

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

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public. The first thirty volumes of opinions published covered the years 1977 through 2006. The present volume covers 2007. Volume 31 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. The Judiciary Act of 1789 authorized the Attorney General 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.

As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Kassier, Richard Hughes, Joanna Ranelli, 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.

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OPINION

OF THE

**ATTORNEY GENERAL OF THE
UNITED STATES**

Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys

Executive privilege may properly be asserted over the documents and testimony concerning the dismissal and replacement of U.S. Attorneys that have been subpoenaed by congressional committees.

June 27, 2007

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

The Senate Committee on the Judiciary and the House Committee on the Judiciary recently issued five subpoenas in connection with their inquiries into the resignation of several U.S. Attorneys in 2006. Broadly speaking, four of the five subpoenas seek documents in the custody of current or former White House officials (“White House documents”) concerning the dismissal and replacement of the U.S. Attorneys. In addition, two of the five subpoenas demand testimony about these matters from two former White House officials, Harriet Miers, former Counsel to the President, and Sara Taylor, former Deputy Assistant to the President and Director of Political Affairs.

You have requested my legal advice as to whether you may assert executive privilege with respect to the subpoenaed documents and testimony concerning the categories of information described in this letter. It is my considered legal judgment that you may assert executive privilege over the subpoenaed documents and testimony.

I.

The documents that the Office of the Counsel to the President has identified as responsive to the subpoenas fall into three broad categories related to the possible dismissal and replacement of U.S. Attorneys, including congressional and media inquiries about the dismissals: (1) internal White House communications; (2) communications by White House officials with individuals outside the Executive Branch, including with individuals in the Legislative Branch; and (3) communications between White House officials and Department of Justice officials. The Committees’ subpoenas also seek testimony from Ms. Miers and Ms. Taylor concerning the same subject matters, and the assertion of privilege with respect to such testimony requires the same legal analysis.

The Office of Legal Counsel of the Department of Justice has reviewed the documents identified by the Counsel to the President as responsive to the subpoenas and is satisfied that the documents fall within the scope of executive

privilege. The Office further believes that Congress's interests in the documents and related testimony would not be sufficient to override an executive privilege claim. For the reasons discussed below, I concur with both assessments.

A.

The initial category of subpoenaed documents and testimony consists of internal White House communications about the possible dismissal and replacement of U.S. Attorneys. Among other things, these communications discuss the wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals. These types of internal deliberations among White House officials fall squarely within the scope of executive privilege. One of the underlying purposes of the privilege is to promote sound decisionmaking by ensuring that senior government officials and their advisers speak frankly and candidly during the decisionmaking process. As the Supreme Court has explained, “[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); see also *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (“The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.”); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 2 (1999) (opinion of Attorney General Janet Reno) (“*Clemency Decision*”) (“[N]ot only does executive privilege apply to confidential communications to the President, but also to ‘communications between high Government officials and those who advise and assist them in the performance of their manifold duties.’”) (quoting *Nixon*, 418 U.S. at 705). These confidentiality interests are particularly strong where, as here, the communications may implicate a “quintessential and nondelegable Presidential power,” such as the authority to nominate or to remove U.S. Attorneys. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997); *Clemency Decision*, 23 Op. O.L.C. at 2–3 (finding that executive privilege protected Department and White House deliberations related to decision to grant clemency).

Under D.C. Circuit precedent, a congressional committee may not overcome an assertion of executive privilege unless it establishes that the documents and information are “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of Congress’s legitimate legislative responsibilities. See *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”).

Assertion of Executive Privilege Concerning Dismissal of U.S. Attorneys

As a threshold matter, it is not at all clear that internal White House communications about the possible dismissal and replacement of U.S. Attorneys fall within the scope of *McGrain* and its progeny. The Supreme Court has held that Congress's oversight powers do not reach "matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). The Senate has the authority to approve or reject the appointment of officers whose appointment by law requires the advice and consent of the Senate (which has been the case for U.S. Attorneys since the founding of the Republic), but it is for the President to decide whom to nominate to such positions and whether to remove such officers once appointed. Though the President traditionally consults with members of Congress about the selection of potential U.S. Attorney nominees as a matter of courtesy or in an effort to secure their confirmation, that does not confer upon Congress authority to inquire into the deliberations of the President with respect to the exercise of his power to remove or nominate a U.S. Attorney.¹ Consequently, there is reason to question whether Congress has oversight authority to investigate deliberations by White House officials concerning proposals to dismiss and replace U.S. Attorneys, because such deliberations necessarily relate to the potential exercise by the President of an authority assigned to him alone. See *Clemency Decision*, 23 Op. O.L.C. at 3–4 ("[I]t appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision [because the decision to grant clemency is an exclusive Executive Branch function]."); *Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch*, 9 Op. O.L.C. 60, 62 (1985) (congressional oversight authority does not extend to "functions fall[ing] within the Executive's exclusive domain").

In any event, even if the Committees have oversight authority, there is no doubt that the materials sought qualify for the privilege and the Committees have not demonstrated that their interests justify overriding a claim of executive privilege as to the matters at issue. The House Committee, for instance, asserts in its letter accompanying the subpoenas that "[c]ommunications among the White House staff involved in the U.S. Attorney replacement plan are obviously of paramount importance to any understanding of how and why these U.S. Attorneys were

¹ See, e.g., *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) ("[T]he Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment."); *Myers v. United States*, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

selected to be fired.” Letter for Fred F. Fielding, Counsel to the President, from John Conyers, Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). But the Committees never explain how or why this information is “demonstrably critical” to any “legislative judgments” Congress might be able to exercise in the U.S. Attorney matter. *Senate Select Comm.*, 498 F.2d at 732. Broad, generalized assertions that the requested materials are of public import are simply insufficient under the “demonstrably critical” standard. Under *Senate Select Committee*, to override a privilege claim the Committees must “point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials.” *Id.* at 733.

Moreover, any legitimate oversight interest the Committees might have in internal White House communications about the proposal is sharply reduced by the thousands of documents and dozens of hours of interviews and testimony already provided to the Committees by the Department of Justice as part of its extraordinary effort at accommodation.² This information has given the Committees extraordinary—and indeed, unprecedented—insight into the Department’s decision to request the U.S. Attorney resignations, including the role of White House officials in the process. *See, e.g., History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 758–59, 767 (1982) (documenting refusals by Presidents Jackson, Tyler, and Cleveland

² During the past three months, the Department has released or made available for review to the Committees approximately 8,500 pages of documents concerning the U.S. Attorney resignations. The Department has included in its productions many sensitive, deliberative documents related to the resignation requests, including e-mails and other communications with White House officials. The Committees’ staffs have also interviewed, at length and on the record, a number of senior Department officials, including, among others, the Deputy Attorney General, the Acting Associate Attorney General, the Attorney General’s former chief of staff, the Deputy Attorney General’s chief of staff, and two former Directors of the Executive Office for U.S. Attorneys. During these interviews, the Committees’ staffs explored in great depth all aspects of the decision to request the U.S. Attorney resignations, including the role of White House officials in the decisionmaking process. In addition, the Attorney General, the Deputy Attorney General, the Principal Associate Deputy Attorney General, the Attorney General’s former chief of staff, and the Department’s former White House Liaison have testified before one or both of the Committees about the terminations and explained, under oath, their understanding of such involvement.

The President has also made significant efforts to accommodate the Committees’ needs. More than three months ago, the Counsel to the President proposed to make senior White House officials, including Ms. Miers, available for informal interviews about “(a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications between the White House and Members of Congress concerning those requests,” and he offered to give the Committees access to White House documents on the same subjects. Letter for Patrick Leahy, U.S. Senate, et al., from Fred F. Fielding, Counsel to the President at 1–2 (Mar. 20, 2007). The Committees declined this offer. The Counsel to the President has since reiterated this offer of accommodation but to no avail. *See* Letter for Patrick Leahy, U.S. Senate, and John Conyers, Jr., U.S. House of Representatives, from Fred F. Fielding, Counsel to the President at 1 (Apr. 12, 2007); Letter for Patrick Leahy, U.S. Senate, John Conyers, Jr., U.S. House of Representatives, and Linda T. Sanchez, U.S. House of Representatives, from Fred F. Fielding, Counsel to the President at 1–2 (June 7, 2007).

to provide information related to the decision to remove Executive Branch officials, including a U.S. Attorney).

In a letter accompanying the subpoenas, the House Committee references the alleged “written misstatements” and “false statements” provided by the Department to the Committees about the U.S. Attorney dismissals. *See* Letter for Fred F. Fielding, Counsel to the President, from John Conyers, Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). The Department has recognized the Committees’ interest in investigating the extent to which Department officials may have provided inaccurate or incomplete information to Congress. This interest does not, however, justify the Committees’ demand for White House documents and information about the U.S. Attorney resignations. Officials in the Department, not officials in the White House, presented the challenged statements, and as noted, the Department has provided unprecedented information to Congress concerning, *inter alia*, the process that led to the Department’s statements. The Committees’ legitimate oversight interests therefore have already been addressed by the Department, which has sought to provide the Committees with all documents related to the preparation of any inaccurate information given to Congress.

Given the amount of information the Committees already possess about the Department’s decision to remove the U.S. Attorneys (including the involvement of White House officials), there would be little additional legislative purpose served by revealing internal White House communications about the U.S. Attorney matter, and, in any event, none that would outweigh the President’s interest in maintaining the confidentiality of such internal deliberations. *See Senate Select Comm.*, 498 F.2d at 732–33 (explaining that a congressional committee may not obtain information protected by executive privilege if that information is available through non-privileged sources). Consequently, I do not believe that the Committees have shown a “demonstrably critical” need for internal White House communications on this matter.

B.

For many of the same reasons, I believe that communications between White House officials and individuals outside the Executive Branch, including with individuals in the Legislative Branch, concerning the possible dismissal and replacement of U.S. Attorneys, and possible responses to congressional and media inquiries about the dismissals, fall within the scope of executive privilege. Courts have long recognized the importance of information gathering in presidential decisionmaking. *See, e.g., In re Sealed Case*, 121 F.3d at 751–52 (describing role of investigation and information collection in presidential decisionmaking). Naturally, in order for the President and his advisers to make an informed decision, presidential aides must sometimes solicit information from individuals outside the White House and the Executive Branch. This need is particularly strong when the decision involved is whether to remove political appointees, such

as U.S. Attorneys, who serve in local districts spread throughout the United States. In those situations, the President and his advisers will be fully informed only if they solicit and receive advice from a range of individuals. Yet the President's ability to obtain such information often depends on the provider's understanding that his frank and candid views will remain confidential. *See Nixon*, 418 U.S. at 705 ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."); *In re Sealed Case*, 121 F.3d at 751 ("In many instances, potential exposure of the information in the possession of an adviser can be as inhibiting as exposure of the actual advice she gave to the President. Without protection of her sources of information, an adviser may be tempted to forego obtaining comprehensive briefings or initiating deep and intense probing for fear of losing deniability.").

That the communications involve individuals outside the Executive Branch does not undermine the President's confidentiality interests. The communications at issue occurred with the understanding that they would be held in confidence, and they related to decisionmaking regarding U.S. Attorney removals or replacements or responding to congressional or media inquiries about the U.S. Attorney matter. Under these circumstances, the communications retain their confidential and Executive Branch character and remain protected. *See In re Sealed Case*, 121 F.3d at 752 ("Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the [presidential communications component of executive] privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves.").³

Again, the Committees offer no compelling explanation or analysis as to why access to confidential communications between White House officials and individuals outside the Executive Branch is "demonstrably critical to the responsible fulfillment of the [Committees'] functions." *Senate Select Comm.*, 498 F.2d at 731. Absent such a showing, the Committees may not override an executive privilege claim.

C.

The final category of documents and testimony concerns communications between the Department of Justice and the White House concerning proposals to dismiss and replace U.S. Attorneys and possible responses to congressional and media inquiries about the U.S. Attorney resignations. These communications are

³ Moreover, the Department has previously conveyed to the Committees its concern that there would be a substantial inhibiting effect on future informal confidential communications between Executive Branch and Legislative Branch representatives if such communications were to be produced in the normal course of congressional oversight.

deliberative and clearly fall within the scope of executive privilege.⁴ *See supra* p. 2. In this case, however, the Department has already disclosed to Congress a substantial amount of documents and information related to White House communications about the U.S. Attorney matter. Consequently, in assessing whether it would be legally permissible to assert executive privilege, it is useful to divide this category into three subcategories, each with slightly different considerations: (1) documents and testimony related to communications between the Department and White House officials that have not already been disclosed by the Department; (2) documents concerning White House-Department communications previously disclosed to the Committees by the Department; and (3) testimony from current or former White House officials (such as the testimony sought from Ms. Miers or Ms. Taylor) about previously disclosed White House-Department communications. After carefully considering the matter, I believe there is a strong legal basis for asserting executive privilege over each of these subcategories.

The President's interest in protecting the confidentiality of documents and information about undisclosed White House-Department communications is powerful. Most, if not all, of these communications concern either potential replacements for the dismissed U.S. Attorneys or possible responses to inquiries from Congress and the media about the U.S. Attorney resignations. As discussed above, the President's need to protect deliberations about the selection of U.S. Attorneys is compelling, particularly given Congress's lack of legislative authority over the nomination or replacement of U.S. Attorneys. *See In re Sealed Case*, 121 F.3d at 751–52. The President also has undeniable confidentiality interests in discussions between White House and Department officials over how to respond to congressional and media inquiries about the U.S. Attorney matter. As Attorney General Janet Reno advised the President in 1996, the ability of the Office of the Counsel to the President to assist the President in responding to investigations “would be significantly impaired” if a congressional committee could review “confidential documents . . . prepared in order to assist the President and his staff in responding to an investigation by the [committee] seeking the documents.” *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996). Despite extensive communications with officials at the Department and the White House, the Committees have yet to articulate any “demonstrably critical” oversight interest that would justify overriding these compelling confidentiality concerns.

There are also legitimate reasons to assert executive privilege over White House documents reflecting White House-Department communications that have been previously disclosed to the Committees by the Department. As discussed,

⁴ To the extent they exist, White House communications approving the Department's actions by or on behalf of the President would receive particularly strong protection under executive privilege. *See, e.g., In re Sealed Case*, 121 F.3d at 752–53 (describing heightened protection provided to presidential communications).

these documents are deliberative in nature and clearly fall within the scope of executive privilege. The Department's accommodation with respect to some White House-Department communications does not constitute a waiver and does not preclude the President from asserting executive privilege with respect to White House materials or testimony concerning such communications. The D.C. Circuit has recognized that each branch has a "constitutional mandate to seek optimal accommodation" of each other's legitimate interests. *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). If the Department's provision of documents and information to Congress, as part of the accommodation process, eliminated the President's ability to assert privilege over White House documents and information concerning those same communications, then the Executive Branch would be hampered, if not prevented, from engaging in future accommodations. Thus, in order to preserve the constitutional process of interbranch accommodation, the President may claim privilege over documents and information concerning the communications that the Department of Justice has previously disclosed to the Committees. Indeed, the relevant legal principles should and do encourage, rather than punish, such accommodation by recognizing that Congress's need for such documents is reduced to the extent similar materials have been provided voluntarily as part of the accommodation process.

Here, the Committees' need for White House documents concerning these communications is weak. The Committees already possess the relevant communications, and it is well established that Congress may not override executive privilege to obtain materials that are cumulative or that could be obtained from an alternative source. See *Senate Select Comm.*, 498 F.2d at 732-33 (holding public release of redacted audio tape transcripts "substantially undermined" any legislative need for tapes themselves); *Clemency Decision*, 23 Op. O.L.C. at 3-4 (finding that documents were not demonstrably critical where Congress could obtain relevant information "through non-privileged documents and testimony"). Accordingly, the Committees do not have a "demonstrably critical" need to collect White House documents reflecting previously disclosed White House-Department communications.

Finally, the Committees have also failed to establish the requisite need for testimony from current or former White House officials about previously disclosed White House-Department communications. Congressional interest in investigating the replacement of U.S. Attorneys clearly falls outside its core constitutional responsibilities, and any legitimate interest Congress may have in the disclosed communications has been satisfied by the Department's extraordinary accommodation involving the extensive production of documents to the Committees, interviews, and hearing testimony concerning these communications. As the D.C. Circuit has explained, because "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability," Congress will rarely need or be entitled to a "precise reconstruction of past events" to carry out its legislative responsibilities. *Senate Select Comm.*,

498 F.2d at 732.⁵ On the other hand, the White House has very legitimate interests in protecting the confidentiality of this information because it would be very difficult, if not impossible, for current or former White House officials testifying about the disclosed communications to separate in their minds knowledge that is derived from the Department's disclosures from knowledge that is derived from other privileged sources, such as internal White House communications. Consequently, given the President's strong confidentiality interests and the Committees' limited legislative needs, I believe that White House information about previously disclosed White House-Department communications may properly be subject to an executive privilege claim.

II.

In sum, I believe that executive privilege may properly be asserted with respect to the subpoenaed documents and testimony as described above.

PAUL D. CLEMENT
Solicitor General & Acting Attorney General

⁵ See also *Senate Select Comm.*, 498 F.2d at 732 (explaining that Congress "frequently legislates on the basis of conflicting information provided in its hearings"); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989) ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.").

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Days of Service by Special Government Employees

The longstanding interpretation of the Executive Branch that service by a special government employee during any part of a day counts as a full day under 18 U.S.C. §§ 203 and 205, which impose greater conflict of interest restrictions after a special government employee works 60 days, is reaffirmed.

January 26, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE

Under some provisions of the criminal conflict of interest laws, a “special Government employee” or “SGE”—an employee expected to work no more than 130 days during a 365-day period—is subject to less extensive restrictions than a regular government employee. Those constraints increase, however, when the SGE has served in an agency for more than sixty days during the preceding 365-day period. *See, e.g.*, 18 U.S.C. §§ 203, 205 (2000). The longstanding interpretation of the Executive Branch has been that service for any part of a day counts as a full day of service toward the sixty-day limit. You have asked us to overturn that interpretation and to count only time the SGE has actually worked, so that a single day for counting purposes would comprise eight hours of work, even if performed over several days. We reaffirm the existing interpretation.¹

¹ Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from William J. Haynes II, General Counsel, Department of Defense, *Re: Computation of the Service of Special Government Employees* (Aug. 22, 2005) (“DoD Letter”). We sought, and received, the views of the Office of Government Ethics (“OGE”). *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics (Oct. 3, 2005) (“OGE Letter”). OGE “does not support” the interpretation advocated in the DoD Letter. OGE Letter at 4. Your office provided a response to the OGE Letter. Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Daniel J. Dell’Orto, Principal Deputy General Counsel, Department of Defense, *Re: Computation of the Service of Special Government Employees* (July 6, 2006) (“DoD Response”).

We understand the DoD letter to address only the computation of 60 days of service, rather than how to estimate whether an employee will work more than 130 days in a 365-day period and thus not qualify as an SGE. *See* DoD Letter, Attachment, *Employment of Experts and Consultants (Counting Days or Hours)* at 1; DoD Response, Attachment, *Computation of Service for Special Government Employees for Purposes of Application of 18 U.S.C. 203 and 205*, at 1. The rule for counting the expected number of workdays towards the 130-day limit has always been the same as for the 60-day limit—a partial day counts as a full day—and is equally longstanding. *See* Memorandum to the Heads of Executive Departments and Agencies, *Re: Preventing Conflicts of Interest on the Part of Special Government Employees*, 28 Fed. Reg. 4539, 4541, 4542 (May 2, 1963) (“Presidential Memorandum”); *see also* OGE Letter at 1 (noting that the counting rule applies outside the context addressed by the DoD Letter).

I.

The term “special Government employee” is defined to include

an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. . . .

18 U.S.C. § 202(a) (2000). Section 203 of title 18 generally forbids an officer or employee of the Executive Branch from (among other things) seeking, receiving, or agreeing to receive “any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another” in any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, or officer. *Id.* § 203(a)(1). An SGE, however, is subject to this prohibition “only in relation to a particular matter involving a specific party or parties,” where either (1) the SGE “has at any time participated personally and substantially as a Government employee or [SGE]” in the matter or (2) the matter “is pending in the department or agency” in which the SGE is serving. The second ground of coverage—that the matter is pending in the SGE’s department or agency—does not apply if the SGE “has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.” *Id.* § 203(c). Thus, until an SGE exceeds the sixty-day limit, he can receive fees for most matters that are pending before the agency where he serves, so long as he has not personally been involved in the matters as a government employee. For example, an SGE who is also a partner in a law firm generally can receive a share of fees in a specific-party matter pending in his agency until he exceeds sixty days of service during the preceding 365 days. *See Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys*, 4B Op. O.L.C. 434, 441, 444 (1980) (attaching, as appendix, Memorandum Opinion for the Deputy Associate Attorney General, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 23, 1979) (discussing section 203 with regard to temporary attorneys)).

Section 205 is similar in relevant respects. It generally bars an officer or employee of the United States from (among other things) “act[ing] as agent or attorney for prosecuting any claim against the United States” or “act[ing] as agent or attorney for anyone” before any department, agency, court, or officer in connection with a particular matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205(a). As with section 203, an SGE is

subject to this prohibition only as to a specific-party matter (1) on which he worked as a government employee, or (2) which is pending in the department or agency where he is serving. The second ground for coverage, once again, does not apply if the SGE “has served in such department or agency no more than sixty days in the preceding period of three hundred and sixty-five consecutive days.” *Id.* § 205(c). Thus, for example, an SGE could serve as an attorney or agent for a client who is pursuing a claim before the SGE’s agency, but only if the SGE has not exceeded the sixty-day limit (and, of course, he has not worked on the matter as a government employee). *See Employment of Temporary or Intermittent Attorneys and Investigators by the Office of Special Counsel*, 3 Op. O.L.C. 78, 83 (1979) (“*Temporary or Intermittent Attorneys*”) (generally discussing section 205(c)).

Congress created the statutory category of “special Government employee[s]” in 1962 as part of a comprehensive revision of the conflict of interest laws. Pub. L. No. 87-849, 76 Stat. 1119 (1962). Less than four months after the legislation took effect, President Kennedy issued a detailed memorandum to the heads of executive departments and agencies discussing its impact. Presidential Memorandum, *supra* note 1. The President stated that “[a] part of a day should be counted as a full day in connection with the 60-day standard.” *Id.* at 4542; *see also id.* at 4541 (stating that “[a] part of a day should be counted as a full day for purposes of this [130-day] estimate”). The Executive Branch has maintained this interpretation ever since. Although President Johnson’s Executive Order 11222, Prescribing Standards of Ethical Conduct for Government Officers and Employees (May 8, 1965), 3 C.F.R. 130 (1965 Supp.), supplanted and revoked the Presidential Memorandum, President Kennedy’s position that partial days of work would count as full days towards the sixty-day limit was continued in the Federal Personnel Manual, app. C-12 (Nov. 9, 1965, revised July 1969, revoked 1994), issued the same year by the Civil Service Commission, to which President Johnson’s Executive Order 11222 had delegated authority in this area.² Since then, the opinions of both our Office and the Office of Government Ethics consistently have applied the same counting rule. *See, e.g., Service of Private Sector Persons on Food and Drug Administra-*

² When the Presidential Memorandum “was rescinded by Executive Order 11222 (May 8, 1965) . . . some provisions were retained in Part III of Executive Order 11222, and the remainder were designated for inclusion in Appendix C [of the Federal Personnel Manual].” Letter for Patricia Schroeder, U.S. House of Representatives, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 1 (Apr. 8, 1982) (“1982 Letter”). As OGE has explained, Executive Order 11222 delegated to the Civil Service Commission the President’s authority to issue regulations for the conduct of persons in the civil service, and “[i]n pursuance of an understanding with interested agencies at the time Executive Order 11222 was drafted, the Civil Service Commission on November 9, 1965, reinstated the most significant portions of the [Presidential Memorandum] . . . by publishing them as instructions of Governmentwide applicability in the form of Appendix C [to the Federal Personnel Manual].” OGE, *Memorandum to Heads of Departments and Agencies of the Executive Branch Regarding Members of Federal Advisory Committees and the Conflict-of-Interest Statutes*, Informal Advisory Mem. 82x22, 1982 WL 31878, at *4 (July 9).

tion Advisory Committees, 2 Op. O.L.C. 151, 155 n.3 (1978) (“*Advisory Committees*”) (reaffirming the interpretation of the Presidential Memorandum); Memorandum for Dudley Chapman, Associate Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (July 10, 1974); Memorandum for Charles F.C. Ruff, Associate Deputy Attorney General, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Conflict of Interest Laws to Special Assistant United States Attorney Frank W. Dunham, Jr.* at 2 (Apr. 19, 1979) (following the view of the Federal Personnel Manual, embodying the Presidential Memorandum); Memorandum for Fred F. Fielding, Counsel to the President, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re: President’s Council on Physical Fitness and Sports* at 6 n.6 (Feb. 8, 1985) (citing and following the view of the Federal Personnel Manual); OGE, *Memorandum to Designated Agency Ethics Officials, General Counsels and Inspectors General Regarding Summary of Ethical Requirements Applicable to Special Government Employments*, Informal Advisory Mem. 00x1, 2000 WL 33407342, at *15 n.10 (Feb. 15); *see also Restrictions on a Federal Appointee’s Continued Employment by a Private Law Firm*, 7 Op. O.L.C. 123, 126 (1983) (employing the same rule for counting a “day” in estimating whether an employee is expected to work 130 days in the next 365 days); *Temporary or Intermittent Attorneys*, 3 Op. O.L.C. at 81 (same); OGE, *Letter to a Private Attorney*, Informal Advisory Ltr. 84x4, 1984 WL 50157, at *1 (Apr. 6) (same).

For two principal reasons, you contend that this interpretation of sections 203 and 205 should be changed and that “the service of SGEs may be computed on an hourly basis.” DoD Letter at 1. First, a 1962 opinion of the Attorney General referred to the Hatch Act as a guide in determining when the conflict of interest laws apply to intermittent employees, *Conflict-of-Interest Statutes: Intermittent Consultants or Advisers*, 42 Op. Att’y Gen. 111, 117 (1962) (“1962 Opinion”), and, since 1994, the Office of Personnel Management (“OPM”) has interpreted the Hatch Act to apply only when employees are on duty. *See* 5 C.F.R. § 734.601 (2006). Because “OPM now applies the Hatch Act when SGEs are only ‘on duty,’” you urge that “it is logical to assume that ‘days of service’ should now also be computed on the ‘on duty’ or hourly basis.” DoD Letter, Attachment, *Hatch Act*. Second, you explain that when the rule on counting days under 18 U.S.C. §§ 203 and 205 was formulated, “pay for consultants was computed only on [a] daily rate,” but agencies “now have authority to pay experts and consultants by the hour.” DoD Letter, Attachment, *Employment of Experts and Consultants (Counting Days or Hours)*. You contend that “[t]his is further evidence that the intent of the law is to cover only the hours worked, and that working one hour of one day does not mean that the consultant worked an entire day.” *Id.*

II.

A.

Since shortly after Congress created the category of “special Government employees,” the Executive Branch consistently has adhered to the interpretation that, under 18 U.S.C. §§ 203 and 205, an SGE “serve[s] in [his] department or agency” on any day on which he works and that each such day thus counts as a full day toward the sixty-day threshold triggering additional restrictions. We would not depart from that contemporaneous and continuous interpretation absent compelling reasons to do so. As explained, we see no such reasons. First, that interpretation accords with the plain meaning of the statutory text, and Congress has not disturbed that understanding when amending sections 203 and 205. Second, we do not believe that a change in the interpretation of the Hatch Act or in the rules for paying consultants justifies such a departure.

The term “days” of service, as used in sections 203 and 205, is better read to mean calendar days on which the SGE performed work for the agency, rather than units consisting of eight hours of work that an employee may have performed over the course of several calendar days. That understanding is consistent with the ordinary meaning of the term “day” at the time of enactment (as well as today). See *Webster’s New International Dictionary* 672 (2d ed. 1958) (“3. The mean solar day, used in ordinary reckoning of time . . . —called, specif., the *civil day*. This is the period recognized by courts as a day.”); accord *Random House Dictionary of the English Language* 369–70 (1966); see also *The Pocket Veto Case*, 279 U.S. 655, 679 (1929) (“The word ‘days,’ when not qualified, means in ordinary and common usage calendar days.”); *Butterbaugh v. Dep’t of Justice*, 336 F.3d 1332, 1337 (Fed. Cir. 2003) (“the ordinary meaning of ‘day’ is a calendar day”). The term “day” also commonly is used to denote the portion of a calendar day that is set aside for work, but even that meaning refers to a portion of a single calendar day devoted to work, rather than to a collection of eight hours of work performed over several days. See *Black’s Law Dictionary* 473 (4th rev. ed. 1968) (“7. The period of time, *within the limits of a natural day*, set apart either by law or by common usage for the transaction of particular business or the performance of labor”) (emphasis added); *Random House Dictionary* 370 (“5. The *portion of a day* allotted to labor: *an eight hour day*.”) (emphasis added to first selection).

Context also supports the conclusion that the term refers to calendar days. Both sections 203 and 205 refer to the sixty-day period in relation to “the immediately preceding period of three hundred and sixty-five consecutive days.” 18 U.S.C. §§ 203(c), 205(c). The word “days” as used here is most naturally understood to refer to the number of calendar days comprising an ordinary year. Congress presumably intended the word “days” to have the same meaning both places that it appears in the same section, the only difference being, as the statute indicates, that

the 365 “days” are to be consecutive, but the sixty “days” need not be. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (“Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning.”) (internal quotation marks omitted). Particularly because the legislation specifically dealt with conflict of interest rules governing “the *part-time* services of consultants and advisers,” S. Rep. No. 87-2213, at 7 (1962) (emphasis added); 18 U.S.C. § 202(a) (addressing the performance of “temporary duties either on a full-time or intermittent basis”), it seems likely that Congress would have expressed the sixty-day limitation in terms of the number of hours worked if its intent had been only to count the portion of the day an SGE actually worked.

This understanding is consistent with the interpretation of one authoritative commentator at the time of the legislation’s passage. Professor Bayless Manning, who was a member of the President’s Advisory Panel on Ethics and Conflicts of Interest in Government whose 1961 report spurred interest in reform, *see* Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government (Apr. 27, 1961), 1 *Pub. Papers of Pres. John F. Kennedy* 326, 327 (1961); S. Rep. No. 87-2213, at 6, and who participated in the development of the legislation enacted in 1962, *see* Bayless Manning, *Federal Conflict of Interest Law* vii (1964), wrote of the 130-day limitation contained in section 202(a): “It seems quite clear that under Section 202 the employee’s working time is not to be computed on a[n] . . . hour by hour basis. In principle, the employee will be considered to have worked a day for the government if he has worked a part of the day.” *Id.* at 28.

Furthermore, the longstanding view of the Executive Branch, in accordance with the language of the statutes and pursuant to the 1963 Presidential Memorandum, has particular weight here. First, in *Advisory Committees*, we noted that “[t]he Presidential [M]emorandum was drafted by the Office of Legal Counsel and therefore reflects a contemporaneous interpretation of the conflict of interest laws by the Department charged with construing them.” 2 *Op. O.L.C.* at 155 n.3. Perhaps the principle that “considerable weight must be accorded” to an agency’s “contemporaneous interpretation of the statute it is entrusted to administer,” *CFTC v. Schor*, 478 U.S. 833, 844 (1986), would not apply when courts construe a criminal statute such as section 207, *see Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) (“[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”). We nonetheless believe that an interpretation issued by the President that has not been repudiated (even if, as explained below, it is no longer formally in effect) should have particular weight in *our* analysis of the position to be taken by the Executive Branch. Under Article II of the Constitution, the President has the authority to determine the Executive Branch’s interpretation of the law:

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone.

Myers v. United States, 272 U.S. 52, 135 (1926). The Presidential Memorandum was an exercise of this power by the President, intended “to achieve the maximum uniformity possible in order to insure general standards of common application throughout the Government.” 28 Fed. Reg. at 4540.³

Second, this presidential interpretation has been continuously followed ever since, a point that is true notwithstanding the current absence of a formal directive mandating this method of computing the number of days. As explained above in Part I, President Kennedy’s interpretation was adopted and reissued by the Civil Service Commission in 1965; it was expressly and continuously in force for twenty-nine years. In January 1994, the Office of Personnel Management, the successor to the Civil Service Commission, abolished the Federal Personnel Manual in an effort to establish “a more flexible and simpler system which will untie the hands of frontline users.” Office of Personnel Management, Press Release, *From Red Tape to Results: OPM Bids Farewell to the FPM* (Jan. 26, 1994); see 59 Fed. Reg. 2945 (Jan. 20, 1994) (deleting references to the Federal Personnel Manual). But there has been no suggestion that OPM has retreated from the partial-day rule, and no part of this history reflects any concern about the legal basis for that rule. Indeed, as noted above, the opinions of this Office and those of OGE have consistently relied upon the interpretation embodied in the Presidential Memorandum.

³ Arguably, because the Presidential Memorandum declares that “[a] part of a day *should* be counted as a full day,” 28 Fed. Reg. at 4542 (emphasis added), it offers prudential advice, rather than an interpretation of the statute. Reading that sentence in context, however, we believe that the “should” reflects instead a directive based on statutory interpretation. The direction about the treatment of a partial day appears in the first sentence of a two-sentence paragraph about counting the 60 days. The next sentence states that “[s]ervice performed by a special Government employee in one department or agency should not be counted by another in connection with the 60-day standard.” *Id.* Because this second sentence, setting out the interpretation that “should” be followed in dealing with SGEs serving in more than one agency, results in a *lesser* restriction than the contrary interpretation, the interpretation adopted in that sentence is plainly not prudential. Nor is this lesser restriction a matter of enforcement policy. By their terms, sections 203 and 205 have always tied the 60-day limit to service in the specific agency where a matter is pending, by referring to an SGE “who has served in such department or agency no more than sixty days.” The rule about separately counting service in each agency, therefore, comes directly from the language of the statute. The word “should” in the two adjoining sentences on the same subject is most naturally read to have the same meaning in both cases and thus to set out an interpretation of the statutory command, not prudential advice.

Third, while the Executive Branch has adhered to this view, Congress has amended sections 203 and 205. In 1986, it made minor amendments to the proviso in section 203 dealing with the sixty-day limit, *see* Pub. L. No. 99-646, § 47(a)(4), 100 Stat. 3592, 3605, and in 1989 it reenacted section 205 and made minor amendments to the parallel proviso in that section, *see* Pub. L. No. 101-194, § 404, 103 Stat. 1716, 1750. The Federal Personnel Manual’s interpretation was public and in force at both times. In making these amendments, Congress did not disturb the consistent administrative interpretation that a portion of any day worked counts as a full day. “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *Schor*, 478 U.S. at 846 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)). We see no reason to depart from that principle here.

B.

The memorandum attached to your letter notes that the Attorney General’s 1962 Opinion, 42 Op. Att’y Gen. at 117, referred to the Hatch Act in discussing application of the pre-existing conflict of interest laws to intermittent consultants. At that time, the Hatch Act generally applied to an intermittent employee throughout any day on which he did some work for the government. The Hatch Act and its implementing regulations have since been amended, and the Act now applies to an intermittent employee only when he is on duty. *See* 5 C.F.R. § 734.601 (2006). Therefore, you contend, “[s]ince the Attorney General relied on how the Hatch Act applied to SGEs to guide the application of 18 U.S.C. 203 and 205, it is logical that he will continue to apply Hatch Act criteria” and thus should count days of service “on the ‘on duty’ or hourly basis.” DoD Letter, Attachment, *Hatch Act* at 1. But the Attorney General’s 1962 Opinion did not, in fact, consider the application of 18 U.S.C. §§ 203 and 205, which did not then exist. The 1962 Opinion “was written before enactment of Pub. L. No. 87-849,” which created the category of SGEs, and it “addressed problems largely resolved by these [later] amendments.” 1982 Letter at 1. When the 1963 Presidential Memorandum later discussed the rule for counting days—an issue raised by the amendments passed after the 1962 Opinion—it made no reference to the Hatch Act (or to the 1962 Opinion).

The 1962 Opinion, moreover, did not suggest that the Hatch Act had some special significance in construing the terms of conflict of interest laws more generally. The 1962 Opinion sought to answer the question under the earlier conflict of interest laws “whether or not an occasional or intermittent consultant or adviser is an ‘officer or employee’ at times when his services are not actually being used by the Government or, to put the question more precisely, the circum-

stances in which these statutes may or may not apply to him.” 42 Op. Att’y Gen. at 115. It focused particularly on whether such an employee should be subject to the conflict of interest laws throughout his time on the agency’s rolls or only on days he actually worked. The Hatch Act presented a “somewhat analogous problem.” *Id.* at 117. As then interpreted, the Hatch Act in most cases applied to an intermittent employee only on days he worked, but it also applied “at all other times during [an employee’s] service where his Government employment, despite its intermittent character, affords his principal means of livelihood or occupies a substantial portion of his time.” *Id.* (citation omitted). The 1962 Opinion suggested only that a similar approach under the conflict of interest laws, “pursuant to regulations . . . might well be held by a court to reflect a sound interpretation of the statutes.” *Id.* It did not suggest that the conflict of interest laws needed to be coextensive with the Hatch Act, or even that they ordinarily would be.

Indeed, whatever the rule for counting days, the application of the conflict of interest laws to intermittent employees undoubtedly now differs from the application of the Hatch Act. For example, section 203 would bar an employee from receiving a fee for his partner’s work on a specific-party matter in which the employee participated in the government, 18 U.S.C. § 203(c)(1), even if the work took place, and the fee was received, at times when the employee was not on duty and the Hatch Act did not apply.

Nor are we persuaded that the change in the policies on paying experts and consultants under 5 U.S.C. § 3109 (2000) supports abandoning the longstanding rule for counting partial days served by SGEs. The memorandum attached to your letter states that, under the regulations in existence before 1995, pay for consultants and temporary employees had to be computed on a daily rate. Since then, however, “Agencies and Departments . . . have authority to pay experts and consultants by the hour,” so “there is no longer a requirement to compute service by days.” DoD Letter, Attachment, *Employment of Experts and Consultants (Counting Days or Hours)*. As OGE notes, however, “since the definition of SGE expressly includes unpaid employees, it is not apparent . . . why the methods used by the Government to calculate compensation should have any special bearing” on the method for counting days under the conflict of interest laws. OGE Letter at 3. *See generally* 18 U.S.C. § 202(a) (SGE includes employees “retained, designated, appointed, or employed . . . with or without compensation”). We are aware of no indication that the rules on compensating paid SGEs have played any part in the longstanding interpretation of how days served by SGEs should be computed.

Even if the payment of experts and consultants under 5 U.S.C. § 3109 could potentially bear on the computation of days under 18 U.S.C. §§ 203 and 205, it would tend to support the existing counting rules as the better interpretation of the meaning of sections 203 and 205 upon their enactment. DoD’s observation that before 1995, “pay for consultants was computed only on the daily rate” rather than on an hourly rate, DoD Letter, Attachment, *Employment of Experts and Consult-*

ants (Counting Days or Hours), tends to suggest that, at the time the legislation was enacted, Congress understood “days” of service to mean calendar days on which the SGE had performed work. The fact that, over thirty years after enactment (and even six years after the most recent minor amendments), agencies gained the flexibility to pay consultants on an hourly basis cannot change that understanding of the statutory language.

We therefore conclude that the longstanding interpretation under which a partial day of work counts as a full day for purposes of the sixty-day limit in 18 U.S.C. §§ 203 and 205 is well founded and should not be overturned.⁴

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⁴ OGE has interpreted the 60-day period to exclude days on which an SGE engages in only *de minimis* work, such as making a brief telephone call to confirm the date of a meeting. OGE Letter at 2 n.1; *see also* Manning, *Federal Conflict of Interest Law* at 28 (concluding that while “the employee will be considered to have worked a day for the government if he has worked part of the day,” “there is doubtless a *de minimis* limitation on this method of computing; a one-minute telephone call in which the consultant agrees to show up on the following Thursday is hardly enough in itself to count as a ‘day’ of his one hundred thirty allotted days”). Furthermore, OGE recently issued additional guidance identifying other possible *de minimis* activities. *See Memorandum for Designated Agency Ethics Officials Regarding Counting Days of Service for Special Government Employees*, Informal Advisory Mem. 07x01, 2007 WL 5065667 (Jan. 19). These activities include uncompensated work limited to strictly administrative matters (such as filling out personnel paperwork), uncompensated brief communications (even if substantive), and uncompensated brief periods of reading or other preparation outside the government workplace. OGE’s guidance mitigates some of the effects the existing counting rule may have on DoD’s ability to attract and retain consultants as SGEs. It also weighs against any argument that the practical administrative demands of the government require a change to the existing rule.

Presidential Signing Statements

This testimony discusses the purpose and history of presidential signing statements.

January 31, 2007

STATEMENT BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

Mr. Chairman, Ranking Member Smith, and Members of the Committee, I appreciate the opportunity to appear here today to discuss the purpose and history of presidential signing statements.

Like most Presidents before him, President Bush occasionally issues statements on signing legislation into law. Presidents have used these “signing statements” for a variety of purposes. At times Presidents use signing statements to explain to the public why the President endorses a bill and what the President understands to be its likely effect. At other times, Presidents use the statements to guide subordinate officers within the Executive Branch in enforcing or administering a particular provision.

Presidents throughout history also have issued what may be called “constitutional” signing statements, and it is this use of the signing statement that has recently been the subject of public attention. Presidents are sworn to “preserve, protect, and defend the Constitution,” and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America’s founding document. Presidents have long used signing statements for the purpose of “informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications,” *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993) (“*Presidential Signing Statements*”), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid possible constitutional infirmities. As Assistant Attorney General Walter Dellinger noted early during the Clinton Administration, “[s]igning statements have frequently expressed the President’s intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality).” *Id.* at 132.

President Bush, like many of his predecessors dating back to President James Monroe, has issued constitutional signing statements. The constitutional concerns identified in these statements often pertain to provisions of law that could be read to infringe explicit constitutional provisions (such as the Recommendations Clause, the Presentment Clauses, and the Appointments Clause) or to violate specific constitutional holdings of the Supreme Court. (Common examples are set forth in Part II below.) As such, President Bush’s signing statements are indistinguishable from those issued by past Presidents. As the Congressional Research Service concluded in its recent comprehensive study, “it is important to note that the substance of [President Bush’s] signing statements do not appear to differ

substantively from those issued by either Presidents Reagan or Clinton.” T.J. Halstead, Cong. Research Serv., *Presidential Signing Statements: Constitutional and Institutional Implications* at CRS-12 (Sept. 20, 2006); accord Curtis A. Bradley & Eric A. Posner, *Signing Statements: It’s a President’s Right*, Boston Globe, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”). In addition, the number of such statements issued by President Bush is in keeping with the number issued by every President during the past quarter century.

It is important to establish at the outset what presidential signing statements are not: an attempt to “cherry-pick” among the parts of a duly enacted law that the President will choose to follow, or an attempt unilaterally to redefine what the law is after its enactment. Presidential signing statements are, rather, a statement by the President explaining his interpretation of and responsibilities under the law, and they are therefore an essential part of the constitutional dialogue between the branches that has been a part of the etiquette of government since the early days of the Republic. Nor are signing statements an attempt to “override” duly enacted laws, as some critics have suggested. Many constitutional signing statements are an attempt to preserve the enduring balance between coordinate branches of government, but this preservation does not mean that the President will not enforce the provision as enacted.

One common example illustrates the natural course by which a President may object to a constitutionally problematic provision without deviating from the text of a statute or failing to abide by its provisions. In the Appointments Clause context discussed below, Congress sometimes attempts to place undue restrictions on the pool from which the President may select appointment candidates. As a mandatory directive to the President, such restrictions violate the Appointments Clause, U.S. Const. art. II, § 2, as each of the past four Presidents has noted in signing statements. If construed as a recommendation from Congress, however, these appointments provisions are constitutional and are often routinely followed. A constitutional signing statement on this issue, therefore, is not a declaration that the President will not follow the appointments provisions, but that he remains free to abide by them as a matter of policy. And it is commonly the case that Presidents do abide by such appointment provisions.

Similarly, a surprising number of newly enacted statutes seek to require the approval of a congressional committee before execution of a law, despite well-settled Supreme Court precedent that such “legislative veto” provisions violate the Presentment and Bicameralism Clauses of the Constitution, art. I, § 7. See *INS v. Chadha*, 462 U.S. 919, 958 (1983). More than 20 years after that clearly controlling Supreme Court decision, unconstitutional legislative veto provisions remain so common that President Bush has had to raise the issue in approximately 55 of his 126 constitutional signing statements. See, e.g., Statement on Signing the

Military Quality of Life and Veterans Affairs Appropriations Act, 41 *Weekly Comp. Pres. Doc.* 1799, 1799 (Nov. 30, 2005) (“The Constitution requires bicameral passage, and presentment to the President, of all congressional actions governing other branches, as the Supreme Court of the United States recognized in *INS v. Chadha* (1983), and thus prohibits conditioning executive branch action on the approval of congressional committees. Many provisions of the Act conflict with this requirement and therefore shall be construed as calling solely for notification, including the following: ‘Department of Defense Base Closure Account 2005,’ ‘Department of Veterans Affairs, Information Technology Systems,’ ‘Department of Veterans Affairs, Construction, Major Projects,’ and sections 128, 129, 130, 201, 211, 216, 225, 226, 227, and 229.”); Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 41 *Weekly Comp. Pres. Doc.* 1701, 1701 (Nov. 10, 2005) (“The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.”).

When constitutionally problematic provisions such as these are placed in otherwise constitutional bills, signing statements serve the appropriate function of reminding Congress and members of the Executive Branch of the deficiency. Again, however, President Bush and past Presidents to our knowledge have not ignored these provisions, but have instead done their utmost to apply them in a manner that does not violate the Constitution by ordering Executive Branch officials to notify congressional committees as anticipated by the provisions. *See id.* In short, where a President has no choice but to avoid a constitutional violation, the President’s best course is to announce publicly his intention to construe the provision constitutionally. Where the constitutional violation stems not from the substance of a provision but from its mandatory nature, as with the Appointments Clause, the President’s best course is to note the deficiency, leaving the President free to act in accordance with the provision as a matter of policy.

In another category of cases, Presidents recognize a statute as constitutional on its face, and anticipate that it will be applied constitutionally, but also foresee that in extreme or unanticipated circumstances it could raise the possibility of an unconstitutional application. An appropriate signing statement may therefore announce that the President fully intends to apply the law as far as possible, consistent with his duty to the Constitution.

The charge that constitutional signing statements are a “power grab” and encroach on Congress’s power to write the law is fundamentally flawed. Signing statements do not alter the constitutional balance between the President and Congress. That is established by the Constitution itself, and neither the President nor Congress can alter it through their actions. Signing statements do not expand

the President's authority: The President cannot adopt the provisions he prefers and ignore those he does not; he must execute the law as the Constitution requires. Nor do signing statements diminish congressional power. Congress has no power to enact unconstitutional laws, and that is true whether the President issues a constitutional signing statement or not.

I.

Signing statements have been an integral part of the constitutional dialogue between the branches of government since the early days of the Republic. After a thorough study, Assistant Attorney General Dellinger concluded that the use of signing statements "to raise and address the legal or constitutional questions . . . presented by" enrolled bills "can be found as early as the Jackson and Tyler Administrations, and later presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." *Presidential Signing Statements*, 17 Op. O.L.C. at 138. Even as early as 1822, President James Monroe issued a signing statement in which he stated that he would construe a statutory provision in a manner that did not conflict with his prerogative to appoint officers. Letter to the Senate of the United States (Apr. 13, 1822), in *2 A Compilation of the Messages and Papers of the Presidents* 698 (James D. Richardson ed., 1897). In 1830, Andrew Jackson "signed a bill and simultaneously sent to Congress a message" setting forth his interpretation "that restricted the reach of the statute." *Presidential Signing Statements*, 17 Op. O.L.C. at 138 (quoting Louis Fisher, *Constitutional Conflicts between Congress and the President* 128 (3d ed. 1991)).

The use of the constitutional signing statement has become more common in recent presidencies, beginning with President Reagan. While the task of counting constitutional signing statements is inexact because of the difficulty of characterizing such statements, Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush have apparently issued constitutional signing statements with respect to similar numbers of laws. By our count, President Reagan issued constitutional signing statements with respect to 80 laws; George H.W. Bush, 114; Clinton, 80. The numbers in the academic literature are comparable or even higher. By our count, President Bush has issued constitutional signing statements with respect to 126 bills as of January 25 of this year. Some Presidents have in the past used signing statements simply to praise a piece of legislation, and even including non-constitutional signing statements, the total number of signing statements is only a small fraction of the number of laws passed by Congress. For example, President Bush issued a total of 28 signing statements for both bills and joint resolutions in 2003, 25 in 2004, 14 in 2005, 23 in 2006, and 1 thus far this year, totaling only approximately 9 percent of the 498 public laws passed by the 108th Congress and the 482 public laws passed by the 109th Congress.

This practice of issuing signing statements does not mean that a President has acted contrary to law or the Legislative Branch. The practice is consistent with, and derives from, the President's constitutional obligations, and is an ordinary part of a respectful constitutional dialogue between the branches. When Congress passes legislation containing provisions that could be construed or applied in certain cases in a manner contrary to well-settled constitutional principles, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. The Supreme Court specifically has stated that the President has the power to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926); *see also Bowers v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").

The President takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8. The President has the responsibility and duty also to faithfully execute the laws of the United States. U.S. Const. art. II, § 3. But these duties are not in conflict: the law the President must execute includes the Constitution—the supreme law of the land. Because the Constitution is supreme over all other law, the President must resolve any conflict between statutory law and the Constitution in favor of the Constitution, just as courts must.

This presidential responsibility may arise most sharply when the President is charged with executing a statute, passed by a previous congress and signed by a prior President, a provision of which he finds unconstitutional under intervening Supreme Court precedent. A President that places the statutory law over the constitutional law in this instance would fail in his duty faithfully to execute the laws. The principle is equally sound where the Supreme Court has yet to rule on an issue, but the President has determined that a statutory law violates the Constitution. To say that the principle is not equally sound in this context is to deny the President's independent responsibility to interpret and uphold the Constitution. It is to leave the defense of the Constitution only to two, not three, of the branches of our government. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) ("The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands."); *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do . . .").

In the past year alone, many prominent commentators, including respected scholars and former officials of the Clinton Administration's Justice Department, have said that the use of signing statements is a legitimate presidential power. For

example, Professors Tribe, Bradley, and Posner have acknowledged the appropriateness of constitutional signing statements. See Laurence H. Tribe, “*Signing statements*” are a phantom target, *Boston Globe*, Aug. 9, 2006; Curtis A. Bradley & Eric A. Posner, *Signing Statements: It’s a President’s Right*, *Boston Globe*, Aug. 3, 2006; Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, *Const. Commentary* (forthcoming). Professor Dellinger has done the same, reiterating the views that he expressed as Assistant Attorney General during the Clinton Administration (and that I have quoted above). Walter Dellinger, *A Slip of the Pen*, *N.Y. Times*, July 31, 2006. And the Congressional Research Service concluded that “in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves.” *Presidential Signing Statements: Constitutional and Institutional Implications* at CRS-1. These analyses by commentators who span the ideological spectrum represent the mainstream opinion among informed constitutional scholars.

I am aware that the American Bar Association issued a report last year that reached a contrary conclusion. See American Bar Association, *Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* (Aug. 2006). We respectfully disagree with the analysis in that report, which suggests that a President has no choice but to enforce a clearly unconstitutional provision of law until the provision is struck down by a court, and that a President has no choice but to veto a bill if even a minor provision of an omnibus bill violates the Constitution in some applications. As noted, scholars of many different viewpoints share our disagreement with the report’s constitutional analysis.

To be sure, people may fairly disagree with the language in particular signing statements, because there is honest disagreement in many instances about what the Constitution requires. But as this testimony will reveal, President Bush’s signing statements are of a piece with prior administrations’ signing statements. He is exercising a legitimate power in a legitimate way.

To appreciate the value of signing statements, consider the alternatives. As we understand the argument, some critics of presidential signing statements would prefer that a President either reject the legislation outright through veto or remain silent upon signing the legislation. First, it has never been the case that the President’s only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson (e.g., the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, as well as George H.W. Bush and Clinton, have signed legislation rather than vetoing it despite concerns that particular aspects of the legislation posed constitutional difficulties. See *Presidential Signing Statements*, 17 Op. O.L.C. at 132 nn. 3 & 5, 134, 138; see

also *Chadha*, 462 U.S. at 942 n.13 (“it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds”). Assistant Attorney General Dellinger explained early during the Clinton Administration: “In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision.” *Presidential Signing Statements*, 17 Op. O.L.C. at 135. To be sure, Presidents have the option of vetoing a bill most of whose provisions are clearly constitutional but that contains a few provisions that may be read to permit certain unconstitutional applications. It is more sensible, however, to sign the bill while giving the problematic provisions a “saving” construction. Respect for the Legislative Branch in this circumstance is not shown by the veto of an otherwise well crafted bill, but by a candid and public signing statement. Compared to vetoing a bill, giving constitutionally infirm provisions a “saving” interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the great bulk of a law’s provisions and the fullest possible effect to even constitutionally problematic provisions. This approach is not an affront to Congress. Instead, it gives effect to the well-established legal presumption that Congress did not choose to enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is “analogous to the Supreme Court’s practice of construing statutes, where possible, to avoid holding them unconstitutional.” *Presidential Signing Statements*, 17 Op. O.L.C. at 133. A veto, by comparison, would render all of Congress’s work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation. The value of this ability to preserve legislation has grown in step with the use of large omnibus bills in the last few decades.

It should also be noted that a veto may only delay, not avoid, the constitutional question. If a President’s veto is overridden by Congress, the resulting statute still must be interpreted and executed by that and future Presidents in keeping with the Constitution. To return to the example of a *Chadha* violation, where a provision attempts to condition future executive action on the approval of a congressional committee, the President and the courts, including the Supreme Court, will still be compelled to find that provision unconstitutional, and therefore unenforceable. Moreover, this was true even before the definitive Supreme Court ruling in *Chadha*. See, e.g., *Chadha*, 462 U.S. at 942 n.13 (citations omitted) (“11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.”).

As for the second suggested alternative to signing statements—presidential silence—it is not clear what critics of signing statements hope will be gained by such a course. Signing statements have the virtue of making the President’s views public. A statement may notify the Congress and the American people of concerns that the President has about the legislation and how the Executive Branch will construe a particular law. Or it may serve only as a reminder to those in the

Executive Branch charged with executing a law that the law must be applied within the confines of the Constitution. Neither Congress nor the public would be better served by such statements being restricted to an internal Executive Branch audience. Employing signing statements to advise Congress of constitutional objections is more respectful of Congress's role as an equal branch of government than public silence, and promotes a constitutional dialogue that is healthy in a democracy.

The last possible alternative—for the President to remain publicly silent *and* not to direct subordinate Executive Branch officials to construe the law in a constitutional manner—would flatly contradict the Constitution's requirement that the President "take care that the Laws [are] faithfully executed." Recent administrations, including the Reagan, George H.W. Bush, and Clinton Administrations, consistently have taken the position that "the Constitution provides [the President] with the authority to decline to enforce a clearly unconstitutional law." *Presidential Signing Statements*, 17 Op. O.L.C. at 133 (opinion of Assistant Attorney General Dellinger) (noting that understanding is "consistent with the view of the Framers" and has been endorsed by many members of the Supreme Court). Indeed, "every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994) (opinion of Assistant Attorney General Dellinger); *see also id.* at 199 (noting that "consistent and substantial executive practice" since "at least 1860 assert[s] the President's authority to decline to effectuate enactments that the President views as unconstitutional"); *Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980) (opinion of Benjamin R. Civiletti, Attorney General to President Carter) ("the President's constitutional duty does not require him to execute unconstitutional statutes"); 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 446 (2d ed. 1836) (statement of James Wilson, signer of Constitution from Pennsylvania) (noting that, just as judges have a duty "to pronounce [an unconstitutional law] void . . . [,] [i]n the same manner, the President of the United States could . . . refuse to carry into effect an act that *violates* the Constitution"). Rather than tacitly placing limitations on the enforcement of provisions (or declining to enforce them), as has been done in the past, signing statements promote a constitutional dialogue with Congress by openly stating the interpretation that the President will give certain provisions.

Finally, some have raised the concern that courts will use signing statements to interpret statutes in contravention of the legislative goal. Signing statements, of course, are not binding on the courts; they are principally an exercise of the President's responsibility as head of the Executive Branch to determine the correct interpretation of the law for purposes of executing it faithfully. There must be an authoritative interpretation of the law within the Executive Branch, and it is the

President's responsibility as Chief Executive to ensure that the law is authoritatively interpreted consistent with the Constitution.

II.

Many of President Bush's constitutional signing statements have sought to preserve three specific constitutional provisions that are sometimes overlooked in the legislative process: the Recommendations Clause, the Presentment Clauses, and the Appointments Clause. Far from using signing statements in "unprecedented fashion," as some critics have contended, this President has employed constitutional signing statements in a way completely consistent with those of his predecessors. Three additional important areas that have elicited comment from Presidents are the protection of confidential national security information, the preservation of the Executive's foreign affairs power and position as Commander in Chief, and the preservation of the President's status as head of a unitary Executive Branch.

A. Recommendations Clause

Presidents commonly have raised concern when Congress purports to *require* the President to submit legislative recommendations, because the Constitution vests the President with discretion to do so when he sees fit, stating that he "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3, cl. 1. By our count, President Bush raised this particular concern in approximately 67 of his 126 constitutional signing statements. President Bush's statements on this point, moreover, are indistinguishable from President Clinton's. *Compare, e.g.,* Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005, 40 *Weekly Comp. Pres. Doc.* 3012, 3012 (Dec. 23, 2004) (President Bush) ("To the extent that provisions of the Act, such as sections 614 and 615, purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient."), *with, e.g.,* Statement on Signing the Shark Finning Prohibition Act (Dec. 26, 2000), 3 *Pub. Papers of Pres. William J. Clinton* 2782, 2782 (2000–2001) ("Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities."). *See also* Statement on Signing the Balanced Budget Act of 1997 (Aug. 5, 1997), 2 *Pub. Papers*

of Pres. William J. Clinton 1053, 1054 (1997) (“Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to *supervise and guide my subordinates, including the review of their proposed communications to the Congress.*”) (emphasis added); Statement on Signing the Treasury and General Government Appropriations Act (Oct. 10, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1339, 1340 (1997) (“Any broader interpretation of the provision that would apply to ‘nonwhistle-blowers’ would *raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch.* I do not interpret this provision to detract from my constitutional *authority in this way.*”) (emphasis added).

B. Presentment Clauses/Bicameralism/*INS v. Chadha*

Presidents commonly raise concern when Congress purports to authorize a single house of Congress to take action on a matter in violation of the well-established rule, embodied in the Supreme Court’s decision in *INS v. Chadha*, 462 U.S. 919, 958 (1983), that Congress can act only by “passage by a majority of both Houses and presentment to the President.” U.S. Const. art. I, § 7 (requiring that bills and resolutions pass both houses before being presented to the President). By our count, President Bush raised this particular concern in 55 of his 126 constitutional signing statements. Again, President Bush followed in the footsteps of prior Presidents, including President Clinton, in raising this concern in various signing statements. *Compare, e.g.*, Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 41 *Weekly Comp. Pres. Doc.* 1920, 1920 (Dec. 30, 2005) (“The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha.*”), *with, e.g.*, Statement on Signing the Consolidated Appropriations Act, FY 2001 (Dec. 21, 2000), 3 *Pub. Papers of Pres. William J. Clinton* 2770, 2776 (2000–2001) (“There are provisions in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha.*”).

C. Appointments Clause

The Appointments Clause of the Constitution, U.S. Const. art. II, § 2, provides that the President, with the advice and consent of the Senate, shall appoint principal officers of the United States (heads of agencies, for example); and that “inferior officers” can be appointed only by the President, by the heads of “Departments” (agencies), or by the courts. Presidents commonly raise a concern when bills seem to restrict the President’s ability to appoint officers, or to vest entities other than those specified in the Constitution with the power to appoint officers. By our count, President Bush raised this concern in 25 of his 126 constitutional signing statements. President Bush’s signing statements on this point are nearly identical to President Clinton’s. *Compare, e.g.*, Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 *Weekly Comp. Pres. Doc.* 1273, 1273 (Aug. 10, 2005) (President Bush) (“The executive branch shall construe the described qualifications and lists of nominees under section 4305(b) as recommendations only, consistent with the provisions of the Appointments Clause of the Constitution.”), *with, e.g.*, Statement on Signing the Gramm-Leach-Bliley Act (Nov. 12, 1999), 2 *Pub. Papers of Pres. William J. Clinton* 2082, 2084 (1999) (“Under section 332(b)(1) of the bill, the President would be required to make such appointments from lists of candidates recommended by the National Association of Insurance Commissioners. The Appointments Clause, however, does not permit such restrictions to be imposed upon the President’s power of appointment. I therefore do not interpret the restrictions of section 332(b)(1) as binding and will regard any such lists of recommended candidates as advisory only.”).

D. Confidentiality of National Security Information

The Supreme Court has held that the Constitution gives the President authority to control the access of Executive Branch officials to classified information. The Supreme Court has stated that the President’s “authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and *exists quite apart from any explicit congressional grant.*” *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988). Presidents commonly have issued signing statements when newly enacted provisions might be construed to involve the disclosure of sensitive information. *See, e.g.*, Statement by the President Upon Approval of Bill Amending the Naval Security Act of 1954 (July 24, 1959), *Pub. Papers of Pres. Dwight D. Eisenhower* 549, 549 (1959) (“I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the

disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.”).

By our count, President Bush raised this concern in approximately 63 of his 126 constitutional signing statements. President Bush’s statements regarding this issue are nearly identical to the statements issued by past Presidents, including Presidents Eisenhower and Clinton. *Compare, e.g.*, Statement on Signing Legislation on Amendments to the Mexico-United States Agreement on the Border Environment Cooperation Commission and the North American Development Bank, 40 *Weekly Comp. Pres. Doc.* 550, 550–51 (Apr. 5, 2004) (President Bush) (“Sections 2(5) and 2(6) of the Act purport to require the annual report of the Secretary of the Treasury to include a description of discussions between the United States and Mexican governments. In order to avoid intrusion into the President’s negotiating authority and ability to maintain the confidentiality of diplomatic negotiations, the executive branch will not interpret this provision to require the disclosure of either the contents of diplomatic communications or specific plans for particular negotiations in the future.”), *with, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2000 (Oct. 5, 1999), 2 *Pub. Papers of Pres. William J. Clinton* 1685, 1688 (1999) (“A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President’s duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise.”); Statement on Signing the National Defense Authorization Act for Fiscal Year 1998 (Nov. 18, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1611, 1612 (1997) (“Because of the President’s constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch.”).

E. Foreign Affairs and Power as Commander in Chief

President Bush also has used signing statements to safeguard the President’s well-established role in the Nation’s foreign affairs and the President’s wartime power. These signing statements also are in keeping with the practice of his predecessors. *See, e.g.*, Louis Fisher, *Constitutional Conflicts Between Congress and the President* 134 (4th rev. ed. 1997) (noting that President Wilson expressed an intention not to enforce a provision on the grounds it was unconstitutional because Congress did not have the authority to direct the President on the conduct

of foreign affairs) (citation omitted); Statement by the President Upon Signing the General Appropriations Act (Sept. 6, 1950), *Pub. Papers of Pres. Harry S. Truman* 616 (1950) (“I do not regard this provision [involving loans to Spain] as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made.”); Statement on Signing the Military Appropriations Authorization Bill (Nov. 17, 1971), *Pub. Papers of Pres. Richard M. Nixon* 1114, 1114 (1971) (Mansfield Amendment setting a final date for the withdrawal of U.S. Forces from Indochina was “without binding force or effect”); Department of State, International Communication Agency, and Board for International Broadcasting Appropriations Bill—Statement on Signing H.R. 3363 Into Law (Aug. 15, 1979), 2 *Pub. Papers of Pres. Jimmy Carter* 1434, 1434 (1979) (“Congress cannot mandate the establishment of consular relations at a time and place unacceptable to the President”).

Some have argued that President Bush has increased the use of presidential signing statements, but any such increase must be viewed in light of current events and the legislative response to those events. While President Bush has issued numerous signing statements involving foreign affairs and his power as Commander in Chief, the significance of legislation affecting national security has increased markedly since the September 11th attacks and Congress’s authorization of the use of military force against the terrorists who perpetrated those attacks. Even before the War on Terror, President Clinton issued many such statements. *See, e.g.*, Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Oct. 23, 1998), 2 *Pub. Papers of Pres. William J. Clinton* 1843, 1847 (1998) (“Section 610 of the Commerce/Justice/State appropriations provision prohibits the use of appropriated funds for the participation of U.S. armed forces in a U.N. peacekeeping mission under foreign command unless the President’s military advisers have recommended such involvement and the President has submitted such recommendations to the Congress . . . [which] unconstitutionally constrain[s] my diplomatic authority and my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities.”); Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Mar. 12, 1996), 1 *Pub. Papers of Pres. William J. Clinton* 433, 434 (1996) (“Consistent with the Constitution, I interpret the Act as not derogating from the President’s authority to conduct foreign policy. . . . While I support the underlying intent of these sections, the President’s constitutional authority over foreign policy necessarily entails discretion over these matters. Accordingly, I will construe these provisions to [b]e precatory.”).

F. Unitary Executive

Some critics have focused in particular on signing statements that make reference to the President’s authority to supervise the “unitary executive.” Although the phrase has been used by critics to mean many things in recent months, at bottom, the core idea of a “unitary executive” is that, because “[t]he executive power shall be vested in [the] President” under the Constitution, U.S. Const. art. II, § 1, the President has broad authority to direct the exercise of discretion by officials within the Executive Branch. As several scholars concluded after an exhaustive survey of historical practice, “each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive” and “every president between 1945 and 2004 defended the unitariness of the executive branch.” Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 Iowa L. Rev. 601, 608, 730 (2005).

President Bush’s statements that he intends to construe particular statutory provisions consistent with his constitutional obligation to “supervise the unitary Executive Branch” are indistinguishable from similar statements made by past Presidents of both parties. For example, President Reagan in 1987 issued the following signing statement:

I wish to make clear my understanding that sections 252(a)(1) and (2) of the amended Act—which direct the President to issue an order “in strict accordance” with the report submitted by the Office of Management and Budget—do not preclude me or future Presidents from exercising our authority to supervise the execution of the law by overseeing and directing the Director of OMB in the preparation and, if necessary, revision of his reports. If this provision were interpreted otherwise so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the *President’s authority as head of a unitary Executive branch*.

Statement by President Ronald Reagan upon Signing H.J. Res. 324 (Sept. 29, 1987), 2 *Pub. Papers of Pres. Ronald Reagan* 1096, 1097 (1987) (emphasis added). *See also, e.g.*, Statement by President William J. Clinton Upon Signing the Balanced Budget Act of 1997 (Aug. 5, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1053, 1054 (1997) (“Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal . . . I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to *supervise and guide my subordinates, including the review of their proposed communications to the Congress.*”) (emphasis added); Statement

by President William J. Clinton Upon Signing the Treasury and General Government Appropriations Act (Oct. 10, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1339, 1340 (1997) (“Any broader interpretation of the provision that would apply to ‘nonwhistleblowers’ would raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch. I do not interpret this provision to detract from my constitutional authority in this way.”) (emphasis added); Statement by President George Bush upon Signing H.R. 3792 (Feb. 16, 1990), 1 *Pub. Papers of Pres. George Bush* 239, 241 (1990) (“I shall interpret these provisions consistent with my authority as head of the unitary executive branch.”) (emphasis added); Statement by President George Bush upon Signing H.R. 5019 (Nov. 5, 1990), 2 *Pub. Papers of Pres. George Bush* 1561, 1562 (1990) (“This provision must be interpreted in light of my constitutional responsibility, as head of the unitary executive branch, to supervise my subordinates.”) (emphasis added).

Similarly, during the Carter Administration, the Justice Department published a legal opinion stating that “[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the constitution evidently contemplated in vesting general executive power in the President alone.” *Administrative Procedure—Rulemaking—Department of the Interior—Ex Parte Communications—Consultation with the Council of Economic Advisors—Surface Mining Control and Reclamation Act* (30 U.S.C. § 1201 et seq.), 3 Op. O.L.C. 21, 23 (1979) (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). The specific phrasing used in these signing statements is not unique, and indeed employs language that was already well settled by the mid-nineteenth century. For example, Attorney General Cushing wrote in an 1854 opinion that the “settled constitutional theory” was that “executive discretion exists, and that judgment is continually to be exercised, yet required unity of executive action, and, of course, unity of executive decision.” *Offices and Duties of Attorney General*, 6 Op. Att’y Gen. 326 (1854). These statements explaining the President’s authority to supervise the Executive Branch in the execution of the law are uncontroversial and consistent with well-established law. The Supreme Court specifically has stated that the President has the power to “supervise and guide [Executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone,” *Myers v. United States*, 272 U.S. 52, 135 (1926). More recently, the Court has explained that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.” *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

III.

Until recently, every scholarly discussion of signing statements of which we are aware simply counted the number of bills about which a President had made constitutional signing statements. Under that traditional measure, the number of signing statements President Bush has issued is, as I have just explained, comparable to the number issued by Presidents Reagan, George H.W. Bush, and Clinton.

Recently, persons critical of the President's use of signing statements have adopted the novel measure of counting the number of *individual provisions* referenced in signing statements. We believe that is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than his predecessors' signing statements. President Clinton, for example, routinely referred in signing statements to "several provisions" or "a number of provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, Statement on Signing the Consolidated Appropriations Act, FY 2001 (Dec. 21, 2000), 3 *Pub. Papers of Pres. William J. Clinton* 2770, 2776, 2777 (2000–2001) ("There are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*."; "*Several provisions* of the Act also raise concerns under the Recommendations Clause. These provisions purport to require a Cabinet Secretary or other Administration official to make recommendations to Congress on changes in law. To the extent that those provisions would require Administration officials to provide Congress with policy recommendations or draft legislation, I direct these officials to treat any such requirements as precatory.") (emphases added); Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000 (Nov. 29, 1999), 2 *Pub. Papers of Pres. William J. Clinton* 2156, 2160 (1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and

responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.”) (emphases added). If, as the CRS and many scholars have indicated, the substance of the President’s signing statements is unobjectionable, it is no fault that those statements specifically identify the provisions at issue. Indeed, doing so tends to promote the constitutional dialogue between the branches.

