to others without some direction from the President.

The Patriot Act amended Rule 6(e) and Title III to provide that matters involving foreign intelligence or counterintelligence or foreign intelligence information may be disclosed by any attorney for the government (and in the case of Title III, also by an investigative or law enforcement officer) to certain federal officials in order to assist those officials in carrying out their duties. Although the new provision in Rule 6(e) requires that any such disclosures be reported to the district court responsible for supervising the grand jury, disclosures made to the President fall outside the scope of the reporting requirement contained in that amendment, as do related subsequent disclosures made to other officials on the President’s behalf.

July 22, 2002

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Your Office has asked for our views concerning how the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278-81 (“Patriot Act”) has affected prior opinions of this Office regarding disclosure to the President and other federal officials of grand jury and Title III information relating to national security and foreign affairs. We discuss below our prior opinions in this area and the changes to the law brought about by the Patriot Act amendments. We then address specific questions raised by your Office.

### **I. Summary**

Prior to enactment of the Patriot Act, this Office had concluded that the secrecy provisions of Rule 6(e) (relating to grand juries) and Title III (relating to wire taps) provided no explicit exception permitting the disclosure of information to the President or other officials for purposes of national security or foreign affairs. We had concluded, however, that these confidentiality provisions were subject to an implied exception where disclosure of information was necessary to permit the President to discharge his constitutional responsibilities under Article II. Our conclusion that the President has inherent constitutional authority to require disclosure of information that is necessary for him to fulfill his constitutional responsibilities remains valid. We conclude that the need for the President to have access to a limited class of information necessary for performance of his constitutional duties means not only that the President may direct the disclosure of such

information, but also that senior officials, such as the Attorney General, who have such information have a duty to disclose it to the President when withholding it would impair the President's ability to discharge his constitutional responsibilities. Thus, the Attorney General may make a determination that Rule 6(e) or Title III information in his possession should be disclosed to the President.

The decision to disclose such information to other Executive Branch officials, however, is a matter for the President himself to determine. He may delegate that authority to others—including by an oral direction—but officials such as the Attorney General may not exercise an inherent constitutional power of the President to disclose such information to others without some direction from the President.

In addition, the Patriot Act recently amended Rule 6(e) and Title III specifically to provide that matters involving foreign intelligence or counterintelligence or foreign intelligence information may be disclosed by any attorney for the government (and in the case of Title III, also by an investigative or law enforcement officer) to certain federal officials in order to assist those officials in carrying out their duties. Federal officials who are included within these provisions may include, for example, the President, attorneys within the White House Counsel's Office, the President's Chief of Staff, the National Security Advisor, and officials within the Central Intelligence Agency and the Department of Defense. Moreover, the purpose of the disclosure may include assisting such officials, including the President, in making decisions regarding bringing charges in a military commission in connection with crimes committed against the United States and its citizens. Although the new provision in Rule 6(e) permitting disclosure also requires that any disclosures be reported to the district court responsible for supervising the grand jury, we conclude that disclosures made to the President fall outside the scope of the reporting requirement contained in that amendment, as do related subsequent disclosures made to other officials on the President's behalf.

## **II. Prior Opinions of the Office of Legal Counsel**

### **A. Disclosure of Grand Jury Material**

Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides that:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Subsection (e)(3) of Rule 6 provides various exceptions to this general rule of secrecy. For example, subsection (e)(3)(A) provides that disclosure may be made (i) to “an attorney for the government for use in the performance of such attorney’s duty,” and (ii) to such other government personnel “as are deemed necessary by an attorney for the government . . . in the performance of such attorney’s duty to enforce federal criminal law.” In 1993 this Office examined the applicability of such exceptions to the disclosure of grand jury material to the President and members of the National Security Council (“NSC”). We expressed the general view that “[w]e do not believe that any of the 6(e) exceptions would apply to disclosures made to the President or NSC officials for general policymaking purposes, as opposed to obtaining the assistance of those officials for law enforcement purposes.” *Disclosure of Grand Jury Matters to the President and Other Officials*, 17 Op. O.L.C. 59, 59 (1993) (“*Grand Jury Matters*”). We viewed “law enforcement purposes” as relating generally to disclosures made for the purpose of assisting the Attorney General or other attorney for the government with the enforcement of federal criminal law. *Id.* at 59, 61. Although we distinguished disclosures made to assist an attorney in the enforcement of the criminal law from those made for mere purposes of general policymaking, *id.* at 61-62, we approved, for example, the concept of a disclosure made to the President and National Security Council members, such as the Secretary of State, for purposes of discussions that would facilitate the Attorney General’s direction and supervision of the criminal investigation into matters that have an unusual national significance, such as the 1993 terrorist attack on the World Trade Center. *Id.* at 61. We also noted that Congress intended federal prosecutors “to have broad leeway in deciding what government personnel should have access to grand jury materials for purposes of facilitating enforcement functions.” *Id.* at 62.

Moreover, despite our view that Rule 6(e)(3) contained no statutory exception to the secrecy rule for disclosures of grand jury information to the President or other intelligence officials for purposes other than assisting an attorney for the government with that attorney’s criminal law enforcement duties, we also explained that:

As the repository of all executive power in the national government, the President is charged with the duty to “take Care that the Laws be faithfully executed.” Accordingly, there may be circumstances in which his constitutional responsibilities entitle the President to obtain disclosure of grand jury information that has already been made available to the Attorney General, even where that disclosure might not be specifically authorized by one of the exceptions under Rule 6(e).

*Id.* at 65 (quoting U.S. Const. art. II, §§ 1, 3). We cited as a “prime example of such circumstances,” “a grand jury investigation of major international terrorist activity in the United States, involving a threat to domestic peace and national security.” *Id.* at 67. We also referred to the President’s removal power justifying the President’s access to grand jury information in a case where the integrity or loyalty of a presidential appointee holding an important and sensitive post was implicated by the grand jury investigation. *Id.* We articulated the threshold inquiry as being whether “the President’s ultimate responsibility to supervise the executive branch, and in particular his duty to ‘take Care that the Laws be faithfully executed,’ U.S. Const. art. II, § 3,” *id.* at 60, is implicated. We cautioned, however, that “[i]n the absence of judicial precedent on this point . . . any disclosure of grand jury matter to the President on this basis should be cautiously undertaken and reserved for matters of clear executive prerogative in areas where the Rule 6(e)(3)(A)(ii) exception could not be used.” *Id.* at 68.

Four years later, in 1997, we addressed more specifically various questions concerning the permissibility of disclosing grand jury information to agencies in the intelligence community for certain official purposes. *See Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. 159 (1997) (“*Grand Jury Material*”). Based on the definition contained in 50 U.S.C. § 401a(4) (as amended by Patriot Act),<sup>1</sup> we defined the term “intelligence community” (“IC”) to include the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and the intelligence elements of the Armed Services, the Federal Bureau of Investigation, and the Department of Treasury. *Grand Jury Material*, 21 Op. O.L.C. at 159 n.1.

As a preliminary matter, we concluded that grand jury information could be disclosed, pursuant to Rule 6(e)(3)(A)(ii), to intelligence community officials in order to permit those officials to assist prosecutors in enforcing federal criminal law. *Id.* at 161. We noted, however, that the official receiving such information could use that information only for purposes of assisting federal criminal law enforcement, and not for foreign intelligence purposes. *Id.* at 169-70. At the same time, we stressed that the phrase “assist . . . in the performance of such attorney’s duty to enforce federal criminal law” could be construed to cover a wide range of matters, such as identifying possible violators of far-reaching anti-drug and anti-terrorism laws. *Id.* at 170 (alteration in original) (quoting Rule 6(e)(3)(B)). We also noted that “as long as the IC was lawfully using the 6(e) material to assist the Government attorneys, and learn[s] . . . the collateral information within the scope of its authorized support operations, the Rule does not require the IC to refrain from using derivative information that it learns incidentally in the course of

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<sup>1</sup> 50 U.S.C. § 401a(4)(J) (1994) also includes “such other elements of any other department or agency as may be designated by the President, or designated jointly by the Director of Central Intelligence and the head of the department or agency concerned.”

providing such assistance.” *Id.* Moreover, we explained that the scope of authorized assistance is determined by “(1) the scope of the requesting attorney’s ‘duty to enforce federal criminal law’ and (2) the scope of the attorney’s request for assistance.” *Id.* at 171. For example, if government personnel are rendering assistance to the Attorney General under subsection (A)(ii), their assistance may extend to a broad criminal law enforcement program for which the Attorney General is responsible, such as a national or international drug interdiction or counter terrorism initiative. On the other hand, depending on the nature of the request by the attorney for the government, the assistance may also be limited to a single case or investigation, or even a single aspect of such a case or investigation, such as providing technical advice concerning a particular technology.

Finally, we addressed the question posed to us by the Acting Counsel for the Office of Intelligence Policy and Review concerning whether 6(e) material could be disclosed to intelligence community officers “where the information in question [is] urgently relevant to a matter of grave consequences for national security or foreign relations.” *Id.* at 172. We stated:

Where approved by the President, we believe such disclosure would be lawful, although we caution that the legal principles supporting this conclusion are not firmly-established in the case law concerning grand jury secrecy. Nonetheless, we believe such disclosure would rest upon the same fundamental constitutional principle that has been held to justify government action overriding individual rights or interests in other contexts *where the action is necessary to prevent serious damage to the national security or foreign policy of the United States.*

*Id.* (emphasis added). We went on to explain that it was our view that Rule 6(e) should not be construed “to limit the access of the President and his aides to information critical to the national security” since such information “would be crucial to the discharge of one of the President’s core constitutional responsibilities.” *Id.* We concluded that since there is no governmental interest more compelling than the security of the Nation, “the President has a powerful claim, under the Constitution, to receive the information in question here and to authorize its disclosure to the IC.” *Id.* at 173. Although we recommended the adoption of procedures requiring consultation with, and approval by, high-ranking Department officials, we concluded that

there are circumstances where grand jury information learned by an attorney for the government may be of such importance to national security or foreign affairs concerns that to withhold it from the President (or his Cabinet members and other key delegates and agents,

acting on his behalf) would impair his ability to discharge his executive responsibilities under Article II of the Constitution,

*id.* at 174, and therefore that “Rule 6(e) should be read to be subject to such an implied exception.” *Id.* We explained that, where justified by the circumstances,

the attorney learning the information would be obliged to convey the information to appropriate superiors (e.g., the U.S. Attorney), who would report it to the Attorney General, who would in turn report it to the President. The President (or appropriate officials acting on his behalf, such as the Attorney General) would clearly be authorized to share such crucial information with his executive branch subordinates, including IC officials, to the extent necessary to discharge his constitutional responsibilities.

*Id.*

Therefore, prior to the Patriot Act amendments to Rule 6(e), it was our view that Rule 6(e) provided no explicit exception to grand jury secrecy for disclosure to the President or other officials of grand jury information relating to national security or foreign affairs, but that the general secrecy rule was subject to an implied exception where such disclosure was necessary to permit the President to discharge his executive responsibilities under Article II.<sup>2</sup> Although we did not assert that it was legally necessary for such disclosures to pass through the Attorney General to the President, we offered as a matter of policy that,

in light of the extraordinary nature of this authority to disclose Rule 6(e) material, and to ensure careful consideration of the constitutional basis for any disclosure made outside the provisions of Rule 6(e), we recommend the adoption of procedures requiring consultation with, and approval by, the appropriate officials (e.g., the Attorney General or the Deputy Attorney General) preceding any such disclosure.

*Id.* at 175. It is important to note, however, that there is no indication in our prior opinions that, in the area of national security and foreign affairs, we believed that the initial assessment of whether disclosure to the President was justified could not be made by those officials in possession of the information.<sup>3</sup> To require a series of

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<sup>2</sup> Although the opinion also discusses the “critical,” “crucial,” or “compelling” nature of the information, it seems clear that these concepts are included as elements of whether the information is necessary to the exercise of the President’s responsibilities over foreign affairs and national defense. See *Grand Jury Material*, 21 Op. O.L.C. at 172-73.

<sup>3</sup> In a recent opinion addressing the process by which the President may obtain grand jury information relevant to the exercise of his pardon authority, we concluded that:

partial disclosures, hints and ambiguous suggestions to take place between the President and the person in possession of the information prior to full disclosure of such information to the President would seem to achieve little other than to complicate, confuse and unduly burden the entire decision-making process. We did caution, however, that “this constitutional authority should not be exercised as a matter of course, but rather only in extraordinary circumstances.” *Id.* at 160. Moreover, while our opinion recognized that disclosure could be made to the President, *id.* at 174-75, and that subsequent or additional disclosures to other federal officials needed to be authorized by the President, *id.* at 174, the opinion suggested that the authority to share such information with other appropriate Executive Branch officials other than the President, including intelligence officials, could be exercised by officials, such as the Attorney General, acting on the President’s behalf. *Id.* There is no requirement that such a delegation be reduced to writing. Given the inherent constitutional nature of such authority, however, we recommend that the authorization by the President of one or more subordinates to act on his behalf in making such disclosures to other appropriate Executive Branch officials be accomplished through, for example, a confidential and privileged memorandum from the President to his subordinate specifically delegating this particular type of authority, and not through a more general preexisting delegation. This delegation may be in the form of a standing order that applies to all decisions to disclose such information, rather than having to be made on a case-by-case basis.<sup>4</sup>

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The President may . . . issu[e] a standing request for certain grand jury material, to the extent it exists, relating to particular issues that he deems relevant to his pardon decisions. That standing request may also provide that prosecutors are permitted to share such grand jury material with identified Department of Justice officials (such as the Attorney General or Deputy Attorney General, in consultation with the Pardon Attorney) for the purpose of having them make the preliminary determination whether the grand jury information is sufficiently relevant to the pardon decision to warrant it being provided to the President. Any such standing directive, however, should be carefully written to make clear that disclosures of grand jury material should not be routine, but rather should be made only when certain factors indicate the existence of material relevant to the President’s decisionmaking process. These procedures will help insure that such disclosures fall within the category of material that the President has specified as being relevant to his decisionmaking process. Alternatively, disclosure might be authorized on a case-by-case basis as deemed appropriate by the President.

*Whether the President May Have Access to Grand Jury Material in the Course of Exercising His Authority to Grant Pardons*, 24 Op. O.L.C. 366, 372-73 (2000). In this matter, however, we had concluded that, “due to the intrinsically subjective nature of the President’s pardon decision, it is difficult for anyone other than the President to assess the materiality of information to the exercise of his pardon authority,” and therefore the decision to disclose the information had to originate with the President. *Id.* at 372.

<sup>4</sup> Under 3 U.S.C. §§ 301 and 302 (2000), the President has broad authority to delegate his powers. Section 302 extends the President’s delegation authority to “any function vested in the President by

## B. Disclosure of Title III Information

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 (2000) (as amended by Patriot Act), governs the subsequent use and disclosure of information obtained as a result of court-authorized electronic surveillance. In relevant part, section 2517(1) and (2) of title 18 provides that investigative or law enforcement officers who have lawfully obtained Title III information may disclose it to other investigative or law enforcement officers, or use it, to the extent the disclosure or use is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure or using the information.

In October 2000, we responded to a request regarding the extent to which law enforcement officials could share with the intelligence community information obtained through court-authorized electronic surveillance pursuant to Title III. *Title III Electronic Surveillance Material and the Intelligence Community*, 24 Op. O.L.C. 261 (2000). After reviewing Title III, in particular 18 U.S.C. § 2517, and section 104(a) of the National Security Act, we concluded that such information could be shared in limited situations,

namely, (1) where law enforcement shares the information with the intelligence community to obtain assistance in preventing, investigating, or prosecuting a crime; and (2) where the information is of overriding importance to national security or foreign relations and where disclosure is necessary for the President to discharge his constitutional responsibilities over these matters.

*Id.* at 261. This analysis was based on the pre-Patriot Act language of section 2517, which permitted disclosure of court-authorized Title III information only from one investigative or law enforcement officer to another and limited the use of that information to uses appropriate to the proper performance of those officials' duties. *Id.* at 264. We concluded that, under Title III, any electronic surveillance or subsequent disclosure of Title III information is prohibited unless expressly permitted. *Id.* at 262-63 (citing cases), 272. Based on the language of the statute, we then concluded that the permissive disclosure and use provisions of section 2517 did not apply to disclosures by law enforcement officers to the intelligence community unless such disclosure constituted a "use" by the law enforcement officer that was "appropriate to the proper performance of the official duties" of that disclosing officer. *Id.* at 263 (internal quotation marks omitted). We explained, therefore, that a law enforcement officer could convey Title III infor-

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law" so long as the "law does not affirmatively prohibit delegation of the performance of such function."



mation pursuant to section 2517(2) only so long as it was done “in order to acquire intelligence information relevant to preventing, investigating, or prosecuting a crime.” *Id.* at 269.<sup>5</sup> In such a situation, we explained, the intelligence officer was then restricted in his or her subsequent use of that information. *Id.* at 269 n.12.

Despite concluding that Title III prohibits every disclosure that it does not explicitly authorize, *id.* at 262-63, 272, we concluded, consistent with our grand jury opinions, that

in extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President’s constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III.

*Id.* at 273. Citing our 1993 and 1997 opinions concerning grand jury material, we explained that “the Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including, where necessary, the collection and dissemination of national security information.” *Id.* We reiterated the principle that, when the President’s authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President’s constitutional authority and should be read to be subject to an implied exception in deference to such presidential powers. *Id.* at 273-74. Thus, we concluded that

law enforcement officers who acquire information vital to national security or foreign relations would be obliged to convey it to the appropriate superiors (e.g., the United States Attorney), who would report it to the Attorney General or Deputy Attorney General, who would in turn report it to the President or his designee. The President (or appropriate officials acting on his behalf, such as the Attorney General) would be authorized to share such crucial information with his executive branch subordinates, including intelligence community officials, to the extent necessary to discharge his constitutional responsibilities.

*Id.* at 274. Thus, although recognizing that the disclosure needed to be made to the President or his designee, and that subsequent or additional disclosures to other

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<sup>5</sup> We cited examples of such legitimate purposes, including obtaining intelligence information concerning the structure of a terrorist organization or specific individuals who are under investigation; obtaining voice identification; and obtaining information about extraterritorial components of a criminal investigation. *Id.* at 270.

federal officials needed to be authorized by the President, *id.*, the 2000 opinion, like our 1997 opinion in the grand jury context, also suggests that the authority to share such information with other appropriate Executive Branch officials, including intelligence officials, could be exercised by officials, such as the Attorney General, acting on the President's behalf. *Id.* As with the disclosure of grand jury information, however, we recommend that, given the inherent constitutional nature of such authority, the authorization by the President of one or more subordinates to act on his behalf in this area be accomplished through an order specifically delegating this particular authority, as opposed to reliance on a more general preexisting delegation.

### **III. Patriot Act Amendments to Rule 6(e) and Section 2517**

The Patriot Act amended Rule 6(e)(3) and 18 U.S.C. § 2517 specifically to provide that matters involving foreign intelligence or counterintelligence or foreign intelligence information may be disclosed to certain federal officials in order to assist those officials in carrying out their duties.<sup>6</sup> As will be discussed in more detail below, both provisions define foreign intelligence or counterintelligence by referring to the definition set forth in 50 U.S.C. § 401a, and both provisions define "foreign intelligence information" identically.

As amended, Rule 6(e)(3)(C)(i)(V) permits disclosure by an attorney for the government of information meeting the above-referenced statutory definitions "to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official" so long as the disclosure is made "in order to assist the official receiving that information in the performance of his official duties." Similarly, section 2517 now permits disclosure to the identical list of federal officials as set forth in Rule 6(e)(3)(C)(i)(V), by any investigative or law enforcement officer (who has lawfully received such information) "of the contents of any wire, oral, or electronic communications, or evidence derived therefrom," to the extent the contents of such information meet the statutory definitions. 18 U.S.C. § 2517(6) (Supp. I 2001). Moreover, like Rule 6(e)'s requirement, the disclosure must be made "to assist the official who is to receive that information in the performance of his official duties," and section 2517(6) explicitly provides that "[a]ny federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information." *Id.*

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<sup>6</sup> Pub. L. No. 107-56, § 203(a)(1), 115 Stat. at 279 (amending Fed. R. Crim. P. 6(e)(3)(C)(i)(V), (e)(3)(C)(iii), (e)(3)(C)(iv)); *id.* § 203(b), 115 Stat. at 280 (amending 18 U.S.C. § 2517(6)). The Patriot Act also added section 403-5d to the United States Code, title 50. *Id.* § 203(d)(1), 115 Stat. at 281. This provision repeats the amendments made to Rule 6(e) and section 2517 in a general section that starts with the phrase "[n]otwithstanding any other provisions of law." *Id.* In light of the specific amendments to Rule 6(e) and section 2517, we do not discuss the significance of this provision here.

Therefore, it is no longer required, as it would have been for disclosures made pursuant to the President's inherent constitutional authority, that the disclosure be necessary to the President's discharge of his constitutional responsibilities. Any information within the statutory categories may be disclosed to "assist" a member of the intelligence community (or other specified officials) with carrying out his duties.

One important distinction between section 2517(6) and Rule 6(e) is that, unlike section 2517(6), Rule 6(e)(3)(C)(iii) has a disclosure reporting requirement that provides that "[w]ithin a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made." The significance of this provision will be discussed in greater detail below.

The information that falls within these statutory exceptions to Rule 6(e) and Title III's confidentiality provisions is "foreign intelligence" or "counter-intelligence," as defined in 50 U.S.C. § 401a (2000 & Supp. I 2001), and "foreign intelligence information," as defined identically in Rule 6(e)(3)(C)(iv) and 18 U.S.C. § 2510(19) (Supp. I 2001). Section 401a(2) of title 50 defines "foreign intelligence" as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities." Section 401a(3) defines "counterintelligence" as "information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities." "[F]oreign intelligence information" is defined as:

- (A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—
  - (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
  - (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
  - (iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—
  - (i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States[.]

18 U.S.C. § 2510(19); *see also* Fed. R. Crim. P. 6(e)(3)(C)(iv). These definitions are quite broad. They encompass a wide array of information relevant to national security and foreign affairs.

#### **IV. Impact of the Patriot Act Provisions on the Ability to Disclose Information Under Rule 6(e) and Title III**

The Patriot Act amendments to Rule 6(e) and section 2517 have not altered the constitutional analysis set forth in our 1993, 1997 and 2000 opinions. Under the analysis this Office has consistently outlined, information necessary to protect the national security and foreign policy interests of the United States may always be disclosed to the President by an attorney for the government regardless of statutory restrictions, and the President or his delegee may, in turn, use and/or disclose that information to other federal officials as necessary to perform the President's constitutional responsibilities under Article II.

Certain statutory limitations discussed in those prior opinions, however, have been significantly modified by the Patriot Act. It is now clear, as a statutory matter, that information falling within the statutory definitions of foreign intelligence, counterintelligence, and foreign intelligence information may be disclosed to a variety of officials under appropriate circumstances. In the context of grand jury material, an attorney for the government, and, in the context of Title III information, any investigative or law enforcement officer, or attorney for the Government, may disclose the protected information without a court order to a number of different categories of federal officials.<sup>7</sup> In addition, in contrast to the situation when material is disclosed under Rule 6(e)(3)(A)(ii) (in which case the information may be used only to assist an attorney for the government in criminal law enforcement), the information disclosed to those federal officials under the new Patriot Act provisions is for the use of *those officials* in the performance of *their* official duties. Moreover, under these statutory provisions, information may be disclosed so long as it will “assist the official who is to receive that information

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<sup>7</sup> This is not to say that the Attorney General may not exercise his supervisory responsibility to require that the decisions to make such disclosures must be approved at the level of the Attorney General, Deputy Attorney General, or Assistant Attorney General. And, in fact, section 203(c) of the Patriot Act provides that “[t]he Attorney General shall establish procedures for the disclosure of information pursuant to section 2517(6) and Rule 6(e)(3)(C)(i)(V) of the Federal Rules of Criminal Procedure that identifies a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).” 115 Stat. at 280-81 (codified at 18 U.S.C. § 2517 note). The Attorney General has directed that the Assistant Attorney General for Legal Policy draft, for his consideration and promulgation, procedures, guidelines, and regulations to implement section 203 of the Patriot Act. Memorandum for the Deputy Attorney General et al., from the Attorney General, *Re: Coordination of Information Relating to Terrorism* at 5 (Apr. 11, 2002).

in the performance of his official duties.” 18 U.S.C. § 2517(6). In the past, if the President’s inherent constitutional authority were invoked to authorize such a disclosure, this could be done only if the information were *necessary* to protect the national security or foreign relations of the United States. Thus, the Patriot Act amendments have made it clear that any attorney for the government (and in the case of Title III, any investigative or law enforcement officer as well) may (1) disclose, without the approval of the President, appropriate information to any federal official engaged in the performance of federal law enforcement, intelligence, protective, immigration, national defense, or national security duties; (2) so long as that information will assist that federal official (it does not need to be “necessary”); (3) in the performance of his official duties.

Nor do we believe that Congress’s decision to amend Rule 6(e) and Title III with respect to the disclosure of foreign intelligence undermines the validity of our prior constitutional analysis. To begin with, as we have previously explained, we do not believe that Congress may legislate in this context to restrict the President’s access to information that is of such importance to national security or foreign affairs that to withhold it from the President would impair the discharge of one of the President’s core constitutional responsibilities. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (recognizing that President may have authority to “tak[e] measures incompatible with the expressed or implied will of Congress” where core executive powers are at stake). Having said this, however, we also believe that neither the text of the amendments nor the chronology of the enactment of the amendments explicitly or implicitly evidences Congress’s disapproval of the exercise of such presidential authority pursuant to a theory of implied exception to the relevant confidentiality provisions. As the Supreme Court has acknowledged:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially . . . in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility.”

*Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Youngstown*, 343 U.S. at 637). At the time it considered these amendments, Congress was not specifically faced with the issue addressed in our prior opinions, there is no indication in the legislative history of the Patriot Act

that the issued was debated or otherwise discussed and there is nothing in the amendments themselves that is directly inconsistent with our constitutional analysis.

## **V. Discussion of Specific Questions**

In addition to your Office's inquiry regarding the general effect of the Patriot Act amendments on Rule 6(e) and Title III, your Office also identified more particularized questions regarding operation of these new provisions, which we address below.

### **A. Who is Authorized to Make the Decision to Disclose Information to the Appropriate Federal Officials?**

#### **1. Statutory Disclosures**

As discussed above, with respect to grand jury matters, any attorney for the government who is in possession of grand jury information may disclose that information so long as such information meets the statutory definition and disclosure is made for a proper purpose to an official falling within one of the enumerated categories. An attorney for the government may include, for example, the prosecutor in charge of the investigation, the United States Attorney for the district in which the grand jury is sitting, or other federal officials within the Department of Justice who gain access to the information under Rule 6(e)(3)(A)(i) in the performance of their law enforcement duties (e.g., the Assistant Attorney General of the Criminal Division, the Deputy Attorney General, or the Attorney General).

With respect to Title III information, the disclosure may be initiated by an investigative or law enforcement officer, or attorney for the government, who has obtained knowledge of the information by any means authorized by the provisions of Title III. "Investigative or law enforcement officer" is defined as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in [title 18], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7) (2000).

#### **2. Disclosure Pursuant to Inherent Constitutional Authority**

Both the Rule 6(e) and the Title III confidentiality provisions are subject to an implied exception where disclosure of such information to the President is necessary to permit him to discharge his executive responsibilities under Article II. As an initial matter, a decision to disclose such information to the President may be made by the official in possession of the information. While disclosure of the

information is an inherent constitutional power of the President, the President cannot determine that it should be disclosed until he has received it. The same principle underlying the President's inherent authority here—namely, the principle that the President has a right to be provided all information necessary for the performance of his duties—also implies an obligation on officials in the government who possess such information to disclose to the President any information that they determine is necessary for the President to have where to withhold it would impair his ability to perform his constitutional duties and responsibilities. Although such disclosures should be reserved for extraordinary circumstances, the Attorney General or Deputy Attorney General is capable of assessing when the nature of the information requires its disclosure to the President.

As for further disclosures to other officials whom the President deems should have the information to assist the President in the performance of his duties, we conclude that the decision to make such disclosures rests with the President. Because the disclosure is made pursuant to an inherent constitutional authority of the President, we conclude that subordinate officers do not have authority to determine on their own to whom such disclosures should be made. Of course, as will be discussed in greater detail, the President may delegate his authority to make further disclosures of such information to one or more subordinates.

## **B. May Information Be Shared with the President, Attorneys in the White House Counsel's Office, the President's Chief of Staff, the National Security Advisor and Officials Within the Department of Defense, and Are There Any Differences in the Standards That Apply for Disclosure to these Different Officials?**

### **1. Statutory Exceptions**

The Patriot Act amended Rule 6(e)(3) and 18 U.S.C. § 2517 of Title III specifically to provide that matters involving foreign intelligence, counterintelligence, or foreign intelligence information may be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. As an initial matter, the statute does not refer to officials holding specific titles, but to officials who exercise functions related to the broadly enumerated categories. Pub. L. No. 107-56, §203(a)-(b), 115 Stat. at 279-80. There can be no doubt that the President, as the head of the Executive Branch, is such a federal official for purposes of at least a number of the enumerated categories (e.g., national defense and national security), and therefore such information may be disclosed to him pursuant to this exception to Rule 6(e)(2). Similarly, to the extent that the White House Counsel, the President's Chief of Staff, or both, may be the President's designee(s) for receiving such information in assisting the President in the conduct of his "official duties," then he or she is clearly eligible to

receive such information directly from a government attorney. The inquiry as to whether an official falls within the statutory definition is not formalistic, but rather requires an analysis of the role of the federal official and whether his role, even if advisory in nature, includes law enforcement, intelligence, protective, immigration, national defense, or national security functions.<sup>8</sup> At any particular time, such officials as the White House Counsel, the President's Chief of Staff, the National Security Advisor, and various other policy, legal, law enforcement, and military advisors to the President (whether they be principal or inferior officers of the United States or purely advisory) may be performing functions that fall within the various enumerated areas of the statute. There is also no doubt that officials at the Department of Defense perform duties that fall within a number of the statutory categories, such as "intelligence," "national defense," and "national security," and thus are eligible to receive foreign intelligence, counterintelligence and foreign intelligence information that is of assistance to any official within that Department in the performance of such duties.

## **2. Disclosure Pursuant to Inherent Constitutional Authority**

As outlined above, this Office has opined that, even though it fell outside the explicit exceptions set forth in the pre-Patriot Act Rule 6(e)(3), grand jury information that is necessary for the performance of the President's national security or foreign relations duties could be disclosed to the President, and, with his approval, to other members of the Intelligence Community. Adoption of the Patriot Act does not affect our prior conclusions. Even if there is grand jury or Title III information that somehow falls outside the type of information defined in Rule 6(e)(3)(C) and section 2517(6), but which is necessary to the President's performance of his constitutional duties, our prior constitutional analysis permits disclosure of such information.<sup>9</sup> As previously explained in our discussion of the first specific question your Office posed, the Attorney General has a duty to make the relevant assessment and disclosure to the President where to withhold the information would impair the ability of the President to discharge his constitutional responsibilities. Similarly, as discussed above, the President may also delegate to the Attorney General and other government officials the authority to disclose such information on his behalf, as appropriate, to other Executive Branch offi-

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<sup>8</sup> We do not understand the term "official" in these provisions to be coextensive with the term "officer of the United States." A federal "official" is only an "[o]fficer of the United States" to the extent he exercises "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (quotation marks omitted). Therefore, the statutes, which use the term "official," see Fed. R. Crim. P. 6(e)(3)(C)(i)(V) and 18 U.S.C. § 2517(6), include federal officials who do not exercise significant government authority.

<sup>9</sup> In fact, as previously discussed, we have also applied this analysis in the context of providing the President grand jury information relevant to the exercise of his pardon power. See *supra* note 3.



cials.<sup>10</sup> Such a delegation may direct the Attorney General to disclose grand jury or Title III information to other federal officials who need such information in order to assist the President in performing his constitutional functions.

It is also our view, however, that any additional or subsequent disclosures to other officials by someone other than the President must be done pursuant to a presidential directive. We recognize that the situation may arise where the Attorney General is in a meeting with the President and other senior advisers of the President and there will be grand jury or Title III information that is relevant to the discussion. However, permitting the Attorney General to disclose such information to others, beyond the President, outside the parameters of a statutory exception would involve the unauthorized exercise of the President's inherent constitutional authority by the Attorney General. This is not a mere formalism. The Attorney General has the authority to make the initial decision to disclose such information to the President because of the President's unique constitutional position which gives *the President* the right to know that information. However, further disclosures, which are made pursuant to the President's inherent constitutional authority but in tension with statutory limitations, should be made only pursuant to the President's conscious exercise of his power where there is no impediment to the President making that initial assessment himself.

Of course, as previously discussed, the President may delegate his authority, and delegation could take place orally in the course of the meeting. A more efficient procedure, however, might be for the President to delegate his authority more broadly to the Attorney General in the form of a standing directive permitting the Attorney General to determine when it would be appropriate to rely on the President's inherent constitutional authority to share information with other high-ranking members of the Executive Branch. In that way, whenever information was relevant at a cabinet or other meeting, the Attorney General could determine whether it should be disclosed to all those present.

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<sup>10</sup> Such a directive may be set forth in a formal executive order, in a less formal presidential memorandum (since the matter deals with an internal process), or pursuant to an oral instruction from the President to the Attorney General or other appropriate officials. At various points over time, Presidents have delegated presidential functions both by executive order and by presidential memorandum. Compare Delegation of Authority Under Section 1401(b) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65), 65 Fed. Reg. 3119 (Jan. 20, 2000) with Exec. Order No. 10250, 3 C.F.R. 755 (1949-1953) (delegation of functions to the Secretary of the Interior), *reprinted as amended* in 3 U.S.C. § 301 app. (1994). "It has been our consistent view that it is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner." *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29, 29 (2000). Nor is such a directive required to be written in order to have legal effect. Cf. Memorandum for the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* at 14 (Dec. 17, 1986) (oral authorization by the President of action inconsistent with an existing executive order creates a valid modification of, or exception to, the executive order).

**C. May Grand Jury and Title III Information Be Shared With the President For Purposes of Making Decisions Regarding Bringing Charges in a Military Tribunal?**

To the extent that the President's advice or approval is needed to determine whether or not to proceed with a criminal prosecution, information necessary to receiving such advice or approval clearly falls within the pre-Patriot Act exceptions set forth in Rule 6(e)(3)(A)(ii) (permitting disclosure of information to government personnel necessary to assist an attorney for the government in the performance of his law enforcement function) and section 2517(2) (permitting a law enforcement officer to share information where necessary to obtain assistance in investigating or prosecuting a crime). Assistance with the decision whether to proceed with an indictment and prosecution goes to the very heart of the Attorney General's law enforcement responsibilities. In addition, information relevant to such a decision may be disclosed under the Patriot Act exceptions. The decision whether to bring charges in a military tribunal in connection with crimes committed against the United States and its citizens by a foreign power or agent falls within the areas of national defense, national security and foreign affairs. The decision to take action against and bring to justice foreign agents who have committed offenses against the United States and its nationals, and the forum within which such enforcement action is taken, may have a significant impact on our nation's security and may also affect our foreign relations. Moreover, given the context of these decisions, to the extent such information falls outside the technical boundaries of the Rule 6(e)(3)(C)(iii) and section 2517(6) provisions, but the President considers the information necessary to his ability to make the decision required of him, then the analysis of our prior opinions regarding the President's right to access information necessary to the performance of his Article II responsibilities governs disclosure of such information.

**D. Does the Reporting Requirement Contained in Rule 6(e)(3)(C)(iii) Apply to the President?**

The Patriot Act amendment to Rule 6(e)(3) also provides that, when any information is disclosed pursuant to this provision, a notice must be filed under seal with the court (by an attorney for the government) stating "the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made." Fed. R. Crim. P. 6(e)(3)(C)(iii). As an initial matter, we construe this language as requiring disclosure only of "the fact" that foreign intelligence or foreign intelligence information has been disclosed, and not the content of such information. Such a plain meaning reading of the statute is further supported by the cardinal principle of statutory interpretation that, when an act of Congress raises a serious doubt as to its constitutionality, the courts will first determine whether a construction of the statute is fairly possible by which the

question may be avoided. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The President has an absolute executive privilege to protect against the disclosure of certain communications, including those made by other officials within the Executive Branch, involving military, diplomatic, or national security secrets, and therefore a construction of the statute should be avoided that would interpret it as requiring an attorney for the government to disclose to a court the content of information communicated to the President that so clearly falls within those categories. See *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 482 & n.3 (1982); *United States v. Nixon*, 418 U.S. 683, 710-11 (1974); *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Your Office has also asked us whether the disclosure notice requirement of Rule 6(e)(3)(C)(iii) even applies in the first place to disclosures made to the President, and, if so, whether such a requirement is constitutional. The plain language of the notice provision does not, by its terms, include the President. It refers only to “departments, agencies, or entities,” none of which describes the President. It could be argued that the President holds his office within an *entity* called the Office of the President, and that the court should be notified that a disclosure was made to the “Office of the President.” We do not think that such a reading is persuasive. The failure of this provision explicitly to include the President leads to the conclusion that it was not intended to apply to him. A well-settled principle of statutory construction, known as the “clear-statement rule,” provides that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President’s constitutional prerogatives. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); see also *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351-57 (1995); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Closing of Government Offices in Memory of Former President Eisenhower* at 3 (Apr. 1, 1969). Inclusion of the President in the reporting requirement could infringe on the presumptively confidential nature of presidential communications by requiring disclosure to a court of the fact that confidential foreign intelligence or foreign intelligence information from a particular grand jury investigation had recently been disclosed to the President. As we have explained in past opinions, the necessity for confidentiality in the Executive Branch communications with the President is “premised on the need to discuss confidential matters which arise within the Executive Branch and to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, unencumbered by fear of disclosure or intrusion by the public or the other branches of government.” *Confidentiality of the*

*Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. at 485. The mere disclosure of the fact that sensitive information of a particular type, elicited by a particular grand jury in the course of a specific investigation, has been disclosed to, and presumably discussed with, the President clearly falls within the scope of executive privilege. Absent a clear expression, therefore, it should not be assumed that Congress intended to require disclosure of such an occurrence.

If the disclosure is made to the President and to others simultaneously, such as in a presidential meeting, a slightly different analysis applies. The analysis outlined above demonstrates that the reporting requirement does not apply to a disclosure made to the President given his unique status and the presumption against reading a statute or rule in way that would raise constitutional concerns by interfering with the President's constitutional prerogatives. The same considerations generally do not warrant construing the reporting requirement so as not to apply to disclosures made to *other* officials in the Executive Branch. Therefore, where such a simultaneous disclosure to the President and others occurs, the disclosures to those other than the President must generally be reported. Our conclusion on this point is supported by the nature of the report that is required. Because the report must specify only the "departments, agencies, or entities to which the disclosure was made" (e.g., the Department of Defense if the Secretary of Defense receives the information at the presidential meeting), none of the exact circumstances of the meeting, or the fact that it was a presidential meeting, needs be revealed. Fed. R. Crim. P. 6(e)(3)(C)(iii). A special case is presented by disclosure to some persons within the Executive Office of the President. For example, if disclosure is made during a meeting in which the President's Chief of Staff, the Vice President or the Counsel to the President is present, a report indicating that a disclosure was made to "the Office of the President" or to the "Office of Counsel to the President" would effectively disclose that the matter was a subject of presidential consideration. The same considerations outlined above dictating that the reporting requirement should be construed not to apply to disclosures to the President himself also dictate that the requirement should not apply to disclosures made to the President's close advisers within the Executive Office of the President where reporting such disclosure will effectively reveal that the matter has been brought to the President's attention.<sup>11</sup>

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<sup>11</sup> Thus, we conclude that the reporting requirement would not apply to a disclosure made to the President's Chief of Staff or to the Counsel to the President (or members of the Counsel's office). It could be argued that the role of *all* senior personnel within the Executive Office of the President ("EOP") is to advise or assist the President and thus that reporting *any* disclosure to a senior official within the EOP might effectively reveal a communication to the President. We conclude, however, that such an argument would cut too broadly. Given the extensive size of some of the entities within the EOP and the roles that they play in day-to-day coordination of the Executive Branch (roles that are performed without any actual contact or communication with the President), we think it is not in keeping with the practical realities of the functions of these entities to argue that any revelation that information has been disclosed to them will effectively disclose a communication to the President.

We note that even though the reporting requirement would *apply* to disclosures made to officials other than the President, we do not believe that it could properly override an assertion of executive privilege with respect to such disclosures made on an “as-applied” basis, where, in the context of the particular investigation and the nature of the grand jury information, the fact of the disclosure (or the identity of the entity to which disclosure was made) was determined to warrant confidentiality protection. The assertion of privilege would need to be reported to the court in lieu of reporting the disclosure.

Yet a different situation is presented if information is first disclosed to the President and the President subsequently further discloses it to other officials. We conclude that such subsequent, derivative disclosures are not subject to the reporting requirement in Rule 6(e)(3)(C)(iii). The reporting requirement set forth in paragraph (3)(C)(iii) applies only to a disclosure made pursuant to paragraph (3)(C)(i)(V)—that is, a disclosure of grand jury information that is foreign intelligence or counterintelligence or foreign intelligence information to an official “to assist the official receiving that information in the performance of his official duties.” Nothing in the phrasing of the reporting obligation suggests that it applies to *subsequent* dissemination of the information made by such an official in the course of pursuing his duties. To the contrary, because the rule expressly anticipates disclosure “to assist the official receiving that information in the performance of his official duties,” it seems to contemplate that use of the information (and hence further dissemination) will be made. Fed. R. Crim. P. 6(e)(3)(C)(i)(V). That dissemination, however, does not in itself constitute a “disclosure” pursuant to paragraph (3)(C)(i)(V). The “disclosure” is the transfer of the information from the realm of the grand jury to the intelligence, national security, or other official who needs the information to perform his duties. The terms of the reporting requirement confirm this understanding. The rule requires a report to the district court only of the “departments, agencies, or entities to which the disclosure was made.” Fed. R. Crim. P. 6(e)(3)(C)(iii). By requiring only such a general report of the agency or department to which the disclosure was made (not the specific officials), the rule appears to contemplate that the officials who first receive the information will need to distribute it further in pursuing their duties. Indeed, in the sentence immediately preceding the reporting requirement, paragraph (3)(C)(iii) makes it explicit that Congress anticipated such further dissemination of the information as it states that officials who have received grand jury information under paragraph (3)(C)(i)(V) may use the information “subject to any limitation on the unauthorized disclosure of such information.” Disclosures are thus contemplated and are restricted, not by Rule 6(e) itself, but solely by unspecified “limitations” that must derive from *other* sources of law. If Congress had intended Rule

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Thus, for example, we believe that the reporting requirement does properly apply to disclosures made to officials at the Office of Management and Budget or the National Security Council.

6(e) itself to regulate that further spread of the information, it surely would have said so more explicitly by at least cross-referencing the Rule 6(e) provision that limits disclosure of the information.

Two aspects of the text and structure of the Rule strongly support this interpretation of the new provision. First, under the plain terms of Rule 6(e), the secrecy requirement does not extend to information disclosed pursuant to new paragraph (3)(C)(i)(V). Paragraph (e)(2) of the Rule lists with great specificity the persons to whom the rule of secrecy applies. It states: “A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.” Where a person to whom a disclosure is made under a specific provision of the rule is intended to be covered, the text makes that explicit (as in the case for disclosures made under paragraph (3)(A)(ii)). By its terms, the rule of secrecy does not extend, however, to those who receive disclosures under paragraph (3)(C)(i)(V). Moreover, paragraph (2) explicitly states that “[n]o obligation of secrecy may be imposed on any person except in accordance with this rule.”

Second, the interpretation outlined above is strongly buttressed by the contrast between the wording of this new reporting requirement added by the Patriot Act and the pre-existing reporting requirement for information disclosed to government personnel to assist a government attorney in federal criminal law enforcement pursuant to paragraph (3)(B) of Rule 6(e). Paragraph (3)(B) establishes a much stricter reporting regime. It requires an accounting of each person to whom information is disclosed as it requires an attorney for the government to report to the district court “the names of the persons to whom such disclosure has been made.” Moreover, it makes it clear that the information is still subject to Rule 6(e)’s rule of secrecy, and thus that further disclosures must also be reported to the court, as it requires the government attorney to certify that he “has advised [the persons to whom the information was disclosed] of their obligation of secrecy under this rule.” Fed. R. Crim. P. 6(e)(3)(B); *see also* Fed. R. Crim. P. 6(e)(2) (stating that the rule of secrecy applies, *inter alia*, to “any person to whom disclosure is made under paragraph (3)(A)(ii)”). That clear statement that the information remains subject to Rule 6(e) stands in sharp contrast to the suggestion in paragraph (3)(C)(iii) that information disclosed pursuant to the new Patriot Act provision may be further disseminated subject only to unspecified “limitations on the unauthorized disclosure of such information.” If Congress had intended such “limitations” to be derived from Rule 6(e), it surely would have followed the same pattern used in paragraph (3)(B) and would have made that restriction explicit. In short, when Congress intended to demand a strict accounting of all the persons who received grand jury information and to ensure that Rule 6(e) would continue to regulate subsequent disclosures of such information, it crafted language tailored

to that end. Those requirements were not included, however, in the reporting requirement created by the Patriot Act.

