OPINIONS

OF THE

# OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

## PRESIDENT OF THE UNITED STATES,
## THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE OFFICERS OF
THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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# FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public. The first twenty-six volumes of opinions published covered the years 1977 through 2002. The present volume covers 2003. Volume 27 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

# Bond Proceeding of Undocumented Aliens Seeking to Enter the United States Illegally

In determining whether to release on bond undocumented migrants who arrive in the United States by sea seeking to evade inspection, it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien migrants into the United States without adequate screening.

In bond proceedings involving aliens seeking to enter the United States illegally, where the government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, immigration judges and the Board of Immigration Appeals shall consider such interests.

Considering national security grounds applicable to a category of aliens in denying an unadmitted alien's request for release on bond does not violate any due process right to an individualized determination in bond proceedings under section 236(a) of the Immigration and Nationality Act.

April 17, 2003

OPINION IN BOND PROCEEDINGS

Respondent is an undocumented alien from Haiti who was taken into custody and detained by the Immigration and Naturalization Service ("INS") on October 29, 2002, while attempting to evade lawful immigration procedures and enter the United States illegally. He arrived aboard a vessel that sailed into Biscayne Bay, Florida, on that date, carrying 216 undocumented aliens from Haiti and the Dominican Republic. He and other passengers on the vessel were apprehended ashore after the vessel sought to evade coastal interdiction by the United States Coast Guard and after many of the aliens sought to evade law enforcement authorities ashore. *See* INS Brief in Support of Bond Appeal ("INS Brief"), Ex. A. Respondent was placed in removal proceedings and charged as being an inadmissible alien under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6)(A)(i) (2002). He is now seeking asylum in the United States and has applied for bond, which would allow his release into the community pending disposition on removal or asylum.

On November 6, 2002, an immigration judge ("IJ") granted respondent's application for release on bond (set at $2,500) over the objections of the INS. The INS argued, *inter alia*, that the release of respondent, and of other members of the undocumented migrant group of October 29, would stimulate further surges of such illegal migration by sea and threaten important national security interests. The INS then appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). The BIA dismissed the appeal, concluding, *inter alia*, that the broad national interests invoked by the INS were not appropriate considerations for the IJ or the BIA in making the bond determination, "[a]bsent contrary direction from the Attorney General." Decision of the Board of Immigration Appeals, *In re D–J–*, at 2 (Mar. 13, 2003) ("BIA Dec."). Exercising authority transferred to the Depart-

ment of Homeland Security ("DHS") by the Homeland Security Act of 2002 ("HSA"), and pursuant to the provisions of 8 C.F.R. § 1003.1(h)(1)(iii), the Under Secretary for Border and Transportation Security has now referred the BIA's decision to me for review.[1] This referral automatically stayed the BIA's order pending my decision. *See* 8 C.F.R. § 1003.19(i)(2).

On February 12, 2003, the IJ denied respondent's application for asylum. His appeal of that decision is pending before the BIA.

Although authority to enforce and administer the INA and other laws related to the immigration and naturalization of aliens has recently been transferred to the Secretary of Homeland Security by the HSA, the Attorney General retains his authority to make controlling determinations with respect to questions of law arising under those statutes.[2] This statutory framework is consistent with the Attorney General's traditional role as the primary interpreter of the law within the Executive Branch. *See generally* 28 U.S.C. §§ 511–513 (2000).

Pursuant to the authority and discretion vested in me under the provisions of section 236(a) of the INA, 8 U.S.C. § 1226(a) (2000),[3] I have determined that the

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[1] On March 1, 2003, the INS was transferred from the Department of Justice to the Department of Homeland Security pursuant to the HSA, Pub. L. No. 107-296, 116 Stat. 2135, 2178. The Executive Office for Immigration Review, however, remains in the Department of Justice. On February 28, 2003, the Attorney General published a technical rule that moved 8 C.F.R. § 3.1(h) (2002) to 8 C.F.R. § 1003.1(h). *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9332 (Feb. 28, 2003) (to be codified at 8 C.F.R. § 1003.1(h)). The authority of the INS Commissioner to refer Board decisions to the Attorney General is now vested in the Secretary of Homeland Security, or in "specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General." 8 C.F.R. § 1003.1(h)(iii).

[2] *See* INA § 103(a)(1) (codified at 8 U.S.C. § 1103(a)(1), as amended by Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, div. L, § 105(a)(1), 117 Stat. 531 (2003)), which provides:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

[3] Section 1102 of the HSA, 116 Stat. at 2274, added a new subsection (g) to section 103 of the INA, providing as follows:

> The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

The Attorney General's authority to detain, or authorize bond for aliens under section 236(a) of the INA is one of the authorities he retains pursuant to this provision, although this authority is shared with the Secretary of Homeland Security because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings. *See* INA § 103(a), (g) (as amended); 8 C.F.R. §§ 236.1(c), (d), 287.3(d) (2002).

release of respondent on bond was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut by the release of respondent and other undocumented alien migrants who unlawfully crossed the borders of the United States on October 29, 2002. I further determine that respondent has failed to demonstrate adequately that he does not present a risk of flight if released on bond and that he should be denied bond on that basis as well. *See* 8 C.F.R. § 236.1(c)(8) (2002). Accordingly, I order that the BIA's decision and order be vacated, and that respondent be denied bond and detained pending appropriate disposition and proceedings respecting his status under the immigration laws.

## I.

My review of the BIA's decision in this case is de novo; it is not confined to reviewing the decisions of the BIA or the IJ for legal or factual error. *See Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 4 (1988) ("[W]hen the Attorney General reviews a case pursuant to 8 C.F.R. § 3.1(h), he retains full authority to receive additional evidence and to make de novo factual determinations."). In making their decisions in this matter, both the IJ and the BIA were exercising limited authority that is dependent upon delegation from the Attorney General. *See id.* When I undertake review of such decisions pursuant to a referral under 8 C.F.R. § 1003.1(h), the delegated authorities of the IJ and the BIA are superseded and I am authorized to make the determination based on my own conclusions on the facts and the law. The recent promulgation of 8 C.F.R. § 1003.1(d)(3), which precludes the BIA from engaging in de novo review of an IJ's findings of fact, does not affect the de novo standard articulated in *Doherty* because that regulation does not govern the authority of the Attorney General to review BIA decisions.

I now turn to the question of whether respondent should have been detained or released on bond under the authority of section 236(a) of the INA.

## II.

### A.

The law governing the detention or release of aliens such as respondent (i.e., aliens arrested and detained pending a decision on removal) is set forth in section 236(a) of the INA. It provides that the Attorney General may (1) continue to detain the alien; or (2) release the alien on bond or conditional parole.[4] Conditional parole

[4] *See supra* note 3.

is not placed in issue here, so the only question is whether respondent should be detained or released on bond.

As recognized by the Supreme Court, section 236(a) does not give detained aliens any *right* to release on bond. *See Carlson v. Landon*, 342 U.S. 524, 534 (1952). Rather, the statute merely gives the Attorney General the authority to grant bond if he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted. The extensive discretion granted the Attorney General under the statute is confirmed by its further provision that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." INS § 236(c). Even apart from that provision, the courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond under this and like provisions. *See, e.g.*, *Carlson*, 342 U.S. at 540; *United States ex rel. Barbour v. Dist. Dir. of INS*, 491 F.2d 573, 577–78 (5th Cir. 1974). Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal. *See, e.g.*, *Carlson*, 342 U.S. at 534 (Attorney General's denial of bail to alien is within his lawful discretion as long as it has a "reasonable foundation"); *Barbour*, 491 F.2d at 578 (INS finding that alien was a threat to national security warranted denial of bond, applying "reasonable foundation" standard); *see also Sam Andrews' Sons v. Mitchell*, 457 F.2d 745, 748 (9th Cir. 1972) (Attorney General's exercise of discretionary authorities under the INA must be upheld if they are founded "on considerations rationally related to the statute he is administering").

Further discretionary authority for the release on bond of aliens such as respondent is found in subpart A, section 236.1 of the INS regulations governing "Detention of Aliens Prior to Order of Removal." This regulation provides:

> Any officer authorized to issue a warrant of arrest *may, in the officer's discretion*, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.

8 C.F.R. § 236.1(c)(8) (emphasis added). This provision gives the DHS discretionary authority to release a covered alien on bond if, and only if, the alien makes a satisfactory demonstration with respect to the stated criteria. Like section 236(a), it does not establish any right to release on bond.

**B.**

I will now briefly summarize the pertinent facts and contentions of the parties indicated in the record.

As noted above, respondent arrived off the shores of Florida in an overloaded vessel with 216 undocumented aliens from Haiti and the Dominican Republic on October 29, 2002. After the vessel sought to evade the orders and interdiction efforts of a United States Coast Guard ("USCG") vessel, some of the alien passengers jumped from the vessel and swam ashore. After the migrant vessel ran aground, the remaining passengers disembarked and, despite the order of USCG officers to stop, ran ashore and fled from law enforcement officers before they were apprehended. *See* INS Brief, Ex. A (Declaration of Captain Mark J. Kerski, USCG) ("Kerski Declaration"). I find nothing in the record showing that respondent was not among the alien migrants who disobeyed the orders of, and sought to evade, USCG or law enforcement officers ashore in an effort to enter the United States unlawfully.

Respondent offered limited evidence and information in the proceedings below in support of his claims that he did not present a danger to the community, a risk of flight, or a threat to national security. Respondent testified that he has not been arrested or convicted of a crime; and that, if released, he would live with an uncle residing in New York, New York, who would provide him with food, shelter, and transportation while he applied for asylum. Memorandum Decision of the Immigration Judge, *In re D–J–*, at 2 (Dec. 12, 2002) ("IJ Dec.").

Respondent's brief before the BIA asserts that he was "willingly taken into INS custody." Respondent's Brief in Support of the Immigration Judge's Custody Determination at 3 ("Respondent's Brief"). That assertion, however, does not address whether respondent was among the migrants who sought to evade USCG and other law enforcement officers after coming ashore, as indicated in the USCG's Kerski Declaration. Respondent's brief further asserts that, because he does not speak or understand English, he could not be expected to obey any orders from English-speaking law enforcement officers at the time he came ashore. That assertion, however, does not address the likelihood, indicated by the content of the Kerski Declaration, that the circumstances in which those orders were issued were such that their meaning would have been clear in context, without regard to the particular words uttered by the officers. *See* INS Brief, Ex. A, ¶¶ 4–6.

In opposing respondent's contentions, the INS submitted declarations from officers of the Coast Guard, the Department of State, and the Department of Defense ("DOD") as exhibits before the IJ and the BIA.[5] The INS maintains that

[5] The exhibits submitted with the INS brief included: Declaration of Captain Mark J. Kerski, USCG (Exhibit A); Memorandum from the United States Department of State (Exhibit B); Declaration of Captain Kenneth A. Ward, USCG (Exhibit C); Declaration of Johnny Williams (Exhibit D); Supple-

these declarations show that there are strong concerns of national security requiring the continued detention of respondent and similarly situated undocumented migrants pending removal proceedings. Two general areas of concern are implicated. First, there is a concern that the release of aliens such as respondent and the other October 29 migrants would tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national and homeland security resources. Such mass migrations would also place the lives of the aliens at risk. Second, in light of the terrorist attacks of September 11, 2001, there is increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process.

The first area of national security concern advanced by the INS is the threat of further mass migration. The INS asserts that reports and rumors of successful entry into the United States by Haitian migrants have fueled recent migration surges and the perception of further successful entries could encourage further mass migration attempts.[6] In support of this contention, the INS has submitted a memorandum issued by the State Department supporting detention of the migrants who landed in Florida on October 29, 2002, in order to prevent further mass migrations. The memorandum states in relevant part:

> The disposition of those detained in the October 29 arrival will spur further migration if they are released into the U.S. Such treatment would create a perception in Haiti of an easing in U.S. policy with respect to admission of migrants. For this reason, the Department of State strongly recommends that the 216 migrants (207 Haitians, 9 Dominicans) from the boat which reached Key Biscayne on October 29 be detained while they undergo processing. The migrants should be detained unless and until they demonstrate a well-founded fear of persecution. Those who cannot do so should continue to be held, absent a compelling humanitarian reason for release, until they can be expeditiously repatriated.

INS Brief, Ex. B. The State Department memorandum sets forth extensive and detailed information documenting the relationship between perceptions in Haiti of

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mental Declaration of Captain Kenneth A. Ward, USCG (Exhibit E); and Declaration of Joseph J. Collins, Deputy Assistant Secretary of Defense for Stability Operations (Exhibit F).

[6] Following the successful landing of more than 200 Haitians on October 29, 2002, on November 7, 2002, and again on November 9, 2002, the USCG successfully interdicted three groups of undocumented Haitian migrants attempting to transit to the United States via the Bahamas. In all, 264 Haitian migrants were interdicted on these dates. Such incidents are "typical of a surge in Haitian migrant departures following similar successful landings and demonstrates the 'pull' factor that successful landing can have." INS Brief, Ex. E, ¶ 3 (Supplemental Declaration of Captain Kenneth A. Ward, USCG).

successful U.S. entry by seagoing migrants and the likelihood of further mass migrations. *Id.*

The declarations submitted from the Coast Guard (*see supra* note 6) and the Defense Department express corroborating statements regarding this concern. The Coast Guard states that "[a]necdotal reporting and operational experience strongly suggests that detaining and swiftly repatriating those who illegally and unsafely attempt to enter the United States by sea is a significant deterrent to surges in illegal immigration and mass migration." INS Brief, Ex. C, ¶ 9 (Declaration of Captain Kenneth A. Ward, USCG). Similarly, the Department of Defense declaration states that "[a]ctual or even *perceived* changes in U.S. immigration policy can trigger mass migration events by encouraging other potential illegal migrants." INS Brief, Ex. F, ¶ 5 (Declaration of Joseph J. Collins, Deputy Assistant Secretary of Defense for Stability Operations).

The INS submissions also outline an additional national security implication of encouraging future mass migrations by sea from Haiti. The Coast Guard declaration asserts that continued mass migrations from Haiti have "heavily taxed Coast Guard capacity and capabilities," while "reducing responsiveness in other mission areas." INS Brief, Ex. C, ¶ 7. The Department of Defense, which is also involved in efforts to contain such overseas migrations, also asserts that the demands of mass migrations from Haiti "would create a drain on scarce assets that are being used in or supporting operations elsewhere." INS Brief, Ex. F, ¶ 8.

The declarations submitted by the INS also substantiate a national security concern raised by the prospect of undocumented aliens from Haiti being released within the United States without adequate verification of their background, associations, and objectives. Thus, the State Department declaration asserts that it has "noticed an increase in third country nations (Pakistanis, Palestinians, etc.) using Haiti as a staging point for attempted migration to the United States. This increases the national security interest in curbing use of this migration route." INS Brief, Ex. B, ¶ 11. Relatedly, the Coast Guard's supplemental declaration asserts that the boatloads of interdicted Haitians have included persons previously deported for drug trafficking and subject to outstanding felony warrants. INS Brief, Ex. E, ¶ 4 (Supplemental Declaration of Captain Kenneth A. Ward, USCG). The Coast Guard further asserts that "because maritime migrants are typically undocumented and carry little or no identification, it is often difficult to ascertain the identity and background of interdicted persons, particularly in large groups, which presents potential threats to officer safety, as well as national security." *Id.*

## III.

Having considered the record and the briefs of the parties, and exercising my authority under section 236(a) of the INA, I have determined that the release of respondent on bond is unwarranted.

I conclude that releasing respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy. As demonstrated by the declarations of the concerned national security agencies submitted by the INS, there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities. Such national security considerations clearly constitute a "reasonable foundation" for the exercise of my discretion to deny release on bond under section 236(a). *See Carlson*, 342 U.S. at 534; *Barbour*, 491 F.2d at 578.

I have noted the BIA's suggestion that the INS's recent adoption of a policy placing certain aliens (including many undocumented aliens who arrive by sea and are not admitted or paroled) in expedited removal proceedings in which affected aliens, with limited exceptions, would be automatically detained without review by an IJ or the BIA tends to negate the INS's concern regarding the encouragement of migration surges. BIA Dec. at 2 n.3; *see* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924–26 (Nov. 13, 2002). The offsetting effect suggested by the BIA would presumably be due to the prospect that the new expedited removal policy will be so restrictive that potential Haitian migrants would learn of that and be deterred from future migration attempts, regardless of respondent's fate and that of the other October 29 migrants. While the expedited removal policy may reduce the incidence of seagoing Haitian migrants being released on bond pending removal, it hardly provides airtight assurance against future successful entries by such migrants through legal and extra-legal maneuvers, or the encouragement of additional maritime migrations likely to arise from such entries. I note, for example, that the policy's strict detention provision is entirely inapplicable to aliens who are admitted or paroled. In any event, even if the new policy somewhat reduced the expectations of further successful U.S. entries, the release of respondent and hundreds of others from the October 29 migrant group would strongly undercut any resultant deterrent effect arising from the policy. The persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it, confirms that even sporadic successful entries fuel further attempts. I therefore am not persuaded that the new expedited removal policy negates the migration "surge" consideration.

I further conclude that the release on bond of undocumented seagoing migrant aliens from Haiti without adequate background screening or investigation presents a risk to national security that provides additional grounds for denying respond-

ent's release on bond. This consideration is fortified by the State Department's assertion that it has observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States. Under the current circumstances of a declared national emergency, the government's capacity to promptly undertake an exhaustive factual investigation concerning the individual status of hundreds of undocumented aliens is sharply limited and strained to the limit. Under these circumstances, it is reasonable to make a determination that aliens arriving under the circumstances presented by the October 29 influx should be detained rather than released on bond. There is substantial risk that granting release on bond to such large groups of undocumented aliens may include persons who present a threat to the national security, as well as a substantial risk of disappearance into the alien community within the United States.

I note that the BIA has acknowledged the seriousness of the INS's arguments that the detention or release of these aliens implicates important national security interests. *See* BIA Dec. at 2. The BIA determined, however, that such considerations fall "outside the scope of Immigration Judge bond proceedings as such proceedings are currently constituted," except where individual considerations show that respondent is not likely to appear or presents a danger to the community. The BIA then stated: "Absent contrary direction from the Attorney General, we therefore agree with the Immigration Judge's focus on the respondent's individual likelihood to appear and individual danger to the community." *Id.* This opinion provides the BIA and IJs with the "contrary direction" to which the BIA referred. In future proceedings involving similarly situated aliens, this opinion constitutes binding precedent, requiring the BIA and IJs to apply the standards set forth herein, including consideration of national security interests. *See generally Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (administrative judges "are entirely subject to the agency on matters of law"). Further, in all future bond proceedings involving aliens seeking to enter the United States illegally, where the government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests.

Finally, I conclude that respondent has not individually demonstrated that he satisfies the prerequisites to discretionary release on bond under the provisions of 8 C.F.R. § 236.1(c)(8). The INS may (but is not required to) grant release under that provision if the alien demonstrates to its satisfaction that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. I do not find that respondent has adequately demonstrated that he is likely to appear at future proceedings for purposes of granting release on bond pursuant to section 236(a)(2) of the INA or 8 C.F.R. § 236.1(c)(8). There are strong indications in the record that respondent was among those aliens who sought to evade Coast Guard and law enforcement officers in a determined effort to effect illegal entry into the United States. Because such evasive behavior does

not provide reassuring evidence of respondent's likely reliability in appearing for future proceedings, it was incumbent upon respondent to produce substantial countervailing evidence as to that criterion. I conclude that the minimal showing made by respondent on this point was insufficient to demonstrate the likelihood of his appearance for future proceedings.[7]

In addition, I note that respondent was denied asylum by the immigration judge on February 12, 2003. Respondent appealed that decision to the BIA on March 14, 2003, and that appeal remains pending. The IJ's denial of respondent's application for asylum increases the risk that respondent will flee if released from detention. "A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing than one who, based on a criminal record or otherwise, has less potential of being granted such relief." *Matter of Andrade*, 19 I. & N. Dec. 488, 490 (BIA 1987).

## IV.

Although neither the IJ nor the BIA chose to address the issue, respondent contends that he is constitutionally entitled on due process grounds to an "individualized determination" of his request for release on bond and that denying bond on broad national security grounds that are generally applicable to the October 29 migrants would somehow violate such a right. Respondent's Brief at 6–8. In that regard, I note that several federal appellate courts have recently held that a *lawful permanent resident alien* has a due process right to an individualized hearing and determination on whether he poses a risk of flight or a danger to the community when subjected to the mandatory detention provisions of section 236(c) of the INA. *See Kim v. Ziglar*, 276 F.3d 523 (9th Cir.), *cert. granted sub nom. Demore v. Kim*, 536 U.S. 956 (2002); *Patel v. Zemski*, 275 F.3d 299, 314–15 (3d Cir. 2001); *see also Hoang v. Comfort*, 282 F.3d 1247, 1256 (10th Cir. 2002). Another federal appeals court has reached a contrary conclusion on that issue, *see Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999), and the Supreme Court has granted the government's petition for a writ of certiorari and heard oral argument in *Kim*.[*]

I first note that the decisions in *Kim* and *Patel* were specifically addressed to the *mandatory* detention provisions of section 236(c) of the INA and are therefore fundamentally distinguishable from the procedures afforded under section 236(a). Section 236(c) requires nondiscretionary detention as a categorical statutory mandate for those aliens covered by it, whereas section 236(a) affords aliens to

[7] The INS also offered evidence disputing respondent's claim that, individually, he does not pose a danger to the community and is likely to appear in future proceedings. *See* INS Brief at 14–15.