IV.

The constitutional signing statements discussed here are a small, but central, sampling of the many statements issued by American Presidents. These statements are an established part of the President’s responsibility to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. Members of Congress and the President will occasionally disagree on a constitutional question. This disagreement does not relieve the President of the obligation to interpret and uphold the Constitution, but instead supports the candid public announcement of the President’s views.

JOHN P. ELWOOD

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Legality of Alternative Organ Donation Practices Under 42 U.S.C. § 274e

Two alternative kidney donation practices, in which a living donor who is incompatible with his intended recipient donates a kidney to a stranger in exchange for the intended recipient's receiving a kidney from another donor or increased priority on a waiting list, do not violate the prohibition on transfers of organs for "valuable consideration" in 42 U.S.C. § 274e.

March 28, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HEALTH AND HUMAN SERVICES

Section 301 of the National Organ Transplant Act ("NOTA" or "Act"), entitled "Prohibition of organ purchases," imposes criminal penalties of up to \$50,000 and five years in prison on any person who "knowingly acquire[s], receive[s], or otherwise transfer[s] any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346-47 (1984) (codified at 42 U.S.C. § 274e (2000)). You have asked whether certain arrangements for donation of kidneys by living donors involve "valuable consideration" under this statute. We conclude that they do not.

I.

Someone requiring a kidney transplant may generally obtain a kidney in two ways. First, he may join a national waiting list to receive a kidney from a deceased donor. There are far more people waiting, however, than there are cadaveric kidneys available, and the wait can be long. Alternatively, such a person may receive a kidney from a living donor. In many cases, however, the would-be donor is biologically incompatible with the intended recipient.

Two alternative donation practices have developed to mitigate these problems. In a Living Donor/Deceased Donor ("LDDD") Exchange, a living donor donates a kidney to an unknown, compatible recipient on the list for a deceased donor. The living donor's intended (but incompatible) recipient receives in turn some priority on the deceased-donor waiting list, and this priority may significantly shorten his waiting time. In a Paired Exchange, an organ procurement and transplantation network matches two or more incompatible donor/recipient pairs where each living donor is compatible with another living donor's intended recipient. Hospitals have performed a number of transplants involving Paired Exchanges. *See, e.g.,* Susan Levine, *Hopkins Celebrates Quintuple Transplant*, Wash. Post, Nov. 21, 2006, at A21. You seek our views primarily so that the Secretary of Health and Human Services may know whether section 301 imposes a barrier to his taking certain actions to encourage these practices.

When a living donor simply gives the gift of a kidney to his intended recipient, he receives in return only the satisfaction of helping that recipient. Although a knowing “transfer” of a “human organ . . . for use in human transplantation” has occurred, the lack of any exchange eliminates any question of the transfer’s being “for valuable consideration.” 42 U.S.C. § 274e(a). But when a donor transfers the kidney through an LDDD or Paired Exchange to be implanted into someone else, the donor does so in exchange for a benefit to his intended recipient as a third party. The intended recipient either receives from a network advancement on the waiting list for a cadaveric kidney or receives a kidney from another living donor. Thus, the question arises whether either of these donative practices involves a transfer for “valuable consideration” under section 301.

II.

The term “consideration” has deep roots in the common law of contracts and a fairly established meaning, but the meaning of the term “valuable consideration” is less clear. Drawing on the available sources of guidance, however, we conclude that the latter term as used in section 301 does not apply to an LDDD Exchange or a Paired Exchange, because neither involves the buying or selling of a kidney or otherwise commercializes the transfer of kidneys.¹

Section 301 does not define “valuable consideration,” but it and a related provision in the Act provide some initial guidance. Section 301 lists certain acts that do not involve “valuable consideration”: “The term ‘valuable consideration’ does not include the *reasonable payments* associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the *expenses* of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.” 42 U.S.C. § 274e(c)(2) (emphases added). These exclusions address types of “payments” and “expenses” that may otherwise fall within the term “valuable consideration” on the theory that they involve monetary benefits or at least a monetary transfer. Any benefits received in the LDDD and Paired Exchanges, on the other hand, are not monetary or otherwise pecuniary. To the extent that Congress concluded that exclusions from the prohibition on transfers for “valuable consideration” were necessary only for the specified monetary payments and reimbursements, the lack in section 301 of a comparable exclusion for non-monetary benefits may suggest that non-monetary exchanges such as LDDD and Paired Exchanges do not involve valuable consideration.

The title that Congress affixed to section 301 supports such an interpretation. It is established that “the title of a statute or section can aid in resolving an ambiguity

¹ In considering this question, we have benefited from the views of your office as well as those of the Department of Justice’s Criminal Division. Our conclusion is consistent with the views of both.

in the legislation’s text.” *INS v. Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. 183, 189 (1991) (concluding that the term “employment” in statutory text referred to “unauthorized employment,” in accordance with heading of section). Here, although the title does not expressly address “valuable consideration,” it does describe section 301 as involving a “[p]rohibition of organ purchases.” 42 U.S.C. § 274e. Reading the statutory text in light of this title suggests that the vague phrase “valuable consideration” addresses organ transfers that could be considered to involve a “purchase[],” rather than all donations that may involve some exchange.

In addition, section 301 applies only “if the transfer affects interstate commerce.” Apart from the distinct question whether a transfer that did involve valuable consideration would satisfy this requirement, the requirement indicates that section 301 rests on Congress’s power to “regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. That foundation further suggests that “valuable consideration” involves some sort of commercial transaction. *See United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding criminal statute not authorized by this power, because it had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”); *cf. Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (“Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act] are quintessentially economic. . . . [It] regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”); *Perry v. St. Francis Hosp. & Med. Ctr.*, 886 F. Supp. 1551, 1563–64 (D. Kan. 1995) (“For whatever reason, . . . society presently rejects the commercialization of human organs . . . and tolerates only an altruistic system of voluntary donation.”).

As a further, albeit less direct, indication, the Act in another section gives certain duties to an organ procurement and transplantation network established by the Secretary. The network has a duty to “work actively to increase the supply of donated organs.” 42 U.S.C. § 274(b)(2)(K) (2000). One should seek to interpret the provisions of an act in harmony with one another; here, that rule of interpretation indicates that this statutory mandate to increase the supply of donated organs can illuminate the statute’s unclear phrase “valuable consideration.” In particular, section 301 should be read to allow creative practices that “increase the supply of donated organs,” *id.*, but do not involve buying, selling, or otherwise commercializing the transfer of organs. Both of the forms of exchange at issue enable someone who desires simply to donate his kidney to a family member or another specific individual, but is unable to do so directly due to incompatibility, to benefit that individual by other means. By donating his kidney to someone other than his intended recipient, the donor does receive something in exchange, but not a payment, financial gain, or direct personal benefit; rather, he receives an increased opportunity for his intended recipient to obtain a compatible kidney. These

arrangements may fairly be described as enabling donations rather than as transfers for “valuable consideration.”²

Some other references to “valuable consideration” in the United States Code reinforce these indications from the Act (while the remainder of the references are inconclusive). The most relevant reference tracks section 301 by making it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.” 42 U.S.C. § 289g-2(a) (2000). The title—“Purchase of tissue”—also parallels section 301. It is an accepted rule that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). The prohibition on the purchase of fetal tissue was enacted nine years after NOTA, *see* National Institutes of Health Revitalization Act, Pub. L. No. 103-43, § 112, 107 Stat. 122, 131 (1993), and is codified with NOTA as part of the Public Health Service Act, 42 U.S.C. §§ 201–300gg-92 (2000). Thus, the penalty for violating the prohibition is illuminating: a “fine . . . in an amount not less than twice the amount of the valuable consideration received.” *Id.* § 289g-2(c)(2). The requirement for calculating the fine presumes that the “valuable consideration” is monetary or at least has a readily measurable pecuniary value. It is reasonable to apply that same meaning to the identical term in section 301, and “valuable consideration” so understood would not include the two donative practices at issue.³

A further indication of the meaning of “valuable consideration” in section 301 is usage in similar contexts in contemporaneous state laws. A California law enacted in 1984, the same year as NOTA, makes it “unlawful for any person to knowingly acquire, receive, sell, promote the transfer of, or otherwise transfer any

² The Act’s legislative history does not directly suggest a meaning of “valuable consideration” but is consistent with the above indications and interpretation. The Senate Report states that the bill “prohibits the interstate buying and selling of human organs for transplantation” and “is directed at preventing the for-profit marketing of kidneys and other organs.” S. Rep. No. 98-382, at 2, 4, *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976, 3978. It adds that “individuals or organizations should not profit by the sale of human organs” and that “human body parts should not be viewed as commodities.” *Id.* at 16–17, 1984 U.S.C.C.A.N. at 3982. The House Conference Report explains that the final bill “intends to make the buying and selling of human organs unlawful.” H.R. Conf. Rep. No. 98-1127, at 16, *reprinted in* 1984 U.S.C.C.A.N. 3989, 3992. The legislative history does not suggest that any member of Congress understood the bill as addressing non-monetary or otherwise non-commercial transfers.

³ Several other federal statutes use “valuable consideration” in different contexts and without defining it or otherwise clearly indicating its meaning, although they seem to suggest some sort of commercial transaction. *See, e.g.*, 15 U.S.C. § 1060 (2000) (protecting “subsequent purchaser [of a trademark] for valuable consideration”); 31 U.S.C. § 3125(a) (2000) (defining “obligation” to mean “a direct obligation of the United States Government issued under law for valuable consideration, including bonds, notes, certificates of indebtedness, Treasury bills, and interim certificates”); 47 U.S.C. § 338(e) (2000) (making it unlawful for a satellite carrier to “accept or request monetary payment or other valuable consideration” for certain actions).

human organ, for purposes of transplantation, for valuable consideration.” Cal. Penal Code § 367f(a) (2005). That statute defines “valuable consideration” to mean “financial gain or advantage.” *Id.* § 367f(c)(2). An essentially identical South Dakota prohibition enacted in 1992 likewise defines “valuable consideration” to mean “financial gain or advantage.” *See* S.D. Codified Laws §§ 34-26-43 (definition), 34-26-44 (prohibition) (2005). And the Uniform Anatomical Gift Act, while not defining “valuable consideration,” does provide that “[a] person may not knowingly, for valuable consideration, *purchase or sell* a part for transplantation or therapy, if the removal of the part is intended to occur after the death of the decedent.” *Id.* § 10(a) (1987) (emphasis added). (All three of these sources also have exclusions for reasonable payments similar to the exclusions in section 301.) This usage also indicates that “valuable consideration,” at least as applied to organ donations, involves some sort of buying and selling, or otherwise commercial transfer, of organs.

It also is appropriate, as suggested above, to look to the common law of contracts, because “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (citation omitted). With regard to mere “consideration,” a broad range of promises and actions may suffice, though even there the outer limits are hazy. *Compare* 2 William Blackstone, *Commentaries* *440 (5th ed. 1773) (“[I]n case of leases, always reserving a rent, though it be but a peppercorn [such] . . . considerations will, in the eyes of the law, convert the gift . . . into a contract.”), with Restatement (Second) of Contracts § 79 cmt. d (1979) (“Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense.”). With regard to “valuable consideration,” however, there is much less of a “settled meaning.” The term is rarely defined, and its apparent meaning has varied over time and among jurisdictions. It also is difficult to determine how it differs from mere “consideration,” even though, under normal rules of interpretation, one would expect the additional word to have some meaning. In addition, the definitions indicated by various authorities are not specific to the context of organ transfers. Nevertheless, the common law does at least allow for the reading of section 301 that we have derived from relevant statutory usage; it certainly does not foreclose it.

Black’s Law Dictionary defines “consideration” generally as “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” *Id.* at 324 (8th ed. 2004). It then defines “valuable consideration” as “[c]onsideration that is valid under the law; consideration that either confers a *pecuniarily* measurable benefit on one party or imposes a *pecuniarily* measurable detriment on the other.” *Id.* at 326 (emphases added). This latter definition dates to the 1999 edition, which was a significant update and revision.

Id. at 302 (7th ed. 1999). The definition in the edition current when NOTA was enacted had not required “pecuniarily measurable” consideration:

A class of consideration upon which a promise may be founded, which entitles the promisee to enforce his claim against an unwilling promisor. Some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. . . . It need not be translatable into dollars and cents, but is sufficient if it consists of *performance, or promise thereof, which promisor treats and considers of value to him.*

Id. at 1390 (5th ed. 1979) (emphasis added). (This edition did, however, define “valuable” to mean “[o]f financial or market value; commanding or worth a good price; of considerable worth in any respect, whether monetary or intrinsic.” *Id.*) Under this definition, a kidney made available to a third party in an LDDD or Paired Exchange could be viewed as a “benefit” “of value to” the donor of a kidney; in turn, the network in an LDDD Exchange and the complementary donor in a Paired Exchange could be viewed as undertaking a “responsibility” toward the intended recipient.

The case law is similarly inconclusive as to whether “valuable consideration” necessarily involves a pecuniary element, though it does suggest that valuable consideration typically involves consideration that can be measured in monetary terms. In *Prewitt v. Wilson*, 103 U.S. 22 (1881), the Supreme Court quoted Sir Edward Coke for the proposition that “[m]arriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents.” *Id.* at 24 (citation omitted). Other authority also indicates that “valuable” generally refers to a pecuniary value. *See, e.g., Nelson v. Brown*, 51 So. 360, 363 (Ala. 1910) (marriage “is valuable in a way which must be differentiated from that valuable consideration which will support a contract in that ordinarily the word ‘valuable’ signifies that the consideration so described is pecuniary, or convertible into money”); *In re Haugh’s Estate*, 12 Ohio Supp. 57, 1943 WL 3216, at *3 (Ohio Prob. 1943) (quoting digest for the proposition that “[m]arriage, however, is distinguishable from other valuable consideration in that it is not capable of being reduced to a value which can be expressed in dollars and cents,” but noting that “an antenuptial contract does have certain very valuable considerations which can be reduced to dollars and cents”). In *Stanley v. Schwalby*, 162 U.S. 255 (1896), however, the Court concluded that the promise to establish a military headquarters on particular land was valuable consideration for a city’s conveyance of the land to the United States, as “[a] valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance.” The Court explained that “[t]he advantage enuring to the city of San Antonio from the

establishment of the military headquarters there was clearly a valuable consideration for the deed of the city to the United States,” but did not discuss how readily that promised act could be converted into a pecuniary value to the city. *Id.* at 276.

Thus, the common law understanding of “valuable consideration” either is inconclusive, leaving open the meaning we derive from statutory sources, or tends to confirm that meaning by suggesting that consideration, to be “valuable,” should be pecuniary, readily convertible into monetary value. There is no doubt a sense in which any act or thing could be given some value in dollars and cents. But the third-party benefits received under the donative practices at issue here are not commonly or readily so measured, as far as we are aware.

Finally, notwithstanding the above indications of the meaning of “valuable consideration,” the scope of the phrase does remain open to some question. Given that section 301 is a criminal statute, it is therefore appropriate to apply the rule of lenity in favor of a narrower reading, and thus to understand “valuable consideration” in section 301 of the Act as referring to the buying and selling of organs for monetary gain or to organ exchanges that are otherwise commercial. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (“Even if [the relevant statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner’s favor.”). As the Supreme Court has stressed: “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citations and internal quotations omitted). Setting aside the strong circumstantial evidence of meaning discussed above, it is certainly true, at a minimum, that section 301 does not “clear[ly] and definite[ly]” encompass LDDD and Paired Exchanges, as distinct from “purchases” or other transfers for a profit.

For all of the above reasons, the donative practices you have described do not violate section 301.

C. KEVIN MARSHALL
Deputy Assistant Attorney General
Office of Legal Counsel

Status of the Public Company Accounting Oversight Board Under 18 U.S.C. § 207(c)

A former senior employee of the Securities and Exchange Commission communicating with the Commission on behalf of the Public Company Accounting Oversight Board during the year after his service as a senior employee at the Commission ends would not be communicating on behalf of the United States and therefore 18 U.S.C. § 207(c) would apply to bar such a communication.

March 30, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL SECURITIES AND EXCHANGE COMMISSION

Under 18 U.S.C. § 207(c) (2000), a former senior official of the Executive Branch, in the year after his departure, may not communicate with, or appear before, his former agency “on behalf of any other person (except the United States),” in connection with a matter on which he seeks official action. You have asked whether a former senior official of the Securities and Exchange Commission (“Commission”) communicating with the Commission on behalf of the Public Company Accounting Oversight Board (“Board”) during the year after his service at the Commission ends would be acting “on behalf of . . . the United States.”¹ We believe that former senior official would not be communicating on behalf of the United States and that the statute therefore would apply to bar such a communication.

I.

The Sarbanes-Oxley Act, 15 U.S.C. § 7211 (Supp. IV 2004), created the Board “to oversee the audit of public companies that are subject to the securities laws, and related matters,” *id.* § 7211(a). To carry out that responsibility, the Board, among other things, is “to register public accounting firms that prepare audit reports for issuers” under the Act, *id.* § 7211(c)(1); “establish or adopt . . . auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports,” *id.* § 7211(c)(2); “conduct inspections of registered public accounting firms,” *id.* § 7211(c)(3); “conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms,” *id.* § 7211(c)(4); “perform such other duties or functions as the Board (or the

¹ Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Brian G. Cartwright, General Counsel, Securities and Exchange Commission (Apr. 14, 2006) (“Commission Letter”). In accordance with the practice of our Office, the Commission has agreed to be bound by our opinion in this matter. *Id.* at 1. We do not address the status of the Board for any other purpose, including under any provision of the United States Constitution. See generally *Status of National Veterans Business Development Corporation*, 28 Op. O.L.C. 70, 72 (2004).

Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out [the] Act,” *id.* § 7211(c)(5); and “enforce compliance with [the] Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof,” *id.* § 7211(c)(6).

The Commission exercises substantial “oversight and enforcement authority” over the Board. *Id.* § 7217(a). For example, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, the Commission appoints all five members of the Board. *Id.* § 7211(e)(4). The Commission has the power to approve the Board’s rules of operation and administration, *id.* § 7211(g), and must approve (or modify) the Board’s rules for public accounting firms before they can take effect, *id.* § 7217(b). The Commission also may “enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof.” *Id.* § 7217(c)(3). The statute nonetheless declares that the Board

shall not be an agency or establishment of the United States Government No Member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

Id. § 7211(b).

The present question concerns the status of the Board for purposes of 18 U.S.C. § 207(c). Under that provision, a former senior employee of an agency is criminally liable if

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

(Emphasis added).² Because “[t]he nature of the close working relationship between the Commission and the [Board] necessitates frequent contact between

² Section 207(c) identifies covered senior officials by reference to salary level or to the authority under which they have been appointed. 18 U.S.C. § 207(c)(2). Although the Commission Letter does

the Commission’s staff and [Board] members and staff,” Commission Letter at 4, if the Board is not considered “the United States” for purposes of section 207(c), a former senior Commission official “could not, as a practical matter, accept an appointment as a member of the [Board] or its senior staff,” *id.*

II.

Your question concerns former “Commissioners or staff members who leave the Commission to accept a position with the [Board]” and communicate with the Commission as part of their official functions. Commission Letter at 1, 3. We believe that such a former official would not communicate “on behalf of . . . the United States” under 18 U.S.C. § 207(c).

A.

We have previously concluded that communications “on behalf of” a person under section 207 “include only communications that are made by one who is acting as an agent or attorney, or in some other representational capacity for another.” Memorandum for Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 207(a) to Pardon Recommendation Made by Former Prosecutor* at 6 (Oct. 17, 1990) (“*Pardon Recommendation*”). A former senior official who works at the Board and communicates in his official capacity to the Commission would do so as the Board’s agent: “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other so to act.” *Id.* (quoting Restatement of the Law (Second) of Agency § 1 (1958) (emphasis omitted)); *accord* Restatement of the Law (Third) of Agency § 1.01 (2006). The applicability of section 207(c) thus turns on whether, as an agent of the Board, a former employee of the Commission would act as an agent of “the United States.” The statute answers that question in the negative.

The Sarbanes-Oxley Act provides that “[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or *agent* for the Federal Government by reason of such service.” 15 U.S.C. § 7211(b) (emphasis added). That provision, we believe, indicates that a person employed by or acting as agent for the Board is not acting “on behalf of . . . the United States” under section 207(c). Title 18 does not have a general definition of “the United States,” except “in a territorial sense,” 18 U.S.C. § 5 (2000), but section 207(c) itself suggests the meaning in the present context. Section 207(c) states that its

not ask for us to address the lifetime ban under 18 U.S.C. § 207(a)(1) for specific-party matters in which a former officer or employee participated personally and substantially or the two-year ban for specific-party matters pending under the official responsibility of the former officer or employee, we note that both provisions also use the “on behalf of . . . the United States” language.

restrictions apply to certain former “officer[s] or employee[s] of the executive branch of the United States.” The reference to the Executive Branch of “the United States” plainly is to the Executive Branch of the federal government. When the section later refers to a communication “on behalf of . . . the United States,” the “normal rule of statutory construction” would call for the conclusion that “identical words used in different parts of the same act are intended to have the same meaning,” *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986), and this principle is especially compelling here because the identical words appear in the same sentence, see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006).³ See also 18 U.S.C. § 207(b) (provision restricting a former employee’s activities with respect to trade or treaty negotiations applies to a former employee “who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated”). Because a communication “on behalf of the United States” would thus have to be on behalf of the federal government, the statement that the Board’s personnel are not “agent[s] for the Federal Government” negates precisely that they act “on behalf of . . . the United States” within the meaning of the statute.

The interests of the Board may well coincide with those of the United States. The Board is a creation of the United States government and is subject to the control of the Commission in significant respects. Nevertheless, section 207 can apply even when a former official is advocating the same position that is taken by his former agency. “[A] former employee does not act on behalf of the United States . . . merely because the United States may share the same objective as the person whom the former employee is representing.” 18 U.S.C. § 207 and the *Government of Guam*, 20 Op. O.L.C. 326, 329 (1996) (quoting Office of Government Ethics, *Summary of Post-Employment Restrictions of 18 U.S.C. Section 207*, at 4 (Nov. 4, 1992)). Here, although the Board, the Commission, and more generally the United States may have the same interests, Congress has declared that the Board’s personnel are not “agent[s] for the Federal Government,” and, given this declaration, it does not matter if the Board’s personnel advance interests that match those of other entities of the federal government. The statute, in other words, distinguishes between the Board and the United States and treats Board personnel as speaking on behalf of the Board.

³ The covered persons are former officers and employees “of the executive branch of the United States,” 18 U.S.C. § 207(c), but communications by a former officer or employee are allowed if they are “on behalf of . . . the United States,” not just the Executive Branch, Office of Government Ethics, *Summary of Post-Employment Restrictions of 18 U.S.C. § 207*, Informal Advisory Mem. 04x11a, at 5 (July 29, 2004) (attachment to Office of Government Ethics, *Summary of 18 U.S.C. § 207*, Informal Advisory Mem. 04x11 (July 29, 2004)) (available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/>, last visited Aug. 12, 2014) (“2004 Summary”) (communications on behalf of Congress are permitted). This difference does not affect the meaning of “the United States,” which in both cases refers to the federal government.

B.

The conclusion that communications on behalf of the Board are not “on behalf of . . . the United States” is consistent with an earlier opinion of our Office, *Applicability of 18 U.S.C. § 207(a) to the Union Station Development Corporation*, 12 Op. O.L.C. 84 (1988) (“*Union Station*”). There, we stated that we have “looked to the definition of ‘agency of the United States’ in 18 U.S.C. § 6 to determine if an entity should be regarded as the United States for the purposes of the conflict of interest laws.” *Id.* at 84. We have some doubt that this characterization is entirely correct; the opinions cited in *Union Station* may be read to interpret the term “agency” or “agency of the United States,” not “United States” itself. Nevertheless, even if that line of opinions is applicable, it is consistent with the conclusion we reach here. Section 6 states that

[t]he term ‘agency’ includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6. We have read section 6 as “establish[ing] a presumption that a governmental entity is an agency for purposes of a given offense, including the conflict of interest statutes.” *Application of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee*, 5 Op. O.L.C. 194, 195 (1981) (“*Organizing Activities*”).

Here, however, the statute conclusively rebuts that presumption. Section 7211 states explicitly that the Board “shall not be an agency or establishment of the United States Government.” 15 U.S.C. § 7211(b). In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Supreme Court concluded that a statute providing that Amtrak “will not be an agency or instrumentality of the United States Government,” *id.* at 391 (quoting 84 Stat. 1330 (1970)), was “assuredly dispositive of Amtrak’s status as a Government entity for purposes of matters that are within Congress’s control.” *Id.* at 392. Similarly, Congress’s declaration that the Board is not “an agency or establishment of the United States Government” is dispositive of its status as an agency under the conflict of interest laws.

When a statute has not expressly addressed whether an entity is an agency or establishment of the United States, we sometimes have examined such factors as the entity’s “functions, financing, control, and management.” *Union Station*, 12 Op. O.L.C. at 86.⁴ But the use of a multi-factor test is not appropriate where, as

⁴ A 1948 letter of the Attorney General concluded that the Panama Railroad Company was an agency of the United States for purposes of the conflict of interest laws, Letter for the Secretary of the Army, from Tom C. Clark, Attorney General (Dec. 2, 1948), but the statute in that case provided that the company was “an agency or instrumentality of the United States,” Pub. L. No. 80-807, 62 Stat.

here, Congress has explicitly determined that an entity is not an agency of the United States for purposes within Congress's control.

The conclusion that the Board is not "the United States," we believe, squares with the Sarbanes-Oxley Act's own post-employment provision. Under 15 U.S.C. § 7211(g)(3), the Board is to

establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board.

This provision does put the Board into a position similar to that of an agency of the federal government, but this treatment is entirely consistent with the view that the Board is not a federal agency for purposes of the general conflict of interest laws, including 18 U.S.C. § 207(c), and thus requires its own conflict of interest provision. And although the provision, by limiting the practice before the Commission by former Board members and staff, might be read to suggest that, for conflict of interest purposes, the Board should be equated with the Commission, the bar on practice before the Commission also could reflect a concern that confidential information involving regulated entities might give former Board members and staff an unfair advantage. *Cf.* Bayless Manning, *Federal Conflict of*

1075, 1076 (1948). In 1963, we found that the Federal National Mortgage Association ("Fannie Mae") was an agency of the United States under 18 U.S.C. § 431 (1958). *See* Memorandum for Joseph F. Dolan, Assistant Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Dec. 18, 1963) ("*Fannie Mae*"). In that instance, the statute made Fannie Mae "a constituent agency of the Housing and Home Finance Agency," 12 U.S.C. § 1717 (1958), and Fannie Mae's obligations were not obligations of the United States or "of any agency or instrumentality thereof *other than [Fannie Mae]*," *id.* §§ 1719(b), 1721(b) (emphasis added); the "other than" language suggested that Fannie Mae itself was an agency or instrumentality of the government. Although we did not refer to these provisions, we noted that the Housing and Home Finance Administrator was the Chairman of Fannie Mae's Board. *Fannie Mae* at 6, 8. In *Organizing Activities*, we determined that the Office of the Architect of the Capitol was an "agency." Noting that the definition in 18 U.S.C. § 6 "in effect, establishes a presumption that a governmental entity is an agency for purposes of a given offense, including the conflict of interest statutes," we did not then identify anything that might have rebutted that presumption. 5 Op. O.L.C. at 195. In *Union Station*, the corporation whose status was in question was "simply the vehicle created by that Department to accomplish [a] congressional mandate" imposed upon the Department of Transportation under 40 U.S.C. §§ 801–819 (1988), and the statute was silent on the status (indeed on the existence) of that corporation. 12 Op. O.L.C. at 86; *see also Applicability of 18 U.S.C. § 207 to the General Accounting Office*, 3 Op. O.L.C. 433 (1979) (concluding that section 207 applies to former employees of the General Accounting Office, which, under the then-applicable statute, was an "establishment of the Government"). Similarly, we concluded that the National Veterans Business Development Corporation was an "agency" under 31 U.S.C. § 9102. The statute creating that entity had "no . . . express disclaimer" of its status as an agency. *National Veterans Business Development Corporation*, 28 Op. O.L.C. at 72.

Interest Law 179 (1964) (stating that concern about misuse of inside information is one reason for federal post-employment restrictions).⁵

Concededly, as a matter of policy, it may make little sense to treat the Board as outside the government for purposes of the conflict of interest laws. As the Commission Letter points out, this understanding of section 207(c) has the effect of excluding from appointment to the Board a “uniquely qualified pool of candidates”—recently departed former high-level officials of the Commission. Commission Letter at 4. Given the “unique statutory relationship between the [Board] and the Commission,” there may be a strong policy argument that, for purposes of the conflict of interest laws, the Board should be treated as an agency of the government. On the other hand, the Board in several respects is similar to self-regulatory organizations like the National Association of Securities Dealers (“NASD”), “a private body empowered by the Commission to oversee the activities of broker-dealers.” *United States v. Frith*, 461 F.3d 914, 916 (7th Cir. 2006). Although the Commission’s authority to oversee the Board is even greater than its authority to oversee the NASD, the Sarbanes-Oxley Act declares that several provisions of the securities laws relating to the Commission’s oversight powers “shall apply to the Board as fully as if the Board were a ‘registered securities association.’” 15 U.S.C. § 7217(a), (b)(4), (b)(5), (c)(2). The statute, to this extent, treats the Board like the private NASD, which we understand is the only “registered securities association.” Congress may have wished to treat the Board as private for all statutory purposes, and section 7211(b) indicates that this is what Congress chose to do. The unequivocal declaration that “[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service” and that the Board “shall not be an agency or establishment of the United States Government,” 15 U.S.C. § 7211(b), determines our answer.

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⁵ Moreover, if the Board were an agency of the United States, a highly paid official of the Board who left the government would be subject to the one-year cooling-off period under section 207(c), and practice before the Board by such a former official in the year after his or her departure would violate the criminal provision. The administrative rule, at least to this extent, would then seem superfluous. See 2004 Summary, *supra* note 3, at 8.

Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences

Light refreshments are “subsistence expenses” to which the prohibition of 31 U.S.C. § 1345 applies, and various statutory provisions that authorize the Environmental Protection Agency to hold meetings, conduct training, and provide grants do not satisfy the “specifically provided by law” exception to the prohibition.

A violation of section 1345 does not, by its own force, also violate the Anti-Deficiency Act.

April 5, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL ENVIRONMENTAL PROTECTION AGENCY

You have asked whether the Environmental Protection Agency (“EPA”) may, consistent with 31 U.S.C. § 1345 (2000), use appropriations to provide light refreshments to non-federal participants at EPA conferences. We conclude that light refreshments, as you have described them, are “subsistence expenses” to which the prohibition of section 1345 applies, and that the various provisions you have cited that authorize the EPA to hold meetings, conduct training, and provide grants do not, in the words of section 1345, “specifically provide[]” for the EPA to use an appropriation for subsistence expenses for a meeting. You have further asked that, if we reach these conclusions, we determine whether a violation of section 1345 also would violate the Anti-Deficiency Act (“ADA” or “Act”), as codified at 31 U.S.C. § 1341(a)(1) (2000). Because the prohibition in section 1345 is not, in the words of that Act, “in an appropriation . . . for the expenditure or obligation,” *id.* § 1341(a)(1)(A), we conclude that a violation of section 1345 does not, by its own force, also violate the Anti-Deficiency Act.

I.

The EPA’s various statutory missions, you have explained, are furthered by the EPA’s providing opportunities for federal officials and employees and persons who are not federal employees to exchange information at meetings, including conferences. You have noted several sources of statutory authority, which we discuss below, under which the EPA holds such meetings and conferences. To facilitate these activities, the EPA wishes, when appropriate, to provide light refreshments—bottled water, coffee, bagels, and the like—to all participants, including those attendees who are not federal employees.

Section 1345 provides as follows:

Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—

- (1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; and
- (2) the Secretary of Agriculture from paying necessary expenses for a meeting called by the Secretary for 4-H Boys and Girls Clubs as part of the cooperative extension work of the Department of Agriculture.

31 U.S.C. § 1345. In 2005, the Comptroller General opined that the National Institutes of Health could pay for light refreshments at a government-sponsored conference because, among other things, “formal conferences” are not “meetings” under this section. *National Institutes of Health—Food at Government-Sponsored Conferences*, B-300826, 2005 WL 502825, at *4 (Mar. 3) (“NIH Opinion”).

This Office, however, concluded in 2004 that a “fellowship program that would bring representatives from various countries to the United States” is a “meeting” under section 1345. *Use of Appropriations to Pay Travel Expenses of International Trade Administration Fellows*, 28 Op. O.L.C. 269, 269 (2004) (“ITA Opinion”). Focusing on the statutory text, we reasoned that such a fellowship program would “[i]n everyday usage . . . involve a ‘meeting’—indeed, several meetings.” *Id.* at 270. We distinguished, and questioned the reasoning of, a 1993 Comptroller General opinion interpreting the term “meeting” in light of the floor statements of a few members of Congress at the time of the statute’s original enactment, *see id.* at 273–74, and instead agreed with the Comptroller General’s pre-1993 interpretations, *see id.* at 271-72. In his NIH Opinion, the Comptroller General relied on his 1993 opinion, even while recognizing that it “effectively overrul[ed] prior [Government Accountability Office (“GAO”)] decisions that applied section 1345 to meetings and conferences other than assemblages and gatherings that private organizations sought to hold at government expense.” NIH Opinion, 2005 WL 502825, at *5 n.5.

For the Executive Branch, this Office’s interpretation of the term “meeting” in the ITA Opinion necessarily continues to control notwithstanding the subsequent decision of the Comptroller General.¹ Because, under this interpretation, section 1345 applies in more instances than it would under the Comptroller General’s

¹ The Comptroller General is an agent of Congress. Therefore, although his views often provide helpful guidance on appropriations matters and related issues, they do not bind the Executive Branch. *See, e.g., Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996).

view, and given the different approaches by this Office and the GAO to interpreting section 1345, you have sought our views on the scope of that section's reference to "subsistence expenses." You have further asked whether, if light refreshments are "subsistence expenses," various statutory provisions applicable to the EPA "specifically provide[]" for use of an appropriation for such expenses for a meeting; and whether, if section 1345 does prohibit such use of an appropriation, a violation of section 1345 also would violate the Anti-Deficiency Act. We answer each question in turn.

II.

The answer to your first question is not beyond debate, but the better reading is that the costs of light refreshments, such as you have described them, are "subsistence expenses" under section 1345. This conclusion rests on the text, context, and statutory history of section 1345, and is consistent with the views of the Comptroller General.

Dictionaries define "subsistence" to mean "the irreducible minimum (as of food and shelter) necessary to support life." *Webster's Third New International Dictionary* 2279 (1993); *see also Webster's Ninth New Collegiate Dictionary* 1176 (1984) ("the minimum (as in food and shelter) necessary to support life"); *The American Heritage Dictionary of the English Language* 1791 (3d ed. 1992) ("[a] means of subsisting, especially means barely sufficient to maintain life"). Thus, "food" of some sort is included within "subsistence." These definitions do not obviously indicate a distinction between food that could be called a "meal" and food that could be called a light refreshment, and many sorts of food could be used for either purpose. In one sense, light refreshments fall more readily within the meaning of "subsistence" than do meals, as the former may be thought of as minimal (or marginal) resources for subsistence, in contrast to more substantial "meals." On the other hand, one could view light refreshments as supplementing meals. But these definitions at least do not exclude light refreshments from the category of "subsistence" and do suggest the possibility of including them.

Although simple dictionary definitions are thus inconclusive, the use of the term "subsistence" elsewhere in the U.S. Code in analogous circumstances, and particularly its use elsewhere in title 31, indicates that "subsistence" as used in section 1345 does include light refreshments. Under 31 U.S.C. § 326(b) (2000), the Secretary of the Treasury "may approve reimbursement to agents on protective missions for subsistence expenses authorized by law without regard to rates and amounts established under section 5702 of title 5," which sets the per diem rates for federal employees on travel. Those per diem rates, in turn, incorporate a definition of "subsistence" as "lodging, meals, and other necessary expenses for the personal sustenance and comfort of the traveler." 5 U.S.C. § 5701(3) (2000); *see also* 2 U.S.C. § 68b (2000) (incorporating this definition of "subsistence" from section 5701 for officers and employees of the Senate). The use of the phrase "other necessary expenses" after the word "meals" in section 5701's definition of

“subsistence” indicates that “subsistence expenses” include more than just “meals” (or lodging). In context, the definition of the term “subsistence” permits the government to reimburse employees for the amount of food that a typical employee eats in one day, without reference to whether the employee consumes the food in two or three meals or, instead, two or three meals supplemented with a snack or two. Light refreshments are therefore fairly included within the terms of the residual category of “necessary expenses” for “personal sustenance and comfort” for which employees may be reimbursed and, by extension, fairly included within the broader term “subsistence expenses.”

In addition, 31 U.S.C. § 3903(c) (2000) permits agencies to procure by contract “subsistence items.” See also 31 U.S.C. § 1501(a)(4)(B) (2000) (authorizing recording amounts as obligations of the United States government when supported by an order purchasing “perishable subsistence supplies”). And 31 U.S.C. § 1353(a) (2000) authorizes the Administrator of General Services to “prescribe by regulation the conditions under which an agency in the executive branch . . . may accept payment, or authorize an employee of such agency to accept payment on the agency’s behalf, from non-Federal sources for . . . subsistence.” We are aware of no authority suggesting that contracts for “subsistence items,” orders for “perishable subsistence supplies,” and acceptance of payment for “subsistence” under these sections can include meals, or the ingredients for meals—that is, food—yet somehow exclude food that is or may be used as light refreshments, nor do we see a basis for such a view. Thus, the use of the term “subsistence” in these provisions as well is better read to include light refreshments.

The statutory history of section 1345 further indicates that “subsistence expenses” include the cost of light refreshments. What is now section 1345 was enacted as section 551 of title 31 in 1935. See Pub. Res. No. 74-2, 49 Stat. 19, 19 (1935) (codified at 31 U.S.C. § 551 (Supp. I 1935)). Section 551 provided, “[u]nless specifically provided by law, no moneys from funds appropriated for any purpose shall be used for the purpose of lodging, *feeding*, conveying, or furnishing transportation to, any conventions or other form of assemblage or gathering to be held in the District of Columbia or elsewhere.” *Id.* (emphasis added). According to the statutory findings, “numerous applications [were] being received from various organizations requesting lodging, *food*, and transportation for the purpose of holding conventions or meetings at Washington and elsewhere,” and “the expenditure of Government funds for such purposes is against the policy of Congress.” *Id.* (emphasis added). The terms “feeding” and particularly “food” include light refreshments, and when Congress in 1982 as part of recodifying title 31 moved section 551 to section 1345 and substituted the current language, including the term “subsistence,” see Pub. L. No. 97-258, sec. 1, § 1345, 96 Stat. 877, 925 (1982), it explained that such revisions should “not be construed as making a substantive change in the laws replaced,” *id.* sec. 4(a), 96 Stat. at 1067.

Our conclusion regarding the term “subsistence expenses” under section 1345 also is consistent with the views of the Comptroller General regarding both section

1345 and its predecessor. Most significantly, soon after Congress enacted section 551, the Comptroller General opined that, because of section 551, appropriations for the American Battle Monuments Commission “are not available for such items of expenditure as ‘transportation to and from monument sites’ and ‘light refreshments.’” *Conventions and Gatherings—Lodging, Feeding, and Transporting*, 14 Comp. Gen. 851, 852 (1935) (emphasis added). More recently, the Comptroller General has opined that section 1345 prohibits expenditures for “food and lodging.” *National Highway Traffic Safety Administration—Travel and Lodging Expenses*, 62 Comp. Gen. 531, 531–32 (1983) (“NHTSA Opinion”) (emphasis added). The Comptroller General also has used the term “subsistence” in related contexts without distinguishing between meals and light refreshments. For example, he has opined that authority in a statute to conduct a meeting “is not sufficient to authorize payment from appropriated funds of the attendees’ subsistence expenses,” by which he meant both “meals” and “refreshments.” *Coast Guard—Coffee Break Refreshments at Training Exercise—Non-Federal Personnel*, B-247966, 1993 WL 266761, at *2–3 (June 16). And he has said that the general rule that “the government may not pay, in addition to an employee’s regular compensation, per diem or subsistence expenses to a civilian employee at his official duty station” applies to expenditures “for coffee and doughnuts.” *FBI Payment for Refreshments During Organized Crime Investigation*, B-234813, 1989 WL 241372, at *2–3 (Comp. Gen. Nov. 9). Finally, the NIH Opinion, discussed above with regard to the meaning of “meeting” in section 1345, does not consider the term “subsistence expenses” in that section, so we have no reason to believe that these prior opinions have ceased to reflect the Comptroller General’s views.

Several federal regulations do distinguish between light refreshments and meals—as does 5 U.S.C. § 5701, noted above. But, as our discussion of section 5701 indicated, our conclusion does not depend on equating the two, only on recognizing that both fall within the term “subsistence,” and none of the regulations of which we are aware distinguishes between the two in using the word “subsistence” or a similar statutory term. Rather, the regulations involve statutory language that gives regulatory agencies flexibility in a particular context. For example, the federal ethics regulations provide that “[m]odest items of food and refreshments such as soft drinks, coffee and donuts, offered other than as part of a meal” do not qualify as gifts. 5 C.F.R. § 2635.203(b)(1) (2006). One of the statutory authorities on which this regulation rests, 5 U.S.C. § 7353(a), (b)(1) (2000 & Supp. III 2003), states that employees of the Executive Branch may not “accept anything of value from a person,” except as permitted in “such reasonable exceptions as may be appropriate.” The statute, in other words (and the quoted regulations), provides for the “reasonable exceptions” that section 1345 does not acknowledge. Government regulations also provide that federal travelers at federal conferences need not deduct the cost of government-furnished light refreshments from their per diem claims, but do need to deduct the cost of meals. *See* 41 C.F.R. § 301-74.21(b) (2006). But those regulations rest on the General Services Admin-

istration's discretion to reimburse federal employees either on a per diem basis, or on an "actual and necessary expenses" basis, or with any combination of the two. *See* 5 U.S.C. § 5702(a)(1) (2000).

Similarly, the apparently common practice among federal agencies of allowing attendees at certain events to partake of light refreshments rests on specific authority under the Government Employees' Incentive Awards Act, not on any premise that light refreshments are not subsistence expenses. *See* 5 U.S.C. § 4503 (2000) (permitting an agency head to "incur necessary expense for the honorary recognition of, an employee"). Nor could this practice support a distinction between "light refreshments" and "meals" for purposes of interpreting "subsistence" (such that the term would include meals yet not light refreshments), because meals also are served at such receptions. As the Comptroller General has explained, "[t]he provision of *food or refreshments* at an awards ceremony is an exception to the general rule prohibiting an agency from feeding its employees at taxpayer expense." *Defense Reutilization and Marketing Service Awards Ceremonies*, B-270327, 1997 WL 108952, at *2 (Mar. 12) (emphasis added).

In sum, although it is undoubtedly true that, as a matter of degree, food when served for "meals" is more significant than food served for "light refreshments," section 1345 in its application to "subsistence expenses" does not draw this distinction between different uses of food. We therefore conclude that the prohibition on "the use of appropriated funds for subsistence expenses" in section 1345 applies to light refreshments as well as meals.

III.

Section 1345's prohibition on the use of an appropriation for subsistence expenses applies "[e]xcept as specifically provided by law." You have directed us to eight sections of the U.S. Code as possibly satisfying this exception with regard to light refreshments for persons at conferences who are not federal employees. Among these are section 103 of the Clean Air Act, 42 U.S.C. § 7403 (2000); section 104 of the Clean Water Act, 33 U.S.C. § 1254 (2000); and the Government Employees Training Act, 5 U.S.C. § 4110 (2000). In an appendix, we have identified all eight sections, as well as the particular subsections and text in them that most bear on this question; here, it is sufficient to summarize the relevant text as authorizing various sorts of programs, training, and grants that may include private parties and state and local governments. Four of them generally authorize the EPA to fund the training of non-federal persons (*see* 42 U.S.C. § 7403 (2000), *id.* § 9604(k)(6) (2000 & Supp. III 2003), *id.* § 9660 (2000), and 33 U.S.C. § 1254 (2000)) and the remainder simply allow the EPA to encourage or fund research, where appropriate. Besides authorizing such actions, however, these provisions say nothing in particular about the "travel, transportation, and subsistence" expenses that section 1345 regulates. As we explain, these general authorizations do not suffice to authorize an exception from section 1345.

In the context of section 1345, the word “specifically” is best read to mean “with exactness and precision” or “in a definite manner.” *Webster’s Third New International Dictionary* 2187 (1993). A general authorization of a meeting is not an exact, precise, or definite authorization of an agency to use appropriated funds for “travel, transportation, and subsistence” expenses.

The structure and context of section 1345 confirm this understanding. A federal agency that expends appropriated funds on a meeting must derive its authority to spend that money from some statutory source. If every statute that authorized the federal funding of meetings attended by non-federal participants also permitted the expenditure of funds for the purposes prohibited by section 1345, then section 1345 never would prohibit expending funds for “travel, transportation, and subsistence” for lawful meetings. While it may not be possible to detail a general rule for exactly how “specific[.]” is specific enough, it is thus clear that general authority to fund a meeting is insufficient.

Our ITA Opinion supports the above interpretation. The Department of Commerce had not identified any statute that it thought would provide specific authority under section 1345 for the expenses of the proposed fellowship program. See ITA Opinion, 28 Op. O.L.C. at 275. We recognized that it had cited as “general authority” 22 U.S.C. § 2351(b) (2000), which authorizes the President to “make arrangements to find, and draw the attention of private enterprise to, opportunities for investment and development in less-developed friendly countries and areas,” but we pointed out that the Department of Commerce did “not contend . . . that section 2351 speaks with sufficient specificity to satisfy section 1345.” ITA Opinion, 28 Op. O.L.C. at 275 n.4.

This reading also is consistent with a series of Comptroller General decisions under section 1345 and its predecessor. Most notably, the Comptroller General opined in 1979 that, “[b]y using the word ‘specifically,’ Congress indicated that authority to pay travel and subsistence expenses of non-government employees attending conventions or other assemblages should not be inferred from other laws but rather that there should be a *definite indication* in an enactment that the payment of such expenses was contemplated, intended and authorized.” *Mine Safety and Health Administration—Payment of Travel Expenses at Seminars*, B-193644, 1979 WL 12354, at *2 (Comp. Gen. July 2) (emphasis added). Such a requirement “is not satisfied merely by showing that an agency has legislative authority to hold conventions or other assemblages” or “authority to train private individuals.” *Id.* The Comptroller General therefore reasoned that a statute that authorized an agency to “expand programs for the education and training” of mine operators and agents did not speak with sufficient specificity to establish an exception to section 1345. *Id.* at *1 (internal quotation marks omitted).

Similarly, in the 1935 opinion discussed above in Part II, the Comptroller General opined that a statute authorizing “every expenditure requisite for or incident to the work of the American Battle Monuments Commission” did not provide specific authority for purposes of the identically phrased exception in section 551,

the predecessor of section 1345: “General terms such as [those] quoted . . . are not sufficient to make an appropriation available for such purposes.” *Conventions and Gatherings*, 14 Comp. Gen. at 851, 852 (internal quotation marks omitted in first quotation). In the 1983 NHTSA Opinion, also discussed above, he likewise opined that a statute permitting the Secretary of Transportation to “cooperate with appropriate State and local officials to the greatest extent possible consistent with the purposes of this subsection” did not speak with sufficient specificity: “[T]here is a distinction between the general authority to hold a conference and the specific authority to overcome the prohibition in 31 U.S.C. § 1345.” 62 Comp. Gen. at 531–32 (internal quotation marks omitted in first quotation). And in 1975, the Comptroller General opined that a statute permitting an agency, for various purposes, to “conduct, and encourage, cooperate with, and render financial and other assistance to appropriate public (whether federal, state, interstate, or local) authorities, agencies, and institutions, private agencies and institutions, and individuals” did not provide the specific authority for an exception to section 551. *Use of Appropriated Funds in Connection with National Solid Waste Management Association Convention*, B-166506, 1975 WL 8253, at *1–2 (July 15) (internal quotation marks omitted). Although he acknowledged that such a statute may give the agency “the authority to hold conventions,” the statute did not permit “the payment from appropriated funds of transportation and lodging expenses of state officials or employees to attend such conventions.” *Id.* at *3.

The Comptroller General has twice found sufficient specificity, in statutes requiring (rather than merely authorizing) a conference, and requiring it to have wide representation. In 1991, he opined that the Commission on Interstate Child Support could spend appropriated funds on transportation and subsistence expenses of conference invitees under a statute requiring that it hold one or more national conferences on child support reform, directing that it ensure wide representation at the conference, and permitting the Commission to adopt such rules and procedures as it deemed appropriate. *Commission on Interstate Child Support—Payment of Lodging and Meal Expenses of Certain Attendees at the National Conference on Interstate Child Support*, B-242880, 1991 WL 71686, at *2–3 (Mar. 27). According to the Comptroller General, “The main difference between [such a] conference and the other section 1345 cases is between a general grant of authority that may be broad enough to permit an agency to hold a conference as opposed to a specific statutory directive to hold a conference in order to implement the law.” *Id.* at *2. This 1991 opinion relied on a 1955 precedent stating that “[t]he express provision in the enabling act that the White House Conference on Education be ‘broadly representative of educators and other interested citizens from all parts of the Nation,’ when considered in conjunction with the provision authorizing the appropriation of such sums as the Congress determines to be necessary for the ‘administration’ of that act, is considered to be sufficiently broad to authorize the appropriation of funds for necessary travel expenses.” *Appropriations—Availability—Travel Expenses of Delegates to White House Conference on Education*, 35 Comp. Gen. 129, 132 (1955). Even assuming

that these decisions are correct, which we have no occasion to consider, they do not apply here because none of the statutes that you have cited requires that a conference be held or that any conference have wide representation. Similarly, the Comptroller General in his 1983 NHTSA Opinion declined to apply the 1955 opinion where the statutory provision at issue did “not mandate that a conference be held,” 62 Comp. Gen. at 532, a view he reiterated in 1991, *see Commission on Interstate Child Support*, 1991 WL 71686, at *1 (distinguishing the workshops in the NHTSA Opinion because the act in question “did not mandate that workshops be held”).

IV.

Finally, given our answers in Parts II and III to your questions regarding light refreshments and section 1345, you have asked whether a violation of that provision also violates the Anti-Deficiency Act, codified at 31 U.S.C. §§ 1341–1342, 1349–1351, 1511–1519 (2000). We conclude that a violation of section 1345 does not, by that fact alone, also violate the ADA, because section 1345 is not part of an appropriation. This conclusion rests on the text, structure, and history of the Act, which together establish that the Act proscribes violations of limits in the relevant appropriation, not violations of all statutory law. This conclusion should not be construed as in any way condoning violations of section 1345, and we do not consider other sanctions that may apply to a violation of section 1345.²

The provision of the ADA primarily at issue prohibits “[a]n officer or employee of the United States Government or of the District of Columbia government” from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding *an amount available in an appropriation or fund for the expenditure or obligation.*” 31 U.S.C. § 1341(a)(1)(A) (emphasis added). A knowing and willful violation is subject to a fine of up to \$5,000 and up to two years in prison. *Id.* § 1350. The ADA also requires reporting to the President and Congress violations of section 1341(a), which provide grounds for administrative discipline including removal

² Congress has ample authority and means to impose penalties, whether derived from the ADA or not, for violating statutory restrictions on spending such as section 1345. Among other things, it may incorporate into such a statute by reference the penalties of the ADA, or it may incorporate the statute by reference into a given appropriation, thus making the ADA apply to a violation pursuant to our reasoning below and in our 2001 ADA opinion discussed below. “[A] statute may refer to another and incorporate part or all of it by reference.” Norman J. Singer, 2B *Sutherland on Statutes and Statutory Construction* § 51.07, at 267 (6th ed. 2000). “There are two general types of reference statutes: statutes of specific reference and statutes of general reference.” *Id.* at 269. The former type “refers specifically to a particular statute by its title or section number.” *Id.* The latter type “refers to the law on the subject generally,” for example by stating that “contracts made under the statute are to be made ‘in the manner now provided by law.’” *Id.* at 269–70. We do not have before us any particular appropriation (which might be said, depending on its text, to incorporate section 1345 through an internal cap or condition), nor does section 1345 by its terms either specifically or generally incorporate the penalties of the ADA.

from office. *Id.* §§ 1349, 1351. You have stated that, if we conclude that a violation of section 1345 violates the ADA, you would “report . . . immediately” pursuant to this provision any violations that may have resulted from the legal uncertainty. (Our conclusion that the ADA does not apply to require reporting a violation of section 1345 says nothing, of course, about the advisability of EPA’s doing so, to the President and, with appropriate permission, the Congress.)

An officer or employee most clearly would violate the ADA if an appropriations statute appropriated \$X for some account or object, and he spent more than \$X—in other words, “excess” or “deficiency” spending. That is the scenario that nearly all judicial interpretations of the Act have considered. In *Hooe v. United States*, 218 U.S. 322 (1910), for example, the Supreme Court noted that an agency would have violated an earlier version of the Act had it incurred an obligation for the rental of a building in excess of an appropriation authorizing a certain amount of moneys “in full compensation for” that rental in a particular fiscal year. *Id.* at 332; *see also Sutton v. United States*, 256 U.S. 575, 580–81 (1921) (holding under earlier version of Act that the Secretary of War did not have, among other things, “authority . . . to obligate the Government” to pay more for improving a channel than Congress had appropriated for that purpose); *Bradley v. United States*, 98 U.S. 104 (1878) (similar to *Hooe*); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990) (citing sections 1341 and 1350 for the proposition that it is a crime to “knowingly spend money in excess of that appropriated”); *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996) (“The [ADA] bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.”). And the Federal Circuit has noted that a federal agency could not fund certain entitlements beyond the amount that Congress had appropriated for them, because the ADA “makes it clear that an agency may not spend more money for a program than has been appropriated for that program.” *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (1995); *see also E. Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75 (1988) (similar).

In 2001, this Office faced the question whether the ADA extended to a different scenario: an expenditure of funds that did not exceed the applicable appropriated amount but did violate certain kinds of restrictions *contained in the appropriation*—namely, a “condition” (which “would prohibit an agency from expending any of its funds for a particular purpose”) or an “internal cap” (which “would prohibit an agency from expending any of its funds in excess of a designated amount for a particular purpose”). *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33, 33–34 (2001) (“2001 ADA Opinion”). We gave “a narrow definition” to these categories, excluding from our consideration, for example, “ceilings within particular appropriations acts,” which would apply to all funds appropriated by an act. *Id.* at 34. As an example of an “internal cap,” we quoted an appropriation act for the Department of Justice that, in a single paragraph, appropriated approxi-

mately \$1 billion for “salaries and expenses for the Border Patrol program, the detention and deportation program, the intelligence program, and the inspections program” and “[p]rovided . . . [t]hat none of the funds available to the [Immigration and Naturalization Service] shall be available to pay any employee overtime pay in an amount in excess of \$30,000” in a particular period. *Id.* (internal quotation marks omitted).

We concluded that to violate a “condition” or “internal cap” in an appropriation would be to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A). We acknowledged that one might read this text (together with the language of other parts of the Act) as simply barring “those expenditures that exceed the total amount of funds Congress has provided within a particular account,” 2001 ADA Opinion, 25 Op. O.L.C. at 36—that is, as mandating “no spending ‘after funds are exhausted,’” *id.*—but reasoned that “Congress’s obvious concern with overall deficiencies caused by expenditures in excess of appropriated funds does not, however, exclude the possibility that it also intended through the [ADA] to enforce its appropriations power by exercising control over the *purposes* for which agencies may use their appropriated funds,” *id.* at 37 (emphasis in original). We relied on two primary arguments to conclude that Congress had so intended with regard to conditions and internal caps.

First, we stated that the word “available” in section 1341(a)(1)(A) “is modified by the phrase ‘for the expenditure or obligation.’” *Id.* at 37–38; *see also id.* at 35, 36, 48 (indicating this view by adding emphases to statutory text). We thought that the inclusion of this phrase “suggests” an intent to incorporate a “legal permissibility” component, because “[i]f Congress had intended to address solely the problem of overall deficiency spending, this phrase would appear somewhat superfluous. Congress could have simply prohibited any expenditure or obligation ‘exceeding an amount available in an appropriation.’” *Id.* at 37–38. Congress’s use of additional language, we reasoned, “suggests that the term ‘available’ should be construed more broadly to encompass the concept of legal permissibility.” *Id.* at 38. Second, we cited several statutes (both appropriations acts and provisions of title 31 codified near the ADA and referring to appropriations) in which “Congress used the term ‘available’ in a manner that is not dependent on whether funds are actually ‘unobligated,’ and that instead limits the permissible purposes for which funds may be spent.” *Id.* Section 1343(d), for example, provides that an appropriation “is available to buy, maintain, or operate an aircraft only if the appropriation specifically authorizes the purchase, maintenance, or operation.” 31 U.S.C. § 1343(d) (2000); *see* 2001 ADA Opinion, 25 Op. O.L.C. at 38; *but cf. id.* at 36–37 & n.5 (acknowledging authority suggesting a different sense of “available” in this context). In addition, although describing the question before us as “a difficult issue of first impression for this Office,” we noted that the Office in a 1984 memorandum had assumed without discussion that the violation of “a condition within an appropriation” ordinarily would violate the ADA. *Id.* at 35 n.2 (describ-

ing Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Independent Counsel Provisions of the Ethics in Government Act to Alleged Violations of the Boland Amendment and the Antideficiency Act* (Apr. 27, 1984).³

Our 2001 ADA Opinion did not address, among other things, “ceilings” (as noted above), the application of the ADA to amounts in a “fund,” or, most importantly for present purposes, “restrictions . . . not found in appropriations acts.” *Id.* at 34 n.1. Nor, as this caveat indicated, does the general recognition that the term “available” in section 1341(a)(1)(A) incorporates a concept of “validity” and suggests “legal permissibility” resolve the scope of such a concept under the terms of the statute and thereby answer the question whether the ADA applies to a restriction not found in an appropriation.

The ADA prohibits “an expenditure or obligation exceeding an amount available *in an appropriation* . . . for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A) (emphasis added). Much as we thought in the 2001 ADA Opinion that reading this statute *not* to include some legal permissibility standard would have left the phrase “for the expenditure or obligation” “somewhat superfluous,” here reading the statute to apply to the violation of a codified statute such as section 1345—not part of an appropriation making an amount available for expenditure or obligation—would leave the phrase “in an appropriation” without any clear purpose. Congress could have prohibited simply expenditures or obligations “exceeding an amount available for the expenditure or obligation,” which might, given our reading of “available” in our earlier opinion, have suggested a broad inquiry into all possible legal constraints on the “availab[ility]” of an amount for an expenditure or obligation. The inclusion of the phrase “in an appropriation” suggests a more restrictive intent, such that one should answer the question of “availab[ility]” by determining “availab[ility]” *within* the terms of a particular “appropriation.”

Moreover, and related, the concluding prepositional phrase “for the expenditure or obligation” in section 1341(a)(1)(A) is better read as modifying the noun “appropriation” (or “fund”) rather than, as our prior opinion asserted, the earlier adjective “available.” The full relevant portion of the ADA refers to “an expenditure or obligation exceeding an amount available in an appropriation or fund for

³ We rejected the holding of *Southern Packaging & Storage Co. v. United States*, 588 F. Supp. 532 (D.S.C. 1984), that violation of a “buy American” condition in an appropriations act did not violate the ADA. That court so held because it had “no evidence . . . that [the Defense Department] authorized expenditures beyond the amount appropriated by Congress for the procurement of” the items in question. *Id.* at 550. We disagreed with “the court’s apparent conclusion that, even though the appropriation forbade the purchase of non-American food items, there remained funds ‘available’ in *that* appropriation for such purchases.” The court’s decision, we thought, was “inconsistent with the Antideficiency Act’s legislative history and evolution and with the rest of the (limited) caselaw.” 2001 ADA Opinion, 25 Op. O.L.C. at 52.

the expenditure or obligation.” Based on proximity, it is more credible to read the statute as referring to amounts “available” in an appropriation that is “for the expenditure or obligation” in question, rather than as essentially stating that the amount must be broadly “available for the expenditure or obligation” and also “in an appropriation.” The statutory history (discussed further below) also suggests this construction, as recognized in the 2001 ADA Opinion. In finding support for our reading of “available” in the existence of the phrase “for the expenditure or obligation,” we acknowledged, based on the version of the Act in force from 1950 to 1982, that the entire phrase “an amount available in an appropriation or fund for the expenditure or obligation” could be interchangeable with “the amount available [i]n” the “appropriation or fund” under which an expenditure or obligation was made. 2001 ADA Opinion, 25 Op. O.L.C. at 39; *see also id.* at 47–48.

Because in the earlier opinion we limited our consideration to “internal caps” and “conditions,” this interpretation of the textual structure gives us no reason to question our ultimate conclusion there, even though that opinion purported to rely on a different interpretation of the structure: Once one identifies the “appropriation or fund for the expenditure or obligation” that is at issue, there is still the question of what amount is “available in” that appropriation, and our prior opinion determined that a limitation on spending that is “in an appropriation” is one whose violation also would violate the ADA. The assertion of how the phrase “for the expenditure or obligation” related to the rest of the provision was not necessary to reach that conclusion, given that the opinion provided additional bases for its reading of “available.” But the different understanding of the textual structure does make a difference here, because a proper reading reinforces that the ADA does not impose a roving requirement of “availability” under all possibly applicable law, but rather requires “availability” in the particular “appropriation . . . for the expenditure or obligation”—whether “availability” in the narrow sense of the existence of “unobligated” amounts “in” the appropriation or in the more extended sense of amounts not being subject to a restriction that is “in” the appropriation, such as the “internal cap” addressed in the 2001 ADA Opinion. One can readily accept our prior reading of “available” as having, since that term was introduced into the ADA in 1950, “incorporated the concept of legal permissibility,” 25 Op. O.L.C. at 39, and still conclude that the question of permissibility applies only “in an appropriation.”

A proper understanding of the term “appropriation” as used in the ADA further supports this interpretation of section 1341. That term refers not to a particular pot of money—such that one might say availability is determined by all laws that apply to that pot—but rather to a particular *legislative authorization* of a federal agency to spend a particular amount of money for some purpose. An “appropriation” is a “legislative body’s act of setting aside a sum of money for a public purpose.” *Black’s Law Dictionary* 110 (8th ed. 2004). The congressional GAO (formerly known as the General Accounting Office) has defined the word similarly to mean “[a]uthority given to federal agencies to incur obligations and to make payments

from the Treasury for specified purposes.” General Accounting Office, GAO/AFMD-2.1.1, *A Glossary of Terms Used in the Federal Budget Process* 21 (1993). The GAO also has explained that “[a]ppropriations do not represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations specified in the appropriation acts.” 1 General Accounting Office, *Principles of Federal Appropriations Law* 2-5 (3d ed. 2004) (“*Federal Appropriations Law*”). The courts of appeals have adopted a similar definition. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 286 n.1 (4th Cir. 2002) (citing the GAO definition). And section 1341(b), although not defining “appropriation,” contemplates that purchases may be made using money from “an appropriation made to a regular contingent fund”—a legislative authorization of a particular amount for a fund.

Two sections of title 31 define the term “appropriations” similarly to the above authority. *See* 31 U.S.C. §§ 701, 1511 (2000). Although both of these provisions define the term only for the chapter or subchapter in which they appear, of which section 1341 is not a part, it is nevertheless reasonable to turn to them for guidance regarding the same term used elsewhere in that title. Section 1511, which concerns apportioning an appropriation across the period of the appropriation and, as indicated above, is part of the ADA, *see generally* 2001 ADA Opinion, 25 Op. O.L.C. at 36–37, defines “appropriations” to mean “appropriated amounts,” “funds,” and “authority to make obligations by contract before appropriations.” 31 U.S.C. § 1511(a); *see also id.* §§ 1512–1514 (similar, part of the subchapter to which section 1511 applies). Section 701, which concerns the work of the GAO, defines “appropriations” as “appropriated amounts,” which includes, depending on the “appropriate context,” “funds,” “authority to make obligations by contract before appropriations,” and “other authority making amounts available for obligation or expenditure.” *Id.* § 701(2); *see also id.* § 1341(a)(1)(B) (providing that an employee may not involve the government “in a contract or obligation for the payment of money before an appropriation is made unless authorized by law”) (emphasis added). Thus, it is an “appropriation” that makes an amount available; the appropriation is not the physical amount that is available. Amounts are appropriated by proper authority, and an appropriation is something that is made. *See, e.g.,* 2001 ADA Opinion, 25 Op. O.L.C. at 37 (referring to “appropriated funds”); *id.* at 45, 50 (same); *id.* at 52 (referring to a use of funds that “the appropriation forbade”). Accordingly, to determine under the ADA the “amount available in an appropriation . . . for [an] expenditure or obligation,” we must look to the applicable legislative act making the amounts in question available for obligation or expenditure—that is, to the applicable appropriation.

A rule of construction that Congress has codified in title 31, and that applies to section 1341, reinforces this understanding of what an “appropriation” is, and thus where one looks to determine the amount available “in an appropriation.” Section 1301(d) provides that “[a] law may be construed to make an appropriation out of

the Treasury or to authorize making a contract for the payment of money in excess of an appropriation *only if the law specifically states that an appropriation is made* or that such a contract may be made” (emphasis added). Enabling legislation, for example, has typically been viewed as not an “appropriation.” *See, e.g., 1 Federal Appropriations Law* at 2-40 (noting that “appropriation acts” “must be distinguished from” enabling or organic legislation, which typically “does not provide any money”). We do not see why the interpretive rule of section 1301(d) would not also apply to resolve any doubt about the scope of the ADA, such that a provision limiting the government’s ability to perform certain functions, including limiting expenditures, is not “in an appropriation” for purposes of section 1341—and thus does not alter the “amount available in an appropriation” for a given expenditure or obligation—unless it is found in a “law specifically stat[ing] that an appropriation is made” for the object in question.

The statutory history of the ADA further supports our conclusion that a violation of a statutory restriction on spending does not violate that Act where the restriction is not “in an appropriation.” Throughout the four versions it has had in its long history, and even as Congress has broadened its scope somewhat, the ADA always has focused on expenditures in excess of sums in “appropriations” or “an appropriation,” and thus respected the distinction between appropriations and other legislation. The initial 1870 version prohibited “any department of the government” from “expend[ing] in any one fiscal year any sum *in excess of appropriations made* by Congress for that fiscal year.” Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (emphasis added). The 1905 version similarly required that “[n]o Department of the Government shall expend, in any one fiscal year, any sum *in excess of appropriations made* by Congress for that fiscal year.” Act of Mar. 3, 1905, ch. 1484, sec. 4, § 3679, 33 Stat. 1214, 1257 (emphasis added). The 1950 revision stated: “No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under *any appropriation* or fund *in excess of the amount available therein*.” Pub. L. No. 81-759, sec. 1211, § 3679, 64 Stat. 595, 765 (1950) (emphases added). The current language of section 1341 was enacted as part of a general recodification of title 31 in 1982 and thus was not intended to work any substantive change, as we have recognized. *See, e.g., 2001 ADA Opinion*, 25 Op. O.L.C. at 39. The preamble to the recodification stated that the bill’s purpose was “[t]o revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, ‘Money and Finance.’” Pub. L. No. 97-258, 96 Stat. 877, 877 (1982); *see also Finley v. United States*, 490 U.S. 545, 554 (1989) (“Under established canons of statutory construction, ‘it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’”); *see generally 2001 ADA Opinion*, 25 Op. O.L.C. at 42–49 (canvassing the statutory and legislative histories of the Act in greater detail). Thus, the 1950 and current versions should be read in harmony, and the 1950 version, together with its predecessors, confirms the need

to focus on what an appropriation from which an expenditure is to be made (or under which an obligation is to be incurred) does or does not make “available.”

The major substantive change during this history (apart from the addition of the word “fund” in 1950) was, as we explained in the 2001 ADA Opinion, the shift in 1950, continued in the current version, from a focus on “overall spending” by a particular department for a fiscal year, under appropriations made for that department, to a focus on “spending out of particular appropriations” and on “expenditures in excess of any single appropriation or fund.” *Id.* at 47, 48. Congress thus did broaden the Act. But, as our earlier explanation indicates, the ADA continued to focus, indeed even more than before, on particular legislative authorizations of spending—on the “appropriation . . . for the expenditure or obligation.” Congress, in making the ADA’s requirements more stringent, did not silently add to the ADA a new sanction for all violations of statutory restrictions on spending, whether in an appropriation or ordinary legislation.⁴

Finally, to the extent that the above analysis leaves any ambiguity about whether violations of restrictions on spending not in the appropriation violate section 1341(a), our reading finds further support in the rule of lenity—the canon that if ambiguity remains in a criminal statute after textual, structural, historical, and precedential analyses have been exhausted, the narrower construction should prevail. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (“Even if [the relevant statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner’s favor.”). As noted above, the ADA carries both administrative (section 1351) and criminal (section 1350) penalties for its violations. The Supreme Court in *Leocal* unanimously held that, where (as here) a statute has “both criminal and noncriminal applications,” the rule of lenity applies in all applications, to ensure a consistent interpretation. *Id.* Our 2001 ADA Opinion did consider and reject the applicability of the rule of lenity to the distinct question whether to “equat[e] the terms ‘available’ and ‘unobligated,’” such that a cap or condition in an appropriation would not affect the “amount available in an appropria-

⁴ It is not clear how the term “fund” (added to the ADA in 1950) would be read in harmony with the term “appropriation.” and, thus, whether one could understand the phrase “amount available in a . . . fund for the expenditure or obligation” in precisely the same sense as the phrase “amount available in an appropriation . . . for the expenditure or obligation.” We are unaware of any judicial cases, opinions of this Office, or decisions of the Comptroller General interpreting section 1341(a)(1)(A) as applied to a “fund.” Although under normal rules of construction one presumptively should seek to read two seemingly parallel words in a statute, such as “appropriation” and “fund,” to have similar meanings, there may be reasons not to do so in section 1341. One can, as explained above, refer to an “appropriation made by Congress” and to “appropriated funds,” but it is not clear how one might use “fund” (or “funded”) in the same sense. Similarly, section 1341(b) refers to “an appropriation *made to* a regular contingent fund,” 31 U.S.C. § 1341(b) (emphasis added), and one would not ordinarily refer to “a fund made to a regular contingent fund” (or an appropriation made to an appropriation). Nor is it clear what it would mean to “authorize an obligation *under* . . . [a] fund.” We need not resolve such questions here, just as our 2001 ADA Opinion did not resolve them, because the facts that you have provided do not suggest the involvement of any “fund” as a possible source of expenditures for light refreshments.

tion” for a given “expenditure or obligation.” 25 Op. O.L.C. at 41. We did so because, although the language of the ADA “admits of some ambiguity,” we found no serious ambiguity or “complete equipoise” on this question. *Id.* But, as noted above, to conclude simply that “available” means more than “unobligated,” such that the ADA would apply to an internal cap or condition—“in an appropriation”—does not answer just how far beyond “obligated” that term reaches, and in particular the critical question whether it reaches beyond the “appropriation” that makes “an amount available . . . for [an] expenditure or obligation,” or not.⁵

For all of the above reasons, we conclude that the ADA does not reach beyond the “appropriation” that makes “an amount available . . . for [an] expenditure or obligation.” Because section 1345 of title 31 is not part of an appropriation, it does not determine the amount available in a particular appropriation for an expenditure or obligation; the ADA therefore does not apply by its own force to a violation of section 1345.