**E. Does the Reporting Requirement Contained in Rule 6(e)(3)(C)(iii) Apply to Secondary Recipients of Information Disclosed Pursuant to Rule 6(e)(3)(C)(i)(V)?**

Under the above interpretation of the Rule, none of the restrictions imposed by Rule 6(e) would carry over to secondary recipients of information that was first disclosed pursuant to paragraph (3)(C)(i)(V)—including the limitation imposed by paragraph (3)(C)(i)(V) itself. That paragraph states that information may be disclosed to certain officials “to assist the official receiving that information in the performance of his official duties.” Paragraph (3)(C)(iii) reiterates this limitation by expressly providing that an official “to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person’s official duties.” Under the interpretation outlined above, because subsequent disclosures of the information in the course of an official’s duties are not themselves disclosures “pursuant to clause (i)(V),” the restriction limiting the use of the information to the course of an official’s duties would not apply. Here again, comparing the restriction imposed by paragraphs (3)(C)(i)(V) and (3)(C)(iii) with that imposed by paragraph (3)(B) is instructive in showing the limited reach of the new restriction. Where Congress intended Rule 6(e) to regulate every subsequent step in the dissemination of information originally derived from the grand jury, it made it explicit that obligations under 6(e) would carry over and even required, upon each disclosure of the information, that the recipients be “advised . . . of their obligation of secrecy under this rule.” Fed. R. Crim. P. 6(e)(3)(B). There is no comparable provision requiring recipients of foreign intelligence information under paragraph (3)(C)(i)(V) to warn any persons to whom they disclose the information in the course of their duties that those recipients are also under an obligation imposed by Rule 6(e). Nor is there any other indication in the text that the Rule was meant to apply in such situations.<sup>12</sup>

This does not mean, of course, that such recipients of information will be free to use the information however they please. It simply means that Rule 6(e) will not provide the governing standard of conduct. Foreign intelligence information

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<sup>12</sup> There is little or no legislative history shedding light on the reporting requirement and restrictions under the new disclosure provision in paragraph (3)(C)(i)(V). A section-by-section analysis of the Act in the Congressional Record does note that “[r]ecipients may use that information only as necessary for their official duties, and use of the information outside those limits remains subject to applicable penalties, such as . . . contempt penalties under Rule 6(e).” 147 Cong. Rec. 20, 686 (2001). That statement is consistent with the interpretation outlined above, because the *recipient* of the disclosure under (3)(C)(i)(V) is subject to the restrictions of that paragraph and paragraph (3)(C)(iii) and could be held in contempt for using the information other than in the course of his official duties.

disclosed under the Rule will often be classified or classifiable material (and thus will be subject to a full set of restrictions on its disclosure), or may be subject to restrictions under the Privacy Act, or officials who receive it may be limited by general regulations governing their use of information that they learn in the course of performing their duties. The text of Rule 6(e)(3)(C)(iii) acknowledges that such *other* limitations on the dissemination of information will exist as it states that persons to whom the information is disclosed under paragraph (3)(C)(i)(V) may use it in their duties “subject to any limitations on the unauthorized disclosure of such information.” Thus, it cannot be suggested that an interpretation under which the terms of Rule 6(e) do not restrict all subsequent recipients of the information creates an irrational gap at odds with the purposes of the Rule by leaving no restrictions whatsoever on the information.

Finally, this understanding of the reporting requirements imposed by paragraph (3)(C)(iii) makes perfect sense given the purpose of the Patriot Act amendments. The objective of the amendments (to Rule 6(e), Title III and other provisions) was to ensure that information with potential value to law enforcement, intelligence, and other personnel for purposes of piecing together a picture of a foreign threat to the United States—and particularly of potential value for preventing an attack that could cost thousands of lives—would be readily made available as a matter of course to the agencies and offices that could make use of it. Given that purpose, requiring the government to regulate and report to the district court every subsequent tier of dissemination of information made by “law enforcement, intelligence, protective, immigration, national defense, or national security official[s]” in the course of their myriad duties would hamper the free flow of vital intelligence information that the provision was designed to promote. Fed. R. Crim. P. 6(e)(3)(C)(i)(V).

As a result, we conclude that after a disclosure is made under Rule 6(e)(3)(C)(i)(V), subsequent dissemination of that information by the officials to whom it was initially disclosed is not subject to the reporting requirement of paragraph (3)(C)(iii). This understanding applies even where the initial disclosure was made to the President himself and was therefore exempt from the reporting requirement.<sup>13</sup>

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<sup>13</sup> We do not believe that this interpretation provides a mechanism for a wholesale end run around the reporting requirements of the Rule. The notion that all, or even a significant portion, of Rule 6(e) information could be passed to other federal officials by running it first through the President is unrealistic. Given the enormous demands on the President, realistically he will only be burdened with information that it is necessary for him to have. It is also important to note that disclosures of grand jury material to other officials made pursuant to the President’s constitutional authority fall outside the reporting requirements of Rule 6(e) because they are made pursuant to a presidential authority under Article II of the Constitution, not pursuant to the terms of Rule 6(e). See, e.g., *Grand Jury Matters*, 17 Op. O.L.C. at 68; *Grand Jury Material*, 21 Op. O.L.C. at 174-75. Of course, as explained above, this constitutional authority may not be invoked merely for routine foreign intelligence information, but



We caution that this interpretation of the newly enacted provisions of Rule 6(e) has not been tested in the courts. The interpretation outlined above is our best understanding of the requirements of the Rule based upon a thorough review and analysis, but we cannot foreclose the possibility that courts in the future might use a different analysis, resulting in different conclusions.

## **VI. Conclusion**

The Patriot Act amendments to Rule 6(e) and section 2517 of title 18 have provided statutory authority that overlaps with the President's inherent constitutional authority to have access to information that relates to national security and foreign affairs, while lowering the standard necessary to justify such statutorily authorized disclosures. To the extent, however, that there is information critical to the ability of the President to carry out his Article II duties that continues to fall outside the scope of these new exceptions, our prior discussions regarding the constitutional principles justifying such disclosures continue to apply.

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*Office of Legal Counsel*

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rather only for information that is actually necessary for the President to discharge his constitutional duties.

## Application of 44 U.S.C. § 1903 to Procurement of Printing of Government Publications

Section 1903 of title 44 of the United States Code does not prevent executive agencies from using private printers at agency expense to print copies of government publications for their own use while at the same time requisitioning depository copies from the Government Printing Office at GPO expense.

August 22, 2002

### MEMORANDUM OPINION FOR THE ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY OFFICE OF MANAGEMENT AND BUDGET

You have asked for our interpretation of section 1903 of title 44 of the United States Code,<sup>1</sup> and what limitations that section may place on the procurement of printing of government publications by executive agencies in light of our previous advice that executive agencies may opt to use private printers rather than the Government Printing Office (“GPO”). We conclude that under the best reading of the statute, executive agencies may fulfill their own needs through use of private printers and, at the same time, have GPO provide and pay for the copies of the publication sent to the depository libraries.

Chapter 19 of title 44 requires that certain government publications “shall be made available to depository libraries through the facilities of the Superintendent of Documents for public information.” 44 U.S.C. § 1902 (1994). For such publications, the Superintendent of Documents informs the component of Government ordering the printing of the number of copies needed for distribution to depository libraries. *See id.* § 1903. Under certain circumstances, discussed below, GPO pays for such copies. *See id.*

We have previously advised that executive branch departments and agencies need not procure printing through GPO. *See Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 221 (1996). We now conclude that for government publications that are to be made available to the depository libraries, executive agencies may “split” their orders. That is, the agency may procure the copies for its own use through private printers and have GPO provide and pay for copies to be sent to the depository libraries.

Section 1903 provides, in relevant part:

Upon request of the Superintendent of Documents, components of the Government ordering the printing of publications shall either

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<sup>1</sup> *See* 44 U.S.C. § 1903 (1994).

increase or decrease the number of copies of publications furnished for distribution to designated depository libraries . . . so that the number of copies delivered to the Superintendent of Documents is equal to the number of libraries on the list. . . .

The Superintendent of Documents shall currently inform the components of the Government ordering printing of publications as to the number of copies of their publications required for distribution to depository libraries. The cost of printing and binding those publications distributed to depository libraries obtained elsewhere than from the Government Printing Office, shall be borne by components of the Government responsible for their issuance; those requisitioned from the Government Printing Office shall be charged to appropriations provided the Superintendent of Documents for that purpose.

44 U.S.C. § 1903.

Because the statute refers both to copies of publications and to publications themselves, some ambiguity arises. Indeed, the statute uses both terms in the same sentence, giving rise to the implication that the two terms have different meanings. *See, e.g., id.* (stating that “components of the Government ordering the *printing of publications* shall either increase or decrease the number of *copies of publications* furnished for distribution to designated depository libraries”) (emphasis added). Taking seriously the possible distinction between copies of publications and publications, it could be argued that the full cost of printing any publication (including depository copies) not requisitioned entirely through GPO must be borne by the ordering component of Government. This is so because, on this reading, “those requisitioned from” GPO would refer to publications that are distributed to depository libraries and not merely to the copies of such publications that actually are so distributed.

We reject this construction, however. Giving effect to the possible distinction between copies of publications and publications undermines the statute. “[T]hose publications distributed to depository libraries” clearly refers to the same thing as “those requisitioned from the Government Printing Office.” But if these phrases refer to the total publication rather than the copies sent to the depository libraries, the statute would require GPO to pay for the entire cost of printing every copy of the publication, as long as the agency requisitioned GPO to print the publication. Not only would this be an absurd result given GPO’s role, but we understand that it is unsurprisingly contrary to practice, *see, e.g.,* Memorandum for Heads of Executive Departments and Agencies, from Mitchell E. Daniels, Jr., Director, Office of Management and Budget, *Re: Procurement of Printing and Duplicating through the Government Printing Office* at 1 (May 3, 2002) (noting that GPO charges agencies for printing services). Because “[s]tatutory construction is a

holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter," *Nat'l Bank of Or. v. Indep. Ins. Agents*, 508 U.S. 439, 455 (1993) (internal quotations and citation omitted), we decline to give effect to any possible distinction between "copies of publications" and "publications."

It follows that the statute provides that GPO shall cover the costs of producing the *copies* of publications that are to be distributed to the depository libraries, as long as the ordering component of Government requisitions GPO to produce those copies. Furthermore, the statute does not require that the ordering component of Government requisition every copy of the publication from GPO in order to have GPO pay for the depository copies. Accordingly, we conclude that section 1903 does not preclude agencies from splitting their orders by contracting with private printers to produce copies for their own use and requisitioning GPO to produce the depository copies.

In summary, executive agencies may split print orders, using private printers at agency expense for their own needs and requisitioning depository copies from GPO at GPO's expense. We note in passing that nothing in the statute requires GPO actually to produce the depository copies in a separate printing run. As GPO itself already contracts out most of its printing work, GPO could certainly choose to purchase the depository copies from the private printer selected by the executive agency.

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## **Relationship Between Section 203(d) of the Patriot Act and the Mandatory Disclosure Provision of Section 905(a) of the Patriot Act**

The sweeping authority to share information set forth in section 203(d) of the Patriot Act has a significant impact on the scope of the mandatory information-sharing obligation set forth in section 905(a) of the Patriot Act. Section 905(a) requires disclosure of foreign intelligence to the Director of Central Intelligence unless disclosure is otherwise prohibited by law. Because of the sweep of section 203(d), however, it is always lawful to disclose information that comes under that section in order to assist a federal official in the performance of his official duties. As a result, the preemptive effect of section 203(d) on all other non-disclosure provisions means that, absent an exception provided for by the Attorney General, foreign intelligence that would assist the Director of Central Intelligence in the performance of his official duties must be disclosed pursuant to section 905(a) because no other applicable law can be said to provide otherwise.

September 17, 2002

### MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL OFFICE OF LEGAL POLICY

You have asked for our views concerning how the broad scope of the information-sharing authority set forth in section 203(d)(1) of the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 203(d), 115 Stat. 272, 281 (“Patriot Act”) (codified at 50 U.S.C. § 403-5d) affects the mandatory disclosure provision contained in section 905(a) of the Patriot Act, 115 Stat. at 388-89 (codified at 50 U.S.C. § 403-5b(a)(1)). Specifically, section 905(a)(2) requires mandatory disclosure to the Director of Central Intelligence (“DCI”) of foreign intelligence acquired in the course of a criminal investigation, “[e]xcept as otherwise provided by law.” 115 Stat. at 389.\* Section 203(d)(1), however, states that “it shall be lawful” to disclose such information to assist a federal official “in the performance of his official duties” “[n]otwithstanding any other provision of law.” 115 Stat. at 281.

We conclude that section 203(d) means what its plain terms say, i.e., that notwithstanding *any* other provision of law limiting disclosure of information, it is lawful to disclose the information described in that section for the purpose of assisting a federal official “in the performance of his official duties.” In turn, the sweeping authority to share information set forth in section 203(d) has a significant impact on the scope of the mandatory information-sharing obligation set forth in section 905(a). Section 905(a) requires disclosure of foreign intelligence to the

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\* Editor’s Note: Subsequent to the issuance of this opinion, 50 U.S.C. § 403-5b(a)(1) was amended to refer to the Director of National Intelligence rather than the Director of Central Intelligence. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1071(a)(1)(G), 118 Stat. 3638, 3689.

DCI *unless* disclosure is otherwise prohibited by law. Because of the sweep of section 203(d), however, it is always lawful to disclose information that comes under that section in order to assist a federal official in the performance of his official duties. As a result, the preemptive effect of section 203(d) on all other non-disclosure provisions means that, absent an exception provided for by the Attorney General,<sup>1</sup> foreign intelligence that would assist the DCI in the performance of his official duties must be disclosed pursuant to section 905(a) because no other applicable law can be said to provide otherwise.

### **I. Scope of Section 203(d)**

Section 203(d)(1) provides as follows:

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section [401a of this title]) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

115 Stat. at 281.

As the Supreme Court has emphasized, “[t]he starting point in every case involving construction of a statute is the language itself.” *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (alteration in original) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). “[W]e begin with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there,’” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)). See also *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”). The language of section 203(d)(1) states clearly that “it shall be lawful” for the foreign intelligence or counterintelligence or foreign intelligence information that is “obtained as part of a criminal investigation

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<sup>1</sup> Section 905(a)(2) provides that the Attorney General “may provide for exceptions” when disclosure “would jeopardize an ongoing law enforcement investigation or impair other significant law enforcement interests.” 115 Stat. at 388-89.

to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official,” so long as the disclosure is made “to assist the official receiving that information in the performance of his official duties.” 115 Stat. at 281. Moreover, the statute plainly states that such a disclosure may lawfully be made “[n]otwithstanding any other provision of law.” *Id.* (emphasis added). Therefore, the plain terms of this provision indicate that any foreign intelligence information and counterintelligence or foreign intelligence, as defined in that section, obtained as part of a criminal investigation may be disclosed to the enumerated officials in order to assist those officials in their duties, regardless of any federal, state, or local law to the contrary.<sup>2</sup>

Congress was clearly concerned with ensuring that relevant foreign intelligence and counterintelligence information that could assist Federal officials in preventing the sort of tragedy that took place on September 11, 2001, could be made available to such officials. Section 203(d) carves out an exception to any existing laws restricting the sharing of information in order to ensure that certain classes of information may be shared with such officials, and we conclude that it should be applied in accordance with its language, that is, without limitation by other statutory provisions that may be inconsistent with it.<sup>3</sup> *Cf. Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999) (“notwithstanding any other provision of law” means that all other jurisdiction-granting statutes shall be of no effect); *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (“notwithstanding” clause read broadly to give Secretary of Transportation “broadest possible discretion”); *United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989) (interpreting “notwithstanding any other provision of law” language in Ethics in Government

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<sup>2</sup> We conclude that the plain meaning of this provision, which encompasses “any” law, includes state laws within its scope. As the Supreme Court has explained, the question of federal preemption of state law “is basically one of congressional intent.” *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). The plain terms of section 203(d)(1) reach “any other provision of law,” and there is no reason to read this broad provision to exclude state law. 115 Stat. at 281 (emphasis added). This is particularly true given the type of information at issue, i.e., foreign intelligence, which is quintessentially a matter for the federal Government to address. Given the purposes of the Patriot Act, there is every reason to believe that Congress intended this provision to apply to all foreign intelligence information obtained under the law of any jurisdiction. Giving effect to confidentiality provisions in state law would impede the flow of foreign intelligence information to federal officials and would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In addition, other courts have viewed virtually identical phrases to have the effect of preempting state laws. *See Burlington N. & Santa Fe Ry. Co. v. Consol. Fibers, Inc.*, 7 F. Supp. 2d 822, 827-28 & n.2 (N.D. Tex. 1998) (holding that the phrase “[n]otwithstanding any other provision or rule of law” preempts state law and citing cases).

<sup>3</sup> This exemption, for example, applies to the prohibition on information disclosure imposed by the Privacy Act, 5 U.S.C. § 552a(b) (2000). Moreover, because section 203(d) exempts the information to which it applies from the prohibition in the Privacy Act entirely, the various exceptions to the prohibition in the Privacy Act are also not applicable. As a result, the conditions that attach to the disclosure of information pursuant to the Privacy Act exceptions do not apply to information disclosed pursuant to section 203(d).

Act to “naturally mean[] that the conferral of prosecutorial powers [on the independent counsel] should not be limited by other statutes”); *Bryant v. Civiletti*, 663 F.2d 286, 292 (D.C. Cir. 1981) (“notwithstanding” clause indicates that other statutory provisions were not intended to apply); *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981) (interpreting “notwithstanding” clause to mean that the remedies established by the statutory provision are not to be modified by any pre-existing law).<sup>4</sup>

Giving effect to the plain terms of section 203(d) is also consistent with section 203(a)(1)<sup>5</sup> and (b)(1)<sup>6</sup> of the Patriot Act. Those provisions amended the grand jury secrecy provisions of Rule 6(e)(3) of the Federal Rules of Criminal Procedure and the non-disclosure provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* (2000), to permit sharing—subject to certain procedures—of foreign intelligence information and counterintelligence or foreign intelligence developed in a grand jury or through a wiretap.

We recognize the argument that if section 203(d) is properly read to permit sharing of information without regard to *any* other law, it renders the disclosure

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<sup>4</sup> On one occasion in the past, we construed the phrase “notwithstanding any other provisions of Federal, State, or local law” to have a more limited meaning. See Memorandum for Andrew J. Pincus, General Counsel, Department of Commerce, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Effect of 8 U.S.C.A. § 1373(a) on the Requirement Set Forth in 13 U.S.C. § 9(a) That Census Officials Keep Covered Census Information Confidential* (May 18, 1999) (preempting federal officials’ discretion to impose prohibitions on disclosure of information, but not effecting the repeal of explicit federal statutory prohibitions). Our analysis in that opinion, however, was entirely dependent on the particular context of the overall language of the statute in question and its relationship to the comprehensive regulation of confidentiality of census information set forth in title 13 of the United States Code. That opinion has no broader application.

<sup>5</sup> Section 203(a)(1) provides that disclosures otherwise prohibited by Rule 6(e) may be made “when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.” 115 Stat. at 279 (amending Fed. R. Crim. P. 6(e)(3)(C)(i)(V)).

<sup>6</sup> Section 203(b) provides that:

Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.

115 Stat. at 280 (codified at 18 U.S.C. § 2517(6)).



authorizations contained in subsections (a) and (b) superfluous, and simultaneously renders the disclosure restrictions contained in those subsections ineffective. Such a reading of the statute should, of course, be avoided. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (cardinal rule of statutory construction is that significance and effect be accorded every word of a statute if possible). We conclude, however, that any such difficulty is more apparent than real and is easily dispelled by the standard canon of statutory construction that the more specific governs the general. *Simpson v. United States*, 435 U.S. 6, 15 (1978). Subsections (a) and (b) deal with specific and sensitive non-disclosure provisions in other laws. In amending those non-disclosure provisions, Congress has not simply duplicated the information-sharing authorization contained in section 203(d), but also has included additional requirements and safeguards, thereby justifying inclusion of separate subsections. 115 Stat. at 278-80. Subsection (a) amends Rule 6(e)(3)(C) to contain a subsection (iii), which provides that the attorney for the government who makes a disclosure under Rule 6(e)(3)(C)(i)(V) is required to “file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.” 115 Stat. at 279. Similarly, subsection (b) permits Title III information to be disclosed only by “[a]ny investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom.” 115 Stat. at 280 (emphasis added).

These specific disclosure provisions, which were enacted as part of the same section as the more general provision in section 203(d), should apply instead of the more general provision, *see Simpson*, 435 U.S. at 15, and thus they have effect independent of the more general provision. Subsections (a) and (b) were included in the Patriot Act to address the particular issues of disclosure in the Rule 6(e) and Title III contexts. Section 203(d) was designed as a sweeping catch-all to ensure that disclosures would not be blocked under any other statutory scheme. It does not matter that Congress perhaps could have made the interrelationship between the provisions more apparent. That is particularly so given the complexity of the Patriot Act and the short time within which it was drafted and enacted in response to the September 11, 2001 attacks.<sup>7</sup> As one court has recently explained, “statutes are not drafted with mathematical precision, and should be construed with some insight into Congress’ purpose at the time of enactment.” *In re Chateaugay Corp.*, 89 F.3d 942, 953 (2d Cir. 1996). *See also United States v. Coatoam*, 245 F.3d 553, 559 (6th Cir. 2001) (noting that the confusion arising as a result of Congress inadvertently enacting a second subsection was “not surprising given the length and breadth of the Crime Control Act”).

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<sup>7</sup> The statute was enacted on October 26, 2001. 115 Stat. 272.

## **II. Impact of Section 203(d) on the Disclosures Required by Section 905(a)**

Section 905(a)(2) provides as follows:

Except as otherwise provided by law and subject to paragraph (2) [of 50 U.S.C. § 403-5b(a) (as added by section 905(a)(2))], the Attorney General, or the head of any other department or agency of the Federal Government with law enforcement responsibilities, *shall* expeditiously disclose to the Director of Central Intelligence . . . foreign intelligence acquired by an element of the Department of Justice or an element of such department or agency, as the case may be, in the course of a criminal investigation.

115 Stat. at 389 (emphasis added). This provision also requires the Attorney General to “develop procedures for the administration of this section, including the disclosure of foreign intelligence by elements of the Department of Justice, and elements of other departments and agencies of the Federal Government.” *Id.* Section 905(a)(2) thus *mandates* disclosure of foreign intelligence acquired in the course of a criminal investigation, but Congress has qualified this mandate by making the disclosure requirement subject to other existing provisions of law that might limit disclosure—that is, it directed disclosure “except as otherwise provided by law.”<sup>8</sup> Section 203(d), in contrast, sets forth a *permissive* grant of authority that is *not* restricted by other provisions of law: section 203(d) makes it lawful to share information “[n]otwithstanding any other provision of law.” 115 Stat. at 281.

It might be argued, therefore, that the different language used in sections 905(a) and 203(d) reflects Congress’s intent that very different standards, with very different results on the scope of information shared, would apply to the mandatory disclosure contained in section 905(a) and the permissive disclosure contained in section 203(d). In crafting mandatory disclosure under section 905(a), the argument would go, Congress sought to preserve all existing restrictions on disclosure of information. In section 203(d), by contrast, Congress authorized sweeping disclosure authority without regard to other laws in order to permit unfettered disclosure by federal officials when those officials thought it appropriate. Such a reading, however, ignores the manner in which the plain terms of the two provi-

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<sup>8</sup> The mandatory disclosure requirement is limited by paragraph (2) of 50 U.S.C. § 403-5b(a) (as added by section 905(a)(2) of the Patriot Act) that the Attorney General “may provide for exceptions to the applicability of paragraph (1) [of 50 U.S.C. § 403-5b(a)] for one or more classes of foreign intelligence, or foreign intelligence with respect to one or more targets or matters, if the Attorney General determines that disclosure of such foreign intelligence under that paragraph would jeopardize an ongoing law enforcement investigation or impair other significant law enforcement interests.” 115 Stat. at 389.

sions interact. Due to the scope of section 203(d), which permits sharing any information that falls within its scope regardless of other statutory restrictions, it is *never* unlawful to disclose foreign intelligence to a federal official when it will assist him in the performance of his official duties. As a result, no other law that would otherwise provide an exception to section 905(a) applies to section 905(a) information that also falls within the scope of section 203(d).

The question then arises how to read these two statutory provisions in a way that gives meaning to both. Because section 905(a) mandates disclosure “except as otherwise provided by law,” yet section 203(d) authorizes disclosure “notwithstanding any other provision of law,” a superficial reading of these provisions might lead one to conclude that section 203(d)’s authorization to disclose information “notwithstanding any other provision of law” renders meaningless section 905(a)’s mandate that disclosure be made “except as otherwise provided by law.” We do not believe that to be the case, however. First, while section 905(a) generally requires the automatic disclosure of any and all foreign intelligence acquired in the course of a criminal investigation, section 203(d) permits disclosure of such information only when it is determined that the disclosure will be made “in order to assist the official receiving that information in the performance of his official duties.” Moreover, section 203(d)(1) further restricts any subsequent use of such information by anyone who receives it pursuant to that section by providing that “[a]ny Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.” 115 Stat. at 281. Second, the “[e]xcept as otherwise provided by law” language of section 905(a) preserves the specific limitations and requirements set forth in section 203(a) and (b).

In short, when the two statutory provisions are read together, the following is the result: There is no mandatory obligation under section 905(a) to disclose foreign intelligence generally when disclosure is prohibited by another law. Nevertheless, despite any restrictions on disclosure imposed in other laws, because foreign intelligence may be disclosed to the DCI (or any other federal official) under the authority of section 203(d) when disclosure of such information to the DCI (or other official) would assist him in the performance of his official duties, there is no law that has the effect of prohibiting the disclosure of information that falls within the scope of section 203(d). Therefore, absent an exception provided for by the Attorney General, information described in section 203(d) that will assist the DCI in the performance of his duties must be disclosed to the DCI pursuant to section 905(a), subject to the requirements of section 203(a) and (b).

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Office of Legal Counsel*

## Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy

The Stafford Disaster Relief and Emergency Assistance Act of 1974 and its implementing regulations permit the Federal Emergency Management Agency to provide federal disaster assistance for the reconstruction of Seattle Hebrew Academy, a private religious school that was damaged in an earthquake in 2001.

The Establishment Clause of the First Amendment does not pose a barrier to the Academy's receipt of such aid.

September 25, 2002

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL FEDERAL EMERGENCY MANAGEMENT AGENCY

You asked us to analyze whether the Federal Emergency Management Agency ("FEMA") may, consistent with the Stafford Disaster Relief and Emergency Assistance Act of 1974 ("the Act"), 42 U.S.C.A. §§ 5121-5206 (1995 & West Supp. 2002), the Act's implementing regulations, and the Establishment Clause of the First Amendment, provide disaster assistance to the Seattle Hebrew Academy ("the Academy"). The Academy, like many other Seattle institutions, sustained severe damage as a result of the Nisqually Earthquake on February 28, 2001. For the reasons set forth below, we conclude that the Act and its implementing regulations permit FEMA to provide a disaster assistance grant to the Academy, and that the Establishment Clause does not pose a barrier to the Academy's receipt of such aid.

#### I.

The Academy, a private nonprofit educational facility for Jewish students, applied to FEMA for disaster assistance pursuant to section 406 of the Act, 42 U.S.C.A. § 5172(a)(1)(B). The Act authorizes the President to "make contributions . . . to a person that owns or operates a *private nonprofit facility* damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person." *Id.* (emphasis added). In 1979, the President transferred to FEMA this and other disaster relief functions that previously had been delegated or assigned to other Federal agencies. *See* Exec. Order No. 12148, § 1-102, 3 C.F.R. 412, 413 (1980).

On March 28, 2001, a FEMA Public Assistance Officer denied the Academy's application for assistance. The Academy appealed to the FEMA Region X Regional Director. The Region X Acting Regional Director denied the appeal on October 19, 2001, on the ground that the Academy's building was not a "private nonprofit facility" for purposes of section 406(a)(1)(B) because it was not open to

“the general public.” See Letter for Donna J. Voss, Deputy State Coordinating Officer, Public Assistance, Emergency Management Division, State of Washington Military Department, from Tamara D. Doherty, Acting Regional Director, Region X, FEMA, at 1 (Oct. 19, 2001) (“Doherty Letter”). In so ruling, the Acting Regional Director determined that a religiously affiliated educational facility is not open to “the general public” if it only admits students of a particular faith. *Id.*

The Academy has appealed the Acting Regional Director’s decision. See Letter for Donna Voss, Washington State Public Assistance Officer, Washington State Disaster Field Office, from Ulrike I. Boehm, Attorney for SHA, Latham & Watkins, *Re: Seattle Hebrew Academy* (Dec. 21, 2001) (“Boehm Letter”). It is our understanding that the Academy’s appeal is presently being considered by the FEMA Associate Director for Response and Recovery. See 44 C.F.R. § 206.206(b)(2) (2001). You asked for our views on whether FEMA is required by statute or regulation to apply a “general public” requirement to all eligible private nonprofit facilities or otherwise to disqualify a religiously sponsored educational facility on the ground that it only admits students of a particular faith. If the Act and its implementing regulations do not require that FEMA deny funding to the Academy, you also asked for our views on whether such funding would violate the Establishment Clause of the First Amendment.

## II.

### A.

On its face, 42 U.S.C.A. § 5172(a)(1)(B) requires the President to find only that a potential disaster relief recipient “owns or operates a private nonprofit facility” damaged or destroyed in a major disaster. The Acting Regional Director’s denial of the Academy’s application added another requirement—that the facility be open to “the general public.” In so ruling, she relied upon the FEMA regulation defining “private nonprofit facility,” which provides in relevant part:

*Private nonprofit facility* means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services *to the general public*, and such facilities on Indian reservations.

44 C.F.R. § 206.221(e) (2001) (second emphasis added). The Acting Regional Director construed this regulation to mean that, in order to qualify for relief under section 406(a)(1)(B) of the Act, any and all private nonprofit facilities—including educational facilities—must provide essential governmental type services to “the general public,” and that a religiously affiliated educational facility does not

satisfy this requirement if it limits admission to students of a particular religious faith. *See* Doherty Letter.<sup>1</sup>

We believe that the Acting Regional Director's reading of 44 C.F.R. § 206.221(e) is not the better interpretation of that regulation. Under the most natural reading of section 206.221(e), the phrase "providing essential governmental type services to the general public" modifies only the "other facilit[ies]" referenced in the clause in which that phrase appears; the requirement to be open to the general public does *not* apply to the types of facilities—namely, "educational, utility, emergency, medical, or custodial care facilit[ies], including a facility for the aged or disabled"—enumerated *prior to* the regulation's "general public" clause. These five types of facilities, and "facilities on Indian reservations," are both set off in independent clauses.<sup>2</sup> Thus, the text of the regulation does not support imposition of a "general public" requirement upon *any* of these facilities.<sup>3</sup>

FEMA has defined four of the types of facilities identified in the statute in a manner that does not impose a "general public" requirement. Most important for present purposes, FEMA's definition of "[e]ducational facilities" does not impose such a requirement. *Id.* § 206.221(e)(1). *See also id.* § 206.221(e)(2), (5), (6) (defining "[u]tility," "[m]edical facility," and "[c]ustodial care facility" in a manner that does not impose a "general public" requirement upon such facilities).<sup>4</sup>

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<sup>1</sup> The record is somewhat unclear as to whether the Academy strictly limits admission to Jewish students. At the time of the earthquake, the Academy's by-laws prohibited admission of non-Jewish students, although the Academy maintains that it no longer abides by this by-law. *See* Doherty Letter at 1. It is undisputed that the Academy grants admission only to otherwise eligible non-Jewish students who agree to "seriously study[] and practic[e] Jewish law and culture in their home[s], under the supervision and instruction of a rabbi." Boehm Letter at 9. Our reasoning, however, does not depend upon the precise nature of the Academy's admission requirements.

<sup>2</sup> As explained below, although section 206.221(e) was crafted to implement a 1988 statutory definition that references the provision of services "to the general public" (42 U.S.C.A. § 5122(9)), that provision cannot fairly be read to require that educational facilities provide services "to the general public." We begin with the regulatory language, however, because it differs slightly from the statutory language: in promulgating its definition of "private nonprofit facility," FEMA (1) replaced the statutory phrase "other private nonprofit facilities which provide" with the phrase "and other facility providing," and (2) added the term "such" before "facilities on Indian reservations." Collectively, these changes make it slightly more plausible to conclude that *all* of the referenced facilities are subject to the "general public" requirement. As explained in the text, however, we think it is most reasonable to read the three clauses of section 206.221(e)—the first, which lists five types of covered facilities; the second, which pertains to facilities providing "essential governmental type services"; and the third, which pertains to "facilities on Indian reservations"—as separate and independent clauses, of which only the second contains a "general public" requirement.

<sup>3</sup> Notably, the Acting Regional Director replaced the middle and final clauses of 44 C.F.R. § 206.221(e) with ellipses, so as to make the provision appear to state: "Private nonprofit facility means any nonprofit educational . . . facility providing essential governmental type services to the general public . . ." Doherty Letter at 1. As explained in the text, this quotation is relevant for what it omits.

<sup>4</sup> For some reason section 206.221(e) contains no definition of "rehabilitational" facilities, although that term appears, along with the other types of facilities enumerated in the first clause of the rule, in 42 U.S.C.A. § 5122(9).

By contrast, FEMA’s definition of “[o]ther essential governmental service facility” does contain a “general public” requirement. *Id.* § 206.221(e)(7).<sup>5</sup> Thus, if the portion of section 206.221(e) relied upon by the Acting Regional Director is simply interpreted in a manner consistent with FEMA’s own regulatory definition of “educational facilities,” there is no basis for imposing a “general public” requirement upon the Academy. As explained above, however, we do not believe that the text of section 206.221(e) supports imposition of a “general public” requirement upon any of the facilities enumerated in the first clause of that regulation.

It is evident that FEMA promulgated section 206.221(e) in order to implement a 1988 statutory definition that references the provision of services “to the general public.” 42 U.S.C.A. § 5122(9).<sup>6</sup> It thus appears that the Acting Regional Director may have adopted her construction of section 206.221(e) on the assumption that it is the best, or only, interpretation of the *statutory* definition of “private nonprofit facility.” As we explain below, 42 U.S.C.A. § 5122(9) cannot fairly be interpreted in that manner. Furthermore, once it is understood that 42 U.S.C.A. § 5122(9) does not support, let alone compel, a regulation of such breadth, the regulatory interpretation adopted by the Acting Regional Director becomes far less tenable.

## **B.**

Second, and more importantly, even if 44 C.F.R. § 206.221(e) could reasonably be construed to require the denial of FEMA assistance to the Academy, such a result would be inconsistent with the terms of the statutory provision that section 206.221(e) implements (42 U.S.C.A. § 5122(9)), and is not authorized by the

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<sup>5</sup> Although FEMA’s regulatory definitions do impose a “general public” requirement on “[i]rrigation facilit[ies]” and “[e]mergency facilit[ies],” 44 C.F.R. § 206.221(e)(3)-(4), we are aware of (and FEMA has provided) no reason, based in the statute or policy, why these facilities ought to be treated differently from the other types of facilities enumerated in the first clause of section 206.221(e). We are aware that in 2000, Congress amended the statutory definition to add the word “irrigation” to the definition of private nonprofit facilities, and the legislative history indicates that “[i]rrigation facilities should be eligible for Federal assistance to the extent that they provide water for essential services of a governmental nature *to the general public.*” 146 Cong. Rec. 20,583 (2000) (statement of Rep. Fowler) (emphasis added). Representative Fowler, however, appears to have assumed (mistakenly) that the statute requires that *all* eligible private nonprofit facilities provide services to the general public, and that likewise appears to be the only explanation for the express references to the “general public” in FEMA’s definitions of “emergency” and “irrigation” facilities. As explained in the text below, the statute itself—even as amended in 2000—provides no warrant for treating irrigation or emergency facilities any differently than educational facilities.

<sup>6</sup> Prior to 1989-90, when FEMA promulgated the regulatory definition of “private nonprofit facility” now found in section 206.221(e), *see* 54 Fed. Reg. 11,610 (1989) (interim rule with request for comments); 55 Fed. Reg. 2297 (1990) (final rule), FEMA’s regulatory definition of that term did not make any reference to “the general public.” Congress’s 1988 statutory amendment, however, did include such a reference. *See infra* p. 119. Thus, it is fair to presume that FEMA promulgated the new definition in order to implement the definition contained in the 1988 Act.

statutory provision that the Acting Regional Director invoked (42 U.S.C.A. § 5151(a)). Upon careful reading, neither of these provisions requires that eligible private nonprofit facilities provide services to “the general public,” or that religious schools that limit admission to students of a particular faith be deemed ineligible for disaster relief.

In 1988, in Public Law No. 100-707, 102 Stat. 4689, Congress amended the Disaster Mitigation Act of 1974 to add for the first time a statutory definition of “private nonprofit facility.” See 102 Stat. at 4690. Section 103(f) of the 1988 Act, as amended and codified, presently provides:

“Private nonprofit facility” means private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.

42 U.S.C.A. § 5122(9). In a manner similar to 44 C.F.R. § 206.221(e) (*see supra* note 2), the provision defines three categories of private nonprofit facilities: seven types of enumerated facilities; other facilities that provide “essential services of a governmental nature to the general public”; and facilities on Indian reservations. The language and structure of this provision indicate that the phrase “which provide essential services of a governmental nature to the general public” modifies *only* the second category of eligible facilities—“other private nonprofit facilities”—which is identified in the same, middle clause as the “general public” requirement. The phrase does not modify either the first category of enumerated eligible facilities (“private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled)”) or the third category of eligible facilities (“facilities on Indian reservations as defined by the President”), both of which are set off in separate, independent clauses. Indeed, the range of institutions found in the first phrase of section 5122(9) itself suggests that the “general public” requirement does not extend to those facilities: in particular, one would not ordinarily think of an “irrigation facility” as being open to the general public, and the text provides no basis for treating irrigation facilities any differently than the other enumerated facilities in this regard. *See supra* note 5.

The statutory history of this definition confirms this interpretation. Private educational institutions first became eligible for disaster assistance in 1972, when Congress gave the President authority to make grants to private nonprofit schools that suffered damage from Hurricane Agnes. Act of Aug. 16, 1972, Pub. L. No. 92-385, § 4, 86 Stat. 554, 556-57. That statute defined which “educational institution[s]” were eligible and further imposed certain conditions on the grants



made to such institutions. *Id.* § 4(b)-(d), 86 Stat. at 556-57. Nowhere, however, did Congress impose any requirement that eligible educational facilities provide services “to the general public.”

Congress amended the governing statute in the Disaster Relief Act of 1974 (now known as the Stafford Act), Pub. L. No. 93-288, 88 Stat. 143, which gave the President still broader authority to make grants for the repair or replacement of certain private facilities damaged in major disasters. *See id.* § 402(b), 88 Stat. at 153 (authorizing the President to make grants “to help repair, restore, reconstruct, or replace private nonprofit educational, utility, emergency, medical, and custodial care facilities, including those for the aged or disabled, and facilities on Indian reservations as defined by the President, which were damaged or destroyed by a major disaster”). Here again, however, the statute did not include any reference to facilities providing services to “the general public.” Nor, as far as we are aware, did the legislative history suggest a “general public” limitation. *See, e.g.*, H.R. Rep. No. 93-1037, at 37 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 3091, 3102. Not surprisingly, therefore, the regulations implementing the 1974 Act—which contained extensive, detailed limitations on eligibility for funding—thereafter defined “[p]rivate non-profit organization,” “[e]ducational [i]nstitution,” “[p]rivate non-profit facility,” and “[e]ducation[al] facilities,” all without reference to any “general public” requirement. *See, e.g.*, 24 C.F.R. § 2205.54(a)(1)-(3), (e), (f) (1976) (HUD regulations); 44 C.F.R. § 205.54(a)(1)-(3), (e), (f) (1979) (FEMA regulations adopting former HUD regulations); 44 C.F.R. §§ 205.2(15), 205.71(a), (d), (e), 205.72(b) (1980-1988) (revised FEMA regulations). It is therefore clear that, prior to the 1988 statutory amendment, neither the statute nor its implementing regulations required educational facilities to provide services to the general public.<sup>7</sup>

It was not until the 1988 amendment discussed above that the governing Act contained any reference to the “general public” whatsoever, and nothing in the language of that amendment or its legislative history suggests that Congress intended to impose a new “general public” requirement for eligibility of those facilities of nonprofit organizations *that already were eligible for relief prior to the amendment*. As the statute’s text confirms, Congress *did* intend that facilities within the newly codified “catch-all” category of “other private nonprofit facilities which provide essential services of a governmental nature” would be required to provide services “to the general public.” But the only change that Congress made

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<sup>7</sup> From the time of their initial promulgation, the pre-1988 regulations defined “[e]mergency facilit[ies]” to mean “those buildings, structures, or systems used to provide emergency services, such as fire protection, ambulance, or rescue, *to the general public*.” *See, e.g.*, 24 C.F.R. § 2205.54(a)(3)(iii) (1976); 44 C.F.R. § 205.71(d)(3) (1980) (emphasis added). When it first promulgated this regulation, HUD did not explain why it included the “general public” qualifier for emergency facilities. *See* 39 Fed. Reg. 28,212, 28,221 (1974). Notably, however, that same qualifier was not included in any of the other definitions prior to the 1988 amendment, including the definition of “education facilities.”

concerning the eligibility of private nonprofit organizations (other than codifying the definition itself) was to establish this new category of eligible facilities—a change that, in the words of the House Committee Report, “broadened” the “definition” of eligible private nonprofit facilities to “include facilities which provide to the general public services of a governmental nature,” such as “museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, and shelter workshops.” H.R. Rep. No. 100-517, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6085, 6088; *see also* 134 Cong. Rec. 4186 (1988) (Congressional Budget Office Cost Estimate, March 16, 1988, included in statement of Rep. Nowak). In sum, there is no evidence that Congress intended to place new restrictions on those facilities that already were eligible for assistance prior to 1988.

For whatever reason, the Acting Regional Director did not invoke section 5122(9) as authority for her decision, notwithstanding the fact that it contains the phrase “general public.” Instead, the only statute she cited was 42 U.S.C.A. § 5151(a), which provides:

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

Doherty Letter at 1. For at least two reasons, however, this statutory provision cannot serve as authority either for a rule that all eligible nonprofit facilities must provide services “to the general public,” or, more specifically, for a rule making ineligible for aid all private nonprofit facilities that limit admission on the basis of religion.

First, section 5151(a) says nothing about requiring that private recipients of aid provide services “to the general public.” Second, and more fundamentally, section 5151(a) is addressed not to discrimination by the *recipients* of FEMA aid, but to discrimination—including religious discrimination—by those engaged in the *provision* of FEMA aid. The regulations that the President is required to issue are “for the guidance of *personnel carrying out Federal assistance functions* at the site of a major disaster or emergency,” and must insure “that the *distribution of supplies, the processing of applications, and other relief and assistance activities* shall be accomplished in an equitable and impartial manner.” (Emphasis added.) Accordingly, we do not think that section 5151(a) is authority for the broad

“general public” requirement that the Acting Regional Director would impose on all eligible private nonprofit facilities.<sup>8</sup>

In sum, we have found no statutory provision that requires either that *all* eligible private nonprofit facilities “provide services to the general public,” or that

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<sup>8</sup> FEMA’s definition of eligible private nonprofit “[e]ducational facilities” further provides that such facilities “[may] not include buildings, structures and related items used primarily for religious purposes or instruction.” 44 C.F.R. § 206.221(e)(1). We note that there is no longer any basis for this requirement in the text of the Act (the Act formerly provided that educational institutions were ineligible if used primarily for religious purpose, *see* Pub. L. No. 92-385, § 4(c)(4), 86 Stat. at 557)—and, in light of current doctrine (*see infra* Part III), there is some question whether it is consistent with the First Amendment to the Constitution—but in any event the Acting Regional Director specifically found that the religious components of the Academy’s class requirements amount to less than 50% of the curriculum, and thus that the Academy’s building is not used “primarily for religious purposes or instruction.” *See* Letter for Tamara Doherty, Acting Regional Director, Region X, FEMA, from Donna J. Voss, Deputy State Coordinating Officer, Public Assistance, State of Washington, at 1 (July 21, 2001); Staff Analysis, Prepared by Bruce Beardson, Public Assistance Section Supervisor, and Donna Voss, Deputy State Coordinating Officer, Public Assistance, State of Washington, *Re: Seattle Hebrew Academy, First Appeal* at 1, 2 (July 24, 2001) (“Staff Analysis”).

<sup>9</sup> We also note that, even if it were proper to interpret 44 C.F.R. § 206.221(e) to require that all eligible facilities (including educational facilities) applying for assistance under the Act be open “to the general public,” it is not entirely clear, in light of FEMA policy, why a school should be deemed to fail this requirement because it uses religious criteria as a basis for admission. In its Private Nonprofit Facility Eligibility Policy, FEMA states that an organization fails its “general public” requirement if “[m]embership” therein “excludes individuals of certain discrete groups.” Policy No. 9521.3, ¶ 7.E.1.e (Apr. 25, 2000). On the other hand, an organization will “likely” satisfy the test if, *inter alia*, “[u]se restrictions, if any, are clearly related to the nature of the facility.” *Id.* ¶ 7.E.2.d. The Policy goes on to provide examples of facilities limited to senior citizens, children’s day care, and care for abused spouses, all of which presumptively satisfy the “general public” requirement. *Id.* ¶ 7.B.4.

In light of these examples, it appears that FEMA does not construe the “general public” requirement to require that facilities be open to *all* persons. Senior citizens’ homes serve only elderly people, excluding the young and middle-aged; child care facilities serve only young people, excluding adults; facilities for abused spouses serve only abused married people, excluding those who are unmarried (and presumably those who are abused by people other than their spouses). It cannot be denied that these facilities “exclude[] individuals of certain discrete groups.” Yet FEMA permits these facilities to receive aid notwithstanding the fact that they are not open to everyone, because their admission practices are “clearly related to the nature of the facility,” which is to serve people with specific needs or backgrounds.