[*] Editor's Note: The Supreme Court subsequently reversed the Ninth Circuit in *Kim*, holding that the government could detain an alien under section 236(c), without providing an individualized determination as to whether the alien presented a flight risk, "for the limited period of his removal proceedings." *Demore v. Kim*, 538 U.S. 510, 531 (2003).

whom it applies the opportunity to seek discretionary relief (bond or conditional parole) in a hearing before an immigration judge. *See Kim*, 276 F.3d at 533.

More significantly, however, the holdings in *Kim* and *Patel* were premised upon the petitioner's status as a lawful permanent resident alien. *See Kim*, 276 F.3d at 528, 534; *Patel*, 275 F.3d at 307. In contrast, respondent has not even been admitted to the United States, let alone acquired the status of a lawful permanent resident alien. Respondent's status is that of an undocumented alien, charged as being inadmissible as an alien present in the United States without having first been admitted or paroled. *See* INA § 212(a)(6)(A)(i). As an alien who has "not yet gained initial admission to the United States," he does not qualify for the limited due process protection extended to "admitted" aliens under the sharply distinguishable circumstances presented in *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question."). As explained by the court in *Gisbert v. Attorney General*, 988 F.2d 1437, 1440 (5th Cir.), *amended on other grounds*, 997 F.2d 1122 (5th Cir. 1993): "Although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country." *Accord United States v. Lopez-Vasquez*, 227 F.3d 476, 484–85 (5th Cir. 2000); *Zheng v. INS*, 207 F. Supp. 2d 550, 552 (E.D. La. 2002) ("The detention of aliens who have been denied initial admission into the United States does not implicate the Fifth Amendment, even if such aliens were subsequently paroled or released within the country.").

Even if respondent *were* entitled to an individualized hearing, however, such a conclusion would not support a contention that this respondent's request for release on bond must be determined exclusively on the basis of his individual situation, rather than on the basis of general considerations applicable to a category of migrants, as a matter of constitutional due process. The mere fact that general considerations are introduced does not negate the individual nature of the hearing. The Attorney General is broadly authorized to detain respondent, and deny his request for bond, based on any reasonable consideration, individualized or general, that is consistent with the Attorney General's statutory responsibilities. *See Reno v. Flores*, 507 U.S. 292, 313–14 & n.9 (1993) (rejecting juvenile aliens' demands for an "individualized custody hearing" and upholding INS use of "reasonable presumptions and generic rules" in such cases).

In any event, I have given full consideration to the individual aspects of respondent's claim for bond based on the record in this proceeding. I find nothing in respondent's individual case that warrants granting him release on bond when balanced against the above-described compelling factors that militate against such

release in the case of undocumented aliens attempting illegal entry into the United States under the circumstances presented by the October 29 influx.

Finally, I note that respondent argued to the BIA that an INS policy of detaining Haitian migrants in order to deter other Haitians from migrating to the United States seeking asylum violates international law. *See* Respondent's Brief at 8–9. In support of his argument, he invokes the right to asylum protected by Article 14 of the Universal Declaration of Human Rights ("UDHR") and an advisory opinion of the United Nations High Commission for Refugees stating that "asylum seekers should not be detained for purposes of deterrence." *Id.* at 8. The BIA did not address respondent's arguments on this point in its decision.

This argument is without merit. First, the UDHR is merely a nonbinding expression of aspirations and principles, rather than a legally binding treaty. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987) (UDHR "is merely a nonbinding resolution, not a treaty"). In any event, the application of U.S. law to protect the nation's borders against mass migrations by hundreds of undocumented aliens violates no right protected by the UDHR or any other applicable rule of international law. As the Supreme Court has recognized, "'the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments . . . .'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). The authority to expel aliens is meaningless without the authority to detain those who pose a danger or a flight risk during the process of determining whether they should be expelled. The national security interests invoked in this opinion are directed at unlawful and dangerous mass migrations by sea, not the right to seek asylum. Aliens who do arrive in the United States, including respondent himself, are afforded the right to apply for asylum and have those applications duly considered.[8]

[8] I note that a regional official of the United Nations High Commissioner for Refugees ("UNHCR") has sent me a letter volunteering certain comments on this proceeding. Letter for The Honorable John Ashcroft, Attorney General of the United States, from Guenet Guebre-Christos, Regional Representative, United Nations High Commissioner for Refugees, *Re: Matter of D–J–, Advisory Opinion on Detention of Asylum Seekers* (Mar. 28, 2003). In brief, the UNHCR letter makes certain arguments invoking purported obligations arising under the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (Jan. 31, 1967) ("Protocol"), and the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968) ("Convention"). The United States is not a party to the Convention, but it is a party to the Protocol, which incorporates by reference Articles 2 through 34 of the Convention. The Protocol is not self-executing, but Congress has incorporated into the INA, through the Refugee Act of 1980, the appropriate requirements of the Protocol. Consequently, the Protocol does not afford respondent any rights beyond what he is afforded under the federal immigration laws, as applied in this decision. *See Abdelwahed v. INS*, 22 Fed. Appx. 811, 815, 2001 WL 1480651 (9th Cir.) (stating that "the Protocol does not give [the petitioner] any rights beyond what he already enjoys under the immigration statutes"); *Legal Obligations of the United States under Article 33 of the Refugee Convention*, 15 Op. O.L.C. 86, 87 (1991) ("[T]he Protocol by which the United States adhered to the Convention is not

**V.**

I have determined that respondent's release on bond under the provisions of section 236(a) of the INA is unwarranted. The BIA's Order of March 13, 2003, is hereby vacated and respondent is to be detained pending decision on removal.

JOHN D. ASHCROFT
*Attorney General*

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self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.").

# OPINIONS

OF THE

# OFFICE OF LEGAL COUNSEL

# Funding for Technical Assistance for Agricultural Conservation Programs

Funding for technical assistance for the agricultural conservation programs listed in amended section 1241(a) of the Food Security Act of 1985 is subject to the "section 11 cap" on transfer of Commodity Credit Corporation funds.

The Secretary of Agriculture may draw on the Department of Agriculture's appropriation for Conservation Operations to fund technical assistance for these programs.

January 3, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

You have asked us to examine the sources and limits on funding for technical assistance provided for agricultural conservation programs listed in amended section 1241(a) of the Food Security Act of 1985. *See* 16 U.S.C. § 3841(a) (Supp. II 2003). That provision instructs the Secretary of Agriculture to "use the funds, facilities, and authorities of the Commodity Credit Corporation [("CCC")] to carry out" these programs. You have asked us to determine (1) whether expenditures on technical assistance for these programs are subject to the annual limit that Congress has placed on aggregate transfers of CCC funds to other components of the Department of Agriculture ("USDA") under section 11 of the Commodity Credit Corporation Charter Act ("CCC Charter Act"), 15 U.S.C. § 714i (2000), and (2) whether the Secretary of Agriculture may draw upon USDA's appropriation for Conservation Operations ("CO") to fund technical assistance for these programs.

Your Office has concluded that the section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a) and that the Secretary of Agriculture may draw upon USDA's CO appropriation to fund technical assistance for these programs.[1] USDA has concurred in your conclusions on both points.[2] The Congressional Budget Office, addressing only the first point, has also concurred.[3] The General Accounting Office ("GAO"), however, has

[1] *See* Letter for Susan A. Poling, Associate General Counsel, General Accounting Office, from Philip J. Perry, General Counsel, Office of Management and Budget (Sept. 16, 2002) ("OMB Letter").

[2] *See* Letter for Susan A. Poling, Associate General Counsel, General Accounting Office, from Nancy S. Bryson, General Counsel, Department of Agriculture (Sept. 16, 2002).

[3] *See* Letter for Senator Tom Harkin, Chairman, Senate Comm. on Agriculture, Nutrition and Forestry, from Nancy S. Bryson, General Counsel, Department of Agriculture (Sept. 24, 2002) (quoting electronic message communicating the Congressional Budget Office's conclusion that the section 11 ceiling remains "applicable to the transfers under section 1241(a)").

reached contrary conclusions: it has determined that the section 11 ceiling does not apply and that the CO appropriation is not available.[4]

For the reasons set forth below, we conclude that the section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a) and that the Secretary of Agriculture may draw upon USDA's CO appropriation to fund technical assistance for these programs.

## I.

We first address whether the section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a).

### A.

In legislation enacted in 2002, Congress substantially revised section 1241 of the Food Security Act of 1985 concerning the use of funds transferred from the Commodity Credit Corporation to finance agricultural conservation programs. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 2701, 116 Stat. 134, 278 ("2002 Farm Bill"), *codified at* 16 U.S.C. § 3841 (Supp. II 2003). Revised section 1241(a) instructs the Secretary of Agriculture, during fiscal years 2002 through 2007, to "use the funds, facilities, and authorities of the Commodity Credit Corporation to carry out [seven specified conservation programs] under subchapter IV [of title 16, chapter 58] (including technical assistance)." 16 U.S.C. § 3841(a). For three of the seven specified programs, this authorization to spend CCC funds is not subject to any specific dollar limitation, although acreage and eligibility restrictions place some limit on potential spending.[5] The remaining four, in contrast, are subject to annual spending limits specified in section 1241(a).[6]

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[4] *See* Letter for Senator Herb Kohl, Chairman, Subcomm. on Agriculture, Rural Development, and Related Agencies, Senate Appropriations Comm., Senator Thad Cochran, Ranking Minority Member, Subcomm. on Agriculture, Rural Development, and Related Agencies, Senate Appropriations Comm., and Representative Henry Bonilla, Chairman, Subcomm. on Agriculture, Rural Development, FDA & Related Agencies, House Appropriations Comm., from Anthony H. Gamboa, General Counsel, General Accounting Office, *Re: Funding for Technical Assistance for Conservation Programs Enumerated in Section 2701 of the Farm Bill*, No. B-291241 (Oct. 8, 2002) (available at http://www.gao.gov) ("GAO Letter").

[5] Sections 1241(a)(1)–(3) instruct the Secretary to use CCC funds, without any dollar-denominated limit, to carry out the Conservation Reserve Program ("CRP"), 16 U.S.C. §§ 3831–3835a (Supp. II 2003); the Wetlands Reserve Program ("WRP"), *id.* §§ 3837–3837e (2000 & Supp II 2003); and the Conservation Security Program ("CSP"), *id.* §§ 3838–3838c (Supp. II 2003).

[6] Sections 1241(a)(4)–(7) instruct the Secretary to use CCC funds, up to prescribed annual limits, to carry out the Farmland Protection Program ("FPP"), 16 U.S.C. §§ 3838h–3838j (Supp. II 2003); the Grassland Reserve Program ("GRP"), *id.* §§ 3838n–3838q; the Environmental Quality Incentives Program ("EQIP"), *id.* §§ 3839aa to 3839aa-9; and the Wildlife Habitat Incentives Program ("WHIP"), *id.* § 3839bb-1.

The 2002 Farm Bill also revised section 1241 to add an express reference to the section 11 limit on the use of CCC funds to meet administrative expenses. Revised section 1241(b) provides that nothing in the new provisions respecting CCC funding "affects the limit on expenditures for technical assistance imposed by section 714i of Title 15 [i.e., section 11 of the CCC Charter Act]." 16 U.S.C. § 3841(b).

The limit on expenditures that is explicitly preserved in this portion of section 1241(b) restricts USDA uses of CCC funds. The CCC, a federal corporation that is located within USDA and managed by a Board of Directors under the supervision of the Secretary of Agriculture, is empowered to obtain funds through borrowing (under a $30 billion line of credit) as well as through direct appropriations from Congress.[7] Section 11 of the CCC Charter Act authorizes the CCC to allot or transfer "to any bureau, office, administration or other agency of the Department of Agriculture . . . any of the funds available to [the CCC] for administrative expenses," 15 U.S.C. § 714i, including funds that the CCC raises through borrowing. In particular, the section 11 cap provides that

> After September 30, 1996, the total amount of all allotments and fund transfers from the Corporation under this section (including allotments and transfers for automated data processing or information resource management activities) for a fiscal year may not exceed the total amount of the allotments and transfers made under this section in fiscal year 1995.

*Id.* According to OMB's figures, section 11 allotments and transfers for administrative expenses during fiscal year 1995 totaled $56 million.

**B.**

Your Office and GAO have offered competing textual analyses of the question whether the section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a). You both agree that the section

[7] *See* 15 U.S.C. § 714b(i) (authorizing the CCC to borrow to finance its programs, subject to $30 billion limit on indebtedness). Borrowing from the U.S. Treasury under authority of section 714b(i) represents the principal source of CCC funding. The CCC repays the loans, thereby restoring its borrowing authority, using programmatic revenues (such as loan repayments by commodity producers) and annual appropriations. *See, e.g.*, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-76, 115 Stat. 704, 716–17, 729 (appropriating "such sums as may be necessary to reimburse the Commodity Credit Corporation for net realized losses sustained, but not previously reimbursed" and specific amounts for overhead expenses of the commodity export guarantee program). Direct appropriations for certain CCC programs, made available through the normal congressional appropriations process, provide a secondary source of funding. *See generally* General Accounting Office, *Commodity Credit Corporation: Information on the Availability, Use, and Management of Funds*, Rep. No. GAO/RCED-98-114, at 1–2 (Apr. 1998) (describing the CCC's use of "line-of-credit" financing and direct appropriations).

11 cap applies only to allotments and fund transfers made by the CCC under its section 11 authority. The pivotal point on which your Office and GAO disagree is whether section 1241(a) gives the CCC a source of authority, independent of section 11, for funding technical assistance to these programs. GAO maintains that section 1241(a) provides the CCC independent authority; that the technical assistance that the CCC funds for the conservation programs listed in section 1241(a) is pursuant to this independent authority; and that the section 11 cap therefore does not come into play. Your Office, by contrast, maintains that section 11 is the sole source of authority for the CCC to fund technical assistance by USDA entities for farm conservation programs.

We believe that section 1241(a) does not confer on the CCC a source of authority, independent of section 11, for funding technical assistance to the programs listed in section 1241(a). We note in particular that section 1241(a) states that "the Secretary shall use the funds, facilities, and *authorities* of the [CCC] to carry out" these programs. Rather than vesting new authority in the CCC, section 1241(a) thus states plainly that the Secretary of Agriculture shall use the CCC's existing "authorities" to provide technical assistance to these programs. Beyond invoking section 1241(a), GAO does not allege any other authority that the CCC has, apart from section 11, for funding technical assistance to farm programs. Nor are we aware of any such authority that would operate separately from section 11. We therefore determine that insofar as the Secretary is using the CCC's authorities to fund such technical assistance, she is relying on the CCC's section 11 authority.

Our textual analysis is reinforced by section 1241(b), which provides that "[n]othing in [section 1241] affects the limit on expenditures for technical assistance imposed by [section 11]." 16 U.S.C. § 3841(b). Before the 2002 Farm Bill was enacted, the section 11 cap indisputably applied to technical assistance funds provided to at least two of the programs (CRP and WRP) now listed in section 1241(a).[8] If, as GAO contends, the effect of section 1241(a) were to remove technical assistance funding of these two programs from the section 11 cap, it would be highly peculiar to describe this escape from the section 11 cap merely as not "affect[ing] the limit on expenditures for technical assistance imposed by [section 11]." It would be far more natural and straightforward for any

[8] We are advised by your Office that under the statutory scheme, including the predecessor version of section 1241, in effect before the 2002 Farm Bill was enacted, OMB and USDA were of the view that (or at least acted as if) transfer of CCC funds for technical assistance for EQIP and WHIP was independently authorized. Whether or not such a view was permissible under the previous statutory scheme, we do not believe that that view should affect our construction of the revised section 1241. It is true that under one canon of construction "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), but that canon plainly does not apply, where, as here, a statute has been revised rather than merely re-enacted. Further, we note that one critical respect in which section 1241 has been revised is the specification that the Secretary shall use the "authorities" of the CCC.

reference to the section 11 cap to state simply that expenditures for technical assistance under section 1241 are not subject to the section 11 cap.

By contrast, section 1241(b) is sensibly phrased under our reading of section 1241(a). With respect to four of the seven programs that it lists, section 1241(a) sets forth specific amounts, totaling in the hundreds of millions of dollars each fiscal year, that the Secretary is to spend. Because section 1241(a) makes clear that the funds expended may be for purposes "including the provision of technical assistance," section 1241(a), read in isolation, might suggest that, irrespective of section 11, any portion of these hundreds of millions of dollars could be used for technical assistance. Section 1241(b) instead succinctly makes clear that the section 11 cap continues to apply.

We therefore conclude that the section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a).[9]

**II.**

We now consider whether the Secretary of Agriculture may draw upon USDA's CO appropriation to fund technical assistance for the programs listed in section 1241(a).

**A.**

Public Law 107-76 contains the fiscal year 2002 appropriation for the CO account. It provides in relevant part:

> For necessary expenses for carrying out the provisions of the Act of April 27, 1935 (16 U.S.C. 590a–f), including preparation of conservation plans and establishment of measures to conserve soil and water (including farm irrigation and land drainage and such special measures for soil and water management as may be necessary to prevent floods and the siltation of reservoirs and to control agricultural related pollutants); operation of conservation plant materials centers; classification and mapping of soil; dissemination of information; acquisition of lands, water, and interests therein for use in the plant materials program by donation, exchange, or purchase at a nominal cost not to exceed $100 pursuant to the Act of August 3, 1956 (7 U.S.C. 428a); purchase and erection or alteration or improvement of permanent and temporary buildings; and operation and maintenance of aircraft, $779,000,000, to remain available until ex-

[9] GAO argues that the legislative history of the 2002 Farm Bill supports its reading of section 1241(a). Because we do not believe that GAO's reading is permitted by the text of section 1241(a), we need not consider its account of the legislative history. *See, e.g.*, *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992).

> pended (7 U.S.C. 2209b), of which not less than $8,515,000 is for snow survey and water forecasting, and not less than $9,849,000 is for operation and establishment of the plant materials centers, and of which not less than $21,500,000 shall be for the grazing lands conservation initiative . . . .

115 Stat. at 717. This same authority for the CO appropriation applies to the continuing appropriations for fiscal year 2003. *See* Pub. L. No. 107-229, §§ 101(1), 103, 116 Stat. 1465–66 (providing continuing appropriations for fiscal year 2003); Pub. L. No. 107-294, 116 Stat. 2062 (extending continuing appropriations through January 11, 2003).

**B.**

GAO maintains that the CO appropriation identifies the specific programs that it is available to fund and that it does not include the programs listed in section 1241(a). It also argues that section 1241(a)'s directive that "the Secretary shall use the funds, facilities, and authorities of the [CCC] to carry out the [listed] programs" should be read to preclude the Secretary from using other funds in support of these programs. GAO contends that both a Senate floor colloquy on the 2002 Farm Bill and the history of funding of the WRP support its position. *See* GAO Letter at 8–11.

Your Office maintains instead that the CO appropriation is sufficiently broad to authorize funding technical assistance for the conservation programs listed in section 1241(a). You argue further that the legislative history of the CO appropriation supports your reading. *See* OMB Letter at 2–4. You find further support in what you characterize as USDA's "longstanding regular practice of using the CO account to fund conservation technical assistance." *Id.* at 4.

We believe that the CO appropriation may be used to fund technical assistance for the conservation programs listed in section 1241(a). The CO appropriation provides funds "for carrying out the provisions of the Act of April 27, 1935 (16 U.S.C. 590a–f)." Although the programs listed in section 1241(a) are not specifically identified in 16 U.S.C. §§ 590a–590f (2000), section 590a(3) authorizes the Secretary to "cooperate or enter into agreements with, or *to furnish financial or other aid to, any agency*, governmental or otherwise, or any person, subject to such conditions as he may deem necessary, *for the purposes of this chapter* [(chapter 3B)]." *Id.* § 590a(3) (emphasis added). Further, the express purposes of chapter 3B include

> (1) preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources; (4) the protection of rivers and harbors against the results of soil ero-

> sion in aid of maintaining the navigability of waters and water courses and in aid of flood control; . . . [and] (6) prevention and abatement of agricultural-related pollution.

*Id*. § 590g(a) ("declar[ing] . . . the purposes of this chapter"). Therefore, insofar as the Secretary determines that providing technical assistance for the conservation programs listed in section 1241(a) would serve any of these purposes, she may use the CO appropriation to fund such technical assistance.

We do not read section 1241(a)'s directive that "the Secretary shall use the funds, facilities, and authorities of the [CCC] to carry out the [listed] programs" to foreclose the Secretary from using the CO appropriation to fund technical assistance for these programs. Section 1241(a) does not state that the Secretary shall use *only* the funds, facilities, and authorities of the CCC to carry out these programs. In short, we see no statutory bar to the Secretary's using other funds, in addition to the CCC's, to carry out these programs.

Because we believe that the text of the CO appropriation clearly authorizes the Secretary to use the CO account to provide technical assistance for the conservation programs listed in section 1241(a) to promote any of the purposes of chapter 3B, we need not address the competing legislative history arguments that your Office and GAO present. Likewise, we see no reason to explore the conflicting accounts of the history of funding of the listed programs: even if GAO is correct in its assertion that the WRP was not funded out of the CO appropriation before the predecessor version of section 1241 was enacted in 1996, that would not bear meaningfully on the question whether the CO appropriation could have been used to fund WRP.