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⁵ As in our 2001 ADA Opinion, we need not here resolve the applicability of the ADA to restrictions other than internal caps and conditions that may appear in an appropriations act. The 2001 ADA Opinion mentioned “ceilings” as an example. 25 Op. O.L.C. at 34. It is enough that section 1345 plainly is not “an appropriation” under any possible scope of that term. The Comptroller General has stated that an appropriation may be “exhausted” for purposes of section 1341(a) upon (1) the “[d]epletion of [an] appropriation account”; (2) the “depletion of a maximum amount specifically earmarked in a lump-sum appropriation”; or (3) the “[d]epletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).” 2 *Federal Appropriations Law* at 6-41. The first category is, as we have explained, the paradigmatic violation of the ADA. The second is similar to the scenario addressed in our 2001 ADA Opinion, although we expressly did not reach specific earmarks. 25 Op. O.L.C. at 34. The third, although not directly on point for section 1345, is arguably in tension with our conclusion. We have considered the Comptroller’s limited precedent and brief reasoning in support of this third category and do not find them persuasive regarding whether the ADA applies to section 1345. *See, e.g., Monetary Ceilings on Minor Military Construction (10 U.S.C. § 2805)*, 63 Comp. Gen. 422, 424 (1984) (indicating, without further explanation, that the monetary limit in section 2805(c) limited the “amount available in an appropriation” under the ADA); *Reconsideration of B-214172*, 64 Comp. Gen. 282, 289 (1985) (without citing *Monetary Ceilings*, extending earlier precedents that “involved limitations that were contained in an appropriation act” to apply “to a limitation contained in authorizing legislation”).

APPENDIX

- ***Clean Air Act section 103, 42 U.S.C. § 7403 (2000)***. The EPA has authority to “establish a national research and development program for the prevention and control of air pollution,” and, among other things, may “promote the coordination” of research with private organizations, and may “provide financial assistance to,” “make grants to,” or “contract with” appropriate public or private agencies. EPA also may “provide training for, and make training grants to,” appropriate public or private organizations or individuals. *Id.* § 7403(a)–(b).
- ***Clean Water Act section 104, 33 U.S.C. § 1254 (2000)***. The EPA has authority to “establish national programs for the prevention, reduction, and elimination of pollution” and, among other things, may “promote the coordination” of relevant activities with appropriate public and private organizations, may “render technical services” to appropriate organizations, and may “cooperate with,” “make grants to,” or “contract with” those organizations. *Id.* § 1254(a)–(b). EPA also may “finance pilot programs,” in cooperation with appropriate public and private parties, of “manpower development and training and retraining.” *Id.* § 1254(g).
- ***Solid Waste Disposal Act section 8001, 42 U.S.C. § 6981 (2000)***. EPA may “encourage, cooperate with, and render financial and other assistance to appropriate” public or private organizations and individuals. *Id.* § 6981(a).
- ***National Environmental Policy Act section 102(2)(G), 42 U.S.C. § 4332(2)(G) (2000)***. Federal agencies shall “make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.”
- ***Comprehensive Environmental Response, Compensation, and Liability Act section 104(k)(6), 42 U.S.C. § 9604(k)(6) (2000 & Supp. III 2003)***. The EPA may “provide, or fund eligible entities or nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations, as appropriate.” In addition, under section 311, the EPA may “enter into contracts and cooperative agreements with, and make grants to, persons, public entities, and nonprofit private entities,” *id.* § 9660(b)(3) (2000), and conduct “a program of training,” *id.* § 9660(b)(9).
- ***Intergovernmental Personnel Act, 42 U.S.C. § 4742 (2000)***. A federal agency “may admit State and local government employees and officials to agency training programs established for Federal professional, administrative, or technical personnel.” *Id.* § 4742(a).
- ***Government Employees Training Act, 5 U.S.C. § 4110 (2000)***. A federal agency may expend travel expenses “for expenses of attendance at meetings which are

concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.”

Officers of the United States Within the Meaning of the Appointments Clause

A position to which is delegated by legal authority a portion of the sovereign powers of the federal government and that is “continuing” is a federal office subject to the Constitution’s Appointments Clause. A person who would hold such a position must be properly made an “Officer[] of the United States” by being appointed pursuant to the procedures specified in the Appointments Clause.

April 16, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSELS OF THE EXECUTIVE BRANCH

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This memorandum addresses the requirements of the Appointments Clause of the Constitution, which sets out the exclusive methods of appointing all “Officers of the United States” whose appointments are not otherwise provided for in the Constitution. U.S. Const. art. II, § 2, cl. 2. In particular, we address which positions are required by that Clause to be filled pursuant to its procedures. We conclude that any position having the two essential characteristics of a federal “office” is subject to the Appointments Clause. That is, a position, however labeled, is in

fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal government, and (2) it is “continuing.” A person who would hold such a position must be properly made an “Officer[] of the United States” by being appointed pursuant to the procedures specified in the Appointments Clause.

I. The Safeguards of the Appointments Clause

The Appointments Clause provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id. The Appointments Clause, as the Supreme Court has explained, reflects more than a “frivolous” concern for “etiquette or protocol.” *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam). Rather, the Clause limits the exercise of certain kinds of governmental power to those persons appointed pursuant to the specific procedures it sets forth for the appointment of “officers.” As the Supreme Court explained in *Buckley*:

We think that the term “Officers of the United States” as used in Art. II, defined to include “all persons who can be said to hold an office under the government,” is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an “Officer of the United States,” and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

Id. at 125–26 (citation omitted; quoting *United States v. Germaine*, 99 U.S. 508, 510 (1879)); see also *id.* at 132 (“Unless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.”); *id.* at 136 (noting that prior cases allowing restrictions on President’s removal power had been careful not to suggest that his appointment power could be infringed). Applying this understanding, the Court in *Buckley* unanimously held that the Appointments Clause required that the enforcement, regulatory, and other administrative powers of the Federal Election Commission could properly “be exercised only by ‘Officers of the United States,’ appointed in conformity with”

the Clause. *Id.* at 143; *see id.* at 267 (White, J., concurring in part and dissenting in part) (agreeing). Because the members of the Commission had not been so appointed, the Commission could not constitutionally exercise these powers. *Id.* at 141–43 (opinion of Court); *see also id.* at 126–27 (describing existing appointment procedure).

This Office also has long taken the same view of the force of the Appointments Clause. We have concluded, for example, that it is not “within Congress’s power to exempt federal instrumentalities from the Constitution’s structural requirements, such as the Appointments Clause”; that Congress may not, for example, resort to the corporate form as an “artifice” to “evade the ‘solemn obligations’ of the doctrine of separation of powers,” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 n.70 (1996) (“*Separation of Powers*”); and that the “methods of appointment” the Appointments Clause specifies “are exclusive,” *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 (1989) (“*Legislative Encroachments*”). Indeed, the Court’s conclusion in *Buckley* that the methods of appointment in the Appointments Clause are exclusive for anyone who can be said to hold an office under the United States was anticipated by a line of Attorney General opinions dating back to well before the Civil War. *See, e.g., Appointment and Removal of Inspectors of Customs*, 4 Op. Att’y Gen. 162, 164 (1843); *see also Civil Service Comm’n*, 13 Op. Att’y Gen. 516, 518 (1871) (Appointments Clause “must be construed as excluding all other modes of appointment” of executive and judicial officers). Moreover, the text of the Appointments Clause emphatically applies to “all” officers of the United States, unless their method of appointment is “otherwise provided for” in the Constitution.

The requirements of the Appointments Clause are “among the significant structural safeguards of the constitutional scheme” and are “designed to preserve political accountability relative to important government assignments.” *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997). The Clause “is a bulwark against one branch aggrandizing its power at the expense of another branch,” particularly by preventing Congress from taking to itself the appointment power, as was at issue in *Buckley*, or otherwise stripping that power from the other Branches. *Ryder v. United States*, 515 U.S. 177, 182 (1995). By vesting the selection of principal officers in the President and of inferior officers in the President or certain other officers of the Executive or Judicial Branches, the Clause “prevents congressional encroachment upon” those branches, *Edmond*, 520 U.S. at 659, and supports the President’s authority and duty to see to the execution of the laws, *Printz v. United States*, 521 U.S. 898, 922–23 (1997). But the Appointments Clause “is more: it preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.” *Ryder*, 515 U.S. at 182 (internal quotation marks omitted). Thus, in *Ryder* the Court held invalid a military court’s affirmance of a conviction where, even though the court had been appointed by an Executive

Branch officer, the appointing official was not among those specified in the Appointments Clause. *Id.* at 179; *see also United States v. Maurice*, 26 F. Cas. 1211, 1216, 1219 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice) (finding appointment by cabinet member, rather than President with Senate advice and consent, invalid under the Appointments Clause and stating that “the policy of the law condemns such appointments,” although illegal appointment did not prevent governmental suit to recover money from appointee); *cf. Auffmordt v. Hedden*, 137 U.S. 310, 326–28 (1890) (rejecting Appointments Clause challenge to action of appraiser appointed by inferior Executive Branch officer—not because Clause did not impose constraints but because position was not an office). By preventing diffusion, the Appointments Clause helps to ensure accountability for the quality of appointments and the operation of the government—through a limited number of publicly known and readily discernible sources of appointing authority, and also, ultimately, through the threat of impeachment, by which Congress may both remove a person from any civil “Office” and disqualify him “to hold and enjoy any Office.” U.S. Const. art. II, § 4; *id.* art. I, § 3.¹

II. The Essential Elements of an Office Subject to the Appointments Clause

Although *Buckley* and subsequent cases confirm that the Appointments Clause limits the conferral of certain kinds of governmental authority to properly appointed “officers,” the Supreme Court has not articulated the precise scope and application of the Clause’s requirements; the Executive Branch, as explained below, has adopted differing interpretations since *Buckley*; and questions about the Clause continue to arise regularly both in the operation of the Executive Branch and in proposed legislation. We therefore have reconsidered the scope of the Clause’s requirements; in doing so, we have focused on relevant constitutional text and the earliest authorities that illuminate that text, as well as Supreme Court authority. The remainder of this memorandum explains the basis for and contours of the two elements of an “office” under the United States whose occupant must

¹ This memorandum does not address other separation of powers principles that might restrict the allocation of appointing authority or the exercise of governmental powers, including the “anti-aggrandizement” principle, constraints on the delegation of power outside of the federal government, and the powers and duties of the President under Article II, such as his duty under the Take Care Clause. *See, e.g., Separation of Powers*, 20 Op. O.L.C. at 131–32, 175–77; *Deputization of Members of Congress as Special Deputy U.S. Marshals*, 18 Op. O.L.C. 125 (1994); *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928) (applying separation of powers principles to interpret statute as barring territorial legislature from appointing persons to vote government’s stock in a corporation, regardless of whether such persons “are public officers in a strict sense”).

be appointed in accordance with the Appointments Clause.² This memorandum discusses and explains the governing principles, which are consistent with and expand on *Buckley* and the precedents on which it relied. But apart from the few specific instances that we expressly consider (such as *qui tam* relators and independent counsels, below in Part II.B.3), this memorandum is not intended to address whether any particular position would be an office or to call into question any particular existing position. Please consult this Office should any particular Appointments Clause question arise that you are unable to resolve based on the principles we set out.

Subpart A explains that a federal office involves a position to which is delegated by legal authority a portion of the sovereign powers of the federal government. Such powers primarily involve binding the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws. Delegated sovereign authority also includes other activities of the Executive Branch concerning the public that might not necessarily be described as the administration, execution, or authoritative interpretation of the laws but nevertheless have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the government. By contrast, an individual who occupies a purely advisory position (one having no legal authority), who is a typical contractor (providing goods or services), or who possesses his authority from a state does not hold a position with delegated sovereign authority of the federal government and therefore does not hold a federal office.

Subpart B explains that, for a position to be a federal office, it also must be “continuing,” which means either that the position is permanent or that, even though temporary, it is not personal, “transient,” or “incidental.” Thus, special diplomatic agents, short-term contractors, *qui tam* relators, and many others in positions that have authority on an ad hoc or temporary basis do not hold offices. Persons holding such non-continuing positions need not be appointed in conformity with the Appointments Clause, even if they temporarily exercise delegated sovereign authority. Primarily because of this element, our analysis departs from that taken in such prior memoranda as *Legislative Encroachments*, 13 Op. O.L.C. at 249, and *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 221–24 (1989).

Finally, Subpart C discusses additional criteria that have been considered in certain contexts for determining when a position is an office or when an individual is an officer. At least for purposes of the Appointments Clause, these criteria are

² Even if the Appointments Clause applies to a position, the Clause does permit various means of relieving administrative burdens on the appointing officer. See *Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 133-38 (2005).

not essential, even if relevant to determining the presence of the two essential elements. In many cases, they are incidental traits that often flow from the existence of an office but do not *define* an office. One such criterion, which this Office previously considered essential, is whether a position involves employment within the federal government. *See Separation of Powers*, 20 Op. O.L.C. at 145–48. As suggested when we formally published *Separation of Powers* in 2002, this prior analysis has been found “inadequate as an expression of the Office’s advice on separation of powers.” *Id.* at 124 (editor’s note). As we explain, federal employment is not necessary for the Appointments Clause to apply. In addition, we explain that the statutory basis for a position ordinarily will be relevant to whether the position involves delegated sovereign authority and is continuing, and thus is an “office” subject to the Appointments Clause, although the applicability of the Clause does not depend on whether Congress has formally and directly created an “office.”

A. The Position Must Possess Delegated Sovereign Authority of the Federal Government

The first essential element of an office under the United States is the delegation by legal authority of a portion of the sovereign powers of the federal government. A position must have the authority to exercise such power before the Appointments Clause will require that the occupant of the position be made an “Officer[] of the United States.” After laying out the authority for this element, we explain its contours and then address three arguably special situations.

1. The Foundations of This Element

The text and structure of the Constitution reveal that officers are persons to whom the powers “delegated to the United States by the Constitution,” U.S. Const. amend. X, are in turn delegated in order to be carried out. The President himself is said to “hold [an] Office,” and the Constitution provides that “[t]he executive Power shall be vested in” that office. *Id.* art. II, § 1, cl. 1. The President cannot carry out the executive power alone, and so the Constitution further contemplates that executive power will be delegated to officers to help the President fulfill this duty. The Constitution recognizes that the President would need to delegate authority to others in, among other places, the clauses empowering him to “*take Care that the Laws be faithfully executed,*” and then, immediately following, providing that the President “shall Commission all the Officers of the United States.” *Id.* § 3 (emphases added). The Constitution also provides that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” *Id.* § 2, cl. 1. *See also id.* art. I, § 6 (barring members of Congress in certain cases from being “appointed to any civil Office under the Authority of the

United States”); *id.* § 8, cl. 18 (referring to the “Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); *cf. id.* cls. 15–16 (referring to “the Officers” of the militia, who, when called into federal service, provide one means of executing federal law).

As the Supreme Court has explained: “The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed,’ Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the ‘Courts of Law’ or by ‘the Heads of Departments’ who are themselves Presidential appointees), Art. II, § 2.” *Printz*, 521 U.S. at 922; *see In re Neagle*, 135 U.S. 1, 63 (1890) (President’s authority to appoint and commission officers is “the means of fulfilling” his obligation under the Take Care Clause); *Myers v. United States*, 272 U.S. 52, 133 (1926) (same); *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823) (similar). *Printz* was echoing President Washington, who explained in 1789 that “[t]he impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust.” 30 *Writings of George Washington* 333, 334 (May 25, 1789) (John C. Fitzpatrick ed., 1939).³ Similarly, the Constitution describes the persons to whom is delegated the “judicial Power of the United States,” a particular kind of power to render binding interpretations of federal law (in the course of deciding cases or controversies), as “hold[ing] . . . Offices.” U.S. Const. art. III, § 1. This power is primarily delegated to the “Judges of the supreme Court,” *id.* art. II, § 2, cl. 2; and the “Judges . . . of the . . . inferior Courts,” *id.* art. III, § 1; but also to other officers, *see Buckley*, 424 U.S. at 126 (clerk, *citing Ex parte Hennen*, 38 U.S.

³ Regarding the significance of the President’s constitutional status as head of the Executive Branch, and his take-care duty, to the nature of an office as a delegation of executive power, *see also* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 324 (Norton 1987) (Gouverneur Morris, July 19, 1787) (“There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence.”); 1 *Annals of Cong.* 481 (James Madison, June 16, 1789) (“if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws”); *id.* at 492 (Fisher Ames, June 16, 1789) (“[I]t was necessary to delegate considerable powers The constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others.”); *id.* at 637 (Theodore Sedgwick, June 29, 1789) (stating that Representative Sedgwick “conceived that a majority of the House had decided that all officers concerned in executive business should depend upon the will of the President for their continuance in office; and with good reason, for they were the eyes and arms of the principal Magistrate, the instruments of execution”).

(13 Pet.) 230 (1839)); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1530, at 387 (1833) (“Story”) (clerk and reporter).⁴

The debate on the ratification of the Constitution reinforces both this textual understanding of a federal “office” as characterized by the delegated sovereign authority of the federal government and the relation of the Appointments Clause to such a position. James Madison argued in the *Federalist* that the Constitution would establish a republican government, which he defined as one that “derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.” *The Federalist* No. 39, at 251 (Jacob E. Cooke ed., 1961). Alexander Hamilton similarly explained in *Federalist* No. 72 that the Executive Branch would be administered by appointed officers exercising the delegated executive power of the President:

The administration of government . . . in its most usual and perhaps in its most precise signification . . . falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys, in conformity to the general appropriations of the legislature; the arrangement of the army and navy, the direction of the operations of war; these, and other matters of a like nature constitute what seems to be most properly understood by the administration of government. *The persons therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.*

Id. at 486–87 (emphasis added); *see also* *The Federalist* No. 29, at 183 (Alexander Hamilton) (referring to “the officers who may be entrusted with the execution of [the] laws”); *cf.* *The Federalist* No. 64, at 436 (John Jay) (referring to Constitution’s allocation of “power to do” each “act of sovereignty by which the citizens are to be bound and affected,” such as making laws, making treaties, and entering court judgments).

⁴ The Constitution specially provides for the election of representatives and senators, for each house of Congress to choose its legislative officers (except for the President of the Senate, an office held *ex officio* by the Vice President), and for the election of the President and Vice President. *See* U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5; *id.* art. II, § 1 & amend. XII. These offices are therefore excluded from the Appointments Clause by its terms.

The earliest commentators shared and perpetuated the *Federalist's* understanding of a federal office as involving the wielding of delegated sovereign authority. William Rawle explained in the 1820s in his prominent commentary on the Constitution that one of “the means provided to enable the president to perform his public duties” is creation of “[s]ubordinate offices,” *A View of the Constitution of the United States of America* 151–52 (2d ed. 1829); described the appointment of officers as the means to allow the President “agents . . . for public duties,” *id.* at 162; and supported the power to impeach officers because “[t]he delegation of important trusts, affecting the higher interests of society, is always from various causes liable to abuse,” *id.* at 211. Joseph Story in the 1830s echoed Madison by explaining that “in a republican government[,] offices are established, and are to be filled . . . for purposes of the highest public good; to give dignity, strength, purity, and energy to the administration of the laws.” 3 Story § 1524, at 376. In his view, the Appointments Clause “give[s] to the president a power over the appointments of those, who are in conjunction with himself to execute the laws.” *Id.* Attorney General Cushing in the 1850s, surveying the law and practice regarding the operation of the Executive Branch, similarly explained that “the lawful will of the President may be announced, and an act in the authority of the President performed, not merely by a Head of Department, but, in the second or other degree of delegation, by some officer subordinate to such head.” *Relation of the President to the Executive Departments*, 7 Op. Att’y Gen. 453, 473 (1855). See also *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482, 489 (1831) (discussing case in which by statute the President “could only act through his subordinate officer” but might issue an order to that officer and enforce it through his removal power); John N. Pomeroy, *An Introduction to the Constitutional Law of the United States* § 642, at 425 (7th ed. 1883) (“Pomeroy”) (“the officers, in all their various subordinate grades, are the means and instruments by which the laws shall be executed, and the general functions and duties of the department performed”).

The common law of the time of the Founding also indicates that delegated sovereign authority is a key characteristic of an office. In late eighteenth century England, “offices” involved a “duty, and in the next place the charge of such duty.” Giles Jacob, *A New Law Dictionary*, tit. Office (9th ed. 1772) (“Jacob”); see also 2 T. Cunningham, *A New and Complete Law Dictionary*, tit. Office (2d ed. 1771) (same) (“Cunningham”); 3 Matthew Bacon, *A New Abridgment of the Law* (4th ed. 1778) (same). “[A]n ‘officer,’” then, “was simply one whom the King had charged with a duty.” Edward S. Corwin, *The President: Office and Powers 1789–1948*, at 85 (5th ed. 1984). A public officer (as distinct from a private one) was someone whom the King had charged with “any duty concerning the publick.” Jacob, *tit. Office*; Cunningham, *tit. Office*. More particularly, public offices involved authority to “affect the people generally,” John Bouvier, *A Law Dictionary* 203 (1839) (1993 reprint) (“Bouvier”), and “entitle[d] a man to act in the affairs of others without their appointment or permission,” P.G. Osborn, *A Concise*

Law Dictionary 223 (2d ed. 1937); 2 Stewart Rapalje & Robert Lawrence, *A Dictionary of American and English Law* 895 (1883) (same).

Thus, the general common law rule for public offices at the Founding was that “where one man hath to do with another’s affairs against his will, and without his leave, that this is an office, and he who is in it, is an officer.” Jacob, *tit. Office*; Cunningham, *tit. Office* (same). The dictionaries derived this rule, essentially verbatim, from the reported arguments of the Crown in the early case of *King v. Burnell*, Carth. 478 (K.B. 1700). *See id.* at 478 (so stating the “Rule”). *Burnell* involved the Censor of the College of Physicians, and the Crown contended that he was a public officer (and therefore subject to an oath requirement) because (1) the King had the duty to take “Care of the Persons of his Subjects, and consequently of their health”; (2) he had “delegated so much of his Office unto those Censors”; and (3) “he is an Officer subordinate, who hath any Part of the King’s publick care delegated to him by the King.” *Id.* at 478–79; *see also id.* at 479 (argument for doctor, not denying general rule as applied to revenue officers and officers of the peace but claiming exception for “particular Powers created for particular Purposes”). The Founders, several decades after *Burnell*, had a similar (albeit less favorable) view of the characteristics of a public office: The Declaration of Independence charged that King George III had “erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance.” *Declaration of Independence* ¶ 12 (U.S. 1776). Two years before, the First Continental Congress had written of “oppressive officers” who needed, by means of the freedom of the press, to be “shamed or intimidated into more honorable and just modes of conducting affairs.” Appeal to the Inhabitants of Quebec, 1 *Journals of the Continental Congress* 105, 108 (1774). Officers, thus, were persons holding sovereign authority delegated from the King that enabled them in conducting the affairs of government to affect the people “against [their] will, and without [their] leave.” *Burnell*, Carth. at 478. So critical to the Founders’ thinking was the abuse of power and the corruption surrounding public offices that “the power of appointment to offices’ was deemed ‘the most insidious and powerful weapon of eighteenth century despotism.’” *Freitag v. Comm’r*, 501 U.S. 868, 883 (1991) (quoting Gordon Wood, *The Creation of the American Republic 1776–1787*, at 143 (1969)); *see generally* Bernard Bailyn, *The Origins of American Politics* 63–91 (1970) (discussing the Founders’ complaints about the power of royal officials); *The Federalist* No. 76, at 509–10 (Alexander Hamilton) (praising the Appointments Clause as likely “to promote a judicious choice of men for filling the offices of the Union,” on which choices “must essentially depend the character of [the government’s] administration,” which was, in turn, “the true test of a good government”).

Authority from the Nation’s early years addressing the nature of a public office confirms this understanding that delegated sovereign authority is a key element. Such post-ratification materials can illuminate the original meaning of the

Constitution where there is no evidence of a break in the law, and we are aware of none here. The Supreme Judicial Court of Maine provided the fullest early explication in 1822, addressing a question under Maine’s equivalent of the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, which bars members of the Legislative Branch in certain cases from being appointed to a “civil Office under the Authority of the United States”:

[T]he term “office” implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others

Opinion of the Justices, 3 Greenl. (Me.) 481, 482 (1822). The court added that “[a]n office [is] a grant and possession of a portion of the sovereign power” and that “every ‘office,’ in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws.” *Id.* at 483. Applying this understanding, the court concluded that an agent for the preservation of timber on public lands was not a public officer because he “is to be clothed with no powers, but those of superintending the public lands, and performing certain acts in relation to them under the discretionary regulations of the governor.” *Id.* His duties were “not essentially different from” those of the “state printer, or a contractor to build a state house, or a state prison.” *Id.* Other courts treated this early analysis as authoritative. See *Bunn v. Illinois*, 45 Ill. 397, 409 (1867) (“The doctrine of this opinion has not been questioned, so far as we are advised, by any court, and it commends itself to our unqualified approbation.”); *Patton v. Bd. of Health*, 59 P. 702, 704, 705 (Cal. 1899) (describing doctrine of Maine opinion as the one that has “been held by most courts,” and *Bunn* as having “very fully examined” the cases).

Similarly, in *Byrne’s Administrators v. Stewart’s Administrators*, 3 S.C. Eq. (3 Des. Eq.) 466 (1812), the South Carolina Court of Appeals held that a solicitor was not a public officer because “he does not possess any portion of the public authority.” *Id.* at 478; accord *In the Matter of Oaths*, 20 Johns. 492, 492 (N.Y. Sup. Ct. 1823) (private attorneys do not hold an “office or public trust” under state constitution because “they perform no duties on behalf of the government; they execute no public trust”). And in *Commonwealth v. Binns*, 17 Serg. & Rawle 219 (Pa. 1828), the Pennsylvania Supreme Court concluded, consistent with one of the examples given in the Maine opinion, that a person who had contracted to be printer of congressional reports was not an officer. *Id.* at 244 (opinion of Tod, J.). A concurring opinion expressly relied on the Maine opinion in describing a public

office as including “a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office.” *Id.* (opinion of Smith, J.). See also *United States v. Hatch*, 1 Pin. 182, 190 (Wis. Terr. 1842) (explaining that the term “civil officers” in appointment provision of territory’s organic act “was intended to embrace such officers as in whom part of the sovereignty or municipal regulations, or general interests of society are vested; and that such has been the general understanding in the states, under their constitutions,” relying on the Maine opinion as quoted in *Binns*); *United States ex rel. Boyd v. Lockwood*, 1 Pin. 359, 363 (Wis. Terr. 1843) (officer has “for the time being, a portion of the sovereignty . . . to be exercised for the public benefit”). Finally, in *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823), Chief Justice Marshall concluded that the Army’s position of “agent of fortifications” was a federal office, where it essentially had the duties of contracting agent—“those of a purchasing quartermaster, commissary, and paymaster.” *Id.* at 1214–15. These were “important duties,” which, if the President in discharging his duty to erect fortifications did not carry out directly through a series of contracts, would be carried out for him by officers. *Id.* at 1214. In general, Marshall explained, “[a]n office is defined to be ‘a public charge or employment,’ and he who performs the duties of the office, is an officer.” *Id.* Thus, an office could be said to involve the performance of public duties. See also *Eliason v. Coleman*, 86 N.C. 235, 239–40 (1882) (office is “a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public”) (quotation marks omitted); *State v. Hocker*, 22 So. 721, 722–23 (Fla. 1897) (surveying law of public offices beginning with 1822 Maine decision and *Maurice*).

Reflecting the understanding from the first hundred years of American law, including pre-Founding English law, a leading treatise summarized and defined a public office as follows:

A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.

Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1–2 (1890) (footnote omitted) (“Mechem”). Mechem added that the “delegation . . . of some of the sovereign functions of government” was the “most important characteristic which distinguishes an office,” such that “[u]nless the powers conferred are of this nature, the individual is not a public officer.” *Id.* § 4, at 5. The “nature of th[e] duty,” as “concerning the public,” was the key factor. *Id.* § 9, at 7 (quoting *Burnell*, Carth. at 479).

Mechem's distillation of the law was quickly and widely accepted. Contemporaneous commentators concurred. See Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* 163 (1903) (essentially reiterating Mechem's definition); James L. High, *A Treatise on Extraordinary Legal Remedies* 581 (3d ed. 1896) ("An office, such as to properly come within the legitimate scope of an information in the nature of a quo warranto, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public."). So did the Judiciary Committee of the House of Representatives in 1899. The House had requested a report on whether any member had "accepted any office under the United States" and whether "the acceptance of such office under the United States ha[d] vacated the seat of the Member" under the Incompatibility Clause, which provides that "no Person holding any Office under the United States" may at the same time be a member of Congress, U.S. Const. art. I, § 6, cl. 2. The Committee extensively surveyed the definition of an "office," particularly relying on Mechem and the 1822 Maine decision, and concluded that membership on "a commission created by law to investigate and report, but having no legislative, judicial, or executive powers," did not constitute an office under the United States. 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604, 604 (1907). The Committee reasoned that a public office requires a delegation of sovereign authority, which "involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted." *Id.* at 607.⁵ The commissioners in question, by contrast, "are not to execute any standing laws which are the rules of action and the guardians of rights, nor have they the right or power to make any such law, nor can they interpret or enforce any existing law." *Id.* at 608; see *id.* at 610 ("They neither make law, execute law affecting the rights of the people, nor perform judicial functions," but rather are "mere advisory agents of the Congress. . . . They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen."). Similarly, the Attorney General at the same time explained that, although "[t]he legal definitions of a public office have been many and various," "[t]he idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power."

⁵ In addition to its conclusion regarding the mere power to investigate and report, the Committee further concluded that "mere power . . . to negotiate a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer." 1 *Hinds' Precedents* at 607–08. This conclusion is correct, not because, as the report suggests, no delegation of sovereign power is involved in the authority to represent the federal government in foreign relations, but only to the extent that the person exercising that "mere power" does not hold a position that is *continuing*, as discussed below in Part II.B. As discussed in the next subpart, the delegated executive power of the federal government is broader than just the power to execute law, and Mechem did not state otherwise.

Office—Compensation, 22 Op. Att’y Gen. 184, 187 (1898); *see also Appointment—Holding of Two Offices—Commissioner of Labor*, 26 Op. Att’y Gen. 247, 249 (1907) (similar, citing 1822 Maine decision).

It was the same House report’s quotation of Mechem’s definition of a public office (along with the Supreme Court’s opinion in *United States v. Hartwell*, 73 U.S. 385 (1867)) on which then-Assistant Attorney General Rehnquist relied in 1969 in concluding that the Staff Assistant to the President did not hold an office within the meaning of the Ineligibility Clause. *See* Letter for Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 9, 1969) (“Rehnquist Letter”). Among other reasons, Rehnquist noted that the position had no specified duties. *Id.* at 3. Similarly, in 1971 this Office, in addressing the scope of the Appointments Clause and the related constitutional provision for the President to commission officers, explained that one of the two key “characteristic[s] of an officer of the United States in the Constitutional sense is that he must be invested ‘with some portion of the sovereign functions of the government.’” Memorandum for John W. Dean, III, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Commissions* at 3 (Dec. 1, 1971) (quoting Mechem §§ 1, 2 & 4).

The Supreme Court soon thereafter (joined by then-Justice Rehnquist) followed essentially the same analytical path in *Buckley v. Valeo*, the Court’s first treatment of the basic requirements of the Appointments Clause since *Auffmordt v. Hedden*, 137 U.S. 310 (1890), *see Buckley*, 424 U.S. at 125–26 & n.162, and its first decision finding a violation of that Clause. In concluding that the commissioners of the Federal Election Commission held offices under the United States and therefore were required to be appointed in accordance with the Appointments Clause, the Court focused on the Commission’s powers and concluded that many of those powers involved “the performance of a significant governmental duty exercised pursuant to a public law.” 424 U.S. at 141; *see id.* at 269–70 (White, J., concurring in part and dissenting in part) (similar); *see also id.* at 137–41, 143 (opinion of Court, surveying powers). Because of their invalid appointments, the commissioners were permitted to “perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law.” *Id.* at 139.

The Court’s reference in *Buckley* (and subsequent cases) to the exercise of “significant authority,” *id.* at 126, does vary somewhat from the well-established historical formulation, but nothing in the Court’s opinion suggests any intention to break with the longstanding understanding of a public office or fashion a new term of art. On the contrary, the Court favorably discussed and cited several of the cases from the 1800s reflecting that understanding, some of them treating arguably insignificant positions as offices. *See id.* at 125–26. The Court also referred simply to the administration and enforcement of the public law, *see id.* at 139 (quoted

above), 141 (same), and explained that “the term ‘Officers of the United States,’ . . . since it had first appeared in [the draft Constitution,] had been taken by all concerned to embrace all appointed officials exercising responsibility under the public laws of the Nation,” *id.* at 131. We therefore take the phrase “significant authority pursuant to the laws of the United States,” *id.* at 126, and similar phrases, *see, e.g., id.* at 141, to be shorthand for the full historical understanding of the essential elements of a public office; this phrase concisely conveys both the historical concept of delegated sovereign power and the second historical element discussed below—whether the position with such power is “continuing”—which was set out in *Auffmordt*, among much other early authority, and could be considered to bear heavily on the “significan[ce]” of the delegation. This Office previously has suggested such an understanding of *Buckley*. *See* Memorandum for Robert P. Bedell, Deputy General Counsel, Office of Management and Budget, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Executive Director of the Property Review Board* at 5–6 (Apr. 1, 1983); *see also United States ex rel. Stone v. Rockwell Intern. Corp.*, 282 F.3d 787, 805 (10th Cir. 2002) (*Buckley* “was clear” that its “definition of an officer of the United States should be construed in conformity with its prior *Germaine* and *Auffmordt* opinions, which the *Buckley* Court extensively quoted with approval.”).

2. Defining Delegated Sovereign Authority

Although the particulars of what constitutes “delegated sovereign authority” will not always be beyond debate, early authorities as well as more recent court decisions and opinions of this Office provide extensive guidance illuminating the term. As a general matter, based on these authorities, one could define delegated sovereign authority as power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit. As indicated from much of the discussion above, such authority primarily involves the authority to administer, execute, or interpret the law. *See also Printz*, 521 U.S. at 922–23 (Constitution provides that President and the officers he appoints are the ones who are “to administer the laws enacted by Congress” and “execute its laws”); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”); *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202 (1983) (holding that positions of commissioners were not subject to the Appointments Clause where they involved “no enforcement authority or power to bind the Government”); 1 *Hinds’ Precedents* at 610 (1898 report concluding that certain commissioners were not officers because “[t]hey neither make law, execute law affecting the rights of the people, nor perform judicial functions”; “They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen”).

For example, the public authority to arrest criminals, impose penalties, enter judgments, and seize persons or property constitutes delegated sovereign authority. The Supreme Court recognized early that a justice of the peace for the District of Columbia was an officer of the United States. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803) (justice of peace holds an office); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 336 (1806) (“Deriving all his authority from the legislature and president of the United States, he certainly is not the officer of any other government,” and “his powers, as defined by law, seem partly judicial, and partly executive”). The New Hampshire Supreme Court likewise concluded early that a “constable” held an office, given his power “to arrest criminals . . . and by execution to seize either the person or property of small debtors,” *Town of Meredith v. Ladd*, 2 N.H. 517, 519 (1823), and the Supreme Court of the Wisconsin Territory concluded that a county probate judge held an office, having “for the time being, a portion of the sovereignty . . . to be exercised for the public benefit,” *Boyd*, 1 Pin. at 363; see also *Payton v. New York*, 445 U.S. 573, 590 n.30 (1980) (discussing arrest powers of “a peace officer” at common law) (internal quotation marks omitted).⁶

Similarly included in delegated sovereign authority is power to issue regulations and authoritative legal opinions on behalf of the government, and other powers to execute the law whether considered “executive” or merely “administrative.” Thus, *Buckley* concluded that both the Federal Election Commission’s “primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights” and its “rulemaking, advisory opinions, and determinations of eligibility for . . . federal elective office” were authorities that rendered the members of the Commission subject to the Appointments Clause. 424 U.S. at 140; see *id.* at 137 (discussing agency’s “functions with respect to . . . fleshing out the statute” and its “functions necessary to ensure compliance with the statute and rules”); *id.* at 110–11 (explaining that the “advisory opinions” at issue

⁶ The same understanding appears in *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (1821). All of the judges of the General Court appeared to agree that a justice of the peace exercised delegated sovereign authority, even while disagreeing about whether a state justice of the peace could, consistent with Article III of the federal Constitution, be authorized by federal law to commit certain persons to jail for trial. The dissent argued that the powers of justices of the peace “to grant warrants of arrest against persons accused of crimes or offences against the Laws of the United States, to examine, bail, or commit the accused, compel the attendance of witnesses, [and] recognize them to appear to give evidence under pain of imprisonment” made them officers under the Appointments Clause. *Id.* at 290–91 (Semple, J., dissenting). The majority of justices of the peace did not dispute the relevance of these powers; instead, the majority concluded that the duties were permissible because not “regular and permanent” but rather involving “incidental and occasional matters”—thus relying on the second essential element of an office, discussed below in Part II.B. *Id.* at 279–80. In *Shepard v. Commonwealth*, 1 Serg. & Rawle 1 (Pa. 1814), the court concluded for similar reasons that a special commissioner was not an officer even though he made binding decisions for the state regarding claims to and compensation for certain lands. *Id.* at 9–10.

provided a legal defense to private parties). Likewise, Joseph Story included among the “most important civil officers” those “connected with the administration of justice [and] the collection of the revenue.” 3 Story § 1530, at 387.

Apart from matters commonly considered law enforcement or execution, delegated sovereign authority also includes other domestic matters authorized by law that could bind or otherwise affect the government or third parties for the public benefit. Such matters include legal authority over the contracts and “supplies . . . of the nation,” *id.* (persons with such authority also are among the “most important civil officers”); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 126 (1831) (discussing officers “for the purpose of making contracts, or for the purchase of supplies”); *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207 (1984) (listing as a “purely executive function[.]” the “signing [of] legal instruments” on behalf of the government), and “the preparatory plans of finance,” *The Federalist* No. 72, at 486; authority over the granting of governmental licenses, *see* Leonard D. White, *The Federalists: A Study in Administrative History* 455 (1948), or to determine the rules for public access to or privileges regarding governmental property, *see In re Corliss*, 11 R.I. 638, 640–42 (1876); *see also Opinion of the Justices*, 3 Greenl. at 483 (contrasting the “discretionary regulations of the governor” regarding the public lands with the subordinate duties of his non-officer agent for the preservation of timber on public lands); and the authority to appoint to or remove from other governmental offices, *see, e.g., State v. Kennon*, 7 Ohio St. 546, 562–63 (1857) (these are “important public powers, trusts, and duties”). To take one example, a leading early case, *Shelby v. Alcorn*, 36 Miss. 273 (1858), concluded that a levee commissioner held an office, where the position included authority to set terms for and enter into contracts on behalf of the government for construction of levees, authority to sue to enforce those contracts, “the duties of treasurer, in which position he is entitled to receive large sums of public money,” and the ability essentially to levy taxes to fund construction. *Id.* at 289. His powers were “extensive and important, and *such as no one could claim to exercise, except in virtue of a legislative enactment*,” and “in the discharge of his proper functions, [he] exercises as clearly *sovereign power* as the governor, or a sheriff, or any other executive officer.” *Id.* at 291–92 (emphasis added). *See also, e.g., Commonwealth v. Swasey*, 133 Mass. 538, 541 (1882) (city physician, through his authority as an *ex officio* member of the board of health, has “important powers to be exercised for the safety and health of the people,” and so is an officer).

At the same time, the 1822 Maine decision indicates that some functions simply involving the management of governmental property may be considered not “sovereign” but rather proprietary. *See Opinion of the Justices*, 3 Greenl. at 483 (“He is to be clothed with no powers, but those of superintending the public lands, and performing certain acts in relation to them under the discretionary regulations of the governor.”); *cf. Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928)

(describing authority to vote government-owned shares of a company's stock as "not sovereign but proprietary in its nature," though declining to give distinction significance in separation of powers challenge to statute); *Constitutional Limits on "Contracting Out" Department of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94, 99 (1990) ("[P]urely ministerial and internal functions, such as building security, mail operations, and physical plant maintenance, which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority, may be performed by persons who are not federal officers or employees.").

As the *Shelby* case indicates, *see* 36 Miss. at 277, delegated sovereign authority further includes, on the one hand, authority on behalf of the government to receive and oversee the public's funds. *See also Corliss*, 11 R.I. at 642 ("office" at least includes a position with authority for "the handling of public money . . . , or the care and oversight of some pecuniary interest of the government"); *Commonwealth v. Evans*, 74 Pa. 124, 139 (1873) (collection agent is "by authority at law, . . . entrusted with the receipt of public moneys" and chargeable with providing such moneys to the treasury); *Tingey*, 30 U.S. at 128 (referring to the "official duties of a receiver . . . of public moneys"). Correspondingly, it also includes authority over the disbursement of those public funds. *See Maurice*, 26 F. Cas. at 1214 (agents of fortifications have duty of "disbursement of the money placed in their hands," consistent with orders of Army engineers); *Tingey*, 30 U.S. at 126–28 (discussing "disbursing officers" and "official duties of . . . an agent for disbursery of public moneys"); 3 Story § 1530, at 387 (civil officers have authority over the "expenditures of the nation"); *Buckley*, 424 U.S. at 140 ("determinations of eligibility for funds" are among duties implicating Appointments Clause). *See generally Military Storekeepers*, 6 Op. Att'y Gen. 4 (1853) (authority to superintend the receiving, safe-keeping, and distribution of military stores and supplies). Alexander Hamilton likewise included within the "administration of government," which ought to be managed by properly appointed officers, "the application and disbursement of the public monies." *The Federalist* No. 72, at 486–87. The President recently implemented this understanding when he avoided Appointments Clause concerns with a private corporation's administration of a fellowship program by "instruct[ing] the head of the department to whose agency these funds are appropriated to treat the money as a grant" to the corporation. Statement by President George W. Bush Upon Signing H.R. 2474, 39 *Weekly Comp. Pres. Doc.* 917, 918 (July 14, 2003), *reprinted in* 2003 U.S.C.C.A.N. 1009.

Finally, delegated sovereign authority of the federal government also encompasses functions that are not necessarily domestic and may not precisely involve the execution of the laws, but that nevertheless are within the "executive Power" that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage. The most notable examples are "[t]he actual conduct of foreign negotiations, . . . the arrangement of the army and navy, [and]

the direction of the operations of war.” *The Federalist* No. 72, at 486–87. The positions with authority to do these things have authority lawfully granted by the government to bind or control in some fashion the government or third parties for the public benefit.

Thus, there are military offices. See U.S. Const. amend. XIV, § 3 (referring to persons who “hold any office, civil or military, under the United States”); *Burnell*, Carth. at 479 (“Officers are distinguished into Civil and Military, according to the Nature of their several Trusts”); *West Point Cadets*, 7 Op. Att’y Gen. 323, 329 (1855) (describing cadets and naval midshipmen, commissioned by President, as “persons of the class of the ‘inferior officers’ of the Constitution”); Mechem §§ 22–24, at 10 (recognizing military and naval officers as distinct from civil officers). These positions are primarily characterized by the authority to command in the Armed Forces—commanding both people and the force of the government. See *Bouvier*, *tit.* Officer (defining classes of officers, including “military officers who have command in the army” and “naval officers, who are in command in the navy”); Mechem §§ 22–23, at 10 (reiterating *Bouvier*’s definitions); *West Point Cadets*, 7 Op. Att’y Gen. at 336 (describing brevet second lieutenant as a commissioned officer, “capable by law to command his company in battle, and, *a fortiori* . . . capable of any duty less than that, which can by law be assigned to a second lieutenant”); *People v. Duane*, 121 N.Y. 367, 373 (1890) (“It is difficult to conceive of . . . a military office without the power of command, the right of promotion or the obligation to perform some duty.”); *Separation of Powers*, 20 Op. O.L.C. at 144 n.54 (“Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat.”). Such offices necessarily involve a delegation of authority that is implicit in and subordinate to the President’s authorities as “Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2; compare *Relation of the President*, 7 Op. Att’y Gen. at 465 (the President cannot relinquish his authority as Commander in Chief), with *id.* at 479–80 (The President “cannot be substituted in person into all the acts of . . . the officers, soldiers, and sailors of the Army and Navy,” and “the actual execution of” the “military business of the Government must, of necessity, devolve on persons subordinate to the President.”).

There also are diplomatic offices. They have the delegated sovereign authority to speak and act on behalf of the United States toward or in other nations, whether executing the laws or otherwise: “Public ministers of every class, are *the immediate representatives of their sovereigns*,” and consuls likewise, although they “have not in strictness a diplomatic character,” are “the public agents of the nations to which they belong.” *The Federalist* No. 81, at 548 (Alexander Hamilton) (emphasis added); see *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att’y Gen. 186, 190 (1855) (ambassadors and other public ministers constitute the “class of public officers who . . . [are] agents of their respective governments

for the transaction of its diplomatic business abroad”); *Appointment of Consuls*, 7 Op. Att’y Gen. 242, 248 (1855) (consuls are a “class of public officers . . . appointed by their government to reside in foreign countries”); *United States Judicial Authority in China*, 7 Op. Att’y Gen. 495, 512 (1855) (Appointments Clause applies to subordinate diplomatic officers and consuls). For this reason, President Washington protested upon learning that a private citizen had been participating in treaty negotiations: “Who is Mr. Rosencrantz? And under what authority has he attended the councils of the Indians at Buffalo Creek? . . . No person should presume to speak to the Indians on business of a public nature except those who derive their Authority and receive their instructions from the War Office for that purpose.” 32 *Writings of George Washington* 116–17 (John C. Fitzpatrick ed., 1939) (quoted in White, *Federalists* at 33); cf. Opinion on the Powers of the Senate Respecting Diplomatic Appointments (1790), in 16 *Papers of Thomas Jefferson* 378, 379 (Julian P. Boyd ed., 1961) (“The transaction of business with foreign nations is Executive altogether.”). And federal law since 1799 has made it a crime for citizens to negotiate with foreign governments regarding the United States without the “authority” of the United States government. See Logan Act, 1 Stat. 613, ch. 1 (1799) (codified as amended at 18 U.S.C. § 953 (2000)).

Indeed, the power of a diplomatic office is peculiarly delegated directly by the President, who makes such officers “the unquestionable representatives *pro tanto* of the sovereignty of the United States.” *Ambassadors*, 7 Op. Att’y Gen. at 211. A direct presidential delegation is particularly important when diplomatic officers carry out the “most important and solemn act of diplomatic service,” the President’s authority to “negotiate[] and sign[] a treaty.” *Id.* at 212; see *Relation of the President to the Executive Departments*, 7 Op. Att’y Gen. 453, 465 (1855) (“in certain stages of the negotiation of a treaty, anterior to and including its signature, [the President] delegates full powers to another person”); see also Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239 (authorizing Postmaster General to “make arrangements” with foreign countries for mail receipt and delivery). Similarly, the delegated authority of consuls has included such clearly sovereign areas as “executing” the “body of laws for the protection of the rights of citizens of the United States in foreign countries.” *Appointment of Consuls*, 7 Op. Att’y Gen. at 267. Common powers and duties have included “administrative, and sometimes judicial, functions,” and assistance “in the collection of the public revenue” by authenticating documents, as well as various duties and rights defined by treaties and the law of nations. *Id.* at 248–49; see also *Field v. Clark*, 143 U.S. 649, 690 n.1 (1892) (discussing example of consular judicial powers). To the Founders, the proper exercise of such sovereign authority by officers abroad was critical for the security of the Nation. Not only does the Appointments Clause ensure accountability for their appointment by expressly mentioning them, U.S. Const. art. II, § 2, cl. 2; see also *id.* art. III, § 2, cls. 1 & 2, but the Emoluments Clause, *id.* art. I, § 9,

cl. 8, was adopted with particular reference to preventing foreign corruption of such officers. See *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55, 57–58 (2005) (“*Emoluments Clause*”).⁷

3. Three Arguably Relevant Characteristics

Having shown that the first element of an “office” for purposes of the Appointments Clause is a delegation of the sovereign authority of the federal government, and having given examples of what such sovereign authority involves, we will touch on three characteristics arguably relevant to the delegation of federal sovereign authority. We conclude that the first of these characteristics (having discretion) is not necessary to the existence of such authority, and that the other two (being a contractor and being a state officer) ordinarily do not involve the exercise of such authority.

a. Discretion

First, “independent discretion” is not a necessary attribute of delegated sovereign authority. *Buckley* is sometimes read to hold that persons who “do not wield independent discretion and [who] act only at the direction of officers” cannot themselves be considered officers. *Separation of Powers*, 20 Op. O.L.C. at 144; see *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 216 (1995) (same). Neither *Buckley* nor early authority supports this restriction on the scope of an “office.”

Buckley did rightly indicate that discretion in administering the laws typically will constitute the exercise of delegated sovereign authority, and therefore is of course relevant. See 424 U.S. at 138 (discretion to bring civil enforcement suit); *id.* at 140–41 (duties akin to those of regulatory agency); *Freytag*, 501 U.S. at 881–82 (noting that special trial judges “perform more than ministerial tasks” and exercise “significant discretion” in their tasks); *cf.* Mechem §§ 567–68, at 368–70 (discussing rules on ability to delegate the performance of official duties, turning on whether the duties involve judgment and discretion or instead are mechanical or ministerial). But *Buckley* did not say, nor does it follow, that such discretion is *necessary*. Indeed, as already indicated, *Buckley* reaffirmed prior decisions that had concluded that “a postmaster first class” and “the clerk of a district court”

⁷ In the context of the Ineligibility Clause, this Office has assumed, consistent with an 1895 opinion of the Attorney General and the text of the Clause, that an ambassador holds a “civil Office” subject to the Clause, while also noting arguments to the contrary based on the specific purposes of that Clause. See *Nomination of Sitting Member of Congress to be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 285 & n.5 (1996).

were officers of the United States. 424 U.S. at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926), and *Ex parte Hennen*, 38 U.S. 225 (1839)). The Court contrasted these officers with the Federal Election Commissioners and concluded that if the former were “inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such ‘inferior Officers’ within the meaning of that Clause.” *Id.*⁸

More fundamentally, treating discretion as necessary for the existence of an office conflicts with the original understanding of “office,” early practice, and early precedents. The Constitution itself repeatedly refers to offices of “Trust” as a *subset* of offices. See U.S. Const. art. I, § 9, cl. 8 (Emoluments Clause); *id.* § 3, cl. 7 (judgments in cases of impeachment); *id.* art. II, § 1, cl. 2 (qualification for presidential electors). And an “office of trust” is “[a]n office whose duties and functions require the exercise of *discretion*, judgment, experience and skill.” Mechem § 16, at 9 (emphasis added); see *Town of Meredith*, 2 N.H. at 519 (similar). Blackstone contrasted “offices of public trust” with “ministerial offices.” 2 William Blackstone, *Commentaries* *36–37. Early legal dictionaries and abridgments, drawing on *Burnell*, similarly explained that a public officer “is not the less a publick officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority.” *E.g.*, Jacob, *tit. Office*. Mechem reaffirmed this point. Mechem § 9, at 7 (quoting *Burnell*, Carth. at 479). Thus, a ministerial office—one that “give[s] the officer no power to judge of the matter to be done, and require[s] him to obey the mandates of a superior”—was still a public office. *Bouvier* at 203; see also Jacob, *tit. Office* (referring to ministerial offices); Charles Viner, *A General Abridgment of Law and Equity* 110 (2d ed. 1791) (same); Mechem § 21, at 10 (“Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors.”) (internal quotation marks omitted); *id.* § 657, at 441 (generally defining ministerial functions and officers).

Early congresses and administrations, perhaps remembering the experiences that had led to the Declaration of Independence’s protest against British officers, confirmed this original meaning of an “office” through their jealousy of discretion, which they considered a threat to liberty in the hands of officers. Congress originally cabined the number of offices that possessed discretion, so that only the President and Cabinet officers would exercise substantial discretion, and most

⁸ At the same time, the Court indicated that there may be positions whose duties are “in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’” *Buckley*, 424 U.S. at 139; see *id.* at 141 (essentially same). As noted above, we have no occasion here to consider particular positions or what such duties or positions may be, apart from the historical examples we discuss of positions not involving delegated sovereign authority. See also *id.* at 126 n.162 (discussing distinction between officers and mere employees); Corwin, *President* at 91 & n.27 (same).

officers in the early Republic performed their sovereign functions within strict and narrow limits. See White, *The Federalists* at 448–59. The first federal marshals, for example, “were ministerial officers,” required “‘to execute . . . all lawful precepts’ directed to them,” and their instructions “dealt normally with a particular person or persons and required a specific action to be performed at the direction of a court.” *Id.* at 455. Even within the early Treasury Department, where discretion in collectors of customs and the Comptroller could not be avoided, Secretary Alexander Hamilton pursued a system in which “little or nothing is left to the discretion of the officers of the revenue,” *id.* at 448 (internal quotation marks omitted), and any necessary discretion was lodged “high in the official ranks,” *id.* Thus, it was generally accepted that the “officers of the United States” included many particular officers who had authority but little if any discretion in administering the laws; these included officers such as registers of the land offices, masters and mates of revenue cutters, inspectors of customs, deputy collectors of customs, deputy postmasters, and district court clerks. See Roll of the Officers, Civil, Military, and Naval, of the United States, 1 *Am. St. Papers, Misc.* 260–319 (1802); *Hennen*, 38 U.S. at 257–58 (district court clerk); *United States v. Morse*, 27 F. Cas. 1 (C.C.D. Me. 1844) (No. 15,820) (Story, Circuit Justice) (inspector of customs); *United States v. Barton*, 24 F. Cas. 1025, 1027 (E.D. Pa. 1833) (No. 14,534) (deputy collector of customs); 3 Story § 1530, at 387 (court clerks and reporters; deputy postmasters). See also Pomeroy §§ 658–59, at 438–39 (1883 critique of spoils system objecting that “[t]he office holder sees that administration of the ministerial functions committed to him, is a thing of no comparative importance,” and referring to “the great mass of ministerial officers, whose duties are not political”).⁹

If it is not necessary to the existence of delegated sovereign authority (and thus to the existence of an office) that a position include the exercise of discretion, all the more is it not necessary that a position include some sort of “independent” discretion in carrying out sovereign functions. The question for purposes of this first element is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers: “[A] delegation of a portion of the sovereign power” involves “a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State,” in contrast with a person whose acts have no “authority and power of a public act or law” absent the “subsequent sanction” of an officer or the legislature. *Opinion of the Justices*, 3 Greenl. at 482;

⁹ The term “ministerial” may, however, be used informally in a different sense to indicate that certain duties do not involve the exercise of delegated sovereign authority. See *Constitutional Limits on “Contracting Out,”* 14 Op. O.L.C. at 99 (quoted above in Part II.A.2).

see also White, *Federalists* at 448 (“Official acts may be either exactly prescribed or discretionary. Official authority is obviously enlarged by extension of discretionary power.”). Again, early practice reinforces this understanding: Inferior revenue officers, for example, had the delegated sovereign authority to make classification decisions, but those decisions could be subjected to two layers of appeal, the second being the Treasury Secretary himself. See *id.* at 455; see also, e.g., Act of May 28, 1796, ch. 37, §§ 3, 8 & 9, 1 Stat. 478, 479, 480–81. A revenue officer’s decision could, without any “subsequent sanction,” by law “bind the rights of others,” even though by law readily “subject to revision and correction” on the initiative of the taxpayer.

b. Contractors

Second, although it is true as a general matter that contractors do not hold an office under the United States, the reason for that (in most cases) is that they do not exercise any delegated sovereign authority. A person’s status as an independent contractor does not per se provide an exemption from the Appointments Clause; rather, a typical contractor provides goods or services instead of possessing any executive or judicial authority. (Similar considerations apply to analysis of grantees.) As the Maine Supreme Judicial Court explained, a contractor merely provides “a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights.” *Opinion of the Justices*, 3 Greenl. at 482–83. That is why a contract with an agent for the preservation of timber on the public lands, like the employment of a “state printer, or a contractor to build a state house, or a state prison,” did not constitute an office. *Id.* at 483. See also *Maurice*, 26 F. Cas. at 1214 (“A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer.”); *Bache v. Binns*, 17 Serg. & Rawle 219, 220 (Pa. 1828) (printer of congressional reports “holds merely a contract . . . as printer of a newspaper, implying such trust only as is ordinarily implied in contracts for work”); *id.* at 221 (printer was “working for the United States government, as he would work for any other customer on contract for pay”). Similarly, the Supreme Court of the United States held, in *Hall v. Wisconsin*, 103 U.S. 5 (1880), that “commissioners” hired to conduct a survey were contractors rather than officeholders (and therefore were protected by the Constitution’s Contract Clause, art. I, § 10, cl. 1); the Court compared them to parties who contract “for the erection, alteration, or repair of public buildings, or to supply the officers or employees who occupy them with fuel, light, stationery, and other things necessary for the public service.” *Id.* at 10. The commissioners lacked any “portion of the sovereignty” or “the enforcement of municipal regulations or the control of the general interests of society.” See *id.* at 9. And in *United States v. Germaine*, 99 U.S. 508 (1878), the Court scoffed at the notion that “a law requiring the commissioner [of Pensions] to appoint a man

to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal” would create an office. *Id.* at 512; *see Auffmordt v. Hedden*, 137 U.S. 310, 328 (1890) (same).

Many members of Congress took the same view in an early debate. Representative John Randolph proposed in 1806 a resolution providing, among other things, that “a contractor under the Government of the United States is an officer within the purview and meaning of the Constitution, and, as such, is incapable of holding a seat in this House” pursuant to the Incompatibility Clause. 15 Annals of Cong. 880 (1852) (reprinting the 1806 resolution); *see generally* David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829*, at 82–85 (2001) (discussing the resolution and debate). The House of Representatives overwhelmingly rejected the resolution, and many who spoke against it explained that, under the accepted definition of an “office,” a contractor was not an officer because he possessed no governmental power. As Representative Eppes observed:

An extensive meaning has been given to the word “office.” . . . That all contractors are not officers, I am certain. A man, for instance, makes a contract with the Government to furnish supplies. He is certainly not an officer, according to the common and known acceptance of that word. He is, however, a contractor, and, under this resolution, excluded from a seat here. A carrier of mail approaches very near an officer. The person takes an oath, is subject to penalties, the remission of which depend on the Executive. His duties are fixed and prescribed by law. Near, however, as this species of contract approaches to an office, I do not consider that the word “office” in the Constitution can include even this species of contract. I consider the word “office” in the Constitution ought to be construed according to the usual import and meaning of that term.

15 Annals of Cong. at 883. Representative Findley likewise argued that a contractor who “furnished the public with [an] article of supply,” such as “flour for the use of the army” or “paper and quills” for the House, did not hold an office because “*it was an essential attribute of office for a man to possess some power, to be exercised on behalf of the Government. Now a mere contractor receives no such power; he only enters into an engagement[] to perform certain specified duties.*” Under Randolph’s view, “Every man who sold anything to the Government must . . . be considered as an officer,” which was absurd. *Id.* at 885. Representative Kelly also concurred: “A contractor receives no authority from Government.” *Id.* at 890–91; *see also id.* at 887 (Rep. Nelson) (persons with whom the Postmaster General contracts to carry the mail “are not officers of the United States, they are mere hirelings”); *id.* at 888 (Rep. Bidwell) (“To say that a contractor is an officer is giving a new signification to the words contractor or officer.”); *id.* at 890 (Rep. Elmer) (“Both common sense and the Constitution

forbade considering a contract in the light of an office, and he had never before heard of it contended that they were equivalent terms.”).

A related reason that contractors in most cases do not hold an office is that, to the extent they do assist the government in carrying out its sovereign functions, their actions (unlike those of the subordinate officers just discussed with regard to discretion) have no legal effect on third parties or the government absent subsequent sanction. They do not actually have delegated sovereign authority, even if they assist those who do or must comply with applicable law in carrying out the contract; rather, their advisory and other assisting actions are a kind of service. As the Maine Supreme Judicial Court explained: “An employment merely has none of these distinguishing features” of an office—namely “delegation of the sovereign power.” Rather, “[a] public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law.” *Opinion of the Justices*, 3 Greenl. at 482. The mere authority to advise or inform is not delegated sovereign authority. See, e.g., *Buckley*, 424 U.S. at 138; *Emoluments Clause*, 29 Op. O.L.C. at 63–70. Even at the time of its broadest prior reading of the Appointments Clause, this Office recognized that “advisory, investigative, informative, or ceremonial functions” are not subject to the Clause. *Legislative Encroachments*, 13 Op. O.L.C. at 249. More recently, we explained that the President may, without creating any issue under the Appointments Clause, “tap advisers . . . to work on his behalf,” grant them substantial practical authority to develop and coordinate policy among federal agencies, and even formalize the arrangement in an executive order, so long as he does not purport to grant such advisers any “legal power” over an agency or otherwise “disturb the statutory allocation of authorities.” *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. O.L.C. 22, 26, 27 (2002) (emphasis added).

Conversely, in those rare cases where a mere contractor *did* exercise delegated sovereign authority (and did so on a continuing basis), he did hold an office subject to the Appointments Clause. See *Maurice*, 26 F. Cas. at 1216–20; cf. *Holdover and Removal of Members of Amtrak’s Reform Board*, 27 Op. O.L.C. 163, 166–68 (2003) (holding that, as an incident of his statutory power to appoint the board members of a federally created corporation, the President had power to remove them at will, notwithstanding statutory provision that the corporation was not a department, agency, or instrumentality of the government). As the Attorney General explained nearly ninety years ago, “the inquiry must always be into the nature of the service to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of those functions, he is an employee.” *Employee’s Compensation Act*, 31 Op. Att’y Gen. 201, 203–04 (1918).

c. State Officers

Finally, state officers ordinarily do not possess delegated sovereign authority of the federal government, even when they assist in the administration of federal law. Thus, the Appointments Clause ordinarily does not apply to them. State officers, even when enforcing federal law, generally exercise the sovereign law enforcement authority of their state, ultimately delegated by the people of that state; if they hold any office, they are officers of their state or locality, not of the United States. They hold authority independently of a delegation from the federal government, and they and those who appoint them are accountable for their actions to the people of the state.

States and their officers stand in a unique relationship with the federal government and the people under our constitutional system of dual sovereignty. As the Tenth Amendment makes express, the Framers “designed a system in which the State and Federal Governments would exercise concurrent authority over the people.” *Printz*, 521 U.S. at 919–20; *see* U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (“The ‘plan of the convention’ . . . draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States.”). The states thus retain inherent sovereign authority within their jurisdictions, and their powers proceed “not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.” *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819); *accord* *The Federalist* No. 32, at 200 (Hamilton) (“[T]he State Governments would clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] *exclusively* delegated to the United States.”). Recognizing this concurrent authority, the Constitution binds state officers, along with federal ones, to swear to support the Constitution. U.S. Const. art. VI, cl. 3.

That retained power includes, if a state wishes, some authority to enforce federal law within the state’s jurisdiction, subject to any limits imposed by the Constitution (apart from the Appointments Clause) or by federal law. *See generally* *Currie, Jeffersonians* at 78 (“the Union may do only what the Constitution permits and the states may do whatever it does not forbid,” although “there are implicit constitutional limitations on state power to interfere with federal operations”); *cf. supra* note 1. Indeed, the Founders assumed that “the States would consent to allowing their officials to assist the Federal Government.” *Printz*, 521 U.S. at 911. Madison, for example, predicted that “the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States,” and found it “extremely

probable that in other instances, particularly in the organisation of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union.” *The Federalist* No. 45, at 313; see *Printz*, 521 U.S. at 910 (cataloguing other such statements). The early federal government did indeed make provision for such action by state officials. See, e.g., Act of March 26, 1790, § 1, ch. 3, 1 Stat. 103 (state judicial officers’ duties involving naturalization); Act of June 18, 1798, §§ 2, 4, ch. 54, 1 Stat. 566, 567–68 (same); Act of April 14, 1802, § 1, ch. 28, 2 Stat. 153, 153–54 (same); Act of July 20, 1790, ch. 29, 1 Stat. 131 (proceedings involving merchant ships); Act of Apr. 7, 1798, ch. 26, 1 Stat. 547 (proceedings involving land claims by refugees); Act of July 6, 1798, ch. 66, 1 Stat. 577, 577–78 (proceedings involving claims against aliens). And in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court upheld Pennsylvania’s power to try a militiaman under federal criminal law for failing to report for federal service. Similarly, this Office has found it “well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.” *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. O.L.C. 26, 29 (1996); see also *United States v. Di Re*, 332 U.S. 581, 589 (1948) (looking to state law to determine validity of arrest without warrant for federal offense); cf. *Separation of Powers*, 20 Op. O.L.C. at 146 n.63 (“Where state officials do exercise significant authority under or with respect to federal law, they do so *as state officials*, by the decision and under the ultimate authority of the state.”).¹⁰

B. The Position Must Be “Continuing”

The second element of a federal “office,” necessary to make a position subject to the Appointments Clause, is that the position be “continuing.” As explained below, a position is most clearly of this sort where it is permanent. But a temporary position also may be continuing, if it is not personal, “transient,” or “incidental.” Like the first element, this second one emerges from the Constitution’s text, extensive early authority (including, after the Civil War, leading decisions of the Supreme Court), and the law of public offices. After setting out the authority for this element, we describe its contours and then apply it to a few recurring areas.

¹⁰ If, however, a state officer enforcing federal law depended on affirmative *federal* authorization—as opposed to state authorization (subject to any federal limits or regulations) or a mere federal removal of a disability (such as preemption)—the constitutional analysis would differ, as suggested by the divisions in the early case of *Pool* discussed above. See *supra* note 6. At the extreme, Congress may not “direct state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme,” *Printz*, 521 U.S. at 904 (emphasis added), or “impress[] state police officers into federal service,” *id.* at 923 n.12, in part because of the Appointments Clause, *id.* at 922–23.

1. The Foundations of This Element

The Constitution refers to an office as something that one “holds” and “enjoys” and in which one “continues,” and these descriptions suggest that an office has some duration and ongoing duties. *See, e.g.*, U.S. Const. art. I, § 3, cl. 7 (impeachment leading to “disqualification to hold and enjoy any Office”); art. I, § 6, cl. 2 (Incompatibility Clause, referring to a “Person holding any Office” and having a “Continuance in Office”); art. I, § 9, cl. 8 (Emoluments Clause, referring to a “Person holding any Office”); art. II, § 1, cl. 2 (providing that no “Person holding an Office . . . shall be appointed an Elector”). Similarly, the Recess Appointments Clause suggests that an office is a position that may be vacant (thus not held only by a single person) and will continue beyond a single session of Congress. *See id.* art. II, § 2, cl. 3 (“The 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.”). And the Appointments Clause itself indicates that most offices are “*established by Law.*” *Id.* cl. 2 (emphasis added). One aspect of an office’s duration is its tenure, the period during which a particular incumbent may hold, enjoy, and continue in the office, and the tenure also establishes that the existence of the office is not contingent on a particular person’s holding it. The Constitution expressly mentions permanent, non-personal offices that may be held for a term, such as President or Vice President, *see id.* art. II, § 1, and others that may be held during good behavior, namely judgeships, *see id.* art. III, § 1. Madison during ratification listed three possible tenures: He referred to “persons holding their offices during pleasure, for a limited period, or during good behavior.” *The Federalist* No. 39, at 251; *see also* Rehnquist Letter at 3 (“The analysis does not rest simply on the fact that the incumbent lacks fixed tenure; such is true of Cabinet members But the position itself, as a position and apart from the particular incumbent, has no fixed duration.”).¹¹

¹¹ The permissibility under the Appointments Clause of assigning a person to carry out the duties of an office temporarily (on an acting basis) is distinct from, albeit related to, whether an office exists. The former question can be understood as whether, if an office exists, a person exercising its duties truly “holds” it. *See United States v. Eaton*, 169 U.S. 331, 343 (1898) (upholding designation of vice consul to act as consul: “Because the subordinate officer is charged with the performance of the duty of the superior *for a limited time and under special and temporary conditions*, he is not thereby *transformed into* the superior and permanent official”) (emphases added); U.S. Const. art. II, § 1, cl. 6 (providing that in cases of removal, death, resignation, or inability of the President, “the Powers and Duties of the said Office . . . shall devolve on the Vice President,” and authorizing Congress by law to declare, for cases of removal, death, resignation, or inability of both the President and Vice President, “what Officer shall then *act as* President, and such Officer shall act accordingly, *until the Disability be removed, or a President shall be elected*”) (emphases added), *amended by id.* amend. XXV (providing that in cases of removal, death, or resignation of the President, the Vice President “shall become

The same meaning of an “office” finds support in the legal dictionaries contemporaneous with the Founding. They distinguished between short-term arrangements, such as an “agreement to make hay, plough land, herd a flock, &c.,” and continuing positions, such as “steward of a manor,” that qualified as public or private offices. Jacob, *tit. Office*; see Cunningham, *tit. Office* (same). Even the early case of *Burnell* suggests the distinction, in the defendant’s attempt to portray his position as not an office because it merely involved “particular Powers created for particular Purposes.” Carth. at 479. By the time of the Founding, an “office” was understood in the common law “as an *institution* distinct from the person holding it and capable of persisting beyond his incumbency,” to which “certain frequently recurrent and naturally coherent duties [were] assigned more or less permanently.” Corwin, *President* at 85.