Insofar as the same can be said of a school that restricts admission to students of a particular faith—such restrictions on admission “are clearly related to the nature of the facility,” which, in part, is to provide religious education—it is not evident why the Academy should be viewed as not providing services “to the general public” simply because it applies religious criteria in its admission practices and thus is not open to *everyone*. To the extent that the Acting Regional Director may have rested on the policy judgment that religious discrimination is more invidious than other types of discrimination, we note that the statute contains no such judgment and that many federal statutes permit religious organizations to preserve their autonomy by limiting their associations to co-religionists. *See* 42 U.S.C.A. § 2000e-1 (2000) (Title VII provision permitting religious nonprofit organizations to hire on a religious basis); *id.* § 2000d (Title VI provision prohibiting recipients of federal funding from discriminating on the basis of “race, color, or national origin,” but not religion); 20 U.S.C.A. § 1681(a) (2000) (Title IX provision prohibiting federally funded educational institutions from discriminating on the basis of sex, but not religion).

schools that limit admission to students of a particular faith be deemed ineligible for disaster relief.<sup>10</sup>

### III.

You also asked us to analyze whether the Establishment Clause of the First Amendment would require another result. Although there is no precedent that directly controls this specific issue, we conclude that the Establishment Clause does not pose a barrier to FEMA's provision of a disaster assistance grant to the Academy. The aid that is authorized by federal law is made available on the basis of neutral criteria to an unusually broad class of beneficiaries defined without reference to religion and including not only educational institutions but a host of other public and private institutions as well. Moreover, the program's design is not characterized by the sort of administrative discretion that can readily be used to favor religion, and the evidence demonstrates that FEMA has exercised its

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<sup>10</sup> Under 42 U.S.C.A. § 5151(b), which the Acting Regional Director did not cite, the President has authority to promulgate "regulations relating to nondiscrimination" that apply to institutions that receive FEMA disaster assistance. *See id.* ("As a condition of . . . receiving assistance under this chapter, . . . organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President . . ."). The President, however, has not promulgated regulations prohibiting recipients of FEMA disaster assistance from discriminating on the basis of religion. *See* 44 C.F.R. § 7.920 (2001) (prohibiting recipients of assistance from discriminating on the basis of age, but not religion). Nor are we aware of any other provision of federal law that would impose such a requirement upon the Academy. *See* 20 U.S.C.A. § 1681(a) (2000) (Title IX) (prohibiting educational institutions from discriminating on the basis of sex, but not religion); 44 C.F.R. pt. 19 (2001) (implementing Title IX for purposes of FEMA assistance); 42 U.S.C.A. § 2000d (prohibiting recipients of federal funding from discriminating on the basis of "race, color, or national origin"); 44 C.F.R. § 7.3 (2001) (prohibiting recipients of FEMA assistance under various statutes from discriminating on the basis of "race, color, or national origin"); *see also* Staff Analysis at 2 (finding that the Academy complies with Title VI).

FEMA Director's Policy 2-01 provides that "[i]t is the policy of [FEMA] to ensure that the Civil Rights of all persons receiving services or benefits from agency programs and activities are protected" and that "[n]o person shall, on the grounds of . . . religion . . . be denied the benefits of, be deprived of participation in, or be discriminated against in any program or activity conducted by or receiving financial assistance from FEMA." *Id.*, *Re: Civil Rights Program*, ¶ 1 (July 17, 2001). *See also id.* ¶ 4 (explaining that these requirements apply to "educational institutions" that receive FEMA assistance). We note, however, that this policy has not been adopted by regulation, and thus cannot be said to implement 42 U.S.C.A. § 5151(b). Nor are we aware of any other statutory authority that would authorize FEMA to impose a "general public" or religious nondiscrimination requirement on the Academy. Sections 5164 and 5201(a)(1) of title 42 (2000) authorize the President to "prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter," but we are doubtful that those provisions would permit FEMA to impose a "general public" requirement where Congress, in the statutory provision that speaks directly to the question, has imposed such a requirement on *other* institutions but not on educational institutions such as the Academy. *See* 42 U.S.C.A. § 5122(9). Similarly, there is some question whether these provisions would authorize FEMA to adopt a "policy" imposing a religious nondiscrimination requirement upon participating institutions where another provision of the same statute (42 U.S.C.A. § 5151(b)) mandates that such requirements be imposed pursuant to "regulations."

discretion in a neutral manner. Thus, we believe that provision of disaster assistance to the Academy cannot be materially distinguished from aid programs that are constitutional under longstanding Supreme Court precedent establishing that religious institutions are fully entitled to receive generally available government benefits and services, such as fire and police protection.

The Supreme Court's general framework for analyzing Establishment Clause issues is familiar. A statute violates the Establishment Clause if it lacks a "secular legislative purpose," has a "primary effect" of advancing religion, or results in an "excessive entanglement" between government and religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Agostini v. Felton*, 521 U.S. 203 (1997) (reformulating the *Lemon* test by incorporating its "entanglement" prong into its "effects" prong). Here, as in the vast majority of situations implicating the Establishment Clause, the critical question is whether allowing the Academy to receive direct disaster assistance would have the "primary effect" of advancing religion.<sup>11</sup> Accordingly, our analysis will focus on decisions that illuminate that inquiry.

Ever since its first modern Establishment Clause decision in *Everson v. Board of Education*, 330 U.S. 1, 17 (1947), the Supreme Court has indicated that religious institutions are entitled to receive "general government services" made available on the basis of neutral criteria. *Everson* held that the Establishment Clause does not bar students attending religious schools from receiving generally available school busing services provided by the government. In reaching its decision, the Court explained that even if the evenhanded provision of busing services increased the likelihood that some parents would send their children to religious schools, the same could be said of other "general state law benefits" that were *even more clearly constitutional* because they were equally available to all citizens and far removed from the religious function of the school. *Id.* at 16. As examples, the Court cited "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," concluding:

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<sup>11</sup> It is clear that allowing a range of nonprofit organizations like the Academy to receive rehabilitation grants serves the secular purpose of rehabilitating the community by helping to rebuild institutions that perform quasi-public functions and are (by virtue of their nonprofit status) most in need of assistance. *See* Pub. L. No. 92-385, § 4, 86 Stat. at 556-57 (explaining that disaster relief for private, nonprofit educational facilities was appropriate because such institutions "have a secular educational mission," and because the public schools would have to bear the cost of educating the students attending such private schools if the damaged institutions were not restored); *see also* 57 Fed. Reg. 18,441 (1992) (preamble to FEMA proposed rule explaining that the 1972 statute permitted grants to private schools "because of the public function which they served"). Nor is there any basis for concluding that allowing the Academy to receive aid would "excessively entangle" the Academy with the state, as there is even less governmental monitoring of aid recipients here than in other cases in which the Court has not questioned the provision of aid under *Lemon*'s entanglement prong. *Cf., e.g., Agostini*, 521 U.S. 203; *Mitchell v. Helms*, 530 U.S. 793 (2000).

cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

*Id.* at 17-18. *See also id.* at 16 (“[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. . . . [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief”).

We believe that a FEMA disaster assistance grant is analogous to the sort of aid that qualifies as “general government services” approved by the Court in *Everson*. Although such aid is not available to *all* citizens or buildings—and thus is not as broadly available as, say, utility services—neither is it limited to educational institutions or, for that matter, to just a few classes of buildings. As noted above, the FEMA grants in question are made available not only to public and private schools, but to “private nonprofit . . . utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.” 42 U.S.C.A. § 5122(9). Accordingly, we think that the “circumference” of this program can fairly be said to “encircle[] a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J.)). As the Court stated in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), “[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.” *Accord Texas Monthly*, 489 U.S. at 14-15 (plurality opinion) (footnote omitted) (“[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause”); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (“we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge”); *Board of*

*Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994) (“we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges”).

In *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), for example, the Court rejected an Establishment Clause challenge to a property tax exemption made available not only to churches, but to several other classes of nonprofit institutions, such as “hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.” *See also id.* at 667 n.1. In upholding the program, the Court relied in part upon the breadth of the tax exemption: the exemption did “not single[] out one particular church or religious group or even churches as such,” but rather was available to “a broad class of property owned by nonprofit, quasi-public corporations.” *Id.* at 673. As the Court stated in reference to *Everson*, if “buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses.” *Id.* at 671. Thus, just as a broad category of beneficiary institutions was sufficient to sustain the inclusion of religious institutions in the tax benefit in *Walz*, we believe the breadth of the eligibility categories in the FEMA program is sufficient to sustain the provision of FEMA aid to the Academy. Put another way, we do not think that providing FEMA grants to religious institutions that qualify for disaster relief on the basis of wholly neutral criteria—a wide array of nonprofit organizations may receive aid for buildings that have suffered structural damage from a natural disaster—lacks a secular purpose or effect. *See generally Lemon*, 403 U.S. at 612-13; *Agostini*, 521 U.S. at 223-30.

We cannot say, however, that there are no arguments to the contrary. Most important, there is an argument that providing FEMA disaster relief to repair a school used for religious instruction would run afoul of Supreme Court precedent restricting the use of “direct” aid that can be put to specifically religious uses. In particular, one might argue that insofar as the grant used to rebuild the Academy’s building would ultimately support the building’s use for secular *and* religious purposes—i.e., both secular and religious teaching—such aid is unlawful under Supreme Court decisions from the 1970s holding that public construction grants for educational institutions may not be applied toward buildings used for religious purposes. *See Tilton v. Richardson*, 403 U.S. 672 (1971) (federal construction grants for college and university facilities must be restricted indefinitely to use for secular purposes); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (invalidating the provision of state maintenance and repair grants to religious schools on the basis that such aid could not be restricted to secular purposes); *see also Hunt v. McNair*, 413 U.S. 734, 744 (1973) (sustaining state financing of construction for religious college under program that barred financing of “buildings or facilities used for religious purposes”).

In *Tilton*, for example, the Court sustained the provision of federal construction grants to religious colleges insofar as the program at issue barred aid for “any facility used or to be used for sectarian instruction or as a place for religious worship,” but invalidated such grants insofar as the program permitted funding the construction of buildings that might someday be used for religious activities. See 403 U.S. at 675, 683 (plurality opinion) (citations omitted) (concluding that a 20-year limitation on the statutory prohibition on use of the buildings for religious activities violated the Establishment Clause, because “[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion”).<sup>12</sup> Similarly, in *Nyquist* the Court invalidated state maintenance and repair grants for nonpublic elementary and secondary schools because it was not possible to “restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes.” 413 U.S. at 774. These portions of the holdings of these decisions, so far as they go, have not been specifically overruled, even where government aid is distributed to both religious and nonreligious schools on the basis of neutral criteria.<sup>13</sup>

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<sup>12</sup> This portion of the holding in *Tilton* was unanimous. See also *id.* at 692 (Douglas, J., dissenting in part, joined by Black and Marshall, JJ.); *Lemon*, 403 U.S. at 659-61 (separate opinion of Brennan, J., concurring in judgment in part in *Tilton*); *id.* at 665 & n.1 (White, J., concurring in judgment in *Tilton*) (“accept[ing] the Court’s invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years”).

<sup>13</sup> See *Mitchell*, 530 U.S. at 840 (O’Connor, J., concurring in the judgment) (“Although ‘[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,’ our decisions ‘provide no precedent for the use of public funds to finance religious activities’” (citation omitted)); see also *id.* (where government has given aid directly to a religious institution, “diversion of secular government aid to religious indoctrination” is “constitutionally impermissible”); *id.* at 865 (the principle that “any use of public funds to promote religious doctrines violates the Establishment Clause,” . . . of course remains good law” (citation omitted)); *id.* at 856-57 (discussing *Tilton*); *id.* at 857 (if plaintiffs were to prove “that the aid in question actually is, or has been, used for religious purposes,” they would “establish a First Amendment violation”); *id.* at 843-44 (emphasizing that the constitutional concern that direct aid might be impermissibly diverted to religious activities is especially pronounced when the aid is in the form of direct monetary subsidies).

We would also note, however, that while the relevant holdings of these cases have not been overruled, significant portions of their reasoning is subject to serious question in light of more recent decisions. Separate portions of the *Nyquist* decision, for example, were overruled by the Court last Term in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and the “pervasively sectarian” doctrine, which comprised the basis for many of the Court’s Establishment Clause decisions in the early 1970s (including *Nyquist*, 413 U.S. at 774-75), no longer enjoys the support of a majority of the Court. See *Mitchell*, 530 U.S. at 825-29 (plurality opinion); *id.* at 857-58 (O’Connor, J., concurring in judgment) (requiring proof of actual diversion of public support to religious uses to invalidate direct aid to schools and explaining that “presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause”); *Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) (explaining that the pervasively sectarian test is no longer valid in light of the holdings of six Justices in *Mitchell*). Moreover, even if decisions such as *Tilton* and *Nyquist* were controlling, they would limit the provision of a construction grant to the Academy only



Assuming, *arguendo*, that *Tilton* and *Nyquist* remain valid precedents in these respects, we do not believe that those decisions control the question whether FEMA may provide a disaster assistance grant to the Academy. In *Nyquist*, the Court distinguished fire and police services from construction grants and repair aid on the ground that police and fire protection are “provided in common to all citizens, are ‘so separate and so indisputably marked off from the religious function,’ that they may fairly be viewed as reflections of a neutral posture toward religious institutions.” 413 U.S. at 782 (citation omitted). But we see no principled reason why the constitutionality of an aid program should turn on whether the aid is provided to *all* citizens rather than, say, a wide array of organizations that falls somewhat short of the entire populace. There is a range of aid programs that are not as “general” as aid provided universally (to *every* person), but yet are not as circumscribed as aid to education,<sup>14</sup> and the grants provided by FEMA admittedly fall somewhere within this middle ground. But such aid is more closely analogous to the provision of “general” government services like those sanctioned by the Court in *Everson* (and many times since, e.g., *Nyquist*, 403 U.S. at 781-82) than to the construction grants at issue in *Tilton* and *Nyquist*, which were available only to educational institutions.

The vast majority of the Supreme Court’s Establishment Clause decisions rendered since *Everson* have concerned aid provided solely to educational institutions as a class (in many cases, moreover, this aid was directed toward the educational process itself), and these decisions rest in part on the theory that aid directed solely to schools is reasonably perceived as advancing the educational mission of those that receive it. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 843

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insofar as the grant would be used to reconstruct those portions of buildings in which specifically religious activities take place.

In a prior memorandum, *Constitutionality of Awarding Historic Preservation Grants to Religious Properties*, 19 Op. O.L.C. 267 (1995) (“Historic Preservation Memo”), this Office concluded that *Tilton* and *Nyquist* prohibited the Interior Department from providing historic preservation grants to religious properties. That opinion did not consider whether the rule of *Tilton* and *Nyquist* should apply where the grants at issue are available to a wide array of nonprofit institutions, rather than being limited to educational institutions. Moreover, the Historic Preservation Memo relied heavily on the fact that qualification for historic preservation grants depended on the application of “subjective criteria,” such as historical importance, in determining “project worthiness.” *Id.* at 271-72. We continue to believe that the degree of discretion exercised by governmental officials, and the manner in which such discretion is exercised, are relevant to the constitutionality of direct aid programs (although we express no opinion here on the Memo’s conclusion regarding historic preservation grants). But to the extent that the Historic Preservation Memo failed to consider the possibility that the rule of *Tilton* and *Nyquist* does not apply where direct aid is more generally available than was the aid in those cases, it does not represent our current thinking, which is set forth in this memorandum.

<sup>14</sup> *See Mitchell*, 530 U.S. at 875 (Souter, J., dissenting) (stating that “government spending resists easy classification as between universal general service or subsidy of favoritism,” and noting that “[t]he 5-to-4 division of the *Everson* Court turned on the inevitable question whether reimbursing all parents for the cost of transporting their children to school was close enough to police protection to tolerate its indirect benefit in some degree to religious schools”).

(2000) (O'Connor, J., concurring in judgment). The argument that direct aid to education unlawfully advances the mission of religious schools applies with the greatest force where such schools constitute a substantial percentage of those that receive aid. *See Lemon*, 403 U.S. at 610 (noting that 96% of students at recipient institutions were pupils at religious schools and that “most” of those schools were Catholic); *Nyquist*, 413 U.S. at 768 (“all or practically all” of the schools eligible for maintenance or repair grants were Catholic, and 85% of those eligible for other forms of aid were church-affiliated); *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) (“more than 75% [of the qualifying schools] are church-related or religiously affiliated educational institutions”), *overruled in relevant part by Mitchell*, 530 U.S. 793; *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (of 720 private schools eligible for aid, “all but 29” were religious), *overruled in relevant part by Mitchell*, 530 U.S. 793.<sup>15</sup> That argument is much harder to make where the aid is provided to a range of nonprofit institutions of which schools are but one part. The broad class of beneficiaries that are eligible for aid under the statute here—which includes “educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations,” 42 U.S.C.A. § 5122(9)—confirms that, in contrast to the education-specific aid at issue in the foregoing cases, the disaster relief provided by FEMA serves goals entirely unrelated to education—namely, rehabilitation of a community that has suffered great loss from a natural disaster by helping to rebuild institutions that perform quasi-public functions and are (by virtue of their nonprofit status) most in need of assistance. *Cf. Mitchell*, 530 U.S. at 883 (Souter, J., dissenting) (“[D]epending on the breadth of distribution, looking to evenhandedness is a way of asking whether a benefit can reasonably be seen to aid religion in fact; we do not regard the postal system as aiding religion, even though parochial schools get mail”).

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<sup>15</sup> We are not suggesting that an aid program has the unlawful effect of advancing religion merely because a large number of its beneficiaries are religious in nature. The Supreme Court has repeatedly repudiated the view that the percentage of a program’s religious beneficiaries is relevant to its constitutionality under the Establishment Clause. *See Mueller v. Allen*, 463 U.S. 388, 391, 401 (1983) (sustaining a tax deduction for educational expenses made available to both religious and secular parents, notwithstanding evidence that “about 95%” of eligible beneficiaries were parents whose children attended religious schools); *Agostini v. Felton*, 521 U.S. 203, 229 (1997) (noting that the Court was not “willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid”); *Mitchell*, 530 U.S. at 812 n.6 (plurality opinion) (citing *Agostini* for the proposition that “the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices [is] irrelevant to the constitutional inquiry”); *Zelman*, 536 U.S. at 658 (refusing to “attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools” and stating that “[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations”).

We find further support for our decision in the fact that *Tilton* and *Nyquist* are in considerable tension with a long and growing line of cases holding that the Free Speech Clause does not permit the government to deny religious groups equal access to *the government's own property*, even where such groups seek to use the property ““for purposes of religious worship or religious teaching.”” *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). See *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993); *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); see also *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). Providing religious groups with access to property is a form of direct aid—albeit not financial aid—and allowing such groups to conduct worship services plainly “advances” their religious mission. The Court, however, has consistently refused to *permit* (let alone require) state officials to deny churches equal access to public school property “on the ground that to permit its property to be used for religious purposes would be an establishment of religion.” *Lamb's Chapel*, 508 U.S. at 394. Indeed, the Court has gone so far as to extend the reasoning of these cases to require equal *funding* of religious student expression, reasoning that “[e]ven the provision of a meeting room . . . involve[s] governmental expenditure” for “upkeep, maintenance, and repair of the facilities.” See *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 842-43 (1995); see also *Prince ex rel. Prince v. Jacoby*, No. 99-35490, 2002 WL 31007791, at \*16-\*18 (9th Cir. Sept. 9, 2002) (extending the principles of *Rosenberger* to monetary and other benefits provided to student groups that are entitled to meet on school grounds under the Equal Access Act).

As in *Rosenberger*, the issue here “lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.” 515 U.S. at 846 (O'Connor, J., concurring). In such a case, “[r]eliance on categorical platitudes,” such as an absolute “no direct aid” principle, “is unavailing.” *Id.* at 847. Accordingly, we do not think it would be appropriate to conclude that the *Tilton-Nyquist* decisions govern the constitutionality of allowing a religious school to receive disaster assistance on the same terms as a wide array of institutions that provide a public service, whether they are educational or non-educational, secular or religious. If the diversity of recipients in *Walz* and the “equal access” line of cases was sufficient to dispel any Establishment Clause problems, we see no reason why a similar array of recipients in the FEMA program should not likewise suffice to sustain it. See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 727 (2002) (Breyer, J., dissenting) (arguing that establishment concerns are “far more” implicated by “government involvement in religious primary education” than by “tax deductions for charitable contributions,” which “come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other”). Accordingly, we conclude that the

FEMA assistance here is more analogous to the police and fire services discussed in *Everson* than to the educational assistance at issue in *Tilton* and *Nyquist*.<sup>16</sup>

For similar reasons, we do not believe that a reasonable observer would perceive an endorsement of religion in the government's evenhanded provision of aid to a religious school damaged by an earthquake. See *Mitchell*, 530 U.S. at 842-44 (O'Connor, J., concurring in judgment).<sup>17</sup> In a direct aid program limited to *educational* recipients, one could argue that if a school "uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement." *Id.* at 843 (O'Connor, J.). The notion is that, where the government provides education-specific aid, it is fair to say that the government is providing the assistance because of the content of the funded education. Such a presumption of governmental endorsement is not present, however, where the aid is provided to a wide array of nonprofit institutions (educational and noneducational alike), where the aid is not provided because of the content of any activities that take place within the building, and where the government is indifferent to the religious or secular orientation of any education that may occur within the building. Indeed, much of the aid here is given to nonprofit institutions that provide services that do not involve any "pedagogy" or "speech" whatsoever.<sup>18</sup>

Our conclusion is strongly supported by the evidence regarding FEMA's application of the criteria for receiving funds under the Act. Apart from the Academy,

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<sup>16</sup> We acknowledge, as Justice O'Connor noted in her concurrence in *Mitchell*, 530 U.S. at 840, that the Court has never approved of any direct financial assistance to religious institutions absent assurance that the aid may not lawfully be diverted to religious activities, and the Court's cases contain rhetoric to the effect that "any use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 865 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring)). At the same time, however, the Court has never passed on a program in which direct financial aid was extended to schools as part of a broader array of public and private institutions.

<sup>17</sup> See generally *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (the Court has, "[i]n recent years, . . . paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion"); see also *id.* at 624-32 (O'Connor, J., concurring in part and concurring in the judgment); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000); *Agostini*, 521 U.S. at 235.

<sup>18</sup> One could also argue that fire protection is distinguishable from disaster assistance in that the latter is a more "substantial" form of aid that permits the construction of an entire facility, whereas fire protection merely prevents such a facility from being destroyed. We do not find this argument persuasive, however. To begin with, the Supreme Court's decisions decreasingly focus on the "substantiality" of aid provided to religious institutions. See, e.g., *Agostini*, 521 U.S. at 205 (rejecting the rule "that all government aid that directly aids the educational function of religious schools is invalid"); *Mitchell*, 530 U.S. at 820-25 (plurality opinion); *id.* at 849-57 (O'Connor, J., concurring in judgment); *Zelman*, 536 U.S. 639. Moreover, we think it would "exalt form over substance" (*Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993)) to say that the government may provide aid that helps a religious organization *avoid* a disaster but not aid that would help such an organization *recover* from a disaster.

of the 268 Nisqually Earthquake applications on which FEMA has ruled,<sup>19</sup> 267 applicants—all but *one*—were declared eligible for funding. *See* Exhibit A. It thus appears that there is little exercise of discretion regarding religion in the distribution of grant funds—indeed, in this instance, funding was virtually automatic—and the diverse makeup of those that have received funds confirms that the program’s administration is not “skewed towards religion.” *Witters v. Washington Dep’t of Servs.*, 474 U.S. 481, 488 (1986). This largely (if not entirely) eliminates any “special risks” that direct aid “will have the effect of advancing religion (or, even more, a purpose of doing so).” *Mitchell*, 530 U.S. at 819 n.8 (plurality opinion). An examination of the array of institutions funded by FEMA confirms that the program is neutral in practice. Of the funded institutions, 245 are public facilities, while only 22 are private nonprofit facilities. The public facilities include, among other things, schools and school districts (of which there are 63), fire stations, libraries, prisons, utilities, and buildings that provide public social services. The private facilities likewise include a broad array of institutions—hospitals and other health facilities, low income housing centers, social services organizations, and even a “maritime discovery center.”<sup>20</sup> Judging from the names of the private organizations, moreover, it appears that only a handful have religious affiliations.<sup>21</sup> In sum, the record reveals no basis for concern that FEMA

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<sup>19</sup> FEMA received 336 applications for funding in response to the Nisqually Earthquake, 68 of which were withdrawn. We are informed that FEMA does not keep records of the reasons for withdrawn applications, and that FEMA does not generally know why applications are withdrawn. Thus, the record does not reflect the reasons for the withdrawals of these applications. Nonetheless, we note that of these 68 withdrawn applications, 61 were withdrawn by public institutions and seven were withdrawn by private nonprofit facilities. Thus, an almost identical percentage of public entity applications (22.22%) and private nonprofit facility applications (23.33%) were withdrawn. In addition, nothing in the record suggests that these withdrawals, to the extent that they were motivated by FEMA’s actions at all, were based on any effort to skew the program in favor of religion, or that FEMA considered the content of activities that take place within the buildings for which construction and repair funds were sought. Moreover, FEMA personnel have informed us that the basis for any withdrawals prompted by the agency would have been purely objective, neutral, and statutory.

<sup>20</sup> The private nonprofit facilities that received funding from FEMA as a result of the Nisqually Earthquake are as follows: (1) Bayview Manor Foundation (\$2,008); (2) Bread of Life Mission Association (\$23,463); (3) Community Health Centers of King County (\$11,910); (4) Graham Hill Mutual Water Company (\$36,594); (5) Group Health Cooperative of Puget Sound (\$87,522); (6) Interim Housing Association (\$6,885); (7) Kitsap Mental Health Services (\$6,718); (8) Lake Alice Water Association (\$33,345); (9) Madrona Beach Water Company, Inc. (\$42,043); (10) Meridian Heights Water District (\$7,048); (11) Odyssey, The Maritime Discovery Center (\$15,768); (12) Pinewood Glen Improvement Club (\$2,911); (13) Pioneer Human Services (\$163,708); (14) Plymouth Housing Group (\$4,190); (15) Providence Health System (\$212,543); (16) Recovery Centers of King County (\$2,866); (17) Safe Homes (\$35,942); (18) Seattle Indian Health Board (\$48,463); (19) The Compass Center (\$1,649,068); (20) The Low Income Housing Institute (\$543,553); (21) View Ranch Estates Water Association (\$1,286); (22) Virginia Mason Medical Center (\$2,831,474).

<sup>21</sup> *See* Exhibit A, No. 23 (Bread of Life Mission Association), No. 336 (YMCA of Greater Seattle). It is our understanding that the application of the Archdiocesan Housing Authority (“AHA”) was initially denied (Exhibit A, No. 9) on the basis that the AHA had not yet applied for a loan from the Small Business Administration (“SBA”). The AHA subsequently did apply for such a loan, however,

administrators have discretion to favor religious applicants, or that those administrators have exercised what little discretion they do have in a manner that favors religion.

Finally, we would emphasize that although there is some risk that a court would invalidate the provision of disaster assistance to the Academy—decisions under the Establishment Clause are notoriously context-dependent and difficult to predict—the facts provide an especially strong case for arguing that direct aid to religious educational institutions is constitutional where made available on the basis of genuinely neutral criteria, to an array of beneficiaries including both educational *and* non-educational institutions. Indeed, there are arguments that excluding religious organizations from disaster assistance made available to similarly situated secular institutions would violate the Free Exercise Clause and the Free Speech Clause. *E.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs”); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, the state may not “impose special disabilities on the basis of religious views or religious status”); *Rosenberger*, 515 U.S. at 828 (“the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression,” including religious expression).<sup>22</sup> Moreover, four members of the Supreme Court have made clear that they would sustain any program of aid that provides secular assistance, on the basis of neutral criteria, to religious and secular schools alike, *see Mitchell*, 530 U.S. at 807-14 (plurality opinion), which is a narrower view of the Establishment Clause than would be required to sustain the provision of FEMA aid to the Academy.

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and its application was denied. Thus, its application is in the process of being reinstated. If the AHA’s application is granted, it appears that not a single applicant that meets the objective criteria for funding under the Act will have been denied eligibility for funding.

<sup>22</sup> In July, for example, the Ninth Circuit—which might well hear any appeal involving a challenge to the provision of disaster assistance to the Academy here—held that the State of Washington violated the Free Exercise Clause of the First Amendment in denying public scholarship assistance to an otherwise eligible college student on the ground that he intended to use the scholarship to pursue a degree in theology. *See Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). There is an argument here, too, that denying aid to the Academy solely on account of their religious faith would violate the Free Exercise Clause.

Editor’s Note: The Ninth Circuit’s decision in *Davey v. Locke* was subsequently reversed by *Locke v. Davey*, 540 U.S. 712 (2004). In that decision, the Supreme Court ruled that the State of Washington could decide not to fund instruction in devotional theology without violating the Free Exercise Clause, because of the State’s “antiestablishment interest[.]” in not “using tax funds to support the ministry,” for which there was a long tradition of state constitutional prohibition. *Id.* at 722, 723.

**Exhibit A**

**Applications Received by FEMA in Response to the Nisqually Earthquake**

1	1361	Aberdeen School District	N	Y	\$13,097
2	1361	Aberdeen, City of	N	Y	Withdrawn
3	1361	Adna School District No. 226	N	Y	\$16,203
4	1361	Alder Mutual Light Co	N	Y	Withdrawn
5	1361	Allyn, Port of	N	Y	\$2,078
6	1361	Anacortes School District No. 103	N	Y	\$39,610
7	1361	Anacortes, City of	N	Y	\$7,958
8	1361	Annapolis Water District	N	Y	\$24,254
9	1361	Archdiocesan Housing Authority	Y	N	Applicant in Process of Being Reinstated
10	1361	Auburn School District No. 408	N	Y	Withdrawn
11	1361	Bainbridge Island, City of	N	Y	\$2,458
12	1361	Bates Technical College	N	Y	Withdrawn
13	1361	Bayview Manor Foundation	Y	Y	\$2,008
14	1361	Beaux Arts Village, Town of	N	Y	Withdrawn
15	1361	Bellevue Community College	N	Y	\$1,227
16	1361	Bellevue, City of	N	Y	\$230,382
17	1361	Bethel School District No. 403	N	Y	\$341,435
18	1361	Black Diamond City Fire Department	N	Y	Withdrawn
19	1361	Black Diamond, City of	N	Y	\$3,201
20	1361	Blaine School District No. 503	N	Y	\$16,100
21	1361	Boistfort Valley Water Corporation	Y	Y	Withdrawn
22	1361	Bothell, City of	N	Y	\$470
23	1361	Bread of Life Mission Association	Y	Y	\$23,463
24	1361	Bremerton School District	N	Y	\$101,876
25	1361	Bremerton, City of	N	Y	\$425,016
26	1361	Bridgeport School District	N	Y	\$15,515
27	1361	Bucoda, Town of	N	Y	\$3,141
28	1361	Burien, City of	N	Y	\$18,195
29	1361	Capitol Hill Housing Improvement Program	N	Y	\$70,348

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30	1361	Carbonado Historical School District	N	Y	\$59,799
31	1361	Carnation, City of	N	Y	\$3,305
32	1361	Cascadia Community College	N	Y	Withdrawn
33	1361	Castle Rock School District No. 401	N	Y	Withdrawn
34	1361	Cedar Glen Community	Y	Y	Withdrawn
35	1361	Cedar River Water & Sewer District	N	Y	\$26,634
36	1361	Central Kitsap Fire & Rescue	N	Y	\$20,595
37	1361	Central Kitsap School District No. 401	N	Y	Withdrawn
38	1361	Centralia College	N	Y	\$9,006
39	1361	Centralia Public School District No. 401	N	Y	\$29,431
40	1361	Centralia, City of	N	Y	\$42,326
41	1361	Chehalis School District No. 302	N	Y	\$255,888
42	1361	Chehalis Tribe	N	Y	\$25,819
43	1361	Chehalis, City of	N	Y	\$34,119
44	1361	Clallam County Fire District No. 3	N	Y	\$3,939
45	1361	Clear Lake Water District	N	Y	\$8,402
46	1361	Clover Park School District	N	Y	\$25,532
47	1361	Clover Park Technical College	N	Y	Withdrawn
48	1361	Community Health Centers of King County	Y	Y	\$11,910
49	1361	Cosmopolis	N	Y	\$10,452
50	1361	Covington Water District	N	Y	\$3,880
51	1361	Cowlitz Cnty Fire Protection District No. 3	N	Y	\$796
52	1361	Darrington School District	N	Y	\$25,253
53	1361	Darrington, Town of	N	Y	Withdrawn
54	1361	Department of Corrections	N	Y	\$1,518,881
55	1361	Department of Labor & Industries	N	Y	\$238,105
56	1361	Department of Licensing	N	Y	\$0
57	1361	Department of Social & Health Services	N	Y	\$2,652,973
58	1361	Department of Veterans Affairs	N	Y	\$16,936
59	1361	Dept. of Community, Trade, & Economic Dev.	N	Y	\$14,584
60	1361	Des Moines, City of	N	Y	\$32,669
61	1361	Dieringer School District No. 343	N	Y	\$17,988
62	1361	Eastside Fire & Rescue	N	Y	\$4,869
63	1361	Eatonville School District No. 404	N	Y	Withdrawn
64	1361	Eatonville, City of	N	Y	\$69,084



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65	1361	Elma, City of	N	Y	\$917
66	1361	Employment Security Department	N	Y	\$34,227
67	1361	Enumclaw School District	N	Y	\$24,770
68	1361	Everett Community College	N	Y	Withdrawn
69	1361	Everett, City of	N	Y	\$30,603
70	1361	Evergreen State College	N	Y	\$350,537
71	1361	Everson, City of	N	Y	\$1,653
72	1361	Federal Way Fire Dept.	N	Y	\$2,508
73	1361	Federal Way Public Schools	N	Y	\$44,060
74	1361	Ferndale School District	N	Y	\$19,895
75	1361	Fife School District	N	Y	\$21,587
76	1361	Fife, City of	N	Y	\$25,078
77	1361	Fircrest, City of	N	Y	\$8,879
78	1361	Franklin Pierce School District	N	Y	\$16,758
79	1361	Gig Harbor, City of	N	Y	Withdrawn
80	1361	Graham Hill Mutual Water Co	Y	Y	\$36,594
81	1361	Grays Harbor Community Hospital	Y	Y	Withdrawn
82	1361	Grays Harbor Fire Protection District No. 2	N	Y	\$7,867
83	1361	Grays Harbor, County	N	Y	\$44,406
84	1361	Green River Community College	N	Y	\$283,842
85	1361	Group Health Cooperative of Puget Sound	Y	Y	\$87,522
86	1361	Highline Community College	N	Y	\$8,385
87	1361	Highline School District No. 401	N	Y	\$465,625
88	1361	Highline Water District	N	Y	\$40,272
89	1361	Historic Seattle Preservation Development Auth.	N	Y	\$202,594
90	1361	Hoquiam, City of	N	Y	\$15,483
91	1361	Housing Authority of Clallam County	N	Y	\$1,566
92	1361	Housing Authority of Seattle	N	Y	\$63,819
93	1361	Housing Authority of Tacoma	N	Y	Withdrawn
94	1361	Housing Resources Group	Y	Y	Withdrawn
95	1361	Interim Housing Association	Y	Y	\$6,885
96	1361	Issaquah, City of	N	Y	\$110,792
97	1361	Joint Legislative Systems Committee	N	Y	\$6,597
98	1361	Kalama, City of	N	Y	\$19,663
99	1361	Kelso School District No. 458	N	Y	Withdrawn

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100	1361	Kelso, City of	N	Y	\$4,807
101	1361	Kent School District	N	Y	\$566,796
102	1361	Kent, City of	N	Y	\$115,269
103	1361	King County Fire District No. 44	N	Y	Withdrawn
104	1361	King County Fire District No. 16	N	Y	Withdrawn
105	1361	King County Hospital District No. 1	N	Y	Withdrawn
106	1361	King County Housing Authority	N	Y	Withdrawn
107	1361	King County International Airport	N	Y	Withdrawn
108	1361	King County Water District No. 90	N	Y	\$7,123
109	1361	King, County	N	Y	\$6,255,945
110	1361	Kirkland, City of	N	Y	Withdrawn
111	1361	Kitsap County Fire District No. 12	N	Y	Withdrawn
112	1361	Kitsap County Fire District No. 7	N	Y	\$2,224
113	1361	Kitsap Mental Health Services	Y	Y	\$6,718
114	1361	Kitsap, County of	N	Y	\$44,427
115	1361	La Conner School District No. 311	N	Y	\$30,771
116	1361	Lacey, City of	N	Y	\$115,042
117	1361	Lake Alice Water Association	Y	Y	\$33,345
118	1361	Lake Stevens School District No. 4	N	Y	\$14,683
119	1361	Lake Stevens Sewer District	N	Y	\$95,586
120	1361	Lake Washington School District	N	Y	Withdrawn
121	1361	Lake Washington Technical College	N	Y	\$3,641
122	1361	Lakewood Fire District	N	Y	\$3,446
123	1361	Lakewood School District No. 306	N	Y	\$15,548
124	1361	Lakewood Water District	N	Y	\$101,031
125	1361	Lakewood, City of	N	Y	Withdrawn
126	1361	Lewis County Fire District No. 12	N	Y	\$788
127	1361	Lewis County Fire District No. 14	N	Y	\$784
128	1361	Lewis County Fire District No. 2	N	Y	Withdrawn
129	1361	Lewis County Fire District No. 5	N	Y	\$5,276
130	1361	Lewis County Fire Protection District No. 9	N	Y	\$788
131	1361	Lewis, County	N	Y	\$49,271
132	1361	Longview, City of	N	Y	Withdrawn
133	1361	Lower Columbia College	N	Y	Withdrawn
134	1361	Lower Elwha Klallam Tribe	N	Y	\$2,783

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135	1361	Lummi Nation	N	Y	\$42,807
136	1361	Lynden Fire Department	N	Y	\$19,817
137	1361	Madrona Beach Water Company, Inc.	Y	Y	\$42,043
138	1361	Makah Tribal Council	N	Y	\$11,598
139	1361	Manchester Water District	N	Y	\$44,950
140	1361	Maple Valley, City of	N	Y	\$35,395
141	1361	Mary M Knight School No. 311	N	Y	\$3,002
142	1361	Mason , County of	N	Y	\$127,535
143	1361	Mason County Fire District No. 6	N	Y	\$788
144	1361	Mason County Public Utility District No. 3	N	Y	\$230,502
145	1361	Mercer Island School District	N	Y	\$0
146	1361	Mercer Island, City of	N	Y	\$7,109
147	1361	Meridian Heights Water District	Y	Y	\$7,048
148	1361	Meridian School District	N	Y	\$3,091
149	1361	Milton, City of	N	Y	\$4,762
150	1361	Morton School District	N	Y	Withdrawn
151	1361	Morton, City of	N	Y	\$10,865
152	1361	Mount Baker School District No. 507	N	Y	\$3,693
153	1361	Mountlake Terrace, City of	N	Y	\$10,192
154	1361	Mukilteo School District	N	Y	\$25,608
155	1361	Mukilteo, City of	N	Y	\$6,017
156	1361	Museum Development Authority	N	Y	\$47,778
157	1361	Newcastle, City of	N	Y	Withdrawn
158	1361	Nisqually Indian Tribe	N	Y	\$131,683
159	1361	Nooksack, City of	N	Y	\$1,460
160	1361	Normandy Park, City of	N	Y	\$835
161	1361	North Bend, City of	N	Y	\$5,384
162	1361	North Highline Fire District	N	Y	Withdrawn
163	1361	North River School District	N	Y	\$8,739
164	1361	North Seattle Community College	N	Y	\$6,244
165	1361	North Sound Regional Support Network	N	Y	Withdrawn
166	1361	North Thurston School District	N	Y	\$90,258
167	1361	Northshore Utility District	N	Y	\$301,483
168	1361	Northwest Railway Museum	Y	Y	Withdrawn
169	1361	Ocean Shores, City of	N	Y	\$8,126

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170	1361	Odyssey, the Maritime Discovery Center	Y	Y	\$15,768
171	1361	Office of the Attorney General	N	Y	Withdrawn
172	1361	Office of the Governor	N	Y	Withdrawn
173	1361	Office of the Lieutenant Governor	N	Y	\$4,705
174	1361	Office of the Secretary of State	N	Y	\$835
175	1361	Office of the State Treasurer	N	Y	Withdrawn
176	1361	Olympia School District No. 111	N	Y	\$65,753
177	1361	Olympia, City of	N	Y	\$675,740
178	1361	Olympic College	N	Y	Withdrawn
179	1361	Olympic View Water & Sewer District	N	Y	\$0
180	1361	Onalaska School District No. 300	N	Y	\$8,140
181	1361	Orting School District No. 344	N	Y	\$2,144
182	1361	Orting, City of	N	Y	\$0
183	1361	Pacific Hospital Preservation & Dev. Auth	N	Y	\$157,980
184	1361	Pacific, County of	N	Y	\$1,819
185	1361	Pe Ell, City of	N	Y	\$8,838
186	1361	Peninsula College	N	Y	\$93,971
187	1361	Peninsula Community Health Services	Y	Y	Withdrawn
188	1361	Peninsula School District No. 401	N	Y	Withdrawn
189	1361	Pierce College	N	Y	\$58,772
190	1361	Pierce County Fire District No. 17	N	Y	\$1,479
191	1361	Pierce County Fire District No. 14	N	Y	\$19,890
192	1361	Pierce County Fire District No. 18	N	Y	\$23
193	1361	Pierce County Fire District No. 21	N	Y	\$796
194	1361	Pierce County Fire District No. 5	N	Y	Withdrawn
195	1361	Pierce County Fire District No. 20	N	Y	Withdrawn
196	1361	Pierce County Fire District No. 23	N	Y	\$19,695
197	1361	Pierce County Regional Support Network	N	Y	\$0
198	1361	Pierce County Rural Library District	N	Y	\$74,136
199	1361	Pierce Transit	N	Y	Withdrawn
200	1361	Pierce, County of	N	Y	\$485,304
201	1361	Pike Place Preservation & Development Auth.	N	Y	\$114,888
202	1361	Pinewood Glen Improvement Club	Y	Y	\$2,911
203	1361	Pioneer Human Services	Y	Y	\$163,708
204	1361	Plymouth Housing Group	Y	Y	\$4,190

*Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*

205	1361	Port Angeles, City of	N	Y	\$47,894
206	1361	Port Gamble S'klallam Housing Authority	N	Y	\$12,856
207	1361	Port of Anacortes	N	Y	\$41,668
208	1361	Port of Chehalis	N	Y	\$8,398
209	1361	Port of Everett	N	Y	\$48,091
210	1361	Port of Olympia	N	Y	\$98,320
211	1361	Port of Port Angeles	N	Y	\$5,192
212	1361	Port of Seattle	N	Y	\$3,829,612
213	1361	Port of Tacoma	N	Y	\$164,646
214	1361	Port Orchard, City of	N	Y	\$27,478
215	1361	Providence Health System	Y	Y	\$212,543
216	1361	PUD #1 of Snohomish County	N	Y	\$38,401
217	1361	Puyallup School District	N	Y	\$194,400
218	1361	Puyallup, City of	N	Y	\$131,431
219	1361	Quinalt Indian Nation	N	Y	\$1,980
220	1361	Rainier School District No. 307	N	Y	\$350
221	1361	Rainier, Town of	N	Y	\$16,585
222	1361	Raymond, City of	N	Y	\$35,282
223	1361	Recovery Centers of King County	Y	Y	\$2,866
224	1361	Redmond, City of	N	Y	Withdrawn
225	1361	Renton School District	N	Y	\$0
226	1361	Renton Technical College	N	Y	\$35,134
227	1361	Renton, City of	N	Y	\$217,310
228	1361	Rochester School District 401	N	Y	\$0
229	1361	Safe Homes	Y	Y	\$35,942
230	1361	Sauk-Suiattle Indian Tribe of Washington	N	Y	\$2,940
231	1361	Seattle-King County Department of Health	N	Y	Withdrawn
232	1361	Seattle Central Community College	N	Y	\$39,047
233	1361	Seattle Chinatown Development Authority	N	Y	\$34,704
234	1361	Seattle Indian Health Board	Y	Y	\$48,463
235	1361	Seattle Indian Services Commission	N	Y	\$426,988
236	1361	Seattle School District No. 1	N	Y	\$1,110,755
237	1361	Seattle, City of	N	Y	\$3,221,569
238	1361	Sedro Woolley, City of	N	Y	\$9,629
239	1361	Sentencing Guidelines Commission	N	Y	Withdrawn

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240	1361	Shelton School District No. 309	N	Y	Withdrawn
241	1361	Shelton, City of	N	Y	\$8,980
242	1361	Shoalwater Bay Indian Tribe	N	Y	\$1,871
243	1361	Shoreline Fire Department	N	Y	Withdrawn
244	1361	Shoreline School District	N	Y	\$21,536
245	1361	Silverdale Water District No. 16	N	Y	\$16,152
246	1361	Skagit, County of	N	Y	Withdrawn
247	1361	Skokomish Indian Tribe	N	Y	\$4,396
248	1361	Snohomish County Emergency Management	N	Y	\$4,398
249	1361	Snohomish County Fire District No. 17	N	Y	\$23,087
250	1361	Snohomish School District	N	Y	\$22,072
251	1361	Snohomish, City of	N	Y	\$12,617
252	1361	Snohomish, County	N	Y	\$74,291
253	1361	Snoqualmie Valley School District No. 410	N	Y	\$135,794
254	1361	Snoqualmie, City of	N	Y	\$64,405
255	1361	Sound Transit	N	Y	\$569,933
256	1361	South Bend School District No. 118	N	Y	\$1,505
257	1361	South Bend, City of	N	Y	\$38,377
258	1361	South Kitsap School District No. 402	N	Y	\$21,130
259	1361	South Prairie, Town of	N	Y	\$957
260	1361	South Puget Sound Community College	N	Y	\$61,128
261	1361	South Seattle Community College	N	Y	\$4,781
262	1361	Southern Puget Sound Inter-Tribal Housing Auth.	N	Y	\$1,529
263	1361	Southwest Suburban Sewer District	N	Y	\$43,149
264	1361	Squaxin Island Tribe	N	Y	\$1,268
265	1361	State Auditor's Office	N	Y	\$1,370
266	1361	State Department of Financial Institutions	N	Y	Withdrawn
267	1361	State Department of General Administration	N	Y	\$8,235,429
268	1361	Steilacoom Historical School District No. 01	N	Y	\$277,798
269	1361	Steilacoom, City of	N	Y	\$21,859
270	1361	Sultan, City of	N	Y	\$1,449
271	1361	Sumner School District	N	Y	Withdrawn
272	1361	Sumner, City of	N	Y	\$7,943
273	1361	Suquamish Indian Tribe	N	Y	\$10,734
274	1361	Swedish Health Services	Y	Y	Withdrawn

*Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*

275	1361	Swinomish Tribal Community	N	Y	\$4,819
276	1361	Tacoma Community College	N	Y	\$138,448
277	1361	Tacoma Department of Public Utilities	N	Y	Withdrawn
278	1361	Tacoma Metro Parks	N	Y	\$5,875
279	1361	Tacoma School District No. 10	N	Y	\$225,927
280	1361	Tacoma, City of	N	Y	\$87,310
281	1361	Taholah School District No. 77	N	Y	\$7,825
282	1361	The Compass Center	Y	Y	\$1,649,068
283	1361	The Low Income Housing Institute	Y	Y	\$543,553
284	1361	Thurston County Fire District No. 3	N	Y	\$4,839
285	1361	Thurston County Fire District No. 6	N	Y	Withdrawn
286	1361	Thurston, County	N	Y	\$381,389
287	1361	Timberland Regional Library	N	Y	\$6,909
288	1361	Timberlands Regional Support Network	N	Y	Withdrawn
289	1361	Toledo, City of	N	Y	\$1,967
290	1361	Tukwila, City of	N	Y	\$53,076
291	1361	Tulalip Tribes Housing Authority	N	Y	\$7,016
292	1361	Tulalip Tribes Inc.	N	Y	\$3,283
293	1361	Tumwater School District	N	Y	\$80,924
294	1361	Tumwater, City of	N	Y	\$55,628
295	1361	University of Washington	N	Y	\$2,826,851
296	1361	University Place, City of	N	Y	Withdrawn
297	1361	Valley Water District	N	Y	\$59,880
298	1361	Vashon Island School District	N	Y	\$6,738
299	1361	Vashon Park District	N	Y	\$17,267
300	1361	View Ranch Estates Water Association	Y	Y	\$1,286
301	1361	Virginia Mason Medical Center	Y	Y	\$2,831,474
302	1361	Wash. State Major League Baseball Stadium	N	Y	\$0
303	1361	Washington Department of Health	N	Y	Withdrawn
304	1361	Washington Dept. of Fish & Wildlife	N	Y	\$40,657
305	1361	Washington Dept. of Information Services	N	Y	Withdrawn
306	1361	Washington Dept. of Natural Resources	N	Y	\$134,437
307	1361	Washington Dept. of Transportation	N	Y	\$266,563
308	1361	Washington State Arts Commission	N	Y	Withdrawn
309	1361	Washington State Board of Accountancy	N	Y	Withdrawn

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310	1361	Washington State Code Reviser's Office	N	Y	\$0
311	1361	Washington State Convention & Trade	N	Y	\$199,059
312	1361	Washington State Dept. of Agriculture	N	Y	\$6,517
313	1361	Washington State Dept. of Ecology	N	Y	\$21,078
314	1361	Washington State Dept. of Retirement Systems	N	Y	Withdrawn
315	1361	Washington State Historical Society	N	Y	Withdrawn
316	1361	Washington State House of Representatives	N	Y	\$42,946
317	1361	Washington State Law Library	N	Y	\$77,365
318	1361	Washington State Library	N	Y	\$46,931
319	1361	Washington State Liquor Board	N	Y	\$0
320	1361	Washington State Military Department	N	Y	\$2,077,599
321	1361	Washington State Office of Financial Mgmt.	N	Y	\$4,472
322	1361	Washington State Parks & Recreation	N	Y	\$393,085
323	1361	Washington State Patrol	N	Y	\$76,993
324	1361	Washington State Redistricting Commission	N	Y	Withdrawn
325	1361	Washington State Senate	N	Y	\$8,046
326	1361	Westport, City of	N	Y	\$2,386
327	1361	Whatcom, County of	N	Y	\$8,197
328	1361	White Pass School District	N	Y	\$11,112
329	1361	White River School District No. 416	N	Y	Withdrawn
330	1361	Wilkeson, City of	N	Y	\$66,081
331	1361	Winlock, City of	N	Y	\$17,139
332	1361	Woodinville Water District	N	Y	\$13,572
333	1361	Woodinville, City of	N	Y	\$23,782
334	1361	Yelm Community Schools District No. 2	N	Y	\$2,553
335	1361	Yelm, City of	N	Y	Withdrawn
336	1361	YMCA of Greater Seattle	Y	Y	\$0



# Authority of the President Under Domestic and International Law to Use Military Force Against Iraq

The President possesses constitutional authority to use military force against Iraq to protect United States national interests. This independent constitutional authority is supplemented by congressional authorization in the form of the Authorization for Use of Military Force Against Iraq Resolution.