## III.

In sum: The section 11 cap applies to technical assistance expenditures for the conservation programs listed in section 1241(a). The Secretary of Agriculture may draw upon USDA's CO appropriation to fund technical assistance for these programs.

M. EDWARD WHELAN III
*Principal Deputy Assistant Attorney General*

# Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges

The doctrine of sovereign immunity precludes the Equal Employment Opportunity Commission from imposing monetary sanctions against federal agencies for violations of orders of EEOC administrative judges.

January 6, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE NAVY
AND
ACTING DEPUTY GENERAL COUNSEL
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Department of the Navy ("the Navy") has asked our opinion as to whether the Equal Employment Opportunity Commission ("EEOC") has authority to impose attorney's fees against federal agencies as a sanction for failure to comply with the orders of EEOC administrative judges ("AJs") in connection with hearings before AJs. In the past, for example, AJs have assessed such sanctions against federal agencies for failures to comply with discovery orders. *See* Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Ellen J. Vargas, Legal Counsel, United States Equal Employment Opportunity Commission at 3 n.4 (Jan. 9, 2001) ("EEOC Letter"). EEOC, of course, maintains that it may impose such sanctions. We agree with the Navy that, pursuant to basic principles of sovereign immunity, EEOC lacks authority to impose monetary sanctions (such as attorney's fees) on federal agencies for failure to comply with AJ orders.

## I. Jurisdiction

Before reaching the merits, we address EEOC's concerns that this matter is not appropriate for resolution by the Office of Legal Counsel. *See* EEOC Letter at 1. We agree with the Navy that it is entitled to our opinion on this issue pursuant to Executive Order 12146, 3 C.F.R. § 409 (1979) ("EO 12146").[1] As presented to us by the Navy, this is a dispute between two executive agencies on a question of law and therefore comes within the terms of section 1-401 of EO 12146, among other provisions. The fact that one agency (here, EEOC) sits in an adjudicatory posture

[1] EO 12146 authorizes the Attorney General to resolve certain legal disputes between agencies. The Attorney General has delegated that function to this Office. *See* 28 C.F.R. § 0.25 (2002).

with respect to an agency requesting our opinion (here, the Navy) does not alter this conclusion, and we have previously resolved such disputes. *See, e.g.*, *Authority of the General Services Board of Contract Appeals to Order Reimbursement of the Permanent Judgment Fund for Awards of Bid Protest Costs*, 14 Op. O.L.C. 111 (1990).

Further, neither the fact that EEOC has authority to enforce Title VII in the federal workplace nor the fact that agencies "shall comply" with EEOC rules and orders, *see* 42 U.S.C. § 2000e-16(b) (2000), divests us of authority to issue this opinion. The Navy contends that EEOC has exceeded its statutory authority. If that is the case—and we conclude that it is—EEOC has no power to impose monetary sanctions on federal agencies for failure to comply with AJ orders. At its base, the present dispute is whether EEOC has exceeded its own jurisdiction; the dispute is therefore entirely appropriate for resolution by this Office. *See* EO 12146, § 1-401 (listing questions of agency jurisdiction among the issues for resolution under that section); s*ee also* Memorandum for Henry L. Solano, Solicitor, Department of Labor, and Leigh A. Bradley, General Counsel, Department of Veterans Affairs, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: The Effect of Veterans' Health Administration Nurses' Additional Pay for Sunday and Night Duty on Calculation of Workers' Compensation Benefits* (Jan. 19, 2001).

## II. Sovereign Immunity

Because the resolution of this dispute hinges on the doctrine of sovereign immunity, we begin by explaining its basic principles. Most fundamentally, the federal government may not be sued without its consent, *see, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821). The absence of consent bars proceeding against the government. *See Meyer*, 510 U.S. at 475. The authority to consent to suit—to waive sovereign immunity—does not rest with the Executive Branch, *see, e.g.*, *United States v. Shaw*, 309 U.S. 495, 500–01 (1940) (explaining "that without specific *statutory consent*, no suit may be brought against the United States"; "[n]o *officer* by his action can confer jurisdiction") (emphases added); *Munro v. United States*, 303 U.S. 36, 41 (1938); *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994), or with the courts, *see, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Shaw*, 309 U.S. at 502, but solely with Congress.

Accordingly, waivers of the "Federal Government's sovereign immunity must be unequivocally expressed *in statutory text*." *Lane*, 518 U.S. at 192 (emphasis added); *see also United States v. Nordic Village*, 503 U.S. 30, 37 (1992). Furthermore, waivers must be "strictly construed, in terms of [their] scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. It follows that waivers of immunity with respect to one type of relief do not thereby waive immunity with respect to other

forms of relief. Thus, although the Clean Water Act and the Resource Conservation and Recovery Act waived the immunity of federal agencies with respect to "coercive fines" designed to insure compliance with the statutes, those statutes did not render such agencies liable for "punitive fines" for past violations. *See Dep't of Energy v. Ohio*, 503 U.S. 607, 614–20 (1992) (concluding that the statutes do not contain a "clear and unequivocal waiver of anything more" than the coercive fines and declining to infer "a broader reading"). And statutes that clearly waive the government's immunity from attorney's fees do not thereby waive immunity from interest on those fees, even if private parties would be liable for interest. *See, e.g.*, *Library of Cong. v. Shaw*, 478 U.S. 310, 317–19 (1986). Instead, the government's sovereign immunity must be clearly and specifically waived with respect to each form of relief claimed. *See id.* at 314, 321; *see also Nordic Village*, 503 U.S. at 34 (recognizing that a provision of the bankruptcy code waived sovereign immunity from monetary claims in two settings but declining to find such a waiver in a third setting); *cf. Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999).[2]

The presumption against waivers of sovereign immunity is especially strong in the context of monetary claims; it "operates on the broadest possible level" and "stands as an obstacle to *virtually all direct assaults against the public fisc*, save only those incursions from time to time authorized by Congress," *Horn*, 29 F.3d at 761 (emphasis added). "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192 (citing *Nordic Village*, 503 U.S. at 34). As we have previously explained, a statutory provision does not waive sovereign immunity for monetary claims if there exists any plausible reading that would not authorize monetary relief. *See Availability of*

[2] On close examination, several cases that may appear to be narrow exceptions to the traditional sovereign immunity canons are actually consistent with them. The Court, for example, has held that equitable tolling generally applies to suits against the government for which Congress has waived immunity. *See Irwin*, 498 U.S. at 95–96. To reach this result, however, the Court first concluded that application of equitable tolling "amounts to little, if any, broadening of the congressional waiver," because "[f]ederal courts have typically extended equitable relief only sparingly," *id*. at 95–96. Even so, the Court has shown great reluctance to extend *Irwin*. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002) (declining to extend *Irwin* to the context of state sovereign immunity). And although the Court has sustained attorney's fee awards for representation in administrative proceedings under part of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) (2000) (providing for such awards to a "prevailing party . . . *in any civil action* . . . for judicial review of agency action") (emphasis added), it did so only after first finding that the administrative proceedings at issue were "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989); *see id*. at 885 (emphasizing that the judicial review provision at issue entailed "a degree of interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act"). In any event, the Court has stressed that such cases "do not . . . eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarge[d] beyond what the language required." *Nordic Village*, 503 U.S. at 34 (alteration in original) (quotations and citations omitted).

*Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 180 (1994).

It follows that attorney's fees may not be imposed against the United States absent an express statutory waiver. In fact, such claims are treated more strictly than other monetary claims because of, among other things, the so-called "American Rule." Under the American Rule, even "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *see also Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001). Moreover, prevailing-party requirements are often read into fee-recovery statutes that do not explicitly require such. *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686, 694 (1983) (holding that "a fee claimant must 'prevail' before it may recover attorney's fees," despite a provision of the Clean Air Act, 42 U.S.C. § 7607(f) (2000), allowing the district court to "award costs [and attorney's fees against the United States] whenever it determines that such an award is appropriate"). Further, the Supreme Court narrowly construes who qualifies as a prevailing party. *See, e.g.*, *Buckhannon*, 532 U.S. at 600 (concluding that a plaintiff who secures the desired relief because a lawsuit induced the defendant *voluntarily* to change its conduct is not a "prevailing party"). Finally, even prevailing-party status may be insufficient. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (concluding that "[i]n some circumstances, even a plaintiff who formally 'prevails' under [42 U.S.C.] § 1988 should receive no attorney's fees at all"). Thus, multiple canons of construction come into play in considering the imposition of attorney's fees against the United States, all of which presume that such awards are unavailable.

Although most of the sovereign immunity case law arises in the context of suits before federal district courts, these principles apply with equal force to agency adjudications. This follows most immediately, we believe, from the fact that, as discussed above, Congress—not the Executive Branch—controls the terms of any waiver of sovereign immunity. Moreover, any other rule would undermine Congress's ability to waive immunity in a specific forum to the exclusion of another, *see, e.g.*, *McElrath v. United States*, 102 U.S. 426, 440 (1880), and more generally, to control the terms under which the United States would be liable to private parties. And, unsurprisingly, the courts have applied the sovereign immunity canons to proceedings before agencies and non-Article III courts. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (holding that sovereign immunity bars fee award to prevailing party in INS proceeding); *Nordic Village*, 503 U.S. at 30 (holding sovereign immunity presumptions applicable in Bankruptcy Court); *Foreman v. Dep't of Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001) (applying sovereign immunity principles to conclude that the Merit Systems Protection Board lacks authority to impose monetary damages). *Cf. United States v. Sherwood*, 312 U.S. 584, 587–88 (1941) (noting that "[e]xcept as Congress has consented there is no jurisdiction in the Court of Claims [a legislative court] more

than in any other court to entertain suits against the United States"). This Office has likewise opined that sovereign immunity principles govern agency awards of monetary relief. *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52 (1994).

Finally, we note that the Supreme Court has raised the question whether "ordinary sovereign immunity presumptions" apply to the question whether an agency may itself grant a specific form of relief against the government when Congress has clearly waived immunity from such relief in suits brought before the district courts. *West v. Gibson*, 527 U.S. 212, 222 (1999). The Court explicitly declined to decide this question, however, concluding in that case that sufficient evidence of a waiver before the agency existed under the traditional presumptions. *See id*. In our view, there can be no doubt that normal sovereign immunity presumptions apply even to the question of how "the waived damages remedy is to be administered," *id*. *See also id*. at 224–28 (Kennedy, J., dissenting). As the dissent in *West* pointed out, "[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *Id*. at 226 (Kennedy, J., dissenting) (citing *McElrath*, 102 U.S. at 440; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 & n.6 (1944); and *Case v. Terrell*, 78 U.S. (11 Wall.) 199, 201 (1870)). But, in any event, there is no suggestion in *West* that the *existence* of a waiver should be ascertained differently in the administrative context than it would be in an Article III court. It is also worth observing that the Court recently declined to distinguish between "court-like administrative tribunals" and Article III proceedings for purposes of state sovereign immunity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 759–60 (2002).

## III. Analysis

Against this backdrop, we turn to EEOC's arguments in support of its power to impose attorney's fees on federal agencies for failure to comply with AJ orders. EEOC appears to put forth two main arguments supporting its authority to impose such fees upon the government. First, EEOC contends that both its statutory mandate to eliminate discrimination from the federal workplace "through appropriate remedies," 42 U.S.C. § 2000e-16(b), and the Federal Rules of Civil Procedure suffice to waive the federal government's sovereign immunity from the type of sanctions at issue here. Second, EEOC maintains that it has inherent power, as an adjudicatory body, to impose these sanctions against federal agencies. The doctrine of sovereign immunity forecloses both arguments.

### A. No Express Waiver Allows EEOC to Impose Monetary Sanctions on Federal Agencies in the Absence of a "Prevailing Party" Determination

EEOC cites 42 U.S.C. § 2000e-16(b) as evidence that Congress has waived the federal government's immunity from the sanctions at issue here. That section empowers EEOC to enforce the prohibition on discrimination in the federal workplace "through appropriate *remedies*," *id*. (emphasis added). Attorney's fees imposed as a sanction for failure to comply with AJ orders relating to the adjudicatory process (such as discovery orders), however, are not a remedy for any act of discrimination. Because the waiver contained in section 2000e-16 must be interpreted in accordance with the above-mentioned rules of construction, this statutory provision does not supply the authority EEOC seeks. EEOC's reliance on *West v. Gibson*, 527 U.S. 212 (1999), is therefore entirely misplaced. In *West*, the Court determined that compensatory damages are an "appropriate remedy" for violations of Title VII as applied to the federal workplace, *see id*. at 217, and that EEOC therefore "possesses the legal authority to enforce" Title VII through such awards. *Id*. at 223. As discussed above, the parties in *West* agreed that Congress had waived the government's sovereign immunity from compensatory damages. By contrast, neither section 2000e-16(b), nor any other statute, contains a provision that even pertains to violations of AJ orders, much less provides an explicit waiver of the government's immunity to monetary sanctions for violations of such orders.

EEOC next asserts that "the Federal Rules of Civil Procedure provide the statutory waiver of sovereign immunity for payments by federal agencies of attorney's fees as sanctions incurred during the federal court adjudicatory process." EEOC Letter at 4. Without further analysis, EEOC simply declares that "[t]hose rules also allow agencies engaged in administrative adjudicatory processes to sanction parties before them, including federal agencies." *Id*. Some courts have concluded that the Federal Rules of Civil Procedure, either by their own force or through the EAJA, waive the United States' sovereign immunity from monetary sanctions imposed by federal district courts. *See, e.g.*, *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1181–84 (Fed. Cir. 1993); *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991); *Adamson v. Bowen*, 855 F.2d 668, 671–72 (10th Cir. 1988). We disagree with this position. *See* Memorandum for Roger B. Clegg, Associate Deputy Attorney General, Office of the Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Departmental Policy on Special Masters* (Oct. 2, 1984).[3] But even were we to

[3] In *Mattingly*, the Ninth Circuit noted that the Federal Rules of Civil Procedure "apply by their own force to all litigants before the court" and that Rule 11 did not expressly exempt attorneys representing the United States. 939 F.2d at 818. The court concluded that because Congress authorized promulgation of the Rules, "applying them to the government with full force cannot be said to violate the principles of sovereign immunity." *Id*. Sovereign immunity principles, however, clearly foreclose

agree with these holdings, nothing in them supports EEOC's assertion that the Federal Rules of Civil Procedure somehow work such a waiver for sanctions imposed during the administrative process for violations of AJ orders.

The Federal Rules of Civil Procedure do not even apply to EEOC proceedings, *see* Fed. R. Civ. P. 1 ("These rules govern the procedure *in the United States district courts* . . . .") (emphasis added), a point on which EEOC has itself relied, *see Bell v. Dalton*, EEOC Appeal No. 01940852, 1994 WL 741530, at *5 (Aug. 17) ("While the Federal Rules of Civil Procedure are used as guidance, they are not binding upon the Commission."). Thus, even if we accepted the proposition that the Federal Rules of Civil Procedure waive the government's sovereign

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the result reached by the court, even assuming that the Federal Rules of Civil Procedure are functionally equivalent to a statute for these purposes. Because the Rules wholly fail to mention the federal government, it certainly cannot be said that they contain an unequivocal waiver of sovereign immunity. *See Lane*, 518 U.S. at 192. And, of course, such waivers may not be implied. *See, e.g.*, *id.*; *Irwin*, 498 U.S. at 95. The fact that the Rules seemingly apply equally to all parties appearing before the court does not change the analysis. As the Supreme Court has explained, "when it comes to an award of money damages, sovereign immunity place[s] the Federal Government on an entirely different footing than private parties." *Lane*, 518 U.S. at 196.

Moreover, both the Rules Enabling Act, 28 U.S.C. § 2072 (2000), and the Federal Rules of Civil Procedure themselves preclude the conclusion that the Rules constitute such a waiver. The Rules Enabling Act provides that the Rules may not "enlarge substantive rights." 28 U.S.C. § 2072(b). But by awarding attorney's fees under the Federal Rules of Civil Procedure, where such awards would otherwise be unavailable, these courts have enlarged substantive rights. *See, e.g.*, *Alyeska*, 421 U.S. at 259 n.31 (suggesting strongly that rules for awarding attorney's fees are substantive for purposes of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)). Further, the Supreme Court has explained that "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978); *United States v. Sherwood*, 312 U.S. 584, 589–90 (1941). The Federal Rules of Civil Procedure themselves clearly state that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein," Fed. R. Civ. P. 82. Because, as we explained above, sovereign immunity *is jurisdictional*, *see, e.g.*, *Meyer*, 510 U.S. at 475, the Federal Rules of Civil Procedure are quite incapable of providing a waiver.

Although not discussed by EEOC, some courts have found that the EAJA, 28 U.S.C. § 2412 (2000), waives sovereign immunity for sanctions imposed for violations of the Federal Rules of Civil Procedure. *See, e.g.*, *Mortenson*, 996 F.2d at 1181–84 (finding it "permissible to look beyond the specific language used" in the EAJA and resorting quite candidly to legislative history to find a waiver of sovereign immunity for discovery sanctions imposed in violation of Rule 37(b)(2) of the U.S. Claims Court); *Adamson v. Bowen*, 855 F.2d 668, 671–72 (10th Cir. 1988). *But see Mattingly*, 939 F.2d at 818 (declining to find the asserted waiver in the EAJA). This does not help EEOC either, if for no other reason than that, as noted below, the Federal Rules of Civil Procedure do not apply to EEOC proceedings. We must note, however, that the approach taken by these courts cannot be reconciled with clear Supreme Court precedent, which requires that waivers of the "Federal Government's sovereign immunity must be *unequivocally expressed in statutory text*." *Lane*, 518 U.S. at 192 (emphasis added). The EAJA allows "the *prevailing party* in any *civil action*" to recover from the United States certain costs and fees. 28 U.S.C. § 2412(a), (b) (emphases added). In *Adamson*, the court simply ignored the pellucid prevailing-party requirement. Instead, the court relied on legislative history and its estimation of Congress's intent. *See Adamson*, 855 F.2d at 671–72. But this flouts the Supreme Court's admonition that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. *If clarity does not exist there, it cannot be supplied by a committee report*." *Nordic Village*, 503 U.S. at 37 (emphasis added) (citation omitted).

immunity from fee awards imposed by federal district courts for breach of those rules, we do not see how this waiver could extend to agency proceedings in which the rules do not apply. That is, even if Congress had waived sovereign immunity for violations of the Federal Rules of Civil Procedure in federal court, it would not follow that it has also waived immunity for arguably analogous (though formally distinct) violations before an entirely different body where these rules do not apply. Indeed, as we have emphasized, the doctrine of sovereign immunity requires the exact opposite presumption. *See supra* Part II; *see also McElrath*, 102 U.S. at 440.

The tentative and unsupported suggestion in *West*—that the traditional sovereign immunity canons may not apply in determining whether an administering agency may grant a form of relief for which sovereign immunity has clearly been waived at least before the district courts—could not help EEOC, even if we believed that it represented the best view of the law. *See West*, 527 U.S. at 222; *see also supra* Part II. In *West*, everyone agreed that sovereign immunity from compensatory damages had been waived; the only issue was *when* such damages could be awarded. Because it is impossible to violate the Federal Rules of Civil Procedure in EEOC proceedings for the simple reason that those rules do not apply, there is no need to analyze the timing issue here.

Finally and in light of the foregoing analysis, we note that Congress has in fact waived sovereign immunity from attorney's fees to a limited extent in the Title VII context. Section 2000e-5(k) provides that "[i]n any action or proceeding under this subchapter *the court*, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k) (2000) (emphasis added). When an agency violates an AJ order in an EEOC proceeding, we do not yet have a prevailing party in an administrative proceeding, let alone in a civil action. This consideration (among others) renders section 2000e-5(k) inapplicable to violations of such AJ orders. Furthermore, "[t]he clarity of [this] provision[] is in sharp contrast to the waiver [EEOC] seeks to tease out of" other provisions, and "illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies." *Lane*, 518 U.S. at 194. Extending this waiver to cover awards of attorney's fees for violations of orders issued by AJs in the course of EEOC proceedings would constitute an impermissible broadening of the terms and scope of the waiver.

Because EEOC points to no explicit statutory text in which we could begin to find a waiver of sovereign immunity, let alone a waiver that "unambiguously . . . extends to monetary claims," *Nordic Village*, 503 U.S. at 34, we conclude that EEOC lacks express authority to impose monetary sanctions on federal agencies for failure to comply with AJ orders.

### B. EEOC Does Not Have Inherent Power to Impose Monetary Sanctions on Federal Agencies

EEOC next argues that its power to impose attorney's fees against federal agencies flows from "the judicial doctrine of the 'inherent powers' of the forum." EEOC Letter at 3. EEOC directs our attention to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), in which the Court discussed the inherent power of the federal courts. But EEOC is not a federal court, and the sanctioned party in *Chambers* was not a federal agency. Because we conclude that the latter difference proves decisive, we address the former only in passing.