Early American practice and precedent, particularly with regard to diplomacy (the conduct of which, as explained above in Part II.A.2, can include delegated sovereign authority), strongly support and illuminate this understanding that, to be an office, a position must have continuance or duration. From the beginning, Presidents repeatedly have “dispatched ‘secret’ agents on diplomatic or semidiplomatic missions without nominating them to the Senate.” Corwin, *President* at 86. One of President Washington’s first acts was unilaterally to name Gouverneur Morris (a fellow delegate to the Constitutional Convention) as a special agent to explore a commercial treaty with Britain. David P. Currie, *The Constitution in Congress: The Federalist Period: 1789–1801*, at 44 (1997). Washington also unilaterally named “commissioners” to deal with a rebellion in Pennsylvania in 1794 without appointing them officers. See Corwin, *President* at 406 n.7. So too have Presidents as far back as Washington “designated members of . . . [Congress] to represent the United States on international commissions and at diplomatic conferences,” *id.* at 86, notwithstanding that the Constitution’s Ineligibility Clause may have barred the members’ appointment to a “civil Office under the Authority of the United States” and that the Incompatibility Clause would have required them to vacate their seats in Congress if they took “any Office under the United States.” U.S. Const. art. I, § 6, cl. 2; see, e.g., *Member of Congress—Appointment to Office*, 21 Op. Att’y Gen. 211, 214 (1895) (finding violation of Ineligibility Clause in appointment of senator, because during his senatorial term “the emoluments of the office of minister to Mexico were increased”). In a striking early illustration, President Jefferson appointed Senator Daniel Smith as a commissioner to negotiate and execute treaties with the Cherokee Indians, yet Jefferson did not submit the nomination to the Senate, and Smith did not vacate his seat in the Senate. See 1 *Am. St. Papers, Indian Affairs* 697–98 (1805). Absent contempora-

President” but that in cases of inability the Vice President shall discharge the powers and duties of the office of President “as Acting President”).

neous objections on constitutional grounds to such early and consistent practice, we presume that it reflects an early consensus of its constitutionality. The rationale for this consensus, evident from the early understanding of an “office,” is that “such diplomatic assignments are not ‘offices’ in the sense of the Constitution, being summoned into existence only for *specific temporary purposes*.” Corwin, *President* at 86 (emphasis added). Indeed, a House select committee in 1822 found no “office as was contemplated by the Constitution” in President Jefferson’s dispatching of Senator Smith, also noting a similar example from Madison’s administration. 39 *Annals of Cong.* 1407, 1409–10 (1855); *see also Office—Compensation*, 22 *Op. Att’y Gen.* 184, 188–89 (1898) (noting other appointments for “special work of great international importance”).

The most prominent early example is the Jay Treaty of 1794. It established tribunals for resolving both a border dispute and claims between creditors and merchants of the United States and Great Britain. The tribunals’ commissioners were to be appointed in equal numbers by the President (with the advice and consent of the Senate) and the British King, with a final commissioner chosen by lot. *See Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit.*, Nov. 19, 1794, arts. V & VI, 8 *Stat.* 116, 119–21 (1794); *see also 1 Journal of the Executive Proceedings of the Senate* 204–05 (Apr. 1, 1796) (1828) (confirmation of commissioners). The treaty’s opponents, perhaps spurred by its requirement of Senate confirmation, objected that the Appointments Clause prohibited creation of commissioners by treaty. Hamilton responded in a series of essays defending the treaty:

[They] are not in a strict sense OFFICERS. They are *arbitrators* between the two Countries. Though in the Constitutions, both of the U States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint *Commissioners or special Agents for special purposes* in a different mode.

Alexander Hamilton, *The Defence* No. 37 (Jan. 6, 1796), *reprinted in 20 The Papers of Alexander Hamilton* 13, 20 (Harold C. Syrett ed., 1974) (second emphasis added); *see Separation of Powers*, 20 *Op. O.L.C.* at 146 n.67 (quoting this passage as primary example of the “long historical pedigree” for the argument that United States representatives to multinational or international entities “need not be appointed in accordance with Article II” where the entities “are created on an ad hoc or temporary basis”).¹²

¹² The objection, as stated by Hamilton, was that “[t]he constitution is said to be violated in that part, which requires the establishment of Officers of the U. States by law—by those stipulations of the Treaty which without the intervention of law provide for the appointment of Commissioners.” 20

A century later, Attorney General Griggs twice applied the same understanding of an office to “special Agents for special purposes.” In 1898, he opined that a commissioner appointed by the President pursuant to a treaty, to arbitrate certain claims between the United States and Great Britain arising from the seizure of British vessels in the Bering Sea, did not hold an “office” under a particular statute, because “the *temporary character* of the employment, which was to consist of and to terminate at the end of the examination of a *limited number of specified claims*, withdraws one of the elements of an office which the Supreme Court regards as essential.” *Office—Compensation*, 22 Op. Att’y Gen. at 188 (citing *Auffmordt*, 137 U.S. at 327) (emphases added); see *id.* at 187 (commissioner is “sent to adjudicate upon certain named claims, listed at the end of the treaty,” and his “employment was thus to perform a certain task which might take a month or several months”); *id.* at 188 (referring to “occasional and temporary commissionerships”). Then in *Members of the General Board of Arbitration*, 23 Op. Att’y Gen. 313 (1900), the Attorney General reaffirmed his 1898 opinion and found it constitutional for the President alone to appoint, pursuant to a treaty, persons to a list from which panels of arbitrators could be drawn to resolve future disputes between signatory nations. (Attorney General Griggs was himself one of the first so named, in 1901.) Those on the list would not be “in the ordinary acceptance of the term, persons holding office,” because they would have no ongoing duties or authority: “Nominally they may be appointed for six years, but they may never actually exercise any functions at all. Their work is not only occasional, but contingent upon what is practically an appointment to act as arbitrators, to be received from foreign powers in the future.” *Id.* at 315.¹³ *Cf. British and American*

Papers of Alexander Hamilton at 14; see Cato, *Observations on Mr. Jay’s Treaty* No. XIII, in 1 *The American Remembrancer* 244, 250–51 (1795) (arguing that offices not enumerated in Appointments Clause may only be established by law, which did not include treaty; adding, “By what authority, then, can Mr. Jay and Lord Grenville, or the president and the senate, over-ride the constitution, and assume a power to control the rights of congress, to create the office, and to place it in such hands as they think proper, under the above limitations?”); *id.* No. XIV, in 2 *The American Remembrancer* 3, 3 (1795) (“No power is vested in [Congress] to allow the appointment of any officer by *lot*, and much less to admit that his Britannic majesty should exercise the right of appointing judges for the trial of causes in which they are themselves to be the parties.”). Hamilton answered the objection indirectly—by denying that any offices were being created. An 1802 “Roll of Civil, Military, and Naval Officers,” tracking expenses, includes the salaries of the American commissioners, “as they were appointed by the President,” and also includes the U.S. contribution of half the salary of the jointly appointed commissioner, but notes that the “commission is not now in a state of activity.” 1 *Am. St. Papers, Misc.* at 307 n.*.

¹³ An alternative ground for Griggs’s 1900 conclusion was that the listed arbitrators, even if called to serve, “are not expected to exercise any part of the sovereignty of the United States; they are not expected to perform any functions in the Government of the United States.” Rather, they would serve “two foreign nations that may select them and authorize them to settle a dispute between two nations.” *Members of the General Board of Arbitration*, 23 Op. Att’y Gen. at 315; cf. *Office—Compensation*, 22 Op. Att’y Gen. at 188 (“a person employed solely as a sworn judge of a joint international commission would not be spoken of as an officer of either country, although, under a treaty requiring it, selected

International Commissioners, 6 Op. Att’y Gen. 65 (1853) (addressing questions regarding payment of commissioners appointed to arbitrate claims between Great Britain and American citizens pursuant to a treaty, without suggesting any constitutional issues).

This second element of an “office” is also well established by the early law of public offices. In *Maurice*, Chief Justice Marshall concluded that the office of “agent of fortifications” existed in the Army. He explained that “if a duty be a continuing one” and “if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.” 26 F. Cas. at 1214. Forty years later, the Illinois Supreme Court in *Bunn* used *Maurice* as the benchmark and reasoned that Marshall would have found no office if the agent had “been appointed merely to superintend the erection of a single fortification, his duties ceasing when the work was accomplished”; the court found no office in a position—commissioner to build the state house—involving “one single special duty,” “not of a permanent, but of a transient and incidental character.” 45 Ill. at 404–05. Similarly, the court in *Pool*, *see supra* note 6, essentially held that a state justice of the peace, allowed by federal law to commit to jail for trial any deserting seaman, was not a judicial officer of the United States, because he was not exercising the “regular and permanent duties” of a federal court but rather handling “incidental and occasional matters,” 2 Va. Cas. at 280; the dissent claimed a violation of the Appointments Clause by focusing only on delegated authority, quoting *Burnell* and objecting that the “important duties” of enforcing federal criminal laws should not be entrusted to “mere agents,” or “persons negotiating occasional business.” *Id.* at 288 (Semple, J., dissenting).

Earlier, the Supreme Court of Pennsylvania in *Shepard v. Commonwealth*, 1 Serg. & Rawle 1 (Pa. 1814), held (in the alternative) that a commissioner, paid by the day for issuing binding decisions regarding certain claims to, and compensation for, certain lands in a particular county, did not hold an office of profit under the state constitution, because the position was “rather the execution of a special commission, than the holding of an office.” *Id.* at 10. The same court also held that a person appointed as a city’s port physician, a post with a statutory duration of four years, did not hold an office subject to the state constitution’s appointments

and sent to his post by one of them”). In both decisions, Griggs also addressed the relationship between the treaty power and the Appointments Clause, the question that Hamilton had avoided. *See* 22 Op. Att’y Gen. at 185–87; 23 Op. Att’y Gen. at 315. But whether it is constitutional for a treaty, as opposed to a law, to establish an office under the United States or, conversely, whether a position created by treaty is not such an office because not created by law (even if otherwise having the characteristics of such an office), or may not be for some other reason, is beyond the scope of this opinion. *See generally infra* Part II.C.2 (discussing creation of offices “by law”). In both cases, it was otherwise clear that the positions did not have the characteristics of offices of the United States.

clause. *Commonwealth v. Sutherland*, 3 Serg. & Rawle 145 (Pa. 1817). The Chief Justice explained that “there are matters of temporary and local concern, which, although comprehended in the term *office*, have not been thought to be embraced by the constitution.” *Id.* at 9. Other early cases are to like effect. See *In re Oaths*, 20 Johns. 492, 493 (N.Y. 1823) (dicta, stating that “office” requires a public employment “not merely transient, occasional or incidental”); *Kennon*, 7 Ohio St. at 559, 562 (declining to decide “[h]ow far the general assembly may go in constituting temporary agencies and commissions for temporary, incidental, transient, or occasional purposes” without “creating an office,” where positions at issue “exercise continuously, and as a part of the regular and permanent administration of the government, important public powers, trusts, and duties”); *Shelby*, 36 Miss. at 289 (declaring it “universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office”); cf. *Barton*, 24 F. Cas. at 1027 (contrasting positions of temporary deputy collector, appointed by collector in cases of his “occasional and necessary absence, or [] sickness,” and the “permanent office” of deputy collector, appointed by Secretary of the Treasury); *Boyd*, 1 Pin. at 363 (“An office is where, *for the time being*, a portion of the sovereignty, legislative, executive or judicial, attaches, to be exercised for the public benefit.”) (emphasis added).

The Attorneys General as well held the same understanding in the domestic context from an early date. An 1828 opinion concluded that a statute granting the Commandant of the Marine Corps authority to appoint officers when “it shall become necessary” did not violate the Appointments Clause so long as it was interpreted to permit only “an occasional and transitory appointment” in emergency circumstances “should [the Marines] be detached from the ships to which they belonged.” *Authority of Lieutenant Colonel Commandant of Marine Corps*, 2 Op. Att’y Gen. 77, 78–79 (1828). In 1843, Attorney General Legare determined that “permanent inspectors” of customs were “officers of the government of the United States,” required to be appointed consistent with the Appointments Clause, while “occasional inspectors whose services were demanded in extraordinary exigencies in the service” were not. *Appointment and Removal of Inspectors of Customs*, 4 Op. Att’y Gen. at 163; see also *Contract With Architect of Public Buildings*, 5 Op. Att’y Gen. 754, 754–55 (1823) (appendix) (contrasting “offices of a permanent nature” with a position involving a “subject-matter . . . of a temporary and limited character,” properly characterized as a contract); *The Reconstruction Acts*, 12 Op. Att’y Gen. 141, 155–56 (1867) (relying on *Sutherland* and invoking the “well established” rule that “persons who exercise special public duties rather in the nature of occasional employments than general and continuing official duty” are not properly considered executive or judicial officers of a state); cf. *Mandatory Statutes—Appointing Power*, 8 Op. Att’y Gen. 41, 44 (1856) (“I can conceive the possibility of a provision of law by which a controversy between the Government

and the city of Baltimore shall be submitted to two arbitrators, one to be appointed by each party, and in case of disagreement, they to select an umpire.”). And the 1822 House report, noted above in connection with diplomatic assignments, was ultimately concerned with whether the temporary assignment of a senator to “examine various land offices of the United States” (that is, to audit their books), for which he was paid by the day, made him an officer under the Ineligibility and Incompatibility Clauses. The committee concluded that it did not. 39 *Annals of Cong.* at 1408–10; *see also id.* at 1410–13 (collecting additional examples). The committee observed that this “opinion seems to have received the sanction, and regulated the practice, of the Government since the adoption of the Constitution, by those who bore a principal share in composing it; and must, therefore, be supposed to have understood its real import.” *Id.* at 1409.

In a series of cases after the Civil War, the Supreme Court adhered to and applied this longstanding understanding. In *Hartwell* (1868), the Court held that “a clerk” in the office of the “assistant treasurer of the United States . . . at Boston” was a “public officer[.]” for purposes of an indictment under an embezzlement statute. The Court explained:

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

73 U.S. (6 Wall.) at 393. *Hartwell* considers, among other things, whether a position’s duties have “duration,” meaning that they are “continuing and permanent” rather than “occasional or temporary,” and whether the position has “tenure.” The term “tenure” refers to the ability of an incumbent to hold a position for a period of time, not contingent on any particular person, as Madison indicated in *Federalist* No. 39, quoted above. *See also Hennen*, 38 U.S. at 259 (“All offices, the tenure of which is not fixed by the Constitution, or limited by law, must be held either during good behavior, or . . . during the life of the incumbent; or must be held at the will and discretion of some department.”); *Tenure of Office of Inspectors of Customs*, 2 Op. Att’y Gen. 410, 412 (1831) (“When an office is held during the pleasure of any designated officer, it is at the pleasure of the *officer*, and not of the *individual*.”). The Attorney General has explained the connection between “tenure” and this second element of an “office” as follows: “By *tenure* is not meant a holding for a fixed term. . . . The distinction is between those persons

whose services are occasional and temporary, fixed by some contract of employment, and those whose services are general and indefinite in a line of duty prescribed by law. . . . A deputy clerk has an indefinite tenure given him by law.” *Deputy Clerks of United States District Courts—Premium on Official Bonds*, 29 Op. Att’y Gen. 593, 595–96 (1912).

The Court applied *Hartwell* in *Germaine* (1879) to hold unanimously that a civil surgeon appointed by the Commissioner of Pensions to examine pensioners and applicants for pensions, and paid per examination, was not an “officer of the United States” for purposes of a criminal statute because his “duties are *not* continuing and permanent, and they *are* occasional and intermittent.” 99 U.S. at 512. The Court explained that “[t]he surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination.” *Id.*¹⁴

In *Auffmordt* (1890), the Court applied these two statutory decisions to the Appointments Clause, while also relying on *Maurice*. Under a customs statute, if an importer demanded a reappraisal of the valuation of his goods, the collector of customs was to select a “discreet and experienced merchant” as at least one of two people to do the reappraisal. If the two agreed, the decision was final. 137 U.S. at 312. The Court, again unanimously, held that such merchant appraiser need not be appointed in accordance with the Appointments Clause, because he did not hold an office:

The merchant appraiser is an expert, *selected as an emergency arises*. . . . He is selected for the special case. *He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case*. He is an executive agent, as an expert assistant to aid in ascertaining the value of the goods, selected for the particular case on the request of the importer, and selected for his special knowledge in regard to the character and value of the particular goods in question. He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure,

¹⁴ President Cleveland in 1886 demonstrated the same understanding of an office when recommending to Congress a means to resolve labor disputes. He suggested that “instead of *arbitrators* chosen in the heat of conflicting claims, and after each dispute shall arise, for the purpose of determining the same, there be created a commission of labor, consisting of three members, who shall be *regular officers* of the Government, charged among other duties with the consideration and settlement, when possible, of all controversies between labor and capital.” Letter to the Senate and House of Representatives (Apr. 22, 1886), in 11 *A Compilation of the Messages and Papers of the Presidents* 4979, 4980 (James D. Richardson ed., 1897) (emphases added). This commission “would have the advantage of being a stable body,” gaining experience and ability, unlike “arbitrators . . . chosen for temporary service.” *Id.* at 4980, 4981.

duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an ‘officer,’ within the meaning of the [Appointments Clause].

Id. at 326–27 (emphases added). As already suggested above in Part II.A.1, although the question of continuance was not at issue, the Court in *Buckley* did favorably cite *Auffmordt* and thus at least implicitly endorsed its analysis, such that one can consider the element of continuance incorporated in the Court’s references to “significant authority.” See 424 U.S. at 126 & n.162.

In the same year as *Auffmordt*, Mechem (discussed above in Part II.A.1 regarding delegated sovereign authority) also recognized this element. Relying particularly on *Maurice*, *Bunn*, and *Hartwell*, he wrote that “[d]uration or [c]ontinuance” is a criterion, Mechem § 8, at 6 (font altered), and explained that “[t]he term office . . . embraces the idea of tenure and duration, and certainly a position which is merely temporary and local cannot ordinarily be considered an office,” *id.*; see *id.* at 6–7 n.7 & 7 n.1; see also *id.* § 1, at 2 (an office is sovereign power invested in an individual “for a given period, either fixed by law or enduring at the pleasure of the creating power”). Mechem nevertheless declared that “this element of continuance can not be considered as indispensable . . . if the other elements are present,” *id.* § 8, at 7, relying primarily on a broad definition of “office” in dicta in *State v. Stanley*, 66 N.C. 59, 63 (1872). He also cited *Commonwealth v. Evans*, 74 Pa. 124 (1874), in which the court adopted a broad rule of statutory interpretation to reach all persons entrusted by law with collecting money due to the public, regardless of whether a person’s service “be special or general, transient or permanent,” even while recognizing that, under such a rule, it could be “a difficult matter to distinguish between a public officer and a person employed by the government to perform some special service by contract.” *Id.* at 139.¹⁵

Other authority from the post-Civil War period likewise could be read to reject the necessity of continuance. First, both the Attorney General and the Supreme Court of Rhode Island concluded that a commissioner of the United States Centennial Commission held an office under the Constitution. The unpaid commission, appointed by the President, had been created by Congress in 1871 and was to continue “until the close of” the 1876 centennial exhibition. See *In re Corliss*, 11 R.I. 638, 640, 642 (1876). The Attorney General, briefly addressing the Emoluments Clause, “entertain[ed] no doubt that, *though their duties are of a*

¹⁵ Mechem also cited *Vaughn v. English*, 8 Cal. 39 (1857). Although the court did not expressly mention the need for continuance, it also did not (unlike *Stanley* and *Evans*) disclaim it, and the position at issue (clerk in a department of the state) appears to have had continuous, indefinite duties with a clearly defined tenure. See *id.* at 42; see also *id.* at 41 (argument of prevailing party). *Vaughn* merely established that an office could have its tenure defined by reference to that of a superior office. See *Patton v. Bd. of Health*, 59 P. 702, 705 (Cal. 1899).

special and temporary character, they may properly be called officers of the United States during the continuance of their official functions.” *Offices of Trust*, 15 Op. Att’y Gen. 187, 188 (1877) (emphasis added). He reasoned that “[t]he Government being interested in the performance of the[ir] duties, they constitute a public charge or office.” *Id.* The court in *Corliss* answered the question under the disqualification rules for presidential electors. See U.S. Const. art. II, § 1, cl. 2. The court likewise pointed to the importance of the high-profile international exhibition, and noted that the commission received a federal appropriation (to be repaid from any profits) and the charge of some federal property. See 11 R.I. at 641–43. As far as we have determined, neither *Corliss* nor the Attorney General’s opinion has been called into question on this issue. See 1 *Hinds’ Precedents* at 609 (1898 report endorsing holding of *Corliss*).

Second, it was the uniform view of the federal courts in this period that a receiver of an insolvent national bank, appointed (ultimately) by the Secretary of the Treasury, was an officer for purposes of a statute authorizing certain suits in federal court by “the United States or any officer thereof.” *Platt v. Beach*, 19 F. Cas. 836, 840 (E.D.N.Y. 1868); *Stanton v. Wilkeson*, 22 F. Cas. 1074, 1075 (S.D.N.Y. 1876); *Frelinghuysen v. Baldwin*, 12 F. 395, 396–97 (D.N.J. 1882); *Price v. Abbott*, 17 F. 506, 507–08 (C.C.D. Mass. 1883) (Gray, Circuit Justice); *United States v. Weitzel*, 246 U.S. 533, 541 (1918). A receiver had statutory authority to bring suit, through a U.S. Attorney and under the direction of the Solicitor of the Treasury, “to take possession of all the property, books, and records of the bank, and to collect all debts due to it”; “upon [a court] order . . . to sell or compound bad or doubtful debts, and to sell all the . . . property of the bank”; and to hold the bank’s stockholders liable if necessary to pay the bank’s debts. See *Price*, 17 F. at 507; *Platt*, 19 F. Cas. at 841. In the first such case, *Platt*, the district court did not respond to the defendant’s argument from *Maurice* and *Shelby* that the position of a receiver was “occasional or transitory, depending upon fluctuations and exigencies,” appointed to “perform a specific duty,” upon the completion of which “his agency or service ceases,” *id.* at 837; *see id.* (“there is no office of receiver of national banks established by law”); *id.* at 840 (an office requires a “continuing” duty). The plaintiff had responded that a receiver “comes within every word of [*Maurice*’s] definition. His duties continue . . . and they would continue though the person of the receiver should be changed.” *Id.* at 839. *Stanton* was the only case to address the question of continuance. Judge Blatchford (later the author of *Auffmordt*) summarized *Hartwell* and simply stated: “A receiver of a national bank is in the public service of the United States. He is

appointed pursuant to law. Vacation of office by the comptroller does not vacate the receivership. His duties are continuing and permanent.” 22 F. Cas. at 1075.¹⁶

We believe it incorrect to treat the element of “continuance” as dispensible, given the constitutional text, the extensive practice and precedent (including *Maurice*) before the Civil War, and the Supreme Court’s authoritative opinions in *Germaine* and *Auffmordt*. The Attorney General was correct in 1907 when he affirmed that “the idea runs through all the cases that in order to constitute an office the employment must be continuing and not temporary,” relying particularly on *Maurice*, his 1898 opinion on the Bering Sea commission, and *Germaine*. *Appointment—Holding of Two Offices—Commissioner of Labor*, 26 Op. Att’y Gen. 247, 249 (1907). The Supreme Court of Mississippi was likewise correct in *Shelby* in 1858 when, relying particularly on *Maurice*, it “apprehend[ed] that it may be stated as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office.” 36 Miss. at 289. Yet “continuance” is not “permanence”; no case of which we are aware before the Civil War indicates that permanence is required, and the post-Civil War authority just discussed is best read as simply confirming that some temporary, non-personal positions may amount to offices. As Mechem himself put it, “certainly a position which is merely temporary *and* local cannot *ordinarily* be considered an office.” Mechem § 8, at 6 (emphases added).

2. Defining a “Continuing” Position

No definition of “office” can be expected to harmonize all of the precedent or answer all cases that may arise. (Thus, our discussions of early authority should not be understood as necessarily endorsing every holding.) But the following two general rules encompass and harmonize most of them, particularly the earliest ones, with regard to the element of continuance or duration: First, an office exists where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate “by the very fact of performance.” *Bunn*, 45 Ill. at 405. This rule is particularly laid out in the early *Kennon* case, which found an office to exist because the defendants were “to exercise continuously, and as a part of the regular

¹⁶ *Cf. Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) (holding that Appointments Clause was not violated when Congress authorized courts of law, rather than President or head of a department, to appoint election supervisors for a particular local election; not discussing question of continuance or citing *Germaine* or other cases); *In re Hathaway*, 71 N.Y. 238, 244 (1877) (court divided 4-3 in holding that person appointed as surrogate for a particular probate case was not a public officer under state constitution, because he performed “transient, occasional or incidental duties” for “special exigencies,” having “no general powers . . . to act in respect to all like cases”).

and permanent administration of the government, important public powers, trusts, and duties.” 7 Ohio St. at 562–63; *see also Sheboygan v. Parker*, 70 U.S. 93, 96 (1865) (applying this formulation); *Patton v. Bd. of Health*, 59 P. 702, 706 (Cal. 1899) (after survey, providing similar summary of the “reasonably well settled” rule for positions with “continuing and permanent” duties). The “continuing” *duties* and *powers* to which these cases refer should not, however, be understood as necessarily involving continuous *activity*, as shown in *Kennon* itself, which involved a standing power to appoint to and remove from specified offices. *See* 7 Ohio St. at 557. Similarly, a federal judge holds a permanent position even if he has a lull in his docket. His “services are general and indefinite in a line of duty,” *Deputy Clerks*, 29 Op. Att’y Gen. at 596, and he has “general functions” and a “claim or right to be designated, or to act” should a case arise, *Auffmordt*, 137 U.S. at 327.

Second, if a position that possesses delegated sovereign authority is temporary (because of, for example, an express expiration date or the nature of its duties), then whether it qualifies as “continuing,” and thus an office, will depend on the presence of three factors that the early authorities discuss in connection with temporariness. The line will not always be bright, as *Kennon* recognized in declining to say “[h]ow far the general assembly may go in constituting temporary agencies and commissioners for temporary, incidental, transient, or occasional purposes . . . without thereby creating an office,” 7 Ohio St. at 559 (emphasis added); but it can be discerned. (1) The position’s existence should not be personal: The duties should “continue, though the person be changed,” *Maurice*, 26 F. Cas. at 1214, and an incumbent’s tenure should not depend on whether “the office of his superior” is vacated, *Hartwell*, 73 U.S. at 393; *see also Tenure of Office*, 2 Op. Att’y Gen. at 412; Corwin, *President* at 85. (2) The position should not be “transient”: The less fleeting and more enduring it is (or is likely to be), the more likely it is to be a continuing seat of power and thus an office. (3) The duties should be more than “incidental” to the regular operations of government. Although these last two factors escape precise definition, and the last of them does not directly bear on a temporal aspect, they nevertheless appear throughout the early authority—in *Pool*, *In re Oaths*, and *Kennon*, for example; and they capture other authority employing similar terms—such as special work; special purposes; a special, specific, single, or particular controversy or case; a special commission; specified claims; local or limited work; and extraordinary or emergency exigencies. *See, e.g., Auffmordt*, 137 U.S. at 326–27; *Germaine*, 99 U.S. at 512; *Inspector of Customs*, 4 Op. Att’y Gen. at 163; *Marine Corps*, 2 Op. Att’y Gen. at 78–79; Hamilton, *The Defence* No. 37, in *20 Papers of Alexander Hamilton* at 20; *see also Eliason*, 86 N.C. at 241 (“The true test of a public office seems to be that it is parcel of the administration of government.”); Corwin, *President* at 85 (an “office” at common law was an “institution” to which “certain frequently recurrent and naturally coherent duties [were] assigned more or less permanently”). Thus, the

nature of the delegated sovereign authority will affect whether a temporary position is an office, even though a person holding a *permanent* position “is not the less a publick Officer where his Authority is confined to narrow Limits.” *Burnell*, Carth. at 479; *see also Shelby*, 36 Miss. at 277 (similar). One reason for considering whether a position is “incidental” is to ensure against evasion of the Appointments Clause: For example, the position of Attorney General presumably still would be an office if Congress provided for it to expire each year but reauthorized it annually.

3. A Few Recurring Areas

The element of continuance provides an additional reason why a typical contractor does not, and need not, hold an office for purposes of the Appointments Clause. *Maurice* focused on continuance in explaining the distinction between an office and a contract (even while recognizing that one might contract to carry out an office). *See* 26 F. Cas. at 1214–15. *Hartwell* explained that a “government contract . . . from its nature is necessarily limited in its duration and specific in its objects,” unlike a government office. 73 U.S. at 393. And the Court held in *Hall*, discussed above in Part II.A.3, that certain persons did not hold offices because they were analogous to “parties who, pursuant to law, enter into stipulations *limited in point of time*, with a State, for the erection, alteration, or repair of public buildings, or to supply the officers or employees who occupy them with fuel, light, stationery, and other things necessary for the public service.” 103 U.S. at 10 (emphasis added). Similarly, Attorney General Wirt determined that “an engagement with a gentleman of the bar, whereby, for a valuable consideration, he is to render his professional services *in a given case*, is a contract, a bargain, an agreement, in the legal sense of these terms,” not an appointment to an office, and therefore was covered by a statute barring contracts between members of Congress and federal officers. *Contracts With Members of Congress*, 2 Op. Att’y Gen. 38, 40 (1826) (emphases altered); *see id.* (referring to contracts “for the service of a lawyer, a physician, or a mail carrier, an army purveyor, or a turnpike road maker”). He also interpreted the “office” of architect of the public buildings to be a contractual position rather than an office, where the architect had been hired to complete “specified work” of “a temporary and limited character,” rather than to occupy a position “of a permanent nature.” *Contract With Architect*, 5 Op. Att’y Gen. at 754, 756; *see id.* at 755–56 (recognizing the frequency of annual contracts). Finally, as discussed above in Part II.A.3, the House of Representatives in 1806 resoundingly rejected the claim that a contractor held an office within the meaning of the Incompatibility Clause. Mail carriers provided a recurring example of contractors, *see* 15 Annals of Cong. at 880, 883, 885, 887, 890, and contracts to carry the mail were limited to one year, *see White, Federalists* at 182; *see also* 15 Annals of Cong. at 882 (statement of Rep. Randolph, in favor of resolution, that “a

contractor is an officer *pro tempore*—it is not an office in perpetuity, but created for a time, and for a particular purpose”).

The element of continuance also justifies our previous conclusion that authorizing a private plaintiff to bring a *qui tam* suit on behalf of the United States under the False Claims Act, *see* 31 U.S.C. § 3730 (2000), does not violate the Appointments Clause, because a *qui tam* relator does not hold an office. Our current reasoning does, however, differ some from that previously given, under which it was sufficient that the relator was not employed by the federal government. *See Separation of Powers*, 20 Op. O.L.C. at 146 & n.65. A *qui tam* relator does at least present a question under the Appointments Clause, *see Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 778 n.8 (2000) (raising and reserving the question), because Congress has allowed him essentially to appoint himself to act as a civil prosecutor for the United States in a case. But such an “appointment” is a temporary and personal one, likely involving only occasional duties, and extending only to a single case; and the relator’s authority even over that case is confined in certain ways. *See id.* at 769–70, 772–73; *see also United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002) (finding no Appointments Clause violation, where relators “are not subject to the requirement . . . that the definition of an officer ‘embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary’”) (quoting *Germaine*, 99 U.S. at 511–12, citing *Auffmordt*, 137 U.S. at 327, and concluding that *Buckley* must be “construed in conformity” with them). In this respect, the *qui tam* relator is similar to the contractors discussed above; and thus, whatever the relevance of his “appointing” himself (in contrast to a person who contracts with the government), the distinction does not pose a problem under the Appointments Clause. For similar reasons, we reaffirm our prior conclusion (but not all of its reasoning) that the federal government’s participation in binding arbitration ordinarily does not raise an Appointments Clause problem. *See, e.g., Separation of Powers*, 20 Op. O.L.C. at 148–49; *see also supra* note 14 (discussing dispute-resolution proposal by President Cleveland).

At the same time, the element of continuance, properly understood, also explains why an “independent counsel” under the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (1982 ed., Supp V), undoubtedly *was* an officer, even though the position was, by the nature of its duties, temporary and largely case-specific. The Court in *Morrison v. Olson*, 487 U.S. 654 (1988), thought it “clear that appellant is an ‘officer’ of the United States, not an ‘employee,’” citing *Buckley*’s discussion of this distinction based on *Auffmordt* and *Germaine*. *Id.* at 671 n.12. Justice Scalia in dissent agreed, adding that none of the parties disputed this, the only question being whether the counsel was a principal or inferior officer. *Id.* at 715. Although the position of a particular independent counsel was temporary, the position was non-personal; it was not “transient,” but rather

indefinite and expected to last for multiple years, with ongoing duties, the hiring of a staff, and termination only by an affirmative determination that all matters within the counsel's jurisdiction were at least substantially complete; and it was not "incidental," but rather possessed core and largely unchecked federal prosecutorial powers, effectively displacing the Attorney General and the Justice Department within the counsel's court-defined jurisdiction, which was not necessarily limited to the specific matter that had prompted his appointment. *See id.* at 660–64 (opinion of Court), 667–68, 671; *id.* at 718 (Scalia, J., dissenting).

C. Several Additional Criteria Are Incidental, Not Distinct Elements of an Office

Courts and others have sometimes discussed several additional criteria, beyond the two elements of delegated sovereign authority and continuance detailed above, as relevant to whether a position is a public office and when an individual is an officer. We discuss five of these, explaining that they are incidents that commonly follow from the existence of a properly constituted office, not essential elements of an office. They may provide evidence of whether an office exists under the two essential elements, but, depending on the circumstances, an office subject to the Appointments Clause may exist without them.

1. Method of Appointment

First, courts sometimes have considered a person's status as an officer by reference to his method of appointment. The Supreme Court has considered an individual's appointment pursuant to the procedures of the Clause in determining that he was an "officer" for certain statutory purposes. For example, the Court in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), held that a justice of the peace was an officer under a militia-exemption statute given that he was appointed by the President: "Under the sanction of a law, he is appointed, by the president. . . . We know not by what terms an officer can be defined, which would not embrace this description of persons." *Id.* at 336. In *Hartwell*, one reason the Court held that a Treasury clerk was an officer of the United States under an embezzlement statute was that he "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." 73 U.S. at 393–94. The statutory cases on receivers of national banks discussed above in Part II.B.1 employed some of the same reasoning. Conversely, courts also have concluded that an individual who is *not* appointed in accordance with the Appointments Clause is not technically an "Officer of the United States." *Maurice* concluded that an agent *not* appointed in accordance with the Appointments Clause was "not legally an officer" (even though he had carried out the duties of a duly constituted office). 26 F. Cas. at 1216. In *United States v. Smith*, 124 U.S. 525 (1888), the Court held that a clerk in the office of a collector of customs was

not a “public officer” under an embezzlement statute because he was not appointed consistent with the Clause: “An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the constitution.” *Id.* at 531–32; *see also Germaine*, 99 U.S. at 509–10 (similar); *Burnap v. United States*, 252 U.S. 512, 516 (1920) (“Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.”).

It is true that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States: “Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, *strictly speaking*, an officer of the United States.” *United States v. Mouat*, 124 U.S. 303, 307 (1888) (emphasis added). But such a person may nevertheless be *required* to be appointed as prescribed by the Clause in order constitutionally to exercise his authority. A contrary conclusion would render the Appointments Clause a matter of etiquette or protocol, *see Buckley*, 424 U.S. at 125, rather than one of the “significant structural safeguards of the constitutional scheme,” *Edmond*, 520 U.S. at 659. *See supra* Part I; *cf. Kennon*, 7 Ohio St. at 557–58 (“The official or unofficial character of the defendants is to be determined, not by their name, nor by the presence or absence of an official designation, but by the nature of the functions devolved upon them.”). Under such a (tautological) reading, the Clause would require a certain means of appointment only for persons appointed by that means. As early as *Maurice* it was recognized that a person might in fact perform the duties of an office under the United States and yet have been unconstitutionally appointed to it. This truth also is recognized in the common law doctrine of *de facto* officers, by which the acts of a person not properly appointed to office might nevertheless be held valid. *See* Mechem § 26, at 10 (summarizing doctrine); *id.* §§ 315–345, at 211 *et seq.* (chapter concerning “officers *de facto*”); *see also Inspectors of Customs*, 4 Op. Att’y Gen. at 165 (apparently assuming applicability of doctrine in event of constitutional challenge to appointment); *Ryder v. United States*, 515 U.S. 177, 180–84 (1995) (discussing doctrine but declining to apply it in a “timely challenge to the constitutional validity of the appointment of an officer who adjudicate[d]” a court-martial). At the same time, the Appointments Clause does not prevent Congress from treating a position that is not, in the constitutional sense, an office under the United States as nevertheless subject to statutory restrictions on offices or officers. *See* Corwin, *President* at 91 (noting that Congress often has done this); *Steele v. United States*, 267 U.S. 505, 506–08 (1925) (in dicta, construing statutory reference to “a civil officer” as not limited to

“an officer in the constitutional sense” and including a general prohibition agent appointed by the Commissioner of Internal Revenue and a deputy marshal appointed by a marshal); *see also supra* Part II.B.1 (discussing Senate-confirmed commissioners under Jay Treaty); *cf. Employee’s Compensation Act—Assistant United States Attorney*, 31 Op. Att’y Gen. 201, 202–04 (1918) (recognizing that Congress might provide for appointment to position by President or head of department even though position was not an office, in which case one must analyze duties to determine position’s nature).

2. Established by Law

Second, other authorities have stated that an office is created by law. This statement, like the proposition that a person must be appointed consistent with the Appointments Clause to be an officer, is true in one sense, and “law” can be highly relevant to whether an office exists, but the statement also can confuse the analysis if not properly understood. The Appointments Clause does provide that offices not recognized by the Constitution itself “shall be established by Law,” thus lodging in Congress ultimate authority over the creation of most offices. U.S. Const. art. II, § 2, cl. 2; *see Maurice*, 26 F. Cas. at 1213–14; *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. O.L.C. 76, 77–78 (1985).¹⁷ The Ineligibility Clause reinforces this view, by providing that “[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,” thereby contemplating that Congress will authorize offices, and reducing the incentive for members of Congress to do so in hopes of being appointed to them. U.S. Const. art. I, § 6 (emphasis added). Thus, an office subject to the Appointments Clause will ordinarily be a position that has been “established by Law”—by or under authority of a statute. But the rule for which sorts of positions have been “established by Law” such that they amount to offices subject to the Appointments Clause cannot be whether a position was formally and directly created as an “office” by law. Such a view would conflict with the substantive requirements of the Appointments Clause. Congress could not evade the Appointments Clause by, for example, the artifice of authorizing a contract for the supervision of the Justice Department, on the ground that no “office” of Attorney General would be created by law—even

¹⁷ The President has authority to appoint to diplomatic offices without an authorizing act of Congress, because the Constitution itself expressly recognizes such offices under the law of nations. *See, e.g., Ambassadors*, 7 Op. Att’y Gen. at 192–93; *Nomination of Sitting Member of Congress to be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286–92 (1996). Regarding the time at which such an office is considered created, *see id.* at 292–93.

where the statutory authorization for the contract were to delegate sovereign authority and establish the continuance of the contractual position. *Cf. Maurice*, 26 F. Cas. at 1214, 1219 (recognizing that the government might enter into “a contract to perform the duties of” a properly established office, but that such a contract would be an “irregular” appointment that would violate the Appointments Clause). Conversely, a contract or other mere employment “may be created by law,” Mechem § 5, at 5, and governmental contracts long have been highly regulated, *see, e.g., Validity of Executive Order Prohibiting Government Contractors From Discriminating in Employment Practices on Grounds of Race, Color, Religion, or National Origin*, 42 Op. Att’y Gen. 97, 98–103 (1961) (collecting examples). Contracts do not, simply because created or regulated by law, create an office.

Thus, whether an office has been established by law does not turn on whether Congress has formally created an “office” by law, but rather on whether the two necessary elements of an office discussed above in Parts II.A and II.B are present “by law.” The Constitution requires an examination of “the nature of the functions devolved upon” a position by legal authority, *Kennon*, 7 Ohio St. at 558, not the way or form in which they are devolved. Any position that is an office in the constitutional sense under the two elements we have described, and has not been created *ultra vires*, will have been created by law in some fashion, regardless of how labeled. It necessarily follows that “the fact that *the powers in question* are created and conferred by law, is an important criterion,” and that an office “finds its source and limitations in some act or expression of the governmental power.” Mechem § 5, at 5 (emphasis added); *see id.* § 1, at 1 (powers of an office are “created and conferred by law”). To be subject to the Appointments Clause, a position must include *some* continuing legal authority, as opposed to simply existing to assist someone who does have legal authority or having duties defined and existing only at the whim of its superior: There must be some sort of “line of duty prescribed by law,” *Deputy Clerks*, 29 Op. Att’y Gen. at 595–96, and power “defined by rules prescribed by law,” *Shelby*, 36 Miss. at 289. As *Buckley* and many other authorities thus recognize, the source of any such authority, and particularly any statutory delineation by Congress, will unavoidably help to determine whether an office exists. *See, e.g., Buckley*, 424 U.S. at 131, 141 (referring, respectively, to “responsibility under the public laws” and duties “exercised pursuant to a public law”); *Freytag*, 501 U.S. at 881 (noting that duties of a special trial judge were “specified by statute,” and contrasting special masters, hired “on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute”); *id.* at 901 (opinion of Scalia, J.) (agreeing with this analysis); *Applicability of Appointment Provisions of the Anti-Drug Abuse Act of 1988 to Incumbent Officeholders*, 12 Op. O.L.C. 286, 288 n.5 (1988) (noting that Congress had by statute authorized Attorney General to create subordinate offices, which he had done by order); *Maurice*, 26 F.

Cas. at 1213–15 (concluding that, at least for purposes of a suit to enforce a purported officeholder’s bond, the office of agent of fortifications had been created by congressionally approved and authorized Army regulations); *Barton*, 24 F. Cas. at 1027 (explaining background rule that, where no law specifies otherwise, a deputy has “the same powers and duties” as his principal); Mechem § 570, at 373 (same); *Ambassadors and Other Public Ministers*, 7 Op. Att’y Gen. at 193, 196–97, 202, 212 (discussing sources of authority of diplomatic offices, even though not created by statute). As Mechem put it: “The authority of a public officer in any given case consists of those powers which are expressly conferred upon him by the act appointing him, or which are expressly annexed to the office by the law creating it or some other law referring to it, or which are attached to the office by common law as incidents to it.” Mechem § 507, at 332.

3. Oath of Office

Third, although “[p]ublic officers are usually required by law to take the oath of office,” doing so “is not an indispensable criterion and the office may exist without it, for . . . the oath is a mere incident and constitutes no part of the office.” Mechem § 6, at 6; *see also Oath of Clerks in Executive Departments*, 12 Op. Att’y Gen. 521, 521–22 (1868) (similar). Article VI, Clause 3, of the Constitution requires that “all executive and judicial Officers, both of the United States and of the several States” take an oath or affirmation to support the Constitution. Only after *separately* knowing whether an office exists could one apply this requirement. *Burnell* demonstrates this, as the applicability of an oath requirement turned on whether the Censor of the College of Physicians held an office. *See Carth.* at 478; *see also Opinion of the Justices*, 3 Greenl. (Me.) at 483 (similar). Similar reasoning applies to a bond, which is “usually required” of officers “to whom are entrusted the collection and custody of public money, and public ministerial officers whose actions may affect the rights and interests of individuals.” Mechem § 263, at 165; *see id.* §§ 253–254, at 162 (oath and bond requirements are common for persons appointed to a public office); *see also 1 Hinds’ Precedents* at 608 (1898 report, concluding that certain commissioners were not officers, in part because “they give no bond and take no oath”).

4. Emoluments

Fourth, an emolument is also a common characteristic of an office, as *Hartwell* indicates, 73 U.S. at 393, but it too is not essential: “Like the requirement of an oath,” provision for pay “may aid in determining the nature of the position, but it is not conclusive. . . . As in the case of the oath, the salary or fees are mere incidents and form no part of the office.” Mechem § 7, at 6; *see id.* at 6 n.3 (“it is not a *sine qua non*”); *Kennon*, 7 Ohio St. at 559 (“That compensation or emolument is a usual incident to office, is well known; but that it is a necessary element

in the constitution of an office, is not true.”). Confirming this, the law of public offices recognized offices of profit, “to which salary, compensation or fees are attached,” Mechem § 13, at 8, and offices of honor, “to which no compensation attaches,” *id.* § 15, at 9. *See also Emoluments Clause*, 29 Op. O.L.C. at 61 (discussing offices of profit). The Constitution recognizes both types of offices. *See, e.g.*, U.S. Const. art. I, § 3, cl. 7 (punishment for impeachment may include “disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States”). In addition, it separately creates the office of President, *id.* art. II, § 1, cl. 1, and provides for its compensation, *id.* cl. 7. If Presidents were to serve without pay, as Benjamin Franklin had proposed, *see* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 51–55 (June 2, 1787) (1987), they would no less hold an office.

Furthermore, any understanding of an “office” that would require an “emolument” akin to the compensation that a person on the regular payroll of the federal government receives would conflict with the original meaning of the Appointments Clause as revealed by earliest practice. In the first decade under the Constitution, most federal officers, particularly those outside the capital, received no compensation from the government, much less a regular one. Instead, they received authority to collect fees:

By far the larger number of federal officials were compensated by fees for services rendered. Nearly the whole of the field service was paid on this basis, including the collectors, naval officers, and surveyors; the supervisors and inspectors of revenue; the attorneys and marshals; the deputy postmasters; and the consuls. . . . Officials were compensated if there was a demand for their services; otherwise the government expended nothing. They were paid on the spot, by those whom the law required to deal with them. There was no problem of collection—the self-interest of the official was sufficient. Public posting of the schedule of fees and stern laws against taking excessive amounts were relied upon to protect the public. English precedent and contemporary convenience spread the system far and wide.

White, *Federalists* at 298. To take one example, many consuls were compensated through the following schedule of fees: two dollars from a U.S. citizen for authenticating a protest, declaration, or deposition; five percent of a citizen’s estate for taking it into possession and settling it; twenty-five cents for administering oaths and affirmations; and a dollar for certifying the delivery of merchandise. *See* 1 *Am. St. Papers, Misc.* at 307. Officials so compensated were no less officers of the United States. At the same time, where a temporary position does include emoluments provided by the government, the nature of the pay may provide some evidence of whether the position is an office under the factors discussed in Part II.B.2. In cases holding that temporary positions were not offices, courts have

remarked that the pay provided was per diem or otherwise based on the amount of work done, rather than involving a salary. *See, e.g., Bunn*, 45 Ill. at 409; *Germaine*, 99 U.S. at 512; *see also Shepherd v. Commonwealth*, 1 Serg. & Rawle 1 (Pa. 1814) (commissioner regarding land claims, paid by the day); 39 Annals of Cong. at 1408–10 (examiner of land offices, paid by the day).

Recognizing the various kinds of emoluments that may attach to an office, and the incidental nature of having *any* emolument, demonstrates the error of some of our prior opinions in concluding that the Appointments Clause does not apply to persons who are not employees of the federal government, even if they are delegated permanent federal authority to enforce federal law. *See, e.g., Separation of Powers*, 20 Op. O.L.C. at 145–48. The primary cases on which we relied for this view—*Maurice*, *Hartwell*, *Germaine*, and *Auffmordt*, all discussed above—do not resolve this question, and to the extent they speak to it do not clearly point in the direction that our prior opinions took. Only *Auffmordt* directly confronted the requirements of the Appointments Clause, but its holding does not turn on whether a person is an employee (as opposed to the nature of his duties), nor did the Court hold or state that a private actor cannot be an officer, which would have been at odds with *Maurice*'s recognition that a *contractor* might hold a position in violation of the Appointments Clause.

In addition, the general language of these cases allows for an office that does not involve government employment in the modern sense. *Maurice*, for example, said that an office is “*a public charge or employment*,” 26 F. Cas. at 1214 (internal quotation marks omitted; emphasis added), and *Hartwell* defined an office as “*a public station, or employment*,” 73 U.S. at 393 (emphasis added). *Maurice*, among others, also does state that an “office is ‘an employment,’” 26 F. Cas. at 1214, but such a statement must be read in a contemporaneous rather than anachronistic sense, broadly to include anyone engaged by the government, whether an independent contractor, “employee,” or other agent. The pertinent definition of “employ” is:

To engage in one's service; to use as an agent or substitute in transacting business; to commission and entrust with the management of one's affairs. The president *employed* an envoy to negotiate a treaty. Kings and States *employ* ambassadors at foreign courts.

Noah Webster, *An American Dictionary of the English Language*, *tit.* Employ (1828). Thus, even an “agreement” to provide services (such as “to make hay” or “plough land”) was an “employment.” Jacob, *tit.* Office; Cunningham, *tit.* Office. As detailed above regarding contractors (*see supra* Parts II.A.3.b & II.B.3) and the creation of offices “by law” (*see supra* Part II.C.2), what matters is the nature of a position—its authority and continuance—not its label, and thus not whether Congress placed it within the federal service. Our prior analysis, notwithstanding its conclusion, went far toward acknowledging this when it recognized the

relevance to Appointments Clause analysis of *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), in which the Court held that the First Amendment applied to a federally created corporation notwithstanding a statute providing that the corporation was not a department, agency, or instrumentality of the government. *See Separation of Powers*, 20 Op. O.L.C. at 147–48 & n.70.¹⁸

5. Commission

Finally, although the holder of an office usually receives a commission, that characteristic too, like an oath or pay, is incidental rather than essential. *See* Mechem § 12, at 8. The Constitution, in Article II, Section 3, requires that the President “shall Commission all the Officers of the United States.” As with the oath requirement, as well as the recognition that offices are created by law, one must know who the officers are before being able to apply this provision. That a person has a commission may no doubt provide evidence that he holds an office. *See, e.g.*, 15 Annals of Cong. at 888–89 (“There is a Constitutional definition of the word officer in the third section of the second article of the Constitution, which provides that the President ‘shall commission all the officers of the United States.’ Here then is a Constitutional definition of what is meant by a person holding an office, *viz.*, a person commissioned by the President.”) (Rep. Bidwell). But it does not follow that a person not commissioned does not hold an office, or, conversely, that only officers have commissions.

III. Conclusion

For all of these reasons, we conclude that an individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, and which is “continuing,” must be appointed pursuant to the Appointments clause. Conversely, a position that does not satisfy one of these two elements need not be filled pursuant to that Clause.

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¹⁸ Similarly, whether for constitutional purposes a person within the federal government is a mere “employee” or rather holds an office subject to the Appointments Clause will turn on the applicability of the two essential elements we have set out. *See generally Buckley*, 424 U.S. at 126 n.162.

When a Prior Conviction Qualifies as a “Misdemeanor Crime of Domestic Violence”

A “misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9) is limited to those offenses of which the use or attempted use of physical force or the threatened use of a deadly weapon is an element—that is, a factual predicate specified by law and required to support a conviction.

Where the legal definition of the crime at issue contains a disjunctive element (which requires proof of only one of multiple specified factual predicates), only one subpart of which requires the use or attempted use of physical force or the threatened use of a deadly weapon, application of the prohibition in section 922(g)(9) will turn on whether the factfinder found that the subpart meeting the “misdemeanor crime of domestic violence” definition had been proved (or whether the defendant pleaded guilty to that subpart). The answer to that question may be gleaned from the record of conviction or the supporting record of proceedings in the court of conviction. Police reports cannot answer that question.

The above interpretations also govern background checks by the Federal Bureau of Investigation for firearms transfers under the National Instant Background Check System, but additional materials, including police reports, may be relied upon by the NICS for certain limited purposes.

May 17, 2007

MEMORANDUM OPINION FOR THE CHIEF COUNSEL BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

Federal law prohibits persons who have been “convicted in any court of a misdemeanor crime of domestic violence” from possessing or receiving a firearm in certain circumstances. 18 U.S.C. § 922(g)(9) (2000). The law defines a “misdemeanor crime of domestic violence” to include only “an offense” that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.” *Id.* § 921(a)(33)(A)(ii). The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) enforces this prohibition by, among other things, denying applications for federal firearms licenses and seizing firearms for forfeiture. *See id.* §§ 923(d)(1)(B) & 924(d). You have asked us to address when a prior conviction qualifies as a “misdemeanor crime of domestic violence.”

We conclude, first, that a “misdemeanor crime of domestic violence” is limited to those offenses of which the use or attempted use of physical force or the threatened use of a deadly weapon is an *element*—that is, a factual predicate specified by law and required to support a conviction. Second, where the legal definition of the crime at issue contains a disjunctive element (which requires proof of only one of multiple specified factual predicates), only one subpart of which requires the use or attempted use of physical force or the threatened use of a deadly weapon, application of the prohibition in section 922(g)(9) will turn on whether the factfinder found that the subpart meeting the “misdemeanor crime of domestic violence” definition had been proved (or whether the defendant pleaded guilty to that subpart). The answer to that question may be gleaned from the record of conviction or the supporting record of proceedings in the court of conviction.

Police reports cannot answer that question. Finally, the above interpretations also govern background checks by the Federal Bureau of Investigation (“FBI”) for firearms transfers under the National Instant Background Check System (“NICS”), but additional materials, including police reports, may be relied upon by the NICS for certain limited purposes.

I.

The “misdemeanor crime of domestic violence” firearms prohibition is the product of two provisions in title 18 of the U.S. Code. Section 922(g) provides:

It shall be unlawful for any person—

. . .

(9) who has been *convicted in any court of a misdemeanor crime of domestic violence*, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(Emphasis added.) Section 921(a)(33)(A) in turn defines a “misdemeanor crime of domestic violence” as:

an *offense* that—

(i) is a misdemeanor under Federal or State law; and

(ii) *has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon*, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(Emphases added.)

Putting these two provisions together, the prohibition applies, as relevant here, only to a person who (1) has been “convicted” in court, (2) of an “offense,” (3) that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.”¹ The application of this prohibition, then, depends upon the “element[s]” of the particular “offense” of which the person was

¹ You have not asked about, and we do not address, the domestic-relationship requirement or the requirement that the offense be a misdemeanor.

“convicted.” That is, the prohibition turns on the *legal definition* of the predicate offense of conviction, not on the *actual conduct* that may have led to the conviction for that offense. One must determine what the convicting court found, not what the defendant did.

This conclusion follows from a proper understanding of the key statutory term “element.” Elements are the factual predicates of an offense that are specified by law and must be proved to secure a conviction. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1970); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *see also Black’s Law Dictionary* 538 (7th ed. 1999) (defining “element” as “[a] constituent part of a claim that must be proved for the claim to succeed”). If conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense. As the en banc Fifth Circuit has explained: “If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element—implicit or explicit—of the crime.” *United States v. Vargas-Duran*, 356 F.3d 598, 605 (2004); *see also Singh v. Ashcroft*, 386 F.3d 1228, 1231 (9th Cir. 2004) (“An element of a crime is a constituent part of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a given statute.”) (internal quotation marks omitted); *United States v. Fulford*, 267 F.3d 1241, 1250 (11th Cir. 2001) (“At common law, the word ‘element’ refers to a constituent part[] of a crime which must be proved by the prosecution to sustain a conviction.”) (internal quotation marks omitted); *United States v. Jones*, 235 F.3d 342, 347 (7th Cir. 2000) (holding that an assault and battery conviction did not qualify as a “crime of violence” under the Sentencing Guidelines because “actual, attempted, or threatened physical force is not a necessary element of the offense”).

It is well established that language turning on the “elements” of a predicate “offense” of “convict[ion]” requires considering the legal definition of the offense of conviction. The Supreme Court, addressing a statute that, much like the “misdemeanor crime of domestic violence” definition, turns on whether a person has been convicted of a predicate “*offense that has as an element the use, attempted use, or threatened use of physical force,*” 18 U.S.C. § 16(a) (2000) (emphases added), has recognized that such language “requires us to look to the elements . . . of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). The Eighth Circuit earlier took the same view in addressing the prohibition at issue here: “When statutory language dictates that predicate offenses contain enumerated elements, we must look only to the predicate offense rather than to the defendant’s underlying acts to determine whether the required elements are present.” *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999). *See also United States v. Griffith*, 455 F.3d 1339, 1341 (11th Cir. 2006) (application of section 921(a)(33)(A)(ii) “does not turn on the actual conduct underlying the conviction but on the elements of the state crime”); *Szucz-Toldy v. Gonzales*, 400 F.3d 978, 982 (7th Cir. 2005) (per curiam) (case involving statute at issue in *Leocal*, citing *Smith*, among other cases, for

proposition that “the particular method by which [the defendant] violated the . . . statute has no bearing whatever on whether one of the elements of that statute is the use or threatened use of force”); *United States v. Shelton*, 325 F.3d 553, 558 n.5 (5th Cir. 2003) (“[W]e look to the elements set forth in the statute—not the actual conduct to determine whether the offense qualifies as a crime of domestic violence.”). Because an “element” is a part of an offense specified *by law*, the existence of the required element is determined by “a legal inquiry as opposed to a factual inquiry.” *Fulford*, 267 F.3d at 1250 (internal quotation marks omitted). This inquiry involves, for statutory offenses, simply determining “the elements *set forth in the statute*.” *Shelton*, 325 F.3d at 558 n.5 (emphasis added). For a common law crime, or a statutory crime stated in general terms that draw on the common law (for example, “battery”), the elements will be specified in the jurisdiction’s case law, but will nevertheless still consist only of the predicate facts defined by law that must be proved in all cases to obtain a conviction. *See, e.g., United States v. Melton*, 344 F.3d 1021, 1026 (9th Cir. 2003) (“Where, as here, the state crime is defined by specific and identifiable common law elements, rather than by a specific statute, the common law definition of a crime serves as a functional equivalent of a statutory definition.”); *State v. Coomes*, 102 N.W.2d 454, 457 (Neb. 1960) (noting that state has no common law crimes but does “resort to common-law definitions where general terms are used to designate crime”) (internal quotation marks omitted); *cf. Taylor v. United States*, 495 U.S. 575, 598 (1990) (holding that Congress, in using the word “burglary” in a statute, meant “the generic sense in which the term is now used in the criminal codes of most States,” and summarizing the elements). Wherever the authoritative definition may be found, however (whether in a statute or case law), if the offense of conviction did not have, as an element, the use or attempted use of physical force or the threatened use of a deadly weapon, then the section 922(g)(9) prohibition does not apply, regardless of the actual conduct that may have provided the basis for the conviction. (Correspondingly, if such action *was* an element of the offense of conviction, there is no cause to consider whether the actual underlying conduct included such action.)

For example, a general criminal statute that prohibits disturbing the peace presumably could be violated by conduct that includes use of force, attempted force, or threatened use of a deadly weapon. But if the legal definition of the disturbing-the-peace offense does not include a requirement that such action be proved, then a conviction for that offense is not a conviction for an offense that has an element meeting the “misdemeanor crime of domestic violence” definition, regardless of whether the defendant actually used force or even whether the government proved conduct that included the use of force. The prohibition therefore does not apply in such a case. As the en banc Fifth Circuit explained in a similar context, if:

an indictment charged a defendant with the crime of disturbing the peace . . . and also specified that he committed the crime “by throwing a bottle at the victim’s head,” . . . the prosecution might be required to prove that the defendant indeed engaged in that charged conduct, but throwing a bottle at someone is not an element of the disturbing-the-peace statute. . . . It is, rather, one means of violating the statute.

United States v. Calderon-Peña, 383 F.3d 254, 257 n.4 (5th Cir. 2004); *see id.* at 258 (distinguishing “the manner and means” of committing a crime, even if charged in the indictment to satisfy due process, from “an element of the offense”). Likewise, Nebraska’s disturbing the peace statute provides simply that “[a]ny person who shall intentionally disturb the peace and quiet of any person, family, or neighborhood commits the offense of disturbing the peace.” Neb. Rev. Stat. § 28-1322 (1977). The statute does not on its face contain elements meeting the requirements of the “misdemeanor crime of domestic violence” prohibition, and state courts have made clear that the statutory language encompasses a wide variety of conduct not limited to violence or the use of force. A person convicted under the Nebraska statute thus “could have committed the offense of disturbing the peace without the use of force.” *Kneifl v. United States*, No. 8:02CV96, slip op. at 16 (D. Neb. Feb. 18, 2003); *see also id.* at 10 (discussing state court interpretations of state statute). Therefore, a conviction for this offense lacks the element necessary to satisfy the definition in section 921(a)(33)(A)(ii), even if in a particular case conduct involving force happens to form the basis for proving what is an element—merely that one has “disturb[ed] the peace and quiet” of another. *See also, e.g., Fulford*, 267 F.3d at 1250–51 (rejecting sentence enhancement under statute that required “proof of firearms use as an element of the crime,” where prior conviction was for “assault . . . [w]ith a deadly weapon without intent to kill”—not necessarily assault with a firearm) (internal quotation marks omitted).

II.

The nature of the materials relevant to determining whether a prior conviction satisfies the “misdemeanor crime of domestic violence” definition follows from the statutory terms discussed above. In general, determining the “element[s]” of the “offense” of which a person was “convicted” will depend only on the record of conviction and, as discussed above, the law defining the offense of conviction. The record establishes the offense of which the person was convicted; the law establishes the elements of the offense. Thus, the Seventh Circuit in *Szucz-Toldy*, after first determining that the predicate state offense did not include “as an element” the facts required by the applicable federal law, concluded that an immigration judge “had no reason to look to the indictment and examine the facts alleged there.” 400 F.3d at 982. Likewise, the Eleventh Circuit in *Fulford*, affirming a

district court’s refusal to consider the allegations in an information, explained that “[t]he phrase ‘as an element’ only permits an examination of the statute under which the defendant was convicted,” and it is therefore improper to “look past the conviction to the charging document.” 267 F.3d at 1250, 1251 (internal quotation marks omitted); *see also United States v. Martinez-Mata*, 393 F.3d 625, 628 (5th Cir. 2004) (refusing to consider indictment where statute plainly did not contain requisite element). And in *Taylor*, the Supreme Court recognized that an elements-based “categorical approach” to prior offenses “generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.” 495 U.S. at 602; *see also id.* at 600 (describing “formal categorical approach” as allowing resort “only to the statutory definitions of the prior offenses”).

One complication arises where the legal definition of a crime can be interpreted to contain a “disjunctive” element—that is, an element with subparts, only one of which must be proved in any particular case—and only the facts specified in some or one of the subparts necessarily includes “the use or attempted use of physical force, or the threatened use of a deadly weapon” as required by the definition of “misdemeanor crime of domestic violence.” The firearms prohibition immediately preceding the prohibition at issue here provides an example of a disjunctive element. It generally makes a firearm shipment, transportation, receipt, or possession unlawful for a person:

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8) (2000). Section 922(g)(8) has three conjunctive subparagraphs—(A), (B), and (C), but the last of these has two clauses. Thus, if subpara-

graphs (A) and (B) “are fulfilled, then by its terms section 922(g)’s firearms disability attaches if *either* clause (C)(i) *or* clause (C)(ii) applies.” *United States v. Emerson*, 270 F.3d 203, 213–14 (5th Cir. 2001). The statute has three rather than four elements, *see id.* at 214, and the third element, like the others, must be met in every case, yet it may be satisfied in one of two ways. Where the definition of a crime may be of this sort, the first question will be one of legal interpretation: Is the definition properly read to contain a disjunctive element? In *Szucz-Toldy*, for example, the Seventh Circuit faced a state statute that prohibited “[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten, or harass any person at the called number.” 400 F.3d at 979 (internal quotation marks omitted). The court looked to this text and to case law interpreting it, and rejected the view that the statute was “divisible” such that “threaten[ing]” could be an element. *See id.* at 980–81. It was clear under the statute’s single offense that “to sustain a conviction . . . it is not necessary to prove the use or threatened use of physical force.” *Id.* at 981. Thus, the court’s inquiry under a federal statute turning on the elements of the prior conviction was at an end. *See id.* at 982; *cf. Martinez-Mata*, 393 F.3d at 628–29 (addressing argument that statute had disjunctive elements but deciding against government on different grounds); *Calderon-Peña*, 383 F.3d at 258 (discussing statutes that “provide[] a list of alternative methods of commission”).

Where the legal definition of a crime is interpreted to have such a disjunctive element, it may be argued that a conviction for such a crime never could satisfy the “misdemeanor crime of domestic violence” definition in section 921(a)(33)(A)(ii), because the factual predicate meeting that definition need not be found in *every case* brought under the statute. Under this approach, there never would be occasion to look beyond the record of conviction and legal definition of the crime of conviction. *Cf. Shepard v. United States*, 544 U.S. 13, 30 (2005) (O’Connor, J., dissenting) (discussing *Taylor* and explaining that “[t]he most formalistic approach would have been to find the ACCA requirement satisfied only when the *statute* under which the defendant was convicted was one limited to” an offense containing the requisite elements); *Fulford*, 267 F.3d at 1250 (suggesting that it would be improper to look beyond conviction and definition of offense if statute had disjunctive element).

The language of the “misdemeanor crime of domestic violence” definition does not, however, require such a strict approach. The general definition of “element” does not appear to address this situation, and we see no reason to conclude that a conviction under a crime that contains a disjunctive element, one subpart of which does meet section 921(a)(33)(A)(ii)’s definition, could never be a conviction for an “offense” that contained the required “element.” In such a case, the legal definition of the crime at least has an element that includes within it the possibility of the requisite judicial finding. It is true that a court might apply such a law as a single, general offense in which one element could be proved in multiple ways. (In the example of section 922(g)(8) given above, the court might simply instruct the

jury that it needed to find subparagraphs (A), (B), and (C) satisfied, without requiring the jury to specify whether it was finding subparagraph (C)(i) or (C)(ii.) Such a conviction would not satisfy the definition of a “misdemeanor crime of domestic violence.” But if, instead, in a particular case the court required the factfinder, in order to convict, to conclude that the subpart of the disjunctive element meeting that definition had been proved (or if it limited a guilty plea in the same way), then it would have applied the law as stating multiple offenses, and the “offense” of which the defendant was actually “convicted” by that court would have been narrowed such that that subpart became, in application, an “element” meeting the definition.

The question, then, will be whether the defendant in fact was convicted under a specific subpart, such that the relevant subpart may be deemed an “element” of his “offense” of conviction. But even when this factual question arises, the actual conduct of the defendant remains irrelevant, as the ultimate question is the same as in the general case: whether the offense of which the person was actually convicted by a court contained an element meeting the required definition. In some cases where a disjunctive element is involved, the record of conviction will provide information sufficient to answer that question. *See, e.g., Flores v. Ashcroft*, 350 F.3d 666, 770 (7th Cir. 2003) (where battery statute “separates into distinct subsections the different ways to commit the offense” and defendant pleaded guilty to the “version” in a particular subsection, there was no need to look beyond the record of conviction). But the record of conviction will not always do so, and in such a case other similarly authoritative records of the convicting court will be relevant to the extent—and only to the extent—that they indicate what that court did. Non-judicial documents, such as police reports or other documents supporting charges, will not be relevant in determining whether a defendant actually has been convicted of a specific disjunctive element of an offense.

Our interpretation finds extensive support in the decisions of courts of appeals that have addressed “as an element” language, including one decision doing so in the context of applying the “misdemeanor crime of domestic violence” definition, and in two decisions of the Supreme Court in a similar context. The en banc Fifth Circuit in *Calderon-Peña*, for example, emphasized that “factual material about the method of committing the offense”—whether “alleged in charging papers” or not—“is irrelevant for purposes of” a statute turning on whether a prior conviction had a certain “element.” 383 F.3d at 257. Yet it found the following “permissible”:

The sentencing court could look to the indictment or jury instructions for the limited purpose of determining which of a series of disjunctive elements a defendant’s conviction satisfies. Under that approach, whenever a statute provides a list of alternative methods of commission . . . we may look to charging papers to see which of the various statutory alternatives are involved in the particular case.

Id. at 258 (citation and internal quotation marks omitted); *see id.* n.7 (“our approach has the virtue of respecting the ‘as an element’ language of the Guideline.”). Similarly, the Seventh Circuit has explained that when the statutory definition of a crime contains a disjunctive provision, “it is necessary to look behind the statutory definition,” but “the inquiry begins and ends with the elements of the crime.” *Flores*, 350 F.3d at 670, 671; *see Szucz-Toldy*, 400 F.3d at 981 (discussing *Flores* and emphasizing “as an element” language); *see also United States v. Kennedy*, 133 F.3d 53, 57–58 (D.C. Cir. 1998) (applying federal statutes turning on the “nature” of prior conviction and whether it had certain facts “as an element,” and consulting indictment to determine whether conviction under Hobbs Act had been for robbery or extortion; noting that “a district court may only undertake this inquiry when a statute provides for both violent and nonviolent means of violation”) (emphasis added).²

The Eighth Circuit in *Smith* encountered this situation in the context of the “misdemeanor crime of domestic violence” firearms prohibition. The defendant had pleaded guilty to the crime of “assault,” defined as follows:

A person commits an assault when, without justification, the person does any of the following:

- (1) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another. . . .
- (2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act. . . .