Using force against Iraq would be consistent with international law because it would be authorized by the United Nations Security Council or would be justified as anticipatory self-defense.

October 23, 2002

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

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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.

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You have asked our Office whether the President has the authority, under both domestic and international law, to use military force against Iraq. This memorandum confirms our prior advice to you regarding the scope of the President’s authority.<sup>1</sup> We conclude that the President possesses constitutional authority to order the use of force against Iraq to protect our national interests. This independent authority is supplemented by congressional authorization in the form of the Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), which supports the use of force to secure Iraq’s compliance with its international obligations following the liberation of Kuwait, and the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which supports military action against Iraq if the President determines Iraq provided assistance to the perpetrators of the terrorist attacks of September 11, 2001. In addition, using force against Iraq would be consistent with international law, because it would be authorized by the United Nations (“U.N.”) Security Council, or would be justified as anticipatory self-defense.

This memorandum is divided into three sections. First, we explain the background to the current conflict with Iraq, touching upon the U.N. Security Council resolutions related to the Persian Gulf War and its aftermath, and highlighting the situations in which the United States has used force against Iraq between 1991 and the present. Second, we discuss the President’s authority under domestic law to direct military action against Iraq, examining both his constitutional authority and supplementary congressional support. Finally, we detail the justification under international law for the United States to use force against Iraq, considering the circumstances in which the U.N. Security Council has authorized such action and the scenarios in which it would be appropriate to use force in anticipatory self-defense.

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<sup>1</sup> You asked us to render our opinion based on the constitutional and other legal authorities that would exist in the absence of new authorization from either Congress or the United Nations (“U.N.”) Security Council. We note that on October 16, 2002, the President signed into law the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, which authorizes the President to use force against Iraq to enforce relevant U.N. Security Council resolutions regarding Iraq and to defend the national security of the United States from the threat posed by Iraq. We have not considered here the legal effect of that resolution. As this memorandum makes clear, even prior to the adoption of the Resolution the President had sufficient constitutional and statutory authority to use force against Iraq. We also note that negotiations are ongoing in the U.N. Security Council on a new resolution regarding Iraq, but we do not address any of the proposed terms here.

## **I. Background**

Prior to examining the President's legal authority to use force in Iraq, it is useful to explain some of the background to the current conflict. On August 2, 1990, Iraq invaded Kuwait. The next day, the U.N. Security Council ("Security Council") passed U.N. Security Council Resolution ("UNSCR") 660, the first of many resolutions condemning Iraq's actions and demanding withdrawal from Kuwait. *See* S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990). For months, the world community sought a diplomatic solution, including sanctions, to persuade Iraq to leave Kuwait. *See* Address to the Nation Announcing Allied Military Action in the Persian Gulf, 1 *Pub. Papers of Pres. George Bush* 42, 43 (Jan. 16, 1991).

On November 29, 1990, the Security Council adopted UNSCR 678, which gave Iraq until January 15, 1991 to implement UNSCR 660 fully. *See* S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). In the absence of compliance by Iraq, paragraph 2 of UNSCR 678 authorized member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." *Id.* Iraq refused to withdraw from Kuwait before the January 15th deadline, and Operation Desert Storm began the next day. Allied air forces commenced an attack on military targets in Iraq and Kuwait. Ground forces were introduced on February 23, 1991, and Iraq was expelled from Kuwait four days later. Exactly 100 hours after ground operations began, President George H.W. Bush suspended offensive combat operations. *See* Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf, 1 *Pub. Papers of Pres. George Bush* 187 (Feb. 27, 1991).

On April 3, 1991, the U.N. Security Council adopted UNSCR 687, which established the conditions for a formal cease-fire suspending hostilities in the Persian Gulf. UNSCR 687 "reaffirm[ed] the need to be assured of Iraq's peaceful intentions" given Iraq's invasion and occupation of Kuwait, its prior use of chemical weapons and ballistic missiles in unprovoked attacks, and reports that it had attempted to acquire materials to build nuclear weapons. S.C. Res. 687, pmb. ¶ 4, U.N. Doc. S/RES/687 (Apr. 3, 1991). To that end, section C of UNSCR 687 imposed a variety of conditions on Iraq. First, the Security Council "decide[d]" that Iraq must:

unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

(a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities . . . ; [and]

(b) All ballistic missiles with a range greater than [150] kilometres, and related major parts and repair and production facilities.

*Id.* ¶ 8. Second, Iraq must agree to “urgent, on-site inspection” to ensure its compliance with this requirement. *Id.* ¶ 9(a). Third, Iraq must “unconditionally undertake not to use, develop, construct or acquire” such weapons of mass destruction (“WMD”) and their delivery systems. *Id.* ¶ 10. Finally, Iraq must “unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapon[s]-usable material or any subsystems or components or any [related] research, development, support or manufacturing facilities,” and to accept “urgent on-site inspection and the destruction, removal or rendering harmless as appropriate” of all such nuclear-related weapons or materials. *Id.* ¶ 12. To carry out on-site inspections of Iraq’s WMD programs, the Resolution called for the establishment of a Special Commission (“UNSCOM”) to act in cooperation with the International Atomic Energy Agency (“IAEA”), which was to take custody of all of Iraq’s nuclear-weapons-usable materials. *Id.* ¶¶ 9, 13.<sup>2</sup> In addition, UNSCR 687 required Iraq, *inter alia*, to renounce international terrorism. *Id.* ¶ 32. On April 6, 1991, Iraq officially accepted the terms set forth in UNSCR 687, and a formal cease-fire went into effect between Iraq, Kuwait and the U.N. members who had cooperated with Kuwait under UNSCR 678, including the United States. *Id.* ¶ 33.

Toward the end of the Gulf War, Iraq brutally suppressed Kurdish insurrections throughout Iraqi Kurdistan, causing the flight of hundreds of thousands of civilians into Iran and Turkey. *See generally* Letter to Congressional Leaders on the Situation in the Persian Gulf, 1 *Pub. Papers of Pres. George Bush* 521, 521-22 (May 17, 1991). In response, the Security Council adopted UNSCR 688, which “condemn[ed]” the repression of the Iraqi civilian population and found that the consequences of such repression—“a massive flow of refugees towards and across international frontiers and . . . cross-border incursions”—threatened international peace and security in the region. S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991). To aid the refugees who had fled northern Iraq, the United States joined the allied coalition in launching Operation Provide Comfort, which provided humanitarian relief for the Kurds. In addition, the coalition established a no-fly zone prohibiting Iraqi military aircraft from flying north of the 36th parallel. *See* Remarks on Assistance for Iraqi Refugees and a News Conference, 1 *Pub. Papers of Pres. George Bush* 378, 378-79 (Apr. 16, 1991). Due to increased repression of

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<sup>2</sup> Significantly, UNSCR 687 also specifically “affirm[ed]” thirteen Security Council Resolutions relating to Iraq, including UNSCR 678, “except as expressly changed . . . to achieve the goals of [this] resolution, including a formal cease-fire.” S.C. Res. 687, ¶ 1. This affirmance of UNSCR 678, which was not “expressly changed” by UNSCR 687, confirmed that its authorization to use force continued in effect after the cease-fire. Several years later, in UNSCR 949, the Security Council again “reaffirm[ed]” UNSCR 678, “in particular paragraph 2.” S.C. Res. 949, pmb1. ¶ 1, U.N. Doc. S/RES/949 (Oct. 15, 1994).

the civilian population in 1992 by Saddam Hussein in both the northern and southern parts of Iraq, British, French and U.S. coalition forces began patrolling an additional no-fly zone south of the 32nd parallel to protect Iraqi Shiites. *See* Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1574, 1574-75 (Sept. 16, 1992). The no-fly zones were intended to assist in the monitoring of Iraqi compliance with UNSCR 687 and UNSCR 688, and to discourage significant Iraqi military operations against the civilian population. *See* Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269-70 (Jan. 19, 1993); Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 1 *Pub. Papers of Pres. William J. Clinton* 715, 716 (May 21, 1993). Iraq does not accept the no-fly zones as legitimate and periodically threatens coalition forces patrolling the zones. The United States and Britain have responded by repeatedly attacking Iraqi surface-to-air missile sites and related facilities in self-defense. *See, e.g.,* Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269 (Jan. 19, 1993); *Iraq's Compliance with United Nations Security Council Resolutions*, H.R. Doc. No. 107-185, at 4 (Jan. 24, 2002).

From its inception, UNSCOM encountered resistance from Iraq. On August 15, 1991, little more than three months after the adoption of UNSCR 687, the Security Council "condemn[ed]" Iraq's "serious violation" of a number of its obligations regarding the destruction and dismantling of its WMD program and of its agreement to cooperate with UNSCOM and the IAEA, and stated that the violation "constitutes a material breach of the relevant provisions of [UNSCR 687] which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region." S.C. Res. 707, ¶ 1, U.N. Doc. S/RES/707 (Aug. 15, 1991). Shortly thereafter, President George H.W. Bush warned that the United States would not tolerate Iraq's misrepresentations regarding, and denial of U.N. access to, its WMD program: "[I]f necessary [the United States] will take action to ensure Iraqi compliance with the Council's decisions so as to fully implement Resolution 678's call for the restoration of international peace and security to the Persian Gulf region." Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1164, 1164-65 (Sept. 16, 1991). Several months later, on January 17, 1993, President Bush ordered the destruction by U.S. missiles of a nuclear facility near Baghdad, "to help achieve the goals of U.N. Security Council

Resolutions 687, 707 and 715<sup>3</sup> requiring Iraq to accept the inspection and elimination of its weapons of mass destruction and ballistic missiles.” Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2270 (Jan. 19, 1993). Although the nuclear facility had been inspected, and some equipment had been removed, President Bush warned that it could be used again to support Iraq’s nuclear weapons program. *Id.*

In addition to directing the use of force to respond to threats to coalition forces in the no-fly zones, President Clinton ordered military action against Iraq on three separate occasions. First, in June 1993, President Clinton ordered a cruise missile attack on the principal command-and-control facility of the Iraqi intelligence service (“IIS”) in Baghdad. The strike was in response to “compelling evidence” that the IIS had directed and pursued a failed attempt to assassinate President George H.W. Bush in April of that year. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 940 (June 28, 1993). President Clinton explained that the goal of the strike was “to target Iraq’s capacity to support violence against the United States and other nations and to deter Saddam Hussein from supporting such outlaw behavior in the future.” Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 938, 938 (June 26, 1993).

Second, President Clinton ordered U.S. cruise missile strikes in September 1996 to respond to an Iraqi attack in northern Iraq (“Operation Desert Strike”). When U.S. intelligence revealed that Iraq had engaged in a military buildup near Irbil, the United States warned Iraq not to use military force. Iraq ignored the warning and stormed Irbil. In response, the United States extended the no-fly zone in southern Iraq from the 32nd to the 33rd parallel and conducted military strikes against fixed, surface-to-air missile sites, command-and-control centers, and air defense control facilities south of the 33rd parallel. *See* Letter for Newt Gingrich, Speaker of the House of Representatives, from President William J. Clinton 1-2 (Sept. 5, 1996) (“Gingrich Letter”) (claiming authority under, *inter alia*, UNSCRs 678, 687, and 688). The strikes were designed to show Saddam Hussein that he must halt all actions that threaten international peace and security. *See id.* at 1.

Third, in December 1998, President Clinton directed missile and aircraft strikes against Iraq in response to Iraqi breaches of its obligations under various UNSCRs, particularly Iraq’s failure to cooperate fully with U.N. inspections of its WMD program. *See* Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 *Pub. Papers of Pres. William J. Clinton* 2195, 2195-96 (Dec. 18, 1998) (claiming authority under, *inter alia*, UNSCRs 678 and 687). The 1998

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<sup>3</sup> UNSCR 715 approved UNSCOM and IAEA plans for inspecting Iraq’s WMD program and demanded that Iraq unconditionally meet its obligations under the plans and give its full cooperation to international inspections. S.C. Res. 715, ¶ 1, U.N. Doc. S/RES/715 (Oct. 11, 1991).

strikes were the culmination of a stand-off between Iraq and the United Nations regarding Iraq's refusal to permit effective international inspections of its WMD program. In the fall of 1997, for example, Iraq demanded that all U.S. members of the UNSCOM inspection team depart Iraq immediately and asked that UNSCOM withdraw its "cover" for the U-2 reconnaissance aircraft flown by the United States as part of UNSCOM's efforts to detect Iraq's WMD program. *See UNSCOM: Chronology of Main Events* (Dec. 1999), available at [www.un.org/Depts/unscom/Chronology/chronologyframe.htm](http://www.un.org/Depts/unscom/Chronology/chronologyframe.htm) (last visited May 3, 2012); *see also* Michael L. Cornell, Comment, *A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 Conn. J. Int'l L. 325, 337 & n.95 (2001). The Security Council responded by adopting UNSCR 1137, which "condemn[ed] the continued violations by Iraq of its obligations under the relevant resolutions to cooperate fully and unconditionally with [UNSCOM]," found that the situation continued to "constitute a threat to international peace and security," and warned that "serious consequences" would result if Iraq failed to comply unconditionally and immediately with its international obligations. S.C. Res. 1137, pmbl. ¶ 8, ¶ 1, U.N. Doc. S/RES/1137 (Nov. 12, 1997).

In early 1998, Iraq's continued intransigence prompted the United States to threaten military force to compel its compliance. *See Contemporary Practice of the United States Relating to International Law*, 93 Am. J. Int'l L. 470, 472 (Sean D. Murphy ed., 1999). Although U.N. Secretary General Kofi Annan secured a Memorandum of Understanding ("MOU") confirming Iraq's acceptance of all relevant Security Council resolutions and its reaffirmation to cooperate fully with UNSCOM and the IAEA in February 1998, Iraq formally halted all cooperation with UNSCOM at the end of October. *Id.* at 473. The Security Council responded by adopting UNSCR 1205, which condemned Iraq's decision as a "flagrant violation of resolution 687 . . . and other relevant resolutions." S.C. Res. 1205, ¶ 1, U.N. Doc. S/RES/1205 (Nov. 5, 1998). On November 15, the United States refrained from launching a massive missile attack against Iraq, only after Iraq committed to full cooperation with U.N. inspections. Remarks on the Situation in Iraq and an Exchange with Reporters, 2 *Pub. Papers of Pres. William J. Clinton* 2035 (Nov. 15, 1998). But despite Iraq's promises, on December 15, the Executive Director of UNSCOM reported that the Commission could not complete its mandate due to Iraq's obstructionism.

The next day, the United States and Britain launched a seventy-hour missile and aircraft bombing campaign against approximately one hundred targets in Iraq—facilities that were actively involved in WMD and ballistic missile activities, or that posed a threat to Iraq's neighbors or to U.S. forces conducting the operation. *See Letter to Congressional Leaders on the Military Strikes Against Iraq*, 2 *Pub. Papers of Pres. William J. Clinton* 2195, 2195-96 (Dec. 18, 1998). President Clinton explained:

I believe our action in Iraq clearly is in America's interest. Never again can we allow Saddam Hussein to develop nuclear weapons, poison gas, biological weapons, or missiles to deliver them. He has used such terrible weapons before against soldiers, against his neighbors, against civilians. And if left unchecked, he'll use them again.

The President's Radio Address, 2 *Pub. Papers of Pres. William J. Clinton* 2197, 2197 (Dec. 19, 1998). President Clinton warned that if UNSCOM were not allowed to resume its work, the United States would "remain vigilant and prepared to use force if we see that Iraq is rebuilding its weapons programs." Address to the Nation on Completion of the Military Strikes in Iraq, 2 *Pub. Papers of Pres. William J. Clinton* 2199, 2200 (Dec. 19, 1998). He also cautioned that the United States must be prepared to use force again if Saddam Hussein threatened his neighbors, challenged the no-fly zones, or moved against the Kurds in Iraq. See Address to the Nation Announcing Military Strikes on Iraq, 2 *Pub. Papers of Pres. William J. Clinton* 2182, 2184 (Dec. 16, 1998).

Since the 1998 airstrikes, Iraq has continued to refuse to permit U.N. inspections of its WMD program. In December 1999, the Security Council decided to disband UNSCOM and replace it with the United Nations Monitoring, Verification and Inspection Commission ("UNMOVIC"). S.C. Res. 1284, ¶ 1, U.N. Doc. S/RES/1284 (Dec. 17, 1999). Although the Security Council "decide[d]" that Iraq must allow UNMOVIC teams immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transport that they need to inspect in accordance with their mandate, *id.* ¶ 4, Iraq has not permitted UNMOVIC to conduct any inspections.

## **II. Domestic Legal Authority for Use of Force Against Iraq**

### **A. Constitutional Authority**

We have consistently advised that the Constitution grants the President unilateral power to take military action to protect the national security interests of the United States. See generally *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188 (2001) ("*President's Authority to Conduct Military Operations*").<sup>4</sup>

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<sup>4</sup> See also Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Specter/Harkin Joint Resolution Calling for Congress to Vote on a Resolution for the Use of Force by the United States Armed Forces Against Iraq* (July 23, 2002); *Applying the War Powers Resolution to the War on Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. 7-13 (2002) (testimony of John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995) ("*Bosnia Opinion*"); *Deployment of United States Armed*



Under Article II, Section 2, the President is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2. The Constitution also gives the President exclusive powers as the Chief Executive and the “sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988) (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)). Although Article I vests in Congress the power to “raise and support Armies,” “provide and maintain a Navy,” and to appropriate funds to support the military—powers that give Congress effective control over the supply of military resources to the President as Commander in Chief<sup>5</sup>—as well as the power to issue formal declarations of war, U.S. Const. art. I, § 8, cls. 1, 11-13, Article II vests in the President, as Chief Executive and Commander in Chief, the constitutional authority to use such military forces as are provided to him by Congress to engage in military hostilities to protect the national interest of the United States. The Constitution nowhere requires for the exercise of such authority the consent of Congress. *Cf.* 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.”); Articles of Confederation of 1778, art. IX, § 6, 1 Stat. 4, 8 (“The United States, in Congress assembled, shall never engage in a war . . . unless nine States assent to the same . . .”). Thus, as then-Attorney General Robert Jackson explained more than sixty years ago, the President’s authority as Commander in Chief “has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting . . . American interests.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941) (Jackson, A.G.).

Presidents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief and their constitutional

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*Forces into Haiti*, 18 Op. O.L.C. 173 (1994) (“Haiti Opinion”); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992) (“Somalia Opinion”); *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271 (1984); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185 (1980); Memorandum for Hon. Charles W. Colson, Special Counsel to the President, from 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).

<sup>5</sup> We have also previously and consistently opined that Congress may not place conditions on its appropriations in such a manner as would interfere with the President’s ability to exercise his constitutional powers over foreign relations and the military as Chief Executive and Commander in Chief. *See, e.g., Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990). For example, in 1996 this Office concluded that Congress could not forbid the Department of Defense from spending appropriated funds on certain activities we had deemed to fall within the President’s constitutional authority as Commander in Chief. *See Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996).

authority to conduct U.S. foreign relations. In fact, the establishment of a large peacetime military force in the twentieth century has given rise to numerous unilateral exercises of military force grounded solely in the President's constitutional authority. For example, the deployment of U.S. troops in the Korean War by President Truman was undertaken without congressional authorization. *See* *Bosnia Opinion*, 19 Op. O.L.C. at 331 n.5. More recently, when President Clinton directed the extensive and sustained 1999 air campaign in the Former Republic of Yugoslavia, he relied solely on his "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, 460 (Mar. 26, 1999). As we recently explained, "[t]he role of practice" in determining the proper allocation of authority between the political branches "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.'" *President's Authority to Conduct Military Operations*, 25 Op. O.L.C. at 202 (quoting *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994)); *see, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Haig v. Agee*, 453 U.S. 280, 292-94 (1981).

Accordingly, we believe that the President's constitutional authority to undertake military action to protect the national security interests of the United States is firmly established in the text and structure of the Constitution and in Executive Branch practice. Thus, to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary. For example, were the President to conclude that Iraq's development of WMD might endanger our national security because of the risk that such weapons either would be targeted against the United States, or would be used to destabilize the region, he could direct the use of military force against Iraq to destroy its WMD capability. Or, were it the President's judgment that a change of regime in Iraq would remove a threat to our national interests, he could direct the use of force to achieve that goal.<sup>6</sup> Were the President to take such action, he would be acting consistently with the historical practice of the Executive Branch.<sup>7</sup>

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<sup>6</sup> These examples are intended to be illustrative and non-exclusive.

<sup>7</sup> We should note that there is almost no judicial discussion of the principles we have examined here. As we have recently explained, various procedural obstacles make it unlikely that a court would reach the question of the President's constitutional power to engage the U.S. Armed Forces in military hostilities, regardless of whether the suit is brought by a Member of Congress or a private citizen. *See* Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel (Sept. 10, 2002); *see also Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000) (Kosovo); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir.

## **B. Statutory Authority**

At times throughout our history, the President's constitutional authority to use force has been buttressed by statute. Such statutory support is not necessary in light of the President's independent constitutional authority to direct military action. See Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 *Pub. Papers of Pres. George Bush* 40 (Jan. 14, 1991) ("my request for congressional support did not, and my signing [Public Law 102-1] does not, constitute any change in the long-standing positions of the executive branch on . . . the President's constitutional authority to use the Armed Forces to defend vital U.S. interests"); see also *Bosnia Opinion*, 19 Op. O.L.C. at 335 ("the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances"); *Haiti Opinion*, 18 Op. O.L.C. at 175-76 ("the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress"). Nonetheless, congressional support of presidential action removes all doubt of the President's power to act. According to the analysis set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), and later followed and interpreted by the Supreme Court in *Dames & Moore*, the President's power in such a case would be "at its maximum." See *President's Authority to Conduct Military Operations*, 25 Op. O.L.C. at 210. Were the President to direct military action against Iraq, he would be acting at the apex of his power because, as we discuss below, his constitutional authority to use such force is supplemented by congressional authorization.

### **1. Public Law 102-1**

On January 14, 1991, shortly before the United States and allied nations began Operation Desert Storm, Congress enacted Public Law 102-1, the Authorization for Use of Military Force Against Iraq Resolution. Section 2(a) authorizes the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677." 105 Stat. at 3.<sup>8</sup> As explained above, UNSCR 678, in turn, authorizes member

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1973) (Vietnam); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (Vietnam); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (Persian Gulf War); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (El Salvador); cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). A federal district court recently dismissed *sua sponte* a suit filed on August 27, 2002 to enjoin the President from engaging in military action against Iraq absent a declaration of war or other extenuating circumstances on the grounds of lack of standing and the political question doctrine. See *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002).

<sup>8</sup> Section 2(b) of Public Law 102-1 conditions the authority granted in section 2(a) on a report to Congress by the President certifying that the United States has exhausted all diplomatic and peaceful

states “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” S.C. Res. 678, ¶ 2. The other resolutions listed in Public Law 102-1 relate to Iraq’s invasion of Kuwait on August 2, 1990 and are identical to the resolutions “recall[ed] and reaffirm[ed]” in UNSCR 678.<sup>9</sup>

By authorizing the use of U.S. Armed Forces “pursuant to” UNSCR 678, Public Law 102-1 sanctions not only the employment of the methods approved in that resolution—i.e., “all necessary means”—but also the two objectives outlined therein—that is, “to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” S.C. Res. 678, ¶ 2.<sup>10</sup> Two of the most important “subsequent relevant

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avenues for obtaining Iraq’s compliance with the relevant UNSCRs and that those efforts have not been and would not be successful in obtaining compliance. 105 Stat. at 3-4. President Bush submitted such a report on January 16, 1991. Letter to Congressional Leaders Transmitting a Report Pursuant to the Resolution Authorizing the Use of Force Against Iraq, 1 *Pub. Papers of Pres. George Bush* 42 (Jan. 16, 1991). The 1991 report satisfies the requirement in section 2(b) with respect to all uses of force against Iraq consistent with Public Law 102-1, and thus additional 2(b) reports were not filed prior to the use of force against Iraq in 1993, 1996 or 1998.

Section 2(c) explicitly provides that section 2 of Public Law 102-1 constitutes specific statutory authorization within the meaning of the War Powers Resolution. 105 Stat. at 4.

<sup>9</sup> See S.C. Res. 660, ¶ 12 (1990) (demanding that Iraq withdraw all of its forces to their positions prior to Iraq’s August 2, 1990 invasion of Kuwait); S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990) (establishing oil embargo and sanctions regime against Iraq and Kuwait); S.C. Res. 662, ¶ 1, U.N. Doc. S/RES/662 (Aug. 9, 1990) (deciding that Iraq’s annexation of Kuwait has no legal validity); S.C. Res. 664, ¶ 1, U.N. Doc. S/RES/664 (Aug. 18, 1990) (demanding that Iraq permit and facilitate the immediate departure from Kuwait of third-party nationals); S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990) (calling upon allied nations to use necessary measures to enforce embargo established in UNSCR 661); S.C. Res. 666, U.N. Doc. S/RES/666 (Sept. 13, 1990) (implementing sanctions regime and the humanitarian needs exception); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990) (demanding that Iraq immediately protect safety of diplomatic and consular personnel and premises in Kuwait); S.C. Res. 669, U.N. Doc. S/RES/669 (Sept. 24, 1990) (relating to Jordan’s request for relief from effects of implementing oil embargo and sanctions regime); S.C. Res. 670, U.N. Doc. S/RES/670 (Sept. 25, 1990) (regulating aircraft transporting cargo to Iraq or Kuwait and reaffirming Iraq’s liability for grave breaches of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War); S.C. Res. 674, U.N. Doc. S/RES/674 (Oct. 29, 1990) (condemning Iraqi mistreatment of Kuwaiti and third-party nationals and inviting collection of materials to bring charges against Iraq for its violations of international law); S.C. Res. 677, U.N. Doc. S/RES/677 (Nov. 28, 1990) (condemning Iraqi attempts to destroy demographic composition of Kuwait and Kuwaiti civil records).

<sup>10</sup> Although it might be argued that, due to the cease-fire formally adopted in UNSCR 687, UNSCR 678’s authorization to use force is no longer in effect, and therefore Public Law 102-1 may not be relied upon as statutory authorization to use force against Iraq, such arguments are not persuasive. First, the Security Council has reaffirmed UNSCR 678 three times, twice in 1991 and again in 1994. See *supra* note 2; S.C. Res. 686, ¶ 1, U.N. Doc. S/RES/686 (Mar. 2, 1991) (affirming that UNSCR 678 “continue[s] to have full force and effect”). Significantly, the Security Council reaffirmed UNSCR 678 in UNSCR 687 itself. Second, because the cease-fire is akin to an armistice, which is a suspension of hostilities rather than a termination of the state of war, see *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948) (“War does not cease with a cease-fire order.”), the cease-fire did not terminate UNSCR 678’s authorization to use force. Instead, general principles of armistice law permit the parties to the cease-fire to resume hostilities under certain conditions, pursuant to the authorization in UNSCR 678. See

resolutions” are UNSCR 687, which requires, *inter alia*, the inspection and destruction of Iraq’s WMD program, and UNSCR 688, which demands that Iraq halt the repression of its civilian population. The second purpose for UNSCR 678, the restoration of peace and security to the Persian Gulf region, depends, at a minimum, on the effective implementation of both of these resolutions, although UNSCR 678 is not limited to implementing these two resolutions. *See, e.g.*, S.C. Res. 687, pmb. ¶ 25 (“bear[ing] in mind [the] objective of restoring international peace and security in the area”); S.C. Res. 688, ¶ 2 (end to repression would “contribut[e] to removing the threat to international peace and security in the region”).

The President could, consistent with Public Law 102-1, determine that using force in Iraq was necessary to implement the terms of UNSCR 687 and thereby to restore international peace and security to the region. Under Public Law 102-1, the President also could authorize force to prevent the repression of Iraqi civilians condemned in UNSCR 688, i.e., repression that threatens international peace and security by contributing to cross-border incursions and migration of refugees. Given Saddam Hussein’s history of intransigence and refusal to cooperate with inspections of Iraq’s WMD program and his continued repression of Iraqi civilians, the President could determine that a change of regime in Iraq is necessary to implement UNSCR 687 and thereby restore international peace and security to the region. Were the President to take any of these actions, he would be acting at the zenith of his authority because it would include “all that he possesses in his own right plus all that Congress can delegate.” *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring) (footnote omitted).

It could be argued that Iraq’s expulsion from Kuwait in February 1991 by the United States and the allied nations fully implemented the UNSCRs listed in Public Law 102-1, and that therefore the authorization in section 2(a) for the use of U.S. Armed Forces has expired. Subsequent congressional legislation demonstrates, however, that the authorization in Public Law 102-1 remains in effect. First, the same Congress that enacted Public Law 102-1 twice expressed its “sense” that Public Law 102-1 continued to authorize the use of force even after Iraq’s withdrawal from Kuwait.<sup>11</sup> Enacted on December 5, 1991, section 1095 of

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*infra* Part III.A.4. Third, the objectives set forth in resolution 678 have not yet been achieved; in particular, Iraq has not complied with its cease-fire obligations, and consequently international peace and security have not been restored to the region. Finally, unlike some UNSCRs authorizing the use of force, *see, e.g.*, S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (Bosnia); S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994) (Rwanda); S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993) (Somalia), UNSCR 678 contains no temporal limit on its authorization.

<sup>11</sup> Although a “sense of the Congress” resolution is hortatory and does not give the President authority he would not otherwise possess, the views of Congress detailed below are evidence of Congress’s understanding of the scope of such authority. *Cf. Somalia Opinion*, 16 Op. O.L.C. at 13 & n.6 (“sense of Congress” that President should, *inter alia*, “ensure” and “secure” the provision of

the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290, 1488 (“1992-1993 Defense Authorization Act”), contains a congressional finding that Iraq is violating UNSCR 687’s requirements relating to its WMD program and expresses Congress’s sense that “the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1).”<sup>12</sup> And section 1096 of the 1992-1993 Defense Authorization Act expresses the same Congress’s “sense” that “Iraq’s noncompliance with United Nations Security Resolution 688 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region . . . and [that] the Congress supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688,” which condemns the repression of the Iraqi civilian population, “consistent with all relevant United Nations Security Council Resolutions and . . . Public Law 102-1.” 105 Stat. at 1489. Second, in 1999, Congress amended Public Law 102-1 to extend the reporting requirements from every 60 days to every 90 days, thereby indicating that the law continues in effect. *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, div. B, § 1000(a)(7), 113 Stat. 1501, 1536 (1999).

In addition, Executive Branch practice confirms that Public Law 102-1 continues to be in effect and to provide statutory authority for the President to implement applicable Security Council Resolutions, including UNSCRs 678, 687, and 688. Consistent with the reporting requirement in section 3 of Public Law 102-1, President Bush and his two predecessors have written to Congress at regular intervals to report on the status of efforts to secure Iraqi compliance with the applicable Security Council resolutions.<sup>13</sup> This practice has gone unchallenged by Congress.

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emergency humanitarian assistance in Somalia demonstrates that Congress recognized the President’s authority to use military force to accomplish that purpose).

<sup>12</sup> Section 1095(b) also expresses the sense of Congress that:

- (1) Iraq’s noncompliance with United Nations Security Council Resolution 687 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region; [and]
- (2) the President should consult closely with the partners of the United States in the Desert Storm coalition and with the members of the United Nations Security Council in order to present a united front of opposition to Iraq’s continuing noncompliance with Security Council Resolution 687.

*Id.*

<sup>13</sup> *See, e.g.*, Letter to Congressional Leaders Transmitting a Report on Iraq’s Compliance with United Nations Security Council Resolutions, 1 *Pub. Papers of Pres. George W. Bush* 110 (Jan. 23, 2002); Letter to Congressional Leaders Transmitting a Report on Iraq’s Compliance with United Nations Security Council Resolutions, 37 *Weekly Comp. Pres. Doc.* 1463 (Oct. 11, 2001); Letter to Congressional Leaders Transmitting a Report on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. William J. Clinton* 1678 (Oct. 1, 1999); Letter to

Even more significantly, President George H.W. Bush and President Clinton authorized the use of force on several occasions under Public Law 102-1 after the successful completion of Operation Desert Storm. For example, in 1998, President Clinton directed missile and aircraft strikes against Iraq “under” Public Law 102-1. Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 *Pub. Papers of Pres. William J. Clinton* 2195, 2196 (Dec. 18, 1998). Two years earlier, in September 1996, President Clinton reported to Congress that he had ordered U.S. cruise missile strikes “consonant with” Public Law 102-1 and section 1096 of the 1992-1993 Defense Authorization Act. Gingrich Letter at 1. President Bush also reported to Congress that he had ordered the 1992 participation of the United States in the enforcement of the southern no-fly zone in Iraq “consistent with” Public Law 102-1. Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1574, 1575 (Sept. 16, 1992). Congress has acquiesced in each of these uses of force.<sup>14</sup>

In sum, both legislation passed by Congress and the consistent practice of the Executive Branch indicate that the authorization to use force in Public Law 102-1 has survived the cease-fire with Iraq. Although congressional authorization is not constitutionally required before the President may direct military action against Iraq in response to threats to the national security and foreign policy of the United

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Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 1 *Pub. Papers of Pres. William J. Clinton* 1046 (June 6, 1994); Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1478 (Nov. 15, 1991); Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1164 (Sept. 16, 1991); Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 896 (July 16, 1991).

<sup>14</sup> In May 1998, Congress expressed its “sense” that none of the funds provided by the 1998 Supplemental Appropriations and Rescissions Act

may be made available for the conduct of offensive operations by United States Armed Forces against Iraq for the purpose of obtaining compliance by Iraq with United Nations Security Council Resolutions relating to inspection and destruction of weapons of mass destruction in Iraq unless such operations are specifically authorized by a law enacted after the date of enactment of this Act.

1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, § 17, 112 Stat. 58, 66. This is only a “sense” of Congress that is not binding. See *Boos v. Barry*, 485 U.S. 312, 327-28 (1988); *Lyng v. N.W. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455 (1988); see also *Carriage of Agricultural Products in United States Vessels Where Exportation Is Financed by Government*, 37 Op. Att’y Gen. 546, 548 (1934) (“In view of the fact, however, that the word ‘sense’ [as used in the term ‘sense of Congress’] is so well understood to mean ‘opinion’ and since the Congress has used the word in the Resolution, I am unwilling to believe that it intended to make the Resolution mandatory.”). A few months later, the same Congress enacted a Joint Resolution “urg[ing]” President Clinton “to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance” with its obligations under various U.N. Security Council Resolutions relating to Iraq’s WMD program. Pub. L. No. 105-235, 112 Stat. at 1541.

States, the President would be acting with the support of Congress were he to direct such action pursuant to Public Law 102-1.

## **2. Public Law 105-235**

Public Law 105-235, a Joint Resolution finding that Iraq “is in material and unacceptable breach of its international obligations,” and “urg[ing]” President Clinton “to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance,” also arguably expresses Congress’s support for the President to direct military action against Iraq. 112 Stat. 1538, 1541 (1998). The resolution contains multiple “whereas” clauses detailing almost two dozen Security Council findings of Iraqi violations of its WMD obligations and concluding that “Iraq’s continuing weapons of mass destruction programs threaten vital United States interests and international peace and security.” *Id.* at 1540. Although the Joint Resolution does not specifically authorize the use of force, and cautions that any action taken must comply with the Constitution and relevant laws, insofar as the President determines that directing military action against Iraq is “appropriate . . . to bring Iraq into compliance with its international obligations,” and consistent with the Constitution and relevant U.S. law, Congress has expressed its support for such action. *Id.* at 1541. In addition, subsequent legislation passed by the same Congress that enacted Public Law 105-235 reflects at least implicit support for military action. In the Iraq Liberation Act, Congress noted with approval Public Law 105-235’s recommendation that the President take appropriate action. *See* Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178. Significantly, the Iraq Liberation Act was passed shortly after President Clinton submitted his September 1998 report under Public Law 102-1, which made clear that military options were “on the table” if Iraq did not resume cooperation with the U.N. inspection regime. *See* Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. William J. Clinton* 1519, 1520 (Sept. 3, 1998). Read in this context, Public Law 105-235 grants at least implicit congressional authorization for the President to use force.<sup>15</sup>

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<sup>15</sup> With respect to using force to facilitate a change of regime in Iraq, we note that in the Iraq Liberation Act Congress expressed its view that “[i]t should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein . . . in Iraq.” Pub. L. No. 105-338, § 3, 112 Stat. at 3179. While the Act focuses on the provision of humanitarian, military, and broadcast assistance to Iraqi opposition forces, rather than direct military action by U.S. Armed Forces, it reflects congressional support for a change of regime in Iraq.

Congressional support for the use of force against Iraq is also reflected in House Resolution 322, 105th Cong. (1997) (enacted). Passed against the backdrop of continued Iraqi interference with U.N. inspections of its WMD programs, that resolution expressed the sense of the House of Representatives that the United States should, if necessary, take military action to compel Iraqi compliance with UNSCRs. *Id.* House Resolution 322 recommended that, if diplomatic efforts proved unsuccessful, any



### **3. Public Law 107-40**

Public Law 102-1 and Public Law 105-235 are not the only potential sources of congressional support for a decision by the President to use force against Iraq; there could be situations in which military action against Iraq would be statutorily authorized pursuant to Public Law 107-40, the “Authorization for Use of Military Force” that was enacted shortly after the terrorist attacks of September 11, 2001. Public Law 107-40 authorizes the President to use “all necessary and appropriate force” against those nations, organizations or persons whom he determines “planned, authorized, committed, or aided the [September 11th] terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” 115 Stat. at 224. Were the President to determine that Iraq provided assistance to the perpetrators of the September 11th attacks, this authorization would apply to the use of military force against Iraq.<sup>16</sup>

### **C. The War Powers Resolution**

Under the 1973 War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1994) (“WPR”), whenever U.S. Armed Forces are deployed for combat, the President shall submit a written report to Congress within forty-eight hours. 50 U.S.C. § 1543(a). Under section 5(b), the President shall terminate any continuous and sustained use of U.S. Armed Forces within sixty days unless Congress has declared war, enacted a specific authorization for such use of U.S. Armed Forces, or extended the sixty-day period or unless Congress cannot meet because of an armed attack on the United States. *Id.* § 1544(b). To the extent that Public Law 102-1 or Public Law 107-40 authorizes the actions being contemplated by the President, those resolutions explicitly state that they satisfy the requirements of section 5(b). Insofar as any of the military options being contemplated fall outside the scope of the authorizations in Public Law 102-1 and Public Law 107-40, and instead would be conducted solely on the basis of the President’s independent constitutional authority, significant constitutional issues regarding the sixty-day clock would be raised.

“[E]very President has taken the position that [the WPR] is an unconstitutional infringement by the Congress on the President’s authority as Commander-in-Chief.” Richard F. Grimmet, Cong. Research Serv., IB81050, *War Powers Resolution: Presidential Compliance 2* (updated Sept. 10, 2002); *see also Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 281-83 (1984) (listing

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military action be undertaken with “the broadest feasible multinational support,” but recognized that, if necessary, the United States should take unilateral military action. *Id.*

<sup>16</sup> Section 2(b)(1) explicitly provides that section 2 of Public Law 107-40 constitutes specific statutory authorization within the meaning of the War Powers Resolution. 115 Stat. at 224.

examples of President's introduction of U.S. Armed Forces into actual or imminent hostilities or hostile territory, without complying with the WPR's reporting requirements, that took place during the Nixon, Ford, Carter, and Reagan Administrations). Indeed, the War Powers Resolution was enacted over a presidential veto based on constitutional objections as well as foreign policy concerns. *See Veto of the War Powers Resolution, Pub. Papers of Pres. Richard Nixon* 893 (Oct. 24, 1973). As President Nixon explained in justifying his veto:

the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation. . . . [The resolution] would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. . . . The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.

*Id.*; *see also* Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 *Pub. Papers of Pres. George Bush* 40 (Jan. 14, 1991) (preserving “long-standing positions of the executive branch on . . . the constitutionality of the War Powers Resolution”).<sup>17</sup>

This Office has never formally opined on the constitutionality of the WPR; we have, however, questioned the WPR's constitutionality on numerous occasions. *See, e.g., Overview of the War Powers Resolution*, 8 Op. O.L.C. at 274 (“The Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.”); *Executive Power with Regard to the Libyan Situation*, 5 Op. O.L.C. 432, 441 (1981) (“We do not believe . . . that the purpose and policy statement should be construed to constrain the exercise of the President's constitutional power.”); *cf. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 195 (1980) (“there may be applications [of the reporting or consultation requirements of WPR] which raise constitutional questions”); *Supplementary Discussion of the President's Powers Relating to the Seizure of the American Embassy in Iran*, 4A Op. O.L.C. 123, 128 (1979) (same); *Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115,

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<sup>17</sup> On one occasion, President Carter did state that WPR's imposition of a sixty-day limitation on military operations absent congressional authorization was constitutional. “Ask President Carter”: Remarks During a Telephone Call-in Program on the CBS Radio Network, 1 *Pub. Papers of Pres. Jimmy Carter* 291, 324 (Mar. 5, 1977) (noting that WPR sixty-day rule was an “appropriate reduction” in the President's power). President Carter may have relied on OLC advice for his statement. *See infra* note 18.

121 (1979) (“The Resolution includes in its statement of purposes and policy a list of situations in which the President is authorized to introduce the armed forces into hostilities or situations of imminent hostility. . . . However, we do not consider that the purpose and policy statement should be construed to constrain the exercise of the President’s constitutional power in this instance.”) (citation omitted).<sup>18</sup> Most recently, this Office has stated that “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.” *President’s Authority to Conduct Military Operations*, 25 Op. O.L.C. at 211.<sup>19</sup>

Finally, we note that the WPR has been controversial ever since its enactment in 1973 and has been the subject of litigation when Presidents have used military force, allegedly in violation of the WPR. *See, e.g., Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Sanchez Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff’d*, 770 F.2d 202 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983). To date, no court that we are aware of has ever reached a judgment on the merits; cases have been dismissed on the basis of a variety of procedural defects, including lack of standing, lack of ripeness, and the political question doctrine. *See* Grimmet, IB81050, *War Powers Resolution* at 2 (“The courts have not directly addressed [whether WPR is an unconstitutional infringement by the Congress on the President’s authority as Commander in Chief].”). If the President were to take military action without complying with the WPR, it is likely that litigation would be brought. We think it is unlikely, however, that a court would rule on the merits of the WPR.