To be sure, Congress has waived sovereign immunity to some extent by applying Title VII to the federal workplace and empowering EEOC to investigate and remedy violations of the statute. Furthermore, agencies *may* possess *some* inherent power to impose sanctions designed to protect the integrity of their proceedings, at least against litigants other than the federal government. *See, e.g.*, *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (upholding SEC rule enabling agency to bar attorneys from practicing before it); *see also Am. Bus Ass'n v. Slater*, 231 F.3d 1, 7 (D.C. Cir. 2000) (discussing inherent powers of agencies). *But see Slater*, 231 F.3d at 9 (Sentelle, J., concurring) ("Agencies have no inherent powers. They instead are creatures of statute and may act only because, and only to the extent that, Congress has delegated them the power to act.") (citations omitted). And arguably, EEOC may have some inherent power to impose some type of sanctions designed to maintain the integrity of its proceedings even against federal agencies. One could infer this from the fact that Congress is presumed to have made its statutory scheme effective.

But it follows from our discussion above that whatever inherent power EEOC may possess cannot possibly extend to the imposition of *monetary* sanctions against the federal government. As we have explained, the imposition of such sanctions would require a clear statement of consent in the text of a statute (the very antithesis of inherent power). That is, as discussed above, the authority to waive sovereign immunity (especially with respect to monetary claims) rests with Congress, not the Executive Branch. Thus, no act of EEOC (including promulgation or invocation of a regulation) can, by itself, waive the government's sovereign immunity. Because we have already concluded that Congress has not waived this immunity, it follows that EEOC lacks the authority to impose these monetary sanctions.[4]

[4] EEOC contends that 29 C.F.R. § 1614.109(f)(3) (2002) provides AJs with the authority to impose monetary sanctions against the Government. That provision allows AJs to impose certain sanctions for failure to comply with their orders. Those sanctions include drawing adverse inferences against the noncomplying party, exclusion of other evidence offered by the noncomplying party, issuing an adverse ruling against that party, and taking "such other actions as appropriate." *Id*. Noticeably absent is any mention of monetary sanctions, a fact that has not evaded EEOC, *see* EEOC Letter at 3 (noting that EEOC regulations "explicitly provide for sanctions other than attorney's fees"). Even if this

Finally, we note that significant controversy surrounds the question whether even Article III courts enjoy inherent power to impose monetary sanctions against the federal government. *Compare Horn*, 29 F.3d at 763–67; *id*. at 765 n.13 (noting that "when the two doctrines [sovereign immunity and inherent powers] lock horns, contempt is barred by sovereign immunity"), *with Cobell v. Norton*, 226 F. Supp. 2d 1, 154–55 (D.D.C. 2002) (arguing that if sovereign immunity were to bar the court from exercising its claimed inherent power, the court would be unable to enforce its orders against the Executive Branch, a result that the court believed to be inconsistent "with the tripartite framework established by the Constitution"); *see also United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997) (characterizing the separation of powers argument as serious enough to invoke the canon of constitutional avoidance); *cf. Chambers*, 501 U.S. at 58 (Scalia, J., dissenting) (agreeing with the majority that Article III courts derive a measure of independent authority from the Constitution). Whatever the merit of this debate, it has no application in this context, because EEOC and the Navy are both part of the Executive Branch.

## IV. Conclusion

We conclude that the doctrine of sovereign immunity bars EEOC from imposing monetary sanctions against federal agencies for violations of AJ orders.

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provision were found in a statute (and not merely a regulation), the provision "fails to establish unambiguously that the waiver extends to monetary claims," *Nordic Village*, 503 U.S. at 34, and therefore fails to waive immunity from those claims, *see id*. at 37. *See also Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 181 (1994) (concluding that the term "appropriate relief" in the Religious Freedom Restoration Act does not suffice to authorize monetary relief against the federal government). Indeed, in *United States v. Woodley*, 9 F.3d 774, 781–82 (9th Cir. 1993), the Ninth Circuit refused to find a waiver of sovereign immunity in the similarly-worded Federal Rule of Criminal Procedure 16(d)(2), under which "the court may order [a non-complying] party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, *or it may enter such other order as it deems just under the circumstances*" (emphasis added). The court found fatal the fact that Federal Rule of Criminal Procedure 16(d)(2), unlike several provisions of the Federal Rules of Civil Procedure, "provides no independent authority for a monetary sanction." *Woodley*, 9 F.3d at 781–82. *See also Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 980 (6th Cir. 1999) (concluding that agency rule providing for non-monetary sanctions "indicates an intention to preclude monetary sanctions").

# Whether Canteen Service Provided Through the Veterans' Canteen Service Is Exempt From Review Under the Federal Activities Inventory Reform Act of 1998

Canteen service provided through the Veterans' Canteen Service is not exempt from review under the Federal Activities Inventory Reform Act of 1998.

January 31, 2003

MEMORANDUM OPINION FOR THE DEPUTY DIRECTOR FOR MANAGEMENT
OFFICE OF MANAGEMENT AND BUDGET

You have asked for our opinion whether canteen service provided through the Veterans' Canteen Service ("VCS") is exempt from review under the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 ("FAIR Act"). As interpreted by the Office of Management and Budget ("OMB"), the FAIR Act requires each Executive Branch agency to determine whether non-governmental functions currently performed for the agency by the government could be performed more cost-effectively in the private sector. The Department of Veterans Affairs ("VA") believes that VCS canteen service is exempt from this cost-comparison process. *See* Letter for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from Tim S. McClain, General Counsel, Department of Veterans Affairs, *Re: Veterans' Canteen Service and the FAIR Act* (Dec. 11, 2002) ("VA Letter"). We have considered VA's arguments and conclude that VCS canteen service is not exempt.

## I.

In 1946, Congress established the VCS "as an independent unit in the [VA]," 38 U.S.C. § 7808 (2000), "for the primary purpose of making available to veterans of the Armed Forces who are hospitalized or domiciled in hospitals and homes of the [VA], at reasonable prices, articles of merchandise and services essential to their comfort and well-being," *id*. § 7801 (2000); *see also id*. § 7803 (2000) ("canteens at hospitals and homes of the [VA] shall be primarily for the use and benefit of veterans hospitalized or domiciled at such hospitals and homes"). In particular, the VCS statute provides that the VA Secretary shall "establish, maintain, and operate canteens where deemed necessary and practicable at hospitals and homes of the [VA] and at other [VA] establishments where similar essential facilities are not reasonably available from outside commercial sources." *Id*. § 7802(1) (2000). It vests the Secretary with additional authority needed to carry out this function. *See id*. § 7802(2)–(11).

The FAIR Act was enacted in 1998 "[t]o provide a process for identifying the functions of the Federal Government that are not inherently governmental functions." 112 Stat. at 2382. The FAIR Act generally defines the term "inherently governmental function" as "a function that is so intimately related to the public interest as to require performance by Federal Government employees," FAIR Act, § 5(2)(A), and it states that that term "does not normally include . . . any function that is primarily ministerial and internal in nature (such as . . . . operation of cafeterias)," *id*. § 5(2)(C)(ii). Section 2(a) of the FAIR Act provides that each fiscal year "the head of each executive agency shall submit to [OMB] a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions." Section 2(d), entitled "Competition Required," states in part:

> Each time that the head of the executive agency considers contracting with a private sector source for the performance of [a listed] activity, the head of the executive agency shall use a competitive process to select the source (except as may otherwise be provided in a law other than this Act, an Executive order, regulations, or any executive branch circular setting forth requirements or guidance that is issued by competent executive authority).

Section 2(d) also directs OMB to "issue guidance for the administration of this" process.

Pursuant to section 2(d)'s directive, OMB revised Circular A-76 ("A-76") and its Supplement to A-76. A-76 implements the FAIR Act by mandating that "the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." A-76, ¶ 5(c). This general prohibition does not apply under the conditions specified in paragraph 8 of A-76—where, for example, "no commercial source is capable of providing the needed product or service"; "Government performance of a commercial activity is required for national defense reasons" or "would be in the best interests of direct patient care" at hospitals operated by the Government; or where studies show that "the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source." *Id*. ¶ 8. It also does not apply "when contrary to law, Executive Orders, or any treaty or international agreement." *See id*. ¶ 7(c)(1). A-76 defines a "commercial activity" as "one which is operated by a Federal executive agency, . . . which provides a product or service that could be obtained from a commercial source," and which does not "meet the definition of an inherently Governmental function." *Id*. ¶ 6(a). In terms virtually identical to the FAIR Act, it defines an "inherently Governmental function" as "a function which is so intimately related to the public interest as to mandate performance by Government employees." *Id.* ¶ 6(e).

## II.

VA argues that VCS canteen service is exempt from the requirements of the FAIR Act, as implemented by A-76. VA does not assert that canteen service is an inherently governmental function or that it meets any of the conditions specified in paragraph 8 of A-76. Instead, VA maintains that application of the FAIR Act "would be inconsistent with the plain language, as well as the legislative history, of the VCS statute." VA Letter at 1. That is, VA essentially claims that canteen service is exempt from the competitive process of A-76 because subjecting canteen service to that process would violate the VCS statute and thus be "contrary to law" under paragraph 7(c)(1) of A-76.[1]

We therefore address whether the competitive process provided by A-76 conflicts with the VCS statute. The VCS statute provides that the VA Secretary shall "establish, maintain, and operate canteens *where deemed necessary and practicable* at hospitals and homes of the [VA] and at other [VA] establishments *where similar essential facilities are not reasonably available from outside commercial sources*." 38 U.S.C. § 7802(1) (emphasis added). VA argues, with considerable force, that the second italicized "where" clause modifies only "other [VA] establishments," not "hospitals and homes of the [VA]." But even if we were to read the second "where" clause in this way, the first "where" clause—"where deemed necessary and practicable"—plainly qualifies the Secretary's obligation to operate canteens at VA hospitals and homes. We believe that the question whether VCS canteen service at VA hospitals and homes is "necessary and practicable," far from precluding consideration of competitive alternatives, is plainly broad enough to permit such consideration.

VA apparently reads this same provision to mean that VA must *itself* establish and operate canteens at VA hospitals and homes where the Secretary deems them to be necessary and practicable, "regardless of the reasonable availability of similar facilities in the private sector." VA Letter at 4. Under this view, VA would be required to run a canteen itself, even if contracting out would be dramatically less expensive. Indeed, if, in a given hospital, the Secretary were to deem a canteen to be necessary but prohibitively costly (and hence not practicable), VA could neither establish a canteen itself nor permit a cost-effective private party to do so. In short, veterans in such a hospital would be deprived entirely of canteen services. Thus, VA's view would produce absurd results that would undermine the stated purpose of the VCS statute. *See* 38 U.S.C. § 7801 (stating that the "primary

[1] We note that the FAIR Act might be read to require cost comparisons *only* when an agency head "considers contracting with a private sector source for the performance of [a listed] activity." FAIR Act § 2(d). On that reading, the agency head, by never *considering* such private sector contracting, could avoid triggering any obligation on the part of his agency to engage in cost comparisons. OMB, however, in the exercise of its authority to implement the FAIR Act, has rejected this interpretation, *see* A-76, ¶ 9(e) (requiring consideration "of *all* existing in-house commercial activities") (emphasis added), and VA does not dispute this point.

purpose [of the VCS statute is to] mak[e] available to veterans of the Armed Forces who are hospitalized or domiciled in hospitals and homes of the Department, at reasonable prices" certain essential merchandise).

VA also argues that canteens should not be considered as individual units, because "[s]eparating canteens in this fashion would dilute the operational control contemplated in the VCS law," and interfere with the cross-subsidization that enables certain canteens to survive. VA Letter at 6. We are unable to locate any textual support in the VCS statute for the notion that all canteens should be considered as a single unit. Indeed, the pivotal language of section 7802(1), requiring the Secretary to establish canteens "where deemed necessary and practicable," appears to contemplate a location-by-location decision process.[2] We further note that although some legislative history may suggest that Congress intended the VCS to be financially self-sustaining, *see, e.g.*, S. Rep. No. 79-1701, at 4 (1946), the VCS statute explicitly authorizes appropriations needed to run VCS, *see* 38 U.S.C. § 7804 (2000), and requires VCS to submit estimates of any funds it may need "to restore any impairment of the revolving fund resulting from operations of the current fiscal year," *id.* § 7806 (2000). Although the VCS statute does contemplate financial interdependence among individual VCS canteens, nothing in the statute supports VA's conclusion that this interdependence precludes contracting out to the private sector where appropriate.

## III.

We conclude that VCS canteen service is not exempt from the FAIR Act's competitive process.

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[2] Nor does the legislative history on which VA relies run counter to this conclusion. To say that the VCS "as a whole is to function as a unit," VA Letter at 4 (quoting S. Rep. No. 79-1701, at 5 (1946)), is not to say that every canteen operated in a VA facility is part of that unit.

# Department of Transportation Authority to Exempt Canadian Truck Drivers From Criminal Liability for Transporting Explosives

The Department of Transportation possesses the authority to issue a regulation that, under section 845(a)(1) of title 18, would exempt Canadian truck drivers from criminal liability under section 842(i) of that title.

The Department of Transportation, however, has not issued such a regulation, and therefore section 842(i) liability would attach to a Canadian truck driver transporting explosives in the United States.

February 6, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION
AND
THE ACTING CHIEF COUNSEL
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

We have been asked by the Department of Transportation ("DoT") and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to resolve a dispute regarding section 1123(b) of the Safe Explosives Act, Pub. L. No. 107-296, 116 Stat. 2135, 2284 (2002) (the "Act"), which became effective January 24, 2003.[1] In particular, we have been asked to address the application of this provision to Canadian truck drivers who "ship or transport" or "receive or possess" explosives in interstate or foreign commerce. Because of the exceedingly short time period we were given to provide our advice, we have limited our discussion to this particular fact situation.

Section 1123(b) of the Act amended section 842(i) of title 18, United States Code, by adding several categories to the list of prohibited persons who may not lawfully "ship or transport any explosive in interstate or foreign commerce" or "receive or possess any explosive which has been shipped or transported in interstate or foreign commerce." The existing law covered any person who was a felon, a fugitive from justice, an unlawful user or addict of any controlled substance, or had been "adjudicated as a mental defective." 18 U.S.C. § 842(i) (2000). The Act added three new categories of persons: aliens (excluding aliens lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20), and four narrow categories of aliens present in the United States for specific purposes), persons dishonorably discharged from the armed forces, and former citizens of the United States who have renounced their citizenship. Pub. L. No. 107-296, § 1123(b), 116 Stat. at 2284. Section 1126 of the Act authorizes the Attorney General to grant

[1] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 4, 116 Stat. 2135, 2142 (2002).

relief from this prohibition if he "determines that the circumstances regarding the applicability of section 842(i), and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of such relief is not contrary to the public interest." 116 Stat. at 2285 (to be codified at 18 U.S.C. § 845(b)(2)).

Section 845(a)(1) of title 18 provides exemptions to some of the criminal prohibitions contained in chapter 40 of title 18, including the prohibition contained in section 842(i). The relevant exemption here states that the provisions of section 842(i) "shall not apply to . . . any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." 18 U.S.C. § 845(a)(1).

The question presented for resolution by our Office is whether the prohibition in section 842(i) on "alien[s]" "ship[ping] or transport[ing]" or "receiv[ing] or possess[ing]" explosives forbids Canadian truck drivers from driving explosives into the United States. ATF posits that the answer to that question is "yes," and that the sole mechanism for these truckers to obtain relief from this prohibition is to apply to ATF for "relief from disabilities" under section 845(b), as amended. DoT, by contrast, argues that the exemption contained in section 845(a)(1) provides an exemption from criminal liability for the Canadian truck drivers.

For the reasons set forth below, we conclude that DoT possesses the authority to issue a regulation that, under section 845(a)(1), would exempt Canadian truck drivers from criminal liability under section 842(i). We further conclude, however, that DoT has not issued such a regulation and therefore section 842(i) liability would attach to a Canadian truck driver transporting explosives in the United States.

## I.

As noted above, section 845(a) of title 18 provides exemptions to some of the criminal prohibitions contained in chapter 40 of title 18, including the prohibition contained in section 842(i).[2] The relevant exemption states that the provisions of section 842(i) "shall not apply to . . . any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." 18 U.S.C. § 845(a)(1) (2000). To decide whether section 845(a)(1) provides an exemption from criminal liability for the Canadian truck drivers, we

[2] Section 845(a)(1) does not apply to the criminal offenses statutorily excepted from the exemption. *See* 18 U.S.C. § 845(a)(1) ("Except in the case of subsection (l), (m), (n), or (o) of section 842 and subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, [chapter 40] shall not apply to . . . any aspect of the transportation . . . .").

first define the reach of the exemption and then discuss whether DoT has issued a regulation that falls within section 845(a)(1).

**A.**

The precise contours of the exemption in section 845(a)(1) are not easy to discern from the statutory text. The exemption uses two plural verbs—"are" and "pertain"—stating that the criminal provisions of chapter 40 "shall not apply to . . . any aspect of the transportation of explosive materials . . . which *are* regulated by" DoT "and which *pertain* to safety." Plural verbs, of course, must correspond to a plural subject. And the only possible plural subject in section 845(a)(1) is the noun "materials."[3] A literal reading of this language would therefore lead to the conclusion that the exemption is triggered by any DoT regulation of the *explosive materials* in question. And, indeed, two courts have read the exemption this way. *See United States v. Illingworth*, 489 F.2d 264, 265 (10th Cir. 1973) ("The exception refers to *materials* which are regulated by the Department"); *id.* ("the dynamite which Illingworth carried with him on the planes was . . . regulated"); *United States v. Petrykievicz*, 809 F. Supp. 794, 797 (W.D. Wash. 1992) ("A proper grammatical reading of the exception results in an interpretation that provides that if the explosive materials transported via air 'are' regulated, the exception applies."); *id.* at 799 ("Section 845 of Title 18 excludes the application of Chapter 40 of Title 18 if the explosive *materials* being transported are regulated by the Department of Transportation.") (emphasis added).

Yet, despite the undeniable force of the argument that this is the most grammatically correct reading of the exemption, there are also powerful reasons to question this reading of section 845(a)(1). First, it is possible that construing section 845(a)(1) as outlined above would render many of the substantive criminal prohibitions of chapter 40 meaningless. As the Western District of Washington has pointed out, this reading could "result[] in an interpretation that provides that if the explosive materials transported . . . 'are' regulated [by DoT], the exception applies." 809 F. Supp. at 797. But, DoT, of course, regulates all, or nearly all, explosives in some fashion, for example, by regulating the explosives' "labeling, packaging, mode of transportation, placarding and shipping papers." *Id.*; *accord* DoT Submission, Tab 1, at 2–3. Therefore, to construe section 845(a)(1) to exempt an individual from criminal liability for transporting explosives simply because the explosives themselves were in some way regulated by DoT would be to "eviscerate[]" the criminal provisions of chapter 40. *United States v. Fiorillo*, 186 F.3d

[3] DoT suggests that "pertain" could correspond to "agencies." DoT Submission, Tab 3, at 5. But this construction does not account for the fact that the full text of the amendment reads "*and* which pertain to safety." The phrase "the United States Department of Transportation and agencies thereof, *and* which pertain to safety" simply does not express the idea that the *agencies* must pertain to safety. Moreover, it is unclear that such a construction would have limiting effect because we are uncertain whether the jurisdiction of any DoT agency could be characterized as unrelated to safety.

1136, 1153 (9th Cir. 1999). Such a construction would mean, for example, that an individual who transported stolen explosives, knowing they were stolen, in violation of section 842(h) of title 18, would not be liable if DoT had a regulation specifying how explosives should be stored. *Cf. id.* at 1153. Under such a reading, even a single DoT regulation concerning explosives would mean that no one would ever be liable for transporting explosives in violation of chapter 40.

Second, construing section 845(a)(1) as outlined above could lead to the opposite, yet equally absurd, conclusion that the *exemption* from criminal liability has no meaning. In the Antiterrorism and Effective Death Penalty Act of 1996, Congress amended section 845(a)(1) to add the phrase "and which pertain to safety." *See* Pub. L. No. 104-132, § 605(1)(B), 110 Stat. 1214, 1290 (1996). Read literally, therefore, the exemption applies only to any "aspect of the transportation of explosive *materials* . . . [(a)] which are regulated by the Department of Transportation . . . and [(b)] which pertain to safety." While it might make sense to refer to "explosive materials" that "are" regulated by DoT, it is not at all clear that there is any content to the category of "explosive materials" "which pertain to safety." Moreover, because the exemption is phrased conjunctively, the exemption would apply only if the materials are both regulated by DoT *and* pertain to safety. Because the latter category is either empty or vanishingly small, to read section 845(a)(1) according to its literal terms is to drain the 1996 amendment to that section of virtually all meaning.

We cannot believe that Congress intended either of these absurd results.[4] *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70–71 (1994). Instead, we believe that the incoherence of the exemption as written is likely the result of a mere scrivener's error. In this case, we believe the error was Congress's failure to include an "s" at the end of the word "aspect."[5] Thus, we believe that the exemp-

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[4] It is worth noting that the two reported decisions that have construed section 845(a)(1) such that the operative provision is DoT's regulation of the explosive materials were decided before the 1996 amendment to the statute. These courts were therefore not faced with the construction of the "and which pertain to safety" language. *See United States v. Illingworth*, 489 F.2d 264, 265 (10th Cir. 1973); *United States* v. *Petrykievicz*, 809 F. Supp. 794, 797 (W.D. Wash. 1992).