Iowa Code § 708.1. Subsections (1) and (2) of the assault statute together set out a disjunctive element, and only the first subpart meets the section 921(a)(33)(A)(ii) definition: “[A] generic assault in Iowa may include, as an element, placing another in fear of imminent physical contact. If *Smith* pleaded guilty to [subsection (2)], then

² We disagree with the Fourth Circuit’s approach in *United States v. Kirksey*, 138 F.3d 120 (4th Cir. 1998), as inconsistent with “as an element” language and with the Supreme Court case law discussed below in this part. Unable to “say categorically that the conduct encompassed in the [elements of the Maryland] crime of battery constitutes the use of physical force against the person of another to the degree required to constitute a crime of violence as used” in the Sentencing Guidelines, the Fourth Circuit resolved the question by consulting the charging documents and concluding, “In the case before us, however, no one disputes that the conduct of *Kirksey*’s prior convictions was violent.” *Id.* at 125. The court conflated the facts of the predicate offense *specified by law* (that is, the elements) with the *actual* conduct underlying the conviction for that offense. The law in question appears not to have included a disjunctive element, *see id.*, and thus was like the disturbing the peace example discussed in Part I.

he was not convicted of an offense that ‘has, as an element, the use or attempted use of force.’” 171 F.3d at 620 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)).

The court of appeals recognized that it would be proper to look beyond the statute and the record of conviction, but only to determine which of the elements of the offense was proved in support of the defendant’s conviction under the statute: “We may expand our inquiry . . . to review the charging papers and jury instructions, if applicable, *only to determine under which portion of the assault statute Smith was convicted.*” 171 F.3d at 620–21 (emphasis added). The court looked to the charging papers, which, although not specifying a subsection, did parrot the language of subsection (1), accusing Smith of “an act which was intended to cause pain or injury to another.” *Id.* at 621 (internal quotation marks omitted). The court thus concluded that the state had charged him under, and he had pleaded guilty to, subsection (1) rather than subsection (2). It therefore found that he “was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of” the “misdemeanor crime of domestic violence” definition.³ *Id.*; see also *United States v. Nobriga*, 474 F.3d 561, 564 (9th Cir. 2006) (holding that conviction under statute containing disjunctive element satisfied definition in section 921(a)(33)(A)(ii) because “the charging papers and the judgment of conviction” made clear that the defendant “necessarily pleaded guilty” to the subpart meeting that definition).

Finally, in the *Taylor* and *Shepard* decisions cited above, the Supreme Court applied the same approach in a similar context. Both cases addressed a reference to “burglary” as a predicate conviction in a “three strikes” anti-recidivism provision of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii). In *Taylor*, the Court first concluded that Congress meant “generic burglary” as commonly accepted among the states, and listed the elements of that offense. 495 U.S. at 598. The Court held that a predicate burglary conviction must have been a conviction of a crime (however labeled) having these “basic elements,” *id.* at 599, as shown by “the statutory definitions of the prior offenses,” not “the particular facts underlying those convictions,” *id.* at 600. The provision at issue did not use the phrase “as an element,” so it is true that *Taylor* (and *Shepard*) do not directly apply to a statute that, as here, does use that phrase. See *Fulford*, 267 F.3d at 1250. But the Court nevertheless interpreted section 924(e)(2)(B)(ii) as if it required an elements-based approach, including by taking guidance from the appearance of “as an element” in the immediately preceding subsection. 495 U.S. at 600–01; see also *Shepard*, 544 U.S. at 19 (language in the ACCA “imposing the categorical approach . . . refers to

³ In reaching its factual conclusion, the court of appeals followed the reasoning of its earlier decision in *United States v. Taylor*, 932 F.2d 703 (8th Cir. 1991), on remand from the Supreme Court. The *Taylor* court recognized that a guilty plea might not be a plea of guilty to the offense charged, but concluded that the plea should be so considered when there was “no evidence in the record” that a guilty plea “resulted from a plea bargain.” *Id.* at 709. (For another of *Taylor*’s prior convictions, there was such evidence, from an order granting probation based on the conviction. See *id.*)

predicate offenses in terms not of prior conduct but of prior ‘convictions’ and the ‘element[s] of crimes’) (quoting *Taylor*, 495 U.S. at 600–01). Thus, like the Eighth Circuit in *Smith* and other courts addressing provisions with “as an element” language, we find *Taylor* (and *Shepard*) instructive.

The relevant question in both *Taylor* and *Shepard* was how one could show a conviction for “generic burglary” when state law defined “burglary” to include actions (such as “burglary” of a vehicle rather than a building) that would not satisfy the Court’s generic definition. *Taylor*, 495 U.S. at 599. In both cases, the Court recognized that it may be necessary to look to materials other than the record of conviction, but also recognized that the question remains the *elements* of the offense of conviction—not the defendant’s actual conduct—and thus that the universe of documents is a narrow one, consisting of records from the convicting court similar to a record of conviction. See *James v. United States*, 550 U.S. 192, 202 (2007) (stating that under *Taylor* and *Shepard* the Court “consider[s] whether the *elements of the offense* are of the type that would justify its inclusion” in section 924(e)(2)(B)(ii) “without inquiring into the specific conduct of th[e] particular offender”); *id.* at 217 (Scalia, J., dissenting) (agreeing “with this approach”).

The Court in *Taylor*, addressing cases tried to a jury, concluded that the “categorical approach” would allow a court “to go beyond the mere fact of conviction in a narrow range of cases where a jury was *actually required to find all the elements* of generic burglary.” 495 U.S. at 602 (emphases added). The question is what “the jury *necessarily had to find*,” and “the indictment or information and jury instructions” together might well answer that question. *Id.* (emphasis added); see *id.* (holding that prior burglary conviction satisfies ACCA if “the charging paper and jury instructions *actually required the jury to find all the elements* of generic burglary in order to convict the defendant”) (emphases added); *Shepard*, 544 U.S. at 17 (reiterating this language of *Taylor*); *id.* at 20 (describing *Taylor* as allowing reference only to “charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category,” such as jury instructions).

In *Shepard*, the Court reaffirmed *Taylor* and considered what would be “adequate judicial record evidence,” 544 U.S. at 20, where a prior conviction under a statute defining burglary to include breaking and entering “a building, ship, vessel or vehicle,” Mass. Gen. Laws Ann. ch. 266, § 16A (West 2000), did not rest on a jury verdict. The Court concluded that “the closest analogs to jury instructions would be a bench-trial judge’s formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge . . . shown by a transcript of a plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.” 544 U.S. at 20; see *id.* at 26 (for guilty plea, inquiry “is limited to the terms of the charging document, the terms of a plea agreement or

transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information”). Such materials meet the categorical standard of *Taylor* as “conclusive records made or used in adjudicating guilt.” *Id.* at 21 (emphasis added). The Court rejected the government’s arguments that complaint applications or materials accompanying them (such as police reports) could be relevant. *Id.* at 21–22.

The Supreme Court in *Shepard* also necessarily rejected a series of decisions from the First Circuit, including the decision below, 348 F.3d 308, 312–13 (1st Cir. 2003), that, while purporting to follow the rule of *Taylor*, had nevertheless considered actual conduct relevant to determining the elements of the offense of conviction. In *United States v. Harris*, 964 F.2d 1234 (1st Cir. 1992), for example, the First Circuit had reasoned that, if the indictment simply charged a violation of a burglary statute, without further detail or with ambiguous boilerplate, and the defendant pleaded guilty, such that no jury instructions existed, then “the conduct in respect to which the defendant was charged and pled guilty . . . may indicate that the defendant and the government both believed that the generically violent crime (‘building’), rather than the generically non-violent crime (‘vehicle’) was at issue.” *Id.* at 1236; *see also Shepard*, 544 U.S. at 18 (noting view of First Circuit below that police reports could be “sufficiently reliable evidence” of elements included in guilty plea).

Determining the “element[s]” of the “offense” of which a person was “convicted” by a court requires, in the words of both *Shepard* and *Taylor* quoted above, and consistent with the definition of “element,” evidence of the facts specified by law that were “necessarily” found or “actually required” to be found by the convicting court. Neither the subjective “belie[fs]” of the government and defendant, *see Harris*, 964 F.2d at 1236, nor the actual conduct of the defendant is relevant to this determination. The question is what the convicting court objectively did. With regard to police reports, there is no necessary correlation between the alleged actual conduct reported by the police and the legally specified facts required to be found by the convicting court (even if a police report becomes attached to a charging document), at least absent a court having in some way adopted such a report so as to make it a “conclusive[] record” of the facts judicially found “in adjudicating guilt.” *Shepard*, 544 U.S. at 21; *see id.* at 20, 26. Indeed, a record of such alleged conduct may be misleading. It may be that not all of the crimes that the defendant arguably committed through his conduct were charged, or that not all of the charges led to convictions, or both. *See, e.g., Kirksey*, 138 F.3d at 122–23. A police report may be particularly misleading in the context of a plea agreement, given that the government may forgo prosecuting certain charged offenses in exchange for a guilty plea to a lesser offense. The Court in *Taylor* noted a similar risk in support of its “categorical approach” to burglary. 495 U.S. at 601–02 (noting possibility of “a guilty plea to a lesser, nonburglary offense” as “the result of a plea bargain” and risk of erroneously imposing a sentence en-

hancement “as if the defendant had pleaded guilty to burglary”). Thus, where a statute genuinely has a disjunctive element, creating a factual question regarding the elements of the actual offense of conviction, only records from the convicting court—“conclusive records made or used in adjudicating guilt,” *Shepard*, 544 U.S. at 21—will in fact reliably indicate whether the particular offense of conviction included an element meeting the definition of a “misdemeanor crime of domestic violence” in section 921(a)(33)(A)(ii).⁴

III.

Our conclusions regarding the plain meaning of the section 921(a)(33)(A)(ii) definition and the materials that are, as a consequence, relevant to whether a convicting court found elements satisfying that definition apply equally to a determination by the FBI, in implementing the NICS, of whether a person’s receipt of a firearm would violate federal law. That conclusion, however, does not mean that non-judicial materials such as police reports are of no use for the work of the NICS.

The Brady Handgun Violence Prevention Act (“Brady Act”) required the Attorney General to “establish a national instant criminal background check system that any licensee may contact . . . for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate [certain federal laws, including 18 U.S.C. § 922(g)(9)] or State law.” Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993). The Attorney General has fulfilled this mandate by establishing and maintaining the NICS within the FBI. *See* 28 C.F.R. §§ 25.1 & 25.3 (2006).

⁴ We are aware of a statement on the Senate floor regarding the section 922(g)(9) prohibition that might be read to support a view that the prohibition should apply to convictions for offenses that do not include as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. *See* 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg, urging “law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant’s criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.”). To the extent that the statement can be so read, it does not control the question before us. First, legislative history has no place where, as here, the relevant statutory text is unambiguous. *See, e.g., Dep’t of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 808 n.3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute.”). Second, the final language defining a “misdemeanor crime of domestic violence” was a compromise between Senator Lautenberg and senators concerned with the breadth of his initial bill, which lacked the “as an element” language. *Compare* 142 Cong. Rec. 5840 (1996) (initial bill) *with id.* at 26,674–76 (discussing compromise). Reliance on a floor statement in such a case would give members of Congress “both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.” *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005). Legislation invariably “reflects compromise among competing interests,” *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995), and our task is simply to give effect to that compromise—as memorialized in “the language actually voted on by Congress and signed into law by the President,” *Regan v. Wald*, 468 U.S. 222, 237 (1984).

Another section of the Brady Act (section 102(b), codified at 18 U.S.C. § 922(t)(1)), requires federally licensed firearms dealers (“licensees”) in most cases to contact the NICS before selling a firearm to a person. Upon receiving an inquiry, the NICS checks certain databases and in the ordinary course immediately responds with one of two determinations: “proceed,” which indicates that the transfer is allowed, or “denied,” which indicates that the transfer is not allowed. *See* 28 C.F.R. §§ 25.2 & 25.6(c)(1) (2006); *see also National Instant Criminal Background Check System Regulation*, 69 Fed. Reg. 43,892, 43,897 (July 23, 2004) (discussing high rate of immediate or nearly immediate responses). If the NICS is unable to determine immediately whether or not the transaction may proceed, it issues a “delayed” response, and the inquiry remains “open.” *See* 28 C.F.R. §§ 25.2 & 25.6(c)(1). Such a response temporarily prohibits the transfer and indicates that the NICS has found “a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm.” *Id.* § 25.6(c)(1)(iv)(B). The NICS “continues researching potentially prohibiting records” in an effort to obtain “definitive information.” *Id.* § 25.2 (defining “Open”). If the NICS is unable to issue a denial within three business days, the restriction on transfer by the licensee expires. 18 U.S.C. § 922(t)(1)(B)(ii). The NICS may, however, continue to investigate the transferee, for up to 90 days under current regulations. *See* 28 C.F.R. § 25.9(b)(1)(ii) (2006) (providing for destroying audit-log records regarding an open inquiry within 90 days of the inquiry). If it subsequently determines that the receipt of the firearm was unlawful, the NICS issues a “delayed denial.” In such a case, the FBI will notify the ATF, *see id.* § 25.9(b)(2)(i), which may take action against the transferee.

The Brady Act authorizes the NICS to issue a denial only if it has concluded “that the receipt of a firearm” by the prospective transferee “*would violate*” federal or state law. 18 U.S.C. § 922(t)(1)(B)(ii) (emphasis added); *see id.* § 922(t)(5) (addressing licensee’s failure to contact the NICS when the NICS “was operating and information was available to the system demonstrating that receipt would violate” federal or state law); Brady Act § 103(b) (requiring NICS to provide information “on whether receipt of a firearm by a prospective transferee would violate” federal or state law). Alternatively, the NICS must issue a “proceed” if it has concluded that such receipt “*would not violate*” federal or state law. 18 U.S.C. § 922(t)(2) (emphasis added). In addition, it may issue a “proceed” in cases in which it is not authorized to issue a denial (and decides that a “delayed” response is not warranted), given that in such case there is no statutory authorization for a denial. *See id.* § 922(t)(4) (referring to the issuance by NICS of a “proceed” if “the information available to the system *does not demonstrate* that the receipt of a firearm by such other person would be” unlawful) (emphasis added).

Our analyses above in Parts I and II establish the statutory rule and relevant category of materials for determining that a transfer “*would violate*” the prohibition set out in sections 921(a)(33)(A)(ii) and 922(g)(9) regarding misdemeanor

crimes of domestic violence. Because the NICS must determine whether a firearm transaction “would violate” section 922(g), the legal and factual questions for the NICS are the same as those for determining whether that prohibition applies in a judicial setting, regardless of the standard of proof applicable to the NICS (a question we have no occasion to address). If the legal definition of the crime of conviction (whether found in a statute or case law) unambiguously includes (or omits) an element involving “the use or attempted use of physical force, or the threatened use of a deadly weapon,” *id.* § 921(a)(33)(A)(ii), then that definition and the record of conviction suffice. If such an element is included, a denial is appropriate; if such an element is omitted, a “proceed” is appropriate, barring any other bases under federal law for a denial. In neither scenario are the facts of the defendant’s underlying conduct relevant.⁵

If the legal definition of the crime specified in the record of conviction contains a disjunctive element, thus creating a factual question about the precise offense of conviction, as described above in Part II, then judicial documents of the sort discussed in Part II are relevant as the NICS seeks to determine whether the court, in convicting, was “actually required to find,” *Taylor*, 495 U.S. at 602, the subpart of the disjunctive element that meets the section 921(a)(33)(A)(ii) definition. If such documents are not already in the system, a “delayed” response putting the inquiry into open status would be appropriate. But even where the statute allows for multiple offenses and the record of conviction is inconclusive, police reports and similar materials may not establish the basis for a denial. For the reasons discussed in Part II, such materials are not probative of whether a transfer “would violate” the section 922(g)(9) prohibition because the transferee had a prior “convict[ion]” for an “offense” containing a particular “element[.]”

We understand from the FBI, however, that NICS practice with regard to statutes containing a disjunctive element has not been consistent with this interpretation and, in particular, that it has included reliance on police reports to justify denials based on the elements of a prior conviction. *See* FBI Views Letter, *supra* note 5, at 1–2. The FBI has expressly relied on the erroneous reasoning of the First Circuit in *Shepard* that even if actual conduct is not technically relevant, a police report may be a generally reliable indicator to “inform the determination regarding the prong of the statute under which the defendant pled or was otherwise convicted.” FBI Views Letter at 4; *see id.* at 2. As explained in Part II, such an approach is inconsistent with the statute and relevant case law.

⁵ The FBI has informed us that its practice in such cases is consistent with this interpretation. *See* Letter for Jay Bybee, Assistant Attorney General, Office of Legal Counsel, from Larry R. Parkinson, General Counsel, FBI, *Re: Treasury Department Request for Opinion Regarding Misdemeanor Crimes of Domestic Violence* at 3 (Mar. 6, 2002) (“FBI Views Letter”) (“NICS has always maintained that . . . the statute at issue *must contain the ‘use of force’ element* (whether in the alternative or not). Only if the statute contains such an element will NICS proceed with its investigation.”) (emphasis added). The denial at issue in *Knefl*, however, a case cited above in Part I, appears inconsistent with this practice, as the Nebraska statute unambiguously did not include such an element.

Nor does the Brady Act allow the NICS to adopt some lesser standard that might justify reliance on police reports. *See* FBI Views Letter at 3. Section 922(t)(1)(B)(ii) provides that the NICS, to justify a denial, must conclude that the transfer “*would violate*” federal or state law. (Emphasis added.) Section 922(t)(5) likewise refers to “information . . . demonstrating that receipt . . . *would violate*” federal or state law. (Emphasis added.) This language is not ambiguous. The information that the NICS possesses must demonstrate a violation; in the case of section 922(g)(9), this requires information demonstrating a prior conviction in which the factfinder necessarily found the *element* required for a misdemeanor crime of domestic violence. (This standard does not mean, however, that the NICS must negate grounds for the prohibition not to apply, any more than a prosecutor must disprove affirmative defenses.) Our discussion in Part II establishes what information is relevant in making such a demonstration. In the absence of such information, there is no statutory authority for the NICS to issue a denial under section 922(g)(9).⁶

We recognize the practical difficulties that the “misdemeanor crime of domestic violence” definition and the limits of the statutory authority of the NICS may present, particularly as the NICS strives to make a determination under the time constraint that the Brady Act imposes. The FBI has explained that the NICS “operates in an environment different from that of ATF” and that, for misdemeanor convictions, “often the only relevant documents available within the three day time frame are the record of conviction and the police report on the underlying incident that led to the conviction.” FBI Views Letter at 3; *see id.* at 5 (similar). But the FBI’s approach creates “practical difficulties and potential unfairness” of its own, *see Taylor*, 495 U.S. at 601–02, and, in any event, the difficulties the FBI has identified do not allow us to disregard what the statute requires. We must reject the FBI’s argument just as the Supreme Court in *Shepard* rejected the government’s argument based on “the happenstance of state court record-keeping practices and the vagaries of state prosecutors’ charging practices.” 544 U.S. at 22 (internal quotation marks omitted).

A police report or similar document may, however, in a particular case assist the NICS in deciding to delay its response to a NICS inquiry and investigate further pursuant to its procedures for open inquiries. The implementing regulations require a “proceed” response “if *no* disqualifying information was found.” 28 C.F.R. § 25.6(c)(1)(iv)(A) (emphasis added). Yet if, as we understand is often the case, the NICS is presented with a legal definition of a crime that at least has a disjunctive element including a subpart that meets the “misdemeanor crime of

⁶ Consistent with the statutory requirement, the NICS regulations likewise provide that a denial should issue only when the NICS has “information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. § 922 or state law.” 28 C.F.R. § 25.6(c)(1)(C); *see also id.* § 25.2 (defining “Open” status as the period in which the NICS researches “potentially prohibiting records” for “definitive information”).

domestic violence” definition, and with a record of conviction that does not specify under which subpart the defendant was convicted, then the NICS does have information indicating the possibility of a disqualification, even if not enough to justify a denial. The NICS might *decline* to conclude that the transfer “would *not* violate” the law. A “delayed” response, rather than an immediate “proceed,” would allow the NICS three days in which to pursue the matter before a transfer occurred. *See id.* § 25.6(c)(1)(iv)(B) (explaining that delay indicates that the NICS has found “a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm”). And given the limited time and resources available to the NICS, a police report or similar record demonstrating alleged conduct that, if charged and proved, might have justified a conviction under the requisite subpart, may be useful for narrowing the field of candidates on which the NICS will conduct more detailed background checks. Even if it could not reach a resolution within the three-day period, and the transfer were allowed pursuant to the statutory requirement, the NICS could continue to investigate and, if appropriate, issue a delayed denial and refer the matter to the ATF. Similar reasoning could apply if a prior conviction involved a statutory crime, not familiar to the NICS, that was stated in general terms drawing on the common law. A police report may assist the NICS in determining whether research into the case law defining the elements of the crime is likely to be worthwhile.

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Eligibility of a Retired Army Officer to Be Appointed Inspector General of the Department of Defense

A retired officer of the Regular Army, not on active duty, is not a “member of the Armed Forces, active or reserve,” under section 8 of the Inspector General Act of 1978 and therefore is not disqualified from being appointed as Inspector General of the Department of Defense.

May 18, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE

Section 8 of the Inspector General Act of 1978 (“IG Act”) provides that “[n]o member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.” 5 U.S.C. app., IG Act § 8(a) (2006). You have asked whether a retired officer of the Regular Army, not on active duty, is a “member of the Armed Forces, active or reserve” under this provision and thus is disqualified from being appointed as Inspector General (“IG”) of the Department of Defense. We conclude that this exclusion does not apply to such a person, because he is neither an “active” nor a “reserve” member of the Armed Forces within the meaning of section 8.

Neither the IG Act nor title 10 of the United States Code clearly defines the phrase “member of the Armed Forces” in the context of section 8 of the IG Act, but it is clear that mere retirement does not remove an officer from membership in the Armed Forces. Section 3075 of title 10 describes “the retired officers . . . of the Regular Army” as part of the “Regular Army.” 10 U.S.C. § 3075(b)(3) (2006). And section 688 lists among the “members of the armed forces” who “may be ordered to active duty” a “retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps.” *Id.* § 688(a), (b)(1). That is, officers who retire from active duty in the Army remain part of the Regular Army, and members of the Regular Army are “members of the armed forces.” Other statutes similarly refer to a “retired member of the Armed Forces.” *See, e.g.*, 5 U.S.C. § 2108(5) (2006); *id.* § 3326; *see generally* Memorandum for George P. Williams, Associate Counsel to the President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of Retired Reserve Officers to the National Selective Service Appeal Board* at 2 (July 25, 1974) (concluding that “a retired member of a reserve component of the armed forces” is a member of the Armed Forces). Your office shares the view, based in part on common usage in the military establishment, that an officer who merely retires from the Regular Army remains a “member of the Armed Forces.” Thus, if section 8 of the IG Act simply barred appointment of a “member of the Armed Forces,” without the additional phrase “active or reserve,” it likely would bar appointment of a retired Regular Army officer. The use of the additional phrase “active or reserve” therefore

suggests some sort of limitation; otherwise it would not clearly add any meaning to the statute.

The reference in section 8's additional phrase to "reserve" members is not directly relevant here. We understand that the prospective nominee is retired from the Regular Army rather than the Army Reserve. The reserve consists of three categories, and the prospective nominee is not in any of them. *See* 10 U.S.C. § 10141(a) (2006) (providing that "[e]ach Reserve shall be placed in one of [the following] categories"—"a Ready Reserve, a Standby Reserve, and a Retired Reserve"); *id.* § 10154 (defining "Retired Reserve" to include "Reserves who are or have been retired under" various sections of the U.S. Code and "Reserves who have been transferred to the Retired Reserve"). He thus is not a "reserve" "member of the Armed Forces." The applicability of section 8's prohibition therefore turns on whether he remains an "active" "member of the Armed Forces."

Neither section 8 nor title 10 defines the term "active" in the military context. It does not appear to be a term of art; rather, it has two plausible meanings in this context, both of which make it equivalent to more precise terms. "Active" can be shorthand for "active duty," which title 10 defines as "full-time duty in the active military service of the United States." *Id.* § 101(d)(1). "Active" also may, you have explained, be used to mean "regular," in contrast to "reserve," *see generally id.* § 101(b)(12) ("The term 'regular,' with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force."), although this latter usage is colloquial and considered imprecise in the Department of Defense. If the former meaning applied in section 8, then that section's prohibition would extend only to active-duty and reserve members. A retired regular officer of the Army not on active duty is neither. If, however, the term "active" were understood to mean "regular" in section 8, then a retired officer of the Army would be subject to the prohibition, because, as explained, he remains a member of a regular component of the Armed Forces—the Regular Army.

Although the answer is not beyond dispute, the evidence is stronger in favor of the former meaning of "active." This reading finds support in the 1982 act that added section 8 to the IG Act, in much of the relevant usage in title 10; in the general approach of Congress to appointments of retired and reserve officers to non-military positions in the Department of Defense, and in the traditional and constitutionally-based presumption that the President has broad discretion in selecting persons for appointment as federal officers.

First, Public Law 97-252, which added section 8 to the IG Act as part of a broader statute concerning the military, repeatedly uses the word "active" as part of the phrase "active duty." Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, §§ 401, 402(b), 501(b), 502, 1116, 96 Stat. 718, 725–26, 750 (1982). Only twice does the statute use the term "active" by itself—the first in adding the provision at issue, *id.* § 1117(b), 96 Stat. at 751, and the second in

“find[ing] that . . . the National Guard and Reserve Forces of the United States are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice, to *augment the active military forces* in time of national emergency,” *id.* § 1130(a)(1), 96 Stat. at 759 (emphasis added). The latter usage might suggest that the term means “regular” forces, as contrasted to “the National Guard and Reserve Forces,” but seems better read as referring more narrowly to those forces that are on active duty and thus presently “ready to respond” should an emergency arise. Retired officers, even if they too might be called upon in time of national emergency by being “ordered to active duty,” 10 U.S.C. § 688(a), (b)(1); *see also id.* § 973(b)(1)(B) (referring to retired regular officer being called to active duty), presumably would not be presently ready to respond in such a situation. The usage in section 1130 of the 1982 act thus, although not conclusively, suggests that Congress used “active” as shorthand for “active duty.” It is reasonable to apply the same sense to the other use of the same term in the 1982 statute.¹

Second, uses of the phrase “active and reserve” and the term “active service” in title 10 indicate, on the whole, that “active” more commonly has the sense of “active duty.” As to the phrase “active and reserve,” which is the most relevant to the usage in section 8 of the IG Act, section 167 of title 10, for example, speaks of the “active and reserve special operations forces of the armed forces stationed in the United States” and says that they should be “assigned to the special operations command.” 10 U.S.C. § 167(b) (2006). And section 487 requires that certain reports include a description “identify[ing] the active and reserve component units of the armed forces participating at the battalion, squadron, or an equivalent level (or a higher level) in contingency operations, major training events, and other exercises and contingencies of such a scale that the exercises and contingencies receive an official designation.” *Id.* § 487(b)(4). The references to “special operations forces” being “stationed” and “assigned” to a command, and to units “participating” in various “operations,” suggest that the “active” forces and component units being discussed are those on “active duty.” Similarly, in the term “active service” in title 10, “active” has the sense of “active duty” rather than referring to anyone who is a member of the regular Armed Forces. Section 1175,

¹ The legislative history is largely inconclusive. The House Conference Report accompanying the final bill simply echoes the bill’s terms: “Both the House and Senate provisions would prohibit the appointment of a member of the Armed Forces, active or reserve, as Inspector General of the Department of Defense.” H.R. Conf. Rep. No. 97-749, at 176, *reprinted in* 1982 U.S.C.A.N. 1569, 1581. The sponsor of the legislation in the Senate, Senator Roth, stated that his “amendment would provide for a *civilian* Inspector General in the Defense Department and *would not permit any military personnel* to assume the Inspector General position.” 128 Cong. Rec. 9678 (May 12, 1982) (emphases added). As we explain below, a retired Regular Army officer commonly would be understood as “civilian” for purposes of appointment in the Department of Defense. But it is not clear in what sense Senator Roth was using the phrase “any military personnel.”

for example, provides that a “member entitled to voluntary separation incentive payments who is also entitled to basic pay for active or reserve service, or compensation for inactive duty training, may elect to have a reduction in the voluntary separation incentive payable for the same period in an amount not to exceed the amount of the basic pay or compensation received for that period.” *Id.* § 1175(e)(2). The references to basic pay and separation, as well as the contrast between “active . . . service” and “inactive duty training,” suggest that “active” was intended to mean the equivalent of “active duty.” And section 942 speaks of “a person retired from the armed forces after 20 or more years of active service,” indicating that retirement and “active service” are distinct. *Id.* § 942(b)(4).

Some provisions in title 10 are more ambiguous, particularly those referring to “active and reserve components” of the various Armed Forces. Usage of “active” in this phrase is the one where “active” might most readily be an equivalent of the more precise term “regular” discussed above: But even in this context, usage often suggests a sense of “active duty,” or at least that, even if the phrase “active component” technically includes persons retired from a regular component (because they remain members of the Armed Forces and are not in a reserve component), its focus is on the active-duty members of that component. Section 118, for example, refers to the “discharge” of particular “missions,” *id.* § 118(d)(16) (requiring that a report submitted by the Secretary of Defense include “[t]he homeland defense and support to civil authority missions of the active and reserve components, including the organization and capabilities required for the active and reserve components to discharge each such mission”); section 153 refers to the ability of active and reserve components to “execute” a military strategy, *id.* § 153(d)(2)(G) (requiring an “[a]ssessment of the capabilities and adequacy of United States forces (including both active and reserve components) to successfully execute the national military strategy”), and to “the readiness” of those components, *id.* § 153(d)(3)(B) (providing that “the Chairman should make assumptions pertaining to the readiness of United States forces (in both the active and reserve components)”); and section 2815 refers to the “joint use” of a construction project by active and reserve components, *id.* § 2815(a) (defining “joint use military construction project” to mean a construction project intended to be used by “both the active and a reserve component of a single armed force” or “two or more components (whether active or reserve components) of the armed forces”). On balance, then, the weight of the statutory evidence of usage seems to be that Congress has used “active” in the context of the Armed Forces either ambiguously or as the equivalent of “active duty,” and that, as “active” is used in section 8 of the IG Act, the better reading is that it is equivalent to “active duty.”

Third, other provisions governing the appointment of persons to non-military offices within the Department of Defense typically permit the appointment of both retired and reserve officers of the Armed Forces, establishing a background rule for positions requiring presidential appointment and Senate confirmation that “active duty” officers are the only ones excluded. Congress reasonably can be

taken to have legislated in light of this background rule. And reading the ambiguous reference to “active” in section 8 of the IG Act as meaning “active duty” conforms the prohibition to this background rule as far as the text allows.

Numerous sections in title 10 require that presidentially appointed, Senate-confirmed officers in the Department be “appointed from civilian life.” *See, e.g.*, 10 U.S.C. §§ 113(a) (2006) (Secretary), 132(a) (Deputy Secretary), 133(a) (Under Secretary for Acquisition, Technology, and Logistics), 134(a) (Under Secretary for Policy), 135(a) (Under Secretary (Comptroller)), 136(a) (Under Secretary for Personnel and Readiness), 137(a) (Under Secretary for Intelligence), 138(a) (Assistant Secretaries), 140(a) (General Counsel), 3013(a) (Secretary of the Army), 5013(a) (Secretary of the Navy), 8013(a) (Secretary of the Air Force). Your office has informed us that the Department of Defense long has understood that language to permit the appointment of retired and reserve officers not on active duty. This understanding is supported by, and may well be based on, a 1961 memorandum of this office for your department, in which we concluded that a retired regular officer is not automatically disqualified from appointment to such positions, and that whether he is “in civilian life” depends on whether he has in fact “ceased to engage in military service and ha[s] entered civil life and civil pursuits.” Memorandum for Cyrus R. Vance, General Counsel, Department of Defense, from Harold F. Reis, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Eligibility of a Retired Regular Officer of the Armed Forces to be Appointed to the Position of Under Secretary or Assistant Secretary of One of the Military Departments* at 3 (Feb. 3, 1961) (internal quotation marks omitted). We added that, when Congress does seek categorically to exclude retired regular officers from appointment to an office, it does so “in unmistakable language,” *id.*, and “expressly,” *id.* at 4.

This background rule is not unqualified, but typically there is only a brief waiting period immediately following retirement, or an exception for reserve or retired officers called to extended active duty. Thus, consistent with this agency understanding, 5 U.S.C. § 3326(b) provides that a “retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense . . . during the period of 180 days immediately after his retirement” only under specific circumstances, including a “state of national emergency.” Section 973 of title 10 similarly prohibits an “active duty” officer from “hold[ing] . . . or exercis[ing] the functions of” a presidentially appointed and Senate-confirmed “civil office in the Government of the United States,” 10 U.S.C. § 973(b)(2)(A) (2006), and includes within the prohibition a retired or reserve officer who is “under a call or order to active duty for a period in excess of 270 days,” *id.* § 973(b)(1)(B) & (C).

Taken together, these provisions indicate that Congress has broadly allowed retired as well as reserve members of the Armed Forces to hold Senate-confirmed civilian positions in the Department of Defense, and in particular that both retired

and reserve members of the Armed Forces are in “civilian life” so long as they are not called to active duty. The IG for the Defense Department also holds a Senate-confirmed position. It is appropriate to read the prohibition in section 8 of the IG Act to be as consistent with this background rule as the text allows. To the extent that section 8 unambiguously applies to “reserve” members of the Armed Forces, it clearly overrides the background rule; but given the ambiguity of the use of “active” in section 8, it is appropriate to read that term as consistent with the background rule, excluding “active duty” members but not members retired from active duty. (We need not here consider the application of section 8 or of 10 U.S.C. § 973 if a retired member serving as IG were called to active duty.)

Reading section 8 in light of this background rule also answers any conflict of interest concerns that one might see in the appointment of a retired member of the Armed Forces to be IG for the Defense Department. For example, an IG who is retired from the Regular Army may have occasion to audit the Army’s retirement program or, in the course of an audit, recommendation, or other analysis, to apply aspects of the Uniform Code of Military Justice. But the same sorts of issues could arise if such a person filled one of the myriad senior positions cited above, yet Congress has not deemed such attenuated potential “conflicts” to be disqualifying. Thus, such concerns provide no ground for us to question our interpretation.

Finally, the term “active” as used in section 8 of the IG Act should, to the extent it is ambiguous, be read narrowly to protect the President’s discretion under the Constitution’s Appointments Clause in selecting “Officers of the United States.” Congress may, as an incident of establishing an office, prescribe “reasonable and relevant qualifications and rules of eligibility of appointees.” *Myers v. United States*, 272 U.S. 52, 129 (1926). The Attorney General has held this same view since well before the Court decided *Myers*. See *Civil-Service Commission*, 13 Op. Att’y Gen. 516, 520–21 (1871). But the discretion in selecting and appointing the best person to fill the office is the President’s alone. See *The Federalist* No. 76, at 512 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“In the act of nomination his judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment.”). As a result, qualifications imposed by Congress may “not so limit selection and so trench upon executive choice as to be in effect legislative designation,” *Myers*, 272 U.S. at 128, and Congress’s “right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will” of the appointing authority, *Civil-Service Commission*, 13 Op. Att’y Gen. at 520. Thus, “[c]ongressional attempts to limit the class of persons from whom the President may appoint the highest officers of the government . . . raise serious constitutional concerns.” *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 357 (1995); see *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (“Congressional limitations—even the placement of burdens—on the President’s appointment power may raise serious constitutional

questions. . . . Presidents have often viewed restrictions on their appointment power not to be legally binding.”). In this case, to read “active” as equivalent to “regular” would exclude from the President’s consideration for appointment all retired regular military personnel—in addition to all of the active duty and reserve members, whom section 8 plainly excludes. To expand the exclusion according to such a reading would presumably bar a large additional number of persons from consideration, and Congress has not clearly indicated why it is relevant to faithfully performing the duties of Defense Department IG that one be entirely divorced from the regular Armed Forces. Indeed, that group may well contain some of the candidates whose experience and special competence best qualify them to perform those duties. By resolving the ambiguity in section 8 in favor of reading the word “active” to mean “active duty” rather than “regular,” we avoid unnecessarily constricting the President’s discretion in appointing the candidate he determines to be best for the job.

Our analysis does lead to one interpretive oddity: A retired regular officer could be appointed as IG (so long as he had not been called to active duty), but a retired *reserve* officer could not (because he would still be a “reserve” member of the Armed Forces, *see* 10 U.S.C. §§ 10141 & 10154 (2006)). If Congress’s desire was to bar from the position of IG persons who had “too much” connection to the military, this result may seem counterintuitive, as one assumes that a person retired from a regular rather than reserve component would have the greater connection. This result is a consequence of the fact that “reserve” has a clear statutory meaning whereas “active” does not. Congress’s decision to use language barring any “member of the Armed Forces, active or reserve,” rather than the more common language requiring that the appointee be “from civilian life,” does suggest an intention to exclude more persons than the latter, ordinary requirement does, but our reading of “reserve” gives effect to that intention: Persons on active duty are excluded, per the usual background rule, and, beyond that, persons who are reserve members also are excluded. In addition, if we were to read “active” as equivalent to “regular,” then, as suggested above, the phrase “active or reserve” in section 8, which is added to the phrase “member of the Armed Forces,” would serve no clear purpose, contrary to normal rules of construction.

For these reasons, we conclude that section 8 of the IG Act does not preclude appointment of a retired Regular Army officer not on active duty as IG for the Department of Defense.

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Constitutionality of the D.C. Voting Rights Act of 2007

S. 1257, a bill to grant the District of Columbia representation in the House of Representatives as well as to provide an additional House seat for Utah, violates the Constitution's provisions governing the composition and election of the United States Congress.

May 23, 2007

TESTIMONY BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY

Thank you for the opportunity to discuss the Department's views on S. 1257, a bill to grant the District of Columbia representation in the House of Representatives as well as to provide an additional House seat for Utah. For the same reasons stated in the Statement of Administration Policy on the House version of this legislation, the Administration concludes that S. 1257 violates the Constitution's provisions governing the composition and election of the United States Congress. Accordingly, if S. 1257 were presented to the President, his senior advisors would recommend that he veto the bill. I will confine my testimony to the constitutional issues posed by the legislation.

The Department's constitutional position on the legislation is straightforward and is dictated by the unambiguous text of the Constitution as understood and applied for over 200 years. Article I, Section 2 of the Constitution provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of *the several States*, and the Electors *in each State* shall have the Qualifications requisite for Electors of the most numerous branch of the *State Legislature*.

(Emphases added.)

This language, together with the language of eleven other explicit constitutional provisions, including the Twenty-Third Amendment ratified in 1961,¹ "makes clear just how deeply Congressional representation is tied to the structure of statehood."² The District of Columbia is not a state. In the absence of a constitutional amendment, therefore, the explicit provisions of the Constitution do not permit Congress to grant congressional representation to the District through legislation.

¹ *E.g.*, U.S. Const. art. I, §§ 2–4; art. II, § 1, cl. 2; amend. XIV, § 2; amend. XVII; amend. XXIII, § 1.

² *Adams v. Clinton*, 90 F. Supp. 2d 35, 47 (D.D.C.) (per curiam), *aff'd*, 531 U.S. 941 (2000).

Shortly after the Constitution was ratified, the District of Columbia was established as the seat of government of the United States in accordance with Article I, Section 8, Clause 17 of the Constitution. The Framers deliberately placed the capital in a federal enclave that was not itself a state to ensure that the federal government had the ability to protect itself from potentially hostile state forces. The Framers also gave Congress “exclusive” authority to enact legislation for the internal governance of the enclave to be chosen as the seat of government—the same authority Congress wields over the many other federal enclaves ceded by the states.

Beginning even before the District of Columbia was established as the seat of government, and continuing to today, there have been determined efforts to obtain congressional representation for the District. Apart from the various unsuccessful attempts to secure such representation through litigation, such efforts have consistently recognized that, because the District is not a state, a constitutional amendment is necessary for it to obtain congressional representation. S. 1257 represents a departure from that settled constitutional and historical understanding, which has long been recognized and accepted by even ardent proponents of District representation.

One of the earliest attempts to secure congressional representation for the seat of government was made by no less a constitutional authority than Alexander Hamilton at the pivotal New York ratifying convention. Recognizing that the proposed Constitution did not provide congressional representation for those who would reside in the seat of government, Hamilton offered an amendment to the Enclave Clause that would have provided:

That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [left blank] such District shall cease to be parcel of the State granting the Same, *and Provision shall be made by Congress for their having a District Representation in that Body.*³

Hamilton’s proposed amendment was rejected. Other historical materials further confirm the contemporary understanding that the Constitution did not contemplate congressional representation for the District and that a constitutional amendment would be necessary to make such provision.⁴ These historical facts refute the

³ 5 *The Papers of Alexander Hamilton* 189–90 (Harold C. Syrett ed., 1962) (emphasis added).

⁴ See 10 *Annals of Cong.* 991, 998–99 (1801) (remarks of Rep. John Dennis of Maryland) (stating that because of District residents’ “contiguity to, and residence among the members of [Congress],” that “though they might not be represented in the national body, their voice would be heard. But if it should be necessary [that they be represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient”); see also 5 *The*

contention by proponents of S. 1257 that the Framers simply did not consider the lack of congressional representation and, if they had considered it, that they would have provided such representation. In fact, Framers and ratifiers did consider the question and rejected a proposal for such representation.

In more recent years, major efforts to provide congressional representation for the District were pursued in Congress in the 1960s and 1970s, but on each occasion Congress expressly recognized that obtaining such representation would require either statehood or a constitutional amendment. For example, when the House Judiciary Committee favorably recommended a constitutional amendment for District representation in 1967, it stated as follows:

If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.⁵

Congress again considered the District representation issue in 1975, and the House Judiciary Committee again expressly acknowledged that, “[i]f the citizens of the District are to have voting representation in Congress, a constitutional amendment is essential; statutory action will not suffice.”⁶

Of course, the courts have not directly reviewed the constitutionality of a statute purporting to grant the District representation because, for the reasons so forcefully reiterated by the House Judiciary Committee, Congress has not previously considered such legislation constitutionally permissible. But numerous federal courts *have* emphatically concluded that the existing Constitution does not permit the provision of congressional representation for the District. In *Adams v. Clinton*, a three-judge court stated, in a decision affirmed by the Supreme Court, that “the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives” and stressed that Article I “makes clear just how deeply Congressional representation is tied to the structure of statehood.” 90 F. Supp. 2d 35, 46–47, 50 (D.D.C.) (per curiam), *aff’d*, 531 U.S. 941 (2000); *see generally S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979) (stating that summary affirmance is a preceden-

Documentary History of the Ratification of the Constitution 621 (John P. Kaminski & Gaspare J. Saladino eds., 1998) (statement by Samuel Osgood, a delegate to the Massachusetts ratifying convention, that he could accept the seat of government provision only if it were amended to provide that the District be “represented in the lower House,” though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention).

⁵ *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 90-819, at 4 (1967) (emphasis added).

⁶ *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 94-714, at 4 (1975).

tial ruling on the merits). In *Banner v. United States*, a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: “The Constitution denies District residents voting representation in Congress. . . . Congress is the District’s Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality.” 428 F.3d 303, 309 (D.C. Cir. 2005) (*per curiam*).⁷ The court added: “It is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress.” *Id.* at 312. And in explaining why the Constitution does not permit the District’s delegate in Congress to have the voting power of a representative in *Michel v. Anderson*, 817 F. Supp. 126 (D.D.C. 1993), the court stressed that the legislative power “is constitutionally limited to ‘Members chosen . . . by the People of the several States.’ U.S. Const. art. I, § [2], cl. 1.” *Id.* at 140.

The numerous explicit provisions of the constitutional text; the consistent construction of those provisions throughout the course of American history by courts, Congress, and the Executive;⁸ and the historical evidence of the Framers’ and ratifiers’ intent in adopting the Constitution conclusively demonstrate that the Constitution does not permit the granting of congressional representation to the District by simple legislation.

We are aware of, and not persuaded by, the recent and novel claim that this legislation should be viewed as a constitutional exercise of Congress’s authority under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, to “exercise exclusive legislation” over the seat of government and other federal enclaves. That theory is insupportable. First, it is incompatible with the plain language of the many provisions of the Constitution that, unlike the Enclave Clause, are directly and specifically concerned with the composition, election, and very nature of the House of Representatives and the Congress. Those provisions were the very linchpin of the Constitution, because it was only by reconciling the conflicting wishes of the large and small states as to representation in Congress that the Great Compromise that enabled the Constitution’s ratification was made possible.

⁷ Judge Roberts was a member of the D.C. Circuit when *Banner* was briefed and argued, but was serving as Chief Justice when the opinion issued. *See Banner*, 428 F.3d at 304–05 n.1.

⁸ *See, e.g.*, Letter for Mr. Benjamin Zelenko, Committee on the Judiciary, House of Representatives, from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1967) (expressing the view that “a constitutional amendment is essential” for the District to obtain voting representation in Congress in the recommendations for the Committee Report on a proposed constitutional amendment); *District of Columbia Representation in Congress: Hearings on S.J. Res. 65 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 95th Cong. 16–29 (1978) (statement of John M. Harmon, Assistant Attorney General, Office of Legal Counsel). In endorsing a constitutional amendment as the means of obtaining congressional representation for the District, Mr. Harmon discussed the alternative ways of obtaining such representation, particularly the option of statehood legislation. Conspicuous by its absence was any suggestion that such representation could be provided through legislation granting the District a seat.

Consequently, every word of Article I's provisions concerning the composition and election of the House and the Senate—and particularly the words repeatedly linking congressional representation to “each State” or “the People of the several States”—was carefully chosen. In contrast, the Enclave Clause has nothing to do with the composition, qualifications, or election of members of Congress. Its provision for “exclusive legislation” concerns legislation respecting the *internal operation of* “such District” and other enclaves. The Enclave Clause gives Congress extensive legislative authority “over such District,” but that authority plainly does not extend to legislation affecting the entire nation. S. 1257 would alter the very nature of the House of Representatives. By no reasonable construction can the narrowly focused provisions of the Enclave Clause be construed to give Congress such sweeping authority.

Second, whatever power Congress has under the Enclave Clause is limited by the other provisions of the Constitution. As stated by the Supreme Court in *Bimms v. United States*, 194 U.S. 486 (1904), the Enclave Clause gives Congress plenary power over the District “save as controlled by the provisions of the Constitution.” *Id.* at 491. As the Supreme Court has further explained, the Clause gives Congress legislative authority over the District and other enclaves “in all cases where legislation is possible.”⁹ The composition, election, and qualifications of members of the House are expressly and specifically governed by other provisions of the Constitution that tie congressional representation to statehood. The Enclave Clause gives Congress no authority to deviate from those core constitutional provisions.

Third, the notion that the Enclave Clause authorized legislation establishing congressional representation for the seat of government is contrary to the contemporary understanding of the Framers and the consistent historical practice of Congress. As I mentioned earlier, the amendment unsuccessfully offered by Alexander Hamilton at the New York ratifying convention to authorize such representation when the seat of government's population reached a certain level persuasively demonstrates that the Framers did not read the Enclave Clause to authorize or contemplate such representation. Other contemporaneous historical evidence reinforces that understanding. *See supra* note 4. Moreover, Congress's consistent recognition in practice that constitutional amendments were necessary not only to provide congressional representation for the District, but also to grant it electoral votes for President and Vice President under the Twenty-Third Amendment, belies the notion that the Enclave Clause has all along authorized the achievement of such measures through simple legislation. Given the enthusiastic support for such measures by their congressional proponents, it is simply implausible that Congress would not previously have discovered and utilized that authority as a means of avoiding the enormous difficulties of constitutional amendment.

⁹ *O'Donoghue v. United States*, 289 U.S. 516, 539 (1993) (citation omitted).

Fourth, the proponents' interpretation of the Enclave Clause proves far too much; the consequences that would necessarily flow from acceptance of that theory demonstrate its implausibility. As the Supreme Court has recognized, "[t]he power of Congress over federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia."¹⁰ It follows that if Congress has constitutional authority to provide congressional representation for the District under the Enclave Clause, it has the same authority for the other numerous federal enclaves (such as various military bases and assorted federal lands ceded by the states). But that is not all. The Supreme Court has also recognized that Congress's authority to legislate respecting the U.S. territories under the Territories Clause, U.S. Const. art. IV, § 3, cl. 2, is equivalent to its "exclusive legislation" authority under the Enclave Clause. *See, e.g., Binns*, 194 U.S. at 488. If the general language of the Enclave Clause provides authority to depart from the congressional representational provisions of Article I, it is not apparent why similar authority does not reside in the Territories Clause, which would enable Congress to enact legislation authorizing congressional representation for Puerto Rico, the Virgin Islands, and other territories. These unavoidable corollaries of the theory underlying S. 1257 demonstrate its invalidity. Given the great care with which the Framers provided for state-based congressional representation in the Composition Clause and related provisions, it is implausible to suggest that they would have simultaneously provided for the subversion of those very provisions by giving Congress *carte blanche* to create an indefinite number of additional seats under the Enclave Clause.

Finally, we note that the bill's proponents conspicuously fail to address another logical consequence that flows from the Enclave Clause theory: If Congress may grant the District representation in the House by virtue of its purportedly expansive authority to legislate to further the District's general welfare, it follows logically that it could use the same authority to grant the District (and other enclaves and territories) two Senators as well.

At bottom, the theory that underlies S. 1257 rests on the premise that the Framers drafted a Constitution that left the door open for the creation of an indefinite number of congressional seats that would have fatally undermined the carefully crafted representation provisions that were the linchpin of the Constitution. Such a premise is contradicted by the historical and constitutional record.

The clear and carefully phrased provisions for state-based congressional representation constitute the very bedrock of our Constitution. Those provisions have stood the test of time in providing a strong and stable basis for the preservation of constitutional democracy and the rule of law. If enacted, S. 1257 would undermine the integrity of those critical provisions and open the door to further deviations

¹⁰ *Paul v. United States*, 371 U.S. 245, 263–64 (1963).

from the successful framework that is our constitutional heritage. If the District is to be accorded congressional representation without statehood, it must be accomplished through a process that is consistent with our constitutional scheme, such as amendment as provided by Article V of the Constitution.

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Application of the Emoluments Clause to a Member of the FBI Director's Advisory Board

A member of the FBI Director's Advisory Board does not hold an "Office of Profit or Trust" under the Emoluments Clause of the Constitution.

June 15, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL FEDERAL BUREAU OF INVESTIGATION

You have asked whether a member of the Federal Bureau of Investigation ("FBI") Director's Advisory Board (the "Board") holds an "Office of Profit or Trust" under the Emoluments Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 8. We conclude that he does not.

I.

The Board is charged with advising the Director of the FBI ("Director") on how the FBI can more effectively exploit and apply science and technology to improve its operations, particularly its priorities of preventing terrorist attacks, countering foreign intelligence operations, combating cyber-based attacks, and strengthening the FBI's collaboration with other federal law enforcement agencies. *See* FBI Press Release, *FBI Director Renames and Announces Additions to Advisory Board* (Oct. 6, 2005) (available at <http://www.fbi.gov/news/pressrel/press-releases/fbi-director-renames-and-announces-additions-to-advisory-board>, last visited Aug. 11, 2014); *see also* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 109, 117 Stat. 11, 67 ("[The Board] shall not be considered to be a Federal advisory committee for purposes of the Federal Advisory Committee Act."). Board members serve, without terms, at the pleasure of the Director. The Board is scheduled to meet four times per year, unless the Director calls additional ad hoc meetings. Although Board members are entitled to travel reimbursements and are classified as special government employees, they receive no other compensation. *See* 18 U.S.C. § 202(a) (2000).

The sole role of the Board is to advise the Director, who is free to adopt, modify, or ignore its recommendations. Board members have no decisional or enforcement authority, and they exercise no supervisory responsibilities over other persons or employees as a result of their positions on the Board. Board members cannot bind the United States or direct the expenditure of appropriated or non-appropriated funds. In addition, Board members do not represent or act on behalf of the Director or the FBI in any particular matter. Board members hold Top Secret security clearances and may receive access to classified information pursuant to their service on the Board, although they do not possess any authority

to access, remove, disseminate, declassify, publish, modify, change, manipulate, originate, or otherwise regulate or oversee the government's handling of classified information. Members of the Board sign nondisclosure agreements in which they agree not to disclose classified information they receive.

You have indicated that several Board members wish to travel overseas at the invitation of foreign governments in connection with their non-FBI interests and wish to be reimbursed by those governments for their travel expenses. Travel reimbursements by foreign governments may constitute emoluments under the Emoluments Clause. *See, e.g.*, Memorandum for John G. Gainey, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expense Reimbursement in Connection with Chairman Stone's Trip to Indonesia* at 2 n.2 (Aug. 11, 1980).¹ The question before us is whether membership on the Board is an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. We conclude that it is not.

II.

The Emoluments Clause provides, in relevant part, that "no Person holding *any Office of Profit or Trust under [the United States]*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8 (emphasis added). "[I]n order to qualify as an 'Office of Profit or Trust under [the United States],' a position must, first and foremost, be an 'Office under the United States.'" *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55, 56 (2005) ("2005 Opinion") (second alteration in original). In the 2005 Opinion, we concluded that a member of the President's Council on Bioethics, an advisory board, did not hold an "Office under the United States" and therefore was not subject to the Emoluments Clause. As we stated there:

¹ Congress has already granted its consent under the Emoluments Clause for officials to receive reimbursement from foreign governments for certain foreign travel expenses. The Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2000), allows employees, with the approval of their agencies, to receive payment of appropriate travel expenses for travel taking place entirely outside the United States. *Id.* § 7342(c)(1)(B)(ii). But that statute does not address what is often the most significant single expense incurred in foreign travel, the cost of the flight to and from the United States. We assume, for purposes of this opinion, that the travel reimbursement received by Board members constitutes compensation for services, and therefore is not prohibited under section 7342(b). *See, e.g.*, *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) ("It seems clear that [the Foreign Gifts and Decorations Act] only addresses itself to gratuities, rather than compensation for services actually performed").

The text of the Emoluments Clause suggests that an “Office of Profit or Trust under [the United States]” must be an “Office under the United States.” . . . [T]o the extent that the phrase “of Profit or Trust” is relevant, it may serve to narrow an “Office . . . under [the United States]” to those that are “of Profit or Trust,” or an “Office of Profit or Trust” may be synonymous with an “Office . . . under [the United States],” but it is clear that the words “of Profit or Trust” do not expand coverage of the Emoluments Clause beyond what would otherwise qualify as an “Office . . . under [the United States].”

Id. at 56–57 (first ellipsis and first and second brackets added). The threshold question, therefore, in determining whether a member of the Board holds an “Office of Profit or Trust under [the United States]” is whether a position on the Board is an “Office under the United States.”

In the 2005 Opinion, we concluded that a purely advisory position is not an “Office under the United States.” Our analysis emphasized that persons holding advisory positions of the sort at issue there did not exercise governmental authority. *Id.* at 63–64. After reviewing two centuries of caselaw, authoritative commentaries, and numerous opinions of this Office, we observed that “[i]nnumerable . . . authorities . . . make clear that an indispensable element of a public ‘office’ is the exercise of some portion of delegated sovereign authority.” *Id.* at 67. *See generally Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87 (2007) (“*Appointments Clause*”) (“As a general matter, . . . one could define delegated sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit. . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law.”). We therefore concluded: “To be an ‘office,’ a position must at least involve some exercise of governmental authority, and an advisory position does not.” 2005 Opinion, 29 Op. O.L.C. at 64; *id.* at 71 (“As the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), . . . an ‘officer of the United States’ exercises ‘significant authority pursuant to the laws of the United States,’ *id.* at 126 (emphasis added).”); *accord Appointments Clause*, 31 Op. O.L.C. at 79, 86, 99–100.

The only relevant distinction between the advisory position at issue in the 2005 Opinion and membership on the Board is that a Board member may receive access to classified information in connection with his official duties.² To conclude that

² While the members of the President’s Committee on Bioethics—the subject of the 2005 Opinion—received modest compensation for their services, *see* 2005 Opinion, 29 Op. O.L.C. at 55, the members of the Board are not compensated. We have previously concluded, however, that while “an emolument is . . . a common characteristic of an office,” it “is not essential.” *Appointments Clause*, 31 Op. O.L.C. at 119.

membership on the Board is an “Office of Profit or Trust” within the meaning of the Emoluments Clause, therefore, we would necessarily have to conclude that, by receiving access to classified information, Board members have received a delegation by legal authority of a portion of the sovereign power of the federal government.

The mere provision of access to classified information, however, is not such a delegation. Board members are given access to classified information solely to help them perform their advisory function; they have no discretionary authority to access, remove, disseminate, declassify, publish, modify, change, manipulate, or originate classified information. They do not have supervisory or oversight authority for the government’s handling or regulation of classified information. *Cf.* 2005 Opinion, 29 Op. O.L.C. at 72–73 (discussing similar authority). Board members who receive such information do not thereby acquire “the right or power to make any . . . law, nor can they interpret or enforce any existing law,” 1 Asher C. Hinds, *Hinds’ Precedents of the House of Representatives of the United States* 604, 608 (1907), nor can they “hear and determine judicially questions submitted [to them],” *id.* at 607. Nor does their receipt of such information empower Board members to “bind the Government or do any act affecting the rights of a single individual citizen.” *Id.* at 610; *accord Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822) (“The power thus delegated and possessed [by an officer], may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, *and in its effects it will bind the rights of others . . .*”) (emphasis added). Rather, receipt of classified information only gives rise to a negative duty not to disclose that information to persons who may not lawfully have access to it. We do not understand the duty to safeguard classified information to constitute a portion of the sovereign power of the federal government. That duty is broadly analogous to the duty of any person entrusted with the due care of government property under his control, which—absent authority to alienate that property—has not traditionally been considered to constitute sovereign authority sufficient to render a position an “office.” *See Appointments Clause*, 31 Op. O.L.C. at 90 (collecting authorities).

In addition, the Board members’ duty of nondisclosure originates not in the statute creating the Board and establishing its duties, but in such authorities as confidentiality agreements executed by the Board members, Exec. Order No. 13292 (Mar. 25, 2003), 3 C.F.R. 196 (2003 Comp.), and generally applicable statutes penalizing the unauthorized disclosure of classified information, *see, e.g.*, 18 U.S.C. § 793(d), (f) (2000); *id.* § 798 (2000). *See generally Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (contrasting special trial judges, whose duties were “specified by statute,” with special masters, who were hired “on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute”); *id.* at 901 (opinion of Scalia, J.) (agreeing with this analysis); Floyd R. Mechem, *A Treatise on the Law of Public*

Offices and Officers § 507, at 332 (1890) (“The authority of a public officer in any given case consists of those powers which are expressly conferred upon him by the act appointing him, or which are expressly annexed to the office by the law creating it or some other law referring to it, or which are attached to the office by common law as incidents to it.”). Although we do not consider that fact dispositive, *see Appointments Clause*, 31 Op. O.L.C. at 117–18, it tends to confirm that Board members’ duty of nondisclosure is simply ancillary to their advisory duties, which, as noted above, are not sufficient to render the position an “office” under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. It also tends to confirm that the Board members’ duty of nondisclosure is indistinguishable from the general duty that any employee or even contractor with access to such information would have, rather than constituting some special authority associated with service on the Board.

Accordingly, we conclude that a member of the Board does not hold an “Office under the United States” by virtue of that position, and likewise does not hold an “Office of Profit or Trust [under the United States]” within the meaning of the Emoluments Clause. *See* 2005 Opinion, 29 Op. O.L.C. at 71 (“A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore . . . would not be an office under the Emoluments Clause . . .”).

We acknowledge that the 2005 Opinion, in concluding that members of the President’s Council on Bioethics were not “officers” for purposes of the Emoluments Clause, noted, among other factors, that members did not have access to classified information, 29 Op. O.L.C. at 55, and cited a handful of opinions that “suggested that individuals with access to sensitive, national security-related information held ‘Office[s] of Profit or Trust’ under the Emoluments Clause, without further analyzing the extent of governmental authority exercised by these federal employees.” *Id.* at 72; *see also id.* at 72 n.10 (collecting citations). In light of those opinions, we wrote, “it is at least arguable that the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public ‘office.’” *Id.* at 72.

One of those opinions involved a part-time staff consultant to the Nuclear Regulatory Commission. *See Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96 (1986) (“1986 Opinion”).³ In the 1986 Opinion, we concluded that such a staff consultant

³ The 2005 Opinion also cites a Letter for James A. Fitzgerald, Assistant General Counsel, Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (June 3, 1986). That is not, however, a separate opinion, but simply the unpublished version of the 1986 Opinion.

could not, consistent with the Emoluments Clause, accept employment with a private domestic corporation to perform work on a contract with a foreign government. *Id.* at 96. In reaching that conclusion, we appeared to place heavy weight on the fact that the consultant might have access to sensitive or classified information:

[The consultant] is highly valued for his abilities and . . . in the course of his employment, he may develop or have access to sensitive and important, perhaps classified information. Even without knowing more specifically the duties of his employment, these factors are a sufficient indication that the United States government has placed great trust in [him] and requires and expects his undivided loyalty. Therefore, we believe the Emoluments Clause applies to him.

Id. at 99. In the 1986 Opinion, we did not consider whether access to classified information constitutes a delegation by legal authority of a portion of the sovereign power of the federal government. While we noted that “[p]rior opinions of this Office have assumed . . . that the persons covered by the Emoluments Clause were ‘officers of the United States,’” *id.* at 98, we interpreted the Emoluments Clause as a “prophylactic provision” whose reach was not limited to “officers of the United States.” *Id.* Instead, we concluded that the relevant inquiry under the Emoluments Clause was “whether [the employee’s] part-time position at the NRC could be characterized as one of profit or trust under the United States—a position requiring undivided loyalty to the United States government.” *Id.* As we have since determined, however, a person who does not hold an office under the United States is not subject to the Emoluments Clause. *See* 2005 Opinion, 29 Op. O.L.C. at 56 (“[I]n order to qualify as an ‘Office of Profit or Trust under [the United States],’ a position must, first and foremost, be an ‘Office under the United States.’”) (second alteration in original).

III.

A sentence in our 2005 Opinion identifies *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867), as supporting the proposition that “the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public ‘office.’” 2005 Opinion, 29 Op. O.L.C. at 72. But, on a close reading of *Hartwell*, we find it consistent with our analysis above. In *Hartwell*, the Court held that a clerk in the office of an assistant treasurer of the United States was an “officer of the United States” for purposes of a federal embezzlement statute. 73 U.S. at 391–93. In reaching that conclusion, the Court noted a number of factors, including that *Hartwell* was “charged with the safe-keeping of the public moneys of the United

States.” *Id.* at 392. By analogy to *Hartwell*, “it could be argued that a federal government employee charged with safeguarding sensitive national security-related information would likewise be a public officer charged with the exercise of some governmental authority.” 2005 Opinion, 29 Op. O.L.C. at 72.

We do not read *Hartwell* so broadly. The statute under which *Hartwell* was indicted applied to “all officers and other persons charged by this act or any other act with the safekeeping, transfer and disbursement of the public moneys.” 73 U.S. at 387 (emphasis and internal quotation marks omitted). The Court determined that *Hartwell* was both an “officer” and a “person charged with the safe-keeping of the public money within the meaning of the act.” *Id.* at 393 (emphasis and internal quotation marks omitted); *see also id.* (“Was the defendant an officer or person ‘charged with the safe-keeping of the public money’ within the meaning of the act? We think he was both.”). The fact that *Hartwell* was responsible for “the safe-keeping of the public moneys of the United States,” *id.* at 392, was relevant, not because it made *Hartwell* an officer, but because it made him an “officer[] [or] other person[] charged by this act or any other act with the safe-keeping, transfer and disbursement of the public moneys.” *Id.* at 387 (emphasis and internal quotation marks omitted). He therefore was liable for criminal prosecution under the act irrespective of the fact that he was an officer. *See id.* at 390–91.

That *Hartwell* was charged with the safekeeping of the public moneys of the United States does not appear to have been relevant to the Court’s analysis of whether he was also an officer. Rather, *Hartwell*’s status as an officer appears to have been based on the fact that his

employment . . . was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

Id. at 393. *Hartwell* therefore is not dispositive of whether being generally entrusted with due care of public funds is itself a delegation by legal authority of a portion of the sovereign power of the federal government, such that the recipient of such authority holds an “Office under the United States.” *A fortiori*, *Hartwell* does not determine whether receiving access to classified information constitutes such a delegation.

IV.

Because mere access to, or receipt of, classified information is not a delegation by legal authority of a portion of the sovereign power of the United States, a member of the Board does not hold an “Office under the United States” by virtue

of that position and therefore does not hold an “Office of Profit or Trust [under the United States]” within the meaning of the Emoluments Clause. *See* 2005 Opinion, 29 Op. O.L.C. at 72.⁴ To the extent the 1986 Opinion reached a contrary conclusion, the 2005 Opinion has substantially undermined the basis for that conclusion, and the 1986 Opinion is no longer authoritative.⁵

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Office of Legal Counsel

⁴ The FBI may, of course, take foreign ties into account in determining the propriety of a person's service on the Board and the appropriateness of granting security clearances.

⁵ The 2005 Opinion referred to two other opinions in which “we suggested that individuals with access to sensitive, national security-related information held ‘Office[s] of Profit or Trust’ under the Emoluments Clause.” 2005 Opinion, 29 Op. O.L.C. at 72; *see id.* at 72 n.10 (citing *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156 (1982), and Memorandum for James H. Thessin, Assistant Legal Adviser for Management, Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army* (Aug. 29, 1988)). In both of those opinions, however, the individuals in question were regular full-time employees of the United States government, and those opinions therefore do not directly bear on the part-time advisory positions at issue here.

Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act

The Religious Freedom Restoration Act is reasonably construed to require the Office of Justice Programs to exempt World Vision—a religious organization that has been awarded a grant under the Juvenile Justice and Delinquency Prevention Act—from the religious nondiscrimination provision in 42 U.S.C. § 3789d(c)(1).

June 29, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF JUSTICE PROGRAMS

World Vision, Inc., is a religious organization that has been awarded a \$1.5 million grant by the Office of Justice Programs (“OJP”) pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 (“JJDP A”), Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601–5792a (2000 & Supp. III 2003)). As a condition of receiving grants pursuant to the JJDP A, recipients must refrain from discriminating on the basis of religion in “employment in connection with any programs or activity” funded by the grant. 42 U.S.C. § 3789d(c)(1) (2000). You have asked whether the Religious Freedom Restoration Act (“RFRA”)—which prohibits the government from “substantially burden[ing]” religious exercise unless that burden “is the least restrictive means of furthering [a] compelling governmental interest,” 42 U.S.C. § 2000bb-1(b) (2000)—requires OJP to exempt World Vision from the religious nondiscrimination provision. We conclude that RFRA is reasonably construed to require that such an accommodation be made for World Vision, and that OJP would be within its legal discretion, under the JJDP A and under RFRA, to exempt World Vision from the religious nondiscrimination requirement of section 3789d(c)(1).¹

I.

A.

World Vision is “a Christian relief and development organization founded in 1950.” Letter for Marie E. Burke, Office of Justice Programs, from Brian K. Vasey, Associate General Counsel, World Vision, Inc., *Re: World Vision Earmark Award* at 2 (Sept. 8, 2005) (“Sept. 8 Letter”). Its stated mission is “to love and serve those in need as a demonstration of [its] faith, and the example of Christ.” *Id.* at 2–3. By its own account, World Vision is “a thoroughly religious organization.” Letter for Charles Moses and Marie Burke, Office of Justice Programs, from

¹ This opinion memorializes advice that we provided to you orally in May 2006.

Brian K. Vasey, Associate General Counsel, World Vision, Inc., *Re: World Vision Congressional Earmark Award* at 2 (Sept. 23, 2005) (“Sept. 23 Letter”).

World Vision operates projects both domestically and abroad. Domestically, it has focused on “at-risk youth” through its “Vision Youth Program.” Sept. 8 Letter at 3. This program serves “at-risk youth” in various communities by meeting their “basic needs,” pairing them with mentors, and providing job training and academic tutoring. *Id.*; Congressional Earmark Submission to Office of Justice Programs from World Vision, Inc. (“Grant Application”), att. 2, Program Narrative at 6–10 (May 26, 2005). The program serves beneficiaries regardless of their religious affiliation. Sept. 8 Letter at 3. It “do[es] not proselytize, and no government funds are ever used for religious activities.” *Id.*

Since its founding, World Vision has made it a policy to hire only “Christian staff to assist with the mission of the organization.” *Id.* at 2. World Vision states that it has done so in order to “maintain [its] identity and strength, which [are] at the core of [its] success,” *id.* at 3, and because it “can only remain true to [its] vision if [it] ha[s] the freedom to select like-minded staff, which includes staffing on a religious basis,” Sept. 23 Letter at 1. World Vision states that the work of the Vision Youth program is “very staff intensive.” *Id.* at 2. Its staff—all of whom “share a faith, passion and commitment to [World Vision’s] mission”—works closely with local volunteers and churches to meet the needs of at-risk youth. *Id.*²

B.

In the Consolidated Appropriations Act, 2005, Congress appropriated \$102,177,000 to the Department of Justice “for demonstration projects, as authorized by sections 261 and 262 of [the JJDPA].” Pub. L. No. 108-447, 118 Stat. 2809, 2866 (2004) (“2005 Appropriations Act”). Sections 261 and 262 of the JJDPA permit the Department to make grants to organizations that are working toward “the prevention, control, or reduction of juvenile delinquency.” 42 U.S.C. §§ 5665–5666 (Supp. III 2003). The conference report accompanying the 2005 Appropriations Act states that “OJP is expected to review the following proposals, [and] provide grants if warranted.” H.R. Rep. No. 108-792, at 769 (2004). Included among the listed proposals was “\$1,500,000 for World Vision for at-risk youth programs.” *Id.* at 771.