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<sup>18</sup> Although this Office has long questioned the constitutionality of the WPR, we have not done so consistently. *Compare Presidential Power to Use the Armed Forces Abroad*, 4A Op. O.L.C. at 196 (“We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of ‘unavoidable military necessity.’ This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.”), *with Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 327-28 n.1 (2000) (“Previous Administrations have expressed different views concerning the constitutionality of the WPR. . . . In light of our conclusion that Congress lawfully authorized continued hostilities beyond the 60-day statutory limit, we have no occasion to consider any constitutional arguments that might be made.”) (citations omitted).

<sup>19</sup> Section 2(c)(3) of the WPR acknowledges the President’s pre-existing constitutional authority to use force in self-defense, defined in the provision as a response to “a national emergency” arising out of an “attack upon the United States.” 50 U.S.C. § 1541(c). We would not, however, read section 2(c)(3) as limiting the President’s right to direct the use of force in self-defense to cases of an actual armed attack because that reading would limit the President’s authority to use force in anticipatory self-defense. *See infra* Part III.B.

### III. Authority Under International Law to Use Force Against Iraq

The United Nations Charter (“U.N. Charter”) requires member states to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. U.N. Charter art. 2, ¶ 4. Nonetheless, the Security Council may act under chapter VII of the Charter to authorize member states to use such force “as may be necessary to maintain or restore international peace and security.” *Id.* art. 42. In addition, article 51 of the U.N. Charter recognizes the “inherent right of individual or collective self-defense.” Authority under international law for the use of force against Iraq stems from two different sources—Security Council authorization in the form of UNSCR 678, which authorizes the use of “all necessary means” to implement various UNSCRs relating to Iraq and to restore international peace and security, *id.* ¶ 2, and the inherent right of self-defense, recognized in article 51.<sup>20</sup> We will discuss each in turn.

#### A. U.N. Security Council Authorization

On November 29, 1990, the Security Council, acting under chapter VII of the U.N. Charter, adopted UNSCR 678, which authorizes member states “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” *Id.* ¶ 2. Two such relevant resolutions are: (1) UNSCR 687, which established the conditions for a formal cease-fire suspending hostilities in the Persian Gulf;<sup>21</sup> and (2) UNSCR 688, which demanded that Iraq cease its repression of its civilian population because the consequences of that repression threatened international peace and security in the region. Fundamental to the restoration of international peace and security to the region is Iraq’s compliance with the terms of both UNSCR 687, particularly its requirements that Iraq permanently dismantle its WMD program and permit U.N. inspections for verification purposes, and UNSCR 688. If UNSCR 678 is read together with UNSCRs 687 and 688, the Security Council has authorized the use of force against Iraq to uphold and implement the conditions of the cease-fire and to encourage Iraq to cease repres-

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<sup>20</sup> While some in the international community might endorse the use of force against Iraq under the doctrine of humanitarian intervention, given Iraq’s abhorrent treatment of its Kurdish population, the United States does not accept that doctrine as justifying the use of force, and there is significant doubt that it has achieved the status of a norm of customary international law. *See* Ralph Zacklin, Comment, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 Va. J. Int’l L. 923, 934-36 (2001); Jonathan I. Charney, Commentary, *Anticipatory Humanitarian Intervention in Kosovo*, 32 Vand. J. Transnat’l L. 1231, 1239-41 (1999).

<sup>21</sup> On April 6, 1991, Iraq responded to the conditions in UNSCR 687 in a letter to the Security Council stating that Iraq had “no choice but to accept this resolution.” U.N. Doc. S/22456 (Apr. 6, 1991).

sion that threatens international peace and security in the region by, for example, contributing to refugee migration and cross-border incursions. To determine whether the existence of the cease-fire would prevent such a use of force, we turn to a consideration of the conditions under which the cease-fire may be suspended.

### **1. The Cease-Fire, Material Breach, and Treaty Law**

No clearly established rule of international law exists regarding the appropriate circumstances in which a cease-fire established by a U.N. Security Council resolution may be suspended.<sup>22</sup> To discern an applicable standard, we look for guidance to general principles of treaty law.

UNSCR 687 explicitly establishes “a formal cease-fire . . . between Iraq and Kuwait and the [U.N.] Member States cooperating with Kuwait in accordance with resolution 678 (1990).” S.C. Res. 687, ¶ 33. UNSCR 687 is not a multilateral treaty, but for our purposes it may be useful to analogize it to such a treaty, as defined by the Vienna Convention on the Law of Treaties art. 60(2)(b), May 23, 1969, 1155 U.N.T.S. 331, 346 (“Vienna Convention”). Under the Vienna Convention, a “treaty” is a written international agreement between States that is governed by international law. *Id.* art. 2(1)(a). The State parties to the cease-fire agreement are Iraq, Kuwait, the United States, and the other members of the coalition in the Persian Gulf War. *Cf.* Ruth Wedgwood, Editorial Comment, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction*, 92 Am. J. Int’l L. 724, 726 (1998) (pointing out that the original cease-fire on the ground was a decision of the individual members of the coalition, not the Security Council as a whole). Even if some of the State-parties to the cease-fire did not specifically agree to its terms because they were not members of the Security Council when Resolution 687 was adopted, the resolution is binding on them as members of the United Nations. *See* U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”); *Paris v. (I) Department of Nat’l Store Branch 1 (Vietnam)*, No. 99 Civ. 8607 (NRB), 2000 WL 777904, at \*5 (S.D.N.Y. June 15, 2000) (under article 25, “all members of the United Nations are obliged to accept and carry out . . . decisions of the Security

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<sup>22</sup> UNSCR 687 appears to be unprecedented in terms of the precision with which the Security Council established the parameters of the cease-fire. *Cf.* S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (demanding that all parties in Kosovo immediately cease hostilities); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973) (calling upon all parties to the fighting in the Middle East to cease all firing and terminate all military activity immediately); S.C. Res. 27, U.N. Doc. S/RES/27 (Aug. 1, 1947) (calling on armed forces of the Netherlands and Indonesia to cease hostilities). The detailed conditions for the armistice suspending the hostilities in Korea, for example, are contained in an international agreement between the United Nations (represented by U.S. General Mark Clark, the Commander in Chief of the U.N. Command) and North Korea. *See* Military Armistice in Korea and Temporary Supplementary Agreement, July 27, 1953, 4 U.S.T. 234.

Council” acting under chapter VII); Memorandum for the President from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Executive Order Entitled “Transactions Involving Southern Rhodesia”* at 2 (Dec. 13, 1977) (“*Rhodesia Executive Order*”) (United States is obligated under international law to implement a UNSCR adopted under chapter VII); *see also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, 1992 I.C.J. 114, 126, ¶ 42 (Apr. 14); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 53, ¶ 115 (June 21) (“*South Africa Advisory Opinion*”).<sup>23</sup>

In the multilateral context, it is well established that a material breach of a treaty by one of the parties entitles a party “specially affected” by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part vis-à-vis the defaulting state. Vienna Convention art. 60(2)(b);<sup>24</sup> *see also* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 23 (Jan. 22, 2002); Letter for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel at 4 n.4 (Nov. 15, 2001); *International Load Line Convention*, 40 Op. Att’y Gen. 119, 124 (1941); 1 Restatement (Third) of the Foreign Relations Law of the United States § 335(2)(b) (1987). Even if the United States were not “specially affected” by Iraq’s noncompliance with UNSCR 687, however, a material breach of a multilateral treaty also permits any non-defaulting party to cite the breach as a ground for complete or partial suspension with respect to itself “if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.” Vienna Convention art. 60(2)(c); *see* 1 Restatement (Third) of the Foreign Relations Law of the United States § 335(2)(c) (1987). According to the Vienna Convention, a “material breach” includes “the violation of a provision essential to the accomplishment of the object

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<sup>23</sup> We express no opinion here regarding whether suspending a Security Council resolution generally would be an appropriate remedy for its breach.

<sup>24</sup> Although not ratified by the United States, this convention “is frequently cited . . . as a statement of customary international law.” *Review of Domestic and International Legal Implications of Implementing the Agreement with Iran*, 4A Op. O.L.C. 314, 321 (1981). Several lower courts have treated the convention as an authoritative codification of the customary international law of treaties. *See, e.g., Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308-09 (2d Cir. 2000), *cert. denied*, 533 U.S. 928 (2001); *Aquamar v. Del Monte Fresh Produce, Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 638 n.9 (5th Cir. 1994).

or purpose of the treaty.” Vienna Convention, art. 60(3)(b);<sup>25</sup> *see also Black’s Law Dictionary* 183 (7th ed. 1999) (defining “material breach” as “[a] substantial breach of contract, usu[ally] excusing the aggrieved party from further performance”).

Regardless of whether a material breach must amount to non-compliance that “specially affects” the United States or that effects a “radical change” in circumstances, it seems clear that Iraq has sufficiently violated the cease-fire to meet either standard. Iraq’s repeated refusals to comply with the international on-site inspections of its WMD program mandated by UNSCR 687 qualify as a material breach because they violate core provisions of the resolution. *See, e.g.*, S.C. Res. 687, ¶ 9 (Iraq shall “agree to urgent, on-site inspection” of its biological, chemical and missile capabilities); *id.* ¶ 12 (Iraq shall accept “urgent on-site inspection” of its nuclear materials and facilities). Iraq’s continuing efforts to prevent the U.N. from inspecting potential WMD sites directly interferes with U.N. Security Council efforts to restore international peace and security in the region. Immediately after the ceasefire, for example, Iraq refused to cooperate with UNSCOM and the IAEA. On August 15, 1991, little more than three months after the adoption of UNSCR 687, the Security Council “condemn[ed]” Iraq’s “serious violation” of a number of its obligations regarding the destruction and dismantlement of its WMD program and of its agreement to cooperate with UNSCOM and the IAEA, and stated that the violation “constitutes a material breach of the relevant provisions of [UNSCR 687] which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region.” S.C. Res. 707, ¶ 1. Over the next two years, the President of the Security Council issued six different statements reiterating that Iraq’s refusal to cooperate with UNSCOM and the IAEA qualified as material breaches of UNSCR 687.<sup>26</sup>

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<sup>25</sup> The International Law Commission of the United Nations explained its choice of the term “material” rather than the term “fundamental”:

The word “fundamental” might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character.

*Report of the Commission to the General Assembly*, [1963] 2 Y.B. Int’l L. Comm’n 187, 206, U.N. Doc. A/CN.4/SER.A./1963/ADD.1.

<sup>26</sup> *See* U.N. Doc. S/25970 (June 18, 1993) (“warn[ing] the Government of Iraq of the serious consequences of material breaches of resolution 687”); U.N. Doc. S/25091 (Jan. 11, 1993) (Iraq’s prohibition on UNSCOM using its own aircraft to transport its personnel to Iraq constitutes “further material breach” of UNSCR 687); U.N. Doc. S/25081 (Jan. 8, 1993) (Iraq’s prohibition on UNSCOM using its own aircraft throughout Iraq is an “unacceptable and material breach” of UNSCR 687); U.N. Doc. S/24240 (July 6, 1992) (Iraq’s refusal to allow UNSCOM to enter certain premises constitutes a “material and unacceptable breach by Iraq of a provision of resolution 687”); U.N. Doc. S/23663 (Feb. 28, 1992) (Iraq’s refusal to commence destruction of ballistic-missile related equipment is a “further

Further, in the years preceding the December 1998 missile strikes, Iraq continued to violate the WMD-related requirements in UNSCR 687. The Security Council adopted several resolutions condemning Iraq's noncompliance as "clear," "deeply disturbing," "unacceptable," "flagrant" and "a threat to international peace and security."<sup>27</sup> Although these denunciations by the Security Council do not use the particular phrase "material breach," the conduct criticized fits within the Vienna Convention's definition of that phrase: it violates conditions of the cease-fire that are essential to its purpose. Moreover, over the past few years, the absence of military force to compel Iraq's compliance with the terms of the cease-fire seems only to have increased its material breach. Since the 1998 airstrikes, Iraq has continued its flagrant violation of the terms of the cease-fire by refusing to permit *any* U.N. inspections of its WMD program. *See* S.C. Res. 1284 (noting Iraq's failure to implement fully UNSCR 687 and other relevant resolutions).

In sum, Iraq's repeated interference with international inspections of its WMD program qualifies as a "material breach" of the cease-fire under international law. In addition, were there to be evidence that Iraq is continuing to develop its WMD program, or has not destroyed its WMD and their means of delivery, such actions also would constitute material breaches of Iraq's obligations under UNSCR 687 unconditionally to destroy, and cease to develop, WMD and their delivery systems.

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material breach" of UNSCR 687); U.N. Doc. S/23609 (Feb. 19, 1992) (Iraq's failure to acknowledge its obligations under UNSCR 707 and 715, its rejection of UNSCOM's and the IAEA's plans for monitoring and verification, and its failure to provide adequate disclosure of its weapons capabilities constitute a "continuing material breach" of UNSCR 687).

<sup>27</sup> *See, e.g.*, S.C. Res. 1060, ¶ 1, U.N. Doc. S/RES/1060 (Jun. 12, 1996) (calling Iraq's refusal to allow access to UNSCOM "a clear violation" of UNSCR 687); S.C. Res. 1115, ¶ 1, U.N. Doc. S/RES/1115 (June 21, 1997) (condemning Iraq's refusal to allow access to UNSCOM as "a clear and flagrant violation of the provisions of" UNSCR 687); S.C. Res. 1134, ¶¶ 1-2, U.N. Doc. S/RES/1134 (Oct. 23, 1997) (deciding that Iraq's refusal to allow access to UNSCOM, and especially Iraqi actions endangering the security of UNSCOM personnel, its destruction of documents, and its interference with the freedom of movement of UNSCOM personnel, were a "flagrant violation" of UNSCR 687); S.C. Res. 1137, pmb. ¶ 11 (determining that Iraq's obstructionism with respect to UNSCOM "continues to constitute a threat to international peace and security"); S.C. Res. 1194, ¶ 1, U.N. Doc. S/RES/1194 (Sept. 9, 1998) (Iraq's decision to suspend cooperation with UNSCOM "constitutes a totally unacceptable contravention of its obligations" under UNSCR 687); S.C. Res. 1205, ¶ 1 (condemning Iraq's decision to end cooperation with UNSCOM as a "flagrant violation" of UNSCR 687); *see also* Statement by the President of the Security Council, U.N. Doc. S/PRST/1997/56 (Dec. 22, 1997) ("The Security Council stresses that failure by the Government of Iraq to provide [UNSCOM] with immediate, unconditional access to any site or category of sites is unacceptable and a clear violation of the relevant resolutions."); Press Statement by the Security Council (Oct. 31, 1998) (referring to Iraq's decision to halt cooperation with UNSCOM and its restrictions on the IAEA's work as "deeply disturbing").



## 2. Remedies

Having determined that the President has sufficient grounds to find Iraq in material breach of the cease-fire, we must address whether unilaterally suspending the cease-fire constitutes a proper remedy for the violation. We believe that Iraq's material breaches of the cease-fire entitle the United States, as a party to the cease-fire, unilaterally to suspend its operation.<sup>28</sup> Cf. Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* at 20-21 (Nov. 15, 2001) ("*Authority to Suspend ABM Treaty*") (In *Charlton v. Kelly*, 229 U.S. 447, 473 (1913), the Supreme Court held that "if a partner to a treaty commits a material breach, the President has the option whether to void the treaty or to overlook the breach and regard the treaty merely as voidable."). Under accepted principles of international treaty law, the United States need not obtain the concurrence of the other parties to the cease-fire prior to suspending its terms. See Wedgwood, *Enforcement of Security Council Resolution 687*, 92 Am. J. Int'l L. at 726 (United States did not need to wait for Security Council approval before responding to a breach of the cease-fire because "[i]t is not unreasonable to regard the terms of such a cease-fire [UNSCR 687] as self-executing, just as the violation of a newly settled boundary line or demilitarized zone would entitle a neighboring state to act upon a violation"); cf. Vienna Convention art. 60 (no requirement that all parties to a multilateral treaty agree to suspend the treaty—one party may suspend the treaty with respect to itself).

Some commentators have argued that, before the cease-fire may be suspended, the United States must first obtain a new UNSCR finding that Iraq is in material breach of its obligations. The circumstances that gave rise to the Security Council's finding in UNSCR 707 that Iraq's noncompliance with the terms of the cease-fire constituted a material breach are still present today—Iraq continues its significant obstruction of international inspections of its WMD program. More-

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<sup>28</sup> We note that, outside the particular parameters of the Iraq context, where Security Council Resolutions both establish a cease-fire between specific parties and authorize the use of force, violations of Security Council resolutions generally lead to challenges before the International Court of Justice, see, e.g., *South Africa Advisory Opinion*, and/or diplomatic repercussions, see *Rhodesia Executive Order* at 6 (noting "considerable embarrassment" suffered by the United States when it violated its obligation under the U.N. Charter to implement a Security Council resolution due to a later legislative enactment that took precedence over the resolution); cf. Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* at 12-13 & n.13 (Nov. 15, 2001) (discussing possible international sanctions the United States may face if it breaches its treaty or other international law obligations).

over, we believe that it is within the power of the United States to ascertain for itself whether, as an objective fact, there has been a material breach of an agreement to which it is a party. *See Legal Authority for the Possible Use of Force Against Iraq*, 92 Am. Soc’y Int’l L. Proc. 136, 141 (1998) (“Whether there [is] a material breach is an objective fact. It is not necessary that it be the [Security] Council that determines or states that a material breach has occurred.”) (statement of Michael Matheson, Principal Deputy Legal Adviser, Department of State); *see also* Michael L. Cornell, Comment, *A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 Conn. J. Int’l L. 325, 356 (2001) (“nothing in UNSCR 687, the U.N. Charter, or international law . . . requires a finding of material breach to be documented by the UNSC”); *cf.* Wedgwood, *Enforcement of Security Council Resolution 687*, 92 Am. J. Int’l L. at 728 n.26 (definition of material breach is objective). For example, the United States launched the 1998 airstrikes without first obtaining either a Security Council resolution or a statement by the President of the Security Council that Iraq had materially breached its international obligations.

Thus, in response to Iraq’s material breaches of the conditions of the cease-fire established in UNSCR 687, the United States may suspend the cease-fire, which otherwise obligates the United States, Iraq, Kuwait, and the other members of the coalition in the Persian Gulf War to refrain from military action. Once the cease-fire is suspended, the United States may again rely on the authorization in UNSCR 678 to use force against Iraq to implement UNSCR 687 and to restore international peace and security to the area. *See* Wedgwood, *Enforcement of Security Council Resolution 687*, 92 Am. J. Int’l L. at 726 (Iraq’s breach of the terms of the cease-fire in 1997-1998 “allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions”); *cf.* Joseph Murphy, *De Jure War in the Gulf: Lex Specialis of Chapter VII Actions Prior to, During, and in the Aftermath of the United Nations War Against Iraq*, 5 N.Y. Int’l L. Rev. 71, 84-85 (1992) (continuing material breach of UNSCR 687 by Iraq would effectively nullify the permanent cease-fire and would reinstate UNSCR 678 and its authorization to use military force to implement all subsequent relevant resolutions, including UNSCR 687). In our view, UNSCR 678’s authorization to use force has continued in effect since it was first adopted in 1990. We disagree with the idea that, due to the cease-fire established in UNSCR 687, UNSCR 678’s authorization has expired. The consistent position of the United States has been that UNSCR 678 survived the cease-fire. *See, e.g.,* Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 1164, 1164-65 (Sept. 16, 1991) (explaining—after the adoption of UNSCR 687—that the United States was willing to take military action to implement UNSCR 678’s call for the restoration of international peace and security to the region); *Legal Authority for the Possible*

*Use of Force Against Iraq*, 92 Am. Soc’y Int’l L. Proc. at 142 (“In the U.S. Government’s view, there is a continuing right to use force [to respond] to such [material] breaches regardless of whether there is further [Security Council] authorization to respond.”) (panelist Michael Matheson, Principal Deputy Legal Adviser, Department of State). As discussed earlier, *see supra* notes 2, 9-10, and accompanying text, UNSCR 678 has been explicitly reaffirmed by UNSCR 687 itself, as well as by UNSCRs 686 and 949.<sup>29</sup> And, as we explain below, *see infra* Part III.A.4, general principles of armistice law confirm that the cease-fire did not extinguish the Security Council’s authorization to use force, but rather suspended hostilities between Iraq, the United States, and other members of the coalition.

In our view, the President could reasonably determine that suspending the cease-fire and resuming hostilities with Iraq is an appropriate response to Iraq’s material breaches of the cease-fire. Over the years, Iraq repeatedly has refused to respond to diplomatic overtures and other non-military attempts to force Iraq to comply with its obligations to permit full U.N. inspections of its WMD program. The President could reasonably conclude that military force is necessary to obtain Iraqi compliance with the terms of the cease-fire, thereby restoring international peace and security to the region. And, as we will explain below, state practice confirms that the suspension of the cease-fire and the subsequent use of military force against Iraq constitute an appropriate remedy for Iraq’s material breaches of the cease-fire, provided that such use of force is necessary and proportional.

### **3. State Practice on Suspension in Response to Material Breach**

Suspension of treaties or international agreements in response to a material breach is a well-established practice in which the United States has engaged on several occasions. Such state practice is relevant as a demonstration of customary international law. *See* 1 Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) (customary international law stems from “a general and consistent practice of states followed by them from a sense of legal obligation”); *id.* § 103 cmt. a (best evidence of customary international law is proof of state practice, ordinarily provided by official documents and other indications of governmental action).

The United States has repeatedly suspended the cease-fire established by UNSCR 687 in response to Iraq’s material breach of that resolution. The United States and Britain, for example, used force against Iraq in 1993 and 1998 in response to Iraq’s material breach of UNSCR 687. On January 17, 1993, President

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<sup>29</sup> The United Nations Secretary General himself endorsed the concept that UNSCR 678 survived the cease-fire when he declared that the January 1993 strikes against Iraq, which were undertaken pursuant to UNSCR 678, were in accordance with the U.N. Charter. *See* Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269 (Jan. 19, 1993).

George H.W. Bush ordered missile strikes against a nuclear facility near Baghdad due to both Iraq's refusal to permit certain U.N. aircraft to land in that city, and a series of incidents in which Iraq challenged the authority of the U.N. Iraq-Kuwait Observation Mission along the Iraq-Kuwait border. The Security Council found each of these actions by Iraq to be material breaches of the cease-fire. In addition, the United States was responding to UNSCOM's findings on January 15 and 16 that Iraq had abdicated its responsibilities to safeguard UNSCOM personnel and was unacceptably attempting to restrict the Commission's freedom of movement. *See* Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269-70 (Jan. 19, 1993). The strikes were designed "to help achieve the goals of U.N. Security Council Resolutions 687, 707, and 715," which required Iraq to accept the inspection and dismantlement of its WMD program. *Id.* at 2270.

Just four days prior to the January 17th strikes, President Bush ordered an air attack on surface-to-missile sites and related facilities in the southern no-fly zone. The January 13th attack, which was joined by Britain and France, appears to have been primarily in response to Iraqi violations of the southern no-fly zone—Iraq had moved surface-to-air missiles into the zone to threaten coalition aircraft, but President Bush also pointed to Iraq's "failure to live up to the resolutions." Barton Gellman & Ann Devroy, *U.S. Delivers Limited Air Strike on Iraq; Bush Sends Battalion to Kuwait; Baghdad Appears to Make Concessions*, Wash. Post, Jan. 14, 1993, at A1, A18 (quoting President Bush); *see also* Press Release, United States Mission to the United Nations, USUN-1 (Jan. 13, 1993) ("[T]he Government of Iraq should understand that continued defiance of U.N. Security Council resolutions and related coalition demarches will not be tolerated.") (statement by Marlin Fitzwater). The President's report to Congress on the attack takes note of a statement by the U.N. Secretary General explaining that "the forces that carried out the [January 13th] raid[] have received a mandate from the Security Council, according to Resolution 687, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire. . . . [T]his action . . . conformed to the Charter of the United Nations." Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269 (Jan. 19, 1993) (quoting U.N. Secretary General Boutros-Ghali).

In December 1998, President Clinton explained that the United States launched seventy hours of missile and aircraft strikes against Iraq "in response to Iraqi breaches of its obligations under resolutions of the United Nations Security Council." *See* Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 *Pub. Papers of Pres. William J. Clinton* 2195, 2195 (Dec. 18, 1998). President Clinton's justification for the military action, which targeted facilities actively involved in Iraq's WMD programs or that threatened Iraq's neighbors or U.S. forces, was that

[i]t is consistent with and has been taken in support of numerous U.N. Security Council resolutions, including Resolutions 678 and 687, which authorize U.N. Member States to use “all necessary means” to implement the Security Council resolutions and to restore peace and security in the region and establish the terms of the cease-fire mandated by the Council, including those related to the destruction of Iraq’s WMD programs.

*Id.* at 2195-96. As the Acting U.S. Ambassador to the United Nations A. Peter Burleigh explained to the other members of the Security Council, Iraq had acted in “flagrant material breach of resolution 687” by interfering with UNSCOM’s inspections, and coalition forces responded under the authority provided by UNSCRs. *See* Press Release, Security Council, Security Council Meets to Discuss Military Strikes Against Iraq; Some Members Challenge Use of Force Without Council Consent, U.N. Press Release SC/6611, at 1-2, 7 (Dec. 16, 1998). Professor Ruth Wedgwood agrees:

Iraq’s calculated defiance of [the terms of the cease-fire regarding elimination of WMD and verification by UNSCOM] in the 1997-1998 confrontation allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions, subject to the requirements of necessity and proportionality. . . . The right to use force unilaterally to vindicate the inspection regime is also ratified by . . . the events of January 1993 [in which] Iraq was warned [by the Security Council] that “serious consequences” would flow from “continued defiance.” On January 13, 1993, the United Kingdom and France joined the United States in conducting air raids on sites in southern Iraq.

Wedgwood, *Enforcement of Security Council Resolution 687*, 92 Am. J. Int’l L. at 726-27. International support for the 1998 airstrikes is reflected by the offer of Argentina, Australia, Canada, the Czech Republic, Denmark, Germany, Hungary, the Netherlands, New Zealand, Portugal, Spain and the United Kingdom to contribute facilities, equipment or forces to the U.S. military effort, and of Kuwait for the use of its air facilities. *See id.* at 727.<sup>30</sup>

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<sup>30</sup> It bears mention, however, that the reaction of the international community to the use of force against Iraq in 1998 was not wholly supportive. Although Britain and Japan spoke in favor of the strikes, the Russian Federation labeled them as “violat[ing] the principles of international law and the principle of the [U.N.] Charter.” U.N. Press Release SC/6611, at 4. Of the Security Council members at the time, China, Costa Rica, Sweden, Brazil, Gambia, Kenya and Gabon also spoke against the 1998 strikes—some preferring the peaceful settlement of disputes and some criticizing the unilateral use of force. *Id.* at 5-10.

The United States engaged in the practice of suspending treaties or international agreements in response to a material breach long before the conflict with Iraq. For example, on June 20, 1876, President Grant informed Congress that he was suspending the extradition clause of the 1842 Webster-Ashburton Treaty with Britain, U.S.-Gr. Brit., art. X, Aug. 9, 1842, 8 Stat. 572, 576. In President Grant's view, the release of two fugitives by Britain whose extradition was sought by the United States was "an abrogation and annulment" of the extradition clause of the treaty, and in response the United States refused to surrender fugitives sought by the British Government until the British resumed performance. *Authority to Suspend ABM Treaty* at 17-18; Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 Va. J. Int'l L. 71, 125-30 (1993).

More recently, in 1973, the United States charged the Democratic Republic of Vietnam with serious violations of the recently-concluded Agreement on Ending the War and Restoring Peace in Viet-nam, Jan. 27, 1973, 24 U.S.T. 1. In response, the United States declared that it would suspend its mine-clearing operations, which were mandated by the Agreement. See Arthur W. Rovine, *Digest of United States Practice in International Law* 482 (1973). The United States explained: "This suspension is justified as a response to the numerous material breaches of the Agreement by the Democratic Republic of Viet-Nam in accordance with the rule of international law as set forth in Article 60 of the 1969 [Vienna] Convention on the Law of Treaties." *Id.*

The United States also partially suspended a multilateral treaty due to a material breach by one of the other parties in August 1986. In response to a policy adopted by New Zealand under which U.S. vessels and aircraft could not enter New Zealand ports unless they declared that they were not nuclear-armed or nuclear-powered, the United States suspended its security obligations under the ANZUS Pact—the Security Treaty Between Australia, New Zealand, and the United States, Sept. 1, 1951, 3 U.S.T. 3420—as to New Zealand but not to Australia. See 1 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981-1988*, at 1279-81. The United States explained that "[a]ccess for allied ships and aircraft . . . is essential to the effectiveness of the ANZUS alliance. . . . Because of New Zealand's decision to renege on an essential element of its ANZUS participation, it has become impossible for the United States to sustain its security obligations to New Zealand." Statement of Secretary of State George Shultz, in *U.S. and Australia Hold Ministerial Talks*, 86 Dep't St. Bull. 43, 44 (Oct. 1986). The United States determined that New Zealand had committed a material breach of article 2 of the ANZUS Pact, which states that the parties, "by means of continuous and effective . . . mutual aid will maintain and develop their individual and collective capacity to resist armed attack." 3 U.S.T. 3422; see Joint Statement by Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, Australian Minister for Foreign Affairs Bill Hayden,

and Australian Minister for Defense Kim Beazley, in *U.S. and Australia Hold Ministerial Talks*, 86 Dep't St. Bull. at 48 (agreeing that access for allied ships and aircraft is essential to the effectiveness of the ANZUS alliance and that New Zealand's policies were detracting from the individual and collective capacity to resist armed attack); see generally *Authority to Suspend ABM Treaty* at 18.

In sum, for more than a century, the United States has engaged in the well-established practice under international law of suspending treaties in response to a material breach by one of the other parties to the treaty. The United States has extended this practice to the conflict with Iraq, viewing material breaches by Iraq of the UNSCR that established the cease-fire as justification for the suspension of that cease-fire. The United States has then proceeded to use force as authorized by the Security Council in UNSCR 678.

#### 4. Armistice Law

Using force in response to a material breach of the cease-fire also would be consistent with general principles of armistice law. The cease-fire established by UNSCR 687 is similar to an armistice—unlike a peace treaty, it does not terminate the state of war, but merely “suspends military operations by mutual agreement between the belligerent parties.” Hague Convention on the Law and Customs of War on Land, Oct. 18, 1907 (“Hague Convention IV”), Annex (“Hague Regulations”) art. 36, 36 Stat. 2277, 2305;<sup>31</sup> see also *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948); *Commercial Cable Co. v. Burlison*, 255 F. 99, 104-05 (S.D.N.Y. 1919) (L. Hand, J.), *rev'd and vacated as moot*, *Kansas v. Burlison*, 250 U.S. 188 (1919) (“An armistice effects nothing but a suspension of hostilities; the war still continues.”); Yoram Dinstein, *War, Aggression and Self-Defence* 50 (3d ed. 2001) (“A labelling of Resolution 687 as a ‘permanent cease-fire’ is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement.”); cf. *In re Yamashita*, 327 U.S. 1, 11-12 (1946) (a state of war exists from the time war is declared until peace is proclaimed); *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904) (“A truce . . . does not terminate the war. . . . At the expiration of the truce, hostilities may recommence without any fresh declaration of war.”) (internal quotations omitted); *Termination of Wartime Legislation*, 40 Op. Att’y Gen. 421, 422 (1945) (statutes effective only “in time of war” remain effective until restoration of a formal state of peace); Sydney D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 Am. J. Int’l L. 461, 463, 469-71 (1977) (whereas an armistice is negotiated directly between the belligerents, the Security Council has introduced a new concept—the cease fire—that “is

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<sup>31</sup> The Nuremberg Tribunal recognized the Hague Regulations as articulating customary international law. See *Trial of the Major War Criminals Before the International Military Tribunal (1945-1946)*, reprinted in *II The Law of War: A Documentary History* 922, 960-61 (Leon Friedman, ed., 1972).

simply a suspension of acts of violence . . . resulting from the intervention of a third party”). Thus, the cease-fire established in UNSCR 687 merely suspended, rather than terminated, hostilities with Iraq.

A cease-fire allows a party to a conflict to resume hostilities under certain conditions. Under the Hague Regulations, “[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.” Hague Regulations art. 40, 36 Stat. at 2305-06; *see also* U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 7, ¶ 493 (July 1956, as updated) (hostilities may be resumed only with “convincing proof of intentional and serious violation of [the armistice’s] terms by the other party”).<sup>32</sup> The Hague Regulations do not contain any explanation of what might qualify as “urgency,” but the Department of the Army’s Field Manual sheds some light on the question. According to the Army Field Manual, warning must be given to the other side, unless “the delay incident to formal denunciation and warning seems likely to give the violator a substantial advantage of any kind.” FM 27-10, ch. 7, ¶ 493; *cf.* 2 L. Oppenheim, *International Law: Disputes, War, and Neutrality* 556 (H. Lauterpacht ed., 7th ed. 1952) (“since the terms ‘serious violation’ and ‘urgency’ lack precise definition, the course to be taken is in practice left to the discretion of the injured party”).<sup>33</sup>

The missile strikes in 1993 and 1998 serve as clear examples of the suspension of a cease-fire and a resumption of hostilities due to serious violations by Iraq. As one scholar has described, “[t]he [1998-1999] air campaign must be seen as a resumption of combat operations in the face of Iraqi violations of the cease-fire terms. The hostilities merely continue a decade-long war, which started when Iraq invaded Kuwait in August 1990.” Dinstein, *War, Aggression and Self-Defense* at 50-51. Whether or not required under international law, warnings were given. *See*

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<sup>32</sup> The provisions in the Hague Regulations relating to a violation of an armistice were a compromise between those who believed that under international law the injured party may recommence hostilities immediately without notice, and those who thought that the only right of the injured party is the right to “denounce” the armistice. *See* 2 L. Oppenheim, *International Law: Disputes, War, and Neutrality* 555-56 (H. Lauterpacht ed., 7th ed. 1952).

<sup>33</sup> In addition to permitting the resumption of hostilities in response to a serious violation of an armistice, the laws of armed conflict permit the United States to resume hostilities at its discretion—provided that warning is given to Iraq. According to the Hague Regulations, if an armistice does not specify its duration, “the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.” Hague Regulations art. 36, 36 Stat. at 2305. If the parties have not made any stipulation regarding notice, it may be provided at any time, and hostilities may recommence immediately after notification. *See* U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 7, ¶ 487 (July 1956, as updated); 2 Oppenheim, *Disputes, War and Neutrality* at 556; *see also* Colonel Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 Am. J. Int’l L. 880, 893 (1956) (although armistices generally do not specify the period of advance notice required, under customary international law, “good faith requires that notice be given of the intention to resume hostilities”) (internal quotations and citations omitted).



generally Note by the President of the Security Council, U.N. Doc. S/25091 (Jan. 11, 1993) (warning Iraq of the “serious consequences” that would follow if it failed to comply with its obligations); Note by the President of the Security Council, U.N. Doc. S/25081 (Jan. 8, 1993) (same); Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269-70 (Jan. 19, 1993) (noting Security Council’s warnings prior to the January 17th attack and explaining that the United States and the coalition warned Iraq prior to the January 13th strikes); The President’s Radio Address, 2 *Pub. Papers of Pres. William J. Clinton* 2197, 2197 (Dec. 19, 1998) (“Last month, when [Saddam Hussein] agreed to fully cooperate, I canceled an American military action. But I . . . made it absolutely clear that if he did not fully cooperate, we would have no choice but to act without further negotiation or warning.”). It is our understanding based on information supplied by the Department of Defense that in neither case did the United States obtain the express agreement of all of the other members of the Persian Gulf War coalition before suspending the cease-fire and using force.

Under general principles of armistice law, therefore, because the initial use of force in response to the invasion of Kuwait—Operation Desert Storm—was authorized under UNSCR 678, subsequent uses of force against Iraq in response to serious violations of the terms of the cease-fire established by UNSCR 687 would be authorized as well, provided either that Iraq has been warned, or that such a warning may be avoided because it would be likely to give Saddam Hussein a substantial advantage.

If Iraq is currently in “serious violation” of the cease-fire, the United States may respond with force. It is our understanding that Iraq continues to violate, in particular, the conditions set forth in section C of UNSCR 687. As outlined above, *supra* Part I, that section requires Iraq to (1) accept unconditionally the destruction, removal, or rendering harmless, under international supervision, of its chemical and biological weapons and its ballistic missiles with a range greater than 150 kilometers (and related major parts, and repair and production facilities) and agree to urgent on-site inspection of such weapons and their delivery systems; (2) undertake unconditionally not to use, develop, construct or acquire such WMD and their delivery systems; (3) agree unconditionally not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any related research, development, support or manufacturing facilities; and (4) accept on-site inspection and the destruction, removal or rendering harmless as appropriate of all such nuclear-related weapons or materials. Iraq must comply with all four conditions to be in compliance with the terms of the cease-fire, and the President could determine that violation of any one of these conditions constitutes a serious violation of the cease-fire. Even if Iraq were to accept the return of U.N. inspectors and grant them unimpeded access, if Iraq has not destroyed its WMD and their delivery systems, or continues to seek to build

such weapons, the United States may still respond with force because Iraq would be in “serious violation” of the cease-fire agreement.

## 5. UNSCR 688

Apart from material breach and armistice law, the use of force against Iraq also may be justified in certain circumstances in response to threats to international peace and security caused by Iraq’s violation of UNSCR 688. UNSCR 678 authorizes the use of “all necessary means” not only to eject Iraq from Kuwait, but also to uphold and implement “subsequent relevant resolutions” and to restore international peace and security to the Persian Gulf region. UNSCR 688 condemned Iraq’s repression of its civilian population, found that such repression endangered international peace and security in the region, and demanded that Iraq cease such repression. By its terms, UNSCR 688 qualifies as a “subsequent relevant resolution” and its effective implementation is necessary to the restoration of peace and security to the region. Thus, UNSCR 688, in combination with UNSCR 678, provides authorization from the U.N. Security Council to use force, if necessary, to stop Iraq from repressing its civilian population if such repression would threaten international peace and security by, for example, causing refugee flows that would destabilize the region.

The Clinton Administration focused on this combination of UNSCRs 678 and 688 to justify its September 1996 airstrikes and the subsequent expansion of the southern no-fly zone. When Saddam Hussein moved against the Kurdish civilian population in northern Iraq in 1996, the Administration stated that he violated UNSCR 688 and thereby threatened international peace and security by increasing the risk of cross-border incursions by neighboring countries or large flows of refugees across international borders. In response, the United States relied on UNSCR 678 to bring Iraq into compliance with UNSCR 688 and to restore international peace and security.<sup>34</sup> See generally Gingrich Letter at 1 (“Our response demonstrates to Saddam Hussein that he must cease all actions that threaten international peace and security.”); *id.* at 2 (“The no-fly zones were originally established pursuant to and in support of [UNSCRs] 678, 687, and 688 . . . . Expanding the no-fly zone was a reasonable response to the enhanced threat posed by Iraq.”); Glyn Davies, U.S. Dep’t of State, Daily Press Briefing at 3 (Sept. 4, 1996), *available at* [http://dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1996/9609/960904db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1996/9609/960904db.html) (last visited June 4, 2012) (“678 and 688 together, I think, form the basis for the action we took”); Nicholas Burns, U.S. Dep’t of State,

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<sup>34</sup> The September 1996 strikes met with a mixed response from other members of the Security Council—while Britain, Germany, Canada and Japan offered general support for the U.S. and U.K. military action, Russia denounced it and France and Spain stated that the United States should have sought a political solution. See Alain E. Boileau, *To the Suburbs of Baghdad: Clinton’s Extension of the Southern Iraqi No-Fly Zone*, 3 ILSA J. Int’l L. & Comp. L. 875, 890-91 (1997).

Daily Press Briefing at 13-14 (Sept. 3, 1996), *available at* [http://dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1996/9609/960903db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1996/9609/960903db.html) (last visited June 4, 2012) (“There was no need for Security Council action. The United States has clear authority under U.N. Security Council Resolution 688.”); *cf.* Letter to Congressional Leaders on the Situation in the Persian Gulf, 1 *Pub. Papers of Pres. George Bush* 521, 521-22 (May 17, 1991) (explaining that introduction of U.S. forces into northern Iraq for emergency relief purposes was “consistent with” UNSCR 688, but not an attempt to intervene militarily into Iraq’s internal affairs or to impair its territorial integrity).<sup>35</sup>

In sum, we believe that the Security Council has authorized the United States to resort to the use of force against Iraq either (1) in response to Iraq’s material breaches or substantial violations of the terms of the cease-fire, which permit the United States to suspend the cease fire and rely on UNSCR 678 as an authorization to use “all necessary means” to bring Iraq into compliance with UNSCR 687, or (2) in response to violations of UNSCR 688 that threaten international peace and security.<sup>36</sup>

## **B. Anticipatory Self-Defense**

Independent of the support provided by U.N. Security Council resolutions, authority under international law for armed intervention in Iraq could come from the national right of self-defense. The right of self-defense under customary

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<sup>35</sup> The international authorization for the 1996 strikes is similar to the justification for establishing and patrolling the no-fly zones in the north and south of Iraq. Although the U.N. has not officially endorsed the creation of the no-fly zones, *see* Ian Johnstone, *Aftermath of the Gulf War: An Assessment of UN Action* 38 (1994), the zones are authorized under a combination of resolutions 678 and 688 to monitor compliance with resolution 688 and to deter repression of the civilian population, as well as under a combination of resolutions 678 and 687 to implement the cease-fire by monitoring Iraq’s compliance with its terms. *See* James P. Rubin, U.S. Dep’t of State, Daily Press Briefing at 5 (Jan. 5, 1999), *available at* <http://www.fas.org/news/iraq/1999/01/990105db.html> (last visited June 4, 2012) (zones are authorized by a combination of UNSCRs 678, 687—which reaffirmed 678—and 688); *see also* Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 1 *Pub. Papers of Pres. William J. Clinton* 715, 716 (May 21, 1993) (no-fly zones monitor Iraqi compliance with UNSCR 688 and UNSCR 687); Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269-70 (Jan. 19, 1993) (southern no-fly zone monitors Iraqi compliance with UNSCR 688).

<sup>36</sup> We believe that UNSCR 678’s authorization of “all necessary means . . . to restore international peace and security in the area” (S.C. Res. 678, ¶ 2) arguably would independently authorize the President to use force, even if Iraq had not engaged in violations of UNSCRs 687 or 688. Determining whether the use of force would be necessary to restore international peace and security would be wholly within the President’s discretion. We need not decide this issue here, however, because, as the President recently explained to the United Nations, Iraq has engaged in repeated violations of both UNSCR 687 and UNSCR 688. *See* Address to the United Nations General Assembly in New York City, 2 *Pub. Papers of Pres. George W. Bush* 1572, 1573 (Sept. 12, 2002).

international law is well established. Article 51 of the U.N. Charter recognizes and affirms that “inherent” right:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

*See also* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (agreeing that if an armed attack occurs against one of the parties, the others will exercise the right of individual or collective self-defense recognized by article 51); Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security art. 3, Sept. 2, 1947, 21 U.N.T.S. 77, 95 (Rio Treaty) (same). Although recognized by these agreements, the right to self-defense is broader in scope than suggested by these provisions. For example, in July 1940, the British used force in self-defense against the French, absent any armed attack by the French and even though Britain and France had recently been fighting Hitler side-by-side. Shortly after the Vichy regime was established in June 1940, the British gave the French an ultimatum requiring the French to take certain steps to protect their ships at Mers-el-Kabir—a small base on the Algerian coast—from being taken over by the Germans. When the French refused to comply, the British opened fire under “Operation Catapult,” killing more than 1,200 French officers and men. *See generally* Alistair Horne, *Mers-el-Kebir Was a Bizarre and Melancholy Action*, 16 *Smithsonian* 122 (July 1985); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 335, 349 (1962). Prime Minister Winston Churchill took this action believing that “the life of the State and the salvation of our cause were at stake. . . . [N]o act was ever more necessary for the life of Britain and for all that depended upon it.” Winston S. Churchill, *The Second World War: Their Finest Hour* 232 (1949); *see also* Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas* at 5 (June 13, 2002) (“*Boarding and Searching Foreign Vessels*”) (discussing 1939 blockade on the high seas adjacent to the American continent to prevent any belligerent nation from taking hostile action in these waters as an example of anticipatory self-defense).

Despite the longstanding recognition of a nation’s right to self-defense, some argue that article 51 has limited the right to permit only a response to an actual “armed attack.” *See, e.g.,* Dinstein, *War, Aggression and Self-Defense* at 167-68. Some even argue that an armed attack must occur across national borders before

the article 51 right is triggered. *See, e.g.,* Ian Brownlie, *International Law and the Use of Force by States* 275-80 (1963). Such an interpretation, however, would mean that the U.N. Charter extinguished the pre-existing right under customary international law to take reasonable anticipatory action in self-defense. There is no indication that the drafters of the U.N. Charter intended to limit the customary law in this way. *See* Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 *Am. J. Int'l L.* 597, 599 (1963) (“There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states.”); *see also* Abraham D. Sofaer, *International Law and Kosovo*, 36 *Stan. J. Int'l L.* 1, 16 (2000).<sup>37</sup> Instead, as we have explained at length elsewhere, article 51 merely reaffirms a right that already existed independent of the Charter. *See Boarding and Searching Foreign Vessels* at 10; *see also* D.W. Bowett, *Self-Defence in International Law* 187 (1958).