[5] Alternatively, the statutory confusion could be the result of a "conjugator's error"—that is, the draftsman of the original exemption may have incorrectly conjugated the verb "to be," choosing the plural form "are" rather than the singular "is" to correspond to the singular subject "aspect." Indeed, ATF's regulations implementing this section have interpreted the statutory provision this way:

> Except for the [prohibitions relating to unmarked plastic explosives and reporting of plastic explosives], this part does not apply to:
>
> (1) Any aspect of the transportation of explosive materials via railroad, water, highway, or air which is regulated by the U.S. Department of Transportation and its agencies, and which pertains to safety.

27 C.F.R. § 55.141(a) (2002) (emphasis added). We recognize that this reading implies that Congress perpetuated its original error when it added the phrase "and which pertain to safety." When Congress amended the statute in 1996, it may simply have followed the verb form chosen by the original draftsman. We note in this regard that the House version of the bill contained the word "pertains," H.R. Rep. No. 104-383, at 19 (1995) (setting forth House version), whereas the version adopted at

tion is more properly read to say that certain provisions of chapter 40, including section 842(i), as amended, "shall not apply to . . . any *aspects* of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety."

Read this way, the exemption focuses on the *aspects* of the transportation of explosive materials that DoT regulates rather than on the *materials* themselves. This is essentially the reading of section 845(a)(1) adopted by the court in *United States v. Scharstein*, 531 F. Supp. 460, 466 (E.D. Ky. 1982) ("The key word in construing the meaning of § 845 is the word 'aspect.'"). In addition, the only legislative history on the exemption supports the construction of the statute that focuses on the "aspects" of transportation, rather than on the "materials" transported. *See* H.R. Rep. No. 91-1549, at 4047 (1970) ("This chapter is not meant to affect *aspects* of the transportation of explosive materials regulated by the Department of Transportation.") (emphasis added). This reading is further supported by the 1996 amendment, which—because there is no meaning to a category of "explosive materials . . . which pertain to safety"—makes clear that Congress was referring to the aspects of transportation that are regulated, not the explosive materials themselves. Finally, although the affected agencies did not address this issue specifically in their submissions to this Office, they seem to agree that the focus of the section 845(a)(1) exemption is on the "aspects" of transportation that are regulated. *See* DoT Submission, Tab 1, at 5 ("It is these 'aspects' of transportation in commerce that [Research and Special Programs Administration] believes are excepted from the prohibitions in 18 U.S.C. § 842(a)–(k)."); *id*., Tab 2, at 4 ("From a legal point of view, the critical issue is the meaning of the term "any aspect" in § 845(a)"); ATF Submission at 4 ("the exception in section 845(a)(1) applies only to those aspects of transportation relating to safety"); *id.* at 13 ("Section 845(a)(1) refers to any aspect of transportation 'regulated by' DoT 'which pertain to safety.'").

Thus, we believe that section 845(a)(1) is best read to say that certain provisions of chapter 40, including section 842(i), as amended, "shall not apply to . . . any *aspects* of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." Accordingly, the exemption is triggered only when (1) DoT has regulated relevant "aspects of the transportation of explosive materials," and when (2) those regulated aspects "pertain to safety." We address these requirements in reverse order.

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conference contained the word "pertain," H.R. Conf. Rep. No. 104-518, at 79 (1996). Whether the error is a "scrivener's" or a "conjugator's" error does not affect our analysis.

**B.**

The phrase "and which pertain to safety" was added to section 845(a)(1) by section 605(1)(B) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat 1214, 1290 (1996). ATF argues that "safety" within section 845(a)(1) is limited to safety in the sense of preventing accidents. *See* ATF Submission at 11 ("DoT statutes are designed to regulate the safe transportation of hazardous materials, such as explosives, while in transit and in commerce. These statutes . . . primarily supplement State regulatory schemes to promote highway safety. This is reflected in statutes requiring drivers to be knowledgeable and qualified to operate motor vehicles, testing, certification, and so forth."); *id.* (the risk DoT regulates is the "general safety and fitness of the operator"). DoT contends that "safety" should be read to include security, i.e., national security concerns. *See* DoT Submission, Tab 1, at 1.

We believe that the term "safety" as it is used in section 845(a)(1) includes security concerns, including the risk to national security posed by drivers transporting explosives. DoT's jurisdiction extends to both safety and security. Congress has authorized the Secretary of Transportation to "prescribe regulations for the safe transportation, *including security*, of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(b) (emphasis added). The clause "including security" was added by section 1711(a) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2319 (2002). The use of the word "including" indicates that Congress believed security is an element of safety.

Moreover, Congress has already assigned DoT a role in assessing the national security risk posed by individuals transporting hazardous materials. In section 1012 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 271, 397 (2001), Congress amended portions of the statutes governing the issuance of licenses for those who transport hazardous materials by motor vehicles. Specifically, Congress prohibited states from issuing commercial driver's licenses for transporting hazardous materials ("hazmat" licenses) "unless the Secretary of Transportation has first determined . . . that the individual does not pose a *security risk* warranting denial of the license." 49 U.S.C. § 5103a(a)(1) (Supp. I 2002) (emphasis added). Under this provision, the Attorney General conducts the background check, *id.* § 5103a(c), but the Secretary of Transportation makes the determination regarding the security risk, *id.* § 5103a(a)(1). Although DoT, through the Transportation Security Administration ("TSA"), has not yet implemented this statutory scheme, *see* DoT Submission, Tab 6, at 1, the grant of authority from Congress is powerful evidence that Congress believes DoT has a role to play with respect to assessing risks to national security. Accordingly, we believe that a DoT regulation addressing the security aspects of the transportation of explosive materials, including an assessment of the risk to national security posed by drivers, could be one "which pertain[s] to safety" within the meaning of section 845(a)(1).

**C.**

We next address what is meant by the clause "aspect[s] of the transportation of explosive materials . . . which are regulated by the United States Department of Transportation." This clause raises two interpretive questions: What is meant by "*aspect[s]* of transportation"?; and what is meant by "which *are regulated* by" DoT? We again address these questions in reverse order.

Section 845(a)(1) states that the provisions of chapter 40 shall not apply to "any aspect[s] of the transportation of explosive materials . . . which *are regulated* by" DoT "and which pertain to safety." This statutory language admits of two possible readings. The first, and we believe the most natural, reading is to say that the provisions of chapter 40 do not apply to "any aspect[s] of the transportation of explosive materials which *are*" in fact, presently being "regulated by" DoT. That is, for the exemption to apply, DoT must have issued regulations addressing the relevant "aspect[s]" of transportation. But there is another possible reading. The exemption might be read to apply to "any aspect[s]" of the safe transportation of explosive materials which are within DoT's regulatory jurisdiction, even if DoT has not actually exercised its jurisdiction by regulating in the area. Thus, "aspect[s] . . . which are regulated" could be read to mean "aspect[s] which are within DoT's regulatory competence." As discussed previously, we believe that the safe and secure transportation of explosive materials lies within DoT's regulatory competence. Thus, if the latter interpretation of the statutory language were correct, DoT's regulatory jurisdiction over the safe and secure commercial transportation of hazardous materials would be essentially exclusive; even without actually regulating *any* aspect of the safe transportation of hazardous materials, DoT would have pre-empted the field. We are reluctant to accept this broad interpretation of section 845(a)(1). To accept it would be to eviscerate the criminal provisions of chapter 40 and the Attorney General's prosecutorial and regulatory authority, *see* 18 U.S.C. § 847,[6] to enforce those provisions, at least as they apply to commercial transportation. Such a construction would run afoul of the "well established [principle] that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect." *Pennsylvania v. Interstate Commerce Comm'n*, 561 F.2d 278, 292 (D.C. Cir. 1977); *accord FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) ("Because we live in an 'age of overlapping and concurring regulatory jurisdiction,' a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.") (internal citations omitted). Although Congress may certainly grant one agency exclusive jurisdiction over an area of federal regulation, we are loath to infer such a sweeping grant

[6] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(c)(1), 116 Stat. 2135, 2275 (2002) (transferring the authorities of the Secretary of Treasury with regard to ATF to the Attorney General).

of authority, which here even displaces criminal prosecutorial authority, without a more precise statement from Congress. Accordingly, we believe that the section 845(a)(1) exemption is best read as applying only when DoT has *actually regulated* some aspect of the safe transportation of explosive materials. *Cf. Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002) (interpreting preemption provision of Occupational Safety and Health Act such that "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace [the Occupational Safety and Health Administration]'s jurisdiction").

Our second interpretive question asks what is meant by the "*aspect[s]*" of the safe transportation of explosives that are regulated by DoT. In interpreting this provision we must ask whether an exemption from criminal liability obtains whenever DoT has actually regulated *any* aspect of the safe transportation of explosive materials or whether the exemption prevails only when DoT has regulated the *particular* aspect of the safe transportation of explosive materials that prompted Congress to enact the criminal statute from which the exemption is sought. We believe that the latter interpretation is the better one.

This reading provides a link between the criminal liability imposed by section 842(i) and the exemption from this liability found in section 845(a)(1). We believe such a link is necessary because it is highly unlikely that Congress would have criminalized a particular aspect of the transportation of explosive materials—here, the threat to security posed by the driver—and then provided a broad exemption from this criminal liability whenever DoT regulates any aspect of the safe transportation of explosive materials, even if the regulated aspect is not one that pertains to the threat Congress addressed in the criminal prohibition. This reading would mean, for example, that if DoT had issued only one regulation pertaining to the safe and secure transport of explosive materials—say, a regulation requiring explosive materials to be locked up at all times during transport to prevent theft—no one, or at least no commercial driver, could be liable for any offense under chapter 40 concerning the transportation of explosives. We believe that this construction reads too much into section 845(a)(1).

Instead, we believe that section 845(a)(1) is more properly construed to provide relief from criminal liability whenever DoT has regulated the *particular aspect* of the safe transport of explosive materials that Congress sought to regulate through criminal liability. That is, section 845(a)(1)'s immunity is limited to situations where an individual is subject to DoT regulations *regarding the activity covered by the criminal provision*. Reading the statute this way ascribes to the exemption a perfectly reasonable purpose: to eliminate wasteful duplication in the enforcement efforts of federal agencies, and to prevent the regulated community from having to comply with two sets of potentially conflicting regulations concerning the same aspect of transportation. This reading also ensures that every person transporting explosives will be covered by one of the two alternative federal schemes (but not both): the criminal prohibition contained in section 842(i) or the regulations issued

by DoT. The alternative reading, by contrast, would ascribe to the statute the startling purpose of creating a blanket immunity from prosecution for *any* criminal explosives offense regarding the transportation of explosives, even if DoT had regulated only certain limited, unrelated, aspects of the safe transportation of explosives. We are reluctant to ascribe to Congress such an unusual intent without more explicit direction. We therefore conclude that the section 845(a)(1) exemption is available only where DoT has regulated *the particular aspect* of the transportation of explosive materials with which Congress was concerned in passing the criminal provision from which relief is sought.

While not directly binding on the question before us, we note that our conclusion is consistent with the conclusion reached by the Supreme Court in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002).[7] In *Chao*, the Court examined a preemption provision contained in the Occupational Safety and Health Act of 1970 ("OSH Act"). The OSH Act, which is enforced by the Occupational Safety and Health Administration ("OSHA"), imposes a duty on covered employers to provide working conditions that "'are free from recognized hazards that are causing or are likely to cause death or serious bodily harm'" to their employees, as well as an obligation to comply with safety standards promulgated by the Secretary of Labor." *Id.* at 240–41 (quoting 29 U.S.C. § 654(a)(1)). However, the Act contains the following preemption provision: "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. § 653(b)(1) (2000).

In *Chao*, OSHA had cited a drilling company for violations of the OSH Act that occurred while the company was drilling a well in the territorial waters of Louisiana. The drilling company argued that OSHA's jurisdiction was preempted by section 653(b)(1) of title 29 because the Coast Guard had regulated some aspects of occupational safety and health on vessels in navigable waters. The Court disagreed, holding that "minimal exercise of some authority over certain conditions on vessels" would not trigger the preemption provision. *Chao*, 534 U.S. at 241. Instead, the Court held that OSHA's jurisdiction was preempted only if the working conditions at issue in a given case were the "particular ones 'with respect to which' another federal agency has regulated." *Id.* (quoting 29 U.S.C. § 653(b)(1)).

*Chao*, of course, is not dispositive in the instant case because the language of the preemption provision in section 653(b)(1) of title 29 differs from the language

[7] Indeed, DoT's Federal Motor Carrier Safety Administration has conceded this point. DoT Submission, Tab 2, at 4 ("The term 'any aspect' could also mean that ATF has no jurisdiction over 'any aspect' of the safe transportation of explosives regulated by DoT, but may apply the prohibitions of Sec. 1123 that are not covered by 'any aspect' of the DoT program. Since DoT does not directly regulate drivers by nationality, this would allow ATF to enforce the prohibition on aliens. [This] position is consistent with the Supreme Court's decision" in *Chao*).

in section 845(a)(1) of title 18. Yet we do not believe that there is a great deal of distance between the statutory language at issue in *Chao* ("[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority") and the language at issue here (the provisions of chapter 40 "shall not apply to any aspect[s] of the transportation of explosive materials . . . which are regulated by" DoT). Both, we believe, are best read to suggest congruence between the general statutory requirement and the regulation that purports to preempt it. Moreover, our reading is consistent with the Court's express desire to avoid "large gaps" in the enforcement of the regulatory scheme. *Chao*, 534 U.S. at 245 n.9 (noting that to construe the preemption provision otherwise "would mean that if the Coast Guard regulated marine toilets on [the vessel in question] and nothing more, any OSHA regulation of the vessel would be pre-empted"). This principle applies with particular force in light of Congress's manifest concern with shoring up the nation's defenses after the events of September 11. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 397 (2001); Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

For these reasons, we believe there must be more than an attenuated link between the DoT regulation that seeks to invoke the section 845(a)(1) exemption and the activity prohibited under chapter 40. We believe that the section 845(a)(1) exemption is triggered only when DoT has regulated the *particular* "aspect[s] of the [safe] transportation of explosive materials" that are criminalized by section 842(i), as amended. By passing section 842(i), as amended, Congress identified a presumptive security threat posed by allowing certain categories of persons to transport explosives, and regulated that threat through criminal liability, subject to relief after satisfactory completion of a background check. It would eviscerate this statutory scheme to conclude that a regulation completely unrelated to the prohibition would provide immunity from criminal liability under this section. Because section 842(i) criminalizes the transportation of explosives by specified categories of persons, we believe that the section 845(a)(1) exemption applies only if DoT has, in fact, regulated the security risk posed by the transportation of explosives by these categories of persons.

**D.**

We next address whether DoT has regulated the security risk posed by the transportation of explosives by the categories of persons listed in section 842(i). The only specific regulation that DoT points to in this regard is that in 1988 DoT "determined that commercial drivers' license[s] issued by Canadian Provinces and Territories in conformity with the Canadian National Safety Code are in accordance with the standards of [49 C.F.R. Part 383]." DoT Submission, Tab 2, at 2 (quoting 49 C.F.R. § 383.23(b) n.1). Part 383 is entitled "Commercial driver's license standards; requirements and penalties." But nothing in that part regulates

the security threat posed by a particular driver. Moreover, DoT's determination in 1988 that Canadian commercial drivers' licenses satisfied DoT regulations pre-dated the requirement in the USA PATRIOT Act that domestic hazmat licenses be issued only after DoT has determined that the applicant does not pose a security risk. *See supra* p. 43 (discussing section 5103a(a)(1) of title 49, as amended, which prohibits states from issuing commercial driver's licenses for transporting hazardous materials "unless the Secretary of Transportation has first determined . . . that the individual does not pose a security risk warranting denial of the license"). Thus, although DoT determined in 1988 that Canadian commercial drivers' licenses satisfied DoT regulations, that determination did not include an assessment of the security review, if any, conducted by Canadian provinces because there was no U.S. equivalent at the time.

DoT does not currently perform any such assessment of Canadian hazmat licensees,[8] nor has DoT officially endorsed any Canadian background check system that may already be in place.[9] Thus, we conclude that DoT has not regulated the security risk posed by the transportation of explosives by the relevant category of persons in section 842(i)—here, aliens.[10]

Accordingly, we do not believe that the regulations cited by DoT have actually regulated the "aspect of the transportation of explosive materials" that is criminalized by section 842(i), as amended, in a way that would allow the Canadian truck

[8] The provisions of the USA PATRIOT Act that require DoT to perform background checks before a person may receive a license to transport hazardous materials, *see* 49 U.S.C. § 5103a (Supp. I 2002), are triggered only by an individual's application for a license issued by a U.S. state. They do not apply to persons holding Canadian hazmat licenses; nor may persons holding Canadian licenses apply for licenses issued by U.S. states. *See* 49 C.F.R. § 383.21 & 383.23(b) n.1 (2001). We are informed that DoT is working with the Canadian government to establish a procedure regarding background checks for Canadian hazmat licensees, but such a procedure is not currently in place. *See* DoT Submission, Tab 7, at 1.

[9] We are informed, for example, that Quebec requires all drivers (Canadian and U.S.) transporting explosives in Quebec to obtain a general explosives permit, and that this permitting process includes a "criminal background check and security review" of the driver. DoT Submission, Tab 2, at 3. DoT has not indicated that any other Canadian province conducts a similar security review; nor has DoT determined that the security review conducted by Quebec is acceptable to DoT or similar to that which will be performed under section 5103a. *See* DoT Submission, Tab 7, at 1 ("Transport Canada has . . . proposed early and effective equivalency programs for background checks of drivers, but [has] not implemented the programs because [it has] not yet received an official USG endorsement.").

[10] This is not to say, however, that a DoT regulation that would trigger the section 845(a)(1) exemption would have to be identical to the scheme put in place by Congress in section 845(b). To construct a hypothetical, we imagine that, before the passage of the USA PATRIOT Act, DoT could have addressed the security risk posed by felons, *see* 18 U.S.C. § 842(i)(1), by promulgating a regulation that allowed certain types of non-violent felons to possess hazmat licenses without going through a background check. This regulation would not have been identical to the scheme Congress created for dealing with the security risk posed by felons in section 845(b) of title 18, but may well have been a sufficient regulation to allow a non-violent felon to take advantage of the exemption contained in section 845(a)(1).

drivers at issue here to take advantage of the section 845(a)(1) exemption from criminal liability.[11]

## II.

We recognize that our resolution of the question presented to us is not free from doubt. To invoke an over-used, but apt phrase, the statute is "far from a model of clarity." Our resolution rests, at bottom, on our conviction that to read the statute in the way suggested by DoT would create an enormous gap in the enforcement of newly enacted national security provisions, which we cannot believe Congress intended to do. Yet two canons of statutory construction—the rule of lenity and the *Charming Betsy* canon—tug against our conclusion. Although we believe that, ultimately, neither of these canons compels a result contrary to the conclusion we have reached, we cannot say with certainty that a court reviewing an indictment or conviction under section 842(i) would agree.

### A.

The rule of lenity provides that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotations and citation omitted). Congress has certainly not done that here. Thus, we can understand how a court might reach the conclusion that the rule of lenity leads to the conclusion that the statute must be construed in the way that most narrows the scope of potential criminal liability. And, indeed, one court has done just that. *See Petrykievicz*, 809 F. Supp. at 799 (invoking the rule of lenity to conclude that the focus of section 845(a)(1) must be on the *materials* regulated rather than on the *aspects* of transportation regulated). Yet the "rule of lenity applies only if, after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended." *Holloway v.*

[11] The section 845(a)(1) exemption applies to "any aspect of the *transportation* of explosive materials via railroad, water, highway, or air which are regulated by" DoT "and which pertain to safety." (Emphasis added.) ATF hints at the argument that regardless of the reach of section 845(a)(1) with respect to *transporting* explosives, section 842(i) still prohibits aliens and other prohibited persons from *possessing* explosives, even if they are doing so only as a part of transportation. *See* ATF Submission at 5, 10–12. Thus, if a driver could be said to be simultaneously transporting and possessing explosives within the meaning of section 842(i), ATF might argue that it could still prosecute the driver for the *possession* of explosives, even if DoT had actually issued a regulation that would trigger the *transportation* exemption under section 845(a)(1). Although we do not resolve the question here, we do note that ATF's assertion of jurisdiction in such a case would severely limit, and arguably eviscerate, section 845(a)(1) because that provision would immunize only those individuals who were transporting but *not* simultaneously possessing explosives. We do not know whether such a class of persons exists, and decline to speculate without further input from the affected agencies.

*United States*, 526 U.S. 1, 12 n.14 (1999) (internal quotations and citation omitted); *accord Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (ambiguity must be "grievous" for rule of lenity to apply); *Johnson v. United States*, 529 U.S. 694, 712 n.13 (2000) (Scalia, J., dissenting) ("[l]enity applies only when the equipoise of competing reasons cannot otherwise be resolved"). Although section 845(a)(1) poses interpretive difficulties, we cannot conclude that any ambiguity is "grievous," or that our interpretation of the statute is "a guess as to what Congress intended." Therefore, we believe the rule of lenity does not apply.

**B.**

[Redacted from original memorandum opinion at the request of the United States Trade Representative.]

**III.**

For the reasons set forth above, we conclude that DoT possesses the authority to issue a regulation that, under section 845(a)(1), would exempt Canadian truck drivers from criminal liability under section 842(i). We further conclude, however, that DoT has not issued such a regulation and therefore section 842(i) liability would attach to a Canadian truck driver transporting explosives in the United States.