OJP thereafter solicited and received a grant application from World Vision, which requested \$1,479,965 to continue funding the Vision Youth Program

² We have had no contact with World Vision representatives and are not in a position to assess the sincerity of its professions about its religious belief and motivations or the accuracy of its factual representations about the organization and the two programs at issue. We therefore accept, for purposes of this memorandum, the accuracy of such representations in its letters and grant submission, in the understanding that review of such representations is ordinarily undertaken during the grant-making process.

(“Vision Youth: Transforming the Lives of At-Risk Youth”) and to initiate a new project called the “World Vision Northern Virginia Community Mobilization Initiative” (“Community Mobilization Initiative”). The Vision Youth Program seeks “to transform the lives of high-risk young people in eight locations across the country” by facilitating “one-on-one mentoring, educational enhancement, and life-skills training for at-risk children and youth.” Grant Application, att. 2, Program Narrative at 1. The grant would fund a portion of the salary and benefits of fourteen existing World Vision employees, each of whom would spend part of his or her time managing the Vision Youth Program funded by the grant. *Id.*, att. 1, Budget Narrative at 1. Those employees oversee the training of Youth Outreach Workers to implement the Vision Youth Program in local communities. *Id.*; see also *id.*, att. 2, Program Narrative at 7. The Youth Outreach Workers, in turn, recruit and train volunteers from local faith-based organizations, “forming a critical mass of supportive adults around these [at-risk] young people.” *Id.*, att. 2, Program Narrative at 7.

The Community Mobilization Initiative would seek to “address the escalating gang presence and related violence and criminal activities in the Northern Virginia metropolitan region.” *Id.* at 13. Like the Vision Youth program, the new initiative would “provid[e] mentoring to youth at-risk for gang involvement, build[] relationships with youth currently involved in gang activity, provid[e] training and workshops for families and the communities, and provid[e] alternative activities for youth at-risk for gang involvement.” *Id.* at 16. The grant would fund all or part of the salary and benefits of eight World Vision employees assigned to the anti-gang initiative. *Id.*, att. 1, Budget Narrative at 1–2. Those employees would work with local law enforcement, schools, and social service agencies “to identify concentrations of young people who are either in or vulnerable to recruitment by local gangs.” *Id.*, att. 2, Program Narrative at 18. In particular, they would initiate a “Neighborhood Transformation Project” and a “Community Outreach Campaign” to counteract gang formation and gang violence. *Id.* at 19–20.

OJP awarded World Vision the full amount of its request. Approximately \$713,110, or 48% of the grant funds, pays all or a portion of the salary and benefits of World Vision employees on the two projects. *Id.*, att. 1, Budget Narrative at 1. The balance covers travel expenses, supplies, consultant fees, and other miscellaneous expenses. *Id.* at 1–5. For the relevant fiscal year, the grant represents approximately 10% of the entire budget for World Vision’s domestic community-based programs, and approximately 75% of the public funding the organization is receiving for domestic operations. Sept. 23 Letter at 2.

C.

This grant, like all grants under the JJDP, is subject to 42 U.S.C. § 3789d(c), the nondiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (the “Safe Streets Act”). 42 U.S.C.

§ 5672(b) (2000) (“Section[] 3789d(c) . . . shall apply with respect to the administration of and compliance with this chapter”). That provision states that “[n]o person in any State shall on the ground of . . . religion . . . be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter.” 42 U.S.C. § 3789d(c)(1).

After approving the grant, OJP informed World Vision that it was subject to the religious nondiscrimination provision of the Safe Streets Act. Letter for Kimberlee LaGree Ross, World Vision, Inc., from Michael L. Alston, Director, Office for Civil Rights, Office of Justice Programs at 2 (Aug. 16, 2005). OJP noted that, “[c]onsequently, in many circumstances, it would be impermissible for faith-based organizations seeking or receiving funding authorized by these statutes to have policies or practices that condition hiring and other employment-related decisions on the religion of applicants or employees.” *Id.*

In response, World Vision “requested relief under the Religious Freedom and [sic] Restoration Act of 1993.” Sept. 23 Letter at 1.³

II.

Congress enacted the Religious Freedom Restoration Act in 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), to respond to the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which had “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” 42 U.S.C. § 2000bb(a)(4) (2000); *see also City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997). RFRA sought to re-impose that requirement by providing that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” 42 U.S.C. § 2000bb-1(a), unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest,” *id.* § 2000bb-1(b). RFRA thus mandates strict scrutiny of any federal law that substantially burdens the exercise of religion, even if the

³ On November 22, 2005, President Bush signed the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, which appropriated funds for demonstration projects under the JJDP A and included this provision: “[S]ection 702(a) of Public Law 88-352 shall apply to any grants for World Vision, described in House Report No. 108-792 and the statement of managers accompanying this Act, and awarded by the Attorney General.” Pub. L. No. 109-108, 119 Stat. 2290, 2303 (“2006 Appropriations Act”). On its face, however, section 702(a) of Public Law 88-352 (codified at 42 U.S.C. § 2000e-1(a) (2000)) exempts religious organizations only from the nondiscrimination provisions of Title VII of the Civil Rights Act of 1964, not from the nondiscrimination provision of the Safe Streets Act. The 2006 Appropriations Act thus does not address whether World Vision is exempt from 42 U.S.C. § 3789d(c).

burden is incidental to the application of a religion-neutral rule. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 430–31 (2006) (“*O Centro*”). RFRA applies “to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” 42 U.S.C. § 2000bb-3(a) (2000).

The White House Office of Faith-Based and Community Initiatives (“OFBCI”) takes the position that “an organization’s ability to select employees that share its common values and sense of purpose . . . is vital to all organizations, not just faith-based groups.” OFBCI, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations* at 3 (“*Faith-Based Organizations*”) (available at <http://georgewbush-whitehouse.archives.gov/government/fbci/religious-hiring-booklet-2005.pdf>, last visited Aug. 12, 2014). Because “[a] secular group that receives government money” to administer a federal program “is currently free to hire based on its ideology and mission,” OFBCI has stated that “[a]llowing religious groups to consider faith in hiring when they receive government funds simply levels the playing field—by making sure that, when it comes to serving impoverished Americans, faith-based groups are as welcome at the government’s table as non-religious ones.” *Id.* OFBCI has accordingly concluded that faith-based groups involved in administering federal social service programs “should retain their fundamental civil rights, including their ability . . . to take their faith into account when they make employment decisions.” *Id.*

Accordingly, the President directed in Executive Order 13279 that:

Consistent with the Free Exercise Clause and the Free Speech Clause of the Constitution, faith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character. Accordingly, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization.

Id. § 2(f), 3 C.F.R. 258, 260 (2002 Comp.) (“Order”). That executive order illustrates ways in which a faith-based organization may “continue to carry out its mission, including the definition . . . and expression of religious beliefs” while participating in a federally funded social service program:

Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities. In addition, [such] a faith-based organization . . . may retain religious terms in its organization's name, *select its board members on a religious basis*, and include religious references in its organization's mission statements and other chartering or governing documents.

Id. (emphasis added).⁴ The Order directs that agency heads “implement new policies for their respective agencies that are consistent with and necessary to further the fundamental principles and policymaking criteria articulated in section 2 of this order.” *Id.* § 3(b)(ii). In addition, we understand that the President wishes to exempt religious organizations that administer federally funded social services from religious nondiscrimination requirements imposed on their employment practices as a condition of funding, if RFRA is reasonably construed to require such an accommodation. See Memorandum for Ralph Boyd, Assistant Attorney General, Civil Rights Division, et al., from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Religious Freedom Restoration Act to Religious Nondiscrimination Requirements Imposed on Grantees Who Administer Federally Funded Services Under the Substance Abuse and Mental Health Services Act* at 1, 11 (Dec. 2, 2002) (“SAMHSA Memorandum”) (discussing application of this intention to SAMHSA grant program); E-mail for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from Neomi J. Rao, Associate Counsel to the President (May 10, 2006); *cf. Faith-Based Organizations* at 9 (“President Bush will strive to ensure that faith-based organizations that receive Federal funds retain their civil right to base employment decisions on their ideals and mission.”).

To implement Executive Order 13279, the Department of Justice adopted regulations that closely track its language. See 28 C.F.R. pt. 38 (2006). The regulations provide that, so long as such groups do not “use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization,” a religious organization that participates in the Department-funded programs or services “will retain its independence from Federal, State, and local governments, and may continue to carry out its mission,

⁴ We understand the four specific instances listed in section 2(f) of the Order to represent *examples* of ways in which a faith-based group could participate in social service programs while “continu[ing] to carry out its mission,” rather than to describe the limit of permissible accommodations. The relevant passage begins by noting a specific accommodation that can be made “[a]mong other things,” and the next sentence discusses three other instances of accommodations that can be made “[i]n addition” to that. Exec. Order No. 13279, § 2(f) (emphasis added). Accordingly, we do not understand the Order to suggest that it forecloses other possible accommodations of religiously-motivated hiring practices.

including the definition, practice, and expression of its religious beliefs.” *Id.* § 38.1(c). The regulations then repeat each of the specific examples of permissible religious practices listed in section 2(f) of the Order. *Id.* The regulations note, however, that “[s]ome Department programs . . . contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion.” *Id.* § 38.1(f). The regulations therefore recommend that grantees “consult with the appropriate Department program office to determine the scope of any applicable requirements.” *Id.*

For the reasons explained below, we conclude that RFRA is reasonably construed to require OJP to exempt World Vision from the Safe Streets Act’s religious nondiscrimination provision otherwise applicable to the grant in question, and that, accordingly, OJP would be within its legal discretion, under the JDDPA and under RFRA, to exempt World Vision from the religious nondiscrimination requirements of section 3789d(c)(1). In Part II.A, we explain that the World Vision programs funded by the grant are an “exercise of religion” under RFRA. In Part II.B, we determine that it is reasonable to conclude that requiring World Vision to comply with the nondiscrimination provision as a condition of receiving the grant would “substantially burden” its religious exercise. In Part II.C, we determine that applying a religious nondiscrimination provision to World Vision would not further a compelling governmental interest. Finally, in Part III, we discuss the consistency of our conclusions with relevant decisions of the Supreme Court concerning the government’s discretion to fund religious activities.

A.

RFRA originally provided that “the term ‘exercise of religion’ means the exercise of religion under the First Amendment to the Constitution.” Pub. L. No. 103-141, § 5(4), 107 Stat. at 1489. Many courts initially interpreted RFRA to require that the exercise of religion be “central” to the claimant’s religious faith. *See Adkins v. Kaspar*, 393 F.3d 559, 567 n.34 (5th Cir. 2004) (collecting cases). In 2000, however, Congress amended RFRA to incorporate the definition of “exercise of religion” from the newly enacted Religious Land Use and Institutionalized Persons Act (“RLUIPA”). Pub. L. No. 106-274, § 7(a)(3), 114 Stat. 803, 806 (codified at 42 U.S.C. § 2000bb-2(4) (2000)) (“As used in this chapter . . . the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title.”). RLUIPA provides that “[t]he term ‘religious exercise’ includes any exercise of religion, *whether or not compelled by, or central to, a system of religious belief.*” 42 U.S.C. § 2000cc-5(7)(A) (2000) (emphasis added). Significantly, courts that previously required a showing under RFRA that a burdened

religious practice was fundamental or central to the claimant's faith have repudiated that view since the 2000 amendment.⁵

Under the "broad definition" in RFRA, *Adkins*, 393 F.3d at 567, we conclude that World Vision's work as part of its "Vision Youth" and "Community Mobilization Initiative" programs constitutes the "exercise of religion" within the meaning of RFRA. The Supreme Court has long recognized that the "exercise" of religion protected by the First Amendment "involves not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877; *accord id.* at 893 (O'Connor, J., concurring in the judgment) ("conduct motivated by sincere religious belief" is "at least presumptively protected by the Free Exercise Clause"). The "exercise" of religion encompasses activity "grounded in religious belief." *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) (collecting authorities); *see also Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972) (rejecting argument that only belief is protected by Free Exercise Clause). The exercise of religion can include charitable work of the sort involved here. Justice

⁵ Compare, e.g., *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 662 (10th Cir. 2006) ("Under the definition of 'religious exercise' . . . , a religious exercise need not be mandatory for it to be protected under RFRA."), with *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) ("To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs . . . or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.") (superseded by RFRA as recognized in *Grace United Methodist*, 451 F.3d at 662–63); *see also Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("RLUIPA's broader definition of religious exercise, which need not be 'compelled by or central to' a particular religion," must be substituted for circuit's earlier, stricter test); *Adkins*, 393 F.3d at 567 n.34 (noting pre-amendment decisions and amendment); *id.* at 570 (rejecting centrality test, relying on RFRA amendment); *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) ("declin[ing] to adopt a definition of substantial burden that would require claimants to show that they either have been prevented from doing something their religion says they must, or compelled to do something their religion forbids"); *Peterson v. Minidoka County Sch. Dist. No. 131*, 118 F.3d 1351, 1357 (9th Cir. 1997) ("Francis of Assisi was exercising his religion when he gave his costly clothes to the poor; if a government had tried to prevent the gesture it would have violated his free exercise although he acted from no binding precept.").

While some post-amendment decisions still use language suggesting that religious beliefs must be central to be covered by RFRA (or RLUIPA), those opinions typically do not address the effect of the amendment, but rather uncritically quote decisions that predate the amendment. *See, e.g., Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) ("To constitute a substantial burden [under RLUIPA], the government policy or actions: must 'significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; . . . or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion.'" (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997))). Indeed, in *Murphy*, the court of appeals did not have to consider whether centrality of belief was necessary, because it accepted, for purposes of summary judgment, the sincerity of the plaintiff inmate's profession that worship with other church members, who could be Caucasian only, was central to his faith. *Id.* at 981, 988. The court of appeals remanded for trial on whether the inmate's beliefs were sincere, on whether the inability to worship communally was a substantial burden on the inmate's faith, and on whether the government had a compelling interest in prison security that justified its refusal to permit the inmate to worship with others of the same faith. *Id.* at 988–89.

Brennan, in his opinion concurring in the judgment in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 340-46 (1987), observed that religious groups “often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life [they] seek[] to foster.” *Id.* at 344. Justice Brennan opined that persons engaging in nonprofit activities with those purposes were engaged in the “exercise of religion.” *Id.* at 343-45. As courts have recognized, charitable work of this sort is an aspect of religious practice in many major world religions. *See, e.g., W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544 (D.D.C. 1994) (“[T]he concept of acts of charity as an essential part of religious worship is a central tenet of all major religions.”); *cf. Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704 (Mich. App. 1996) (“[P]roviding shelter or sanctuary to the needy[] has been part of the Christian religious tradition since the days of the Roman Empire.”).

World Vision’s stated purpose for undertaking these two programs is to “love and serve those in need as a demonstration of [its] faith, and the example of Christ.” Sept. 8 Letter at 2-3. That purpose is consistent with the organization’s general mission statement, which provides that World Vision is a “partnership of Christians whose mission is to follow our Lord and Saviour Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice and bear witness to the good news of the Kingdom of God.” World Vision International, Mission Statement (available at http://www.wvi.org/wvi/about_us/who_we_are.htm, last visited June 22, 2007).^{*} World Vision thus undertakes its charitable work, including the Vision Youth and Community Mobilization Initiative programs, as an expression of its religious beliefs. Even under RFRA’s prior definition, the few courts that directly addressed whether such charitable activities were an exercise of religion concluded that they were. *See, e.g., Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225, 1237 (E.D. Va. 1996) (granting preliminary injunction on RFRA and Free Exercise claim because “plaintiffs have given strong evidence that the Meal Ministry [charitable feeding program] is motivated by their religious belief and that their participation in the Meal Ministry constitutes the free exercise of religion”); *W. Presbyterian*, 862 F. Supp. at 546 (“Unquestionably, the Church’s feeding program in every respect is religious activity and a form of worship.”); *Jesus Ctr.*, 544 N.W.2d at 703-04 (holding that organization’s provision of shelter to homeless, which “flows from its religious beliefs,” is an “exercise of religion” under RFRA).⁶ Under the

^{*} Editor’s Note: The mission statement now can be found at <http://www.wvi.org/our-mission-statement> (last visited Sept. 18, 2014).

⁶ During the debates that preceded the amendment to RFRA’s definition of religious exercise, a number of members of Congress cited *Western Presbyterian* and similar cases and said that those cases represented the kind of activities the members wished to protect through legislation. *See, e.g.,* 145 Cong. Rec. 16,224 (1999) (statement of Rep. Canady) (“While RFRA was on the books, successful claimants included a Washington, D.C. church whose practice of feeding a hot breakfast to homeless

circumstances, we conclude that the two programs operated by World Vision constitute an “exercise of religion.”

Our conclusion that the work conducted under these two programs constitutes the exercise of religion is not affected by the fact that World Vision does not seek to proselytize those whom it serves, or the fact that secular organizations perform similar work. A contrary rule, requiring the “exercise of religion” to include a uniquely religious element (e.g., consumption of sacrament, liturgical expression, evangelization of non-believers) would effectively limit the term to practices deemed central to religious belief or observance. As noted above, Congress explicitly rejected a centrality requirement when it amended RFRA in 2000.

B.

We next address whether requiring World Vision to comply with the Safe Streets Act’s religious nondiscrimination provision as a condition of receiving the OJP grant would “substantially burden” the exercise of religion by World Vision. We conclude that RFRA is reasonably construed to provide that placing such a condition on receipt of a grant would substantially burden World Vision’s religious exercise.

1.

RFRA does not define the term “substantial[] burden.” Because “RFRA expressly adopted the compelling interest test ‘as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),” *O Centro*, 546 U.S. at 420 (quoting 42 U.S.C. § 2000bb(b)(1)), however, it is widely accepted that the Court’s pre-*Smith* decisions provide guidance in determining the meaning of that term. *See, e.g., Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995). Those decisions indicate that directly prohibiting a religious organization from hiring only persons of the same faith could impose a “substantial burden” on the exercise of religion by the organization.

The Supreme Court’s opinion in *Corporation of Presiding Bishop v. Amos* is instructive. The Court there rejected an Establishment Clause challenge to a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), which exempted religious organizations from the Title VII prohibition on religious discrimination and permitted religious organizations to consider religion in hiring for all of their activities. A former employee at a gymnasium operated by the Church of Jesus Christ of Latter-Day Saints had been terminated after he failed to

men and women reportedly violated zoning laws”; “[t]he same sorts of cases would be affected by this legislation.”); *id.* at 16,226 (statement of Rep. Hutchinson) (“It is necessary to make sure that a small church is able to continue its ministry to the homeless.”); *id.* at 16,241 (statement of Rep. Bachus) (“[W]e will not prohibit a church here in Washington, D.C., to feed the homeless”).

provide a certificate indicating that he was a member of the Church. The Church cited the Title VII exemption in responding to his suit for religious discrimination; the employee argued that exempting the religious organization violated the Establishment Clause. The Court explained that the exemption served a valid secular purpose because it “alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Amos*, 483 U.S. at 335.

The Court did not take issue with the trial court’s determination that running the gymnasium was a “nonreligious activity,” *id.* at 332, but nevertheless upheld the Title VII exemption even as applied to the nonreligious activities of a religious organization. *Id.* at 335–36. The Court reasoned that the line between secular and religious activities “is hardly a bright one” and that it would significantly burden a religious group “to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.” *Id.* at 336. “Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.” *Id.* The Court thus deemed it permissible for Congress to exempt the activities of religious organizations from the religious nondiscrimination requirements of Title VII.⁷

This Office previously has concluded that the Court’s opinion in *Amos*, together with Justice Brennan’s concurring opinion in the case, indicates that prohibiting religious organizations from hiring only coreligionists can “impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.” *Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001*, 25 Op. O.L.C. 129, 132 (2001). We explained further:

Many religious organizations and associations engage in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular—in the sense that it does not include religious teaching, proselytizing, prayer or ritual—the religious organization’s performance of such functions is likely to be “infused with a religious purpose.” *Amos*, 483 U.S. at

⁷ While we do not resolve the issue, an argument could be made that not permitting a religious organization to discriminate on the basis of religion in hiring, while permitting non-religious organizations to discriminate on the basis of their particular ideologies in hiring, would violate the Free Exercise Clause and the Free Speech Clause. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (city ordinances forbidding “ritual” killing of animals violated Free Exercise Clause, because they “were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–37 (1995) (university’s policy of reimbursing publication expenses incurred by student organizations, unless organizations engaged in religious activity, constituted viewpoint discrimination in violation of Free Speech Clause).

342 (Brennan, J., concurring). And churches and other religious entities “often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.” *Id.* at 344 (footnote omitted). In other words, the provision of “secular” social services and charitable works that do not involve “explicitly religious content” and are not “designed to inculcate the views of a particular religious faith,” *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), nevertheless may well be “religiously inspired,” *id.*, and play an important part in the “furtherance of an organization’s religious mission.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

Id. at 132–33. We thus concluded that “the selection of coreligionists in particular social-service programs will ordinarily advance a religious organization’s religious mission, facilitate the religiously motivated calling and conduct of the individuals who are the constituents of that organization, and fortify the organization’s religious tradition.” *Id.* at 133. “Where an organization makes such a showing, the title VII prohibition on religious discrimination would impose ‘significant governmental interference’ with the ability of that organization ‘to define and carry out [its] religious mission[,]’ *Amos*, 483 U.S. at 335, even as applied to employees who are engaged in work that is secular in content.” *Id.*⁸

Another agency of the Executive Branch, the Department of Health and Human Services (“HHS”), also has concluded that imposing a religious nondiscrimination requirement on religious organizations under some circumstances can “substantially burden” the exercise of religion within the meaning of RFRA. The Substance Abuse and Mental Health Services Administration (“SAMHSA”), in promulgating regulations governing the disbursement of federal grants to private entities for treatment of substance abuse, has stated:

[W]here a religious entity establishes that its exercise of religion would be substantially burdened by the [applicable] religious nondiscrimination provisions . . . , RFRA super[s]edes those statutory requirements, thus exempting the religious entity therefrom, unless

⁸ See also Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964* at 29–30 (Oct. 12, 2000) (“*Coreligionists Exemption*”) (exempting a religious organization from a nondiscrimination provision “might be a permissible religious accommodation” where the organization’s “preference for coreligionist employees in particular social-service programs . . . advance[s] [the] organization’s religious mission”). Cf. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (construing NLRB jurisdiction not to extend to teachers in church-operated schools, in part because inquiry into and resolution of unfair labor practice charges “may impinge on rights guaranteed by the Religion Clauses”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467–70 (D.C. Cir. 1996) (applying nondiscrimination provision in Title VII to a religious university’s canon law faculty is a “substantial burden” under RFRA).

the Department has a compelling interest in enforcing them. . . . Many . . . religious organizations . . . consider religious faith critical to all of their employees' activities, including those that involve providing government-funded social services to the public. For these groups, imposition of a religious nondiscrimination requirement can impose a particularly harsh burden. . . . For groups that deem religious faith an important part of their self-definition, having to make employment decisions without regard to their faith would substantially alter the charter of their organization.

Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, 68 Fed. Reg. 56,430, 56,435 (Sept. 30, 2003). SAMHSA therefore will exempt a charitable group from religious nondiscrimination requirements if (as relevant here) the group certifies “that it sincerely believes that employing individuals of a particular religion is important to the definition and maintenance of their religious identity, autonomy, and/or communal religious exercise”; “that it makes employment decisions on a religious basis in analogous programs” not supported by the grant; and “that providing the services in question is expressive of its values or mission.” 42 C.F.R. § 54.6(b) (2005). Before the SAMSHA regulations were issued, this Office concluded that it was “reasonable to read RFRA to permit the Secretary of HHS to exempt certain religious organizations from prohibitions on religious discrimination in employment, even in the context of a federally funded program.” SAMHSA Memorandum at 11.⁹

2.

Here, of course, if the Safe Streets Act's religious nondiscrimination requirements were enforced with respect to the World Vision grants, the government would not be directly restricting World Vision's hiring. Rather, it would be conditioning the receipt of a nearly \$1.5 million grant on World Vision's willingness to hire people who do not share the organization's religious convictions. The fact that a law “does not *compel* a violation of conscience,” however, “is only the

⁹ The legislative history of RLUIPA suggests that Congress wished to protect religious preferences in hiring. During the debates preceding enactment of RLUIPA, a number of members of Congress spoke of the importance of protecting the ability of religious groups to take religion into account in hiring. *See, e.g.*, 145 Cong. Rec. 16,224 (1999) (statement of Rep. Canady) (“While RFRA was on the books, successful claimants included . . . a religious school resisting a requirement that it hire a teacher of a different religion”; “the same sorts of cases would be affected by this legislation.”); *id.* at 16,218–19 (statement of Rep. Blunt) (“This is clearly an area that needs protection. It is an area where local governments constantly in recent years have fought in the face of what we consider to be First Amendment rights. . . . In Philadelphia, Pennsylvania, Christian day care centers were threatened with closure if they did not change their hiring practices which barred them from hiring non-Christians [T]hese infringements on religious liberty are significant.”).

beginning, not the end, of our inquiry.” *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981) (quoting *Sherbert*, 374 U.S. at 403–04) (emphasis in original). The Supreme Court “has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibition, are subject to scrutiny under the First Amendment.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988). Indeed, the Court made clear, in the line of cases that RFRA explicitly adopted, that “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege.” *Sherbert*, 374 U.S. at 404. Where a condition placed on the availability of benefits “forces [a person] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to [qualify for benefits], on the other hand,” the government has “put[] the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her [exercise of religion].” *Id.* Thus, in *Sherbert*, the Supreme Court held that a state government violated the Free Exercise Clause by conditioning unemployment compensation benefits on an applicant’s willingness to be available for work on Saturday, in violation of the applicant’s religious beliefs about observing the Sabbath. *Id.* at 403–10; *see also Frazee v. Ill. Dep’t of Empl. Sec.*, 489 U.S. 829, 832–35 (1989) (same); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (same). And in *Thomas*, the Court held that a state government violated the Free Exercise Clause by denying unemployment benefits to a Jehovah’s Witness who had quit his job at a foundry that made tank turrets, because his religious beliefs prevented him from participating in the production of weapons. 450 U.S. at 709–12, 717–19.

Although *Sherbert* and its progeny involved conditions placed on individuals’ exercise of religion, we do not understand that line of cases to apply only to individuals. The Supreme Court has entertained numerous Free Exercise Clause challenges brought by institutions stemming from the denial of benefits or tax exemptions. It has never suggested that institutions may not maintain such a claim. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–92 (1990) (considering but rejecting religious corporation’s free exercise claim); *Lyng*, 485 U.S. at 447–53 (considering but rejecting tribal association’s free exercise claim); *Bob Jones Univ.*, 461 U.S. at 602–04 (considering but rejecting university’s free exercise claim). To the contrary, it has suggested that the denial of tax benefits to religious organizations can constitute a substantial burden. *Bob Jones Univ.*, 461 U.S. at 603–04 (acknowledging that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools,” but upholding denial of tax advantage because of “compelling” government interest in “eradicating racial discrimination in education”).

Even if *Sherbert* and its progeny are properly read to apply only to individuals, Congress seems to have intended that the *Sherbert* standard would apply to

institutions as well as to individuals under RFRA.¹⁰ Thus, this Office previously has advised that “the loss of [discretionary] grants may constitute a substantial burden on religion, provided that the grant would materially affect the grantee’s ability to provide the type of services in question and providing those services is part of the grantee’s mission.” SAMHSA Memorandum at 7. And the 2003 HHS regulations promulgated to govern the SAMHSA program provide that “religious organizations” are eligible under RFRA for relief from religious nondiscrimination requirements in employment statutes. 68 Fed. Reg. at 56,435; 42 C.F.R. § 54.6(b).

Thomas is perhaps the leading Supreme Court exposition of the standard for determining when a condition on public benefits constitutes a substantial burden on the exercise of religion. It states:

Where the state conditions receipt of an *important benefit* upon conduct mandated by religious belief, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting *substantial pressure* on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717–18 (emphases added).¹¹ Thus, *Thomas* provides that the conditioning of a benefit can constitute a substantial burden only if the benefit is an “important” one; its availability is conditioned upon performance of conduct “proscribed by a religious faith,” or refraining from “conduct mandated by religious belief”; and the result is to put “substantial pressure on an adherent to modify his behavior and violate his beliefs.” *Id.* We discuss each of these issues in turn.

¹⁰ RFRA provides that the “Government shall not substantially burden a *person’s* exercise of religion . . .” 42 U.S.C. § 2000bb-1(a) (emphasis added). Although RFRA does not define the term “person,” Congress has made clear that the term ordinarily includes nonprofit corporations such as World Vision. See 1 U.S.C. § 1 (2000) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (the word “person” in 1 U.S.C. § 1 is “normally construed” to include associations and artificial persons). Consistent with that understanding, numerous courts have applied RFRA to claims brought by corporations, see, e.g., *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995); churches and religious groups, see, e.g., *O Centro*, 546 U.S. 418; *W. Presbyterian*, 862 F. Supp. 538; and universities, see, e.g., *Catholic Univ.*, 83 F.3d 455.

¹¹ See also *Hobbie*, 480 U.S. at 141; *United States v. Lee*, 455 U.S. 252, 257 (1982) (concluding that obligation to pay social security taxes substantially burdened exercise of religion by Amish); *Yoder*, 406 U.S. at 218 (concluding that misdemeanor statute compelling school attendance substantially burdened exercise of religion by Amish); cf. *Lyng*, 485 U.S. at 450 (suggesting that “indirect coercion or penalties” with “tendency to coerce individuals into acting contrary to their religious beliefs” may constitute substantial burden on exercise of religion). See generally *Religious Objections to the Postal Service Oath of Office*, 29 Op. O.L.C. 37, 50–51 (2005) (discussing *Thomas* standard).

a.

The precise scope of the term “important benefit” is not clear. *Thomas* suggests that the benefit should be important enough to put “substantial pressure” on the recipient to change its behavior so as not to lose the benefit. From that suggestion we deduce that “importance” should be assessed not in the abstract but rather functionally, by considering the substantiality of the pressure that placing conditions on receipt of a benefit would exert on a particular party “to modify his behavior and to violate his beliefs.” *Thomas*, 450 U.S. at 718; see also *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2004) (RFRA) (applying *Thomas* test); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (same); cf. *Lyng*, 485 U.S. at 451 (explaining that to trigger strict scrutiny under pre-*Smith* interpretation of Free Exercise Clause, governmental burden must have “tendency to coerce individuals into acting contrary to their religious beliefs”).

The term “substantial”—which is the same modifier used in the statutory “substantial burden” test itself—indicates that the pressure must be “material” or “considerable in amount, value, or worth.” *Webster’s Third New International Dictionary* 2280 (2002). At the same time, the pressure need not be overwhelming. *Id.* (“being that specified to a large degree or in the main”); 17 *Oxford English Dictionary* 67 (2d ed. 1989) (“Of ample or considerable amount, quantity, or dimensions. More recently also in a somewhat weakened sense, esp. ‘fairly large.’”). Consistent with that meaning, the courts have interpreted the standard to require more than de minimis pressure—usually “significant pressure” to modify religious behavior, and “more than an inconvenience on religious exercise.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (RLUIPA); *Adkins*, 393 F.3d at 570 (RLUIPA) (“a government action or regulation creates a ‘substantial burden’ on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs”; “the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs”); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (RLUIPA) (“[A] ‘substantial burden’ on ‘religious exercise’ must impose a significantly great restriction or onus upon such exercise.”); *Guerrero*, 290 F.3d at 1222 (RFRA) (“A substantial burden must be more than an ‘inconvenience.’”) (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000); cf. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (“The word ‘substantial’ [in the Americans with Disabilities Act] thus clearly precludes impairments that interfere in only a minor way”); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320–21 (D.C. Cir. 2002) (“substantial burden” test involves “substantial, as opposed to inconsequential burden[s] on the litigant’s religious practice”); see also H.R. Rep. No. 106-219, at

13 (1999) (Congress “intended to ensure that strict scrutiny is not triggered by trivial, technical, or *de minimis* burdens on religious exercise”).¹²

We are not aware of any judicial decisions applying RFRA to discretionary grants of the sort at issue here, but the standard enunciated in *Thomas* appears to be sufficiently broad to bear an interpretation that would include such grants. The benefit at issue undoubtedly is important to World Vision. For the relevant fiscal year, the nearly \$1.5 million grant represents approximately 10% of the entire budget for World Vision’s domestic community-based programs, and approximately 75% of the public funding the organization received domestically. Sept. 23 Letter at 2. World Vision has stated that if it does not receive the grant, its work on the Vision Youth project will be “drastically reduced.” Sept. 8 Letter at 3. Losing the grant “would have an indirect [e]ffect on training at all Vision Youth sites,” and would mean that the “national and site Educational consultants . . . and the pilot project for the sites would no longer be funded.” *Id.* “Program quality and training nationally would be in jeopardy.” *Id.* Moreover, the second component of the grant, the new anti-gang initiative, “would be next to impossible to undertake, given the need to hire all new staff for this brand new program.” *Id.*

The denial of a grant to an institution such as World Vision may not be as important as the denial of unemployment compensation to an individual as in *Sherbert* or *Thomas*. Unemployment compensation may well have been critical for the claimants in *Sherbert* and *Thomas* to maintain their household income. But the Supreme Court’s pre-*Smith* case law acknowledged that losing benefits not critical to subsistence (such as the tax exemption at issue in *Bob Jones*) can also impose a substantial burden. In *Sherbert*, the Supreme Court acknowledged that “of the approximately 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment.” 374 U.S. at 399 n.2. Despite the possibility that she would eventually find suitable work, the Court found the denial of unemployment compensation important enough to the appellant to constitute a substantial burden. *Cf. United States v. Lee*, 455 U.S. 252, 257 (1982) (payment of social security taxes, which could later be recouped as benefits, was nevertheless substantial burden on exercise of religion by Amish, given their belief “in a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system”). Indeed, the pre-*Smith* cases suggest that a substantial burden may arise when a person is denied the opportunity to partake of a public benefit on the same terms as others because of his religious activity. *See Lyng*, 485 U.S. at 449 (suggesting that “governmental action penaliz[ing] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens” would constitute substantial burden); *see also Adkins*,

¹² Because the operative provisions of the two statutes are identical, courts applying RLUIPA and RFRA regularly look to decisions involving the other statute for guidance. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 723 n.11 (2005); *Grace United Methodist*, 451 F.3d at 661.

393 F.3d at 570 (RLUIPA) (“[T]he effect of a government action or regulation is significant when it . . . forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.”). As noted, this Office previously has advised that “the loss of [discretionary] grants may constitute a substantial burden on religion, provided that the grant would materially affect the grantee’s ability to provide the type of services in question and providing those services is part of the grantee’s mission.” SAMHSA Memorandum at 7. And the regulations that HHS promulgated in 2003 governing the SAMHSA program embody the understanding that the loss of such discretionary grants may constitute a substantial burden on religion. 68 Fed. Reg. at 56,435; 42 C.F.R. § 54.6(b) (“To the extent that 42 U.S.C. 300x-57(a)(2) or 42 U.S.C. 290cc-33(a)(2) precludes a program participant from employing individuals of a particular religion to perform work connected with the carrying on of its activities, those provisions do not apply if such program participant is a religious corporation, association, educational institution, or society and can demonstrate that its religious exercise would be substantially burdened by application of these religious nondiscrimination requirements to its employment practices in the program or activity at issue.”). That understanding is consistent with the legislative history of RFRA, which indicates that some members of Congress understood that the statute would apply to the denial of funding as well as conditions on other sorts of benefits.¹³

b.

There is language in *Thomas* suggesting that a condition substantially burdens the exercise of religion only if it requires conduct “proscribed by a religious faith” or abstention from conduct “mandated by religious belief.” 450 U.S. at 717-18. Both under *Sherbert* and under RFRA before the 2000 amendment, courts considered whether a practice was absolutely mandated or prohibited by the claimant’s religious faith as a factor in favor of a determination that a condition imposed a substantial burden, *see, e.g., Thomas*, 450 U.S. at 711 (Jehovah’s Witness’s beliefs forbade participation in production of armaments); *Hobbie*, 480 U.S. at 138 (Seventh Day Adventists’ beliefs forbade work from sundown on Friday to sundown on Saturday), and courts also seem to have given weight to whether the practice was strongly encouraged or discouraged by the claimant’s religious faith, *see, e.g., In re Young*, 82 F.3d 1407 (8th Cir. 1996) (because debtor’s beliefs encouraged tithing, bankruptcy trustee could not treat resulting

¹³ The Senate Report, for example, states that “the denial of such funding, benefits or exemptions may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*.” S. Rep. No. 103-111, at 15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1905.

tithes as voidable transfers under RFRA)¹⁴; *In re Hodge*, 220 B.R. 386 (D. Idaho 1998) (same).

We have already observed, however, that Congress amended RFRA in 2000 to make clear that it protected “any exercise of religion, whether or not *compelled* by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). It would be anomalous for Congress to declare that the “exercise of religion” includes practices neither central to nor mandated by religious faith, but then to impose a rule that a burden on such practices could never be “substantial” under RFRA. We therefore conclude that it is not necessary to show that a person was required to violate a fundamental tenet of his religion to make a “substantial burden” claim under RFRA. Perhaps because of the requirement that a burden be “substantial,” however, many courts apparently continue to require a showing that the practice burdened at least be “important” to the party’s exercise of religion. *See, e.g., Adkins*, 393 F.3d at 570 (“[T]he Supreme Court’s express disapproval of any test that would require a court to divine the centrality of a religious belief does not relieve a complaining adherent of the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion.”) (footnote omitted); *Henderson v. Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (“Although the amendments extended the protections of RFRA to ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief,’ the amendments did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists.”) (citation omitted).

In this case, World Vision has not claimed that its members are compelled by religious conscience to associate only with people who share their faith, in the sense that they would consider hiring non-Christians to be a sin. But World Vision professes a consistent history of hiring coreligionists, which lends credence to its stated belief, *see supra* note 2, that the organization “can only remain true to [its] vision if [it] ha[s] the freedom to select like-minded staff, which includes staffing on a religious basis.” Sept. 23 Letter at 1; *see also* Sept. 8 Letter at 2–3 (stating that hiring staff members who profess similar Christian beliefs is essential for World Vision to remain true to its religious “mission” and “identity”); World Vision International, Mission Statement, available at http://www.wvi.org/wvi/about_us/who_we_are.htm (last visited June 22, 2007) (describing organization as a “partner-

¹⁴ The panel decision in *Young* was vacated by the Supreme Court, *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997), for reconsideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that the application of RFRA to state and local laws exceeded Congress’s enforcement power under the Fourteenth Amendment. On remand, the Eighth Circuit concluded that RFRA remained applicable to the federal bankruptcy code and reinstated the original panel decision that the bankruptcy trustee could not treat the debtors’ tithes as voidable transfers because of RFRA. *In re Young*, 141 F.3d 854 (8th Cir. 1998).

ship of Christians”).* Hiring persons who do not share the organization’s religious beliefs would, according to World Vision’s view of the program, dilute the organization’s conception of undertaking these programs to “love and serve those in need as a demonstration of [its] faith, and the example of Christ.” Sept. 8 Letter at 2–3. In addition, it is apparent that performing service work is an important aspect of World Vision’s exercise of religion, *see supra* note 6 and accompanying text, heeding the Christian “call to share resources with each other” and the “call to servanthood,” World Vision International, Core Values (available at http://www.wvi.org/wvi/about_us/who_we_are.htm, last visited June 22, 2007)**; *cf.* Grant Application, att. 2, Program Narrative at 10 (stating that World Vision is “dedicated to helping children and their communities worldwide reach their full potential”). Thus, to comply with the condition would require World Vision to retreat from an important religious precept by abandoning the explicitly religious manner in which the organization has chosen to define itself.

c.

In light of these principles, we think that it would be reasonable for OJP to conclude that requiring World Vision to comply with the Safe Streets Act’s nondiscrimination provision as a condition of accepting the approximately \$1.5 million grant would “put[] substantial pressure on . . . [World Vision] to modify [its] behavior and to violate [its] beliefs,” by compromising its religious identity. *Thomas*, 450 U.S. at 718. (Indeed, that reading seems at least as reasonable as construing RFRA *not* to require an accommodation under these circumstances.) Application of the provision would practically require World Vision either to forgo substantial federal funding altogether or to compromise its religious identity by abandoning its long-held view that its religious “mission” and “identity” require it to staff the organization with coreligionists. Sept. 8 Letter at 2–3. Of course, the nondiscrimination provision prohibits World Vision from making hiring decisions based on religion only “in connection with any programs or activity funded in whole or in part with [the grant].” 42 U.S.C. § 3789d(c)(1). But World Vision’s current managers, who were (and presumably will continue to be) hired under its current employment policy, will supervise the Vision Youth and anti-gang programs, and a portion of their salaries would thus be traceable to federal funds. *See* Grant Application, att. 1, Consolidated Budget Worksheet at 1 (stating that existing managers would spend between 8.1% and 80% of their annual work hours on these projects). World Vision represents that the programs that are the subject of the grants are “very staff intensive and require[] the

* Editor’s Note: The mission statement now can be found at <http://www.wvi.org/our-mission-statement> (last visited Sept. 18, 2014).

** Editor’s Note: The statement of core values now can be found at <http://www.wvi.org/our-core-values> (last visited Sept. 18, 2014).

programmatic expertise, training and oversight” of existing World Vision employees, Sept. 23 Letter at 2, and that “[i]t is not possible for us to effectively conduct these activities without such essential human resources.” *Id.*

As described in Part II.B.2.a, the benefit provided by the JDDPA grant is very important to the organization. Without it, the Vision Youth program or would have to be “drastically reduced,” and it would be “next to impossible” to undertake the new anti-gang initiative. Because the grant is clearly critical to the organization’s ongoing operations, we conclude, consistent with HHS’s SAMHSA regulations and this Office’s previous views on those regulations, that it is reasonable to conclude that conditioning the grant on the discontinuation of religion-based hiring would place significant pressure on the organization to abandon its religious character. We therefore believe it is reasonable to conclude that conditioning the World Vision grant on compliance with the Safe Streets Act’s religious nondiscrimination provision would constitute a substantial burden on religious exercise under *Thomas*. See 42 C.F.R. § 54.6(b) (requiring charitable group that seeks exemption under SAMHSA regulations from religious hiring restrictions to certify, among other things, “that the grant would materially affect its ability to provide the type of services in question”); SAMHSA Memorandum at 7 (“[I]f a religious organization is otherwise best qualified to receive a \$100,000 grant, and its faith-based hiring practice is the sole reason that it may not receive the grant, the pressure to revise that hiring practice[] to receive aid is quite significant.”); *cf. Children’s Healthcare Is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084, 1093 (8th Cir. 2000) (concluding that requiring people to choose “between adhering to their religious beliefs and foregoing all government health care benefits, or violating their religious convictions and receiving the medical care provided by Medicare and Medicaid,” created “especially acute” pressure “similar to that contemplated by the *Sherbert* line of cases”; providing non-medical benefits for such adherents as an accommodation thus served a valid secular purpose and did not violate the Establishment Clause); *Jesus Ctr.*, 544 N.W.2d at 704–05 (holding that zoning board’s denial of permission to operate shelter in church was substantial burden where, although other locations for operation were available, relocating shelter would be costly and would detract from mission of church to combine worship and social services).

Some courts have suggested that placing conditions on the exercise of religion can constitute a “substantial burden” only with respect to widely available benefits—perhaps because a benefit’s wide availability suggests the government has deemed it to be important, or because a widely available benefit is more likely to induce reliance and thereby increase the pressure that its conditional availability could place upon a RFRA claimant. *Cf. Adkins*, 393 F.3d at 570 (RLUIPA) (stating that conditioning “some generally available, non-trivial benefit” on failing to “follow[] [one’s] religious beliefs” would constitute a substantial burden). *But see Lyng*, 485 U.S. at 449 (suggesting that “governmental action penaliz[ing] religious activity by denying any person an equal share of the rights, benefits, and

privileges enjoyed by other citizens” would constitute substantial burden). We need not determine the relevance of that consideration, because even if a benefit’s wide availability is a predicate for finding that conditions on it constitute a “substantial burden,” the benefit in this case would satisfy that test. While in absolute terms the JJDP A grant program may not be as “widely available” as the unemployment compensation in *Sherbert* and *Thomas*, it is still broadly available to the universe of potential grantees. As noted above, in the 2005 Appropriations Act, Congress appropriated slightly more than \$100 million for OJP to disburse for anti-juvenile delinquency programs under sections 261 and 262 of the JJDP A. Section 261 of the JJDP A makes this funding broadly available to any public or private entity, individual or corporate, that wishes to administer an anti-juvenile delinquency program:

The Administrator may make grants to and contracts with States, units of general local government, Indian tribal governments, public and private agencies, organizations, and individuals, or combinations thereof, to carry out projects for the development, testing, and demonstration of promising initiatives and programs for the prevention, control, or reduction of juvenile delinquency.

42 U.S.C. § 5665(a) (Supp. III 2003). Section 261 further directs OJP to ensure that the grant money is distributed widely to all areas of the country. *Id.* (“The Administrator shall ensure that, to the extent reasonable and practicable, such grants are made to achieve an equitable geographical distribution of such projects throughout the United States.”). It would not be reasonable to characterize the benefit in this case as too narrow to warrant protection under RFRA.

Moreover, because the conference report specifically identified World Vision and said that “OJP [wa]s expected to review” the organization’s proposal and “provide [a] grant[] if warranted,” H.R. Rep. No. 108-792, at 769, it appears that World Vision was more likely than another potential grantee, not specifically identified in the conference report, to receive a grant. Under the circumstances, the benefit that World Vision risks losing is arguably more analogous to a general entitlement than to a discretionary grant whose availability is limited and speculative. We therefore conclude that, under the circumstances, the benefit is broadly enough available that placing conditions on its availability could exert “substantial pressure” on an organization in the position of World Vision. Other more narrowly available benefits may not exert sufficient pressure on a RFRA claimant to qualify as a “substantial burden” on the exercise of religion.

C.

If the application of restrictions on religious hiring constitutes a substantial burden on World Vision’s religious exercise, the next step in the analysis is to

determine whether the government has a compelling interest in requiring World Vision not to discriminate on a religious basis in hiring. 42 U.S.C. § 2000bb-1(b); see generally *O Centro*, 546 U.S. at 424–32. The burden to show a compelling interest is on the government, *O Centro*, 546 U.S. at 428–30, and to meet its burden the government must do more than cite its general interest in preventing religious discrimination, *id.* at 431–33 (general interest in preventing drug abuse not enough to justify denial of exemption from Controlled Substances Act for sacramental consumption of hoasca). “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430–31 (citing 42 U.S.C. § 2000bb-1(b)). Given that many statutes exempt religious organizations from prohibitions on religious discrimination in employment, we conclude that applying the Safe Streets Act’s nondiscrimination provision to World Vision in this instance would not further a compelling governmental interest. Accordingly, we do not address whether the nondiscrimination requirement is the “least restrictive means” of furthering such an interest under 42 U.S.C. § 2000bb-1(b)(2). Compare *Braunfeld v. Brown*, 366 U.S. 599, 607–08 (1961) (plurality opinion) (concluding that Sunday closing law that required merchants to choose between losing sales or remaining open on Saturday did not violate Free Exercise Clause because State had compelling interest in mandating single day of rest); *id.* at 610 (Frankfurter, J., concurring in the judgment) (incorporating by reference opinion in *McGowan v. Maryland*, 366 U.S. 420, 521 (1961) (“[T]he burden which Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal.”)).

The recognition that religious discrimination in employment is permissible in some circumstances suggests that there are contexts in which the government does not have a compelling interest in enforcing prohibitions on such conduct. See *O Centro*, 546 U.S. at 433 (holding that, in light of Controlled Substance Act’s statutory exception for sacramental use of peyote despite its classification as dangerous drug, “it is difficult to see” how congressional findings of dangerousness of drug hoasca can support showing of compelling interest and “preclude any consideration of a similar exception” for that drug); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest “of the highest order” . . . when it leaves appreciable damage to that supposedly vital interest unprohibited”’) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (ellipsis in original)); *Fla. Star*, 491 U.S. at 540 (“[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance.”). Congress has created numerous exceptions to prohibitions on religious discrimination in employment. Religious entities are already exempt from the religious nondiscrimination requirements of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e-1(a) (2000). That exemption “reflects Congress’s judgment that employment decisions are an important component of religious organizations’ autonomy, and that the government has a much stronger interest in applying a religious nondiscrimination requirement to secular organizations than to religious organizations[,] many of whose existence depends upon their ability to define themselves on a religious basis.” 68 Fed. Reg. at 56,435. Indeed, Congress included in the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, a provision explicitly affirming that World Vision is exempt from the nondiscrimination requirements of the Civil Rights Act of 1964, *see supra* note 3, suggesting that Congress has concluded that there is no compelling governmental interest in preventing World Vision—an overtly religious organization—from considering religion in hiring.¹⁵

Congress’s interest in forbidding religious discrimination in employment is arguably stronger in the context of federally funded programs, because Congress may have an interest in ensuring that federal funds do not promote religious discrimination. But even so, many such programs do not impose a religious nondiscrimination requirement upon the employment practices of grantees. Title VI of the Civil Rights Act of 1964 does not prohibit recipients of federal financial assistance from engaging in discrimination on the basis of religion, 42 U.S.C. § 2000d (2000) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”), although some individual programs contain non-discrimination requirements.¹⁶ The nondiscrimination provisions that apply to block grants administered under the Substance Abuse and Mental Health Services program, 42 U.S.C. § 290cc-33(a)(2) (2000) (“No person shall on the ground of . . . religion be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in

¹⁵ Indeed, an argument can be made that, because much religious discrimination resembles ideological or belief-based discrimination, and much of it involves the wish to associate with others of the same belief with no implication of disparaging persons of other beliefs, “it is inappropriate to generalize that all religious discrimination is invidious.” SAMHSA Memorandum at 10 n.8. *See generally Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 870 (2d Cir. 1996) (rejecting argument that “all forms of discrimination on the basis of religion are invidious in all contexts”); Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rts. L.J. 159, 181 (2002) (“Faith is an idea. Unlike racism or other forms of ‘invidious discrimination,’ faith is not tied to the color of one’s skin, to genetic makeup, or to one’s ethnic ancestry. It is a unique blend of emotion and intellect that can be shared by anyone. When a religious group seeks to staff its church outreach program on a religious basis, it is not engaging in the sort of invidious discrimination that is viewed as immoral and thus rightly forbidden by law.”).

¹⁶ Subsequent amendments to Title VI indicate “that Congress was aware that religious organizations had been grantees under Title VI and that it did not disapprove of that practice.” *Bowen v. Kendrick*, 487 U.S. 589, 604 n.9 (1988).

part with funds made available under section 290cc-21 of this title.”); *id.* § 300x-57(a)(2) (“No person shall . . . on the ground of religion[] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under section 300x or 300x-21 of this title.”), do not apply to discretionary grants administered directly by the Secretary—leaving religious organizations that receive such grants free to consider faith in hiring. SAMHSA Memorandum at 2 n.1. Moreover, many statutes include “charitable choice” provisions, which provide that religious groups that receive federal funds retain the level of autonomy over internal governance matters that they possessed before receiving funding. *See, e.g.*, 42 U.S.C. § 290kk-1(b) (2000) (“The purpose of this section is to allow religious organizations to be program participants on the same basis as any other nonprofit private provider without impairing the religious character of such organizations, and without diminishing the religious freedom of program beneficiaries.”); *id.* § 290kk-1(d)(1) (“Except as provided in this section, any religious organization that is a program participant shall retain its independence from Federal, State, and local government, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.”); *id.* § 300x-65(a)(2) (“The purposes of this section are . . . to allow the organizations to accept the funds to provide the services to the individuals without impairing the religious character of the organizations or the religious freedom of the individuals.”); *id.* § 300x-65(c)(1) (“A religious organization that provides services under any substance abuse program under this subchapter or subchapter III-A of this chapter shall retain its independence from Federal, State, and local governments, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.”); *id.* § 604a(f) (“A religious organization’s exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.”); *id.* § 9920(b)(3) (“A religious organization’s exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a).”).

In sum, “Congress’s application of religious nondiscrimination requirements in the employment context is quite selective, which makes it difficult to regard the government as having a compelling interest in imposing such a requirement in this particular context.” 68 Fed. Reg. at 56,435. Moreover, there is nothing about the grants at issue here that suggests any unusually strong governmental interest in religious nondiscrimination in employment with respect to those receiving these grants. Indeed, the opposite is the case: Congress specified by law that an exemption from one such prohibition, contained in title VII of the Civil Rights Act of 1964, was to be applied to this very grant. Because “[c]ontext matters’ in applying the compelling interest test,” *O Centro*, 546 U.S. at 431 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)), and because “strict scrutiny *does* take

‘relevant differences’ into account—indeed, that is its fundamental purpose,” *id.* at 432 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (emphasis in original)), our conclusion is limited to the issuance of this grant to World Vision. In reaching that conclusion, we emphasize that World Vision would satisfy the requirements of other relevant statutory exemptions from prohibitions on religious discrimination, *see, e.g.*, 42 U.S.C. § 300x-65; *id.* § 2000e-1(a), reflecting a congressional judgment that religious discrimination in hiring under such circumstances may be permissible.

In addition, the exemption that World Vision is seeking is not one directed at allowing it to exclude people from a particular religion from employment. Rather, it is directed at allowing it to hire only coreligionists. There is nothing to suggest that its wish for such an exemption is driven by animus towards people of different religions, rather than by a desire to remain an organization of coreligionists and to expand an activity that it already engages in with coreligionists and that is consistent with the kind of charitable activities that religious organizations traditionally have engaged in with coreligionists in this country. Moreover, World Vision’s representations that it can remain true to its religious mission only if it is able to limit employment to coreligionists is borne out by its apparently consistent hiring practice since its founding, and we are aware of no information to indicate that its hiring practices reflect invidious discrimination. We need not resolve whether the government would have a compelling interest in enforcing the Safe Streets Act’s nondiscrimination provision with respect to a differently situated grant applicant—perhaps one without such a history to authenticate its claim that homogeneity of belief is essential to its mission, or whose hiring practices implicate compelling government interests in eradicating racial or sex discrimination. In such a case, the government might well have a compelling interest in requiring strict adherence with the Safe Streets Act’s nondiscrimination requirements. *Cf. Hamilton v. Schriro*, 74 F.3d 1545, 1552–53 (8th Cir. 1996) (“The Religious Freedom Restoration Act . . . establishe[s] one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances in each case.”) (quoting S. Rep. No. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898). This, however, is not such a case.

III.

Our conclusion here is consistent with Supreme Court precedents delimiting the government’s discretion to fund religious activities.

A.

First, to the extent the Establishment Clause prohibits government funding of evangelization or religious instruction, *see Mitchell v. Helms*, 530 U.S. 793, 836–

68 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment) (concluding that actual use of educational materials and equipment loaned by government agency to religious and non-religious schools for religious indoctrination would violate the Establishment Clause), it does not appear that the OJP grant here would implicate that prohibition. World Vision represents that it “do[es] not proselytize, and no government funds are ever used for religious activities.” Sept. 8 Letter at 3. The organization represents that that is true for all of its programs, not only those at issue here.

We are mindful that “[c]ourts occasionally have suggested that whether an organization engages in [religious] employment discrimination is a relevant factor in determining whether the organization is so ‘pervasively sectarian’ that it is constitutionally prohibited from receiving funds directly from the government.” *Coreligionists Exemption*, *supra* note 8, at 19 & n. 39 (Oct. 12, 2000) (“*Coreligionists Exemption*”) (citing *Roemer v. Bd. of Public Works*, 426 U.S. 736, 757 (1976) (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 686–87 (1971) (plurality opinion); *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 166 (4th Cir. 1998); *Minn. Fed’n of Teachers v. Nelson*, 740 F. Supp. 694, 720 (D. Minn. 1990)). “But while religious discrimination in employment might be germane to the question whether an organization’s secular and religious activities are separable in a government-funded program, that factor is not legally dispositive.” *Coreligionists Exemption* at 20 (citing *Columbia Union Coll.*, 159 F.3d at 163)). To the contrary, “it is possible that a particular organization’s overall purpose and character could be ‘primarily religious’ . . . , but that it could nevertheless assure that its ‘privately funded religious activities are not offered as part of its [government-funded] program.’” *Id.* at 19 (quoting *Department of Housing and Urban Development Restrictions on Grants to Religious Organizations that Provide Secular Social Services*, 12 Op. O.L.C. 190, 199 (1988)) (emphases deleted). Department of Justice regulations provide, with exceptions not relevant here, that “[o]rganizations that receive direct financial assistance from the Department . . . may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department.” 28 C.F.R. § 38.1(b)(1) (2006). World Vision represents that it will administer the Vision Youth and Community Mobilization Initiative programs without proselytizing and that “no government funds are ever used for religious activities.” Sept. 8 Letter at 3. We see no reason to assume that the organization will not comply with the regulation, and the Supreme Court’s recent decisions seem to question the notion that “pervasively sectarian” institutions presumptively will divert government funds to impermissible purposes. *See Mitchell*, 530 U.S. at 829 (plurality opinion) (“[N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs This doctrine, born of bigotry, should be buried now.”); *id.* at 857 (O’Connor, J., joined by Breyer, J., concurring in the judgment) (“To establish a First Amendment violation, plaintiffs must prove that

the aid in question actually is, or has been, used for religious purposes.”); *id.* at 858 (“[A]n absolute bar to the aid in question[,] regardless of the religious school’s ability to separate that aid from its religious mission, constitutes a ‘flat rule, smacking of antiquated notions of “taint,” [that] would indeed exalt form over substance.”) (quoting *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13 (1993)); *Bowen v. Kendrick*, 487 U.S. 589, 624–25 (1988) (Kennedy, J., concurring) (“The question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant.”).

B.

Our conclusion also is consistent with the Supreme Court’s decision in *Locke v. Davey*, 540 U.S. 712 (2004), in which the Court rejected a Free Exercise Clause challenge to a state scholarship program that prohibited recipients from pursuing a “degree in theology” while receiving the scholarship. *Davey* was decided after *Smith* and did not purport to apply the “substantial burden” test embodied in *Sherbert* and adopted by RFRA. It concerned a condition attached by a state to the use of public funds, to which RFRA is inapplicable, *City of Boerne*, 521 U.S. 507, and from which the state had chosen not to exempt any recipients on the grounds of religious belief. *Davey* thus did not address the circumstances under which the federal government, which is subject to RFRA, could avoid making an accommodation for religious exercise. Rather, *Davey* held that the state was permitted to impose such a restriction on the use of public funds, even though the restriction was not religion-neutral, because of the state’s specific interest in, and historical tradition of, denying taxpayer support to religious instruction. 540 U.S. at 722 (“[W]e can think of few areas in which a State’s antiestablishment interests come more into play.”); *id.* at 723 (“[R]eligious instruction is of a different ilk.”). That concern is not implicated here, because World Vision does not use public funds to engage in religious instruction, much less the training of clergy. Sept. 8 Letter at 3.

Furthermore, the Court found the burden imposed by the condition in *Davey* to be de minimis. The scholarship program did “not require students to choose between their religious beliefs and receiving a government benefit,” 540 U.S. at 720–21 (citing, among other authorities, *Sherbert*, 374 U.S. 398), because recipients could “attend pervasively religious schools,” could “take devotional theology courses” while there, *id.* at 724–25, and could “still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.” *Id.* at 721 n.4. Thus, in the Court’s view, the condition attached to the scholarship did not require the recipient to modify his religious behavior; rather, he could take the scholarship money and study devotional theology, so long as he did not use the money to pursue a degree in that field. By contrast, as explained above, it does not appear that World Vision’s programs could be revised to conform to the Safe Streets Act’s nondiscrimination provision

without losing their nature as exercises of religion protected by RFRA. The burden that would be imposed here is not de minimis.

IV.

We conclude that RFRA is reasonably construed to require OJP to exempt World Vision from the Safe Streets Act's religious nondiscrimination provision in awarding World Vision a grant pursuant to the JJDPA. World Vision is an entity protected by RFRA; its programs at issue here are an exercise of religion; OJP reasonably may conclude that imposing the nondiscrimination requirement on World Vision would substantially burden the organization's religious exercise; and, in this case, the burden would not be justified by a compelling governmental interest. We conclude that OJP would be within its legal discretion, under the JJDPA and under RFRA, to accommodate World Vision in this manner, consistent with the President's direction that "a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs," Exec. Order No. 13279, § 2(f), and that religious organizations that administer federally funded social services be exempted from restrictions on religious hiring under RFRA where it is reasonably construed to require that result.

JOHN P. ELWOOD
Deputy Assistant Attorney General
Office of Legal Counsel

Immunity of the Former Counsel to the President From Compelled Congressional Testimony

The former Counsel to the President is immune from compelled congressional testimony about matters that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity and is not required to appear in response to a subpoena to testify about such matters.

July 10, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. *See* Letter for Harriet E. Miers, from John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, administrations of both political parties have taken the position that “the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.” *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum for All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity “is absolute and may not be overborne by competing congressional interests.” *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

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

Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal

Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President "serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 4.

The rationale for the immunity is plain. The President is the head of one of the independent branches of the federal government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, "[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) ("Olson Memorandum").

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, "in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.¹ Thus, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions." *Id.*; see also Olson Memorandum at 2 ("The President's close advisors are an extension of the President.")²

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former presidents and former senior presidential advisers remain immune from compelled congressional

¹ In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to members of Congress also applies to congressional aides, even though the Clause refers only to "Senators and Representatives." U.S. Const. art I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that "the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616–17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be "inevitably . . . diminished and frustrated." *Id.* at 617.

² See also *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771–72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his "principal aides").

testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that “if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.” *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). “The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.” *Id.* In a radio speech to the Nation, former President Truman further stressed that it “is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President.” *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser’s immunity is derivative of the President’s, former President Truman’s rationale directly applies to former presidential advisers. We have previously opined that because an “immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity.” Memorandum for the Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

STEVEN G. BRADBURY
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Applicability of the Presidential Records Act to the White House Usher's Office

Because the White House Usher's Office is part of the President's "immediate staff" or, alternatively, would be "a unit . . . of the Executive Office of the President whose function is to advise and assist the President," any documentary materials "created or received [by the Office] in the course of conducting activities which relate to or have an effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President" constitute "Presidential records" under the Presidential Records Act, 44 U.S.C. § 2201(2).

July 13, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the Usher's Office is subject to the recordkeeping requirements of the Presidential Records Act ("PRA" or "Act"), 44 U.S.C. §§ 2201–2207 (2006). As discussed below, we believe that, for the purposes of the PRA, the Usher's Office is either part of the "immediate staff" of the President or is "a unit . . . of the Executive Office of the President whose function is to advise and assist the President." *Id.* § 2201(2). Therefore, records of the Usher's Office are subject to the Act to the extent that they are "created or received . . . in the course of conducting activities which relate to or have an effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President." *Id.*

I.

You have informed us that the Usher's Office is generally responsible for managing and operating the Executive Residence of the President—a function that includes preparing and serving meals to the First Family and their guests, performing housekeeping and maintenance services on the Executive Residence, providing curatorial services, greeting visitors, and assisting the President in his performance of certain official and ceremonial duties. Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Fred F. Fielding, Counsel to the President at 1 (June 6, 2007). In performing its functions, the Usher's Office generates and receives various paper and electronic materials, including "the daily diary of the First Family, First Family personal access lists, event guest lists, equipment, staffing, and food/beverage orders and invoices, and Executive Residence project work orders and invoices." *Id.* Furthermore, the Usher's Office is operationally part of the Executive Residence and supervises the staff of the Executive Residence. Because the Executive Residence is an entity within the Executive Office of the President, *see* Memorandum for Gary Walters, Chief Usher of the Executive Residence, from Andrew H. Card, Jr., White House Chief of Staff (June 11, 2002), the Usher's Office is as well.

Congress enacted the PRA in 1978 in order to preserve and make publicly available certain official records generated or received by the President and certain individuals in his service. *See* H.R. Rep. No. 95-1487, at 2 (1978). Accordingly, the Act mandates the preservation of “Presidential records,” which are defined as:

documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). Excluded from the definition of presidential records are “diaries, journals, or other personal notes . . . which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business.” *Id.* § 2201(3)(A). Also excluded are “materials relating to private political associations,” *id.* § 2201(3)(B), “materials relating exclusively to the President’s own election[,] . . . and materials directly relating to the election of a particular individual or individuals,” *id.* § 2201(3)(C), that have “no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President,” *id.* § 2201(3)(B), (3)(C).

The PRA also explicitly excludes from its coverage any “documentary materials” that are “official records of an agency,” as the term “agency” is defined in the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(f)(1) (2006). 44 U.S.C. § 2201(2)(B)(i). Such records are covered instead by FOIA and the Federal Records Act (“FRA”), 44 U.S.C. §§ 3101–3107, 3301–3314 (2006), which operate in tandem to complement the PRA. Specifically, the FRA requires federal agencies to preserve certain agency records and FOIA requires federal agencies to make such records publicly available subject to application of various statutory exemptions. As the Court of Appeals for the D.C. Circuit has explained, “the coverage of the FRA is coextensive with the definition of ‘agency’ in the FOIA As a result, . . . ‘[t]he FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different . . . regime.” *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996) (quoting *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993)). Congress applied the PRA to the President and those Executive Office of the President (“EOP”) entities that are not “agencies” subject to FOIA and the FRA, *see* H.R. Rep. No. 95-1487, at 3 (1978), and the Supreme Court has held that FOIA—and by implication the FRA—does not apply to “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15

(1974)) (legislative history of 1974 amendments to FOIA); *Armstrong*, 1 F.3d at 1295; *see also Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).

II.

As discussed below, we conclude that records created or received by the Usher's Office are covered by the PRA because the Usher's Office must be viewed either as part of the "immediate staff" of the President or as "a unit . . . of the Executive Office of the President whose function is to advise and assist the President." 44 U.S.C. § 2201(2).

A.

The PRA provides no definition of the President's "immediate staff," and we are aware of no judicial decisions interpreting the term in the context of the PRA. In enacting the PRA, however, Congress specifically relied upon and incorporated the conference report on the 1974 amendments to FOIA, which had become law only four years earlier. *See* H.R. Rep. No. 95-1487, at 11 (1978) (the term "Executive Office of the President," to which FOIA applies, "'is not interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President'" (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974))). Thus, in determining whether the Usher's Office is part of the President's "immediate staff" for purposes of the PRA, we look to how courts have interpreted the phrase "immediate personal staff" of the President in cases involving the applicability of FOIA. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

No court has precisely described the composition of the President's "immediate staff" or "immediate personal staff." The D.C. Circuit, however, has indicated that in the FOIA context "immediate personal staff" includes "at least those . . . individuals employed in the White House Office." *Meyer*, 981 F.2d at 1293 n.3. The court explained that "[p]roximity to the President, in the sense of continuing interaction, is surely in part what Congress had in mind when it exempted the President's 'immediate personal staff' [from FOIA's requirements] without requiring a careful examination of its function." *Id.* at 1293. Like the White House Office staff, employees of the Usher's Office directly interact with the President on a continuing basis. The Usher's Office manages the President's official residence and is closely involved in various daily activities—including preparing the President's food, greeting his guests, and helping him perform certain official and ceremonial functions.

Moreover, the Executive Residence—which includes the Usher's Office—and the White House Office are treated similarly under federal law. Congress has granted the President broad discretion in hiring the employees of both units. The President is specifically authorized to “appoint and fix the pay of employees” in the White House Office and the Executive Residence “without regard to any other provision of law regulating the employment or compensation of persons in the Government service.” 3 U.S.C. §§ 105(a)(1), (b)(1) (2006). These provisions reflect Congress’s judgment that the President should have complete discretion in hiring staff with whom he interacts on a continuing basis. *See Haddon v. Walters*, 836 F. Supp. 1, 3 (D.D.C. 1993) (“Attempts to limit the President’s power to hire and fire those who work in his own home must be carefully and thoughtfully drawn. We speak here of individuals who occupy positions in close physical proximity to the President.”); *see also* S. Rep. No. 95-868, at 7 (1978) (explaining that section 105 of title 3 grants the President “total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees” in both the White House Office and the Executive Residence). In addition, employees of both the White House Office and the Executive Residence must “perform such official duties as the President may prescribe.” 3 U.S.C. §§ 105(a)(1) & (b)(1). Due to the similar proximity to the President shared by the White House Office and the Usher’s Office, we conclude that the Usher’s Office falls within the President’s “immediate staff” for purposes of the PRA.

B.

Alternatively, if the staff of the Usher’s Office were not viewed as part of the “immediate staff” of the President, we believe that it would constitute a “unit . . . of the Executive Office of the President whose function is to advise and assist the President.” 44 U.S.C. § 2201(2). This phrase, too, stems from the conference report on the 1974 Freedom of Information Act Amendments, upon which Congress specifically relied when it enacted the PRA. *See* H.R. Conf. Rep. No. 95-1487, at 11 (1978) (FOIA “is not interpreted as including the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President”) (quoting H.R. Rep. No. 93-1380, at 15 (1974)). Congress intended for the PRA to apply to “all White House and Executive Office records, except those of a purely private or nonpublic nature, which, as a consequence of the Conference Report language, fall *outside* the scope of the FOIA because they are not agency records.” H.R. Conf. Rep. No. 95-1487, at 11.

The D.C. Circuit has held that the staff of the Executive Residence is not an agency under FOIA because the sole function of the Executive Residence is to advise and assist the President. *See Sweetland v. Walters*, 60 F.3d 852, 853–55 (D.C. Cir. 1995). The court explained that it reached this decision based on the fact that the Executive Residence did not exercise any substantial authority

independent of the President. *Id.* at 854 (“[E]very one of the EOP units that we found to be subject to FOIA has wielded substantial authority independently of the President. . . . The staff of the Executive Residence exercises none of the independent authority that we found to be critical. . . .”). Because the Executive Residence includes the Usher’s Office, under *Sweetland* the Usher’s Office is likewise exempt from FOIA as part of an EOP unit whose sole function is to advise and assist the President.