The customary international law right to use force in anticipatory self-defense is a well-established aspect of the “inherent right” of self-defense. As we explained forty years ago:

The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the

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<sup>37</sup> The negotiating history of the U.N. Charter reveals that the drafters did not intend for the prohibition on the use of force in article 2(4) to impair “the use of arms in legitimate self-defence.” Bowett, *Self-Defence in International Law* at 182 (internal quotations omitted); *see also* Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945*, at 466 (1958) (states agreed at Dumbarton Oaks that “the Charter could not deny the inherent right of self-defense against aggression”). The genesis of article 51 was the desire to preserve the right of collective self-defense under regional arrangements such as the Act of Chapultepec, which incorporated the concept that an attack on one state in the region would be seen as an attack on all. *See* Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation and Secretary of State E.R. Stettinius, *reprinted in The Charter of the United Nations: Hearings Before S. Comm. on Foreign Relations*, 79th Cong. 34, 96-100 (1945) (“Report to the President”) (article 51 designed to integrate regional arrangements with the establishment of a universal international organization); *see also* Dinstein, *War, Aggression and Self-Defense* at 161; *see generally* Russell, *History of the United Nations Charter* at 697-706. The Latin American states wanted to make the Act of Chapultepec’s policy of collective defense, which was to last only until the end of World War II, permanent in a multilateral treaty, and article 51 was drafted in large part to ensure that the U.N. Charter did not interfere with that goal. Report to the President at 100. Moreover, the Senators who gave their advice and consent to the U.N. Charter were primarily concerned that it not interfere with the Monroe Doctrine. *See The Charter of the United Nations*, S. Exec. Rep. No. 79-8, at 10 (1945) (under article 51, “in the case of a direct act of aggression against an American country—that is, in the case of the first contingency contemplated in the Monroe Doctrine—the United States and the other American Republics could proceed at once to the assistance of the victim of the attack”). The purpose of article 51 was to protect the pre-existing right of self-defense, not to restrict it. *See* Bowett, *Self-Defence in International Law* at 188.

words of Elihu Root,<sup>38</sup> “the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself.”

Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union* at 2 (Aug. 30, 1962); *cf. Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) (“the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion”). Thus, under existing Department of Justice opinions, the United States has the right under international law to use force against another state even before we actually come under armed attack, in order to prevent or forestall that attack. We now turn to the task of explaining the legal principles that give content to the doctrine of anticipatory self-defense.

### **1. The *Caroline* Test**

The classic formulation of the right of anticipatory self-defense arose from the *Caroline* incident. In 1837, the steamer *Caroline* had been supplying armed insurgents against British rule in Canada with reinforcements of men and materials from the United States. In response, a British force from Canada entered U.S. territory at night, seized the *Caroline*, set the ship on fire, and launched it down Niagara Falls, killing two U.S. citizens in the process. The British claimed that they were acting in self-defense, and Secretary of State Daniel Webster called upon the British to show that the

necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment of deliberation . . . [and that the British force], even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

Letter for Henry Fox, British Minister in Washington, from Daniel Webster, Secretary of State (Apr. 24, 1841), *reprinted in 1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, pt. I, series C, 153, 159 (Kenneth Bourne ed., 1986) (“Webster Letter”). The next year, Lord Ashburton, who had been sent by the British as a special minister to resolve the *Caroline* dispute and other related matters, implicitly accepted this test by

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<sup>38</sup> Elihu Root served as Secretary of War in President McKinley’s Administration and as Secretary of State in President Theodore Roosevelt’s Administration. He was also a Senator from New York and winner of the Nobel Peace Prize.

justifying Britain's actions in these terms. See Letter for Daniel Webster, Secretary of State, from Lord Ashburton (July 28, 1842), reprinted in 1 *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, pt. I, series C, 332-35 (Kenneth Bourne ed., 1986). Although Secretary Webster disagreed that his test had been satisfied, viewing the burning of the ship in the middle of the night as an unnecessary and disproportionate response to the threat, he agreed to accept Great Britain's apology and dismiss the matter. See Letter for Lord Ashburton, from Daniel Webster, U.S. Secretary of State (Aug. 6, 1842), reprinted in 1 *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, pt. I, series C, 346-47 (Kenneth Bourne ed., 1986); see generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82, 82-91 (1938). Webster's formulation was reaffirmed a century later by the International Military Tribunal at Nuremberg when it ruled that the German invasion of Norway in 1940 was not defensive because it was unnecessary to prevent an "imminent" Allied invasion, and instead was an impermissible act of aggression because the primary objective of the invasion was to secure operational bases in Norway. See *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 Am. J. Int'l L. 172, 205 (1947) ("[P]reventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.'") (quoting the *Caroline* case); see also Bowett, *Self-Defence in International Law* at 142-43.

The *Caroline* test has been distilled into two principal requirements for legitimate self-defense. First, the use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option. Second, the response must be proportionate to the threat. See Bowett, *Self-Defence in International Law* at 53, 188-89; see also McDougal, *Soviet-Cuban Quarantine*, 57 Am. J. Int'l L. at 597-98.<sup>39</sup> International legal authorities seem to agree that necessity and proportionality apply to the use of force in all cases, not just in cases of self-defense.<sup>40</sup>

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<sup>39</sup> The principle of proportionality requires that the force used be that which is needed to neutralize or eliminate the threat. See Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* 242-43 (1961); see also Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1637 (1984). Proportionality permits the removal of the danger that justifies the use of force as being necessary. See Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F.L. Rev. 245, 251 (1997) (proportionality is "the degree of force, that is reasonable in terms of intensity, duration and magnitude, required to decisively counter the hostile act or demonstration of hostile intent that constitutes the necessary part of the equation—but no more than that"). As with necessity, the fundamental test is one of reasonableness. See McDougal & Feliciano, *Law and Minimum World Public Order* at 218.

<sup>40</sup> Similarly, the requirements of necessity and proportionality apply to any use of force in self-defense, whether in anticipation of an attack, or in response to an armed attack that has already occurred. In *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J.

## 2. Necessity

International law does not supply a precise or detailed definition of what it means for a threat to be sufficiently “imminent” to justify the use of force in self-defense as necessary. Even outside the use-of-force context, although the term “imminent” is used in a variety of international agreements, it is rarely defined.<sup>41</sup> Although the dictionary definition of “imminent” focuses on the temporal, *see Webster’s Third New International Dictionary* 1130 (1993) (defining “imminent” as “ready to take place: near at hand: impending . . . hanging threateningly over one’s head: menacingly near”), under international law the concept of imminence encompasses an analysis that goes beyond the temporal proximity of the threat.

The ICJ, for example, has attempted to define imminence in the context of the necessity doctrine as it relates to relieving a state of its international obligations. In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7 (Sept. 27), the ICJ addressed whether Hungary was justified in suspending work on the Gabčíkovo-Nagymaros dam because of Hungary’s fears regarding the environmental consequences of such work on the Danube. A treaty with Slovakia required Hungary to perform the work. The court considered whether Hungary’s suspension of work was justified by a “state of necessity,” which it defined by reference to article 33 of the Draft Articles on the International Responsibility of States adopted by the International Law Commission. *Id.* at 36-37 ¶ 50. The ICJ described article 33 as reflecting customary international law. *Id.* at 41-42 ¶ 52. Article 33 permits a state to invoke a state of necessity as a ground for failing to

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14 (June 27), for example, the International Court of Justice (“ICJ”), reserving the issue of the appropriate use of force in anticipatory self-defense because the case concerned an armed attack that had already occurred, noted that “[t]he Parties also agree in holding that whether the response to the attack is lawful [under customary international law] depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.” *Id.* at 103 ¶ 194; *see also id.* at 94 ¶ 176 (well established under customary international law that measures taken in self-defense must be necessary and proportional). The United States, however, refused to accept the jurisdiction of the ICJ in this case, filed no pleadings on the merits, and did not appear at oral argument. *Id.* at 20 ¶ 17. Nonetheless, the State Department Legal Adviser at the time, Abraham Sofaer, agreed with this formulation of customary international law, stating, “we recognize that force may be used only to deter or prevent aggression, and only to the extent it is necessary and proportionate.” Abraham D. Sofaer, *Joint Luncheon With the Section of International Law and Practice of the American Bar Association*, 82 Am. Soc’y Int’l L. Proc. 420, 422 (1988), *reprinted in* 3 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981-1988*, 3388, 3389 (1995).

<sup>41</sup> *See, e.g.*, Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area art. 10(7), Oct. 24, 2000, 41 I.L.M. 63 (defining “threat of serious injury” as “serious injury that, on the basis of facts and not merely on allegation, conjecture or remote possibility, is clearly imminent”); United Nations Convention on the Law of the Sea art. 198, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (obligation to notify affected states when the marine environment is in “imminent danger of being damaged” by pollution); Convention for the Intervention on the High Seas in Cases of Oil Pollution Casualties art. 2, Nov. 29, 1969, 26 U.S.T. 765 (defining “maritime casualty” to include various occurrences resulting in “imminent threat of material damage” to a ship or cargo).



comply with an international obligation if, *inter alia*, “the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril.” *Id.* at 36 ¶ 50. The ICJ declared that

“Imminence” is synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility.” As the International Law Commission emphasized in its commentary, the “extremely grave and imminent” peril must “have been a threat to the interest at the actual time.” That does not exclude, in the view of the Court, that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

*Id.* at 42 ¶ 54 (internal citations omitted).<sup>42</sup> The court thereby acknowledged that evaluating imminence requires an analysis of not just the timing, but also the probability of the threat.

In addition to the probability the threat will materialize, international law recognizes the need to evaluate the magnitude of harm the threat would cause. Over time, the advent of nuclear and other sophisticated weapons has dramatically increased the degree of potential harm to be factored in. Weapons of mass destruction threaten devastating and indiscriminate long-term damage to large segments of the civilian population and environment. As the ICJ explained in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 244 ¶ 36 (July 8), nuclear weapons possess unique characteristics, “in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.” In addition, the danger posed by WMD is exacerbated by the possibility that the means of delivery may be relatively unsophisticated—for example, a “dirty bomb” driven into a building by a suicide bomber, or the spread of a biological agent with an ordinary crop duster. At the same time, development of advanced missile technology has vastly improved the capability for stealth, rendering the threat of the weapons they deliver more imminent because there is less time to prevent their launch.

With these developments in offensive arms and their means of delivery, the calculus of whether a threat is sufficiently imminent to render the use of force necessary has evolved. Indeed, the importance of the temporal factor has diminished. As Professor Myres McDougal explained in 1963, referring to the necessity prong of the *Caroline* test: “[T]he understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant

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<sup>42</sup> The ICJ found that, because the dangers cited by Hungary were uncertain, the alleged peril was not “imminent.” *Id.* at 42-45 ¶¶ 55-56.

to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.” McDougal, *Soviet-Cuban Quarantine*, 57 Am. J. Int’l L. at 598; see also Mallison, *Limited Naval Blockade or Quarantine-Interdiction*, 31 Geo. Wash. L. Rev. at 348 (“In the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques, Secretary Webster’s formulation could result in national suicide if it actually were applied instead of merely repeated.”). Similarly, a supplement to the U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations* explains that Daniel Webster’s requirement of immediacy is “too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning.” Oceans Law and Policy Dep’t, Naval War College, *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* 4-13 ¶ 4.3.2.1 n.32 (1997) (“*Commander’s Handbook Supplement*”), available at [http://www.ficnl.org/uploads/media/US\\_Navy\\_Commander\\_s\\_Handbook\\_Annotated\\_Supplement\\_1997.pdf](http://www.ficnl.org/uploads/media/US_Navy_Commander_s_Handbook_Annotated_Supplement_1997.pdf) (last visited June 4, 2012). Nor does the *Caroline* test take into account the modern realities of international terrorism: “[T]he traditional theories of customary international law were developed in a completely different era, with no concern for the danger presented by a modern well-financed terrorist organization in a world of chemical, biological, and nuclear weapons capable of horrific destruction, and yet portable by a single individual. A terrorist ‘war’ does not consist of a massive attack across an international border . . . .” Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int’l L.J. 145, 173 (2000).

### **3. State Practice**

State practice since the development of nuclear weapons and sophisticated delivery systems confirms the evolution of the degree of imminence and proportionality that would justify the use of force in self-defense. Such practice is relevant because it is the source of customary international law. See *supra* Part III.A.3.

#### **a. Cuban Missile Crisis**

During the Cuban Missile Crisis, for example, this Office adopted a more elastic concept of necessity than that articulated in the *Caroline* test. In that case, we labeled the secret establishment of long-range nuclear missile bases in Cuba by the Soviet Union as an “immediate threat” to U.S. security and found that the imposition of a blockade of offensive military equipment to Cuba was a justifiable act of self-defense. Memorandum, Office of Legal Counsel, *Re: Summary of Legal Justification of Quarantine of Shipment of Offensive Weapons and Material to*

*Cuba* at 1 (Oct. 23, 1962) (unsigned) (“Cuba Quarantine Memorandum”);<sup>43</sup> *see also* Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba, *Pub. Papers of Pres. John F. Kennedy* 809, 810 (Oct. 23, 1962) (ordering U.S. Armed Forces to interdict offensive weapons and associated materiel en route to Cuba “to defend the security of the United States”); White House Statement on Soviet Proposals Relating to International Security, *Pub. Papers of Pres. John F. Kennedy* 813, 813 (Oct. 27, 1962) (describing threat as “immediate”); McDougal, *Soviet-Cuban Quarantine*, 57 *Am. J. Int’l L.* at 601-03. *But cf.* Abram Chayes, Legal Adviser to the Secretary of State, *The Legal Case for U.S. Action on Cuba*, 47 *Dep’t St. Bull.* 763, 764-65 (Nov. 1962) (arguing that the quarantine was justified because it was taken in accordance with a resolution of the Organization of American States and observing that “[t]he quarantine action was designed to deal with an imminent threat to our security”; “[b]ut the President . . . did not invoke article 51 or the right of self-defense”); *Commander’s Handbook Supplement* at 41-13 ¶ 4.3.2.1 n.31 (U.S. government characterized Cuba quarantine as a sanction imposed under article 52 of the U.N. Charter rather than as self-defense).

The presence of nuclear weapons in the Cuban Missile Crisis changed the conception of the right to self-defense. Although the sudden and secret preparation of the missile bases undoubtedly “add[ed] to an already clear and present danger,” 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), their positioning in Cuba constituted a less immediate temporal threat of armed attack on the United States than that contemplated by previous applications of the *Caroline* test because there was no indication that the Soviet Union would use them either immediately, or even in the near term.<sup>44</sup> President Kennedy explained our more elastic concept of imminence:

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use . . . may well be regarded as a definite threat to peace.

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<sup>43</sup> The opinion also focused on additional factors for justifying the blockade: it would not violate article 2(4) of the U.N. Charter because it would not threaten the territorial integrity or political independence of Cuba; it did not qualify under international law as an act of war; and it qualified as action under a regional arrangement sanctioned by article 52 of the U.N. Charter. *Cuba Quarantine Memorandum* at 2-4.

<sup>44</sup> Indeed, some commentators argue that in 1962 a direct Soviet attack would have been “inconceivable” because the nuclear balance of power so highly favored the United States. *See Stanimir A. Alexandrov, Self-Defense Against the Use of Force in International Law* 158-59 (1996).

*Id.* As the President articulated, as the magnitude of the possible harm caused by an attack increases, the probability that the attack will occur may be reduced and still justify an exercise of the right to anticipatory self-defense.<sup>45</sup>

### **b. Osirak Reactor Strike**

The analysis becomes more complicated, however, when the threat of attack comes not from deployable nuclear weapons, but from fixed facilities engaged in the production of WMD. In that situation, the potential harm that would be caused by an attack remains high, but the probability that it will occur is more remote. In 1981, for example, Israel attacked a nuclear reactor under construction in Iraq, claiming that the strike was justified as anticipatory self-defense because the reactor was intended to manufacture nuclear bombs and very soon would have become operational. Israel also emphasized the limited window of opportunity in which to strike—once the reactor became operational, an attack would have been impossible because it could not have been carried out without exposing the inhabitants of Baghdad to extensive lethal radioactive fallout. *See* U.N. SCOR, 2280th mtg. at 10-11, ¶ 95, U.N. Doc. S/PV.2280 (June 12, 1981) (statement of Israeli Ambassador to the U.N.). Nonetheless, the international community, including the United States, condemned the Israeli attack. President Reagan’s displeasure, however, appears to have been centered on Israel’s failure to consider other options. He acknowledged that Israel may have genuinely viewed its actions as self-defense. *See* The President’s News Conference, *Pub. Papers of Pres. Ronald Reagan* 519, 520 (June 10, 1981); *see also* Statement and Remarks by the Department of State Spokesman (Fischer) at the Daily Press Briefing (June 8, 1981), *reprinted in* Am. Foreign Pol’y Current Documents 1981, Doc. 301, at 684 (1984) (“The United States Government condemns the reported Israeli air strike on the Iraqi nuclear facility, the unprecedented character of which cannot but seriously add to the already tense situation in the area.”).

Two weeks after the raid, the Security Council unanimously adopted a resolution “[s]trongly condemn[ing]” the Israeli strikes as a “clear violation of the Charter of the United Nations and the norms of international conduct.” S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981). Several members of the Security Council quoted the *Caroline* test and argued that the attack did not meet the requirements for necessity, noting in particular that Israel had spent several months planning for the attack. *See* Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 *Brook. J. Int’l L.* 493, 508-09 (1990). The Israeli Ambassador to the United Nations disagreed,

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<sup>45</sup> For a discussion of the legality of the U.S. blockade, *compare* Cuba Quarantine Memorandum and McDougal, *Soviet-Cuban Quarantine*, 57 *Am. J. Int’l L.* 597 (Cuba quarantine was justified as self-defense), *with* Quincy Wright, *The Cuban Quarantine*, 57 *Am. J. Int’l L.* 546 (1963) (quarantine was not lawful act of self defense due to lack of an armed attack).

claiming that “[t]o assert the applicability of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State’s inherent and natural right of self-defence.” U.N. SCOR, 2288th mtg. at 10, ¶ 80, U.N. Doc. S/PV.2288 (June 19, 1981). The United States voted for the resolution, with the caveat that it was imperfect, and that the U.S. determination that the strike violated the U.N. Charter was “based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute.” *Id.* at 16, ¶ 157; cf. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 *Mil. L. Rev.* 89, 109 (1989) (writing as Legal Adviser to the Secretary of State) (noting “absence of any evidence that Iraq had launched or was planning to launch an attack that could justify Israel’s use of force”).<sup>46</sup>

### **c. 1986 Strike Against Libya**

Like the development of nuclear weapons, the rise in international terrorism has resulted in an expansion of the concept of imminence. For example, one aspect of the U.S. justification for the air strikes of April 14, 1986 against terrorist-related targets in Libya was the doctrine of anticipatory self-defense. The strikes were prompted in part by the terrorist bombing of the La Belle discotheque in Berlin on April 5, which was frequented by U.S. military personnel. The blast killed two people, including an American soldier, and injured over two hundred others, fifty of whom were Americans. President Reagan cited conclusive evidence that Libya had planned and executed the Berlin bombing, Address to the Nation on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 468 (Apr. 14, 1986), which was only the most recent in a long line of terrorist attacks against U.S. installations, diplomats, and citizens supported and directed by Muammar Qadhafi.<sup>47</sup> *Id.* at 468-69; see generally *President’s Authority to Conduct Military Operations*, 25 *Op. O.L.C.* at 208-09 (listing attacks by Libya on U.S. interests). Several of these attacks had been planned to occur in the weeks immediately preceding the La Belle bombing. In addition, the United States had

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<sup>46</sup> For a discussion of the legality of the Osirak attack, compare Timothy L.H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (1996) (attack justified), and Anthony D’Amato, *Israel’s Air Strike Against the Osirak Reactor: A Retrospective*, 10 *Temp. Int’l & Comp. L.J.* 259 (1996) (not justified as anticipatory self-defense but because Israel was acting as proxy for international community), with W. Thomas Mallison & Sally V. Mallison, *The Israeli Attack of June 7, 1981, Upon the Israeli Nuclear Reactor: Aggression and Self-Defense?*, 15 *Vand. J. Transnat’l L.* 417 (1982) (attack not justified).

<sup>47</sup> One of these attacks involved the firing by Libya of surface-to-air missiles at U.S. aircraft flying over international waters in the Gulf of Sidra. U.S. Armed Forces responded by taking “limited measures of self-defense necessary to protect themselves from continued attack.” Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the Gulf of Sidra Incident, 1 *Pub. Papers of Pres. Ronald Reagan* 406, 406 (Mar. 26, 1986).

clear evidence that Libya was planning a “multitude” of future attacks. U.N. SCOR, 2674th mtg. at 17, U.N. Doc. S/PV.2674 (Apr. 15, 1986) (statement of Ambassador Vernon A. Walters, U.S. Permanent Representative to the United Nations) (“Walters Statement”).

The United States explained that the strikes on Libya were undertaken in self-defense and were fully consistent with article 51. *See* Address to the Nation on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 468, 469 (Apr. 16, 1986) (“Self-defense is not only our right, it is our duty.”); Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 478 (Apr. 16, 1986); *see also* U.N. Doc. S/17990 (Apr. 14, 1986) (“The Libyan policy of threats and use of force is in clear violation of Article 2(4) of the United Nations Charter. It has given rise to the entirely justifiable response by the U.S.”). We justified the strikes in large part as anticipatory self-defense.<sup>48</sup> President Reagan argued that the primary objective of the U.S. strikes was to forestall future terrorist attacks on the United States: “This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5 [1986].” Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 478, 478 (Apr. 16, 1986); *see also* Walters Statement at 14-15 (strikes were designed to disrupt Libya’s ability to carry out terrorist acts and to deter future such acts). In addition to the threat of future Libyan-sponsored terrorist attacks, the United States pointed to the exhaustion of nonmilitary remedies as meeting the customary international law standard of necessity. Address to the Nation on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 468, 469 (Apr. 14, 1986) (“We always seek peaceful avenues before resorting to the use of force—and we did. We tried quiet diplomacy, public condemnation, economic sanctions, and demonstrations of military force. None succeeded.”). Moreover, President Reagan emphasized that the strikes were proportional—the targets “were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians.” Letter to the

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<sup>48</sup> The United States also justified the strikes as a response to what amounted to an armed attack by Libya on U.S. citizens. Address to the Nation on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 468, 469 (Apr. 14, 1986). Even before the La Belle bombing, President Reagan had argued that Libya’s provision of material support to terrorist groups that attack U.S. citizens amounted to armed aggression under established principles of international law. The President’s News Conference, 1 *Pub. Papers of Pres. Ronald Reagan* 17 (Jan. 7, 1986); *see also* Address of Secretary of State George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 86 Dep’t St. Bull. 15, 17 (Mar. 1986).

Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya, 1 *Pub. Papers of Pres. Ronald Reagan* 478, 478 (Apr. 16, 1986). Although several countries criticized the U.S. strikes, supporting a UNSCR condemning the attack as a violation of the U.N. Charter, Australia, Denmark, France, and Britain and Northern Ireland joined the United States in vetoing the resolution. U.N. SCOR, 2682nd mtg., U.N. Doc. S/PV.2682 (Apr. 21, 1986).<sup>49</sup>

#### **d. 1989 Intervention in Panama**

The United States again responded in self-defense to an imminent threat to U.S. lives when it took military action in Panama on December 20, 1989. Shortly before the U.S. military action, Panama's National Assembly of Representatives (a 510-member body appointed by General Manuel Noriega) had declared that a state of war existed between Panama and the United States, and General Noriega had delivered an inflammatory anti-American speech. A few days earlier, Panamanian armed forces had killed an unarmed U.S. Marine officer, beat an unarmed U.S. Naval officer, and physically abused and threatened the Navy officer's wife. The combination of "General Noriega's reckless threats and attacks upon Americans in Panama [had] created an imminent danger to the 35,000 American citizens in Panama." Address to the Nation Announcing United States Military Action in Panama, 2 *Pub. Papers of Pres. George Bush* 1722, 1723 (Dec. 20, 1989). As President Bush explained: "The deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger . . ." Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, 2 *Pub. Papers of Pres. George Bush* 1734, 1734 (Dec. 21, 1989). According to the State Department spokesperson, the "right of self-defense entitles the United States to take necessary measures to defend U.S. military personnel, U.S. nationals, and U.S. installations." Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Use of Force*, 84 *Am. J. Int'l L.* 545, 548 (1990).<sup>50</sup> The United

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<sup>49</sup> For a discussion of the legality of the strikes, compare Sofaer, *Terrorism, the Law, and the National Defense*, 126 *Mil. L. Rev.* 89 (strikes justified as self-defense), and Major Wallace F. Warriner, *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) (same), and Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 *Case W. Res. J. Int'l L.* 177 (1987) (same), with Major Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 *Ind. Int'l & Comp. L. Rev.* 293 (2000) (attacks not justified as self-defense), and Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 *W. Va. L. Rev.* 933 (1987) (attacks probably not justified as self-defense).

<sup>50</sup> The United States also justified its actions as self-defense resulting from the armed attacks against U.S. citizens. U.N. Doc. S/21035 (Dec. 20, 1989). In addition to protecting U.S. citizens, the

States noted that they had “exhausted every available diplomatic means to resolve peacefully disputes with Mr. Noriega, who has rejected all such efforts.” U.N. Doc. S/21035 (Dec. 20, 1989). The United States assured the Security Council that the use of force would be proportionate, *id.*, and President Bush chose removing Noriega from power as the only way to protect U.S. citizens in Panama. *Cf.* Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 Colum. J. Transnat’l L. 281, 290 (1991). In the midst of the fighting, the Security Council considered a draft resolution that would have labeled the invasion as “a flagrant violation of international law,” but Great Britain, France, and Canada joined the United States in vetoing the resolution. U.N. Doc. S/21048 (Dec. 22, 1989); U.N. SCOR, 2902nd mtg., U.N. Doc. S/PV.2902 (Dec. 23, 1989).<sup>51</sup>

### **e. 1993 Strike Against Iraq**

The United States justified the June 1993 strike on Iraqi intelligence service headquarters, which was undertaken in response to “compelling evidence” that Iraq had attempted to assassinate President George H.W. Bush two months earlier, as an exercise of the inherent right of self-defense as recognized in article 51 of the United Nations Charter. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 940, 940 (June 28, 1993). President Clinton explained the necessity for U.S. action:

The evidence of the Government of Iraq’s violence and terrorism demonstrates that Iraq poses a continuing threat to United States nationals and shows utter disregard for the will of the international community as expressed in Security Council Resolutions and the United Nations Charter. Based on the Government of Iraq’s pattern of disregard for international law, I concluded that there was no reasonable prospect that new diplomatic initiatives or economic measures could influence the current Government of Iraq to cease planning future attacks against the United States.

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invasion had three other objectives: (1) helping to restore democracy in Panama, (2) protecting the integrity of the Panama Canal Treaties, and (3) bringing Noriega to justice. *See* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 Am. J. Int’l L. 494, 494 (1990) (quoting a statement by President Bush on January 3, 1990).

<sup>51</sup> For a discussion of the legality of the U.S. military action, *compare* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 Colum. J. Transnat’l L. 293 (1991) (intervention violated international law), and Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 Am. J. Int’l L. 494 (1990) (U.S. intervention in Panama violated international law on the use of force, in part because it failed to show necessity), and Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 Am. J. Int’l L. 503 (1990), with Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 Colum. J. Transnat’l L. 281 (1991) (U.S. action did not violate Article 2(4) of the U.N. Charter).



*Id.*<sup>52</sup> The objective of the strikes was to diminish Iraq's capability to support violence against the United States and others, and "to deter Saddam Hussein from supporting such outlaw behavior in the future." Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 938, 938 (June 26, 1993).<sup>53</sup> President Clinton described the strikes as "limited and proportionate." Letter to Congressional Leaders, 1 *Pub. Papers of Pres. William J. Clinton* at 941 (June 28, 1993). The reaction of the Security Council was largely favorable, and its members rejected the plea of the Iraqi ambassador that the Council condemn the U.S. action as an act of aggression against Iraq. See Julia Preston, *Security Council Reaction Largely Favorable to U.S. Raid*, Wash. Post, June 28, 1993, at A12.<sup>54</sup>

#### **f. 1998 Attack on Afghanistan and Sudan**

On August 7, 1998, terrorists bombed the U.S. embassies in Kenya and Tanzania, killing over 250 people, including twelve Americans. Two weeks later, based on "convincing information from a variety of reliable sources" that the Osama bin Laden organization was responsible for these bombings, the United States launched cruise missile attacks against terrorist training camps and installations in Afghanistan used by that organization and against a facility in Sudan being used to produce materials for chemical weapons. Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 *Pub. Papers of Pres. William J. Clinton* 1464 (Aug. 21, 1998). President Clinton explained the international law justification for the strikes:

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<sup>52</sup> The strikes were also justified as a response to an attack against the United States. See Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 1 *Pub. Papers of Pres. William J. Clinton* 938, 938 (June 26, 1993) ("the Iraqi attack against President Bush was an attack against our country and against all Americans").

<sup>53</sup> Similarly, the January 17, 1993 strike on a nuclear facility in Baghdad, while primarily designed to encourage Iraq to comply with its obligations under UNSCRs, was undertaken in part to prevent the facility from being used again to support Iraq's nuclear weapons program. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 *Pub. Papers of Pres. George Bush* 2269, 2269-70 (Jan. 19, 1993).

<sup>54</sup> For a discussion of the legality of the U.S. strikes, compare Robert F. Teplitz, Note, *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, 606-07 (1995) (U.S. action was a legitimate use of force in self-defense), with Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 *B.U. Int'l L. J.* 207 (2001) (1993 strikes did not satisfy requirements of anticipatory self-defense), and John Quigley, *Missiles With a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 *Hastings Int'l & Comp. L. Rev.* 241 (1994) (same), and Dino Kritsiotis, *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law*, 45 *Int'l & Comp. L.Q.* 162 (1996) (impossible to determine legality of strikes).

The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.

*Id.*; see also 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 (Aug. 20, 1998) (noting the existence of "compelling information" that additional terrorist attacks against U.S. citizens were being planned, and that the groups affiliated with bin Laden were seeking to acquire chemical and other dangerous weapons). As Professor Wedgwood recognized: "Even by the demanding test of the *Caroline* . . . the danger of renewed assault [by bin Laden's network] justified immediate action." Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *Yale J. Int'l L.* 559, 565 (1999). In its report to the Security Council after the strikes, the United States emphasized that the attacks were undertaken only after repeated warnings to Afghanistan and Sudan that they must stop harboring and supporting terrorist groups such as bin Laden's organization. U.N. Doc. S/1998/780 (Aug. 20, 1998).<sup>55</sup> The response of the international community was mixed, but the Security Council took no formal action in response to the attacks. See Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 *Harv. J.L. & Pub. Pol'y* 559, 563-64 (2002).<sup>56</sup>

In sum, recent practice demonstrates that the United States has used force in response to a threat of aggression that is less imminent in the temporal sense than described by Secretary Webster over 150 years ago. Rapid advances in weapons technology have changed the calculus, in large part because a state cannot defend itself if it waits until such weapons are launched.

The new threat of nuclear weapons apparently is not, however, sufficient to erase completely any requirement of temporality. For example, the international community did not consider the threat posed by an Iraqi nuclear reactor before it had become operational to be sufficient to justify its destruction by Israel in 1981. Nonetheless, the backdrop against which the threat to Israel was evaluated has changed significantly in the past twenty years. In 1981, Iraq was permitted to have

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<sup>55</sup> The United States also justified the strikes as a response in self-defense to the embassy attacks. *Id.*

<sup>56</sup> For a discussion of the legality of the U.S. strikes, compare Wedgwood, *Responding to Terrorism*, 24 *Yale J. Int'l L.* 559 (1998 strikes justified as proportionate self-defense), and Hendrickson, *Article 51 and the Clinton Presidency*, 19 *B.U. Int'l L.J.* 207 (attacks justified under Article 51), with Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 *Yale J. Int'l L.* 537 (1999) (attacks not justified).

nuclear materials under the safeguards of the IAEA, and Saddam Hussein had not yet used chemical weapons against Iran and his own people, militarily invaded an innocent neighbor, or spent over a decade flouting his country's international obligations to destroy and cease to develop WMD and their means of delivery. In other words, the imminence of a likely attack by Iraq has increased since 1981 because Iraq has demonstrated a WMD capability and a willingness to use it. Moreover, even at the time of the Osirak attack, some international law scholars believed that, were Israel's argument that it acted in the last window of opportunity to be true, the attack would have qualified as lawful self-defense, even if the materialization of the threat—the development of a nuclear bomb by Iraq—were as many as five years away. *See The Israeli Air Strike: Hearings before the S. Comm. on Foreign Relations*, 97th Cong. 251-52 (1981) (statement of Professor John Norton Moore).

The rise of international terrorism, characterized by unpredictable, sporadic, quick strikes against civilians, *see* Travaglio, *Terrorism, International Law, and the Use of Military Force*, 18 *Wis. Int'l L.J.* at 173, similarly has expanded the elasticity of the imminence requirement. If a state waits until a terrorist attack is on the verge of being launched, it likely will be unable to protect the civilians who are being targeted, especially in light of the mentality of suicide bombers, who are immune to traditional methods of deterrence. Terrorists are also difficult to locate and track, and seek to escape detection by concealing themselves and their activities among an innocent civilian population. As terrorists burrow more deeply into the population, defensive options may become more limited. Due to these considerations, a state may need to act when it has a window of opportunity to prevent a terrorist attack and simultaneously minimize civilian casualties. *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 *Yale J. Int'l L.* 609, 648 (1992). The United States acted in self-defense to prevent future terrorist strikes in 1986, 1993 and 1998, even though the attacks it sought to prevent were in the planning rather than the implementation stage. As Secretary of State Shultz explained in the context of the conflict with Libya in the mid-1980s:

A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks . . . . The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the rights of states to use force in exercise of their right of individual or collective self-defense.

The UN Charter is not a suicide pact.

Shultz, *Low-Intensity Warfare*, 86 *Dep't St. Bull.* at 17 (Mar. 1986).

Finally, we note that U.S. military action in Panama, which was not in response to the threat of WMD or international terrorism, demonstrates that the degree of

imminence required to justify the use of force in self-defense has broadened even in response to conventional threats. Although the attacks by Panamanian forces on unarmed U.S. military personnel and Noriega's anti-American rhetoric indicated that future attacks on the 35,000 Americans in Panama were likely, the threat does not appear to have been one that was "instant, overwhelming, leaving no choice of means, and no moment of deliberation." Webster Letter at 159. The Panama precedent also reveals that, when using force in self-defense, the removal of a world leader from power, or "regime change," may be a proportionate response to the threat posed by that leader.

#### 4. The Current Test

The use of force in anticipatory self-defense must be necessary and proportional to the threat. As outlined above, however, we believe that, at least in the realm of WMD and international terrorism, the test for determining whether a threat is sufficiently "imminent" to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth-century formulation. Factors to be considered include: the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity;<sup>57</sup> whether diplomatic alternatives are practical;<sup>58</sup> and the magnitude of the harm that could result from the threat. *See* Travaglio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. at 172 (while use of force in self-defense against terrorists need not meet the *Caroline* standard for imminence, "there must be a substantial likelihood that the threat will become manifest before it can be eliminated by means other than the use of military force"). If a state instead were obligated to wait until the threat were truly imminent in the temporal sense envisioned by Secretary Webster, there is a substantial danger of missing a limited window of opportunity to prevent widespread harm to civilians. As the President recently cautioned: "If we wait for threats to fully materialize, we will have waited too long." Press Release, The White House, President Bush Delivers Graduation Speech at West Point (June 1, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html> (last visited June 5, 2012). Finally, in an age of

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<sup>57</sup> A similar concept exists for self-defense in the individual criminal context. Many states require that, in order for force to be justified as self-defense, the threat of harm must be "imminent." That does not mean, however, that the victim must wait until the final moment before a threatened harm materializes. If the harm cannot necessarily be avoided by waiting for the last moment, force may be used as early as is required for the victim to defend himself effectively. *See* 2 Paul H. Robinson, *Criminal Law Defenses* § 131(c)(1) (1984).

<sup>58</sup> *See* McDougal & Feliciano, *Law and Minimum World Public Order* at 231 (The degree of imminence must be "so high . . . as to preclude effective resort by the intended victim to non-violent modalities of response."); Bowett, *Self-Defence in International Law* at 53 (force may be used in self-defense only when no alternate means of protection are available).

technologically advanced delivery systems and WMD, international law cannot require that we ignore the potential harm represented by the threat.

## 5. Iraq

Applying the reformulated test for using force in anticipatory self-defense to the potential use of force against Iraq reveals that it may well be reasonable for the President to determine that the threat of a WMD attack by Iraq, either directly or through Iraq's support for terrorism,<sup>59</sup> is sufficiently "imminent" to render the use of force necessary to protect the United States, its citizens, and its allies.

First, based on Iraq's WMD capability and Saddam Hussein's previous use of WMD against both his enemies and his own people, the President could find that there is a high probability that he will use them again. Prior to the Persian Gulf War and the subsequent adoption of UNSCR 687 and the U.N. inspection regime in 1991, Iraq possessed a significant, extensive WMD capability. Saddam Hussein employed chemical weapons against Iranian troops and civilians during the Iran-Iraq war, and he used nerve gas against Kurdish civilians in northern Iraq in 1988, killing nearly 5,000 men, women and children. See Bureau of Political Military Affairs, U.S. Department of State, *Chronology of Events Leading to the U.S.-Led Attack on Iraq* (Jan. 8, 1999), available at <http://www.state.gov/www/regions/nea/iraqchrony.html> (last visited June 5, 2012). Saddam Hussein also has revealed his willingness to use biological weapons. See Wedgwood, *Enforcement of Security Council Resolution 687*, 92 Am. J. Int'l L. 724; Report of the Secretary-General on the Status of the Implementation of the Special Commission's Plan for the Ongoing Monitoring and Verification of Iraq's Compliance with Relevant Parts of Section C of Security Council Resolution 687 (1991), UN Doc. S/1995/864, at 26-27 ¶ 75(w) (Oct. 11, 1995). Moreover, Iraq attempted to assassinate former President Bush in 1993. In addition, after the September 11th attacks, the official Iraqi news station stated that the United States was "reaping the fruits of [its] crimes against humanity." U.S. Department of State, *Patterns of Global Terrorism*

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<sup>59</sup> There is no question that Iraq's state sponsorship of terrorism violates international law. In response to the terrorist attacks of September 11, 2001, the Security Council recently reaffirmed that all nations have a duty to refrain from sponsoring terrorist acts in another state or even "acquiescing in organized activities within its territory directed towards the commission of such acts." S.C. Res. 1373, pmb. ¶ 9, U.N. Doc. S/RES/1373 (Sept. 28, 2001); see also S.C. Res. 748, pmb. ¶ 6, U.N. Doc. S/RES/748 (Mar. 31, 1992) (reaffirming that such a duty stems from article 2(4) of the U.N. Charter). Again, in the words of Secretary Shultz:

There should be no confusion about the status of nations that sponsor terrorism against Americans and American property. There is substantial legal authority for the view that a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks.

*Low-Intensity Warfare*, 86 Dep't St. Bull. at 17 (Mar. 1986).

2001, at 65 (May 2002) (“*Patterns of Global Terrorism*”), available at <http://www.state.gov/j/ct/rls/crt/2001/> (last visited June 5, 2012). Iraq has a long history of using weapons of mass destruction.

The Central Intelligence Agency recently assessed that Iraq has the capability to reinstate its chemical weapons programs within a few weeks or months. Central Intelligence Agency, *Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions, 1 January Through 30 June 2001*, at 3 (2002) (“CIA Report”), available at [https://www.cia.gov/library/reports/archived-reports-1/jan\\_jun2002.html](https://www.cia.gov/library/reports/archived-reports-1/jan_jun2002.html) (last visited June 5, 2012). In addition, the Administration has stated that it strongly suspects that Iraq has used the time without U.N. inspections to improve all phases of its offensive biological weapons program. See John R. Bolton, Under Secretary of State for Arms Control and International Security, *Remarks to the 5th Biological Weapons Convention RevCon Meeting* (Nov. 19, 2001), available at <http://2001-2009.state.gov/t/us/rm/jan/july/6231.htm> (last visited June 5, 2012); see also CIA Report at 4 (UNSCOM believes that Iraq maintains a knowledge base and industrial infrastructure that could be used to produce quickly a large number of biological agents at any time). The Intelligence Community also is concerned that Iraq is reconstituting its nuclear weapons program. CIA Report at 4-5. Finally, Iraq has refurbished trainer aircraft that are believed to have been modified to deliver chemical and biological warfare agents. *Id.*

Second, although we do not have available the information regarding whether the use of force against Iraq at a particular time would be necessary to take advantage of a window of opportunity to prevent the threat of a WMD attack from materializing, the State Department has reported that a growing number of terrorist groups are interested in acquiring and using WMD to rival the attacks of September 11. See *Patterns of Global Terrorism* at 66. The President could determine that, were we to wait until after Iraq has transferred WMD to terrorist groups, it would be very difficult to determine where and when WMD would be used, given the sporadic nature of terrorist attacks and the terrorist tactic of infiltrating the civilian population. Moreover, the President could reasonably conclude that pursuing diplomatic remedies is not a practical alternative given that the United States has engaged in more than a decade of unsuccessful attempts to work through the United Nations to obtain Iraqi compliance with its disarmament obligations under UNSCR 687.

Third, as we have discussed earlier, the degree of harm that could result from Iraq’s use of WMD could well be catastrophic. The combination of the vast potential destructive capacity of WMD and the modest means required for their delivery make them more of a threat than the military forces of many countries. See Travaglio, *Terrorism, International Law, and the Use of Military Force*, 18 *Wis. Int’l L.J.* at 155; see also Wedgwood, *Responding to Terrorism*, 24 *Yale J.*

Int'l L. at 560 ("The indiscriminate nature of [biological] weapons and their extraordinary range of destruction multiplies the threat."). Chemical weapons and biological agents are easy to hide, and small quantities can have a devastating effect on the civilian population. Perhaps even more frightening is the tinder-box that would result were Iraq to transfer WMD to terrorists.

We observe, therefore, that even if the probability that Iraq itself would attack the United States with WMD, or would transfer such weapons to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States.

Were the President to determine that the use of force in self-defense is necessary to counter the threat posed by Iraq's WMD program, such force should be proportional; in other words, it should be limited to that which is needed to eliminate the threat posed by Iraq. The President could reasonably determine that such proportionate response might include destruction of Iraq's WMD capability or removing Saddam Hussein from power. Finally, to the extent that the President were to have credible evidence that Saddam Hussein was giving WMD to the terrorists responsible for the September 11th attacks, the use of force against Iraq also would be justified as an exercise of self-defense expressly contemplated by article 51: responding to an armed attack. There is no doubt that the events of September 11th qualify as an "armed attack" under international law. *See* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 Harv. Int'l L. J. 41, 47-51 (2002); *cf.* Wedgwood, *Responding to Terrorism*, 24 Yale J. Int'l L. at 564 ("[T]he massacre of civilians and destruction of facilities in Kenya and Tanzania must qualify as an armed attack [warranting self-defense under Article 51].").

#### **IV. Conclusion**

The President has broad authority under domestic law to use military force against Iraq. The Constitution grants the President unilateral power to take military action to protect the national security interests of the United States. In the case of Iraq, the President's independent constitutional authority is supplemented by Public Law 102-1, Public Law 105-235, and Public Law 107-40. While congressional authorization is not needed before the President may direct the use of force against Iraq to protect our national security, were he to do so pursuant to any or all of these provisions, he would be acting with approval previously granted by Congress.

In addition, international law authorizes the President to use force against Iraq on two independent grounds. First, the Security Council has authorized military action against Iraq to implement the terms of the cease-fire, and in response to the

threat to international peace and security caused by Iraq's repression of its civilian population. Due to Iraq's material breaches of the cease-fire, established principles of international law—both treaty and armistice law—currently permit the United States to suspend its terms and use force to compel Iraqi compliance with its disarmament and inspection requirements or redress any threat to international peace and security caused by Iraq's repression of its civilian population. Such a use of force would be consistent with U.S. practice. Second, international law also permits the President to use force against Iraq in anticipatory self-defense if the use of force would be both necessary due to an imminent threat, and a proportional response to that threat.

JAY S. BYBEE  
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## **Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq**

United Nations Security Council Resolution 1441 does not alter the legal authority, under international law, granted by existing U.N. Security Council resolutions to use force against Iraq.

November 8, 2002

### MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked our Office to analyze the effect of United Nations (“U.N.”) Security Council Resolution 1441, adopted on November 8, 2002, on the President’s authority under international law to use military force against Iraq. We recently advised you that the use of military force against Iraq would be consistent with international law under existing U.N. Security Council resolutions (“UNSCRs”), or as an exercise of anticipatory self-defense. *See Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 143 (2002) (“Iraq Opinion”). The terms of UNSCR 1441 do not alter our earlier conclusion: the United States continues to have the authority, under international law, to use force against Iraq.<sup>1</sup>

We emphasize at the outset that U.N. Security Council authorization is not a necessary precondition under international law for the use of force. On numerous occasions, states have, consistent with international law, used force without prior authorization from the Security Council. Such uses of force have been based on the inherent right to national self-defense recognized and affirmed in article 51 of the U.N. Charter. *See generally* Iraq Opinion, 26 Op. O.L.C. at 178, 181-82. Under the doctrine of anticipatory self-defense, the United States may use force against Iraq if the President determines the use of force would be necessary due to an imminent threat, and a proportional response to that threat. *See generally id.* at 177-95.

We also emphasize that the question of legality of the use of force against Iraq under international law has no bearing on the President’s authority under domestic law. As we have advised you previously, the President has full constitutional authority as Chief Executive and Commander in Chief to use force against Iraq. *Id.* at 6-8. Congress most recently supported the President’s authority in this context by passing H.R.J. Res. 114, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

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<sup>1</sup> As we have previously advised, it is the responsibility of this Office, on behalf of the Attorney General, to provide authoritative opinions for the President on all legal questions, including questions of international law. *See* Letter for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel (Jan. 11, 2002).

## I. UNSCR 1441

On November 8, 2002, the U.N. Security Council unanimously approved a resolution regarding Iraq. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002). UNSCR 1441 “deplor[es]” Iraq’s continued failure to comply with various UNSCRs, including in particular the requirements imposed by those resolutions that Iraq: (1) fully disclose all aspects of its weapons of mass destruction (“WMD”) and other nuclear programs; (2) fully and unconditionally cooperate with the United Nations Special Commission (“UNSCOM”), its successor, the United Nations Monitoring, Verification and Inspection Commission (“UNMOVIC”), and the International Atomic Energy Agency (“IAEA”); (3) provide immediate, unconditional and unrestricted access to UNMOVIC and the IAEA; (4) renounce international terrorism; (5) cease the repression of its civilian population; (6) provide access by international humanitarian organizations to all those in need of assistance in Iraq; (7) return, or cooperate in accounting for, Kuwaiti and third country nationals wrongfully detained by Iraq; and (8) return Kuwaiti property wrongfully seized by Iraq. *Id.* pmb1. ¶¶ 6-9 (2002).