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

# Appointment of Member of Holocaust Memorial Council

The process of appointing an individual as a member of the United States Holocaust Memorial Council was not completed.

Even if the process of appointing a member of the Council had been completed, the President's appointment of another individual to that same position effected a removal of that appointee.

February 6, 2003

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether an individual who claims to occupy a position as a member of the United States Holocaust Memorial Council ("Council") was actually appointed to that position. On the facts presented to us, which we set forth below, this question is indistinguishable from a question we previously answered regarding persons claiming to occupy positions as trustees of the John F. Kennedy Center for the Performing Arts. *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, *Re: Kennedy Center Board of Trustees* (Oct. 10, 2001) ("Kennedy Center Memorandum"). Consistent with the Kennedy Center Memorandum, we conclude that the process of appointing the putative appointee was never completed.

You have further informed us that on May 29, 2002, President Bush appointed another individual to serve as a Council member in the very position to which the putative appointee claims to have been previously appointed. We conclude below that if *arguendo* (and contrary to our conclusion on your first question) the putative appointee was in fact actually appointed to that position, President Bush's subsequent appointment of another individual to that same position effected a removal of the putative appointee.[*]

## I.

The Council operates as the board of trustees of the United States Holocaust Memorial Museum ("Museum"): it has "overall governance responsibility for the Museum, including policy guidance and strategic direction, general oversight of Museum operations, and fiduciary responsibility." 36 U.S.C. § 2302(a) (2000). The Council consists of 65 voting members. Of these voting members, 55 are appointed by the President; five are appointed by the Speaker of the House of Representatives from among members of the House; and five are appointed by the President pro tempore of the Senate from among members of the Senate. *Id.*

[*] Editor's Note: We are not identifying in the published version of this opinion the names of the putative appointee to the Council or the other individual appointed to the Council.

§ 2302(b). In addition, the Council has three "ex officio nonvoting members"—one appointed by the Secretary of the Interior, one by the Secretary of State, and one by the Secretary of Education. *Id.*[1]

Our opinion rests on the following understanding of the facts:

In a memorandum dated May 18, 2000, Bob Nash, who was Assistant to the President and Director of Presidential Personnel, recommended that President Clinton "approve" the putative appointee for the vacant position on the Council "vice: Beth Dozoretz." The memorandum provided lines labeled "Approve" and "Disapprove" immediately after the recommendation. President Clinton checked the "Approve" line.

On May 25, 2000, the Office of Presidential Personnel sent the White House Counsel's Office ("Counsel's Office") a memorandum stating that "President Clinton has approved" the putative appointee and asking that the Counsel's Office "initiate a preliminary background investigation on" the putative appointee. Letter for Alberto R. Gonzales, Counsel to the President, from Lanny A. Breuer, Covington & Burling, Tab C (Aug. 9, 2002) ("Covington Memorandum"). On May 31, 2000, the putative appointee submitted information requested of him for the background investigation. *See id.*, Tabs G–H. By letter dated June 21, 2000, Mr. Nash congratulated the putative appointee "on your selection by the President to be a member" of the Council; in that same letter, he advised the putative appointee of forms that needed to be completed "in order for the appointment process to proceed." *Id.*, Tab I. On June 26, 2000, the Counsel's Office sent a memorandum back to Mr. Nash reporting that it had "completed its clearance review of the nomination" of the putative appointee and advising that "such nomination may proceed." *Id.*, Tab J. On June 29, 2000, the Office of the Press Secretary released a statement that the President had "today announced his intent to appoint" the putative appointee and three other individuals to the Council. *Id.*, Tab K.

According to White House appointments practice, the following steps remained to be taken after the Counsel's Office memorandum reporting on the background investigation. The Director of Presidential Personnel would then draft a memorandum to the President, stating that the appointment could proceed. This memorandum would go first to the Executive Clerk's Office, so that the Executive Clerk could prepare either a commission, if time permitted, or an order of appointment, with a commission to follow. The Executive Clerk would then forward the memorandum and the appointment papers to the President, through the Staff Secretary. The President's signature would typically be affixed by autopen. The package would then return to the Executive Clerk, who would record the appointment and transmit the appointment papers to the Department of State.

[1] The statutory designation of appointing authorities for certain Council members and the inclusion of members of Congress on the Council raise serious constitutional questions that are beyond the scope of the issue that you have asked us to address.

In the case of the putative appointee, a search of documents has not uncovered any memorandum from the Director of Personnel, nor has it uncovered a commission or order of appointment signed by President Clinton. We assume, for purposes of this analysis, that no commission or order of appointment exists. Each of the three other individuals whom the June 29 press release stated that President Clinton intended to appoint to the Council was thereafter appointed by commission. One commission was signed on July 28, 2000, and two other commissions were signed on September 5, 2000.

On May 29, 2002, President Bush appointed another individual to serve as a Council member. President Bush appointed that individual to the same seat—"for a term expiring January 15, 2005 (vice Beth E. Dozoretz)"—to which the putative appointee had sought appointment.

On January 9, 2003, counsel for the putative appointee provided your Office an affidavit that former President Clinton had signed on November 25, 2002, setting forth his understanding of the facts and law relating to the appointment process for the putative appointee. *See* Affidavit of William Jefferson Clinton ("Clinton Affidavit"), *attached to* Letter for David G. Leitch, Deputy Counsel to the President, from Robert A. Long, Jr., Covington & Burling (Jan. 9, 2003). In that affidavit, Mr. Clinton states:

> While serving as President of the United States, I made a final decision to appoint [the putative appointee] to serve as a member of the Holocaust Memorial Council and exercised the authority conferred on me as President of the United States to appoint him to that position. As described in detail below, I made a record of my decision to appoint [the putative appointee] by placing a check mark next to his name on a Decision Memorandum prepared for me by the Director of Presidential Personnel. *My decision to appoint [the putative appointee] was final, subject only to the requirement that [the putative appointee] successfully complete a background check*. [The putative appointee] satisfied this requirement, his appointment was publicly announced and he entered into service as a member of the Holocaust Council, where I understand he has served with honor for two years.

Clinton Affidavit ¶ 4 (emphasis added). Mr. Clinton further states:

> As a matter of routine, members of the White House staff took the ministerial steps in connection with an appointment following completion of the background check, including issuing a press release, preparing and delivering a commission to the appointee, etc. These steps were not essential to the valid exercise of my Presidential power of appointment.

*Id*. ¶ 9.

## II.

We first address whether the putative appointee was actually appointed a member of the Council.

The definitive statement of many aspects of appointment law is Chief Justice Marshall's opinion for the Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[2] There, President John Adams had signed a commission to appoint William Marbury as a justice of the peace, and the seal of the United States had been affixed to the commission, but the commission had never been delivered. Although the case had to do with an appointment by the President with the Senate's advice and consent, the Court's analysis of the acts constituting or evidencing an appointment appears equally applicable to appointments by the President alone. According to *Marbury*, "[t]he appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him." *Id.* at 157. Typically, that last act is the President's signing a commission for the appointee. However, because the Constitution treats as separate the making of an appointment and the issuing of a commission, the appointment might "be evidenced by any public act other than the commission." *Id.* at 156. In either case—the signature on a commission or the other public act – the "appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction." *Id.* at 157.

We believe that under the White House's regular appointments practice the signing of a commission or an appointment order would be the "open, *unequivocal* act," *id.* (emphasis added), showing the appointment to be complete; and on the facts as we understand them, no such document was signed. Nor was there any other "open, unequivocal act" of appointment. Therefore, the appointment of the putative appointee was never made.

The documents made available to us, which were prepared in or issued by officials at the White House, indicate that until the signing of a commission or appointment order, an appointment was still "inchoate and incomplete." *Id.* After the President checked "Approve" on the memorandum conveying the recommen-

[2] Whether or not members of the Council appointed by the President are "Officers of the United States" in the constitutional sense, *see* U.S. Const. art. II, § 2, cl. 2, the statute providing for their appointment calls for applying the principles applicable to appointment of such officers. Under the statute, these members are "appointed . . . by the President," 36 U.S.C. § 2302(a), and "[i]n our view, the statute uses the term 'appointment' in the same sense as does the Constitution." *Federal Election Commission—Appointment of Members (2 U.S.C. § 437)*, 2 Op. O.L.C. 359, 359–60 (1977). Furthermore, the practice has been to treat appointment of members in the same way as appointment of officers, both in the signing of commissions or appointment orders and in the affixing of the seal to the commissions. *See* 5 U.S.C. § 2902(a) (2000) (seal to be affixed to "the commission of an officer appointed by the President").

dations of the Office of Presidential Personnel, a memorandum from the Office of Presidential Personnel to the White House Counsel's Office requested a "preliminary background investigation" on the candidate approved by the President. *See* Covington Memorandum, Tab C. When the background investigation was finished, the Counsel's Office notified the Office of Presidential Personnel that the "nomination may proceed." *See id.*, Tab J. The press release then issued about the putative appointee and the three other persons selected announced the President's "intent to appoint" those persons. *See id.*, Tab K. These documents are inconsistent with the view that an appointment had already been made when the President checked the "Approve" line on the May 18 memorandum or when the press release was issued.

Indeed, if a commission had been issued at the end of this process, it would have begun with these words: "Know ye, that reposing special trust and confidence in the Integrity and Ability of [name of appointee], I *do appoint* him [name of office], and do authorize and empower him to execute and fulfil the duties of that Office according to law." *See* E-mail for Daniel L. Koffsky, Office of Legal Counsel, from G. Timothy Saunders, Executive Office of President, *Re: Standard Straight Appointment Commission Language* (Oct. 1, 2001). If an appointment order had been used, it also would have stated on its face that the President was then making the appointment: "I *hereby* appoint [name of appointee] to be a Member of the United States Holocaust Memorial Council for a term expiring [date]."

The practice of the Executive Clerk, as explained to us, conforms to the conclusion that it is the commission or, when an appointment order is used, the appointment order that signifies the appointment: the Executive Clerk records the date of the appointment as the date of the commission or, in cases when an appointment order has first been issued, the date of the appointment order. The issuance of a commission or order of appointment, as well as the Executive Clerk's recording of the date of appointment, makes up the "practice of the Executive" and provides the framework in which the events surrounding appointments are to be understood. *See Bennett v. United States*, 19 Ct. Cl. 379, 383 (1884).[3]

To be sure, the signature on the commission or appointment order might typically, although apparently not invariably, be inscribed by autopen rather than the President's own hand. But "the executive practice which existed at that time in such cases . . . must be taken to have been done with the knowledge and consent of the President, if not by his express direction." *Id.* at 385. The autopen, like the President's own hand, could give effect to an instrument signifying that a person had been appointed. "Where the President's signature is to appear on a document, the signature generally may be affixed by any means, such as . . . by the use of a

[3] Within the framework of the White House's appointments practice, we therefore do not agree with former President Clinton's legal assertion that the execution of a commission or appointment order was "not essential" to his exercise of his appointment power. Clinton Affidavit ¶ 9.

mechanical signature device." Letter for John D. Ehrlichman, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Att. at 7 (Mar. 20, 1969). The signing of the commission or appointment order, therefore, was the "last act required from the person making [the appointment]," *Marbury*, 5 U.S. at 157, and until that act, the appointment was "inchoate and incomplete," *id.*

The putative appointee nonetheless contends that he was actually appointed. He appears to rely either on the President's checking the "Approve" line on the May 18 memorandum or on the June 29 White House press release stating the President's "intent to appoint" the putative appointee. This argument, we believe, cannot overcome what the documents say.

Reliance on the President's checking the "Approve" line mistakes the character of the "open, unequivocal act" that shows an appointment to have been made. *Marbury*, 5 U.S. at 157. After such an unequivocal act, there can be no discretion as to the appointment, because the appointment is complete. The Court in *Marbury*, addressing an office with protected tenure, explained:

> The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

*Id.* at 162. Even if the tenure of the office is not protected, the President is still without discretion as to the appointment. Although he may arrest the commission before delivery, he is then removing the officer, not declining to appoint him. *Id.* And it is, of course, not just the President who has no further discretion over the appointment. To his subordinates, too, are left only ministerial acts, such as putting the seal on the commission. *Id.* at 158.

Here, when the President checked the "Approve" line on the May 18 memorandum, the "preliminary background investigation" of the putative appointee had not been completed. Former President Clinton's own affidavit confirms this point: "My decision to appoint [the putative appointee] was final, *subject only to the requirement that [the putative appointee] successfully complete a background check*." Clinton Affidavit ¶ 4 (emphasis added). The judgment whether, in light of the background investigations, the putative appointee was fit for office had not yet been made. Such judgment can be exceedingly delicate and, in any event, calls for the exercise of discretion. The act of checking the "Approve" line on the May 18 memorandum, therefore, cannot be the "unequivocal act" signifying an end to discretion about making an appointment.

Nor does the June 29 press release show that the appointment had been completed. The press release announced only the President's "intent to appoint" the

putative appointee and three other persons. The reference is clearly to a future act, not to one that already had taken place on, or as of, a specified date. Indeed, each of the three other persons was later appointed by commission.

For the putative appointee, "the last act required from the person making [the appointment]" was never performed. *Marbury*, 5 U.S. at 157. The appointment remained an "inchoate and incomplete transaction." *Id.*

## III.

On the assumption *arguendo* that the putative appointee was properly appointed a member of the Council, we next turn to the question whether he would remain a member. This question is easily answered. It has long been established that appointment of a successor to a removable officer has the effect of displacing the incumbent. *See, e.g.*, *Wallace v. United States*, 257 U.S. 541, 545 (1922); *Mullan v. United States*, 140 U.S. 240, 246–47 (1891); *Nominations for Prospective Vacancies on the Supreme Court*, 10 Op. O.L.C. 108, 109 (1986). By subsequently appointing another individual to the same position[4] that the putative appointee would have occupied, President Bush would have effected the putative appointee's removal from that position. Therefore, even if (contrary to our conclusion) he had been properly appointed in the first instance, the putative appointee would no longer be a member of the Council.

## IV.

Applying the same analysis as in the Kennedy Center Memorandum, we conclude that the putative appointee was never actually appointed to a position as a member of the Council. If he had been, President Bush's appointment of another individual would have effected the putative appointee's removal from that position.

M. EDWARD WHELAN III
*Principal Deputy Assistant Attorney General*
*Office of Legal Counsel*

[4] The other individual's commission states that he was appointed "vice Beth E. Dozoretz." If, contrary to fact, the putative appointee had previously been appointed to the seat previously occupied by Ms. Dozoretz, it would have been better form for his commission to state that he was appointed "vice [the putative appointee]." But any imperfection in form would not have affected the validity of the other individual's appointment, so long as it would have been clear (as it would have) to which office he was being appointed. *See Marbury*, 5 U.S. at 157 ("appointment is evidenced by an open, unequivocal act").

# Limitations on the Detention Authority of the Immigration and Naturalization Service

The Immigration and Nationality Act by its terms grants the Attorney General a full 90 days to effect an alien's removal after the alien is ordered removed under section 241(a) of the Act, and it imposes no duty on the Attorney General to act as quickly as possible, or with any particular degree of dispatch, within the 90-day period. This reading of the Act raises no constitutional infirmity.

It is permissible for the Attorney General to take more than the 90-day removal period to remove an alien even when it would be within the Attorney General's power to effect the removal within 90 days. The Attorney General can take such action, however, only when the delay in removal is related to effectuating the immigration laws and the nation's immigration policies. Among other things, delays in removal that are attributable to investigating whether and to what extent an alien has terrorist connections satisfy this standard. An obligation to act with "reasonable dispatch" will attach at some point after the expiration of the 90-day removal period.

February 20, 2003

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Your Office has asked us to address two questions concerning the timing of removal of an alien subject to a final order of removal under section 241(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a) (2000). First, your Office has asked us to determine whether the Attorney General is under an obligation to act with reasonable dispatch in effecting an alien's removal within the 90-day removal period established by section 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). We conclude that the INA by its terms grants the Attorney General a full 90 days to effect an alien's removal after the alien is ordered removed and imposes no duty on the Attorney General to act as quickly as possible, or with any particular degree of dispatch, within the 90-day period. We also conclude that this reading of the Act raises no constitutional infirmity. In particular, even under the Supreme Court's recent decisions, such as *Zadvydas v. Davis*, 533 U.S. 678 (2001), the "substantive" component of the Due Process Clause does not impose a requirement that the Attorney General act with particular dispatch *within* the 90-day removal period. To the extent that the INS General Counsel's Office has issued advice to the contrary, suggesting that there is such a constitutionally-based timing obligation, we disagree with that analysis. While the Attorney General's ability to delay removal of an alien within the 90-day period is not constrained by a particular timing requirement (i.e., an obligation to act with dispatch), it is also not entirely unconstrained. We conclude that an express decision to postpone removal of an alien until later in the 90-day period likely must be supported by purposes related to the proper implementation of the immigration laws. We need not definitively resolve that question here because the delays in the particular case your Office inquired about were clearly supported by purposes related to proper implementation of the immigration laws.

Second, your Office has asked—in a situation where it would be logistically possible to remove an alien within the 90-day removal period—whether and for what purposes the Attorney General may nonetheless refrain from removing the alien within the removal period and instead detain him beyond the 90-day period with a view to removing him at a later time. We conclude, under each of two alternative readings of the statute, that it is permissible for the Attorney General to take more than the 90-day removal period to remove an alien even when it would be within the Attorney General's power to effect the removal within 90 days. The Attorney General can take such action, however, only when the delay in removal beyond the 90-day period is related to effectuating the immigration laws and the nation's immigration policies.

## I.

These issues arose in the context of the case of a particular alien who received a final order of removal on October 1, 2002, and whose 90-day removal period thus expired on December 30, 2002. This alien has significant connections to a known al Qaeda operative who was seized in Afghanistan and who is now held at the naval base at Guantanamo Bay, Cuba. It was deemed a substantial possibility that the alien himself was a sleeper agent for al Qaeda. Insufficient information existed at first, however, to press criminal charges or to transfer the alien to military custody as an enemy combatant. When it became apparent that it would be logistically possible to remove the alien very early within the 90-day removal period to the country that had been specified at the removal hearing (i.e., travel documents were obtained), the question arose whether his removal could be delayed to permit investigations concerning his al Qaeda connections to continue. Several avenues remained for developing further information about the alien, and such information would have been relevant for several purposes. For example, at first, your Office had been informed by the INS that the alien had designated a particular country of removal under section 241(b)(2)(A) of the INA, 8 U.S.C. § 1231(b)(2)(A). In that case, the Attorney General would have had statutory authority to disregard that designation if he determined that removing the alien to that country would have been "prejudicial to the United States." *Id.* § 1231(b)(2)(C)(iv). Obviously, in order for him to make that determination, it would have been important for the Attorney General to have the fullest information possible about the alien's terrorist connections, the extent of the threat he posed, and the ability (and willingness) of the law enforcement or security services of the destination country to deal appropriately with the alien. On further examination of the record, the INS later informed your Office that the alien had not, in fact, designated any country of removal. That situation raised unresolved questions of statutory interpretation concerning the Attorney General's authority under the statute to determine the country of removal—a decision that, again, depending upon the scope, if any, of the Attorney General's discretion, could obviously

benefit from the fullest information possible about the alien's terrorist connections. In addition, even apart from the question of the country to which the alien would be removed, full information about the alien's terrorist connections was critical for ensuring coordination with the law enforcement and security services in the country of removal before removing the alien. Ensuring such coordination based upon the fullest information about the threat posed by the alien would have promoted both the national security interests of the United States (by perhaps providing a basis for law enforcement officials in the destination country to detain the alien) and the foreign policy interests of the United States in maintaining good relations with the country. Other countries ordinarily would prefer not to have potential terrorists sent to their shores without adequate warning. Finally, if enough further information had been developed concerning the alien, a different course of action might have been taken with respect to him, such as criminal prosecution or detention as an enemy combatant.

These circumstances also raised the possibility that significant information might be developed concerning the alien at or near the end of the 90-day period. As a result, if it were lawful to do so, the Attorney General might have wanted to take more than 90 days to execute the removal order and thus to detain the alien beyond the 90-day removal period.

## II.

Whether the Attorney General is required to effect an alien's removal as quickly as possible within the 90-day removal period established by section 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A), is a question of statutory interpretation. In determining the meaning of a statute, we begin by examining its text. *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). "[W]e begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Section 241(a)(1)(A) of the INA states that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." Section 241(a)(2) provides that "[d]uring the removal period, the Attorney General shall detain the alien." The meaning of the statute is plain on its face: the Attorney General is granted a full 90 days after an alien has been ordered removed to effect the alien's removal. During that period, the Attorney General is to detain the alien. The statute does not impose a duty on the Attorney General to remove aliens as quickly as possible within the 90-day removal period, nor does it purport to prescribe the reasons for which the Attorney General might decide to act more quickly or more slowly in effectuating a particular removal within the 90-day period.