The decision in *Sweetland* contains no discussion of whether the staff of the Executive Residence functions to “advise” the President, strongly suggesting that as long as a unit of the EOP exercises no substantial authority independently of the President, it should be classified as a unit that functions to advise and assist the President for purposes of being exempt from the FRA and FOIA—and, by implication, being subject to the PRA—regardless of whether the unit in fact “advises” the President on official or ceremonial matters. However, even if the PRA requires that a unit of the EOP both “advise” and “assist” the President in order to be covered by the Act, the Usher’s Office would still satisfy this test. First, the Usher’s Office certainly assists the President. The core functions of the Usher’s Office include “assisting the President in maintaining his home and carrying out his various ceremonial duties.” *Sweetland*, 60 F.3d at 854. Second, the Usher’s Office also advises the President in carrying out his ceremonial duties. For example, the Usher’s Office advises the President on what food to serve and what formalities to follow at an official White House state dinner depending, for example, on cultural sensitivities and differences. Furthermore, the Chief Usher advises the President by serving on the Committee for the Preservation of the White House, which reports to the President recommendations regarding, *inter alia*, the articles of furniture, fixtures, and decorative objects which shall be used or displayed in certain areas of the White House. Exec. Order No. 11145, §§ 2–3, 3 C.F.R. 123, 123–24 (1964 Supp.).

III.

Because the Usher’s Office is thus part of the President’s “immediate staff” or, alternatively, would be “a unit . . . of the Executive Office of the President whose function is to advise and assist the President,” any documentary materials “created or received [by the Office] in the course of conducting activities which relate to or have an effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President” constitute “Presidential records.” 44 U.S.C. § 2201(2). As noted above, we understand that the Usher’s Office does create and receive documentary materials in the course of conducting activities related to the President’s various official and ceremonial duties. Such materials constitute “Presidential records” under the PRA, and, consequently, the Usher’s Office is

Applicability of the Presidential Records Act to the White House Usher's Office

responsible for complying with the relevant recordkeeping provisions of the Act with respect to those materials. *See id.* § 2203.

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Whether the Office of Administration Is an “Agency” for Purposes of the Freedom of Information Act

The Office of Administration, which provides administrative support to entities within the Executive Office of the President, is not an agency for purposes of the Freedom of Information Act.

August 21, 2007

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

Your Office has asked whether the Office of Administration (“OA”), which provides administrative support to entities within the Executive Office of the President (“EOP”), is an “agency” for purposes of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2000). For the reasons discussed below, we conclude that it is not.

I.

The Office of Administration is entirely a presidential creation, and its duties are confined to the EOP. It was created as an entity within the EOP by Reorganization Plan No. 1 of 1977, § 2, 5 U.S.C. app. 1 (2000) (“Reorganization Plan”), which provided that OA “shall be headed by the President” and “shall provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct.” Further presidential direction regarding OA’s responsibilities is set forth in Executive Order 12028, 3 C.F.R. 161 (1977 Comp.) (as amended by Exec. Order No. 12122, 3 C.F.R. 365 (1979 Comp.); Exec. Order No. 12134, 3 C.F.R. 385 (1979 Comp.)). Section 3(a) of Executive Order 12028 states that OA “shall provide common administrative support and services to all units within the Executive Office of the President, except for such services provided primarily in direct support of the President.” For those services provided “primarily in direct support of the President,” OA “shall, upon request, assist the White House Office in performing its role of providing those administrative services.” *Id.* § 3(a). Section 3(b) provides that OA’s administrative support and services “shall encompass all types of administrative support and services that may be used by, or useful to, units within the Executive Office of the President,” including, but not limited to, “personnel management services”; “financial management services”; “data processing”; “library, records, and information services”; and “office services and operations, including[] mail, messenger, . . . graphics, word processing, procurement, and supply services.” *Id.* § 3(b) (as amended by Exec. Order No. 12134 (transferring responsibility for printing and duplication services to the Department of the Navy)).

The President heads OA and appoints its Director, who, as the chief administrative officer of OA, is “responsible for ensuring that [OA] provides units within the

[EOP] common administrative support and services.” *Id.* § 2. Subject to the President’s “direction or approval,” the Director “organize[s] [OA], contract[s] for supplies and services, and do[es] all other things that the President, as head of [OA], might do.” *Id.* § 4(a) (as amended by Exec. Order No. 12122). On a day-to-day basis, the Director reports to the Assistant to the President and Deputy Chief of Staff, through the Deputy Assistant to the President for Management, Administration, and Oval Office Operations. In addition, the Director provides advice to the President, through the Deputy Chief of Staff, on matters such as budget and appropriations issues, cyber security and threats, and administrative questions.

II.

The Freedom of Information Act requires that “[e]ach agency” make available to the public various agency records. 5 U.S.C. § 552. As revised in 1974, the statutory definition of the term “agency” includes “any executive department, military department, Government corporation, Government controlled corporation, or *other establishment in the executive branch of the Government (including the Executive Office of the President)*, or any independent regulatory agency.” 5 U.S.C. § 552(f)(1) (emphasis added). In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), the Supreme Court relied on the legislative history of this definition to hold that “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President’ are not included within the term ‘agency’ under the FOIA.” *Id.* at 156 (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)). The Court of Appeals for the D.C. Circuit has recognized that, in revising the definition of the term “agency” in 1974, Congress drew on and codified that court’s finding in *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), that an “agency” included “any administrative unit with substantial independent authority in the exercise of specific functions,” including such a unit in the EOP. *See Meyer v. Bush*, 981 F.2d 1288, 1291 (D.C. Cir. 1993) (“As clearly shown by the legislative history, . . . Congress intended to codify our earlier decision . . . in *Soucie v. David*.”).

In a series of cases addressing whether an EOP entity is an “agency” for FOIA purposes, the D.C. Circuit has focused on whether the entity possessed “substantial independent authority,” and in seeking to resolve that question, has articulated a three-factor test, which was first set out in *Meyer*. *See id.* at 1293. The test requires consideration of “(1) ‘how close operationally the group is to the President,’ (2) ‘whether it has a self-contained structure,’ and (3) ‘the nature of its delegat[ed] authority.’” *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (quoting *Meyer*, 981 F.2d at 1293). Each factor is not “weighed equally”; instead, each “warrants consideration insofar as it is illuminating in a particular case.” *Id.* In practice, the D.C. Circuit has placed considerable emphasis on the third factor, closely considering the “nature of its delegated authority” to determine the ultimate question whether the entity exercises “sub-

stantial independent authority” or instead functions solely to advise and assist the President. *Id.*

As explained below, this third factor is dispositive here. Although OA has an organizational structure that would allow it to exercise independent authority should the President so delegate, and although it is not proximate to the President in the same way as the President’s personal staff, we believe that the nature of the delegated authority that OA actually exercises is such that OA cannot be said to exercise substantial independent authority in its limited mission of providing administrative assistance solely within the EOP, which itself supports the President. We therefore conclude that OA is not an agency for purposes of FOIA.¹

A.

The logical initial inquiry, under both the statutory language and the D.C. Circuit case law, concerns organizational structure, the second of the three factors set out in *Meyer*. As the D.C. Circuit has explained, it “seems very doubtful” that “an entity without a self-contained structure could ever qualify as an agency that exercises substantial independent authority.” *Armstrong*, 90 F.3d at 559; *see also Meyer*, 981 F.2d at 1296 (“FOIA, by declaring that only ‘establishments in the executive branch’ are covered, 5 U.S.C. § 552(e), requires a definite structure for agency status.”). In *Armstrong*, the court concluded that the National Security Council (“NSC”) had the self-contained structure necessary for a FOIA “agency”:

The NSC staff is not an amorphous assembly from which ad hoc task groups are convened periodically by the President. On the contrary, it is a professional corps of more than 150 employees, organized into a complex system of committees and working groups reporting ultimately to the Executive Secretary. There are separate offices, each responsible for a particular geographic region or functional area, with clearly established lines of authority both among and within the offices.

¹ In a prior opinion concluding that White House data entered and stored on OA computers under specified conditions did not qualify as “agency records” under FOIA, we stated that OA, “as a unit within EOP which does not have the sole function of advising and assisting the President, may well be an ‘agency’ within the meaning of FOIA.” Memorandum for Fred F. Fielding, Counsel to the President, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Freedom of Information Act to White House Records Entered and Stored in Office of Administration Computers* at 4 (Feb. 22, 1982). The opinion did not provide any analysis supporting that statement and predated subsequent court decisions, such as *Meyer*, 981 F.2d 1288; *Sweetland v. Walters*, 60 F.3d 852 (D.C. Cir. 1995); and *Armstrong*, 90 F.3d 553. Now that the question is squarely presented and we have occasion to analyze it fully, and in light of the subsequent case law discussed herein, we reject any suggestion that OA is an agency for the purposes of FOIA.

90 F.3d at 560. By contrast, *Meyer* held that the President’s Task Force on Regulatory Relief, an ad hoc task force created by President Reagan, was not an agency because it operated out of the Vice President’s office and, importantly, lacked a separate staff. *See Meyer*, 981 F.2d at 1296 (“[T]he Task Force’s lack of a separate staff is a strong indicator that it was neither an ‘establishment’ nor an independent actor in the executive branch.”).

Like the NSC, OA has a defined hierarchy. The President stands at its head, and a director—who is personally appointed by, and serves at the pleasure of, the President—provides for the Office’s day-to-day management. In its Fiscal Year 2008 Congressional Budget Submission, OA reported that it maintains a staff consisting of approximately 225 employees, and it is organized into five different offices, each with its own defined functions, that report to the Director. *See Executive Office of the President, Office of Administration, Congressional Budget Submission, FY 2008, at OA-3.* A court would likely find this to be the kind of “self-contained structure” necessary to characterize OA as an agency for FOIA purposes.²

As the D.C. Circuit has explained, however, “while a definite structure may be a prerequisite to qualify as an establishment within the executive branch . . . not every establishment is an agency under the FOIA.” *Armstrong*, 90 F.3d at 558 (internal quotations and citations omitted). Even when an office “has a structure sufficiently self-contained that the entity could exercise substantial independent authority . . . [t]he remaining question is whether the [entity] does in fact exercise such authority.” *Id.* at 560. Indeed, the reason for considering an entity’s organizational structure is to determine whether the entity is even in a position to exercise independently any authority delegated by the President.

B.

We consider next OA’s “proximity” to the President. The D.C. Circuit has explained that “[t]he closer an entity is to the President, the more it is like the White House staff, which solely advises and assists the President, and the less it is like an agency to which substantial independent authority has been delegated.” *Armstrong*, 90 F.3d at 558; *see also Meyer*, 981 F.2d at 1293 (“Proximity to the

² We note that OA is currently governed by regulations suggesting that OA may have considered itself to be an agency for purposes of FOIA. *See* 5 C.F.R. §§ 2502.1–2502.10 (2007). That fact, however, is not significant to our analysis. As the D.C. Circuit explained in *Armstrong*, “[t]he NSC’s prior references to itself as an agency are not probative on the question before the court—whether the NSC is indeed an agency within the meaning of the FOIA; quite simply the Government’s position on that question has changed over the years.” 90 F.3d at 566. The court was referring in part to a 1993 opinion of this Office that applied subsequent legal developments to reverse the prior position of the Office that the NSC was an agency subject to FOIA. *See Memorandum for Alan Kreczko, Special Assistant to the President and Legal Adviser, NSC, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, Re: Status of NSC as an “Agency” under FOIA* (Sept. 20, 1993). The court in *Armstrong* agreed with the legal conclusion of our 1993 opinion regarding the NSC.

President, in the sense of continuing interaction, is surely in part what Congress had in mind when it exempted the President's "immediate personal staff" [from the requirements of FOIA] without requiring a careful examination of its function.") (quoting conference committee report relied on in *Kissinger*). Thus, the *Armstrong* court, in holding that the NSC is not an "agency" for purposes of FOIA, explained that the NSC shares an "intimate organizational and operational relationship" with the President. *Armstrong*, 90 F.3d at 560. The NSC is chaired by the President, and its staff is supervised by the Assistant to the President for National Security Affairs ("National Security Adviser"), who "work[s] in close contact with and under the direct supervision of the President." *Id.* Because of this close relationship, the court stated that it would require a "strong showing" on the remaining factor of the three-part *Meyer* test—the nature of the NSC's delegated authority—in order for the court to conclude that the NSC is an "agency" under FOIA. *Id.*

To some extent, OA may be deemed proximate to the President. Like the NSC, OA is headed by the President, Reorganization Plan § 2, and the OA Director, who supervises the day-to-day functions of OA, is appointed by the President, *id.*, and is subject to "direction or approval as the President may provide or require," Exec. Order No. 12028, § 4(a) (as amended by Exec. Order No. 12122). The OA Director does not regularly report directly to the President, but he does report to senior White House staff, and he provides advice to the President, through the Deputy Chief of Staff, on matters such as budget and appropriations issues, cyber security and threats, and administrative questions. *See supra* p. 201.

On the other hand, OA does not share the kind of "intimate organizational and operating relationship" with the President that the NSC does. *Armstrong*, 90 F.3d at 560. For example, in *Armstrong* the President was described as "working in close contact with" and "direct[ly] supervis[ing]" the National Security Adviser, who controls the NSC staff. *Id.* Here, by contrast, the President rarely if ever works "in close contact with" or "direct[ly] supervis[es]" the OA Director. In this sense, therefore, OA is not as "proximate" to the President as his "immediate personal staff," *Kissinger*, 445 U.S. at 156, who interacts with him on a regular basis.

Like the analysis of whether an EOP entity has a self-contained structure, however, the analysis of an EOP entity's proximity to the President does not ultimately determine whether it is an agency for purposes of FOIA. Although an entity's proximity to the President may suggest a lack of substantial independent authority, *see Armstrong*, 90 F.3d at 560 (NSC's close proximity to the President required plaintiff to make a "strong showing . . . regarding the remaining factor under *Meyer*"), it does not follow that a more distant relationship itself establishes independent authority, much less substantial independent authority. Rather, such a determination requires an examination of the authority actually exercised by the entity.

C.

Thus, our analysis ultimately turns on the nature of OA’s delegated authority. As explained below, we believe that because OA only provides administrative support to the EOP, it does not exercise “substantial independent authority.”

In a very similar case, the D.C. Circuit found a lack of substantial independent authority where the entity performed administrative functions for the President. In *Sweetland v. Walters*, 60 F.3d 852 (D.C. Cir. 1995), the court determined that the Executive Residence of the President, which “provides for the operation of the Executive Residence” by, among other things, conducting “general housekeeping, prepar[ing] and serv[ing] meals, greet[ing] visitors, and provid[ing] services as required in support of official and ceremonial functions,” *id.* at 854, does not wield substantial independent authority.³ The court explained that “the Residence staff’s functions demonstrate[] that it is exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties,” and that the staff “does not oversee and coordinate federal programs . . . or promulgate binding regulations.” *Id.* Accordingly, the court concluded, the staff of the Executive Residence does not have “delegated independent authority” and is therefore “not an agency as defined in FOIA.” *Id.* at 854-55.⁴

We think that OA’s authority is closely analogous to the authority of the Executive Residence at issue in *Sweetland*. By executive order, OA exercises the authority to “provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct.” Reorganization Plan § 2. The President likewise has delegated to the OA Director, as the chief administrative officer, the authority to “organize [OA], contract for supplies and services, and do all other things that the President, as head of [OA], might do.” Exec. Order No. 12028, § 4(a) (as amended by Exec. Order No. 12122). OA’s mission is “to provide administrative services to all entities of the [EOP], including direct support services to the President.” Office of Administration, <http://www.whitehouse.gov/oa> (last visited ca. 2007). Such services include “financial management and information technology support, human resources management, library and research assistance, facilities management, procurement, printing and graphics support, security, and mail and messenger operations.” *Id.*

³ The D.C. Circuit held in 1995 that the Executive Residence was not a unit within the EOP, but was “analogous to an EOP unit for purposes of a FOIA analysis.” *Sweetland*, 60 F.3d at 854. The White House subsequently incorporated the Executive Residence into the EOP in 2002. See Memorandum for Gary Walters, Chief Usher, Executive Residence, from Andrew H. Card, Jr., White House Chief of Staff (June 11, 2002).

⁴ The court also noted that the responsibilities of the Executive Residence, as is the case with OA, are carried out “under the direction of the President” or “with the approval of the President.” 60 F.3d at 855 (citation omitted); see also *Armstrong*, 90 F.3d at 563 (plaintiff “has not . . . established that any of [the NSC’s] authority can be exercised without the consent of the President”).

OA is therefore very much like the Executive Residence in that its role is to provide services in support of the President by assisting the staff of the EOP. OA's mission is to provide the necessary administrative support for the staff of the EOP "so that policy-making staff elsewhere in the EOP can focus on national policy decisions without having the distractions caused by routine administrative services." See Executive Office of the President, Office of Administration, Congressional Budget Submission, FY 2006, at 69. Like the Executive Residence, OA does not have any authority to make policy or supervise other units of the Executive Branch. Rather, the heads of other EOP offices remain responsible for policymaking functions where those functions may overlap with OA's responsibilities. Exec. Order No. 12028, § 4(d) (as amended by Exec. Order No. 12122) ("The Director shall not be accountable for the program and management responsibilities of units within the [EOP]; the head of each unit shall remain responsible for those functions."). Accordingly, because the "ultimate authority to set objectives, determine policy, and establish programs rests elsewhere," and OA's sole function is to provide administrative support, OA does not exercise the substantial independent authority required for a FOIA agency. *Armstrong*, 90 F.3d at 564.

Indeed, OA's non-substantive, administrative support authority stands in stark contrast with the kind of authority exercised by the EOP units determined by the D.C. Circuit to be agencies under FOIA: the Office of Science and Technology had authority, transferred to it from the National Science Foundation, "to evaluate the scientific research programs of the various federal agencies," *Soucie*, 448 F.2d at 1073; the Council on Environmental Quality had regulatory authority over federal agencies, see *Pac. Legal Found. v. Council on Env't'l Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980); and the Office of Management and Budget had a statutory duty to prepare the budget submitted to Congress by the President, *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979). The D.C. Circuit has never held that an administrative office like OA exercises the "substantial independent authority" of a FOIA agency.⁵

⁵ As the discussion in this memorandum has indicated, when the D.C. Circuit analyzes whether an EOP unit is an agency under FOIA, it focuses on whether the entity exercises "substantial independent authority" and not on whether the "sole function" of the entity is to "advise and assist" the President. See, e.g., *Armstrong*, 90 F.3d at 558-66; *Sweetland*, 60 F.3d at 853-55. The implication of the D.C. Circuit decisions is that as long as a unit of the EOP exercises no substantial independent authority, it should be classified as a unit that functions to advise and assist the President for purposes of being exempt from FOIA, without requiring a separate showing as to how the unit provides both advice and assistance to the President. The opinion in *Sweetland*, for example, contains no discussion of whether the staff of the Executive Residence functions to "advise" the President, strongly suggesting that as long as a unit of the EOP exercises no substantial authority independently of the President, it is not subject to FOIA. Therefore, although OA does in fact advise the President, see *supra* p. 188, it is not necessary that OA "advise" as well as "assist" the President in order for OA to be classified as a "unit[]" in the Executive Office whose sole function is to advise and assist the President." *Kissinger*, 445 U.S. at 156 (internal quotations and citations omitted).

Finally, we emphasize that OA differs from the EOP entities that have been held to be agencies for purposes of FOIA in the additional respect that its responsibilities derive entirely from executive orders of the President; OA does not trace its authority back to a federal statute. An office within the EOP will be more likely to act independently of the President when, like an agency outside the EOP, the office is charged with specific duties by statute, rather than by an immediate delegation from the President. *See Armstrong*, 90 F.3d at 565. Thus, the D.C. Circuit relied on the Office of Science and Technology’s statutory authority to evaluate federal scientific programs, *see Soucie*, 448 F.2d at 1075, and the Office of Management and Budget’s statutory responsibility over the budget, *see Andrus*, 581 F.2d at 902, in holding that both offices are FOIA agencies. By contrast, Congress neither created OA nor charged it with any statutory responsibility. Rather, OA’s authority derives solely from an executive order, the Reorganization Plan, which places the office under the direct supervision of the President. The President serves as the head of OA, and the Director remains “[s]ubject to such direction or approval as the President may provide or require.” Exec. Order No. 12028, § 4(a) (as amended by Exec. Order No. 12122).

III.

For the foregoing reasons, we conclude that the authority delegated by the President to OA to provide administrative support does not constitute “substantial independent authority.” We therefore conclude that OA is not an “agency” for purposes of FOIA.

STEVEN A. ENGEL
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of the President to Name an Acting Attorney General

The President may designate an Acting Attorney General under the Vacancies Reform Act, even if an officer of the Department of Justice otherwise could act under 28 U.S.C. § 508, which deals with succession to the office of the Attorney General.

September 17, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether the President has authority to name an Acting Attorney General under the Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d (2000 & Supp. IV 2004), even if an officer of the Department of Justice otherwise could act under 28 U.S.C. § 508 (2000). As we advised orally, we believe that the President has this authority.

The Vacancies Reform Act ordinarily provides “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate.” 5 U.S.C. § 3347(a). This provision is subject to an exception, however, when “a statutory provision expressly . . . authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” *Id.* § 3347(a)(1)(A). Section 508 of title 28 is such a statute. It states that when the office of Attorney General is vacant, the Deputy Attorney General “may exercise all the duties of that office”; that when the office of Deputy Attorney General is vacant, the Associate Attorney General “shall act as Attorney General”; and that the Attorney General “may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.” 28 U.S.C. § 508(a), (b). The Vacancies Reform Act thus did not extinguish the authority under 28 U.S.C. § 508 by which an Acting Attorney General might serve.

Attorney General Alberto R. Gonzales has resigned, effective today. Attorney General Order No. 2877-2007 (Mar. 29, 2007), issued under 28 U.S.C. § 508, specifies the order of succession to act as Attorney General when the positions of Deputy Attorney General and Associate Attorney General are vacant—as they are now. The Solicitor General is first in line, followed by the Assistant Attorneys General for the Office of Legal Counsel, for National Security, for the Criminal Division, and for the Civil Division. The President wishes the Assistant Attorney General for the Civil Division to act as Attorney General. To achieve this end, he has decided to designate that officer under the Vacancies Reform Act. Your question arises because the provision specifying that the Vacancies Reform Act

ordinarily is the exclusive means for naming an acting officer, 5 U.S.C. § 3347, does not apply here.

That the Vacancies Reform Act is not exclusive does not mean that it is unavailable. By its terms, the Vacancies Reform Act (with express exceptions not relevant here) applies whenever a Senate-confirmed officer in an executive agency resigns. 5 U.S.C. § 3345(a). The Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used. Indeed, the Senate Committee Report accompanying the Act expressly disavows this view. After listing a number of statutes that would come within the exception to exclusivity in the Vacancies Reform Act, including 28 U.S.C. § 508, the Senate Committee Report states that “[i]n any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office.” S. Rep. No. 105-250, at 17 (1998).¹

Furthermore, nothing in the text of the statute or its legislative history supports the conclusion that the “alternative procedure” of the Vacancies Reform Act may be used only when no one can serve under a statute like 28 U.S.C. § 508. In analogous circumstances, we earlier concluded that the President could use the Vacancies Reform Act to name an Acting Director of the Office of Management and Budget, even though another statute, 31 U.S.C. § 502(f) (2000), came within the exception to exclusivity under the Vacancies Reform Act and authorized the President to designate an Acting Director. We wrote that “[t]he Vacancies Reform Act does not provide . . . that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable. The legislative history squares with the conclusion that, in such circumstances, the

¹ The President has already issued an order embodying the conclusion that the Vacancies Reform Act is available for naming an Acting Attorney General. On March 19, 2002, he issued a Memorandum for the Attorney General on Designation of Officers of the Department of Justice, 1 *Pub. Papers of Pres. George W. Bush* 752 (2002), under which he exercised his authority under the Vacancies Reform Act to provide that, when the officials designated under 28 U.S.C. § 508 have died, resigned, or otherwise become unavailable to perform the duties of the Attorney General, specified United States Attorneys would constitute an additional chain of succession to act as Attorney General. The precise issue here, however, is whether the President may use the Vacancies Reform Act even if an officer otherwise would be able to act under 28 U.S.C. § 508.

We note that, under the version of the Vacancies Act in effect before the Vacancies Reform Act, the provision allowing the President to designate an officer to act did “not apply to a vacancy in the office of Attorney General.” 5 U.S.C. § 3347 (1994). As originally introduced and as later reported by the Senate Committee, the Vacancies Reform Act would have provided that “[w]ith respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.” See 144 Cong. Rec. 12,433 (June 16, 1998) (proposed 5 U.S.C. § 3345(e)); S. Rep. No. 105-250, at 25 (same). That provision was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute.

Vacancies Reform Act may still be used.” *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 121 n.1 (2003).² We do not believe that this opinion could be distinguished on the ground that, there, the President had the authority under both statutes, while here the authority under the Vacancies Reform Act belongs to the President and section 508 provides that the Attorney General may designate officers to serve. Neither the text of the statute nor the legislative history places any weight on such a distinction. Nor would it make sense that the Attorney General, through the exercise of a discretionary authority to name a further order of succession after the Deputy Attorney General and Associate Attorney General, could prevent the President, his superior, from using his separate authority under the Vacancies Reform Act. Indeed, for this reason, we believe that the President’s action under the Vacancies Reform Act, without more, trumps the Attorney General’s designation of a succession under section 508.³

A footnote in guidance from the Counsel to the President issued in 2001 states that the Vacancies Reform Act does not apply to the position of Attorney General “unless there is no official serving in any of the positions designated by section 508 to act as attorney general in the case of a vacancy.” Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto R. Gonzales, Counsel to the President, *Re: Agency Reporting Requirements Under the Vacancies Reform Act* at 2 n.2 (Mar. 21, 2001). For the reasons set out above, we believe that this statement is incorrect and that the President may use the Vacancies Reform Act even when there is an official serving in one of the designated positions under section 508. We note that the subject of the memorandum was reporting requirements under the Vacancies Reform Act, not the eligibility of officers to act under the statute, and the footnote appears in a section of the memorandum that only gives background for the reader. Moreover, the memorandum preceded our later analysis of the analogous issue posed by a vacancy in the Office of Management and Budget.

² Similarly, we have concluded that the Vacancies Reform Act could be used to provide for an Acting United States Attorney. We observed that another statute, 28 U.S.C. § 546, allowed appointment of an interim United States Attorney, who would fill the office (not be an acting officer), but that even if section 546 had dealt with acting officers, that section and the Vacancies Reform Act would both be available. *Temporary Filling of Vacancies in the Position of United States Attorney*, 27 Op. O.L.C. 149, 149–50 (2003).

³ Section 508 itself may give some indication that it does not displace the Vacancies Reform Act whenever an official in the chain of succession under 28 U.S.C. § 508(a) remains at the Department. Section 508(a) provides that “for the purpose of section 3345(a) of title 5 the Deputy Attorney General is the first assistant to the Attorney General.” *Cf. United States v. Lucido*, 373 F. Supp. 1142, 1147–51 (E.D. Mich. 1974) (under a previous version of the statute, the court suggested that the Deputy Attorney General had acted under the “first assistant” provision of the Vacancies Act and, when he reached the time limit under that statute, thereafter served under 28 U.S.C. § 508; the Department of Justice argued that the entire service was only under section 508).

Authority of the President to Name an Acting Attorney General

We therefore believe that the President may name an Acting Attorney General under the Vacancies Reform Act and that he can take this step even if officers named under section 508 would otherwise be able to perform the Attorney General's functions and duties.⁴

STEVEN G. BRADBURY

*Principal Deputy Assistant Attorney General
Office of Legal Counsel*

⁴ In the event that the Assistant Attorney General for the Civil Division were unable to carry out the duties of the Attorney General, either in general or in a specific case, the order of succession under 28 U.S.C. § 508 would again become applicable.

Department of Justice Authority to Represent the Secretary of Housing and Urban Development in Certain Potential Suits

The Department of Justice has statutory authority to represent the Secretary of Housing and Urban Development in suits that may arise from his decision to exercise his authority under the United States Housing Act of 1937 to override certain state civil service protections that would otherwise apply to employees of the Housing Authority of New Orleans.

October 10, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

You have asked whether the Department of Justice (the “Department”) has statutory authority to represent the Secretary of Housing and Urban Development (the “Secretary”) in suits that may arise from his decision to exercise his authority under the United States Housing Act of 1937, 42 U.S.C. §§ 1437–1437bbb-9 (2000) (“Housing Act”), to override certain state civil service protections that would otherwise apply to employees of the Housing Authority of New Orleans (“HANO”), which is a public housing agency (“PHA”) established under Louisiana law, *see* La. Rev. Stat. Ann. §§ 40:381 *et seq.* *See* Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Robert M. Couch, General Counsel, Department of Housing and Urban Development, *Re: Representation of the Secretary in Forthcoming Litigation Regarding the Housing Authority of New Orleans* (June 28, 2007) (“Couch Letter”).¹ For the reasons set forth below and based on the facts that you have provided, we answer that question in the affirmative.

I.

Section 6 of the Housing Act authorizes the Secretary to “take possession of all or part of [a] public housing agency” where the PHA is in “substantial default” on the covenants and conditions contained in its federal grant contracts. 42 U.S.C. § 1437d(j)(3)(A)(iv) (2000). You have informed us that in February 1996, the Secretary notified HANO and the City of New Orleans that HANO was in substantial default on its federal funding obligations. Later that month, acting under section 1437d(j)(3)(A)(iv), the Secretary took possession of HANO. The Housing Act provides that in doing so, the Secretary “shall be deemed to be acting not in [his] official capacity . . . , but rather in the capacity of the public housing

¹ The Department of Housing and Urban Development sought our views at the suggestion of the Civil Division. The Civil Division did not submit a views letter, but we did discuss the matter with the Deputy Assistant Attorney General who oversees Federal Programs.

agency.” *Id.* § 1437d(j)(3)(H). That same section of the Housing Act further provides that “any liability incurred, regardless of whether the incident giving rise to that liability occurred while the Secretary . . . was in possession of all or part of the public housing agency (including all or part of any project or program of the agency), shall be the liability of the public housing agency.” *Id.* Thus, when the Secretary took possession of HANO in 1996, he was “deemed” to have done so in the capacity of HANO (not in his official capacity as the Secretary), and HANO would be potentially liable with respect to any claims arising out of the Secretary’s possession of HANO.

You have informed us that the Secretary now has determined that, “to effectuate HANO’s recovery from its substantial default” and “to preserve [it] from insolvency,” he must operate HANO without regard to state civil service laws, and he therefore plans to exercise his authority under the Housing Act, *see* 42 U.S.C. § 1437d(j)(3)(D)(i)(V) (authorizing the Secretary to disregard “any State or local law relating to civil service requirements . . . that, in the Secretary’s written determination . . . , substantially impedes correction of the [PHA’s] substantial default”), to exempt certain HANO employees from state civil service protections. Couch Letter at 1.

II.

Congress has given the Department broad authority to represent a party in any court when doing so is in the interests of the United States. Section 517 of title 28 provides that the Attorney General may send an attorney from the Department of Justice “to attend to the interests of the United States in a suit pending” in state or federal court “or to attend to any other interest of the United States.” 28 U.S.C. § 517 (2000). Section 518(b) further authorizes the Attorney General personally or through an officer of the Department to “conduct and argue any case in a court of the United States in which the United States is interested,” whenever the Attorney General “considers it in the interests of the United States.” *Id.* § 518(b). The Supreme Court noted sixty years ago that section 518 and other “long-existing statutes . . . grant the Attorney General broad powers to institute and maintain court proceedings in order to safeguard national interests.” *United States v. California*, 332 U.S. 19, 27 (1947).

Whether the Department may represent a particular party in litigation depends primarily on the interests to be vindicated and not on the identity of the party to be represented, though obviously the identity of the party may say much about the nature of the underlying interests. More specifically, as explained below, we have concluded that a federal pecuniary interest suffices to trigger the Department’s representational authority, even when the party represented is private. We also have concluded that the Department may represent various parties (such as foreign governments) to protect non-pecuniary federal interests. Finally, we have explained that the Department may represent federal officers and employees sued in

their individual capacities for actions taken in the course of their duties based on two government interests: the interest of the government in vindicating particular actions at issue and the distinct interest of the government in protecting its officers and employees.

First, we have concluded that the existence of a federal pecuniary interest satisfies the requirements of 28 U.S.C. §§ 517 and 518. *See* Memorandum for the Attorney General, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Litigation by the United States on Behalf of the People's Republic of China Concerning Properties Transferred by the Republic of China to Private Parties* at 3 (Jan. 18, 1979) (“1979 Memorandum”). In the 1979 Memorandum, we stated that “[i]t seems clear that the United States would be deemed interested within the terms of [28 U.S.C. §§ 516–518] when it has a pecuniary interest in the outcome of the litigation.” *Id.* We further explained that the statutory requirements still would be satisfied “if the party represented is a private party [] or when the defendant is a federal officer acting within the scope of his authority.” *Id.* (footnotes omitted). That is, when the government has a financial interest in the outcome of litigation, the Department may represent even a private party to vindicate that interest.

Second, we have explained that the term “interest” in the Department’s representational statutes encompasses non-pecuniary interests as well as pecuniary interests. *Id.* at 5. In the 1979 Memorandum, we explained that the Attorney General has “broad discretionary authority . . . to represent a party in a suit in which the United States has a pecuniary interest *or which implicates the public interest, generously defined.*” *Id.* at 6 (emphasis added). There, we found sufficient the interest of the United States in “perfecting the [President’s] recent [diplomatic] recognition” of China. *Id.* Moreover, we concluded that the Department’s statutory authority to attend to the interests of the United States extended to the representation of such entities as foreign governments. *See, e.g., id.* (concluding that the Department may conduct litigation on behalf of the People’s Republic of China to recover embassy properties located in the District of Columbia and transferred to private parties, even where the United States has no pecuniary interest at stake). The courts have agreed that section 517 authorizes the Attorney General to represent private persons where the non-pecuniary interests of the United States (broadly defined) are at stake. *See, e.g., Hall v. Clinton*, 285 F.3d 74, 80 (D.C. Cir. 2002) (“[E]ven if [Mrs.] Clinton were a purely private citizen at all times relevant to Hall’s suit[,] . . . it was well within the DOJ’s discretion to determine that the United States has (and continues to have) an interest in representing the former First Lady in litigation based upon actions she allegedly undertook while at the White House.”); *Brawer v. Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976) (explaining that it “approaches the frivolous” to argue that “the Department of Justice possesses no statutory or regulatory authority [under section 517] to represent a nongovernment defendant in a civil case,” even where the interest of the United States—namely, defending a witness that cooperated with federal prosecutors—is

non-pecuniary). Thus, as with pecuniary interests, when the United States has a non-pecuniary interest in a case, it may represent federal and non-federal parties to vindicate that interest.

Finally, we have specifically addressed the authority of the Department to represent federal officers and employees in a variety of proceedings. We have explained that section 517 authorizes the Department to represent officers and employees “sued or subpoenaed in civil or congressional proceedings, or charged in state criminal proceedings, in their individual capacities, for acts taken in the course of their official duties.” Memorandum for Dick Thornburgh, Attorney General, and Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Attorney Fees for Private Counsel Representing Former Government Officials in Federal Criminal Proceedings* at 9 (Oct. 18, 1989) (“1989 Memorandum”). We have articulated two distinct federal interests in such situations that may satisfy the requirements of section 517. We explained that “the United States ordinarily has interests substantially identical to those of the employee in establishing the lawfulness of authorized conduct on behalf of the United States.” *Id.*; see also *Department of Justice Representation in Federal Criminal Proceedings*, 6 Op. O.L.C. 153, 153–54 (1982) (discussing general interests of United States in representing employees); Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Civil Division’s Recommendations Concerning Reimbursement of Legal Expenses* at 2–3 (June 24, 1981) (same).²

Even apart from the government’s interest in establishing the lawfulness of particular conduct, we have noted that the government has an interest “in relieving the employee of the threat and burden of litigation that might otherwise chill the performance of official duties.” 1989 Memorandum at 9. The Attorney General articulated this rationale 150 years ago: “No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense.” *Case of Captain Wilkes*, 9 Op. Att’y Gen. 51, 52 (1857); see also *Fees of District Attorneys*, 9 Op. Att’y Gen. 146, 148 (1858) (“When a[n] . . . executive officer is sued for an act done in the lawful discharge of his duty, the government which employed him is bound, in conscience and honor, to stand between him and the consequences.”).

² We have even suggested that the mere “interest in the development of judicial precedent involving litigation against federal employees” may be sufficient for purposes of section 517, “even where, in the particular case, the government lacks an interest in vindicating the employee’s conduct or avoiding deterrence of similar conduct.” 1989 Memorandum at 10 n.12; see also 28 C.F.R. § 50.15(a)(4) (2006) (providing that the United States may have an “interest” in representing federal employees in certain criminal actions, notwithstanding the Department of Justice’s countervailing interests).

Given the facts that you have provided, we believe the United States has clear and substantial interests in the Secretary's exercise of his statutory authority under section 1437d(j)(3)(D)(i)(V) to exempt certain HANO employees from state civil service protections. The United States has a pecuniary interest in how HANO spends its funds, the vast majority of which come from congressional appropriations. See E-mail for Andrew Oldham, Attorney-Adviser, Office of Legal Counsel, from William C. Lane, Office of the General Counsel, Department of Housing and Urban Development (Sept. 5, 2007). In addition, the United States has a non-pecuniary interest in the ability of its officers to execute federal law, including the Housing Act, on behalf of the United States. Finally, the United States has an interest in defending an officer from suits arising from the faithful discharge of his statutory responsibilities and authorities because, in defending the suit, the government would attempt to establish the lawfulness of government conduct and because it would be protecting an officer from the potential burden of litigation arising out of his service. These interests suffice to allow the Department to represent the Secretary in the potential suits at issue.

Section 1437d(j)(3)(H) does not change the analysis. Section 1437d(j)(3)(H)—which “*deem[s]* [the Secretary] to be acting . . . in the capacity of the public housing agency”—may simply create a legal fiction for the limited purpose of clarifying that “any liability incurred . . . shall be the liability of the public housing agency,” and not that of the United States. 42 U.S.C. § 1437d(j)(3)(H) (emphasis added); see also *Black's Law Dictionary* 446 (8th ed. 2004) (noting the word *deem* “has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by ‘deeming’ something to be what it is not or negatively by ‘deeming’ something not to be what it is”) (quoting G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996)).³ We need not resolve this issue, however. For the reasons discussed above, the United States has pecuniary and non-pecuniary interests in the Secretary's ability to execute his statutory authority under the federal Housing Act. The representational statutes discussed above provide ample authority for the Department of Justice to defend the Secretary based on the interests of the United States in so doing. The key is the interests of the United States, not the status of the Secretary or the source of funds that may be used to pay a potentially successful plaintiff.

³ Such an interpretation would be particularly reasonable, given the litigation risk that would be created by the various potentially contentious actions authorized by section 1437d(j)(3) to resuscitate distressed PHAs. For example, under certain circumstances, the Secretary may appoint (on a competitive or noncompetitive basis) a receiver, who, under certain circumstances, may abrogate certain contracts, may demolish and dispose of all or part of the assets of the public housing agency, may establish new PHAs and consolidate existing ones, and may disregard state civil service laws. 42 U.S.C. § 1437d(j)(3)(A)-(C). Moreover, without appointing a receiver, the Secretary may take possession of the PHA and take the same actions directly. *Id.* § 1437d(j)(3)(D). Given that each of these provisions implicates various interests—including those of employees, private contractors, residents, and organized labor—any action taken by either the Secretary or a receiver can be expected to result in lawsuits.

DOJ Authority to Represent Secretary of HUD in Certain Potential Suits

In summary, based on our understanding of the facts, we conclude that the Department of Justice has statutory authority to represent the Secretary of Housing and Urban Development in potential suits arising from his decision to exercise his federal statutory authority to override certain state civil service protections that would otherwise apply to employees of HANO. Because the United States would have pecuniary and non-pecuniary interests in these potential suits, it does not matter that the Secretary may be “deemed to be acting not in [his] official capacity . . . , but rather in the capacity of the public housing agency,” 42 U.S.C. § 1437d(j)(3)(H).⁴

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⁴ We note that the Department of Justice’s regulations do not expressly provide for representation of federal employees in suits arising from their official actions on behalf of a non-federal entity. *Cf.* 28 C.F.R. § 50.15 (providing for DOJ representation in certain individual-capacity tort suits against federal employees that implicate the “interests” of the United States). We have previously concluded, however, that even without separate regulatory authorization, section 517 enables the Department to represent non-federal officials and entities where it is in the “interests” of the United States to do so. *See, e.g.*, 1979 Memorandum at 3. For present purposes, it is therefore sufficient to note that—unlike the situation presented in the 1989 Memorandum, *see id.* at 6–8—the regulations do not preclude the Department of Justice from representing the Secretary under the facts as we understand them.

Rate of Accrual of Annual Leave by a Civilian Employee Appointed While on Terminal Leave Pending Retirement From One of the Uniformed Services

A member of a uniformed service appointed to a civilian position while on terminal leave pending retirement from the service is entitled to credit for his years of active military service only for the duration of his terminal leave.

Once the employee retires from the uniformed service, he no longer is entitled to credit for his years of active military service unless he satisfies certain statutory exceptions detailed in 5 U.S.C. § 6303(a) or (e). The employee's leave-accrual rate must be recalculated upon his retirement to reflect his reduced years of creditable service.

October 16, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE

“Terminal leave” is “a term of art originating during World War II” meaning “a leave of absence granted at the end of one’s period of service.” *Terry v. United States*, 97 F. Supp. 804, 806 (Ct. Cl. 1951). Members of the uniformed services who are on terminal leave pending retirement from active duty and who accept civilian employment with the federal government are entitled to receive the pay of both positions “for the unexpired portion of the terminal leave.” 5 U.S.C. § 5534a (2000).

You have asked us whether a member of a uniformed service who is appointed to a civilian position while on terminal leave pending retirement is entitled to credit for his years of active military service for the purpose of determining the rate at which he accrues annual leave under section 203 of the Annual and Sick Leave Act, Pub. L. No. 82-233, 65 Stat. 672, 679–80 (1951) (codified as amended at 5 U.S.C. § 6303 (2000 & Supp. V 2005)).¹ We conclude that such a member is entitled to credit for his years of active military service only for the duration of his terminal leave. Once the employee retires from the uniformed service, he no longer is entitled to credit for his years of active military service unless he satisfies certain statutory exceptions, *see id.* §§ 6303(a)(A)–(C), (e), and the employee’s leave-accrual rate must be recalculated upon his retirement to reflect his reduced years of creditable service.

¹ In considering this question, we have had the benefit of the views of the Department of Defense and the Office of Personnel Management. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Daniel J. Dell’Orto, Principal Deputy General Counsel, Department of Defense (June 26, 2006). The Office of Personnel Management has informed us that its views are expressed in its April 2005 letter to your office. *See* Letter for Daniel J. Dell’Orto, Principal Deputy General Counsel, Department of Defense, from Mark A. Robbins, General Counsel, Office of Personnel Management (Apr. 14, 2005). This opinion memorializes advice that we provided to you informally in November 2006.

I.

As a general matter, a member of a uniformed service “whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law,” 5 U.S.C. § 5536 (2000).² Section 203 of the Dual Compensation Act, Pub. L. No. 88-448, 78 Stat. 484, 487 (1964), however, authorizes a member of a uniformed service on terminal leave pending retirement from active service to accept civilian employment and to receive the pay of both positions:

A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave.

5 U.S.C. § 5534a. It is well settled, and both the Department of Defense (“DoD”) and the Office of Personnel Management (“OPM”) agree, that a member of a uniformed service on terminal leave is still on active duty and has not yet been “release[d]” from the service. *See* 10 U.S.C. § 701(e) (2000) (“Leave taken before discharge is considered to be active service.”); *Madsen v. United States*, 841 F.2d 1011, 1013 (10th Cir. 1987) (“Terminal leave, or leave taken prior to discharge, is statutorily defined as active duty service.”).

The “pay” for a civilian position to which a service member on terminal leave is entitled necessarily includes annual leave with pay. *See Matter of Office of Technology Assessment Authority for Incentive Awards Program*, 67 Comp. Gen. 418, 420 (1988).³ Section 6303 of title 5, United States Code, governs a civilian employee’s entitlement to annual leave.⁴ Section 6303(a) provides that “[a]n

² The uniformed services are statutorily defined to include the Armed Forces (the Army, Navy, Air Force, Marine Corps, and Coast Guard, *see* 10 U.S.C. § 101(a)(4) (2000)), and the commissioned officer corps of the National Oceanic and Atmospheric Administration and the Public Health Service, *see* 5 U.S.C. § 2101(2), (3) (2000). *See* 10 U.S.C. § 101(a)(5) (2000) (same).

³ Although the Executive Branch is not bound by the legal opinions of the Comptroller General, this office considers them useful sources in resolving appropriation issues. *See, e.g., Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996).

⁴ For the purposes of section 6303, section 6301 defines an “employee” to include both an “employee” within the meaning of 5 U.S.C. § 2105 (2000) (“employee” includes any individual who is appointed by, among others, the President or Congress, performs a “Federal function under authority of law or an Executive act” and is subject to the supervision of an appointing authority) as well as “an individual first employed by the government of the District of Columbia before October 1, 1987.” *Id.*

employee is entitled to annual leave with pay which accrues” at graduated rates for employees with specified periods of creditable service: four hours of leave per biweekly pay period for employees with less than three years of creditable service, six hours per pay period for those with “3 but less than 15 years of service,” and eight hours for more years of service.” The change in an employee’s rate of accrual of annual leave “takes effect at the beginning of the pay period after the pay period . . . in which the employee completed the prescribed period of service.” 5 U.S.C. § 6303(c).

“In determining years of service” an employee is to be credited with, section 6303(a) directs that “an employee is entitled to credit for all service of a type that would be creditable” under two provisions of title 5, sections 8332 and 6303(e). 5 U.S.C. § 6303(a). Section 8332 counts active military service as creditable service, subject to a number of detailed conditions and exceptions. 5 U.S.C. § 8332(c)(1)(A) & (B) (2000). Specifically, if an employee “is awarded retired pay based on any period of military service,” the employee’s military service will generally not be counted “unless the retired pay is awarded” either based upon certain service-connected disabilities or pursuant to certain provisions of title 10 of the United States Code (specifically, 10 U.S.C. §§ 12731–12741 (2000 & Supp. IV 2004)) governing retired pay for non-regular service. 5 U.S.C. § 8332(c)(2).

Section 6303(a) contains a similar exclusion limiting the credit that a civilian employee who is a retired member of a uniformed service may receive for his years of active military service. A civilian employee retired from a uniformed service “is entitled to credit for active military service only if” one of three conditions is met: (1) “his retirement was based on disability” received in the line of duty “as a direct result of armed conflict” or caused by “an instrumentality of war and incurred in [the] line of duty during a period of war,” 5 U.S.C. § 6303(a)(A); (2) his service “was performed in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized,” *id.* § 6303(a)(B); or (3) “on November 30, 1964, he was employed in a position to which this subchapter applies and thereafter continued to be so employed without a break in service of more than 30 days,” *id.* § 6303(a)(C). Section 3501 defines “retired member of a uniformed service” to mean “a member or former member of a uniformed service who is entitled, under statute, to retired, retirement, or retainer pay on account of his service as such a member.” 5 U.S.C. § 3501(2) (2000). Thus, with limited exceptions, title 5 prohibits a retired uniformed service member from receiving credit for his military service for purposes of calculating his annual leave while he is entitled to receive retirement pay. *See id.* §§ 3501(2), 6303(a), & 8332(c)(2).

§ 6301(1), (2) (2000). The definition of “employee” in section 6301 affirmatively excludes 13 categories of positions, such as, for example, “an employee of either House of Congress or of the two Houses,” *id.* § 6301(vi), and “an officer in the executive branch or in the government of the District of Columbia who is designated by the President, except a postmaster, United States attorney, or United States marshal,” *id.* § 6301(xi).

Rate of Accrual of Annual Leave by a Civilian Employee

Section 202(a)(1) of the Federal Workforce Flexibility Act of 2004, Pub. L. No. 108-411, 118 Stat. 2305, 2312 (adding 5 U.S.C. § 6303(e)), provides one such exception. That provision required OPM to promulgate regulations that would permit the head of an appointing agency to credit a new civilian employee for past uniformed service notwithstanding section 6303(a), so long as the employee's duties while in the uniformed service "directly relate to the duties" of the civilian appointment and, in the judgment of the head of the appointing agency, granting credit for such years of service "is necessary in order to achieve an important agency mission or performance goal." 5 U.S.C. § 6303(e)(1)(A)(i), (B). Under OPM's regulations, the head of an agency may "provide credit for active duty uniformed service that otherwise would not be creditable under 5 U.S.C. 6303(a)" upon determining that the employee's skills and experience are "[e]ssential to the new position," "were acquired through performance in a position in the uniformed services having duties that directly relate to the duties of the position," and are "[n]ecessary to achieve an important agency mission or performance goal." 5 C.F.R. § 630.205(b)(1) & (2) (2007).

II.

OPM interprets section 6303(a) to require an agency to credit the employee for his years of active military service until his retirement. OPM further reads section 6303(a) to require that the employee continue to receive that credit even after he has retired from the uniformed service. OPM reasons that the agency has no specific statutory authority to adjust the leave-accrual rate downward after an employee retires from a uniformed service and, therefore, there is no legal basis authorizing the recalculation of the leave accrual rate upon retirement from the military.⁵

DoD contends that a uniformed service member who is appointed to a civilian position while on terminal leave should be treated *as if he has already retired*, and should not be entitled to credit for his years of active military service, either at the time he is appointed to a civilian position or afterwards. DoD bases its interpretation of section 6303(a) on its understanding of the purposes of section 5534a,

⁵ OPM's interpretation does not appear in regulations promulgated pursuant to notice and comment procedures, nor does it appear in any decision issued pursuant to formal adjudication procedures. OPM has previously articulated this interpretation in informal decisions resolving claims brought by employees who were hired while on terminal leave. *See, e.g., In re Passey*, No. 04-0023 (Jan. 11, 2006) (concluding that claimant is "entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment" and that his "military retirement . . . does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment"). OPM's interpretation also previously appeared in OPM's *Guide to Processing Personnel Actions Operating Manual* ("*OPM Manual*") ch. 6, subch. 1, at 1-2 (2007) (available at <http://www.opm.gov/feddata/gppa/gppa.asp>, last visited ca. 2007) (defining "Service Computation Date," which agency must set "at appointment" for the purpose of determining the rate at which an employee accrues annual leave).

which DoD says was intended to permit members of the military to be hired as civilian employees by the government in order to retain personnel with valuable skills, but was not intended to create a windfall of compensation for retiring members of the military.

While your opinion request was pending, Congress resolved the issue prospectively in section 1101 of the John Warner National Defense Authorization Act for FY 2007 (“the Warner Act”), Pub. L. No. 109-364, 120 Stat. 2083, 2407 (Oct. 17, 2006). That provision amends 5 U.S.C. § 5534a to provide that a uniformed service member who is appointed to a civilian position while on terminal leave is “entitled to accrue annual leave with pay in the manner specified in section 6303(a) of this title *for a retired member* of a uniformed service.” (Emphasis added.) Going forward, any member appointed to a civilian position thus will be entitled to credit for his years of active military service only if he either satisfies the requirements of section 6303(a)(A)–(C) or receives credit under the regulations implementing section 6303(e). You have asked us to resolve the issue under the prior law to determine whether DoD may adjust the leave-accrual rate of retired uniformed service members who were appointed to civilian positions before the effective date of the new law.

III.

In resolving this issue, we will apply the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Proposed Agency Interpretation of “Federal Means-Tested Public Benefits” Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 21 Op. O.L.C. 21, 21–23 (1997); Memorandum for James W. Carroll, Jr., Deputy General Counsel, Department of the Treasury, from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Validity of Regulation Interpreting Federal Alcohol Administration Act to Prohibit Slotting Fees in Connection with Alcohol Sales* at 3 (Mar. 11, 2005). Under *Chevron*, we first ask “whether Congress had directly spoken to the precise question at issue.” 467 U.S. at 842. This matter presents two distinct statutory questions: (1) whether a service member who is appointed to a civilian position is entitled to credit for his years of active service in determining his leave-accrual rate while he continues on terminal leave; and (2) whether such an employee continues to be entitled to credit for his years of active service even after he retires from uniformed service. If Congress has addressed these questions directly, then we “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. If “the statute is silent or ambiguous with respect to the specific issue[s],” however, then we proceed to consider whether Congress has delegated to OPM the authority to administer the

statute and “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.⁶

We resolve both issues at step one of the *Chevron* inquiry. We conclude that OPM’s interpretation with respect to the first issue—that a service member appointed to a civilian position while on terminal leave from a uniformed service is entitled to credit for his years of active military service until his retirement—is not only a permissible construction of 5 U.S.C. §§ 5534a and 6303(a), but it is required by the plain terms of those two provisions. We also conclude, however, that OPM’s interpretation with respect to the second issue—that such an employee is entitled to credit for his years of active service even after retirement from uniformed service—conflicts with the plain terms of section 6303(a) and, therefore, is not a permissible construction of that provision.

A.

In determining whether Congress has addressed these issues, we begin with the text of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Congress “says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); accord *The Food and Drug Administration’s Discretion to Approve Methods of Detection and to Define the Term “No Residue” Pursuant to the Federal Food, Drug, and Cosmetic Act*, 19 Op. O.L.C. 247, 263 (1995) (applying *Chevron* principles in analyzing whether agency interpretation of statute was lawful).

Under the express terms of section 5534a as it stood before the effective date of section 1101 of the Warner Act, a uniformed service member on terminal leave appointed to a civilian position would be “entitled” to receive both his military pay and allowances and the pay of his civilian position, including annual leave, “for the unexpired portion of the terminal leave.” Under section 6303(a), a civilian employee likewise would be “entitled” to receive annual leave accruing at a rate determined by his years of “service of a type that would be creditable under [5 U.S.C. §] 8332 . . . and for all service which is creditable by virtue of [section 6303](e).” The years of creditable service to which a uniformed service member

⁶ Congress has vested OPM with authority to “prescribe regulations necessary for the administration” of the Annual and Sick Leave Act. 5 U.S.C. § 6311 (2000). The Director of OPM also is responsible, as a general matter, for “securing accuracy, uniformity, and justice in the function of the Office,” *id.* § 1103(a)(1) (2000), and for “executing, administering, and enforcing” the “civil service rules and regulations of the President and the Office and the laws governing the civil service,” *id.* § 1103(a)(5)(A). See generally *Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000) (holding that OPM has authority under the Annual and Sick Leave Act to “fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program”).

on terminal leave is entitled under section 6303(a) include years of active military service. Honorable active military service is service “of a type” creditable for the purpose of determining the amount of an annuity under section 8332(c)(1) and, therefore, is creditable service for the purpose of determining an employee’s rate of accrual of annual leave under section 6303(a). *See* 5 U.S.C. § 8331(13) (2000) (credit for “military service” includes “honorable active service”); 10 U.S.C. § 101(d)(3) (2000) (“active service” includes “service on active duty or full-time National Guard duty”); *id.* § 101(d)(1) & (5) (further defining “active duty” and “full-time National Guard duty”). As noted above, a uniformed service member on terminal leave remains on active duty and has not yet retired. *See* 10 U.S.C. § 701(e) (2000) (“Leave taken before discharge is considered to be active service.”); *Madsen*, 841 F.2d at 1013 (time on terminal leave is “undisputed active duty status”). Accordingly, such a member is not subject to the exclusion from credit because he is not retired and, therefore, he need not qualify under the exceptions in section 6303(a)(A)–(C) to receive credit for his years of active service. Rather, he continues to be entitled to credit for his years of active military service under sections 6303(a) and 8332(c)(1) for the purpose of accruing annual leave.

DoD contends that these provisions are best interpreted to provide that a member who is appointed to the civil service while on terminal leave pending retirement is not entitled to accrue more than four hours of annual leave, because, before retirement, his military service cannot be considered creditable service for purposes of 5 U.S.C. § 6303(a). According to DoD, because the purpose of section 5534a was only to enable departing members of the uniformed services to take positions with the federal government while on terminal leave, and was not to provide members of the armed forces on terminal leave with a windfall of annual leave to which they would not otherwise be entitled, section 6303(a) should be read to preclude a member on terminal leave from receiving credit for his years of active military service in calculating the rate at which he accrues annual leave in his civilian position. Even if that is a correct statement of the statutory purpose, “it is ultimately the provisions of our laws rather than the principal concerns of . . . legislators” that determine a statute’s meaning. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Where, as here, “the statutory language is clear and unambiguous, we need neither accept nor reject a particular ‘plausible’ explanation for why Congress would have written a statute.” *Barnhart*, 534 U.S. at 460–61. Rather, “deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that ‘the legislative purpose is expressed by the ordinary meaning of the words used.’” *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

B.

The plain language of section 6303(a) is equally clear in providing that a uniformed service member appointed to a civilian position while on terminal leave generally loses his entitlement to receive credit for his prior active service upon retirement. Once a member of a uniformed service transitions from “terminal leave” (an active-duty status) to “retired,” he “is retired” within the meaning of sections 3501(2) and 6303(a). From then on, such an employee is “entitled” to receive credit for his years of active military service *only* to the extent that either his prior active military service falls into one of the three express exceptions in 5 U.S.C. § 6303(a)(A)–(C) or the head of the agency grants him credit under 5 U.S.C. § 6303(e) for service that otherwise would not be creditable. *See also id.* § 8332(c)(2) (employee “awarded retired pay based on any period of military service” is not entitled to credit for any period of military service unless retired pay is awarded based upon certain types of service-connected disabilities or pursuant to the provisions for certain non-regular service at 10 U.S.C. §§ 12731–12741). OPM’s interpretation of section 6303(a), however, would require agencies to continue to credit an employee who was appointed while on terminal leave for his years of active military service even after he has retired and regardless of whether he satisfies one of the three statutory exceptions set forth in section 6303(a).

OPM contends that it is foreclosed from adjusting an employee’s years of credit downward after his retirement from active military service because nothing in section 6303 authorizes the reduction of the employee’s leave accrual rate based on the employee’s subsequent retirement from the military. We disagree. OPM’s interpretation is inconsistent with the plain terms of title 5 of the United States Code, which establish the only basis for an employee’s entitlement to pay, including annual leave. “Title 5 of the United States Code and its implementing regulations set forth in meticulous detail the compensation that attaches to positions in the government service. . . . These provisions are the *exclusive* source of employees’ compensation rights.” *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983) (emphasis in original); *see also Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002) (“Congress—and only Congress—can authorize the benefits that a retired federal employee, whether civilian or military, is entitled to receive.”). Indeed, section 5536 expressly provides that an employee “whose pay or allowance is fixed by statute or regulation *may not* receive additional pay or allowance for the disbursement of public money . . . unless *specifically authorized* by law.” 5 U.S.C. § 5536 (emphases added). Far from having “specifically authorized” former service members to continue to receive credit for their service after retirement, Congress has *expressly barred* giving credit under such circumstances. That alone provides sufficient authority to revisit the accrual determination.

Furthermore, although we do not rely upon the provision to support our conclusion, section 6303(c) reasonably may be construed to authorize an employer to revisit a military retiree's leave-accrual rate. That provision states that "[a] change in the rate of accrual of annual leave by an employee under this section takes effect at the beginning of the pay period after the period . . . in which the employee completed the prescribed period of service." 5 U.S.C. § 6303(c). We believe that the phrase "completed the prescribed period of service" may be construed to apply to the retiree's completion of his military service. Take, for example, a member of a uniformed service appointed as a civilian employee while on terminal leave who has 20 years of active military service and no other creditable service: Before the end of his terminal leave and his retirement, such an employee is entitled to accrue annual leave at a rate of eight hours per biweekly pay period. After retirement from the uniformed service, however, he would be entitled to zero years of creditable service under section 6303(a). Because the employee would have completed "less than three" years of *creditable* service, he would be entitled to accrue annual leave at a rate of only four hours per biweekly pay period. It would be reasonable to read section 6303(c) to provide that the "change in the rate of accrual" resulting from his retirement from the uniformed service would be put into effect for the biweekly pay period following the member's retirement from the uniformed service.

Even if section 6303(c) does not itself authorize an agency to *reduce* the leave-accrual rate of an employee, but instead permits an agency only to *increase* an employee's leave-accrual rate when he has completed additional years of creditable service, nothing in section 6303(c) indicates that it is the exclusive means by which an agency may adjust an employee's leave-accrual rate. Certainly, section 6303(c) does not negate an agency's authority to carry into effect the clear command in section 6303(a) that only certain retired members of the uniformed services are entitled to credit for prior active military service following retirement. Section 6303(c)'s explicit direction with respect to increasing an employee's leave-accrual rate does not, under the circumstances, support the inference that Congress implicitly prohibited a *reduction* in an employee's leave-accrual rate. Congress knew how to prohibit an agency from reducing the creditable service of a civilian employee after his appointment date, yet it did so only for certain types of service that otherwise would not be creditable under section 6303(a). *See* 5 U.S.C. § 6303(e)(2)(B) (once an agency, acting pursuant to regulations promulgated under section 6303(e)(1), gives employee credit for years of service which would not otherwise be creditable under section 6303(a), such service "shall not thereafter cease to be so creditable, unless the employee fails to complete a full year of continuous service with the agency"). The omission of similar language here is telling. *See Russell v. United States*, 464 U.S. 16, 23 (1983) ("Where 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 omitted).

Moreover, we understand that OPM, in other contexts, has instructed agencies to adjust an employee’s leave-accrual rate even where section 6303 provides no express authority to make such an adjustment. For example, following the reasoning in decisions of the Comptroller General, OPM has instructed federal agencies to readjust the leave-accrual rate of an employee appointed to a civilian position while on the Temporary Disability Retired List (“TDRL”). *See* OPM Manual ch. 6, subch. 2, 2-2(d); *In re Cejka*, 63 Comp. Gen. 210, 213 (1984).

The Comptroller General’s decision in *Cejka* supports the conclusion that an agency must carry into effect the clear command of section 6303(a) that a retired service member is no longer entitled to credit for his years of active military service. In *Cejka*, the Comptroller General concluded that an employee who was appointed to a civilian position while on the TDRL was not entitled to be credited for his years of active military service “so long as his name is carried on that [TDRL] list.” *Id.* at 213. The Comptroller General stated that “the basis for crediting annual leave at one of the rates specified in [5 U.S.C. § 6303](a)(1)–(3), is predicated on the employee’s accumulation of the specified number of years of creditable service,” and “[t]he rate to be applied to ‘each full biweekly pay period’ is determined at the beginning of each upcoming biweekly pay period.” *Id.* at 213–14. So long as *Cejka* was on the TDRL, he was “only entitled to” credit for his active military service effective as of “the date of removal of his name from that list.” *Id.* at 213. During “any biweekly pay period of Federal employment while [*Cejka*] is in a military retired status . . . he may not be credited with his military service time,” because as a member on the TDRL, he was entitled to credit for his years of active military service under section 6303(a) only if he could satisfy one of the exceptions in section 6303(a)(A)–(C). *Id.* *Cejka* did not satisfy any of those exceptions. Therefore, the Comptroller General concluded that section 6303(a) required that *Cejka*’s annual leave accrual rate be adjusted and that “annual leave credited to his account . . . in excess of th[e] rate [to which he is entitled], is to be subtracted from his leave balance.” *Id.* The reasoning of *Cejka*, which we find persuasive, *see supra* note 3, indicates that recalculation of an employee’s leave-accrual rate is warranted where an employee moves between a creditable and a non-creditable military status.

We are not persuaded that the only relevant time for considering whether a person is retired for the purposes of section 6303(a) is the time of appointment. The plain language of section 6303 establishes that leave-accrual rate determinations may be made *after* the time of appointment, such as when the employee completes additional years of service. 5 U.S.C. § 6303(a), (c). OPM’s practice following *Cejka*, as evidenced in its decisions and in the former OPM Manual, *see supra* note 5, likewise demonstrates that leave-accrual rate determinations may be reevaluated after an employee’s initial appointment.

IV.

For the foregoing reasons, we conclude that, for appointments made before the effective date of section 1101 of the Warner Act, a member of a uniformed service appointed to a civilian position while on terminal leave is entitled under section 6303(a) to credit for his years of active military service in determining the rate at which he accrues annual leave, but only while he continues on active duty. Once the member retires from the uniformed service, he is entitled to credit for his years of active military service on the same basis as any other retired member, namely only if he satisfies one of the exceptions in section 6303(a)(A)–(C) or receives credit from the head of the appointing agency pursuant to section 6303(e).⁷

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⁷ We do not address the separate issue of agencies' discretion to waive the recovery of annual leave erroneously granted to employees as an "erroneous payment of pay . . . the collection of which would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a) (2000); *id.* § 5584(a)(2) (granting authority to head of agency to waive recovery of erroneous payment of up to \$1,500); Office of Management & Budget, *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316* (Dec. 17, 1996) (delegating to agency heads authority under 5 U.S.C. § 5584(a)(1) to waive recovery of erroneous payment of more than \$1,500).

Responsibility of Agencies to Pay Attorney's Fee Awards Under the Equal Access to Justice Act

The judgment of attorney's fees and expenses entered against the United States in *Cienega Gardens v. United States* cannot be paid out of the Judgment Fund because the Equal Access to Justice Act provides for payment.

Pursuant to EAJA, the Department of Housing and Urban Development must pay the award. HUD would be the "agency over which the [plaintiffs] prevail[ed]" under EAJA because it administered the federal program that was the subject of the litigation.

October 16, 2007

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL CIVIL DIVISION

You have asked for our opinion on which agency, if any, must pay the judgment of attorney's fees and expenses entered against the United States in *Cienega Gardens v. United States*, No. 02-5050 (Fed. Cir. Mar. 5, 2004). In particular, you have asked whether the award may be paid out of the Judgment Fund, under 31 U.S.C. § 1304 (2000), or whether it must be paid out of the appropriations of an agency responsible for the award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000).

On December 9, 2005, we advised that the award could not be paid out of the Judgment Fund, because the Judgment Fund is available only when "payment is not otherwise provided for." 31 U.S.C. § 1304(a)(1). EAJA provides for payment, by directing that a fee award "be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 28 U.S.C. § 2412(d)(4). We further advised that the Department of Housing and Urban Development ("HUD") would be the "agency over which the [plaintiffs] prevail[ed]" under EAJA, because HUD administered the federal program that was the subject of the litigation. This opinion confirms our previous advice and provides additional analysis of these questions.

I.

The Federal Circuit imposed the fee award in *Cienega Gardens* at the close of a protracted lawsuit challenging amendments to a HUD program designed to subsidize low- and moderate-income multifamily housing. After almost a decade of litigation and three rounds of appeals, the United States Court of Appeals for the Federal Circuit ruled that the amendments constituted a regulatory taking of the plaintiffs' property and ordered the United States to pay just compensation. The court of appeals further ordered that the United States pay the plaintiffs the attorney's fees and expenses incurred during their third appeal, the stage of the litigation during which the plaintiffs prevailed on their takings claims. Before

considering which instrumentality of the federal government must pay this fee award, we discuss the relevant events in the *Cienega Gardens* litigation.

A.

The plaintiffs in *Cienega Gardens* were the owners of housing constructed in the 1970s under the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701–1750g (2000 & Supp. V. 2005)), and financed with HUD-insured low-interest mortgages. As a condition of receiving the HUD-insured mortgages, the plaintiffs incorporated into their mortgage contracts with private lenders a variety of restrictions on the properties, including restrictions on income levels of tenants, allowable rental rates, and the rate of return on initial equity that the owners could receive. By their terms, these restrictions remained in effect for the duration of the mortgage contracts. Under HUD regulations then in effect, developers retained the right to prepay their loans and satisfy their mortgage obligations after twenty years. 24 C.F.R. §§ 221.524(a), 236.30(a) (1970). Owners who prepaid the mortgages would be released from the regulatory restrictions.

As the twenty-year mark for many HUD-insured mortgages approached, Congress became concerned that large numbers of owners would exercise their prepayment rights and remove their properties from the low-income housing pool. Congress found that such an event “would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into.” Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, tit. II, § 202(a)(4), 101 Stat. 1877, 1877 (1988) (“ELIHPA”); *see also* S. Rep. No. 101-316, at 105 (1990).

Congress chose to forestall such an outcome by enacting ELIHPA, which blocked the owners from exercising their prepayment rights without first obtaining HUD approval. In order to obtain that approval, the owners were required to submit a “plan of action” informing HUD of how the developers would use the property following prepayment. ELIHPA § 223, 101 Stat. at 1879. HUD could only approve prepayment upon finding that the plan would “not materially increase economic hardship for current tenants or involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available.” *Id.* § 225(a)(1), 101 Stat. at 1880. In 1988, HUD issued an interim rule implementing these prepayment restrictions, 53 Fed. Reg. 11,224 (Apr. 5, 1988) (codified at 24 C.F.R. pt. 248 (1989)), and issued instructions to its field offices detailing the procedures for filing and reviewing plans of action. In 1990, HUD issued a final rule implementing the prepayment restrictions imposed under the interim rule. 55 Fed. Reg. 38,944 (Sept. 21, 1990) (codified at 24 C.F.R. pt. 248 (1991)).

The ELIHPA restrictions would have expired after two years, but Congress extended them before their expiration, Pub. L. No. 101-494, 104 Stat. 1185 (1990),

and then made them permanent under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (“LIHPRHA”). HUD continued to issue regulations implementing ELIHPA and LIHPRHA.¹ The plaintiffs were effectively prohibited from prepaying their mortgages until Congress enacted the Housing Opportunity Program Extension Act of 1996, which permitted owners to exercise their prepayment rights and be free from the affordability restrictions if they agreed not to increase their rents until sixty days after prepayment. *See* Pub. L. No. 104-120, § 2(b), 110 Stat. 834, 834.

B.

In 1994, the *Cienega Gardens* plaintiffs brought suit in the Court of Federal Claims challenging their inability to prepay the HUD-insured mortgages under ELIHPA and LIHPRHA. *Cienega Gardens v. United States*, 33 Fed. Cl. 196 (1995). Throughout the litigation, the United States was represented by attorneys from the Civil Division of the Department of Justice (“DOJ”), with attorneys from HUD appearing on the briefs as “of counsel.” We understand that the Civil Division and HUD had no significant disagreement over the positions asserted during the course of the litigation.

Pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), the plaintiffs named the United States as the only defendant. Plaintiffs’ complaint charged that the government had violated several duties allegedly owed to the plaintiffs by implementing the prepayment restrictions that Congress had imposed through ELIHPA and LIHPRHA. First, plaintiffs claimed that the government had breached express contracts with the plaintiffs in the form of the regulatory agreements that incorporated the prepayment right. Second, plaintiffs claimed that the government had violated certain statutory directives in the manner in which it had administered the programs under sections 221(d)(3) and 236 of the National Housing Act. Finally, plaintiffs claimed that the government had taken their

¹ *See* Prepayment of a HUD-Insured Mortgage by an Owner of Low Income Housing, 56 Fed. Reg. 20,262 (May 2, 1991) (proposed rule); Guidelines for Determining Appraisals of Preservation Value Under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, 56 Fed. Reg. 64,932 (Dec. 12, 1991) (notice and request for public comment); Prepayment of a HUD-Insured Mortgage by an Owner of Low Income Housing, 57 Fed. Reg. 11,992 (Apr. 8, 1992) (interim rule); Preservation of Multifamily Assisted Rental Housing: Interim Guidelines for the Section 222(e) Windfall Profits Test, 57 Fed. Reg. 12,064 (Apr. 8, 1992) (notice of interim guidelines and request for public comment); Final Guidelines for Determining Appraisals of Preservation Value Under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, 57 Fed. Reg. 19,970 (May 8, 1992) (notice); Delegation of Authority for the Emergency Low Income Housing Preservation Act of 1987, as Amended by the Low Income Housing Preservation and Resident Homeownership Act of 1990, and as Further Amended by the Housing and Community Development Act of 1992, 58 Fed. Reg. 63,384 (Dec. 1, 1993) (notice of delegation of authority).

property without just compensation, in violation of the Fifth Amendment, by denying them the right to put their property to a more profitable use after twenty years.

In the initial round of litigation, the Court of Federal Claims granted summary judgment in the plaintiffs' favor on the contract claim, held that plaintiffs could maintain a claim for a regulatory taking, and ruled in the government's favor on all other claims. *Cienega Gardens v. United States*, 33 Fed. Cl. 196 (1995). The court then held a trial to determine contract damages for four model plaintiffs. *Cienega Gardens v. United States*, 38 Fed. Cl. 64 (1997). On appeal, the Federal Circuit upheld the rulings in the government's favor but reversed on the contract claim, holding that HUD was not in privity with plaintiffs under the regulatory agreements. *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998).

The case returned to the Court of Federal Claims to address plaintiffs' remaining claim for a regulatory taking. The trial court dismissed that claim on the ground that plaintiffs had failed to exhaust their administrative remedies by not filing a plan of action with HUD seeking a release from the affordability restrictions. The Federal Circuit reversed on appeal, however, holding that the plaintiffs had "set forth uncontested facts demonstrating that it would be futile for them to file prepayment requests with HUD." *Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001).

Following another remand, the trial court rejected the regulatory taking claim on the merits. The plaintiffs filed a third appeal, and the Federal Circuit again reversed, ruling that the four model plaintiffs had suffered a regulatory taking and that the other plaintiffs should be given the opportunity to prove the facts underlying their claims before the trial court. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).²

C.

Following their success on the third appeal, the plaintiffs moved for an award of attorney's fees and expenses from the United States under EAJA, 28 U.S.C. § 2412(d). In relevant part, section 2412(d)(1)(A) provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States . . . , unless the court

² The *Cienega Gardens* litigation has continued, although the subsequent developments are not relevant to the issues addressed in this opinion. See, e.g., *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007); *Independence Park Apts. v. United States*, 449 F.3d 1235, on reconsideration, 465 F.3d 1308 (Fed. Cir. 2006).

finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). In a brief order, the Federal Circuit granted the motion for fees and expenses under section 2412(d), but limited the award to those incurred during the plaintiffs' third appeal, when the court of appeals reversed the trial court's denial of the regulatory taking claim:

The application is granted in part. The court allows reasonable attorney fees and expenses pursuant to the EAJA for *Cienega III*, in the amount of \$147,373.24 as reasonable attorney fees and \$9,386.16 in expenses, for a total of \$156,759.40.

Order, *Cienega Gardens v. United States*, No. 02-5050, at 2 (Mar. 5, 2004). To award fees under this provision, the Federal Circuit was obliged to find that the efforts of the United States to defend the Court of Federal Claims' ruling on the regulatory takings question in the third appeal were not "substantially justified" and that no "special circumstances" made the award of fees unjust. The Federal Circuit's conclusion provided no explanation for why the United States was not justified in seeking to defend the trial court decision, and on its face, such a ruling would appear questionable. The United States did not seek further review of that decision, however.

II.

In light of the Federal Circuit's judgment, you have asked which federal agency, if any, bears responsibility under EAJA to pay the award of attorney's fees and expenses in the *Cienega Gardens* case. EAJA provides that "[f]ees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 28 U.S.C. § 2412(d)(4). In most cases, which federal agency must pay the award is not likely to be an issue. The defendant in the case will be a federal agency or an officer acting on behalf of a federal agency, and the plaintiff's suit will directly challenge the action or inaction of the government defendant. In such a case, the "agency over which the party prevails" would be clearly identified.

The circumstances of this case, however, have engendered some disagreement over which agency, or whether in fact any agency, should be responsible for the award of attorney's fees and expenses. The plaintiffs did not sue any one agency but rather brought suit against the United States. Furthermore, the primary issue in the litigation was whether two statutes enacted by Congress, ELIHPA and LIHPRHA, had effected an uncompensated taking of plaintiffs' property. You and HUD therefore have expressed the view that *Cienega Gardens* constitutes the rare case in which no agency bears responsibility for the fee award and in which

payment should be made out of the Judgment Fund, 31 U.S.C. § 1304, which Congress established to cover judgments against the United States for which no appropriation is otherwise available. See Letter for Debra Diener, Chief Counsel, Financial Management Service, Department of the Treasury, from Carole W. Wilson, Associate General Counsel for Litigation, Department of Housing and Urban Development, *Re: Cienega Gardens, et al. v. United States, United States Court of Appeals for the Federal Circuit, Award of Attorneys' Fees* (May 12, 2004) (“HUD Letter”), and attached Memorandum of Law (May 11, 2004) (“HUD Memo”); Memorandum for Steven Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Peter D. Keisler, Assistant Attorney General, Civil Division, *Re: Request for New Opinion Concerning Payment of Judgments under the Equal Access to Justice Act* at 10-12 (May 4, 2005) (“DOJ Letter”).

The Department of the Treasury, which administers the Judgment Fund, disagrees. Treasury notes that the Judgment Fund is available only when “payment is not otherwise provided for” by federal law, 31 U.S.C. § 1304(a)(1). Letter for Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, Department of Justice, from Margaret Marquette, Chief Counsel, Financial Management Service, Department of the Treasury, *Re: Cienega Gardens, et al. v. United States, No. 02-5050 (Fed. Cir.)* at 2 (Feb. 1, 2005). Treasury contends that EAJA does provide for payment of “fees and other expenses” by “any agency over which the party prevails” and that HUD is the responsible agency under the statute. Treasury notes that “the cause of action was based upon a statute within HUD’s purview (12 U.S.C. § 4122), DOJ consulted with HUD as the client agency, and HUD attorneys were listed on the court briefs as ‘of counsel.’” *Id.* Based on this understanding, Treasury has declined payment absent an opinion to the contrary from this office.

Accordingly, you have asked for this office’s view as to whether the Judgment Fund is authorized to pay EAJA judgments entered against the United States, when no agency has been named as a defendant in the litigation. As both Treasury’s response and your memorandum suggest, this question also requires consideration of whether Congress deemed a particular agency to be responsible under EAJA for the fee award. For the reasons discussed below, we conclude that the Judgment Fund is not available to satisfy the fee award, because HUD constitutes the “agency over which the party prevail[ed]” under EAJA.

A.

The Judgment Fund is available “to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments” against the United States only when “payment is not otherwise provided for.” 31 U.S.C. § 1304(a)(1). If Congress has made an appropriation that is reasonably interpreted to cover a liability incurred by the government, the liability must be satisfied out of that

appropriation. “The fact that it might be necessary to do some statutory interpretation to determine if a particular appropriation is available to pay a judgment or compromise settlement does not preclude use of that appropriation.” *Matter of: S.S. Silberblatt, Inc. v. East Harlem Pilot Block—Payment of Judgment*, 62 Comp. Gen. 12, 16 (1982) (rejecting HUD’s argument that a settlement should be paid out of the Judgment Fund).³

Here, Congress did provide a statutory mechanism for the payment of EAJA awards by specifically providing that fee awards “shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4). Congress, in other words, intended to ensure that, to the extent possible, fee awards should be paid by whichever agency, or agencies, may be described as having been prevailed over in an action against the United States. Congress did not intend for agencies to turn to the Judgment Fund to pay a fee award under EAJA, unless it can be said that the plaintiffs did not prevail over “any agency.”

The history of EAJA confirms this interpretation. The original version of the statute provided:

Fees and other expenses awarded under this subsection *may* be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517, of this title.

Pub. L. No. 96-481, tit. II, § 204(a), 94 Stat. 2325, 2329 (1980) (emphasis added) (codified at 28 U.S.C. § 2412(d)(4)(A) (Supp. V 1981)).⁴ In 1982, this office opined that Congress had not intended to give the losing agency unfettered discretion to seek payment from the Judgment Fund, but rather “a reasonable amount from the unrestricted appropriations of an agency *must* be allocated to the payment of awards for fees and expenses” under EAJA. *Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op. O.L.C. 204, 205 (1982). We concluded that an agency could seek payment from the Judgment Fund “only when making an award out of agency funds would be a very heavy financial blow to the agency[.]” *Id.* at 211. This office therefore recognized that the previous

³ Although the Executive Branch is not bound by the legal opinions of the Comptroller General, in resolving appropriation issues we consider them for what persuasive value they may have. *See, e.g., Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996).

⁴ Sections 2414 and 2517(a) of title 28 set forth the standard procedures for obtaining disbursements from the Treasury to satisfy a judgment against the United States.

version of EAJA would permit an agency to turn to the Judgment Fund for the payment of fee awards only under very narrow circumstances.

Congress eliminated even this narrow agency discretion by amending EAJA in 1985. Rather than providing that an agency “may” pay a fee award from available funds, Congress declared that the agency “shall” pay the award from agency funds. Pub. L. No. 99-80, § 2(d), 99 Stat. 183, 185 (1985). Congress also eliminated the second sentence of the former section 2412(d)(4)(A) that permitted the agency to treat a fee award like other judgments. EAJA now provides simply that “[f]ees and other expenses awarded under this subsection to a party *shall* be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4) (emphasis added). These amendments confirm that Congress did not intend that the Judgment Fund be used to pay fee awards under EAJA. The Judgment Fund is available to pay a fee award only if there is *no* agency over which the plaintiffs can be said to have prevailed under EAJA.

B.

We therefore turn to the question whether “any agency” may be held responsible for the *Cienega Gardens* fee award. As a general rule, the “agency over which the party prevails” under EAJA will be the agency whose regulatory interest was at stake in the litigation and whose actions or policies are successfully challenged in the court action. This interest may be identified by the fact that the agency took affirmative action against the prevailing party, in the form of a regulation or administrative ruling, or it may be identified by the fact that the agency had statutory authority over the regulatory program that the prevailing party successfully challenged. In a typical case, that agency may be named as the plaintiff or the defendant, but EAJA does not require that the agency itself be specifically named as a party. These considerations, as we explain, point towards the conclusion that HUD is the agency responsible under EAJA.

EAJA provides that a court shall award fees upon finding that the “position of the United States” is not “substantially justified.” 28 U.S.C. § 2412(d)(1)(A). EAJA defines the “position of the United States” to mean “in addition to the position taken by the United States in the civil action, *the action or failure to act by the agency upon which the civil action is based.*” *Id.* § 2412(d)(2)(D) (emphasis added). It further provides that “[w]hether or not the position of the United States was substantially justified shall be determined on the basis of the record (*including the record with respect to the action or failure to act by the agency upon which the civil action is based*) which is made in the civil action for which fees and other expenses are sought.” *Id.* § 2412(d)(1)(B) (emphasis added). Congress added these latter two provisions in the same 1985 amendment in which it clarified that agencies could not use the Judgment Fund to pay fee awards assessed against them under EAJA. Pub. L. No. 99-80, §§ 2(b), 2(c)(2), 99 Stat. 183, 184–85. Before the

1985 amendment, several courts had interpreted EAJA to prohibit consideration of the actions of the agency that preceded the lawsuit.⁵ Congress thus made clear through the 1985 amendment that EAJA predicates responsibility for the fee award not simply on the litigating position of the United States, but on the course of regulatory action, or inaction, giving rise to the position of the United States over which the private litigants prevailed.

This definition of the “position of the United States” is consistent with the purpose underlying EAJA. As the Supreme Court has explained, “Congress passed the EAJA in response to its concern that persons ‘may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.’” *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989) (quoting Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980)). Through EAJA, Congress sought “to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States.” Pub. L. No. 96-481, § 202(b)(1), 94 Stat. at 2325. Congress sought therefore to reduce the cost, and consequent deterrent effect, of challenging or defending against unreasonable government action. *Hudson*, 490 U.S. at 883 (“When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.”) (quoting S. Rep. No. 96-253, at 5 (1979)). By the same token, by transferring the costs of litigation to the agency responsible for the subject matter of the litigation and whose actions or policies are under challenge, EAJA would deter the “unreasonable governmental action” that gave rise to litigation in the first place.

EAJA further recognizes that the agency responsible for the fee award need not be a named party to the lawsuit. EAJA provides that a “prevailing party” may win fees, but the statute contains no corresponding requirement that the agency “over which the party prevails” have been a named party to the litigation. See 28 U.S.C. § 2412(d)(1)(A), (d)(4). Indeed, EAJA recognizes that fees may be awarded in any action “brought by or against *the United States*,” *id.* § 2412(d)(1)(A) (emphasis added), which is defined to include not only the government as a named party but also “any agency and any official of the United States acting in his or her official capacity.” *Id.* § 2412(d)(2)(C). In assigning responsibility for the payment of fee

⁵ See *Spencer v. NLRB*, 712 F.2d 539, 546–57 (D.C. Cir. 1983) (concluding that “‘the position of the United States,’ for the purposes of the Act, means the arguments relied upon by the government in litigation,” not the underlying action of the government); *Gava v. United States*, 699 F.2d 1367, 1371 (Fed. Cir. 1983) (“In determining an application for attorney’s fees under the Act, the inquiry is directed to the justification for the government’s litigating position before the court, not the justification for the government’s administrative action that prompted the suit.”). But see *Natural Res. Def. Council v. EPA*, 703 F.2d 700, 707 (3d Cir. 1983) (“We hold that the word ‘position’ refers to the agency action which made it necessary for the party to file suit.”).

awards, however, Congress stated that the fees shall be paid by “any agency over which the party prevails,” *id.* § 2412(d)(4), and not by “the United States” or by one of its officials. This difference in language confirms that the “agency over which the party prevails” will include the agency whose conduct led to “the position of the United States,” even if the agency was not named as a party to the litigation.

Applying these principles to the case at hand, we believe that EAJA assigns responsibility for the fee award in the *Cienega Gardens* case to HUD, the agency charged with administering the federal statutory scheme in question. HUD issued the regulations in 1970 that were incorporated into plaintiffs’ mortgage notes and initially gave them the right to prepay their HUD-insured loans after twenty years and be released from the affordability restrictions. Following Congress’s enactment of ELIHPA and LIHPRHA, HUD again issued regulations that implemented those statutes and recognized what the Federal Circuit held to be the loss of plaintiffs’ prepayment rights. Plaintiffs’ successful takings claims were predicated on the uncompensated deprivation of property rights created and rescinded under this HUD-administered regulatory scheme. Under these circumstances, we believe that the plaintiffs are most reasonably said to have prevailed over HUD.

In opposition to this conclusion, HUD maintains, and you agree, that HUD should not be deemed the agency responsible for the fee award, because HUD lacked any institutional interest in the litigation surrounding plaintiffs’ takings claim. HUD Memo at 4; DOJ Letter at 7. HUD took no direct action against any of the plaintiffs, who did not file any petition with HUD, but instead brought suit in the Court of Claims following the enactment of ELIHPA and LIHPRHA. In addition, plaintiffs’ takings claims did not challenge any HUD regulation or administrative decision, and the outcome of the litigation—a monetary award compensating the plaintiffs for their losses—did not affect or alter any existing HUD program. HUD Memo at 4; DOJ Letter at 7. HUD acknowledges that it had an institutional interest in the earlier stages, where the plaintiffs asserted claims for breach of contract and administrative violations. HUD Memo at 7. The agency maintains, however, that once the dismissal of those claims was upheld on appeal, HUD had no remaining interest in the litigation, and specifically had no institutional interest in the third appeal that was the subject of the fee award. At that point, “the plaintiffs’ only remaining claim . . . was that the enactment of LIHPRHA constituted a temporary regulatory taking of a property right.” *Id.* The governmental entity that effectuated the unconstitutional taking was Congress, which enacted the statutes that of their own force deprived the plaintiffs of their property interests. DOJ Letter at 10. Under this view, HUD itself lacked any institutional interest in the litigation by the time of the fee award, and therefore, it should not be deemed to be the agency over which the plaintiffs prevailed.

We disagree, however, with the suggestion that HUD lacked a regulatory interest in plaintiffs’ takings claims. HUD acknowledges its “institutional interest” in

the breach of contract and administrative law claims that arose out of its actions in granting the prepayment rights and then in restricting prepayment under ELIHPA and LIHPRHA. HUD Memo at 7. We see no reason why this institutional interest would not extend to the takings claims that arose out of the very same actions.⁶ The *Cienega Gardens* litigation directly challenged the constitutionality of the HUD-administered changes to the low-income housing program. HUD issued the regulations that originally set the terms of plaintiffs' prepayment rights, and when Congress enacted ELIHPA and LIHPRHA, HUD was not a passive observer to events. Rather, HUD issued regulations and other guidance recognizing the loss of the plaintiffs' prepayment rights and setting the terms under which HUD would approve prepayment in the future. By the time of the Federal Circuit's judgment, Congress may have relaxed the restrictions on prepayment through a 1996 statute, *see supra* p. 231, but that was merely a fortuity. Had Congress not altered the statutory scheme, the Federal Circuit decision likely would have led HUD to alter its regulatory policies to prevent the United States from being exposed to continuing liability based on regulatory takings claims.

It is true that the *Cienega Gardens* plaintiffs brought suit against the United States in the Court of Claims without first petitioning HUD for the right to prepay the mortgages in question. HUD Memo at 7. The Federal Circuit found that such an action would have been futile, however. *Cienega Gardens*, 265 F.3d at 1248. HUD's regulations provided that plaintiffs could only exercise their prepayment right if HUD was satisfied that the plaintiffs' plan of action would not unduly diminish the availability of low-income housing.⁷ Plaintiffs contended that they could not meet that standard, and the Federal Circuit found the facts underlying this contention to be undisputed. *Cienega Gardens*, 265 F.3d at 1248. Plaintiffs' successful takings claim amounted to a declaration that the existing HUD regulations reflected an uncompensated taking of their prepayment rights. The fact that the remedy in the case was compensation, rather than injunctive relief directed at

⁶ Indeed, as HUD notes, the agency's attorneys appeared "of counsel" on the government's briefs throughout the litigation, including on the third appeal. HUD Memo at 7. We do not regard the participation of counsel as a basis *ipso facto* for assigning responsibility to HUD, but the participation of HUD attorneys does confirm that HUD constituted the agency with the specific regulatory interest in the *Cienega Gardens* litigation.

⁷ HUD states that it "never promulgated regulations to enforce the restrictions on prepayment contained in ELIHPA and LIHPRHA. HUD's regulations permitting prepayment after twenty years remained in effect throughout the time when prepayment was restricted by those statutes." HUD Memo at 2. HUD, however, issued multiple sets of regulations to implement ELIHPA and LIHPRHA, *see supra* p. 218 & n. 1, including regulations to implement the "plan of action" restriction on prepayment. *See* 24 C.F.R. § 248.221(b)(1)(i) (1993) ("The [Federal Housing] Commissioner may approve a plan of action that involves termination of the low income affordability restrictions only upon a written finding that . . . [t]he supply of vacant, comparable housing is sufficient to ensure that the prepayment will not materially affect . . . [t]he availability of decent, safe and sanitary housing affordable to lower income and very low income families in the area . . .").

the agency, does not alter the fact that HUD's actions and policies were at issue in the litigation.

In addition to suggesting that HUD lacked a regulatory interest in the takings claim, you and HUD suggest that HUD should not be held responsible for the fee award on the ground that the agency itself did not engage in any unreasonable action to cause plaintiffs' loss. HUD Memo at 7; DOJ Letter at 9. The Federal Circuit described Congress as the responsible actor in taking plaintiffs' property through the enactment of ELIHPA and LIHPRHA. *See, e.g., Cienega Gardens*, 331 F.3d at 1328 (describing the questions on the appeal as whether plaintiffs' property interest was "taken by the enactment of ELIHPA and LIHPRHA" and whether "the regulatory restriction in the statutes" was significant enough to require compensation). Under this view, HUD's regulatory actions amounted to nothing more than implementing the directives of ELIHPA and LIHPRHA. HUD did not add to plaintiffs' injury, and HUD lacked any statutory authority to determine whether those federal laws constituted a taking or to provide the plaintiffs with payment for any lost property interest. Because HUD took no wrongful action, you maintain that "making HUD pay EAJA fees, under the circumstances, would not promote Congress's primary reason for making agencies liable for EAJA fees: to penalize unreasonable agency action." DOJ Letter at 8.

We do not disagree that HUD did nothing more than carry out its statutory obligations in this case, yet that fact does not relieve HUD of its responsibilities under EAJA for fees and costs incurred by plaintiffs who successfully challenged the HUD-administered program. Congress may be the entity most responsible for the regulatory takings recognized by the Federal Circuit, but Congress clearly cannot be the "agency over which the plaintiffs prevailed." *See* 5 U.S.C. § 551(1)(A) (excluding Congress from the definition of "agency" under the Administrative Procedure Act). It is no doubt true that "Congress's primary reason for making agencies liable for EAJA fees" is "to penalize unreasonable agency action." DOJ Letter at 8. Yet EAJA does not require a specific finding of fault before an agency may be held responsible for the award; it requires only a showing that the "position of the United States" was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Upon finding that the "position of the United States" is not "substantially justified," EAJA requires payment from the "agency over which the plaintiffs prevailed" without regard to whether the agency properly or improperly exercised its discretion.

For the above reasons, we conclude that HUD does constitute the agency over which the plaintiffs prevailed in *Cienega Gardens*. The agency responsible to pay a fee award against the United States under EAJA is the agency whose regulatory interest is at stake in the litigation. This interest may be identified by the fact that the agency took affirmative action against the prevailing party, in the form of a regulation or administrative ruling, or it may be identified by the fact that the agency had statutory authority over the regulatory program that the prevailing

party successfully challenged. By either measure, HUD would constitute the agency responsible to pay the fee award to the *Cienega Gardens* plaintiffs.

C.

Our conclusion that HUD bears responsibility for the fee award does not end our analysis, because EAJA provides for payment by “*any* agency over which the party prevails,” suggesting that more than one agency may bear responsibility. Accordingly, we must consider whether another agency, namely DOJ, should be deemed jointly responsible. HUD suggests that if the plaintiffs prevailed over any agency, it was DOJ, because “DOJ, not HUD, was entirely responsible for the arguments made and briefs filed in the third appeal” for which the plaintiffs were awarded fees. HUD Memo at 7. HUD further points out that DOJ, not HUD, had the ability to settle the litigation. *Id.*; see 28 U.S.C. § 2414 (2000). This would be true in most cases involving the federal government, however. With the exception of independent agencies that have their own litigating authority, the Attorney General has the statutory authority to control the course of any litigation brought by or against the United States or one of its agencies. 28 U.S.C. § 516 (2000). We do not believe that Congress intended for DOJ to be deemed the “agency over which the party prevails” under EAJA merely by virtue of its statutorily mandated role as litigating counsel.⁸ If we were to adopt such an interpretation, DOJ would become responsible for all fee awards under EAJA (except those involving independent agencies), even when the plaintiff has named an agency like HUD as the defendant and has clearly challenged a specific agency action as unreasonable. This interpretation would render largely superfluous the 1985 amendment, in which Congress made clear that the “position of the United States” includes more than the arguments advanced in the briefs; it includes also the “action or failure to act . . . upon which the civil action is based.” 28 U.S.C. § 2412(d)(2)(D).

Our view that the regulating agency, and not DOJ, would constitute the agency subject to a fee award is consistent with fee-shifting principles and fee-shifting statutes that govern private litigation, which generally impose fee awards on the parties to the lawsuits, not on the lawyers who represent them.⁹ Indeed, parties

⁸ We need not address whether our conclusion would be any different in a case in which DOJ attorneys engaged in acts of litigation misconduct or advanced a legal argument contrary to the views of the agency involved. We understand that there was no such disagreement or misconduct in this case.

⁹ Some fee-shifting statutes specifically identify the party responsible for the fee award. *See, e.g.*, 29 U.S.C. § 2617(a)(3) (2000) (Family and Medical Leave Act) (“The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney’s fee, reasonable expert witness fees, and other costs of the action *to be paid by the defendant.*”) (emphasis added); 42 U.S.C. § 2000e-5(k) (2000) (Title VII) (“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and *the Commission and the United States shall be liable for costs the same as a private person.*”) (emphasis added). Others speak

bear responsibility for fee awards in the same manner that they do for judgments. It is the exceptional circumstance when a statute or rule specifically identifies that counsel, in addition to the litigant, may be responsible for sanctions or fees.¹⁰ DOJ's authority to direct litigation in the federal courts may provide it with somewhat greater control over the "position of the United States" than a typical attorney would have over the position of the client, yet we see no basis in EAJA to suggest that Congress intended to adopt a novel rule, where counsel would be subject to liability based upon a good faith defense of the position of their clients. Rather, we believe that EAJA, by providing that the fees shall be paid by the "agency over which the party prevails," provides that the responsible agency—whether or not named as a party adverse to the prevailing party—would be the agency that functions as the relevant adversary for fee-shifting purposes, because the litigation implicates its regulatory interests and challenges the agency's actions or policies.¹¹

III.

For the reasons given, we conclude that HUD constitutes the agency over which the *Cienega Gardens* plaintiffs prevailed under EAJA. Because EAJA provides for payment, the Judgment Fund is not available and, therefore, the award must come out of HUD appropriations.

STEVEN A. ENGEL
Deputy Assistant Attorney General
Office of Legal Counsel

in terms of the "prevailing party," but the fee judgment falls on the losing party, not the losing party's counsel. *See, e.g.*, 15 U.S.C. § 1117(a) (2000) (Lanham Act) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party.").

¹⁰ *See, e.g.*, Fed. R. Civ. P. 37(a)(4)(A) (providing in discovery that "the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees").

¹¹ We note that our view does not mean that DOJ could never be the "agency over which the party prevails." A different case would be presented if DOJ's own actions or policies were challenged in the litigation. *See* Memorandum for Stephen R. Colgate, Assistant Attorney General, Justice Management Division, from Richard Shiffirin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Attorney's Fees Under the Equal Access to Justice Act* (Aug. 25, 1994) (acknowledging DOJ's responsibility to pay EAJA fee award where DOJ had intervened in bankruptcy litigation to challenge, unsuccessfully, the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984).

Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union From Qualifying for Child’s Insurance Benefits Under the Social Security Act

The Defense of Marriage Act would not prevent the non-biological child of a partner in a Vermont civil union from receiving child’s insurance benefits under the Social Security Act.

October 16, 2007

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL SOCIAL SECURITY ADMINISTRATION

The Social Security Act defines a “child” for the purpose of determining eligibility for child’s insurance benefits (“CIB”) by reference to the inheritance law in the relevant state. 42 U.S.C. § 416(h)(2) (2000). The law provides that a child shall receive CIB on account of a disabled parent when the child would inherit as a son or daughter if the parent were to die intestate. *Id.* Vermont law provides that the parties to a same-sex civil union enjoy the same benefits of parentage laws that would apply to a married couple, and so the natural child of one member of the union may be deemed to be the child of the other member for purposes of intestacy under Vermont law. Vt. Stat. Ann. tit. 15, § 1204; *see also Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006).

You have asked whether the Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, 110 Stat. 2419 (1996), would prevent the Commissioner of Social Security (the “Commissioner”) from providing the non-biological child of one member of a Vermont civil union with social security benefits on account of that individual’s relationship with the child.¹ We conclude that it would not. Although DOMA limits the definition of “marriage” and “spouse” for purposes of federal law, the Social Security Act does not condition eligibility for CIB on the existence of a marriage or on the federal rights of a spouse in the circumstances of this case; rather, eligibility turns upon the state’s recognition of a parent-child relationship, and specifically, the right to inherit as a child under state law. A child’s inheritance rights under state law may be independent of the existence of a marriage or spousal relationship, and that is indeed the case in Vermont. Accordingly, we conclude that nothing in DOMA would prevent the non-biological child of a

¹ See Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Thomas W. Crawley, Acting General Counsel, Social Security Administration (June 6, 2007) (“SSA Letter”). We are informed that the Commissioner has agreed to be bound by the opinion of this Office. See E-mail for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from Thomas W. Crawley, Acting General Counsel, Social Security Administration (June 29, 2007, 12:16 EST).

partner in a Vermont civil union from receiving CIB under the Social Security Act.

I.

Two women, Karen and Monique, entered into a civil union under Vermont law in 2002, and Monique gave birth to a son, Elijah, in 2003. Karen did not formally adopt Elijah, but she appears on the birth certificate as his “2nd parent” and on other documents as his “civil union parent.” *See* SSA Letter at 1. In 2005, the Commissioner found Karen to be eligible for disability benefits, and she then filed an application for CIB on behalf of Elijah. *Id.* At the time of the application, Karen was domiciled in Vermont. *Id.* at 2. In order to determine whether federal law would allow Elijah to qualify as Karen’s “child” on account of her civil union with Elijah’s natural mother, we first consider whether Elijah would qualify as Karen’s “child” under 42 U.S.C. § 416(e)(1). We then consider whether the interpretive principle mandated by DOMA affects Elijah’s status under the Social Security Act.

The Social Security Act provides that an applicant may be eligible for CIB if he is the dependent “child” of an individual entitled to disability benefits. 42 U.S.C. § 402(d) (2000). The Act defines “child” to include “the child or legally adopted child of an individual,” as well as stepchildren and, in some cases, grandchildren. *Id.* § 416(e)(1). In many, if not most, cases the existence of a parent-child relationship must be established under the provisions of section 416(h) that further define the relationship for CIB purposes.

With respect to Elijah’s relationship to Karen, the Act directs the Commissioner to look to how the relevant state would define the parent-child relationship for purposes of inheritance law. Specifically, the Act provides:

[T]he Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

42 U.S.C. § 416(h)(2)(A). The Commissioner has issued regulations tracking this statutory provision, and they provide, in relevant part, that a “natural child” shall be defined based on “the law on inheritance rights that the State courts would use to decide whether [the individual] could inherit a child’s share of the insured’s personal property if the insured were to die without leaving a will.” 20 C.F.R. § 404.355(b)(1) (2007). Where, as here, the insured is living, the Commissioner

“look[s] to the laws of the State where the insured has his or her permanent home.” *Id.*

Because Karen was domiciled in Vermont at the time of Elijah’s application, we look to Vermont law for guidance. The Vermont statute addressing intestate succession provides that the “estate of a decedent, not devised nor bequeathed and not otherwise appropriated and distributed in pursuance of law, shall descend” in the first instance “to the children of such decedent or the legal representatives of deceased children,” but the statute does not otherwise define “children.” Vt. Stat. Ann. tit. 14, § 551(1); *see also Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 969 (Vt. 2006) (recognizing that under Vermont law, “the term ‘parent’ is specific to the context of the family involved” and has been principally defined through judicial precedent). The civil union statute provides broadly that parties to a civil union shall have “all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage,” Vt. Stat. Ann. tit. 15, § 1204(a), including “laws relating to . . . intestate succession,” *id.* § 1204(e)(1). The statute further provides that parties to a civil union shall enjoy the same rights, “with respect to a child of whom either becomes the natural parent during the term of the civil union,” as “those of a married couple.” *Id.* § 1204(f).

The Vermont Supreme Court recently relied upon these provisions to hold that a child, like Elijah, who is born to one partner of a civil union during the existence of the civil union, should be deemed the child of the other partner under Vermont law for purposes of determining custodial rights following the dissolution of the civil union. *Miller-Jenkins*, 912 A.2d at 969–70.² The court reasoned that in the context of marriage, courts have regularly found that a child born by artificial insemination should be deemed to be the child of the husband, even if there is no biological connection. Such holdings followed the intent of the spouses in the marriage, ensured that the child would have two parents, and avoided the need for requiring adoption proceedings in every case. *Id.* Because section 1204 requires equal treatment of partners in civil unions, the court held that the same result should apply to the non-biological partner in a civil union. *Id.* at 970–71.

Although *Miller-Jenkins* recognized the parent-child relationship in the context of custodial rights, we see no reason why Vermont courts would reach a different result when considering who would constitute a child for purposes of inheritance. The Vermont civil union statute makes clear that a partner in a civil union shall enjoy not merely the “rights” that a married person would enjoy, but more broadly all “benefits, protections and responsibilities under law.” Vt. Stat. Ann. tit. 15,

² In addition, the Vermont Supreme Court identified certain factors to support its conclusion, including the following: the parties to the civil union expected and intended for the non-biological parent to be the child’s parent, the non-biological partner participated in the artificial insemination decision, and no other individual had a claim to be the child’s parent. *Id.* at 970. In Elijah’s case, it is apparent from the birth certificate and other documents that the partners to the civil union intended for Karen to be his parent. *See* SSA Letter at 1.

§ 1204(a). With respect to civil union partners, these “benefits, protections and responsibilities” specifically include both bequeathing and inheriting property, should one partner die intestate. *Id.* § 1204(e)(1). Insofar as Vermont law further seeks to place partners in a civil union on equal footing with married couples with respect to children, *see id.* § 1204(f), we believe that Vermont courts similarly would conclude that the property of a partner in a civil union who dies intestate would descend on the same terms as it would for a married person, and in particular, would go to those who would be recognized as his or her children under Vermont law. Accordingly, as applied here, we conclude that Vermont law would recognize Elijah as Karen’s child for purposes of his right to inherit, should she die intestate.

II.

The question remains whether DOMA would prevent the Commissioner from otherwise recognizing Elijah as a beneficiary under the Social Security Act. Congress enacted DOMA in response to the decision of the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that the equal protection guarantee of that state’s constitution required the recognition of same-sex marriage. *See* H.R. Rep. No. 104-664, at 3–4 (1996) (“House Report”). DOMA seeks to ensure that neither the federal government nor individual states are forced to give legal effect to same-sex marriages, either on account of one state’s recognizing such a marriage or by the judicial interpretation of existing law. *See id.* at 2. At the same time, DOMA respects states’ traditional rights in the arena of domestic relations, allowing them to establish their own public policies with respect to same-sex unions. *See id.*³

DOMA contains two operative provisions. The first provision, codified at 28 U.S.C. § 1738C (2000), provides that a state need not give full faith and credit to “a relationship between persons of the same sex that is treated as a marriage” under the laws of another state. That provision, which provides that each state may adopt its own public policy with respect to same-sex marriage, is not implicated here. It is the second provision of DOMA, codified at 1 U.S.C. § 7, that arguably might bear upon Elijah’s entitlement to CIB under the Social Security Act. This section, 1 U.S.C. § 7, was added to the Dictionary Act, 1 U.S.C. §§ 1 *et seq.*, to

³ The House Report described DOMA as having “two primary purposes”:

The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

Id. at 2.

define “marriage” and “spouse” for purposes of federal statutes and regulations as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means *only a legal union between one man and one woman as husband and wife*, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. This section reflects a federal policy against interpreting any federal law, regulation, or other administrative act so as to afford legal consequence to same-sex marriages. The provision defines “marriage” and “spouse” for those purposes so as to exclude reading those terms to extend to same-sex relationships.

By its terms, 1 U.S.C. § 7 does not apply to Elijah’s eligibility for CIB under the Social Security Act. As discussed, Elijah’s eligibility arises out of his status as Karen’s “child” under section 416, and the law provides that he “shall be deemed such” simply because he “would have the same status relative to taking intestate personal property as a child” under Vermont law. 42 U.S.C. § 416(h)(2)(A). That analysis does not require any interpretation of the words “marriage” or “spouse” under the Social Security Act or any other provision of federal law. Nor does the analysis even require interpreting those terms under Vermont law in a way that might have consequence for the administration of federal benefits. An individual may qualify as a “child” under section 416 wholly apart from the existence of any marriage at all, as would be the case of a natural-born child of an unmarried couple, or, as is the case here, where Vermont recognizes a parent-child relationship outside the context of marriage. The fact that Elijah’s right of inheritance ultimately derives from Vermont’s recognition of a same-sex civil union is simply immaterial under DOMA. Accordingly, DOMA would not preclude Elijah from qualifying for CIB as a child of Karen under the Social Security Act.

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Application of 18 U.S.C. § 207 to Former CIA Officials' Communications With CIA Employees on Detail to Other Agencies

The prohibition in 18 U.S.C. § 207(c), under which a former high level official, in the year after his departure, may not make “any communication to or appearance before any officer or employee” of his former agency, would apply if former CIA officials make communications to or appearances before CIA employees who are on detail to other agencies.

October 23, 2007

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL CENTRAL INTELLIGENCE AGENCY

A provision of the conflict of interest laws, 18 U.S.C. § 207(c) (2000 & Supp. IV 2004), generally forbids a former high level official, in the year after his departure, from making “any communication to or appearance before any officer or employee of the department or agency in which such person served.” You have asked whether section 207(c) would apply if former officials of the Central Intelligence Agency (“CIA”) make communications to or appearances before CIA employees who are on detail to other agencies.¹ We believe that it would.

I.

The conflict of interest laws provide for a one-year “cooling off” period when a high level official leaves the government. During the one-year period after the termination of his service, the former official may not

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

18 U.S.C. § 207(c)(1).²

¹ Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from John A. Rizzo, Senior Deputy General Counsel, CIA (Feb. 2, 2006). We also received the views of the Office of Government Ethics (“OGE”). Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, OGE (Feb. 9, 2006). The CIA later presented some additional views and information. Letter for Daniel Koffsky, Office of Legal Counsel, from Joan P. Walton, Agency Ethics Counsel, CIA (May 18, 2007) (“CIA Supplemental Letter”).

² The provision applies to several categories of former high level officials. Of greatest relevance here, the provision reaches former officials whose pay was at least 86.5 percent of the basic pay for

The Office of Government Ethics has taken the view that this provision applies to a former official's communication to or appearance before an officer or employee of his former agency, even if, at the time of the communication or appearance, that officer or employee has been detailed to an agency other than the one in which the former official served. OGE expressed this view in *Letter to a Private Attorney*, Informal Advisory Ltr. 03x9, 2003 WL 23675085 (Nov. 26) ("OGE Advisory Letter"). That opinion relied on 18 U.S.C. § 207(g) (2000), which provides:

For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

OGE concluded that, under section 207(g), "a current employee to whom communications are made is to be considered an employee of both his own agency and the agency to which he has been detailed" and that "[a]ccordingly, in order for the one-year cooling-off period to be triggered, the appearance does not have to be before the former senior employee's agency, but only before an employee of the former senior employee's agency." OGE Advisory Letter, 2003 WL 23675085, at *1, *2.

It could be argued, however, that section 207(c) does not apply to a communication to or appearance before the detailed employee because the detailed employee would be acting on behalf of an agency other than the agency in which the former senior employee worked. Under such circumstances, the former senior employee arguably would not be in a position to influence his former agency or trade on nonpublic information acquired during his government employment. In addition, it could be argued that section 207(g) makes the one-year bar applicable with respect to any agency in which a former official served in his last year with the government, including any agency to which the employee was detailed, but does not specify the employees to whom communications, or before whom appearances, are forbidden.

II.

The central issue here is whether a CIA officer or employee, while on detail to another agency, is an "officer or employee of the [CIA]" for purposes of section 207(c)'s prohibition against a former high level official's communications to or

Level II of the Executive Schedule. 18 U.S.C. § 207(c)(2)(A)(ii). The provision also covers, among others, those whose pay is specified in subchapter II of chapter 53 in title 5 or who are in positions of active duty commissioned officers of the uniformed services serving in a grade or rank paid at the O-7 level or above. *Id.* § 207(c)(2)(A)(i), (iv).

appearances before “any officer or employee of the department or agency in which such person served.” We believe that section 207(g) resolves this issue. It provides, in unequivocal language, that, “[f]or purposes of this section,” i.e., section 207 in its entirety, an employee on detail “from one . . . agency . . . to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of *both* departments, agencies, or such entities.” 18 U.S.C. § 207(g) (emphasis added). Thus, a CIA employee on detail is deemed an employee of the CIA, as well as an employee of the agency to which he is detailed. Nothing in the language of section 207(g) limits the circumstances in which a detailed employee has this dual status for purposes of section 207. Therefore, a prohibition that applies to a “communication to or appearance before an officer or employee of the department or agency in which [a former CIA official] served” covers an officer or employee who has been detailed from the CIA to another agency or entity.³

We recognize that the language of section 207(g), together with section 207(c), arguably goes beyond the precise purposes that Congress intended to achieve. The legislative history suggests that section 207(c) was originally intended to deny former officials any “improper or unfair advantage in subsequent dealings with that department or agency” in which they served. *See* S. Rep. No. 95-170, at 33 (1977). As noted above, the ability of former officials to take unfair advantage of their prior service is arguably reduced or eliminated when they communicate with employees of their former agencies who have been detailed elsewhere. But “we do not resort to legislative history to cloud a statutory text that is clear.” *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994). Moreover, the implications of the legislative history here are far from clear: a former CIA official might still be able to influence a detailee by virtue of a past association. *See* 135 Cong. Rec. 29,668 (1989) (statement of Sen. Levin) (“[T]he offense is committed if the former employee seeks official action by an agency or department employee.”); *cf.* S. Rep. No. 95-170, at 33 (1977) (the cooling off period is aimed at preventing the

³ Because the language of the statute is clear, the rule of lenity, calling for an ambiguous penal statute to be construed in favor of a defendant, does not apply. *See Chapman v. United States*, 500 U.S. 453, 463 (1991). Moreover, we do not believe that any particular weight should be placed on the fact that OGE had not addressed this specific issue in its regulations and informal publications. As noted above, OGE did address the issue in the 2003 OGE Advisory Letter.

Section 207(i)(1) states that the “officer or employee” to whom a communication may not be made “include[s] . . . (A) in subsections (a), (c), and (d), the President and the Vice President; and (B) in subsection (f), the President, the Vice President, and Members of Congress.” The section addresses some of the officers to whom prohibited communications may not be made. We do not believe that any inference can be drawn from the silence in this section about the treatment of detailees. First, section 207(g) deals with detailees specifically, “[f]or purposes of this section.” Any further treatment of detailees would have been superfluous. Second, section 207(i) concerns the status of elected officials, and its declaration that the statute “include[s]” them for some purposes hardly suggests that the provision is intended to exclude other “officer[s] or employee[s]” from the category of persons whom a former official is forbidden to contact.

use of “information, influence, and access acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with that department or agency”). Even if the language of the statute does cover instances beyond the abuses at which it was aimed, “Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States.” *Crandon v. United States*, 494 U.S. 152, 164 (1990). By providing in section 207(g) that a detailee is deemed an officer or employee of the agencies from which and to which he is detailed, Congress laid down a clear rule designed to prevent undue influence. Even assuming that the statute might be “applied in situations not expressly anticipated by Congress,” that fact “does not demonstrate ambiguity. It demonstrates breadth.” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994).

We do not believe that the terms under which CIA officers and employees are detailed, as you have explained them to us, are so unusual that such an officer or employee is not “a person who is detailed from one department, agency, or other entity to another department, agency, or other entity” under 18 U.S.C. § 207(g). No general statutory definition of the term “detail” exists, but the Federal Personnel Manual defined a detail as “the temporary assignment of an employee to a different position for a specified period, with the employee returning to . . . regular duties at the end of the detail.” *The Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service*, B-224033, 1987 WL 101529, at *2 (Comp. Gen. Jan. 30) (quoting *Department of Health and Human Services Detail of Office of Community Services Employees*, 64 Comp. Gen. 370, 376 (1985) (citing Federal Personnel Manual ch. 300, § 8-1 (Inst. 262, May 7, 1981))). Even after the Federal Personnel Manual was abolished, we have continued to use this definition, which reflects the common understanding of the term. *See, e.g., Applicability of 3 U.S.C. § 112 to Detailees Supporting the President’s Initiative on Race*, 21 Op. O.L.C. 119, 120 (1997). Neither the extended length of CIA details nor the removal of employees from the CIA chain of command is contrary to this usual understanding. Although a “detail” may generally be short-term, there are other instances in which details, though “temporary,” last for years. Under 5 U.S.C. § 3343(b) (2000), for example, an agency may “detail” an employee to an international organization for up to five years, and, upon a finding by the President, this period may be extended for three more years. *See also* 22 U.S.C. § 3983 (2000 & Supp. IV 2004) (details to American Institute in Taiwan for up to six years). The Environmental Protection Agency and the Department of the Interior detail employees to the Office of Agricultural Environmental Quality in the Department of Agriculture for up to three years. *See* 7 U.S.C. § 5402(c)(2) (2000); *see also* 22 U.S.C. § 2685(a) (2000) (reimbursement to Department of State when details exceed two years).

We understand that CIA personnel often serve particularly long details at other agencies, but we do not believe that the arrangements are so unusual in this

respect as to fall outside the term “detail” as generally understood. Indeed, when CIA employees are assigned to other agencies under specific statutes that exempt the assignments from the usual limits on duration, those statutes use the term “detail.” *See* 10 U.S.C. § 444(c) (2000 & Supp. V 2005) (“details” to the National Geospatial-Intelligence Agency); 50 U.S.C. § 403v (2000) (“detail” to the National Reconnaissance Office). Similarly, “an assignment to a different position” necessarily entails some loss of control by the detailing agency, and it is doubtful that an agency detailing an employee to, for example, the National Security Council continues in any practical sense to include the employee within its own chain of command. Once again, the terms of CIA details are not so unusual as to make the term “detail” in section 207(g) inapplicable.

That the CIA detailees do not encumber the positions from which they are detailed presents a somewhat more complicated issue. The definition derived from the Federal Personnel Manual includes that the detailed “employee return[s] to his regular duties at the end of the detail.” If detailees do not continue to encumber the positions they previously occupied, they may, upon their return to the agency, have different responsibilities from those previously assigned to them, *see* CIA Supplemental Letter at 4 (a detailee from the CIA “routinely returns to different duties from those she left”), and arguably that fact takes these detailees outside the usual understanding of a “detail.” We would not, however, read the reference in the Federal Personnel Manual to “his regular duties” so narrowly. If a detailee were told that he would be promoted upon his return to the detailing agency, he would not thus lose the status of a detailee. The “regular duties” to which a detailee returns must mean something broader, such as full-time duties at the agency from which he came. We do not, moreover, understand the CIA to contend that the employment relationship between the agency and its employees is lost or changed during details to other federal agencies. Detailees may not return to the same positions at the agency, but they do generally return. We therefore do not believe that the fact that the employee does not encumber the position from which he was detailed would change the analysis.

We understand that construing section 207(c) to apply to communications by a former high level official to employees of his former agency, even if they are on detail to another agency, may present practical difficulties. For example, you have suggested that such a reading would require former senior agency officials to poll meeting participants to determine whether he is communicating with a detailee from his former agency. Section 207(c) applies, however, only when the former official “knowingly makes . . . any communication to or appearance before any officer or employee” of his former agency. 18 U.S.C. § 207(c)(1). By its terms, the statute appears to require, as an element of the offense, that the former official know he is speaking to an employee of his former agency. The 1989 amendments to the statute, it is true, did remove a provision under which an element of the

offense had been the former employee's knowledge that his former agency had an interest in the matter or that the matter was pending before the agency.⁴

But even if, under the current version of section 207, that particular element has been deleted, the statute on its face seems to impose liability only if the former official knows at least that the employee with whom he is communicating is from his former agency.

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⁴ Before 1989, section 207(c) extended to communications to "the department or agency in which [the former official] served as an officer or employee, or any officer or employee thereof," provided the matter was "pending before such department or agency" or the department or agency had "a direct and substantial interest." 18 U.S.C. § 207(c) (1982). In *United States v. Nofziger*, 878 F.2d 442, 444 (D.C. Cir. 1989), the District of Columbia Circuit held that the statute required knowledge that the former agency was considering the matter or had an interest in it. The Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, amended the statute to remove this knowledge requirement. Senator Levin explained:

In the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law, the word "knowing" modified all the elements of the offense including the provision that the particular matter was pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee. There is no requirement, here, that the former employee know that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.

135 Cong. Rec. 29,668 (1989).

Term of the Commissioner of Internal Revenue

Under 26 U.S.C. § 7803, the five-year term of the Commissioner of Internal Revenue runs from the date of appointment and is not calculated from the expiration of his predecessor's term.

December 4, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

The term of the Commissioner of Internal Revenue is set by 26 U.S.C. § 7803 (2000), which provides in relevant part that the Commissioner “shall be appointed by the President, by and with the advice and consent of the Senate, to a 5-year-term.” *Id.* § 7803(a)(1)(A). You have asked whether the term of the person appointed to serve a full term as Commissioner (rather than to fill a vacancy occurring before the expiration of a predecessor's term) runs from the date of appointment or from the expiration of the predecessor's term. We conclude that section 7803(a)(1)(A) provides that the term runs from the date of appointment.*

“As Attorney General Brewster explained more than a century ago, ‘[t]here are two kinds of official terms.’” *United States v. Wilson*, 290 F.3d 347, 353 (D.C. Cir. 2002) (quoting *Commissioners of the District of Columbia*, 17 Op. Att’y Gen. 476, 476 (1882) (“*D.C. Commissioners*”). The first type refers to a period of personal service. In that case, “the term is appurtenant to the person,” *id.* (quoting 17 Op. Att’y Gen. at 476), and the term runs from the official's date of appointment. Accordingly, a person appointed to serve a fixed term of years would be able to serve the full term before it expired. The second type refers to a “*fixed slot of time* to which individual appointees are assigned.” *Id.* (emphasis in original). Such a term “runs with the calendar,” *id.*, in fixed increments from the expiration of the predecessor's term. Such a term of office would expire a given number of years after the expiration of the predecessor's term, regardless of when the person was appointed to the position.

Section 7803(a) establishes the office of the Commissioner of Internal Revenue and sets its term. It provides, in relevant part:

(1) *Appointment.*

(A) *In general.* There shall be in the Department of the Treasury a Commissioner of Internal Revenue who shall be appointed by the President, by and with the advice and consent of the Senate, to a

* Editor's Note: After this opinion was issued, Congress amended 26 U.S.C. § 7803(a)(1) to alter the Commissioner's term by providing that “[t]he term of the Commissioner of Internal Revenue shall be a 5-year term, beginning with a term to commence on November 13, 1997. Each subsequent term shall begin on the day after the date on which the previous term expires.” Pub. L. No. 110-176, § 1(a), 121 Stat. 2532 (2008).

Term of the Commissioner of Internal Revenue

5-year term. Such appointment shall be made from individuals who, among other qualifications, have a demonstrated ability in management.

(B) *Vacancy*. Any individual appointed to fill a vacancy in the position of Commissioner occurring before the expiration of the term for which such individual's predecessor was appointed shall be appointed only for the remainder of that term.

(C) *Removal*. The Commissioner may be removed at the will of the President.

(D) *Reappointment*. The Commissioner may be appointed to more than one 5-year term.

Section 7803(a) explicitly provides that any individual appointed to fill a vacancy occurring before the expiration of the predecessor's term "shall be appointed only for the remainder of that term," *id.* § 7803(a)(1)(B), making clear that the term of a person appointed to fill a predecessor's unexpired term "runs with the calendar." *Wilson*, 290 F.3d at 353. The statute is silent, however, about the starting point of the term of a person appointed after the predecessor's term expired (i.e., the term of a person who is not appointed to fill an unexpired term).

The presumption is that "when a statute provides for an appointee to serve a term of years, the specified time of service begins with the appointment." *Term of a Member of the Mississippi River Commission*, 23 Op. O.L.C. 123, 123 (1999) ("*Mississippi River Commission*"); 63C Am. Jur. 2d *Public Officers and Employees* § 143 (1997). To depart from that rule requires "some apt expression of [legislative] intent." *D.C. Commissioners*, 17 Op. Att'y Gen. at 477. Here, the legislative history strongly reinforces the presumption that the term runs from the date of appointment. The conference report on the legislation specifically states that "[t]he Commissioner is appointed to a 5-year term, *beginning with the date of appointment*." H.R. Conf. Rep. No. 105-599, at 207 (emphasis added), *reprinted in* 1998 U.S.C.C.A.N. 288, 302.¹

That understanding is further confirmed by practice under section 7803. The only IRS Commissioner appointed since the 1998 enactment of the relevant provisions was nominated, confirmed, and appointed for a full five-year term. Mark Everson was nominated on January 22, 2003, for "a term of five years, vice

¹ Significantly, this language appears in a section of the House conference report explaining the general operation of section 7803. In a separate passage, the report also discusses the conferees' understanding of the bill's application to the incumbent, then-Commissioner Charles O. Rossotti. *See* H.R. Conf. Rep. No. 105-599, at 207, *reprinted in* 1998 U.S.C.C.A.N. at 302 ("The provision relating to the 5-year term of office applies to the Commissioner in office on the date of enactment. This 5-year term runs from the date of appointment.").

Charles Rossotti,” who was appointed Commissioner on November 13, 1997, and left office after a five-year term on November 12, 2002. 149 Cong. Rec. 1621 (Jan. 22, 2003). Mr. Everson’s nomination was reported out by the Senate Committee on Finance with the recommendation that he be confirmed “for a term of five years.” 149 Cong. Rec. 8235 (Apr. 2, 2003). The Senate confirmed Mr. Everson as Commissioner on May 1, 2003, “for a term of five years,” 149 Cong. Rec. 10,391 (May 1, 2003), and he was appointed on May 5, 2003, for a five-year term. That history indicates that the Senate Committee on Finance, the Senate, and the President all understood section 7803 to provide that Commissioner Everson would commence serving a full five-year term upon his appointment on May 5, 2003. Had section 7803 been understood to create a term that ran from the expiration of his predecessor’s term, Mr. Everson instead would have been confirmed and appointed to serve a term of approximately four and a half years, expiring November 12, 2007.²

This reading of section 7803 is strongly supported by practice under similar statutes. The language and structure of 12 U.S.C. § 1462a (2006), governing the appointment of the Director of the Office of Thrift Supervision, is nearly identical to that of section 7803. Like section 7803, it provides that “[t]he Director shall be appointed for a term of 5 years,” and, like section 7803, it provides that a person appointed to fill “[a] vacancy in the position of Director which occurs before the expiration of the term . . . shall be appointed only for the remainder of such term.” *Id.* § 1462a(c)(2), (3)(A). The first Director appointed under that provision after its enactment in 1989, Timothy Ryan, was confirmed “for a term of 5 years.” 136

² A confirmation for a term commencing on appointment typically states that it is “for a term of *x* years,” while one for a term running from the date a predecessor’s term expired typically specifies the date on which the term shall be deemed to have commenced or its date of expiration. *Compare, e.g.*, 137 Cong. Rec. 33,978 (Nov. 22, 1991) (confirmation of Reggie Barnett Walton and Emmet Gael Sullivan as judges, each for “the term of 15 years”); *id.* (confirmation of Ernest Wilson Williams to be U.S. Attorney “for the term of 4 years”), *with id.* (confirmation of Lawrence B. Lindsey to be a member of the Board of Governors of the Federal Reserve System “for the unexpired term of 14 years from February 1, 1986”); *id.* (confirmation of H. Edward Quick, Jr. to be Commissioner of the Postal Rate Commission “for the term expiring November 22, 1996”); *id.* (confirmation of Trevor Alexander McClurg Potter and Scott E. Thomas to the Federal Election Commission, each “for a term expiring April 30, 1997”); *id.* (confirmation of Karen Borlaug Phillips to be member of the Interstate Commerce Commission “for a term expiring December 31, 1996”). This practice was observed around the time Mr. Everson was confirmed as Commissioner. On the day of Mr. Everson’s confirmation, Lawrence Mohr, Jr., and Sharon Falkenheimer were confirmed for staggered terms on the Board of Regents for the Uniformed Services University of the Health Sciences, *see* 10 U.S.C. § 2113(b) (2000), for terms expiring June 20, 2003 and June 20, 2007, respectively, *see* 149 Cong. Rec. 10,379 (May 1, 2003), and the Senate Judiciary Committee recommended confirmation of Adam Noel Torres to be U.S. Marshal (whose term runs from the date of appointment, *see Farley v. United States*, 139 F. Supp. 757, 757 (Ct. Cl. 1956)), “for the term of four years.” 149 Cong. Rec. 10,345 (May 1, 2003). *See also, e.g.*, 149 Cong. Rec. 12,944 (May 22, 2003) (confirmation of Mark Moki Hanohano to serve as U.S. Marshal “for a term of four years,” and confirmation of Michael E. Horowitz and Ricardo H. Hinojosa to staggered terms on the United States Sentencing Commission, *see* 28 U.S.C. § 992(a) (2000), each “for a term expiring October 31, 2007”).

Cong. Rec. 6816 (Apr. 4, 1990). The second, Ellen Seidman, was nominated on February 6, 1997, well after the expiration of her predecessor's term. Nonetheless, she was confirmed on October 23, 1997, "for a term of five years." 143 Cong. Rec. 22,800 (Oct. 23, 1997); *see also* 143 Cong. Rec. 1685 (Feb. 6, 1997) (reporting nomination of "Ellen Seidman, of the District of Columbia, to be Director of the Office of Thrift Supervision for a term of 5 years, vice Timothy Ryan, resigned"); 143 Cong. Rec. 21,728 (Oct. 8, 1997) (reported from Senate Banking, Housing, and Urban Affairs Committee with recommendation for confirmation "for a term of five years"). When Ms. Seidman resigned before the end of her term, her successor, James Gilleran, was appointed "for the remainder of the term expiring October 23, 2002," 147 Cong. Rec. 23,145 (Nov. 28, 2001), confirming that Ms. Seidman's term ran from the date of her appointment and not from the date her predecessor's term expired. *See also* 147 Cong. Rec. 23,146 (Nov. 28, 2001); 147 Cong. Rec. 22,996 (Nov. 27, 2001) (Seidman nomination reported out of Committee); 147 Cong. Rec. 16,338 (Sept. 4, 2001) (nomination). The nomination and confirmation of John M. Reich to be Director underscore the understanding of the Senate and the President. On May 25, 2005, President Bush originally nominated Mr. Reich "for a term expiring October 23, 2007, vice James Gilleran, term expired," 151 Cong. Rec. 11,191 (May 25, 2005), which would have reflected the understanding that Mr. Reich's term would run from the expiration of his predecessor's term. On June 6, 2005, the President withdrew that nomination and replaced it with a nomination for a full five-year term as Director. 151 Cong. Rec. 11,673, 11,674 (June 6, 2005). On July 28, 2005, Mr. Reich's nomination was reported out of Committee with a recommendation that he be confirmed "for a term of five years," 151 Cong. Rec. 18,975 (July 28, 2005). The following day, the Senate unanimously confirmed Mr. Reich "to be Director of the Office of Thrift Supervision for a term of five years." 151 Cong. Rec. 19,328, 19,338 (July 29, 2005).

Similar provisions for the Administrator of the Saint Lawrence Seaway Development Corporation, 33 U.S.C. § 982(a) (2000),³ and for the Special Counsel, 5 U.S.C. § 1211(b) (2000),⁴ have been subject to the same consistent practice: persons filling a vacancy occurring before the expiration of their predecessor's term serve out that term, but others serve a full term beginning on the date of their appointment. *See* Morton Rosenberg & Henry B. Hogue, Cong. Research Serv.,

³ Section 982 provides, "[t]he management of the corporation shall be vested in an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of seven years. Any Administrator appointed to fill a vacancy in that position prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term."

⁴ Section 1211(b) provides, in relevant part, "[t]he Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. . . . A special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term."

Term of Office of the Commissioner of Internal Revenue at CRS-5 (Sept. 12, 2007).⁵

This consistent practice under a variety of similarly worded statutes strongly supports the understanding that Congress intended section 7803 to create a five-year term that runs from the date of appointment. Congress is presumed to be aware of consistent administrative practice when it legislates. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). By employing language that was subject to an established interpretation, Congress is presumed to have intended that interpretation to be given to the language of section 7803. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993). As the D.C. Circuit wrote in the context of determining the term of appointments, “Congress is presumed to preserve, not abrogate, the background understandings against which it legislates. ‘[L]ong-standing practices’ of the Executive Branch can ‘place[] a “gloss” on Congress’s action in enacting’ a particular provision. Here the consistent treatment of appointments by the Executive Branch provides such a ‘gloss.’” *Wilson*, 290 F.3d at 356 (quoting *Ass’n of Civilian Technicians v. FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001) (citations omitted)). Indeed, in the present case, the support from practice is even stronger, because that practice encompasses action not only of the Executive Branch, but also of the Senate, in its role of giving advice and consent to nominations.

It might be argued that Congress’s provision in section 7803(a)(1)(B) for filling a vacancy before the term expires suggests that *every* appointment as Commissioner must run with the calendar from the expiration of the predecessor’s term, and that otherwise, the provision for filling a vacancy to an unexpired term would serve no purpose. We disagree. Although the specific purpose of section 7803(a)(1)(B) is not apparent from the legislative history, the provision would serve a valuable function even if Commissioners appointed after the expiration of

⁵ *See, e.g.*, 152 Cong. Rec. 21,648 (Sept. 29, 2006) (Collister Johnson, Jr., confirmed as Administrator of the Saint Lawrence Seaway Development Corporation “for a term of seven years” after expiration of predecessor’s term); 145 Cong. Rec. 15,349 (July 1, 1999) (Albert S. Jacquez confirmed as Administrator “for a term of seven years” after expiration of predecessor’s term); 141 Cong. Rec. 38,466 (Dec. 22, 1995) (Gail Clements McDonald confirmed for the remainder of “the term expiring March 20, 1998,” after Stanford E. Parris resigned four years into his seven-year term); 137 Cong. Rec. 6949 (Mar. 20, 1991) (Stanford E. Parris confirmed as Administrator for a term of 7 years after expiration of predecessor’s term); 149 Cong. Rec. 32,306 (Dec. 9, 2003) (Scott J. Bloch confirmed to be Special Counsel “for the term of five years” after expiration of predecessor’s term); 144 Cong. Rec. 5946 (Apr. 2, 1998) (Elaine D. Kaplan confirmed to be Special Counsel “for the term of five years” after expiration of predecessor’s term); 137 Cong. Rec. 33,978 (Nov. 22, 1991) (Kathleen Day Koch confirmed to be Special Counsel “for the term of 5 years” after expiration of predecessor’s term); 132 Cong. Rec. 21,412 (Aug. 13, 1986) (Mary F. Wieseman confirmed to be Special Counsel “for a term of 5 years” after expiration of predecessor’s term); 128 Cong. Rec. 25,930 (Sept. 29, 1982) (K. William O’Connor confirmed to be Special Counsel “for the remainder of the term expiring June 3, 1986,” after Alex Kozinski resigned one year into five-year term); 127 Cong. Rec. 11,147 (June 2, 1981) (Alex Kozinski confirmed to be Special Counsel “for a term of 5 years”).

a predecessor's term served a full five years from the date of appointment. The provision serves to prevent an outgoing President from extending the duration of his appointments by installing a new Commissioner immediately before leaving office.

United States v. Wilson does not support a contrary reading of section 7803. There, the D.C. Circuit held that the term of a member of the United States Commission on Civil Rights began and ended on fixed dates based on the staggered terms of initial commissioners, rather than running from the date of appointment of the individual member. 290 F.3d at 355. But the court's conclusion in that case relied critically on the fact that Congress clearly intended for the members of the Commission, who were subject to statutory removal restrictions, *see id.* at 350, to serve staggered terms. That is a recognized exception to the general rule that a term in office runs from the date of appointment, because the terms of multi-member commissions with staggered terms are presumed to run from the expiration of the predecessor's term to preserve staggering. *See Mississippi River Commission*, 23 Op. O.L.C. at 123. Moreover, the court emphasized that the "relevant practices of the Executive Branch which presumably informed Congress's" understanding, as well as the "policy ramifications" of maintaining staggered terms, both supported the conclusion that the terms ran from the expiration of the predecessors' terms. 290 F.3d at 354. Here, by contrast, there is no indication that the term of the Commissioner of Internal Revenue (who statutorily is subject to "remov[al] at the will of the President," *see* 26 U.S.C. § 7803(a)(1)(C)), is to be staggered.⁶ And whereas the court in *Wilson* emphasized that it was "the common practice of the Executive Branch in making appointments to staggered boards and commissions" for terms to run "from the expiration of their predecessors' term," 290 F.3d at 354–55, here—outside the context of a multi-member board with staggered terms—the consistent practice of both the

⁶ Nor do we believe that the term of the Commissioner, because of his service on the Internal Revenue Service Oversight Board ("Board"), *see* 26 U.S.C. § 7802(b)(1)(C), is staggered to fit into the appointment regime for that body such that his term as Commissioner would run with the calendar. Six members of the Board are appointed by the President with the Senate's advice and consent to serve terms that the statute explicitly requires to be staggered. *See id.* § 7802(b)(2)(B). Both the Secretary of the Treasury (or the Deputy Secretary, if designated by the Secretary) and the Commissioner are members but, unlike the other members, they have *no* terms on the Board, staggered or otherwise. *See id.* § 7802(b)(1)(B), (b)(2)(B). Moreover, the provision requiring staggering is explicitly limited to the six other members. *See id.* § 7802(b)(2)(B). *See generally Russell 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). Significantly, when members of the Board are confirmed, they are confirmed for terms expiring on specific dates. *See, e.g.*, 151 Cong. Rec. S2874 (daily ed. Mar. 16, 2005) (confirmation of Raymond Thomas Wagner, Jr., to Board "for a term expiring September 14, 2009"); 150 Cong. Rec. S8791 (daily ed. July 22, 2004) (confirmation of Charles L. Kolbe to Board "for the remainder of the term expiring September 14, 2004"); *see also* 150 Cong. Rec. S8473 (daily ed. July 20, 2004) (Senate Committee on Finance recommending confirmation of Paul Jones to Board "for a term expiring September 14, 2008").

Executive Branch and Congress under similar statutes is that the term of officials whose predecessor's term expired runs from the date of appointment.

Nor does *Wilson* reject that idea that Congress could intend for a Commissioner to serve a full term if he was appointed after the expiration of his predecessor's term, but serve only a partial term if he was appointed to fill the unexpired term of his predecessor. Under the circumstances of that case, the court rejected the idea that the single phrase "the term of office of each member of the Commission" had "two different meanings for two distinct classes of commissioner." *Id.* at 356. Under the interpretation rejected by the court, "when an appointee's predecessor had served out her full term, but there was a delay in the nomination of the new appointee, that new appointee could permissibly serve less than a full six years," but "when the appointee is replacing a predecessor who had failed to serve out a full term, . . . the new appointee should serve a new, full six years from the date of her appointment." *Id.* at 355. The court commented that "[w]e have difficulty believing that Congress *sub silentio* created two different tracks." *Id.* But our reading would not result in a "two-track" system; every "term," as that word is used in the statute, would be a five-year term running from the appointment of Commissioners succeeding a predecessor's expired term. That is true whether the person is appointed to serve a full term or appointed to fill a vacancy in an unexpired term.⁷ In any event, *Wilson* only addressed whether such a distinction should be drawn where Congress had not explicitly spoken to the issue. But here, Congress did not act *sub silentio*. The legislative history explicitly states that the Commissioner "is appointed to a 5-year term, *beginning with the date of appointment.*" H.R. Conf. Rep. No. 105-599, at 207 (emphasis added), *reprinted in* 1998 U.S.C.C.A.N. at 302. Particularly in light of consistent practice under several similarly worded statutes, nothing in *Wilson* suggests that the Commissioner's term must run from the date a predecessor's term expired.

We are aware that a memorandum prepared by staffers of the Congressional Research Service has concluded that, "[w]hile the matter is not free from doubt, it is likely that a reviewing court would hold that Congress intended to establish a continuous tenure design for the Office of Commissioner" under which each Commissioner's tenure would be based on five-year increments from the end of Commissioner Rossotti's term as Commissioner. *Term of Office of the Commissioner of Internal Revenue* at CRS-15. We do not find that analysis persuasive. First, it disregards relevant legislative history. The memorandum does not discuss or even acknowledge the portion of the House Conference Report explicitly stating that the term of the IRS Commissioner runs from appointment. *See id.* at CRS-10

⁷ Thus, for example, a nominee to fill the remainder of Commissioner Everson's five-year term would be able to serve until May 4, 2008, five years from the date of Commissioner Everson's appointment. But if the same person were then reappointed to a new term, he would serve "a 5-year term" from the date of his reappointment. In both instances, the "term" would be a five-year term running from the appointment of a Commissioner succeeding a predecessor's expired term.

to CRS-12. That legislative history is unambiguous and cannot be reconciled with the view taken in the CRS memorandum. Second, the memorandum notes the substantial practice that accords with, and supports, the view of the statute that we take here, *see id.* at CRS-4 to CRS-5; however, instead of giving weight to that practice, as cases like *Wilson* require, *see* 290 F.3d at 356, the memorandum simply dismisses the practice as contrary to the authors' reading of the statutory language in the abstract. Contrary to the memorandum, we believe that the practice of both the Executive Branch and the Senate, in its role of giving advice and consent, tends to establish the correct reading of the statute.

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