UNSCR 1441 grants Iraq “a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council,” and specifies that, in order for Iraq to begin to comply with these obligations, it must submit a full disclosure of its WMD program within thirty days of the resolution. *Id.* ¶¶ 2, 3. It specifically requires Iraq to provide “immediate, unimpeded, unconditional, and unrestricted access to any and all, including underground, areas, facilities, buildings, equipment, records, and means of transport which [UNMOVIC and the IAEA] wish to inspect” and to all officials and other persons. *Id.* ¶ 5. Because international inspectors have been absent from Iraq since 1998, UNSCR 1441 also strengthens previous resolutions by providing UNMOVIC and the IAEA with expansive new authorities to assist them in fulfilling their mission. *Id.* ¶ 7. UNSCR 1441 directs the Executive Chairman of UNMOVIC to report immediately to the Security Council “any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution.” *Id.* ¶ 11. False statements or omissions in the declarations submitted pursuant to UNSCR 1441 and failure to cooperate fully in implementing UNSCR 1441 also must be reported to the Security Council. *Id.* ¶ 4. Upon receipt of such a report, the Security Council will “convene immediately . . . in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.” *Id.* ¶ 12.

Significantly, UNSCR 1441 “[d]ecides” that Iraq “has been and remains in material breach of its obligations under relevant resolutions,” in particular the obligations in UNSCR 687 regarding Iraq’s WMD program. *Id.* ¶ 1. In addition, the resolution specifies that any false statements or omissions with respect to

Iraq's WMD program "shall constitute a further material breach of Iraq's obligations." *Id.* ¶ 4. The resolution also reminds Iraq that the Security Council has repeatedly warned that "serious consequences" will result from the continued violation of its obligations. *Id.* ¶ 13. Finally, UNSCR 1441 twice "[r]ecall[s]" UNSCR 678 and explicitly restates the authorization in that resolution for member states "to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to resolution 660 (1990) and to restore international peace and security in the area." *Id.* p.mbl. ¶¶ 1 & 4.

Nothing in UNSCR 1441 alters our prior conclusion that the use of force against Iraq by the United States would be consistent with the U.N. Charter and international law, due to existing U.N. Security Council resolutions and the nation's inherent right of self-defense.

## **II. U.N. Security Council Authorization to Use Force Against Iraq**

As we explained previously, existing Security Council resolutions provide continuing authority to use force against Iraq. Enacted at the start of the Persian Gulf War, UNSCR 678 authorizes member states to use "all necessary means" to eject Iraq from Kuwait, to uphold and implement "all subsequent relevant resolutions," and "to restore international peace and security in the area." S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990); *see also* Iraq Opinion, 26 Op. O.L.C. at 176-77. One of the most significant "subsequent relevant resolutions" is UNSCR 687, which established the terms of the cease-fire that suspended hostilities between Iraq and the U.S.-led international coalition. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991). As we detailed in our earlier opinion, Iraq Opinion, 26 Op. O.L.C. at 165-66, and as the President has made clear in recent speeches, *see, e.g.*, Address to the United Nations General Assembly in New York City, 2 *Pub. Papers of Pres. George W. Bush* 1572 (Sept. 12, 2002); *see also* Statement of Prime Minister Tony Blair to the Emergency Session of the House of Commons (Sept. 24, 2002), *available at* [http://news.bbc.co.uk/2/hi/uk\\_politics/2278495.stm](http://news.bbc.co.uk/2/hi/uk_politics/2278495.stm) (last visited May 7, 2012); Office of the Press Secretary, White House, *A Decade of Deception and Defiance: Saddam Hussein's Defiance of the United Nations* (Sept. 12, 2002), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912.html> (last visited May 7, 2012), Iraq has committed numerous material breaches of the cease-fire, in particular by continuing to develop weapons of mass destruction and by preventing U.N. inspectors from discovering and destroying these weapons. Iraq's material breaches permit the United States to suspend the cease-fire and rely on UNSCR 678 as an authorization to use force to bring Iraq into compliance with UNSCR 687 and other relevant resolutions. Further, Iraq's ongoing drive to develop weapons of mass destruction and its demonstrated hostile intentions toward its

neighbors continue to pose a serious threat to international peace and security in the region. Therefore, under UNSCR 678, the United States may use force to implement the terms of UNSCR 687 and thereby restore international peace and security in the area.

Nothing in UNSCR 1441 undermines or restricts the authority to use force granted by existing resolutions. Rather, UNSCR 1441 provides further support for the conclusion that the use of force would be appropriate under existing resolutions because it confirms that the President has sufficient grounds to find Iraq in material breach of the cease-fire. *Id.* ¶ 1. Although we believe that the United States may determine for itself whether Iraq is in material breach of UNSCR 687, *see* Iraq Opinion, 26 Op. O.L.C. at 163-66, the adoption of a resolution making that finding demonstrates that the Security Council agrees. A finding that Iraq is in material breach of UNSCR 687 or other relevant resolutions is by itself sufficient to trigger the suspension of the cease-fire and the authority to use force under UNSCR 678.<sup>2</sup> UNSCR 1441's finding of material breach adds further support to our authority under international law.

UNSCR 1441 does not undermine the consistent position of the United States that UNSCR 678's authorization to use force remains in effect. *See* Iraq Opinion, 26 Op. O.L.C. at 166-69. The Security Council has already reaffirmed UNSCR 678 three times. *See* S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991); S.C. Res. 687, U.N. Doc. S/RS/687 (Apr. 8, 1991); S.C. Res. 949, U.N. Doc. S/RES/949 (Oct. 15, 1994). UNSCR 1441 neither revokes UNSCR 678's authorization to use "all necessary means" against Iraq, nor terminates the authorization in any way. The U.N. Security Council has not readily authorized the use of force in the past (indeed, it appears to have done so only in the context of seven conflicts), nor has it rescinded those decisions lightly. When the Security Council has taken the serious step of ending an authorization to use force, it has only done so in one of two ways: either by expressly terminating the prior authorization, or by setting an up-front time limit on the authorization.<sup>3</sup> *See, e.g.*, S.C. Res. 1031, ¶ 19, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (Bosnia) (deciding that "the authority to take certain measures conferred upon States by [various UNSCRs] shall be terminated"); S.C. Res. 954, ¶ 1, U.N. Doc. S/RES/954 (Nov. 4, 1994) (extending the mandate for the U.N. Mission in Somalia (UNOSOM II) for a

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<sup>2</sup> UNSCR 1441 puts to rest the arguments of those commentators who claim that only the Security Council may determine whether Iraq is in material breach. *See, e.g.*, Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 Am. J. Int'l L. 124, 150 (1999). Such commentators argue that the Security Council's previous resolution finding that Iraq was in material breach, which was adopted over ten years ago, is too outdated to provide a basis for suspending the cease-fire. *See id.* at 151-52; S.C. Res. 707, U.N. Doc. S/RES/707 (Aug. 15, 1991).

<sup>3</sup> For your convenience, we have attached an appendix listing the various UNSCRs that have authorized the use of force and their current status.

“final period” until March 31, 1995); S.C. Res. 929, ¶ 4, U.N. Doc. S/RES/929 (June 22, 1994) (Rwanda) (specifying that “the mission of Member States cooperating with the Secretary-General will be limited to a period of two months following the adoption of the present resolution,” if not earlier).<sup>4</sup> U.N. Security Council practice has been consistent on this point over a substantial period of time. UNSCR 678, however, contains no self-imposed time-limit, and none of the resolutions relating to Iraq, including UNSCR 1441, have explicitly terminated the resolution’s authorization to use force. Unless the Security Council clearly states, using the same language it has in the past, that it has terminated UNSCR 678’s authorization for the use of force, that authorization continues. Instead, UNSCR 1441 twice “[r]ecall[s]” UNSCR 678 and explicitly restates the authorization in UNSCR 678 for member states “to use all necessary means to uphold and implement its resolution 660 (1990) . . . and all relevant resolutions subsequent to resolution 660 (1990) and to restore international peace and security in the area.” S.C. Res. 1441, pmb1.; S.C. Res. 678, ¶ 2.<sup>5</sup>

Other elements of UNSCR 1441 further support our conclusion that it does not affect existing authority, under previous Security Council resolutions, to use force against Iraq. First, UNSCR 1441’s warning that Iraq’s continued violation of its international obligations will result in “serious consequences,” read together with

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<sup>4</sup> Similarly, the practice of the Security Council is to state clearly its intention to terminate sanctions imposed by previous UNSCRs. *See, e.g.*, S.C. Res. 1367, ¶ 1, U.N. Doc. S/RES/1367 (Sept. 10, 2001) (deciding “to terminate the prohibitions established by . . . resolution 1160 (1998),” which required all states to prevent the sale or supply to the Federal Republic of Yugoslavia of arms and related materiel of all types); S.C. Res. 1074, ¶ 2, U.N. Doc. S/RES/1074 (Oct. 1, 1996) (former Yugoslavia) (deciding “to terminate, with immediate effect, the measures referred to in paragraph 1 of” UNSCR 1022); S.C. Res. 1022, ¶ 4, U.N. Doc. S/RES/1022 (Nov. 22, 1995) (deciding that the Security Council “will terminate [certain] measures on the tenth day following the occurrence of the first free and fair elections” provided for in the General Framework Agreement for Peace in Bosnia and Herzegovina); S.C. Res. 1011, ¶ 8, U.N. Doc. S/RES/1011 (Aug. 16, 1995) (deciding that “on 1 September 1996 the restrictions imposed by paragraph 13 of resolution 918 (1994) on the sale or supply of military arms and related *materiel* to the Government of Rwanda shall terminate, unless the Council decides otherwise after its consideration of the second report of the Secretary-General”); S.C. Res. 944, ¶ 4, U.N. Doc. S/RES/944 (Sept. 29, 1994) (deciding “to terminate the measures regarding Haiti set out in [various] resolutions . . . at 001 a.m. EST on the day after the return to Haiti of President Jean-Bertrand Aristide”); S.C. Res. 919, ¶¶ 1, 2, U.N. Doc. S/RES/919 (May 26, 1994) (deciding “to terminate forthwith the mandatory arms embargo and other restrictions related to South Africa imposed by resolution 418 (1977) . . . [and] to end forthwith all other measures against South Africa contained in resolutions of the Security Council”); S.C. Res. 460, ¶ 2, U.N. Doc. S/RES/460 (Oct. 21, 1979) (deciding “to call upon Member States to terminate the measures taken against Southern Rhodesia under Chapter VII of the Charter pursuant to resolutions 232 (1966), 253 (1968) and subsequent related resolutions on the situation in Southern Rhodesia”).

<sup>5</sup> We do not read UNSCR 1441’s referral to UNSCR 678 in the past tense as an indication that the authorization in that resolution has expired. *See* S.C. Res. 1441, pmb1. ¶ 4 (“[r]ecalling that resolution 678 (1990) authorized member States to use all necessary means”). Instead, the past tense appears to have been used because it is describing a previously adopted resolution. For example, UNSCR 1441 describes obligations “imposed” by UNSCR 687, and there is absolutely no doubt that that resolution continues in effect. S.C. Res. 1441, pmb1. ¶ 5.

its references to UNSCR 678, suggest that the Security Council views such serious consequences as including the use of force under UNSCR 678.<sup>6</sup> S.C. Res. 1441, ¶ 13. Second, under general principles of armistice law, the cease-fire under UNSCR 687 suspended hostilities between the parties to the Persian Gulf War, but did not extinguish the Security Council's authorization to use force. *See* Iraq Opinion, 26 Op. O.L.C. at 167-70. Third, nothing in UNSCR 1441 precludes the United States from assessing for itself whether the authorization in UNSCR 678 remains in effect. Just as the Security Council has terminated authorizations to use force using only clear and unambiguous language, it also has been clear and unambiguous when it has wanted the Security Council itself, rather than individual member states, to determine whether an authorization continues in effect. *See* S.C. Res. 940, ¶ 8, U.N. Doc. S/RES/940 (July 31, 1994) (Haiti) (deciding "that the multinational force will terminate its mission . . . when a secure and stable environment has been established . . . [as determined] by the Security Council, taking into account recommendations from the Member States of the multinational force"). UNSCR 1441 contains no such clear and unambiguous statement.

It should be noted that UNSCR 1441 contains two provisions that might cast doubt on the continuing authorization to use force against Iraq under previous U.N. Security Council resolutions. We believe, however, that these two paragraphs only promise further review of Iraqi failure to comply with the new inspection regime. The first, paragraph 2, while "acknowledging" Iraq's previous material breaches, "[d]ecides . . . to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under the relevant resolutions of the Council." This language might be read by some to suggest that no action will be taken against Iraq until Iraq has had time to comply with its disarmament obligations under the framework of the new resolution. Paragraph 2, however, cannot constitute a legal repeal of existing international legal authority to use force against Iraq. As explained above, the Security Council has always used clear and unambiguous language when it intends to terminate an authorization to use force. UNSCR 1441 does not impose a new sunset date, nor does it use the clear and unambiguous termination language that previous Security Council resolutions have employed when rescinding authorizations to use force. As a legal matter,

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<sup>6</sup> Twice before, military force against Iraq has followed warnings by the Security Council that Iraq's continued intransigence would result in serious consequences. On January 8 and 11, 1993, the President of the Security Council warned Iraq that "serious consequences" would follow if it failed to comply with its international obligations. *See* S.C. Pres. Statement 1993/25091, U.N. Doc. S/PRST/25091 (Jan. 11, 1993); S.C. Pres. Statement 1993/25081, U.N. Doc. S/PRST/25081 (Jan. 8, 1993). Shortly thereafter, on January 13, 1993, President George H.W. Bush ordered an air attack on surface-to-missile sites and related facilities in the southern no-fly zone. And the December 1998 airstrikes against Iraq followed a late-October 1997 warning by the President of the Security Council that "serious consequences" would result if Iraq failed to comply unconditionally and immediately with its international obligations. S.C. Pres. Statement 1997/49, U.N. Doc. S/PRST/1997/49 (Oct. 29, 1997); *see also* S.C. Res. 1137, pmbll., U.N. Doc. S/RES/1137 (Nov. 12, 1997) (recalling that statement).

nothing in paragraph 2 alters the existing authorization in UNSCR 678 for member States to use “all necessary means” to uphold and implement UNSCR 687 and other relevant resolutions and to restore international peace and security to the area. If paragraph 2 sought to suspend or repeal existing authority under UNSCR 678 to use force, it would have employed clear and unambiguous language equivalent to the “terminate” provisions or sunset dates used in previous resolutions. *See infra* Appendix.<sup>7</sup>

Nor could paragraph 2 alter the international law principle that, in response to Iraq’s previous material breaches of the cease-fire, the United States may, at any time, suspend the cease-fire and rely on the authorization to use force against Iraq. *See Iraq Opinion*, 26 Op. O.L.C. at 166-75. We do not read paragraph 2 as containing a clear agreement by the parties to the cease-fire, codified by UNSCR 687, to modify its terms in any way. Certainly there is no clear statement that paragraph 2, or any other part of UNSCR 1441, seeks to alter the terms of the 1991 cease-fire.

Paragraph 12 of UNSCR 1441 states that the Security Council will convene immediately upon a report of Iraqi noncompliance by the Executive Chairman of UNMOVIC “to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.” Although some might read this language to preclude the unilateral use of force against Iraq until the Security Council had held such a meeting, this interpretation would be in error. Paragraph 12 does not alter our view that, under principles of both treaty and armistice law, the United States may, at any time, unilaterally suspend the cease-fire and rely on the authorization in UNSCR 678 to resume hostilities in response to Iraq’s prior material breaches. *See Iraq Opinion*, 26 Op. O.L.C. at 166, 173; *see also* Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction*, 92 Am. J. Int’l L. 724, 726-27 (1998) (discussing U.S. right to use force unilaterally to “vindicate” the Iraqi inspection regime). At most, paragraph 12 only ensures that the U.N. Security Council will convene immediately to address further material breaches by Iraq. Simply requiring another meeting holds open the possibility of additional Security Council action, but does not eliminate past decisions and authorities. Paragraph 12, therefore, has no effect on the remedies available under international law in response to Iraq’s previous and ongoing material breaches of the cease-fire. A decision by the Security Council to convene immediately in the event of Iraqi noncompliance cannot amount to a

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<sup>7</sup> Even if paragraph 2 were to be read to limit the use of force while Iraq undertook to comply with UNSCR 1441, any Iraqi breach of UNSCR 1441 itself would exhaust its “final opportunity” to comply with its disarmament obligations. *See* S.C. Res. 1441, ¶ 4 (failure by Iraq at any time to comply with or cooperate fully in the implementation of UNSCR 1441 constitutes a further material breach of its obligations). This would provide yet another independent basis for the use of force under UNSCR 678.

suspension or repeal of the substantive authorization to use force granted by existing U.N. Security Council resolutions.

### **III. Conclusion**

UNSCR 1441 does not alter the legal authority, under international law, granted by existing U.N. Security Council resolutions to use force against Iraq. We also emphasize that a U.N. Security Council authorization is not a necessary precondition under international law for the use of force. Under the doctrine of anticipatory self-defense, the United States may use force against Iraq if the President determines the use of force would be necessary due to an imminent threat, and a proportional response to that threat.<sup>8</sup> We refer you to our Oct. 23, 2002 Iraq Opinion for a complete examination of self-defense under international law and its application to Iraq. *See generally id.*, 26 Op. O.L.C. at 177-97.

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<sup>8</sup> The United States has consistently taken the position that the inherent right to self-defense under international law is not limited to responding to actual armed attacks. *See Iraq Opinion*, 26 Op. O.L.C. at 185-87; Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas* at 10 (June 13, 2002).



## **Appendix**

### **UNSCRs Authorizing the Use of Force**

#### **Korea**

UNSCR 83 “[r]ecommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.” S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

Termination: This resolution does not appear to have been terminated.

#### **Iraq**

UNSCR 678, “[a]cting under Chapter VII of the Charter . . . , [a]uthorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the aforementioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

Termination: This resolution has not been terminated.

#### **Somalia**

UNSCR 794, “[a]cting under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.” S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992).

UNSCR 814 expanded the U.N. Operation in Somalia (“UNOSOM II”) “for an initial period through 31 October 1993, unless previously renewed by the Security Council.” S.C. Res. 814, ¶ 6, U.N. Doc. S/RES/814 (Mar. 26, 1993).

Termination: UNSCR 954 “decides to extend the mandate for UNOSOM II for a final period until 31 March 1995.” S.C. Res. 954, ¶ 1, U.N. Doc. S/RES/954 (Nov. 4, 1994).

#### **Rwanda**

UNSCR 929, “[a]cting under Chapter VII of the Charter of the United Nations, authorizes the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve [certain] humanitarian objectives.” S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/

929 (June 22, 1994). (Paragraph 2 welcomes the establishment of a temporary operation under national command and control aimed at contributing to the security and protection of displaced persons, refugees, and civilians at risk in Rwanda.)

Termination: UNSCR 929 contains its own termination date, specifying that “the mission of Member States cooperating with the Secretary-General will be limited to a period of two months following the adoption of the present resolution,” if not earlier. *Id.* ¶ 4.

### **Haiti**

UNSCR 940, “[a]cting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement.” S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

Termination: UNSCR 940 “[d]ecides that the multinational force will terminate its mission . . . when a secure and stable environment has been established,” as determined by the Security Council, taking into account recommendations from Member States of the multinational force (“MNF”). *Id.* ¶ 8. In UNSCR 975, the Security Council made such a determination and provided for a full transfer of responsibility from the MNF to the U.N. Mission in Haiti by March 31, 1995. S.C. Res. 975, ¶¶ 5, 7, U.N. Doc. S/RES/975 (Jan. 30, 1995).

### **Former Yugoslavia**

UNSCR 770 “[c]alls upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina.” S.C. Res. 770, ¶ 2, U.N. Doc. S/RES/770 (Aug. 13, 1992).

UNSCR 781 “[c]alls upon States to take nationally or through regional agencies or arrangements all measures necessary to provide assistance to the United Nations Protection Force [UNPROFOR], based on technical monitoring and other capabilities” to monitor compliance with the ban on military flights. S.C. Res. 781, ¶ 5, U.N. Doc. S/RES/781 (Oct. 9, 1992).

UNSCR 816 “[a]uthorizes Member States . . . to take, under the authority of the Security Council . . . all necessary measures in the airspace of the Republic of Bosnia and Herzegovina . . . to ensure compliance with the” flight ban. S.C. Res. 816, ¶ 4, U.N. Doc. S/RES/816 (Mar. 31, 1993).

UNSCR 836 “[d]ecides that . . . Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council . . . all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR.” S.C. Res. 836, ¶ 10, U.N. Doc. S/RES/836 (June 4, 1993).

UNSCR 844 “[r]eaffirms its decision in . . . resolution 836 (1993) on the use of air power, in and around the safe areas, to support UNPROFOR in the performance of its mandate.” S.C. Res. 844, ¶ 4, U.N. Doc. S/RES/844 (June 18, 1993).

UNSCR 958 “[d]ecides that the authorization given in [UNSCR 836] shall apply also to such measures taken in the Republic of Croatia.” S.C. Res. 958, pmb., U.N. Doc. S/RES/958 (Nov. 19, 1994).

Termination: UNSCR 1031 states that “with effect from the day on which the Secretary-General reports to the Council that the transfer of authority from the United Nations Protection Force (UNPROFOR) to IFOR [a multinational implementation force] has taken place, the authority to take certain measures conferred upon States by resolutions [770, 781, 816, 836, 844 and 958] shall be terminated.” S.C. Res. 1031, ¶ 19, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

UNSCR 1031 “[a]uthorizes . . . Member States . . . to take all necessary measures to effect the implementation of and to ensure compliance with Annex I-A of the Peace Agreement . . . [and] to ensure compliance with the rules and procedures, to be established by the Commander of IFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic . . . [and] to take all necessary measures, at the request of IFOR, either in defence of IFOR or to assist the force in carrying out its mission, and *recognizes* the right of the force to take all necessary measures to defend itself from attack or threat of attack.” *Id.* ¶¶ 14-17.

Termination: UNSCR 1031 itself “[d]ecides, with a view to terminating the authorization [provided for in the resolution] one year after the transfer of authority from UNPROFOR to IFOR, to review by that date and to take a decision whether that authorization should continue, based upon the recommendations from the States participating in IFOR and from the High Representative through the Secretary General.” *Id.* ¶ 21. IFOR has been replaced by a multinational stabilization force (“SFOR”). S.C. Res. 1088, ¶ 18, U.N. Doc. S/RES/1088 (Dec. 12, 1996). The most recent relevant resolution is UNSCR 1423, which authorizes the use of force by Member States in support of SFOR in situations similar to those delineated in UNSCR 1031. S.C. Res. 1423, ¶¶ 10-13, U.N. Doc. S/RES/1423 (July 12, 2002).

### **East Timor**

UNSCR 1264, “[a]cting under Chapter VII of the Charter of the United Nations, . . . [a]uthorizes the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia . . . and *authorizes* the States participating in the multinational force to take all necessary measures to fulfill [their] mandate.” S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

Termination: This authorization appears to continue in effect. The most recent resolution is UNSCR 1410, which establishes for 12 months from May 20, 2002 a U.N. Mission of Support in East Timor (“UNMISSET”), including a civilian police and a military component. S.C. Res. 1410, ¶¶ 1-3, U.N. Doc. S/RES/1410 (May 17, 2002). UNSCR 1410 “reaffirms” UNSCR 1272, which, in turn, “welcomes” the deployment of the multinational force to East Timor pursuant to UNSCR 1264. S.C. Res. 1272 (1999), pmbl., U.N. Doc. S/RES/1272 (Oct. 25, 1999).

## Designation of Acting Solicitor of Labor

Eugene Scalia, now serving as the Solicitor for the Department of Labor under a recess appointment, could be given a second position in the non-career Senior Executive Service in the Department of Labor before or after his recess appointment expires and, while serving in his non-career Senior Executive Service position, could be designated as the Acting Solicitor after his recess appointment expires.

November 15, 2002

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

You have asked whether Eugene Scalia, now serving as the Solicitor for the Department of Labor under a recess appointment, could be designated the Acting Solicitor after his recess appointment expires. You have asked us to address two scenarios. Under the first scenario, Mr. Scalia would be given a second position in the non-career Senior Executive Service in the Department of Labor before his recess appointment expires. Under the second scenario, he would be given the non-career Senior Executive Service position in the Department of Labor after his recess appointment expires. We conclude, for the reasons stated below, that under either scenario Mr. Scalia could be designated, while serving in his non-career Senior Executive Service position, as the Acting Solicitor after his recess appointment expires.

On April 30, 2001, the President nominated Eugene Scalia to be Solicitor for the Department of Labor. 147 Cong. Rec. 6508 (2001). After the Senate returned all pending nominations when it took a long intrasession recess, the President nominated Mr. Scalia again on September 4, 2001. 147 Cong. Rec. 16,339 (2001). Once again, the Senate failed to act on the nomination. The President gave Mr. Scalia a recess appointment during the Senate's recess from December 20, 2001, to January 23, 2002, and submitted his nomination to the Senate on February 5, 2002. 148 Cong. Rec. 600 (2002). The Senate has not acted upon this last nomination, and Mr. Scalia's recess appointment will expire when the Senate next adjourns sine die. U.S. Const. art. II, § 2, cl. 3.

#### I.

Under either scenario, Mr. Scalia would lawfully hold a position in the non-career Senior Executive Service. To begin with the second scenario: There is no question that Mr. Scalia may be given a position in the non-career Senior Executive Service in the Department of Labor after his recess appointment as Solicitor for the Department of Labor expires.<sup>1</sup>

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<sup>1</sup> It is possible that an interruption in Mr. Scalia's government service—i.e., the time between the expiration of his recess appointment and the commencement of his work in the non-career Senior

As for the first scenario: We also believe that Mr. Scalia, while holding the office of Solicitor for the Department of Labor by recess appointment, could simultaneously hold a position in the non-career Senior Executive Service in the Department of Labor. We have repeatedly concluded that “there is no longer any prohibition against dual office-holding.” Memorandum for Honorable John D. Ehrlichman, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, at 2 (Feb. 13, 1969) (“Rehnquist Memorandum”); *see also* Memorandum for James H. Thessin, Deputy Legal Adviser, Department of State, from Randolph D. Moss, Deputy Assistant Attorney General, *Re: Dual Office-Holding* at 2 (Dec. 3, 1997) (“*Dual Office-Holding*”); Memorandum for Philip B. Heymann, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Creation of an Office of Investigative Agency Policies* (Oct. 26, 1993) (“*Office of Investigative Agency Policies*”); *Dual Office of Chief Judge of Court of Veterans Appeals and Director of the Office of Government Ethics*, 13 Op. O.L.C. 241, 242 (1989) (“*Dual Office*”); Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Dual Office of Executive Secretary of National Security Council and Special Assistant* (Mar. 1, 1988); Memorandum for the Honorable George P. Williams, Associate Counsel to the President, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Dual Appointment* (June 24, 1974); Memorandum for the Honorable Myer Feldman, Special Counsel to the President, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Fixing of Salary of Director of Office of Economic Opportunity* (Aug. 19, 1964). In 1964, Congress repealed a statute generally barring the holding of more than one office, *see* Rehnquist Memorandum at 1, and the current statute forbidding the receipt of pay for holding more than one position, 5 U.S.C. § 5533 (2000), “impliedly permits” dual office-holding. *Dual Office*, 13 Op. O.L.C. at 242. Furthermore, as we have pointed out, it is of no consequence if one of the offices to be held is Senate-confirmed and the other is not. *See* Rehnquist Memorandum at 2.

A possible limit on the holding of two offices, however, may arise from the doctrine of “incompatibility.” This doctrine, which existed in common law, “precludes a person from holding two offices if public policy would make it improper for the person to perform both functions, such as when the functions of the offices are inconsistent with each other.” *Office of Investigative Agency Policies* at 6 (citations omitted). “The doctrine has been stated in various ways, sometimes tautologically, but usually states that offices that are incompatible ‘are such as bear a special relation to each other; one being subordinate to and interfer-

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Executive Service position—might have certain adverse consequences for him. But this issue, which you have not asked us to address, has no bearing on your question.

ing with the other so as, in the language of Coke, to induce the presumption that they cannot be executed with impartiality and honesty.” *Id.* (quoting 3 McQuillin, *The Law on Municipal Corporations* § 12.67 (1982)). As we have noted, “[i]t is arguable that [the doctrine] has either fallen into desuetude or been repealed by statute.” Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment as Associate Attorney General* at 3, 4 (June 14, 1983). *But see United States v. Thompson*, 475 F.2d 1359, 1363 (5th Cir. 1973) (discussing whether positions have any “inherent” conflict). Even assuming the continued validity of the doctrine, however, a recess appointee could be appointed to another office as long as “[n]either office, as a matter of statute, reports to the other or reviews determinations that the other has made.” *See Dual Office-Holding* at 4.

Under the Dual Compensation Act, 5 U.S.C. § 5533, the recess appointee could receive the pay for only one of the offices. As we have interpreted the Act, the holder of two offices “must be paid the higher salary if it is fixed by law,” because he “would otherwise be waiving a right to compensation established pursuant to statute—which is unlawful.” *Dual Office*, 13 Op. O.L.C. at 243 n.3 (citations omitted).<sup>2</sup>

## II.

Under either of your two scenarios, we believe that, after expiration of his recess appointment, Mr. Scalia may be designated under the Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d (2000), to act in the position he will have vacated when his recess appointment expired. Under the Vacancies Reform Act, the President “may direct an officer or employee of [an] Executive agency to perform the functions and duties of [a] vacant [Senate-confirmed] office temporarily in an acting capacity,” subject to specified time limits, provided that, during the year preceding the occurrence of the vacancy, the officer or employee served for at least 90 days in a position in that agency for which the rate of pay equaled or exceeded the rate for GS-15 of the General Schedule. 5 U.S.C. § 3345(a)(3). By virtue of his non-career Senior Executive Service position with the Department of Labor, Mr. Scalia would be “an officer or employee” of that agency, and, during the year before the expiration of his recess appointment created a vacancy, he would have served for at least 90 days in a position—the office of Solicitor, to which he was recess appointed—for which the pay exceeded the GS-15 rate. By

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<sup>2</sup> A Senior Executive Salary might, or might not, exceed the Executive Level IV pay of the Solicitor of Labor. Salaries in the Senior Executive Service cover a range. 5 U.S.C. § 5382(a). The lowest level of Senior Executive Service pay, even with a “locality-based comparability” adjustment for Washington, D.C., *see* 5 U.S.C. § 5304 (2000), would be less than the pay for Executive Level IV, while the higher levels would exceed the pay for Executive Level IV.

the plain terms of the Vacancies Reform Act, he would be eligible to be designated to act.<sup>3</sup>

There are two contrary arguments, the first based on the Vacancies Reform Act and the second on the Recess Appointments Clause. In our view, neither argument is persuasive.

The first argument is that, under the Vacancies Reform Act, the relevant vacancy would have occurred when the recess appointee's predecessor left office and that the recess appointee, unless he qualified by virtue of service in the agency before then, would not be able to act in the position. The basis for this argument would be the provision of the Vacancies Reform Act stating that the Act is the exclusive means for designation of an acting official, with two exceptions—(1) a statute expressly authorizing the President, a court, or a head of a department to name an acting official or a statute expressly designating an official to act, or (2) the Recess Appointments Clause of the Constitution. 5 U.S.C. § 3347(a). According to this argument, the Vacancies Reform Act thus treats a recess appointment as identical to an acting designation, and an acting designation does not fill an office but only assigns its duties and powers. The provisions of the Vacancies Reform Act that allow designations of acting officials but set time limits on their service, for example, contemplate that a “vacancy” occurs when the occupant dies or resigns or is otherwise unavailable (except as a result of sickness), 5 U.S.C. §§ 3345-3346, and the departure of an acting official does not create a new vacancy. So, too, as this argument would go, the expiration of a recess appointment does not create a new vacancy.

The language of the Vacancies Reform Act refutes this argument. While the statute provides that an acting official only will “perform the functions and duties of the [vacant] office temporarily,” *id.* § 3345(a)(1), (2), (3), it states that a recess appointment “fill[s] a vacancy,” *id.* § 3347(a)(2). Therefore, when the recess appointment ends, a new vacancy is created. We accordingly would read the statutory reference to recess appointments as simply making clear that Congress did not intend, by the Vacancies Reform Act, to restrict the President's recess appointment power in any way.

The second argument is that, because an acting official has the same duties and powers as a recess appointee, a designation to act would extend the recess appointment past the constitutionally mandated limit of “the End of [the Senate's] next Session.” U.S. Const. art. II, § 2, cl. 3. This argument, in our view, would ignore the differences between holding an office and acting in it. An acting official does not hold the office, but only “perform[s] the functions and duties of the

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<sup>3</sup> A provision of the Vacancies Reform Act that, in some circumstances, forbids an official to act in a position for which he has been nominated, 5 U.S.C. § 3345(b)(1), does not apply if an official is acting pursuant to the President's designation. See *Guidance on Application of the Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 64 (1999) (Question 15).



office.” 5 U.S.C. § 3345(a)(1), (2), (3). He is not “appointed” to the office, but only “direct[ed]” or authorized to discharge its functions and duties, and he thus receives the pay of his permanent position, not of the office in which he acts. *See* 5 U.S.C. § 5535(a) (2000). A recess appointee, on the other hand, is appointed by one of the methods specified in the Constitution itself, *see Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996) (recess appointment is not an “inferior” procedure to appointment with Senate confirmation); he holds the office; and he receives its pay. We therefore conclude that a designation to act would not unconstitutionally extend the tenure of a recess appointee.

Mr. Scalia’s service as Acting Solicitor would be subject to the time limits in 5 U.S.C. § 3346. Ordinarily, an acting official’s service, absent any further action, may continue for 210 days from the occurrence of the vacancy. 5 U.S.C. § 3346(a)(1). However, “[i]f a vacancy occurs during an adjournment of the Congress sine die, the 210-day period . . . shall begin on the day that the Senate first reconvenes.” *Id.* § 3346(c). If the Senate does not adjourn sine die before the House, we believe that the vacancy here would occur “during an adjournment sine die of the Congress.” The office would be filled at all times that Congress was in session, because the recess appointment would expire “at the End of [the Senate’s] . . . Session.” U.S. Const. art. II, § 2, cl. 3.

Notwithstanding the usual 210-day limit, if the President submitted a nomination for the vacant office (including a nomination of Mr. Scalia), Mr. Scalia’s service could continue as long as the nomination was pending in the Senate. *Id.* § 3346(a)(2). If the Senate rejected or returned the nomination or the President withdrew it, a new 210-day period would begin. *Id.* § 3346(b)(1). Once again, however, if the President submitted a nomination, the service could continue while the nomination was pending. *Id.* § 3346(b)(2). Rejection, return, or withdrawal of the nomination would start a final 210-day period, which would not be suspended by the President’s making another nomination. *Id.* § 3346(b)(2)(B). If any of the 210-day periods ends when the Senate is not in session, the second day on which the Senate is next in session and is receiving nominations is deemed the last day of the period. *Id.* § 3348(c).

M. EDWARD WHELAN III

*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

## Expiration of Authority of Recess Appointees

Two members of the National Labor Relations Board who received recess appointments between the first and second sessions of the 107th Congress may not continue to serve on the Board after the Senate adjourned the second session sine die.

November 22, 2002

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

You have asked whether two members of the National Labor Relations Board (“Board”) who received recess appointments between the first and second sessions of the 107th Congress may continue to serve on the Board after the Senate adjourned the second session sine die. We believe that these members may not continue to serve after that adjournment.

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. The commissions of the recess appointees in question thus expired when the Senate adjourned the second session of the 107th Congress sine die. At that point, the recess appointees no longer were members of the Board and had no authority to exercise any power of Board members. *See* Memorandum for Cindy Daub, Chairman, Copyright Royalty Tribunal, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Tenure of Recess Appointees on the Copyright Royalty Tribunal* at 8 (Nov. 24, 1993) (“1993 Opinion”).

The statute for the Board does not provide that members may hold over after their terms of office. *See* 29 U.S.C. § 153 (2000). While “it is, at the least, a grave and doubtful proposition that a recess appointee/holdover could continue to serve in an important office (possibly as a principal officer of the United States) without a presidential commission” even if Congress authorized the service, 1993 Opinion at 8, we need not reach that question here. In any event, the members may not serve past the Senate’s adjournment sine die.

The Senate’s resolution on adjournment, S. Con. Res. 160, provided that, “the House of Representatives concurring,” the Senate “stand[s] adjourned sine die.” By its terms, therefore, S. Con. Res. 160 did not become effective until the House concurred. Indeed, under a unanimous consent resolution, *see* 148 Cong. Rec. 23,429-30 (Nov. 20, 2002), the Senate was to return today, November 22, at 2:00 p.m., if the House had not acted on the resolution of adjournment by then. We understand, however, that the House did pass S. Con. Res. 160 today, and the Senate thus was in recess sine die as soon as the House acted. That time marks the end of the recess appointments at issue here.

M. EDWARD WHELAN III  
*Principal Deputy Assistant Attorney General  
Office of Legal Counsel*

## Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute a "Further Material Breach" Under U.N. Security Council Resolution 1441

False statements or omissions in Iraq's weapons of mass destruction declaration would by themselves constitute a "further material breach" of U.N. Security Council Resolution 1441.

December 7, 2002

### MEMORANDUM OPINION FOR THE COUNSEL TO THE VICE PRESIDENT\*

You have asked whether the Government of Iraq will have committed a "further material breach" of its international legal obligations, as that term is defined in paragraph 4 of United Nations ("U.N.") Security Council Resolution 1441 ("UNSCR 1441"), if it makes false statements or omissions in the declaration required by paragraph 3 of that resolution.<sup>1</sup> In paragraph 3, the Security Council required that Iraq report on all aspects of its weapons of mass destruction ("WMD") programs. Paragraph 4 finds that false statements or omissions in Iraq's paragraph 3 declaration *and* failure by Iraq to comply and cooperate with UNSCR 1441 would constitute a further material breach. We conclude that false statements or omissions by themselves represent a material breach of the Security Council resolution.

We have addressed the meaning of U.N. Security Council resolutions regarding Iraq in previous opinions. *See generally Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 135 (2002) ("Iraq Opinion"); *Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 190 (2002). As the Security Council itself has recognized, Iraq is currently in material breach of pre-existing Security Council resolutions related to its development of WMD programs, its repression of its civilian population, and its threat to international peace and security in the region. S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002). Violation of

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\* For the book edition of this memorandum opinion, some of the internet citations have been updated or replaced with citations of equivalent available printed authorities.

<sup>1</sup> You have not asked, and we do not address, what actually constitutes "false statements or omissions" under paragraph 4. Our Office has not reviewed the Iraqi declaration, which is due on December 8, 2002. We note, however, that the U.N. Security Council itself has stated that "[a]ny false statement or omission in the declaration" qualifies for purposes of paragraph 4 as "a further material breach." Press Release, Security Council, Security Council Holds Iraq in 'Material Breach' of Disarmament Obligations, Offers Final Chance to Comply, Unanimously Adopting Resolution 1441, U.N. SC/7564 (Aug. 11, 2002) ("UNSCR 1441 Press Release"), available at [www.un.org/News/Press/docs/2002/SC7564.doc.htm](http://www.un.org/News/Press/docs/2002/SC7564.doc.htm) (last visited May 10, 2012) (emphasis added).

those resolutions authorizes the United States to use force against Iraq in order to enforce the resolutions and restore international peace and security to the region. Iraq Opinion, 26 Op. O.L.C. at 153-69. As we have advised, the President (who represents the United States in its foreign affairs) may make the determination whether Iraq has committed a material breach of the U.N. Security Council resolutions regarding Iraq. *Id.* at 158-61.<sup>2</sup>

## I.

UNSCR 1441 reaffirms that the Government of Iraq is already “in material breach of its obligations under relevant resolutions.” S.C. Res. 1441, ¶ 1. It also imposes additional obligations on Iraq in order to provide it with “a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council.” *Id.* ¶ 2. Paragraph 3 of UNSCR 1441 requires Iraq to provide a new declaration disclosing all aspects of its WMD program within 30 days of its enactment. As the U.N. Security Council approved UNSCR 1441 on November 8, 2002, the Iraqi declaration of its WMD program is due by December 8, 2002.

Specifically, paragraph 3 requires Iraq to provide to the United Nations Monitoring, Verification and Inspection Commission, the International Atomic Energy Agency, and the Security Council a “currently accurate, full, and complete declaration of all aspects of its” WMD program. *Id.* ¶ 3. Paragraph 4 provides

that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution *and* failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq’s obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below.

*Id.* ¶ 4 (emphasis added).

Because of its use of the word “and,” paragraph 4 might be misconstrued by some to provide that a “further material breach” has occurred only when Iraq *both* makes false statements or omissions *and* fails to comply and cooperate with the resolution. Under such an interpretation, the word “and” conveys only a conjunctive meaning. Therefore, false statements or omissions in Iraq’s paragraph 3 declaration alone would not in itself constitute a further material breach. Rather, those false statements or omissions would have to be accompanied by some other

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<sup>2</sup> It is the responsibility of this Office, on behalf of the Attorney General, 28 C.F.R. § 0.25(a) & (e) (2002), to provide authoritative opinions for the President on all legal questions, including questions of international law. See Letter for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel (Jan. 11, 2002).

action amounting to a failure to comply with UNSCR 1441 or cooperate fully with its implementation.

## II.

In this context, an interpretation of “and” as solely conjunctive is illogical and inconsistent with the text and purpose of UNSCR 1441. It is well established that the word “and” is capable of more than one possible construction. In some contexts, “and” conveys a conjunctive meaning, under which all enumerated conditions must be satisfied before a particular result is achieved. In other contexts, however, “and” is used disjunctively, in which case any one of among two or more conditions by itself would be sufficient to trigger a particular result. Whether the word “and” conveys a conjunctive or disjunctive meaning depends on the context. In this case, examination of the context of UNSCR 1441 demonstrates clearly that paragraph 4 uses “and” in the disjunctive sense. Making false statements or omissions in Iraq’s declaration of its WMD programs, *without more*, would constitute a further material breach of Iraq’s international obligations.

### A.

Under standard approaches to legal interpretation, it has been long established that the word “and” may convey a disjunctive rather than a conjunctive meaning.<sup>3</sup> Determining which usage was intended in a particular provision requires, as always, an examination of the context in which the term appears. As the Supreme Court has explained, in order to give effect to the intention of those who drafted a text, “courts are often compelled to construe ‘or’ as meaning ‘and,’ and again ‘and’ as meaning ‘or.’” *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865). *See also Union Ins. Co. v. United States*, 73 U.S. (6 Wall.) 759, 764 (1867) (“when we look beyond the mere words to the obvious intent we cannot help seeing that the word ‘or’ must be taken conjunctively”). Such constructions are permitted to effectuate “[t]he obvious purpose” of the provision, and are appropriate when “[t]he evil intended to be remedied” is “transparent.” *Fisk*, 70 U.S. at 447. While pleading for reading “and” in its common conjunctive meaning, the most recent edition of Sutherland’s treatise on statutory construction recognizes that “[d]isjunctive ‘or’ and [c]onjunctive ‘and’ may be interpreted as substitutes.”

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<sup>3</sup> Some might object that United States cases on the disjunctive meaning of “and” are not applicable to international law. The ordinary meaning of words, purpose, and context are relevant in international legal interpretation, just as they are in American practice. As the Restatement (Third) of Foreign Relations Law explains, “an international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.” Restatement (Third) of Foreign Relations Law 325(1) (1987). *See also* Vienna Convention on the Law of Treaties, art. 31(1) (same). The reasoning of American courts in interpreting “and” is therefore relevant and persuasive with regard to how “and” should be read in light of its context.

1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 21:14, at 183-88 (6th ed. 2002).<sup>4</sup> Federal courts of appeals,<sup>5</sup> federal district courts,<sup>6</sup> and state courts<sup>7</sup> have held that the word “and” is capable of conveying a disjunctive meaning. Such constructions have been applied to wills<sup>8</sup> and contracts<sup>9</sup> as well as statutory enactments.<sup>10</sup>

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<sup>4</sup> Courts cite Sutherland’s discussion of conjunctive and disjunctive terms as authority. See, e.g., *Bruce v. First Fed. Sav. & Loan Ass’n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988); *United States v. Del Rio Springs, Inc.*, 392 F. Supp. 226, 227 (D. Ariz. 1975).

<sup>5</sup> See, e.g., *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958) (“the word ‘and’ is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings”); *Cal. Lumbermen’s Council v. FTC*, 115 F.2d 178, 185 (9th Cir. 1940) (“when the order is read as a complete article there is no question but that the acts prohibited [‘the purchase and the offering for sale’] are prohibited in the case of purchase and sale or the purchase or sale, separately or together”); *Pitcairn v. Am. Refrigerator Transit Co.*, 101 F.2d 929, 937 (8th Cir. 1939) (“‘and’ is sometimes read as ‘or’, when necessary to effectuate an apparent intent”); *Atlantic Terra Cotta Co. v. Masons’ Supply Co.*, 180 F. 332, 338 (6th Cir. 1910) (“‘and’ is frequently read as ‘or’”).

<sup>6</sup> See, e.g., *Matter of Velis*, 123 B.R. 497, 510 (D.N.J. 1991) (“The word ‘and’ is to be accorded its normal conjunctive connotation, rather than treated as a synonym for the word ‘or,’ unless such strict grammatical construction would frustrate clear legislative intent.”), *rev’d on other grounds*, 949 F.2d 78 (3rd Cir. 1991); *United States v. Mullendore*, 30 F. Supp. 13, 15 (N.D. Okla. 1939) (“the Courts have many times held that ‘and’ in a statute may be read to mean ‘or’”).

<sup>7</sup> See, e.g., *Mayer v. Cook*, 57 N.Y.S. 94, 95 (N.Y. App. Div. 1899) (“courts have construed ‘and’ as ‘or’”).