Where, as here, the language of a statute is clear, there is no need to resort to legislative history to elucidate the meaning of the text. *See, e.g.*, *Hill*, 437 U.S. at

184 n.29. Nevertheless, we note that the legislative history here is consistent with the reading of the plain text given above—it confirms that Congress intended to give the Attorney General a full 90 days as a reasonable period of time within which to effect an alien's removal. The predecessor provision to the current section 241(a)(1) appeared at 8 U.S.C. § 1252(c) (1994), and provided that:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States . . . . Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, it shortened the removal period from six months to 90 days and eliminated any reference from the INA to a requirement that the Attorney General proceed with "reasonable dispatch" in effecting an alien's deportation. Congress seems to have viewed its newly-established 90-day time frame as a per se reasonable period of time in which to effect an alien's deportation, rendering judicial inquiry into the dispatch with which the Attorney General performed the duty unnecessary. Neither the text of the statute nor its legislative history provides any reason to believe that Congress intended to impose on the Attorney General an implicit requirement that he remove aliens from the country as quickly as possible within the 90-day removal period.

It might be argued that the plain-text reading outlined above raises constitutional issues that require a narrowing construction of the statute to limit the Attorney General's authority to use the full 90-day period for effecting removal. It is settled, of course, that where there are two or more plausible constructions of a statute, a construction that raises serious constitutional concerns should be avoided. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932). There are two arguments that might be raised for a constitutional narrowing construction here.

First, in light of the Supreme Court's decision in *Zadvydas*, it might be claimed that the government is under an obligation, even within the 90-day statutory period, to act with reasonable dispatch to remove the alien as quickly as possible. The claim would be, in other words, that it would be unconstitutional for Congress

to grant the Attorney General 90 days in which to effect an alien's removal without any obligation that he act quickly within those 90 days. We reject this view and conclude that the Constitution imposes no obstacle to such a grant of authority.

Second, also in light of the decision in *Zadvydas*, it might be argued that, if it becomes clear at a point during the removal period that an alien can be removed, the Constitution imposes some constraints on the *purposes* for which removal may nevertheless be delayed (and detention continued) until later in the 90-day period. The *Zadvydas* Court explained that detention under the INA must be related to the purpose for which detention is authorized—securing the alien's removal. It thus might be argued that an express decision to delay an alien's removal until the end of the 90-day period must be based upon some purpose related to the proper execution of the immigration laws. As explained below, we conclude that the Constitution may require that the statute be read to include such a limitation. We need not definitively resolve the hypothetical question whether removal could be delayed for a reason wholly unrelated to executing the immigration laws, however, because in the instant case multiple bases existed for delaying the removal of the alien in question that were directly related to the broad considerations the Attorney General is charged with taking into account in enforcing the immigration laws.[1]

**A.**

It is doubtful that the terms of section 241(a)(1)(A) could plausibly be construed to include a reasonable-dispatch requirement, particularly in light of Congress's explicit deletion of any such requirement from the statute when it enacted the IIRIRA in 1996. *Cf. Salinas v. United States*, 522 U.S. 52, 60 (1997) (principle of constitutional avoidance does not permit pressing statutory construction "to the point of disingenuous evasion"). We need not resolve that particular issue, however, because reading the statute not to include a reasonable-dispatch requirement—which, as we have outlined above, is the best reading of the text—does not raise any serious constitutional questions.

In *Zadvydas*, the Supreme Court held that the Constitution required reading an implicit limitation into section 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6), restricting the detention of an alien beyond the 90-day removal period "to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689. The Court read this limitation into the statute because, in its view, "[a] serious constitutional problem [would arise] out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without any

[1] Of course, it is also implicit in the granting of any authority to an executive officer that it may not be exercised in a manner that is expressly constitutionally proscribed. Thus, the Attorney General could not, for example, delay the removal of an alien solely as a mechanism for imposing punishment on the alien. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

[procedural] protection." *Id.* at 692. Thus, the Court ruled that if a habeas court determines that "removal is not reasonably foreseeable [during post-removal-period detention], the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699–700.

It could be argued that a constitutional limitation restricting the government's authority to detain an alien to a period "reasonably necessary to bring about that alien's removal" necessarily entails an obligation that the government proceed with reasonable dispatch in effecting removal and remove the alien as soon as reasonably practicable to do so. Even if that were a valid interpretation of the limitation imposed by *Zadvydas* on post-removal-period detention under section 241(a)(6)—an issue that we need not definitively decide in this portion of our analysis—that limitation is inapplicable to detention *within* the 90-day removal period established by section 241(a)(1)(A). The constitutional concerns that motivated the *Zadvydas* Court simply do not arise in the context of detention within the removal period.

In *Zadvydas*, the Court made clear that the central concern informing its constitutional analysis was that the detention it was addressing was "not limited, but potentially permanent." 533 U.S. at 691. *See also id.* at 692 (stressing the "indefinite, perhaps permanent deprivation of human liberty" at stake). The 90-day removal period, by contrast, is of a fixed and relatively short duration. Indeed, the *Zadvydas* Court expressly distinguished detention during the 90-day removal period from the detention it was addressing on precisely this ground, stating that "importantly, post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point." *Id.* at 697. At least one lower court has ruled that *Zadvydas* is inapplicable to the 90-day removal period on precisely these grounds. *Shehata v. Ashcroft*, No. 02 CIV. 2490 (LMM), 2002 WL 538845, at *2 (S.D.N.Y. Apr. 11) ("Here, on the other hand, the 90 day period is quite limited in time, and serves a rational purpose, to allow INS to effect removal of a person already determined to be removable."); *see also Badio v. United States*, 172 F. Supp. 2d 1200, 1205 (D. Minn. 2001) ("*Zadvydas* does not apply to petitioner's claim because pre-removal-order proceedings do have a termination point.").

The relatively short detention period under section 241(a)(1)(A) makes a critical difference because the holding in *Zadvydas* rests upon considerations of substantive due process. Although the Court did not expressly label its decision as one based on "substantive due process," it made it clear that this was the foundation of its reasoning as it explicitly invoked the Fifth Amendment's Due Process Clause, *see Zadvydas*, 533 U.S. at 690, and at the same time disavowed any concern with procedural deficiencies:

> [W]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, *irrespective of the*

> *procedures used*, the Constitution permits detention that is indefinite and potentially permanent.

*Id.* at 696 (citation omitted) (emphasis added). The grounding of the decision in substantive due process is important because, as a general rule, government conduct violates substantive due process constraints only when it is so extreme and intrusive that it can be said to "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The prospect of "indefinite and potentially permanent" detention may shock the conscience of the courts, *Zadvydas*, 533 U.S. at 696, but detention for a limited period of 90 days clearly does not. In fact, several courts called upon to review early immigration statutes that did not specify a fixed period for the government's detention authority settled upon similar time frames in specifying the permissible length of a "reasonable" detention. *See, e.g.*, *United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 202 (D. Mass. 1942) ("The period of time which judges have found to be appropriate in peace-time varies from one month . . . to four months."); *United States ex rel. Ross v. Wallis*, 279 F. 401, 404 (2d Cir. 1922) (holding that four months is a reasonable time); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (holding that two months is a reasonable time); *Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (authorizing the detention of an alien already held for five months for an additional 30 days).

More important, the *Zadvydas* Court expressly held that the detention of an alien for a period of up to six months is presumptively constitutionally reasonable and does not violate substantive due process constraints. *See Zadvydas*, 533 U.S. at 701. If detention for a period of six months to effect removal is presumptively reasonable and does not violate an alien's substantive due process rights, it follows *a fortiori* that detention during the shorter 90-day removal period cannot be constitutionally problematic. *See Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1039 (D. Minn. 2001) ("*Zadvydas* confirms that a legally admitted alien can always be detained during the 90-day 'removal period' contemplated by the statute. But after that, the Court held, the alien can be held for only a 'reasonable period,' which is presumed to be six months"), *rev'd on other grounds*, 325 F.3d 1003 (8th Cir. 2003). Where conduct that "shocks the conscience" is the ultimate touchstone for constitutional analysis, if six months' detention is reasonable, detention for 90 days is simply below the threshold for substantive due process constitutional concerns. Indeed, *Zadvydas* makes the constitutionality of detention during the 90-day removal period even clearer than this, because the six-month "presumptively reasonable" period established by that decision may very well not begin to run until *after* an alien has already been detained for the 90-day removal period.[2]

[2] *Zadvydas* does not make it clear whether the six-month "presumptively reasonable" period begins at the end of, or encompasses, the 90-day removal period. *Zadvyda*s, 533 U.S. at 700–01. The lower courts appear to be split on the issue. *Compare Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1040–41 (D. Minn. 2001) ("As interpreted by the Supreme Court in *Zadvydas*, § 1231(a)(6) authorizes the INS to detain aliens for six months after the expiration of the 90-day removal period.") (emphasis added), *with*

Substantive due process constraints thus do not afford any basis for reading a "reasonable dispatch" requirement into section 241(a)(1)(A).

In addition, because this particular case involves removal of an alien with demonstrated ties to members of a terrorist organization with which the United States is currently at war, it is even plainer that detention for 90 days without any obligation on the government to act quickly cannot be a concern of constitutional dimensions under the reasoning in *Zadvydas*. In outlining the constitutional problems with potentially indefinite detention, the Supreme Court made it express that the principles it was applying might very well not apply to the government's actions dealing with aliens suspected of involvement in terrorism. The Court distinguished that context, saying that "we [do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. Indeed, the Court implied that the government's interest in preventing terrorism is sufficiently great that detention measures specifically targeting "suspected terrorists" are deserving of heightened judicial deference. *See id.* at 691. Thus, the Court suggested that, in the context of an alien suspected of involvement in terrorism, detention might well be justified beyond the six-month period of detention that the Court deemed presumptively constitutionally reasonable for any case. As a result, whereas here, investigation to determine whether an alien is connected to a terrorist organization is part of the justification for prolonging detention and the detention remains confined *within the 90-day removal period*, there can be no basis for concluding that substantive due process constraints are implicated.

Although we conclude, based on the reasoning of *Zadvydas*, that the Constitution does not require that a "reasonable dispatch" obligation be read into section 241(a)(1)(A), one line of lower court decisions regarding the substantive due process implications of prolonged detention should be briefly distinguished. Certain lower courts addressing pretrial detention in the criminal justice system have held that lengthy detention may violate substantive due process constraints under certain circumstances and that evaluating a claimed violation "requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement." *United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986). *See also United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986). It might be thought that those cases call into question our blanket conclusion that detaining aliens for a period of 90 days does

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*Malainak v. INS*, No. 3-01-CV-1989-P, 2002 WL 220061, at *2 (N.D. Tex. Feb. 11, 2002) ("the Court opined that a presumptively reasonable period of detention was between the ninety days provided for by the IIRIRA and six months") (emphasis added). In November 2001, the Department issued regulations reflecting an assumption that the presumptively reasonable six-month period from *Zadvydas* includes the 90-day removal period. 8 C.F.R. § 241.13(b)(2)(ii) (2002). The choice to treat the six-month period in that fashion in the regulation, of course, is not definitive on constitutional *requirements* for measuring the six-month period.

not violate substantive due process guarantees, even where the Attorney General fails to act with reasonable dispatch. The purpose for the case-by-case inquiry engaged in by the courts in those cases, however, is to examine factors *other* than length of confinement that the courts deemed relevant to the substantive due process inquiry—such as which party is primarily responsible for any delays. *See, e.g.*, *Gonzales Claudio*, 806 F.2d at 340 ("we also consider the extent to which the prosecution bears responsibility for the delay that has ensued"). If the factor of length of confinement is viewed in isolation, applicable case law makes it crystal clear that a 90-day detention period is not constitutionally objectionable, and that no case-by-case inquiry into the length of confinement is therefore required. As we have already mentioned, *Zadvydas* explicitly states that civil detention for a period of six months in the context of deportation is presumptively constitutionally reasonable, *see* 533 U.S. at 701, and even cases examining the constitutionality of prolonged pretrial detention have typically begun their analysis by presuming that the 90-day period established by the Speedy Trial Act is a reasonable detention period. *See, e.g.*, *Gonzales Claudio*, 806 F.2d at 340–41 (citing 18 U.S.C. § 3164(b)).

Moreover, precedents relating to preventive pretrial detention in criminal cases are not directly applicable to the context of detention incident to removal. In distinguishing its own pretrial detention precedent from the context of immigration proceedings, the Second Circuit noted that "a deportation proceeding is not a criminal proceeding . . . and the full trappings of legal protections that are accorded to criminal defendants are not necessarily constitutionally required in deportation proceedings." *Dor v. INS*, 891 F.2d 997, 1003 (2d Cir. 1989). In a later decision, the Second Circuit elaborated on this distinction:

> It is axiomatic, however, that an alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of the national interest. Control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). . . . In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891. Governmental conduct that may be considered "shocking" when it serves to deprive the life, liberty or property of a citizen may not be unconstitutional when directed at an alien.

*Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991) (citations omitted), *cert. dismissed*, 503 U.S. 901 (1992). Thus, the Second Circuit considers the detention of an alien prior to removal to be constitutionally permissible unless the alien can show that "his continuing detention was the result of an 'invidious purpose, bad

faith or arbitrariness.'" *Ncube v. INS Dist. Dirs. & Agents*, No. 98 Civ. 0282 HB AJP, 1998 WL 842349, at *16 (S.D.N.Y. Dec. 2), *citing Doherty*, 943 F.2d at 212. Especially where the Supreme Court has already established that detention of an alien for a period of six months is presumptively constitutionally reasonable, detention for a period of 90 days in itself cannot possibly satisfy that exacting standard for establishing a violation. Thus, lower court decisions that have examined the substantive due process implications of pretrial detention do not call into question our conclusion that the Constitution does not require that the Attorney General act with reasonable dispatch during the 90-day removal period.

Finally, we note that in January 2002, the INS General Counsel's Office issued an opinion in which it advised that, during the 90-day removal period, the INS is constitutionally required to "proceed[] with reasonable dispatch to arrange removal." Memorandum for Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, from Dea Carpenter, Deputy General Counsel, *Re: Authority to Detain During the 90-Day Removal Period* at 1 (Jan. 28, 2002) ("INS Memorandum"). Based on the analysis outlined above, we disagree with the INS's conclusion.

The INS derived the reasonable-dispatch requirement from language in *Zadvydas* construing section 241(a)(6) and stating that "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." INS Memorandum at 2, *citing Zadvydas*, 533 U.S. at 689. The INS reasoned that, "while the *Zadvydas* opinion is technically limited to post-removal period detention, and while the statute provides authority to detain an alien with a final order of removal for up to the 90-day removal period, the INS should not continue to detain an alien during the removal period beyond the point at which the alien could be removed except to the extent that the INS is taking necessary actions to process the alien for removal." INS Memorandum at 3. In our view, this conclusion was in error because it mistakenly applies the limitations on post-removal period detention under section 241(a)(6) to removal-period detention under section 241(a)(1)(A). As explained above, neither the plain language of section 241(a)(1)(A) nor its legislative history allows any inference that Congress intended to impose a reasonable-dispatch obligation on the INS during the 90-day removal period. Moreover, the constitutional concerns that impelled the Supreme Court to read such an obligation into section 241(a)(6) simply are not applicable to detention during the 90-day removal period. In *Zadvydas*, the Supreme Court reasoned that because indefinite civil detention of lawfully admitted aliens would raise serious constitutional questions, detention must be limited to a period reasonably necessary to effect removal. The *Zadvydas* Court expressly distinguished the 90-day removal period, however, on the ground that it has a defined termination point. 533 U.S. at 697. Lower courts, accordingly, have held that *Zadvydas*'s constitutional reasoning is inapplicable to detention during the removal period. *See Shehata*, 2002 WL 538845, at *2. In short, we disagree with

the INS's reading of *Zadvydas*, and reaffirm our conclusion that the Constitution does not impose a reasonable-dispatch obligation during the 90-day removal period.[3]

**B.**

The second argument that might be raised for a constitutionally based narrowing construction of section 241(a)(1)(A) would rest on the theory that, once all of the mechanical steps that are necessary to effectuate an alien's removal have been taken, the Constitution imposes some limitations on the purposes for which it is permissible to further delay the alien's removal while keeping the alien in detention. In *Zadvydas*, the Supreme Court explained that the reasonableness of an alien's detention must be measured "primarily in terms of the statute's basic purpose," which the Court identified as securing the alien's removal. *Zadvydas*, 533 U.S. at 699. Similarly, in the wake of *Zadvydas*, the Third Circuit has stated that "[t]he requirements of substantive due process are not met unless there is a close nexus between the government's goals and the deprivation of the interest in question." *Patel v. Zemski*, 275 F.3d 299, 311 (3d Cir. 2001). Thus, the INS has taken the position, both in the INS Memorandum and in some instances of prior litigation, that it does not have the power to detain aliens for any purpose other

[3] The INS Memorandum also cites at length several decisions addressing the impact of INS detention on triggering the Speedy Trial Act where it appears that the INS has held an alien solely for the purpose of allowing a criminal investigation (into the same conduct that forms the basis for deportation) to proceed. *See* INS Memorandum at 3–4. It is unclear to what extent, if at all, the INS intends to rely on these cases for the proposition that the INS must act with reasonable dispatch. Instead, the INS relies on them primarily for the proposition that the INS can detain an alien solely for purposes of effecting removal, an issue we address below. *See infra* Part II.B. In any event, the Speedy Trial Act cases provide no support for any general obligation on the INS to act with dispatch. Rather, they establish solely that, when an alien is prosecuted for the same conduct that formed the basis for the immigration violation on which he was held and when the INS has delayed deportation (and prolonged detention) solely to permit the criminal investigation to proceed, the INS detention may trigger the deadlines of the Speedy Trial Act. That, in turn, may lead to a Speedy Trial Act violation that may be raised *in the criminal trial* to seek dismissal of the indictment. *See, e.g.*, *United States v. Garcia-Martinez*, 254 F.3d 16 (1st Cir. 2001); *see also United States v. De La Pena-Juarez*, 214 F.3d 594, 598–99 (5th Cir.), *cert. denied*, 531 U.S. 983 (2000), *and cert. denied*, 531 U.S. 1026 (2000). That consequence for the criminal trial does not mean by any stretch that the INS lacks power to detain the alien for the full 90 days prior to removal or that the INS has a general obligation to act with dispatch during that time. It is true that, in explaining how INS detention solely for purposes of criminal investigation may trigger the Speedy Trial Act, one district court stated in dicta that "[i]n essence, the INS has an obligation to act with all deliberate speed to remove from the United States a detained alien who has been finally determined to be deportable." *United States v. Restrepo*, 59 F. Supp. 2d 133, 138 (D. Mass. 1999). In context, it is clear that all the court was indicating was that, when the sole purpose of detention is providing time for criminal investigation, there may be consequences under the Speedy Trial Act for the prosecution. To the extent that this dictum might be construed to suggest anything further concerning a general obligation to act with dispatch, there is no support in the court's Speedy Trial Act analysis for such a conclusion and it is not a correct statement of the law.

than the effectuation of removal.[4] *See* INS Memorandum at 1; *United States v. Restrepo*, 59 F. Supp. 2d 133, 138 (D. Mass. 1999).[5] Even before *Zadvydas*, in fact, several district courts had expressed the view that, once it has become apparent that an alien cannot be deported, his detention can no longer be said to be for purposes of effecting his removal. *See United States ex rel. Blankenstein v. Shaughnessy*, 117 F. Supp. 699, 703–04 (S.D.N.Y. 1953) ("courts have the power to release on habeas corpus an alien held for deportation on a showing . . . that the detention cannot in truth be said to be for deportation"); *United States ex rel. Kusman v. INS*, 117 F. Supp. 541, 544–45 (S.D.N.Y. 1953); *Rodriguez v. McElroy*, 53 F. Supp. 2d 587, 591 n.6 (S.D.N.Y. 1999) ("[d]etention is intended for the sole purpose of effecting deportation"); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 793 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *Williams v. INS*, No. 01-043 ML, 2001 WL 1136099, at *4 (D.R.I. Aug. 7, 2001).

There is support in the cases for the general principle suggested by the INS to this extent: the detention of an alien—perhaps even during the 90-day removal period—likely must be related to enforcing the immigration laws and properly effecting the alien's removal in accordance with the nation's immigration laws and policies. Thus, in the abstract, it might raise difficult constitutional questions if the Attorney General were expressly to delay the removal of an alien (and thereby prolong his detention) solely for a purpose that was—by hypothesis—entirely unrelated to any legitimate interest in the enforcement of the immigration laws.[6] We need not definitively decide whether such a hypothetical scenario would raise constitutional infirmities, however, because in the present case there are reasons directly related to the enforcement of the immigration laws that justify any delay in the alien's removal.[7] Of course, acknowledging (as we do for purposes of

[4] In coming to this conclusion, the INS relies heavily on several cases holding that, when aliens detained by the INS are held solely for the purpose of facilitating a criminal investigation, the detention triggers the provisions of the Speedy Trial Act. *See* INS Memorandum at 3–4. As noted above, however, those cases merely interpret the Speedy Trial Act and the guarantees it provides a defendant *in the context of his criminal case*. It might well be the case that, if the INS were to hold an alien solely for the purpose of permitting a criminal investigation to proceed, there would be a Speedy Trial Act problem in the criminal prosecution. That does not mean, however, that the INS lacked legal authority to detain the alien while the criminal investigation proceeded. We therefore do not view those cases as useful for determining the scope of the INS's authority under section 241(a)(1) of the INA to delay removal of an alien during the 90-day removal period.

[5] *See also* INS Memorandum at 5 ("While nothing in the language of the statute requires that the INS expedite an alien's removal during the 90-day removal period, or that the INS remove an alien at the very earliest point at which travel arrangements can be made . . . detention beyond that point must be related to removing the alien.").