<sup>8</sup> See, e.g., *Polsky v. Cont’l Nat’l Bank of Lincoln*, 110 F.2d 50, 57 (8th Cir. 1940) (“The word ‘and’ may sometimes be substituted for the word ‘or,’ and vice versa, even in the construction of a will, where that is necessary to carry out the manifest intention of the testator.”).

<sup>9</sup> See, e.g., *In re Knepp*, 229 B.R. 821, 847 (Bankr. N.D. Ala. 1999) (“It is a general rule of contract construction that ‘and’ can be read as ‘or’ and vice-versa under certain conditions. The words should not be treated as interchangeable when their accurate and literal reading does not render the sense dubious. . . . [T]he intent of the parties must determine whether the Court chooses to adopt this construction.”) (citations and quotations omitted).

<sup>10</sup> Courts have given varying degrees of presumptive weight to the standard usage of “and” in its conjunctive sense. Compare, e.g., *Bruce*, 837 F.2d at 715 (“The word ‘and’ is . . . to be accepted for its conjunctive connotation rather than as a word interchangeable with ‘or’ except where strict grammatical construction will frustrate clear legislative intent.”), *Peacock*, 252 F.2d at 893 n.1 (“The words ‘and’ and ‘or’ when used in a statute are convertible, as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes, when the evident intention of the lawmaker requires it.”), and *Rice v. United States*, 53 F. 910, 912 (8th Cir. 1893) (“Undoubtedly ‘and’ is not always to be taken conjunctively. It is sometimes read as if it were ‘or,’ and taken disjunctively and distributively, but this is only done where that reading is necessary to give effect to the intention of the legislature, as plainly expressed in other parts of the act, or deducible therefrom.”), with *Geyer v. Bookwalter*, 193 F. Supp. 57, 62 (W.D. Mo. 1961) (“In order to effectuate the intention of this testator, the word ‘and’ is to be construed to mean ‘or.’”), and *United States v. Cumbee*, 84 F. Supp. 390, 391 (D. Minn. 1949) (construing statute “in the light of the purpose and history of the provision of which it is a part and the statutes to which it applies” to “give ‘and’ the meaning of ‘or’”); see also 1A C. Dallas Sands, *Sutherland on Statutes and Statutory Construction* § 21:14, at 90-91 (4th ed. 1972) (“the words are interchangeable . . . one may be substituted for the other, if to do so consistent with the legislative intent”) (quoted in *Del Rio Springs*, 392 F. Supp. at 227).

## B.

The text and purpose of UNSCR 1441 unequivocally demonstrate that giving conjunctive meaning to the word “and” in paragraph 4 would be illogical and would frustrate the clear intent of the U.N. Security Council. Indeed, in a press release announcing its unanimous approval of UNSCR 1441, the Security Council stated that “[a]ny false statement or omission in the declaration will be considered a further material breach of Iraq’s obligations.” UNSCR 1441 Press Release, *supra* note 1. In light of “[t]he obvious purpose” of paragraph 4, *Fisk*, 70 U.S. at 447, we would likewise read the term “and” disjunctively and conclude that Iraq will be in “further material breach of [its] obligations” if it makes “false statements or omissions in the declarations submitted . . . pursuant to [paragraph 3 of] this resolution.” S.C. Res. 1441, ¶ 4.

A conjunctive approach to paragraph 4, taken to its logical conclusion, is both untenable and impossible to reconcile with either the text or purpose of the resolution. Under a conjunctive construction, the Government of Iraq would not be in “further material breach of [its] obligations” unless it *both* (1) makes “false statements or omissions in [its] declarations” and (2) “fail[s] . . . to comply with, and cooperate fully in the implementation of, this resolution.” S.C. Res. 1441, ¶ 4. In other words, Iraq could avoid a finding of “further material breach” simply by making a completely truthful and accurate declaration. Iraq could willfully refuse inspections and even engage in military hostilities against U.N. inspectors and the U.S. and allied forces protecting them. Under a conjunctive reading of “and,” Iraq could make a full disclosure of its existing WMD programs, and then refuse to disarm and instead re-double its illegal efforts to obtain such weapons and yet still not be in “further material breach of [its] obligations” to the Security Council. Or a material breach would not occur if Iraq fully cooperated with U.N. inspectors, but utterly failed to provide any disclosure of information related to its WMD programs.

Such a result cannot be squared with the text of UNSCR 1441. Paragraph 5 and subsequent provisions of UNSCR 1441 detail Iraq’s specific obligations with respect to inspections and disarmament. Iraqi violations of these provisions, such as refusing to allow inspectors into Iraq, or harming inspectors, or concealing WMD locations and materials, would constitute a material breach of its obligations under UNSCR 1441. Yet, under the conjunctive construction, the most willful violations of its inspection obligations would not constitute a “further material breach” so long as Iraq has not made false statements or omissions in its paragraph 3 declaration. Under the conjunctive approach, once Iraq satisfied its declaration obligations under paragraph 3 and refrained from making “false statements or omissions” in that declaration, Iraq would *never* be vulnerable to a finding of “further material breach of Iraq’s obligations.” Such a construction of

the resolution would render most of UNSCR 1441 a nullity. Only by reading “and” in paragraph 4 as disjunctive can we give effect to all of UNSCR 1441.

Reading “and” to be conjunctive would also conflict with the very purpose of UNSCR 1441. The text of the resolution makes clear that its fundamental purpose is to disarm Iraq of WMD. Honest declarations and full and complete access for inspectors are merely a means required to meet an end. UNSCR 1441 expressly states that, although Iraq already “has been and remains in material breach of its obligations” under prior U.N. Security Council resolutions, the Council would “afford Iraq . . . a final opportunity to comply with its *disarmament obligations*.” S.C. Res. 1441, ¶¶ 1-2 (emphasis added). The resolution specifically notes that the declaration requirements of paragraph 3 are not an end in themselves, but that they are imposed so that Iraq might “begin to comply with its disarmament obligations.” *Id.* ¶ 3. Paragraph 3’s mandate of a “currently accurate, full, and complete declaration” is the “begin[ning],” and thus the *sine qua non*, of disarmament. *Id.* ¶¶ 3-4. In light of the resolution’s clear purpose to achieve the disarmament of Iraq, a construction of paragraph 4 that allows Iraq to refuse to disarm and still avoid a finding of “further material breach” would be at odds with the text and structure of UNSCR 1441.

Events surrounding the passage of UNSCR 1441 further demonstrate that the core purpose of the resolution is to secure Iraqi disarmament. On October 25, 2002, President Bush made clear that the United States would not accept any Security Council resolution that did not make disarmament its paramount objective. He stated that “any resolution that evolves must be one which does the job of holding Saddam Hussein to account. That includes a rigorous, new and vibrant inspections regime, *the purpose of which is disarmament, not inspections for the sake of inspections.*”<sup>11</sup> After the Council approved UNSCR 1441, President Bush stated that, “[w]ith the resolution just passed, . . . Saddam Hussein must fully disclose *and* destroy his weapons of mass destruction. . . . Any act of delay or defiance will be an additional breach of Iraq’s international obligations. . . . Any Iraqi noncompliance . . . will show that Iraq has no intention of disarming.”<sup>12</sup> In its press release announcing its unanimous approval of UNSCR 1441, the Security Council reiterated that the resolution merely “afford[ed]” Iraq “a ‘final opportunity to comply’ with its disarmament obligations.” UNSCR 1441 Press Release, *supra* note 1. That announcement also quotes U.N. Secretary-General Kofi Annan, who applauded the resolution and said that “[t]he goal is to ensure the peaceful disarmament of Iraq in compliance with Council resolutions and a better, more secure future for its people.” *Id.* John Negroponte, the United States ambassador to

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<sup>11</sup> The President’s News Conference with President Jiang Zemin of China in Crawford, Texas, 2 *Pub. Papers of Pres. George W. Bush* 1897, 1900 (Oct. 25, 2002) (emphasis added).

<sup>12</sup> Remarks on the Passage of a United Nations Security Council Resolution on Iraq, 2 *Pub. Papers of Pres. George W. Bush* 2053, 2053 (Nov. 8, 2002) (emphasis added).



the United Nations, said that “the resolution constituted the world community’s demand that Iraq disclose and destroy its weapons of mass destruction. The new course in that effort would send a clear message to Iraq insisting it *disarm or face the consequences*.” *Id.* (emphasis added). These remarks demonstrate that Iraq’s fundamental obligation is disarmament, and that honest declarations by themselves cannot immunize Iraq from a finding that it has committed a “further material breach of [its] obligations.”

Representatives from the other member nations of the Security Council have made similar statements. For example, United Kingdom representative Jeremy Greenstock said that “[t]he resolution made crystal clear that Iraq was being given a final opportunity to comply with its disarmament obligations. The regime in Baghdad now faced an unequivocal choice: between complete disarmament and the serious consequences indicated in paragraph 13 of the resolution.” *Id.* The Mexican delegate, Adolpho Aguilar Zinser, maintained that, “[i]n case of failure to comply, the Council would act”—apparently without regard to whether Iraq had given an accurate declaration free of any false statements or omissions. *Id.* Richard Ryan of Ireland explained that “[t]he resolution was about disarming Iraq,” and that “[t]he Council had given Iraq an opportunity to comply with its disarmament obligations.” *Id.* Bulgaria’s Stefan Tafrov similarly noted that the resolution’s “objective” was “the disarmament of Iraq.” *Id.* Ole Peter Kolby of Norway acknowledged “the overall objective of disarming Iraq of weapons of mass destruction” and that “the Council had afforded Iraq with a final opportunity to comply with its disarmament obligations.” *Id.* The President of the Council, Zhang Yishan of China, stated that “[t]he purpose” of the resolution “was to disarm Iraq.” *Id.* Even the Russian delegate, Sergey Lavrov, who contended that “it would not be seen as a violation if” Iraq took “more than 30 days” to issue its paragraph 3 declaration, nevertheless “emphasized the need for Iraq to comply with *all* its disarmaments obligations on the basis of today’s resolution.” *Id.* (emphasis added).

We have found no evidence, moreover, to suggest that any member nation of the Security Council believed that noncompliance with inspections or Iraqi refusal to disarm would not constitute a “further material breach” under UNSCR 1441, so long as Iraq provided a complete and accurate disclosure of its WMD program. In light of the apparent consensus that Iraq’s fundamental obligation was disarmament, it is unsurprising that no pre-enactment history adopts a conjunctive approach to paragraph 4 or asserts that honest declarations by themselves could prevent a finding of “further material breach of Iraq’s obligations.”

### III.

In conclusion, should Iraq make false statements or omissions in its paragraph 3 declaration, Iraq would necessarily be in “further material breach of [its] obliga-

tions.” False statements or omissions alone are enough to constitute “further material breach” as that term is defined in paragraph 4. An additional showing of noncompliance and noncooperation with the resolution is not required, because the word “and” in paragraph 4 has a disjunctive, rather than a conjunctive, meaning.

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## **Duty to File Public Financial Disclosure Report**

A member of a commission in the Executive Branch need not file a public financial disclosure report in circumstances where the employee's salary is set by administrative action within a range specified by statute, is below the statutory salary threshold for such reports, but could have been set at a level making a public report necessary.

The financial disclosure obligations of Legislative Branch officials should be construed similarly, because the statutory language applicable to officials in the Executive Branch is, in relevant part, identical to that applicable to officials in the Legislative Branch.

December 19, 2002

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

You have asked for our opinion whether an employee in the Executive Branch, by virtue of his salary, must file a public financial disclosure report. You have asked us to assume that the employee's salary is set by administrative action within a range specified by statute, is below the statutory salary threshold for such reports, but could have been set at a level making a public report necessary. We believe that, in such circumstances, no public report is required. We further believe that the financial disclosure obligations of Legislative Branch officials should be construed similarly, because the statutory language applicable to officials in the Executive Branch is, in relevant part, identical to that applicable to officials in the Legislative Branch. The present opinion confirms our oral advice.

#### **I.**

You have asked us to consider what rules as to salary thresholds would apply to members of a commission in the Executive Branch whose salaries were to be set as follows:

[e]ach member of the Commission may be compensated at not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day during which that member is engaged in the actual performance of the duties of the Commission.

The Ethics in Government Act of 1978 requires the filing of a public financial disclosure report by, among others,

each officer or employee in the executive branch . . . who occupies a position . . . , in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent

of the minimum rate of basic pay payable for GS-15 of the General Schedule.

5 U.S.C. app. 4 § 101(f)(3) (2000). *See also* 5 C.F.R. § 2634.202(c) (2002) (positions “the rate of basic pay for which is fixed . . . at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15”). At present, the current minimum rate of basic pay for GS-15 is \$82,580, and 120 percent of that rate would be just under \$99,100. The maximum salary that could be set for a member of the Commission is the rate for level IV of the Executive Schedule, currently \$130,000.

We address only public financial disclosure requirements. Employees who are not required to file public disclosures may have to file confidential forms. *See* 5 C.F.R. § 2634.904 (2002).

## II.

The Executive Branch has taken two approaches to determining whether “the rate of basic pay [for a position] is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule.” The position about which you ask would not qualify under either approach.

The first approach is illustrated by the application of the financial disclosure requirements to Assistant United States Attorneys, whose salaries are set under a statute that is nearly identical to the provision you have asked us to consider. Under 28 U.S.C. § 548 (2000), the Attorney General “shall fix the annual salary” of Assistant United States Attorneys and certain other officials “at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.” We are informed that Assistant United States Attorneys file public financial disclosure reports if their pay exceeds the threshold. The evident rationale is that the position does not have a “rate of basic pay” until one is set administratively. Thus, Assistant United States Attorneys do not all escape the filing requirement because the statute would permit setting their pay at zero, and, conversely, it is not the case that, because the statute calls for a salary “not to exceed” a level at which a public financial disclosure report would be required, every Assistant United States Attorney must file a public report. *See* United States Attorneys’ Manual § 1-4.200 (2002).<sup>1</sup>

Under the second approach, where the salary of individual employees is set administratively within a statutory range that is not divided by grades or steps, the

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<sup>1</sup> We have confirmed with the Departmental Ethics Office that those Assistant United States Attorneys whose pay exceeds the threshold file public forms and those whose pay is below do not. We are further informed that the pay of supervisory Assistant United States Attorneys is intentionally set above the threshold to ensure that they file.

Office of Government Ethics (“OGE”) has interpreted the “rate of basic pay” to be the lowest level of that range. *Senior Employees; Post-Government Employment Restrictions; Public Financial Disclosure Requirement*, Informal Advisory Op. 98x2 (Feb. 11, 1998), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited Aug. 5, 2012) (“1998 Opinion”). In the 1998 Opinion, OGE was asked about a component in an agency whose employees’ pay was “determined by the Secretary, in an amount not less than the minimum rate payable for GS-15 nor more than the rate payable for level I of the Executive Schedule.” *Id.* at 1. Under the implementing regulations, “no established pay grades or steps exist[ed] within those parameters, but instead the system ha[d] a single, flexible pay range,” and “[e]ach employee’s actual pay [was] individually determined by the Secretary or her designee, based on factors in the regulation, and that amount [could] be periodically adjusted.” *Id.* OGE held that, for purposes of financial disclosure requirements, the “rate of basic pay” in these circumstances “means the lowest step or entry level pay authorized for a particular pay grade or range.” *Id.* at 3. Thus, because the pay of employees in question could be as low as GS-15, “which will always be less than the statutory pay threshold for requiring public financial disclosure reports (120 per cent of the minimum rate payable for GS-15), [these employees were] not required by 5 U.S.C. app., 101(f)(3) to file such reports.” *Id.* (footnote omitted). OGE recognized that, as a result, “some . . . employees who receive relatively high amounts of pay would not be required to file,” *id.*, but that “[i]t would be up to Congress to amend the financial disclosure statute, if they intended a different result.” *Id.*

Here, the pay of a member of the commission could be set as low as zero, and there are no grades or steps within the range from zero to the highest possible salary at executive level IV. Therefore, if the 1998 Opinion were followed, members would not file public disclosure forms under the salary provisions.

It might be possible to reconcile these two approaches. Arguably, the concept of a salary “grade” makes no sense when the range begins at no salary at all, and only the first approach would fit the present case. But we need not try here to reconcile these two approaches. Under either one, the salary threshold would not be met by a member of the Commission making less than \$99,100.<sup>2</sup>

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<sup>2</sup> We do not address any other ground on which an Executive Branch employee might be required to file a public disclosure form, including particularly an exercise of the discretionary authority of the Director of OGE to declare that a position is of “equal classification” to positions above the salary threshold. See Office of Government Ethics, *Public Financial Disclosure Positions and Equal Classification Process*, Informal Advisory Op. 85x7 (May 20, 1985), available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/> (last visited Aug. 7, 2012) (employees are of “equal classification” to covered employees because their responsibilities are equivalent to those of employees in the Senior Executive Service); Memorandum for Kevin D. Rooney, Assistant Attorney General for Administration, and Philip H. Modlin, Deputy Associate Attorney General, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Filing of Public Disclosure Reports by Presidential Appointees in the Department* (Aug. 8, 1979) (finding of “equal classification”

### III.

We note that the language applicable to officials in the Executive Branch is, in relevant part, identical to the language defining those “officer[s] or employee[s] of the Congress” required to file public forms (leaving aside the additional category of principal assistants for Members of Congress who have no employees above the salary threshold). *See* 5 U.S.C. app. 4 §§ 101(f)(10), 109(13)(A), (B).<sup>3</sup> We therefore believe that the language ought to be construed to have the same meaning. *See Dep’t of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (“identical words used in different parts of the same act are intended to have the same meaning”) (citations and internal quotations omitted). In light of the Attorney General’s responsibility for enforcing the financial disclosure requirements for both Legislative Branch and Executive Branch officials, *see* 5 U.S.C. app. 4 § 104(a) (Attorney General may bring a civil penalty action for knowing and willful failure to file a report), it would be particularly anomalous for two provisions of the same act, having identical language, to be subject to different constructions.

A memorandum by the Congressional Research Service (“CRS”) appears to offer a view contrary to ours. Memorandum for the Senate Committee on Governmental Affairs, from Jack Maskell, Cong. Research Serv., *Re: Financial Disclosure Requirements of Persons Appointed to a Federal Commission* (Dec. 4, 2002) (“CRS Memorandum”). Noting that members of the National Commission on Terrorist Attacks Upon the United States (“Commission”) may be compensated

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could be made for United States Marshals). Unlike employees in the Executive Branch, Legislative Branch employees are not subject to discretionary determinations based upon the “equal classification” of their positions. *See* 5 U.S.C. app. 4 § 109(13).

<sup>3</sup> As originally enacted, the Ethics in Government Act used very similar, but not identical, language to specify the salary levels at which a public disclosure filing was required. The 1978 Act defined a covered officer or employee of the Legislative Branch to include “each officer or employee of the legislative branch who is compensated at a rate equal to or in excess of the annual rate of basic pay in effect for grade GS-16 of the General Schedule[.]” Pub. L. No. 95-521, § 101(e)(1). The Executive Branch officers and employees required to file a public report included “each officer or employee in the executive branch . . . whose position is classified at GS-16 or above of the General Schedule prescribed by 5332 of title 5, United States Code, or the rate of basic pay for which is fixed (other than under the General Schedule) at a rate equal to or greater than the minimum rate of basic pay fixed for GS-16[.]” *Id.* § 201(f)(3). In 1992, Congress amended section 201(f)(3) to read as it does today—“who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for the GS-15 of the General Schedule.” Pub. L. No. 102-378, § 4(a)(1)(A). In that same act, Congress also amended the definition of employees and officers of Congress, substituting “each officer or employee of the legislative branch who, for at least 60 days, occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule” for “each officer or employee of the legislative branch who is compensated at a rate equal to or in excess of the annual rate of basic pay in effect for grade GS-16 of the General Schedule[.]” Pub. L. No. 102-378, § 4(a)(2)(B).

at a level making a public report necessary, CRS states that “[a]n incumbent in or entrant into such a covered position might arguably be able to waive compensation, or agree to a lesser amount of compensation, but it is not clear whether such action would then exempt such incumbent from the disclosure requirements, since the *position* itself is one which is statutorily entitled to receive a rate of pay above the threshold amount.” *Id.* at 3 (original emphasis). The CRS Memorandum cites, in support of this suggestion, the Office of Government Ethics’ guidance that Executive Branch officials, if detailed into covered positions, must file financial disclosure reports. *Id.* at 3 & n.11 (citing Office of Government Ethics, *Public Financial Disclosure: A Reviewer’s Reference* 2-7 (1994)).

The CRS Memorandum mistakenly assumes that when a position, by statute, has a “rate of basic pay” above the threshold, an employee may agree to accept a lesser amount. But “[a] federal office holder cannot legally waive a salary fixed by law.” *Dual Office Compensation*, 2 Op. O.L.C. 368, 368 (1977) (citing *Glavey v. United States*, 182 U.S. 595 (1901)) (footnote omitted). A member of the Commission receiving less than the maximum rate would not be “waiv[ing]” compensation or “agree[ing] to a lesser amount” than set by statute. The CRS Memorandum rests on the view that the “rate of basic pay” is the highest amount that a Commission member could be paid, but that view is without foundation. Whether the rate of pay is taken to be the lowest pay of the “grade” or the amount set administratively, the “rate of basic pay” in the present circumstances would be below the threshold.<sup>4</sup>

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*Office of Legal Counsel*

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<sup>4</sup> It makes no difference that a member of the Commission may have a greater power than other officers or employees to choose the level of his pay. Because the member cannot waive his salary, it cannot be concluded that the amount he receives (even if he helped to determine that amount) is less than his “rate of basic pay.”

## Under Secretary of the Treasury for Enforcement

The President does not have a legal duty to make a nomination for Under Secretary of the Treasury for Enforcement.

If the President does not make a nomination, the Secretary of the Treasury could perform the duties himself or assign them to another official of his department.

December 19, 2002

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

You have asked for our opinion whether the President has a legal duty to make a nomination for Under Secretary of the Treasury for Enforcement. We believe that he does not. You have further asked how, if the President does not make a nomination, the duties of the office may be discharged. We believe that the Secretary of the Treasury (“Secretary”) could perform the duties himself or assign them to another official of his department.

#### I.

Under 31 U.S.C. § 301(d) (2000), the Department of the Treasury “has . . . an Under Secretary for Enforcement . . . appointed by the President, by and with the advice and consent of the Senate.” At present, this Under Secretary supervises the Bureau of Alcohol, Tobacco, and Firearms, but the recently enacted Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), which will become effective January 24, 2003, *id.* § 4, 116 Stat. at 2142, will largely transfer that bureau to the Department of Justice. *Id.* § 1111(c). The Treasury Department will retain only the bureau’s administration and revenue collection functions, which will be performed by a newly created Tax and Trade Bureau. *Id.* § 1111(d). The Tax and Trade Bureau is to be headed by an Administrator, “who shall perform such duties as assigned by the Under Secretary for Enforcement of the Department of the Treasury.” *Id.* § 1111(d)(2). In addition to assigning these duties, the Under Secretary for Enforcement implicitly will have one other statutory responsibility: to receive advice and recommendations from the Director of the Financial Crimes Enforcement Network about “matters relating to financial intelligence, financial criminal activities, and other financial activities.” 31 U.S.C.A. § 310(b)(2)(A) (West, Supp. 2002).

In view of the highly limited statutory duties that the Under Secretary for Enforcement will exercise after the Homeland Security Act takes effect, you have raised the possibility that the President might not wish to fill the next vacancy in that office.



## II.

Our opinions do not definitively resolve whether, in these circumstances, the President has a legal duty to make a nomination. Some statutes provide that the President “shall” nominate and, with the Senate’s advice and consent, appoint a particular officer, and these statutes may be understood to require the President to make a nomination within a reasonable time. See Memorandum [for the Acting Attorney General], from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the 30-Day Vacancies Act Time Limit to Your Tenure as Acting Attorney General* at 29-30 (Dec. 7, 1973) (the statute providing for appointment of the Attorney General and the President’s constitutional responsibilities “create a legal duty—and not merely political pressure—to submit a nomination within a reasonable time after the vacancy occurred”); see also Memorandum for the Attorney General, from Golden W. Bell, Assistant Solicitor General, *Re: Vacancy in the Office of Attorney General*, 8 Unpub. Op. A.S.G. 1538, 1540 (Dec. 5, 1938). But see Letter for the President, from Homer Cummings, Attorney General, 2 Unpub. Op. A.S.G. 447 (Jan. 24, 1934).<sup>1</sup> Other statutes provide that the President “may” make nominations and appointments. See, e.g., 28 U.S.C. § 504 (2000) (Deputy Attorney General). By their plain terms, these other statutes give the President the discretion to leave the offices unfilled.

Here, the language of the statute is that the Treasury Department “has” an Under Secretary for Enforcement. 31 U.S.C. § 301(d). This language appears to describe, rather than prescribe, the make-up of the Department. Along these lines, the Senate Committee on Appropriations’ Explanatory Statement on the Emergency Supplemental Appropriations Act of 1994, the bill that enacted the language, observed that the provision would “*permit* the President to nominate, with the advice and consent of the Senate, a third Under Secretary of the Treasury.” 140 Cong. Rec. 2031 (1994) (emphasis added).<sup>2</sup> At the least, Congress imposed no clear obligation upon the President to make a nomination, and we would not read

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<sup>1</sup> In other instances, we have more generally identified a duty to submit a nomination when an official is “acting” in an office and thus when failure to make a nomination within a reasonable time might undercut the Senate’s role of advice and consent. See, e.g., *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 290 (1977); Memorandum for the Attorney General, from Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Acting Designation* (Dec. 12, 1997); see also Letter for the President, from Homer Cummings, Attorney General, 6 Unpub. Op. A.S.G. 756 (Sept. 24, 1936); *Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the Senate Comm. On Governmental Affairs*, 105 Cong. 138, 148 (1998) (statement of Joseph N. Onek, Principal Deputy Associate Attorney General, and Daniel Koffsky, Special Counsel, Office of Legal Counsel).

<sup>2</sup> Congress in 1993 directed that “[n]otwithstanding any other provision of law, the Secretary of the Treasury shall establish an Office of the Undersecretary for Enforcement within the Department of the Treasury by no later than February 15, 1994.” Pub. L. No. 103-123, § 105, 107 Stat. 1226, 1234 (1993). Congress enacted the current language of 31 U.S.C. § 301(d) in 1994. Neither of these enactments answers the question whether Congress has required the filling of the office to be established.

one into the statute: “When Congress decides purposefully to enact legislation restricting *or regulating* presidential action, it must make its intent clear.” *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (emphasis added).

To be sure, 31 U.S.C. § 301 also provides that “[t]he President may appoint, by and with the advice and consent of the Senate, an Assistant General Counsel who shall be the Chief Counsel for the Internal Revenue Service,” 31 U.S.C. § 301(f)(2), and the use of “may” in this provision arguably suggests that, in contrast, the “has . . . an Under Secretary for Enforcement” language was intended to impose a duty on the President to fill the office of Under Secretary for Enforcement. *See 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.”) (internal quotation marks omitted). But this possible inference hardly makes “clear” that Congress intended to fix a duty upon the President. *Armstrong*, 924 F.2d at 289. Indeed, the provision on the Chief Counsel continues: “The Chief Counsel is the chief law officer for the Service and shall carry out duties and powers prescribed by the Secretary.” 31 U.S.C. § 301(f)(2). As this additional language shows, section 301 does not invariably use the present tense of verbs (“has” or “is”) to refer to offices that necessarily will be filled, and no inference should be drawn from the use of the words “has . . . an Under Secretary for Enforcement” rather than some variation of the “may appoint” formulation.

### III.

If the President leaves the office unfilled, the remaining duties of the office must be carried out by some other official. As noted above, the Under Secretary for Enforcement assigns duties to the Tax and Trade Bureau and receives advice and recommendations from the Director of the Financial Crimes Enforcement Network. Absent new legislation, there are, we believe, two basic ways in which these responsibilities could be performed.

First, the Secretary himself could assign duties to the Tax and Trade Bureau and receive the reports from the Director of the Financial Crimes Enforcement Network. Under 31 U.S.C. § 321(c) (2000), “[d]uties and powers of officers and employees of the Department are vested in the Secretary,” with some express exceptions not relevant here. The Secretary, therefore, could carry out these duties. Interpreting similar language applicable to the Attorney General, 28 U.S.C. § 509 (2000), we have concluded that the provision sets up a “general standing rule that all functions performed by officers in the Department of Justice are vested ultimately in the Attorney General and may be performed by him.” Memorandum for the Deputy Attorney General, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Attorney General Over the*

*National Institute of Justice and the Bureau of Justice Statistics* at 2 (Oct. 14, 1980) (“1980 Opinion”). We would find a similar “general standing rule” under 31 U.S.C. § 321(c). Although this “standing rule” may be overcome when, for example, there is a “specific and explicit reservation of ‘final’ decisionmaking power” in a subordinate official, 1980 Opinion at 2, no such reservation or other limit applies to the duties of the Under Secretary for Enforcement. *See also, e.g., Vacancy Act (5 U.S.C. § 3345-3349)—Law Enforcement Assistance Administration*, 2 Op. O.L.C. 72, 74 (1978) (the functions of the Law Enforcement Assistance Administration, unlike “most of the components of the Department,” were not “completely vested in the Attorney General,” although the Attorney General had supervisory power). Accordingly, the Secretary himself could perform those duties.

Second, we believe that the Secretary could exercise his power under 31 U.S.C. § 321(b)(2) to “delegate [his] duties and powers . . . to another officer or employee of the Department of the Treasury.” With 31 U.S.C. § 321(c) having vested in the Secretary the duties of the Under Secretary for Enforcement, section 321(b)(2) would allow the Secretary to assign those duties to another officer or employee of the Treasury Department. Once again, we have recognized the lawfulness of similar arrangements under the statutes governing the Department of Justice. *See Memorandum for the Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, and Rosemary Hart, Senior Counsel, Office of Legal Counsel, Re: Granting Special Deputy United States Marshal Status to Private Security Guards* at 3 n.1 (Oct. 30, 2001) (function of the Marshals Service is vested in the Attorney General and delegated to the Deputy Attorney General).

We can identify no bar to the exercise of this authority in the present case. Although Congress may restrict the transfers of particular authorities to particular components, *see, e.g., 5 U.S.C. app. 3, § 9(a)(2)* (2000) (ordinarily barring the transfer of “program operating responsibilities” to an Inspector General), no such restriction appears applicable here. Further, under the Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d (2000), if a statute or regulation provided that *only* the Under Secretary of Enforcement could perform a particular responsibility, and if that position became vacant, only the Secretary of the Treasury himself or an Acting Under Secretary for Enforcement could perform that function or duty. *See 5 U.S.C. § 3348(a)(2), (b)*. Here, however, the statutes do not require the Under Secretary for Enforcement personally to carry out the assigned duties, rather than delegating them; we have found no codified regulation requiring such personal action, *see 31 C.F.R. §§ 1.1, 1.20* (2002); and we are informed by your office that there are no such uncodified regulations or orders. We therefore believe that the

Vacancies Reform Act would not preclude the Secretary from delegating the duties in question to another official of the Department.<sup>3</sup>

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<sup>3</sup> We do not intend here to set out a comprehensive list of all the kinds of restrictions that might apply to any transfer of authority within the Department of the Treasury, but confine ourselves to the present case. We also note that we do not address any provisions governing the transfer of funds necessary to effect a transfer of responsibilities. *See, e.g.*, 31 U.S.C. § 321(b)(3) (the Secretary “may transfer within the Department the records, property, officers, employees, and unexpended balances of appropriations, allocations, and amounts of the Department that the Secretary considers necessary to carry out a delegation” under section 301(b)(2)).

## Legality of Fixed-Price Intergovernmental Agreements for Detention Services

The Department of Justice has authority to enter Intergovernmental Agreements with state or local governments to provide for the detention of federal prisoners and detainees on a fixed-price basis and is not limited to providing compensation for costs under such agreements.

December 31, 2002

### MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Your Office has asked us to advise whether the Department of Justice (“Department”), in entering into so-called Intergovernmental Agreements, or IGAs, under which state or local governments provide for the detention of federal detainees, may agree to a fixed price for detention services. For the reasons set forth below, we conclude that the Department may do so.

#### I.

The U.S. Marshals Service (“USMS”) and the Immigration and Naturalization Service (“INS”) frequently enter into IGAs with state and local governments for the detention of persons in connection with federal criminal and immigration proceedings. These IGAs have typically set compensation for these services at the cost actually incurred by the provider, as determined pursuant to OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments (rev. May 4, 1995, as further amended Aug. 29, 1997). The Department’s Office of the Detention Trustee, which is responsible for directing USMS and INS on detention operations, Pub. L. 106-553, app. B, 114 Stat. 2762A-52 (2000), recommends that the Department consider using fixed-price IGAs in the future in certain circumstances. Under a fixed-price arrangement, the price for detention services would not be based solely on the provider’s costs and would not be subject to ongoing or retroactive adjustment to reflect costs actually incurred. Instead, the price would be set at a fair and reasonable level at the time the IGA was executed. This fixed price might be above or below the provider’s expected or actual costs.

The Department’s Office of the Inspector General (“OIG”) maintains that the Department lacks legal authority to enter into fixed-price IGAs for detention services. It argues both that the Department has no statutory authority to enter into such agreements and that such agreements violate OMB Circular A-87.<sup>1</sup>

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<sup>1</sup> See Memorandum for the Deputy Attorney General, from Glenn A. Fine, Inspector General, *Re: Procurement of Detention Services* (March 12, 2002) (“OIG Memorandum I”); Memorandum for Larry D. Thompson, Deputy Attorney General, from Glenn A. Fine, Inspector General, *Re: OIG Comments on August 1, 2002 Memorandum from Federal Detention Trustee* (Sept. 18, 2002) (“OIG Memorandum II”).

## II.

We first consider whether the Department has statutory authority to enter into fixed-price detention IGAs. Section 119 of Public Law 106-553 provides:

*Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.*

114 Stat. 2762A-69 (2000) (emphasis added).

Although Public Law 106-553 was an annual appropriations act, section 119 is clearly earmarked as permanent legislation by its use of the term “hereafter,” a term that is regularly used by Congress to specify that particular sections of an appropriations act constitute permanent legislation. *See, e.g., United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *Cella v. United States*, 208 F.2d 783, 790 (7th Cir.1953) (“The use of the word ‘hereafter’ by Congress as a method of making legislation permanent is a well-known practice.”); *Permanency of Limitation on Interstate Commerce Commission’s Approval of Railroad Branchline Abandonments Contained in 1982 Appropriation Act*, 70 Comp. Gen. 351, 353 (1991).

### A.

Section 119 grants the Attorney General permanent authority to enter into contracts “of any reasonable duration” for the use of detention facilities and related services “on any reasonable basis.” The concluding phrase “on any reasonable basis,” interpreted within the ordinary meaning of those terms, appears to encompass all pertinent terms (including price terms) that would be reasonable to include in an agreement of the kind described. Because a fixed-price term is plainly reasonable, section 119 therefore appears to confer authority on the Attorney General to enter into fixed-price detention IGAs.

OIG disputes this interpretation. Relying on its understanding of the legislative history of section 119, OIG argues that the phrase “on any reasonable basis” is “shorthand” for a phrase—“to acquire such space or facilities on a lease-to-ownership, lease-with-option to purchase, or other reasonable basis”—that OIG says was proposed by the Department as substitute language for an earlier version of what became section 119. *See* OIG Memorandum II, *supra* note 1, at 4 & attach. F. OIG further states: “There is no suggestion in any of the Department’s communications [to Congress] that the Department sought this provision for the purpose of entering into . . . agreements with state and local governments on a basis other than cost.” *Id.* at 4.

Initially, we question whether resort to legislative history is appropriate to determine the meaning of the phrase “on any reasonable basis.” As a general proposition, resort to legislative history is inappropriate when the terms of a statute are unambiguous. *See, e.g., Barnhill v. Johnson*, 503 U.S. 393, 401 (1992). In context, we believe that the ordinary, and only natural, reading of the phrase “on any reasonable basis” is that it encompasses all the terms and provisions, including price, that ordinarily make up a contract.

But even if we were to entertain legislative history, the Department proposals recounted by OIG in support of its interpretation of the phrase “on any reasonable basis” do not constitute reliable evidence of Congress’s intent in enacting section 119. Even on the assumption that the Department communicated such proposals to congressional staff, there is no reliable indication that these proposals were actually communicated to, or seen by, any Members of Congress, let alone the responsible committee chairmen, floor managers, or members of the Conference Committee. Nor is there any indication in the Conference Report on Public Law 106-553 that the Department proposals in question were considered by, or had any influence upon, the Conference Committee which introduced and adopted the language of section 119. Consequently, it is highly doubtful that the Department proposals recounted by OIG even qualify as legislative history. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 579 (1995) (“Material not available to the lawmakers is not considered, in the normal course, to be legislative history.”); *id.* at 580 (“If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating.”)

In any event, even if the proposals in question could be viewed as legislative history, the contents of an executive department’s communications proposing statutory language narrower than that which Congress enacted simply do not provide evidence that Congress intended the narrower objective sought by that executive department. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (“Executive statements and letters addressed to congressional committees” do not provide “a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us.”). If anything, they tend to support the view that Congress *deliberately* chose the broader language that was in fact enacted, because a specific proposal for a narrower provision was demonstrably available and yet rejected. While the materials cited by OIG may establish the *executive department’s* intent in proposing legislation, they fail to provide reliable evidence of *Congress’s* intent in enacting legislation that is different from what the executive department proposed.

Thus, we disagree with OIG’s contention that the broad phrase “on any reasonable basis” should be construed as “shorthand for the term ‘to acquire such space of facilities on a lease-to-ownership, lease-with-option to purchase, or other reasonable basis.’” OIG Memorandum II, *supra* note 1, at 4. We cannot read this ordinary phrase to carry this coded meaning. If Congress somehow intended such

meaning (and we see no reason to think that it did), it was obligated to say so.<sup>2</sup> We instead conclude that the phrase “on any reasonable basis” has its ordinary meaning and that section 119 therefore authorizes the Attorney General to enter into fixed-price detention IGAs.

## B.

Having determined that section 119 gives the Attorney General the authority to enter into fixed-price IGAs for detention services, we next must consider how broad that authority is. In particular, we must explore whether there are other statutes that, by their terms, would prohibit the Attorney General from entering into such fixed-price agreements, and, if so, whether section 119 overrides them.

The obvious starting point for analyzing the interaction of section 119 and any seemingly conflicting statute is section 119’s opening phrase, “[n]otwithstanding any other provision of law.” As the Supreme Court has noted, “the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). In certain circumstances, there may be some question about the extent to which Congress actually intended to override other statutes. *See, e.g., Oregon Natural Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (“the phrase ‘notwithstanding any other law’ is not always construed literally”). In general, however, a “notwithstanding” phrase works in tandem with the substantive reach of the section to which it is attached. (That is simply another way of determining which provisions are actually “conflicting.” *Cisneros*, 508 U.S. at 18.) Thus, a statute that grants prosecutorial powers “notwithstanding any other provision of law” will be read to “mean[] that the conferral of prosecutorial powers should not be limited by other statutes.” *United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989). And a statute that limits liability “notwithstanding any other provision of law” will be read to “mean[] that the remedies established by the [statute] are not to be modified by any preexisting law.” *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *see also Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999)

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<sup>2</sup> The Supreme Court’s observations in *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945), have force here as well:

The argument from the legislative history undertakes, in effect, to contradict the terms of Section 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.



(statute that strips jurisdiction “notwithstanding any other provision of law” means “that all other jurisdiction-granting statutes . . . shall be of no effect.”).

In the case of section 119, the substance of the provision deals with the Attorney General’s authority to enter into contracts for detention services. Therefore, other legal provisions dealing with that subject, to the extent that they conflict with section 119, are overridden by its “notwithstanding” phrase.

We illustrate the effect of section 119 by addressing various other statutes that concern the Attorney General’s authority to enter into agreements for detention services.

## 1.

Under 18 U.S.C. § 4002 (enacted in 1948), the Attorney General is authorized to contract with state or local governments, for “a period not exceeding three years,” for the “imprisonment, subsistence, care, and proper employment” of “all persons held under authority of any enactment of Congress.” With regard to permissible payments under such contracts, section 4002 provides:

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

*Id.* This language does not prohibit rates of payment for detention facilities or services that are fixed without respect to cost (or that otherwise might be in excess of cost). Indeed, the closing provision that the rates “may be such as will permit and encourage” the pertinent state or local authorities to provide the kind of decent quarters and subsistence described appears to contemplate and authorize rates that could exceed mere costs in order to bring about the desired conditions.

We note further that insofar as the “reasonable duration” of a detention services agreement may exceed the three-year limit under section 4002, section 119 overrides that three-year limit.

## 2.

Under 18 U.S.C. § 4006 (enacted in 1948), the Attorney General “shall allow and pay only the reasonable and actual cost of the subsistence of prisoners in the custody of any marshal of the United States.”

We first note the limited scope of this provision. It applies only to the subsistence of federal detainees who are *in the custody of U.S. marshals*, such as persons in custody awaiting trial, execution of sentence, or extradition. It therefore does

not apply, for example, to detention agreements covering convicted federal offenders serving sentences in prison (who are in BOP custody) or INS detainees awaiting removal or deportation.<sup>3</sup>

The Department's Justice Management Division ("JMD") addressed the effect of section 4006 in 1998 (i.e., before the enactment of section 119 of Public Law 106-553 in 2000). *See* Memorandum for Janis Sposato, Deputy Assistant Attorney General, Justice Management Division, from Stuart Frisch, General Counsel, Justice Management Division, *Re: USMS Agreements and Contracts for Detention and Subsistence Under 18 U.S.C. § 4006* (Apr. 21, 1998) ("JMD Memorandum"). JMD considered whether section 4006 limits the USMS to "cost reimbursement" contracting for detainees' subsistence or whether it permits other types of contract arrangements, such as fixed-price contracts. JMD concluded that section 4006 does not limit the USMS to cost-reimbursement arrangements. JMD Memorandum at 1. JMD primarily based its conclusion on its interpretation of the undefined term "actual cost" in section 4006. Specifically, JMD determined that the term "actual cost" could have any of three meanings: "the actual price charged for the goods and/or services, the actual cost to the provider of producing such goods or services, or the actual selling price after mark-up." *Id.* at 3.

We need not determine whether we agree with JMD's interpretation of "actual cost" because we conclude that, insofar as section 4006 would restrict USMS detainee subsistence agreements to "cost-basis" contracts, that restriction does not survive the enactment of section 119. Section 4006 by its terms provides that any agreement that the Attorney General reaches with state or local governments for the subsistence of federal detainees in USMS custody must limit payment to the "reasonable and actual cost of the subsistence." Unless the flexible interpretation of "actual cost" applied by JMD in its 1998 opinion is adopted, the "actual cost" restrictions of section 4006 would conflict with, and therefore would be overridden by, the Attorney General's authority under section 119 to contract for detention services "on any reasonable basis," "[n]otwithstanding any other provision of law."

### 3.

Under 18 U.S.C. § 4013 (enacted in 1988), the Attorney General is further authorized to make payments from appropriated funds in support of federal

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<sup>3</sup> See 28 C.F.R. § 0.111(k), which provides that the responsibilities of the U.S. Marshals Service include:

- (k) Sustention of custody of Federal prisoners from the time of their arrest by a marshal or their remand to a marshal by the court, until the prisoner is committed by order of the court to the custody of the Attorney General for the service of sentence, otherwise released from custody by the court, or returned to the custody of the U.S. Parole Commission or the Bureau of Prisons.

prisoners in non-federal institutions. Subsection (a)(4)(C) of this section, which concerns contracts or cooperative agreements with state or local governments regarding the construction or renovation of facilities for detention services, specifies that “the per diem rate charged for housing such Federal prisoners shall not exceed the allowable costs *or other conditions* specified in the contract or cooperative agreement.” *Id.* § 4013(a)(4)(C) (emphasis added). This provision expressly recognizes that “other conditions” specified in the contract or cooperative agreement may permit the payment of per diem rates exceeding costs. Those conditions, for example, might include provisions for payment on the basis of a fixed price that is not co-extensive with cost. We therefore do not believe that section 4013 is in conflict with section 119.

#### **4.**

Under 8 U.S.C. § 1103(a)(11) (amended by the Homeland Security Act of 2002, Pub. L. 107-296, § 1102, 116 Stat. 2135 (2002)), the Attorney General is authorized to (1) make payments from immigration appropriations “for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of” INS detainees under an agreement with a state or local governments; and (2) enter into a cooperative agreement with a state or local government for the provision of acceptable conditions of confinement and detention services for INS detainees for whom that state or local government agrees to provide guaranteed bed space. Nothing in this section prohibits the Department from contracting or paying for detention facilities or services provided by State or local governments on a fixed-price basis. This section therefore does not conflict with section 119.

#### **C.**

We therefore conclude that section 119 confers authority on the Attorney General to enter into fixed-price IGAs with state and local governments for the detention of federal detainees.

### **III.**

OIG also argues that OMB Circular A-87 prohibits the Attorney General from including in detention IGAs a price provision that is based on terms other than cost. OIG Memorandum I, at 6-8. OMB Circular A-87 provides in relevant part:

This circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program deliver, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify

the circumstances or dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award. *Provision for profit or other increment above cost is outside the scope of this Circular.*

OMB Circular A-87, ¶ 5 (emphasis added). OIG evidently reads the Circular's statement that "[p]rovision for profit or other increment above cost is outside the scope of this Circular" to mean that such provision would violate the Circular.

The Office of Management and Budget ("OMB") itself has repudiated OIG's reading of OMB Circular A-87. As OMB explained to OIG:

It is our understanding that DOJ uses inter-governmental service agreements (IGAs) to acquire detention space from State and local governments. DOJ's General Counsel, the Marshals Service, and the Immigration and Naturalization Service have determined that some of the IGAs with certain States are fixed-price contracts, rather than cost-reimbursement contracts. *As such these fixed-price IGAs are not covered under OMB Circular A-87.*

Letter for Glenn A. Fine, Inspector General, U.S. Department of Justice, from Joseph L. Kull, Deputy Controller, Office of Management and Budget (Aug. 22, 2002) (emphasis added). OMB's view comports with the most natural reading of OMB Circular A-87: it merely governs *how* properly to determine applicable costs, not *whether* a government contract may authorize payments on a basis *other than* costs. We therefore conclude that OMB Circular A-87 does not prohibit fixed-price detention IGAs.

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