[6] Of course, as noted above, *see supra* note 1, it is also clear that the INS could not prolong an alien's detention for a constitutionally impermissible purpose

[7] Even if other motivations exist in addition to the need to develop information relevant to decisions in the deportation process, to our knowledge it has never been suggested that the existence of additional governmental motivations can undermine or invalidate a detention that is supported by a lawful purpose. *See, e.g.*, *United States ex rel. Zapp v. INS*, 120 F.2d 762, 764 (2d Cir. 1941) (ongoing

analysis here) that the reason for an alien's detention must be related to legitimate interests in enforcing the immigration laws does not in itself provide much concrete guidance for determining precisely what activities meet that test. Rather, it merely frames the next step of the inquiry. Here, we cannot purport by any means to provide a comprehensive assessment of all the tasks or all the inquiries that may meet that standard in the myriad scenarios that may arise. Given the numerous broad objectives that underlie the nation's regulation of immigration—many of which relate to protecting our citizens from harm at the hands of aliens—there are potentially a vast array of interests legitimately related to policing immigration that may have a bearing on the Attorney General's decision (effected through the INS) concerning exactly when during the removal period an alien should be removed.[8] For present purposes, we limit our discussion to the interests relevant in this case.

At a bare minimum, of course, administrative tasks such as making transportation arrangements, securing travel documents, communicating with domestic and foreign law enforcement agencies, and making internal administrative arrangements for escorts and security are all legitimately related to removal. *Accord* INS Memorandum at 4.

In our view, moreover, there is a substantially broader range of immigration-related considerations that the Attorney General is permitted to take into account in effecting the removal of an alien, and thus deciding whether and exactly when to remove an alien. For example, as the Supreme Court acknowledged in *Zadvydas*, the immigration policy of the United States is inextricably intertwined with complex and important issues of foreign policy. *Zadvydas*, 533 U.S. at 700. *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). Every removal of an alien necessarily involves an act affecting foreign policy because it requires sending the alien to another country. In some cases, the foreign policy implications

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criminal investigations do not affect the INS's removal authority); *cf. Whren v. United States*, 517 U.S. 806, 811–13 (1996) (holding that subjective motive of officers for traffic stop is irrelevant where stop is supported by probable cause and thus rejecting "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999) (explaining that where an alien's presence in this country is a violation of the immigration laws, he may be deported and the possible existence of additional reasons for the government's focus of enforcement efforts on him is irrelevant; indeed, the "Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat").

[8] For example, 8 U.S.C. § 1231(c)(2)(A)(ii) makes it express that the Attorney General may stay the removal of an alien stopped upon arriving at a port of entry (who otherwise would be removed "immediately," *id.* § 1231(c)(1)) if the "alien is needed to testify in [a criminal] prosecution." A similar need for an alien's presence in a criminal or civil trial may well be a legitimate concern justifying a delay in removal. We need not decide such questions here.

of that act may be significant. As the Supreme Court has recognized, enforcement priorities in the immigration context may reflect "foreign-policy objectives" and it is even possible that the Executive might wish "to antagonize a particular foreign country by focusing on that country's nationals." *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999). *See also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (noting that decisions relating to immigration "may implicate our relations with foreign powers"); *cf. Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (grounding federal control over ingress and egress of aliens in part in federal government's "entire control of international relations"). More importantly here, releasing criminal or terrorist aliens into another country without providing adequate warning to the appropriate law enforcement or other officials in the receiving country can have adverse consequences for the security of that country, which can lead to the souring of diplomatic relationships or other negative results for foreign policy. Similarly, releasing aliens from United States custody who are suspected of involvement with terrorism can have a profound impact on our own national security. National security is also a concern inherently relevant to policing the flow of persons across our borders under the immigration laws. *See generally Carlson v. Landon*, 342 U.S. 524, 534–36 (1952).

It is not only common sense that makes clear the inherent relationship between enforcing the immigration laws and considerations of both foreign policy and national security; rather, those considerations are embedded in the text of the immigration laws themselves. For example, the fact that an alien's presence in the United States could result in "adverse foreign policy consequences" is *in itself* a grounds for removal under the INA. *See* INA § 237(a)(4)(C)(i), 8 U.S.C. § 1227(a)(4)(C)(i) (2000). Similarly, in certain circumstances, the Attorney General may block the departure of an alien from the United States when it would be deemed prejudicial to national security interests to permit him to depart. *See* 8 C.F.R. § 215.3(b), (c) (2002).

More importantly here, the INA expressly gives the Attorney General authority in many instances to make discretionary decisions bearing upon the removal of an alien based on broad considerations of policy. For example, section 241(b)(2)(C)(iv) provides that "[t]he Attorney General may disregard [an alien's designation of a country to which he would like to be removed] if the Attorney General decides that removing the alien to the country is prejudicial to the United States." Similarly, section 241(b)(2)(E)(vii) provides that the Attorney General is not to remove an alien to certain countries, even if they are willing to accept the alien, if he determines that it is "impracticable" or "inadvisable." By granting the Attorney General authority to make such determinations, Congress made it clear that the broad considerations of foreign policy or national security that might underlie such decisions are directly related to—indeed, are an integral part of—the enforcement of the immigration laws. Where more time is needed for the Attorney General to receive further information bearing on such decisions, the investigation

to generate such information is legitimately related to enforcing the immigration laws and can justify delaying the alien's departure.

Thus, at a minimum, where the Attorney General has a statutorily prescribed decision to make concerning the removal of an alien—such as whether it would be "prejudicial to the United States" to remove him to a particular country—developing the information needed for the Attorney General to make that determination wisely is a task that is related to proper implementation of the immigration laws. It would thus be justifiable to delay an alien's removal while an investigation to develop that information (including information about whether the alien has terrorist or criminal connections) is pursued.

In addition, even where the Attorney General does not have such an express statutory determination to make, we conclude that efforts to investigate an alien's background to determine, for example, ties to terrorist organizations are legitimately related to the process of removal. Full information on such aspects of an alien's background may be critical for a number of purposes. It permits the United States to coordinate appropriately with law enforcement officials in the receiving country to ensure that they are aware of any threats the alien might pose and might potentially benefit the national security interests of both the United States and the receiving country by providing officials in the receiving country a basis for arresting upon arrival an alien who poses a serious threat. Taking such steps to coordinate with the receiving country is part and parcel of the proper implementation of the immigration laws. Delaying departure of an alien until later in the 90-day period in order to continue pursuing such investigations into terrorist ties is thus entirely permissible.[9] It is true that, as a purely mechanical matter, the physical removal of an alien and his transportation might be arranged without thoroughly investigating his background and without taking the time to appropriately inform countries that may be willing to accept him about the results of our

[9] We note that the INS appears to agree in principle with the understanding we have outlined here concerning the factors that are legitimately considered in effecting an alien's removal. In discussing "critical aspects of the removal process," the INS has stated as follows:

> It is clearly a legitimate governmental interest that the INS communicate with other law enforcement agencies, both domestic and foreign, and make sure that a particular alien is not wanted for prosecution or needed as part of an investigation, in which case the alien could be transferred into the legal custody of another law enforcement agency. In the context of the investigation into the September 11, 2001 attacks on the Pentagon and the World Trade Center, the United States and the country of removal also have a legitimate interest *in ensuring to the extent possible that a particular alien has no connection with any terrorist organization or activity.*

INS Memorandum at 4 (emphasis added). The full scope of the conclusions that the INS drew from this analysis is not entirely clear. As the text above explains, we conclude that if investigations into an alien's terrorist connections are ongoing during the 90-day removal period, postponing removal until later in the period in order to permit such investigations to continue is permissible. Such investigations are legitimately related to effectuating the removal properly under the immigration laws.

investigations. But there can be no question that time spent on such efforts is nevertheless reasonably related to the enforcement of the immigration laws.

## III.

Your Office has also asked us to determine whether (and under what circumstances) the Attorney General may decide to take longer than the 90-day removal period to remove an alien even where it would be logistically possible to accomplish the removal before the expiration of the 90 days. We conclude, under either of two alternative readings of the statute, that at least certain categories of removable aliens may be held by the INS beyond the 90-day removal period, at least where there are reasons for the delay that are related to carrying out the immigration laws. We note, however, that under the Supreme Court's decision in *Zadvydas*, an obligation to act with "reasonable dispatch" will attach at some point after the expiration of the 90-day removal period.

### A.

Section 241(a) of the INA directs that the Attorney General "shall remove" aliens within 90 days of the date on which they are ordered removed. INA § 241(a)(1)(A). It also indicates, however, that section 241 elsewhere provides exceptions to that general rule. *Id.*[10] Section 241(a)(6) on its face provides such an exception. It states that "[a]n alien ordered removed who is inadmissible under section 212 [1182], removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [1227] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."

The plain text of the provision expressly states, in language indicating a grant of authority, that listed classes of aliens "may be detained beyond the removal period." By its terms it thus grants the Attorney General the power to refrain from removing an alien—and instead to keep him in detention—after the removal period has expired. The statute does not provide any preconditions for the exercise of this authority, other than that the alien must belong to one of the listed categories. Thus, in the *Zadvydas* litigation the United States took the position that "by using the term 'may,' Congress committed to the discretion of the Attorney General the ultimate decision whether to continue to detain such an alien and, if so, in what circumstances and for how long." Brief for the Petitioners, *Ashcroft v. Ma*, 533 U.S. 678 (2001) (No. 00-38), 2000 WL 1784982, at *22 (filed Nov. 24, 2000).

[10] The provision reads: "Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . . ."

Nothing in the Supreme Court's decision in *Zadvydas* casts any doubt on the validity of the plain-text reading of section 241(a)(6) as an express authorization for the Attorney General to detain—and thus refrain from removing—the listed classes of aliens beyond the removal period. The *Zadvydas* Court held that it would raise serious constitutional questions for Congress to authorize the *indefinite* detention of aliens falling into the listed classes. It thus read into the statute an implicit limitation on the allowable *duration* of post-removal-period detention. 533 U.S. at 689 ("the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States"). The Court also implied that detention beyond the 90-day removal period must be in furtherance of removal-related purposes, as it stated that the reasonableness of a detention should be measured "primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal." *Id.* at 699. Nothing in the Court's decision, however, calls into question the central point that section 241(a)(6) constitutes an express source of authority to detain aliens in the listed classes beyond the removal period, albeit subject to the above limitations.

This plain-text reading, moreover, does not lead to an absurd or an unconstitutional result. The statute limits the authority to prolong detention beyond the removal period to particular classes of aliens designated by Congress. The aliens listed in the statute include aliens who were never legally admitted to the country, INA § 212, aliens who violate their nonimmigrant status or their conditions of entry, *id.* § 237(a)(1)(C), criminal aliens, *id.* § 237(a)(2), aliens who are a potential threat to national security, *id.* § 237(a)(4), and aliens deemed by the Attorney General to constitute a flight risk or a danger to the community, *id.* § 241(a)(6). Congress could reasonably have anticipated that in many instances additional time beyond the 90-day removal period would be required to remove these classes of aliens, perhaps because of heightened security concerns, the need to conduct especially thorough background investigations, or the difficulty that might be encountered in finding foreign countries willing to accept such aliens. *Zadvydas* confirms the constitutionality of holding such aliens beyond the 90-day removal period, and establishes that it is constitutionally permissible to hold aliens in confinement "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Our plain text reading of section 241(a)(6) is thus constitutionally unproblematic.

It might be argued that section 241(a)(6) does not itself constitute an exception to the 90-day rule, but rather merely empowers the Attorney General to *detain*, rather than *release*, aliens who *happen*, for some other reason, to still be in the country at the expiration of the 90-day removal period (for example, because no country would accept them or because their removal was delayed based upon some other source of authority that provides an exception to the command to remove aliens within 90 days). Under this view, section 241(a)(6) would be understood as a parallel provision to section 241(a)(3). Section 241(a)(3) gives

authority to impose supervised release when it happens that an alien has not been removed within the 90-day period. Section 241(a)(6), the argument would go, should be understood as simply a parallel authority to detain the alien in the same circumstance. The difficulty with that approach to the statute is that the two sections are not drafted in parallel terms. Congress demonstrated in enacting section 241(a)(3) that it knows how to phrase language that does not grant an authority to delay removal of an alien beyond the 90-day period, but at the same time does give a power that can be exercised when it happens (for some other reason) that an alien has not been removed by the deadline. Section 241(a)(3) empowers the Attorney General to impose terms of supervised release on an alien "[i]f the alien does not leave or is not removed within the removal period." The quoted language makes it clear that section 241(a)(3) does not itself constitute authorization to delay removal beyond the removal period, but rather merely establishes an authority to impose supervised release in a certain situation—the situation where it happens that alien has not been removed within the 90 days. The reasons *why* the alien has not been removed are not specified, and presumably could include the impossibility of removal or the exercise of some *other* authority to delay removal. The absence of similar conditional language triggering the application of section 241(a)(6)—just three paragraphs later in the same subsection—is a strong textual indication that section 241(a)(6) is not similarly limited. Instead, it was intended to serve as a general authorization for the Attorney General to refrain from removing the listed classes of aliens and to detain them beyond the removal period. It is well settled, after all, that "[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 and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, we note that there is further textual support for the conclusion that section 241(a)(6) cannot properly be read as applying solely to a situation where it has proven impossible to remove an alien within the 90-day removal period. Here again, Congress knows how to express such a limitation when it wants to impose one, and it did so in the very next subsection of the statute. Section 241(a)(7) allows the Attorney General to authorize employment for those aliens who, although ordered removed, "cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien." That provision explicitly limits a grant of employment authorization to situations where it is impossible to remove an alien because no country is willing to accept him. The absence of similar language from section 241(a)(6) demonstrates that Congress did not intend similarly to limit the Attorney General's discretion in determining when and under what circumstances to detain aliens falling within the listed classes beyond the 90-day removal period.

**B.**

Even if section 241(a)(6) did *not* authorize the Attorney General to delay removal of an alien beyond the removal period and instead provided solely authority to detain aliens who happen, for some other reasons, to still be in the country after the removal period, we would still conclude that the Attorney General has statutory authority to delay removal of at least some aliens until beyond the 90-day deadline.

We start with the observation that the text of section 241 makes it clear that Congress did not intend to obligate the Attorney General to remove aliens within the removal period in *all* instances. Despite the mandatory language directing that the Attorney General "shall remove" aliens within the removal period, numerous provisions in section 241 expressly contemplate that aliens who have been ordered removed will still be in the country after the expiration of the removal period. For example, as noted above, section 241(a)(3) establishes standards for supervised release of aliens that apply "[i]f the alien does not leave or is not removed within the removal period." Similarly, under the reading of section 241(a)(6) that we are assuming for this portion of our analysis, that provision provides authority for the Attorney General to detain an alien who has not been removed within the removal period. Both of these provisions assume a situation in which an alien has not been removed by the end of the removal period. They would make no sense if the INA imposed an ironclad legal obligation to effect the removal of all aliens before the removal period ended. Similarly, section 241(a)(7) permits the Attorney General to grant work authorizations to aliens who have been ordered removed and applies only in limited circumstances (such as where no country will accept the alien) that suggest the alien will be in the country well beyond the 90 days.

Other provisions in section 241 reinforce the conclusion that Congress understood that, in at least some instances, aliens would not be removed within the removal period. Section 241(b) establishes a detailed decision tree that the Attorney General must follow in determining to which country an alien should be removed. In some instances, the statute contemplates that the Attorney General may have to negotiate sequentially with as many as nine or more separate countries to secure permission to remove an alien, with each round of negotiations taking as many as 30 days.[11] *See* INA § 241(b)(2). It might simply be impossible to

[11] For example, an alien who is to be removed under section 241(b)(2) first has the opportunity to designate the country to which he would like to be removed. *See* INA § 241(b)(2)(A). Once the alien has designated a country, that country is accorded a minimum of 30 days to decide whether to accept the alien. *See* INA § 241(b)(2)(C)(ii). The Attorney General may also override the alien's designation if he determines that removing the alien to the designated country would be "prejudicial to the United States." *See* INA § 241(b)(2)(C)(iv). If the designated country declines to accept the alien, or if the Attorney General overrides the designation, the Attorney General is instructed by the statute to attempt to remove the alien to the country of his nationality or citizenship. *See* INA § 241(b)(2)(D). That country is then accorded a presumptive 30 days by the statute to decide whether to accept the alien, but here the Attorney General is further vested with discretion to alter that time period, raising the

complete this entire process within the 90-day removal period, even without taking into account the time that the Attorney General and his agents must devote to such administrative tasks as securing necessary travel documents and making appropriate security arrangements. Thus, as the Supreme Court acknowledged in *Zadvydas*, "we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time." 533 U.S. at 701.

While the text of section 241 thus makes it clear that there may be instances in which an alien is not removed within the removal period, that in itself does not explain the circumstances that would make it permissible for the Attorney General to fail to accomplish removal within the allotted time. The discussion above does suggest one such circumstance—namely, the situation where it is simply not possible to remove an alien within 90 days because a country has not yet been found that will accept him. As explained above, the detailed decision tree established in section 241(b) sets out a process for finding a country of removal that has various timing provisions built in and that may very well take more than 90 days to complete in some cases. And section 241(a)(7), in permitting the Attorney General to grant employment authorization in some circumstances, acknowledges that there may be instances in which "the alien cannot be removed due to the refusal of all countries" to accept him. It is significant, however, that the statute nowhere provides an express exception to the command to remove aliens within 90 days for such cases of impossibility. Instead, that exception must be implied based on the explicit textual references acknowledging that aliens may, in fact, be in the country past the 90-day period, the nature of the process Congress established for choosing the country of removal (a process that, on its face, may take longer than 90 days), and the assumption that Congress would not extend its command about timing to require the Attorney General to do the impossible.

The question here is whether a similar exception may also be implied under the statute that would permit the Attorney General under certain conditions to *choose* to delay removal of an alien even where it would be possible to remove him by the deadline. It could be argued that impossibility of removal—a circumstance beyond

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possibility that this step could take even longer. *See* INA § 241(b)(2)(D)(i). If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* INA § 241(b)(2)(E)(i)–(vi). Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time—presumably 30 days—to decide whether to accept or reject the alien. Finally, if none of the six listed countries is willing to accept the alien, or if the Attorney General decides that it would be "inadvisable" to send the alien to any of the listed countries that is willing to accept him, the Attorney General is instructed to remove the alien to any country of the Attorney General's choice whose government is willing to accept the alien. *See* INA § 241(b)(2)(E)(vii). Needless to say, following this decision tree through to its very last step—which Congress must have contemplated would be necessary in at least some cases—would take considerably longer than the 90 days allotted to the Attorney General by section 241(a)(1)(A).

the Attorney General's control—is the *only* circumstance that makes it permissible for the Attorney General to fail to accomplish removal by the 90-day mark. Such a limited exception to the 90-day rule, however, would not be consistent with the nature of the decisions that are entrusted to the Attorney General under the immigration laws. Rather, a similar exception to the 90-day deadline should be understood as implicit in the statute where the time deadline would conflict with the Attorney General's ability properly to enforce the immigration laws, taking into account the full range of considerations he is charged with weighing in accomplishing removal of an alien. The Attorney General is charged by different provisions of section 241, for example, with determining whether it would be "prejudicial to the United States" to remove an alien to the country of his choosing, INA § 241(b)(2)(C)(iv), and with determining whether it would be "inadvisable" to remove aliens to other countries designated by the statutory decision tree, *id.* §§ 241(b)(1)(C)(iv), 241(b)(2)(E)(vii), 241(b)(2)(F). *Cf.* INA § 241(a)(7)(B) (noting circumstances in which Attorney General may make a finding that "removal of the alien is otherwise impracticable or contrary to the public interest"). As explained above, in making these and other similar determinations an essential part of the operation of the immigration laws, Congress has embedded considerations of foreign policy and national security in the decisions that the Attorney General must make in accomplishing the removal of aliens. *See Zadvydas*, 533 U.S. at 700–01. And even where a specific statutory determination is not required, in any situation involving removal of an alien with terrorist connections, weighty considerations of foreign policy and national security bear upon efforts to provide the fullest information possible to the receiving country to promote both its security and the security of the United States. At other times, the health and well-being of an alien, including human rights that are protected by the United States' treaty obligations, must be considered. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20 (1988); INA § 241(b)(3)(A).

In entrusting the Attorney General with the responsibility to make determinations that could have such serious implications, Congress surely did not intend to require him to make determinations in undue haste and without taking the necessary time to conduct thorough investigations, seriously deliberate, confer with other executive agencies, and make an informed decision. If the 90-day deadline were considered an inexorable command, however, it might require precisely such uninformed decision-making. For example, under the decision tree provided by section 241(b), a country willing to accept a particular alien might not be found until late in the removal period, and the Attorney General might then be faced with deciding whether it would be "inadvisable" to remove the alien to that particular country in a matter of days. Where the Attorney General has such a role to perform—and particularly where his decision may rest upon grave concerns for national security—there is no reason to understand the 90-day deadline as an overriding imperative in the statute that may force a premature decision based on

incomplete information or lack of deliberation. Similarly, where the removal of an alien with terrorist connections is at stake and the United States is in the process of investigating information that, if passed along to a receiving country, could have a profound impact on the measures that country could take to ensure both its security and the national security of the United States, there is no reason for thinking that the 90-day deadline was meant to trump due deliberation on such proper considerations under the immigration laws.

In short, in our view, Congress did not intend a rigid time deadline to take precedence in situations where the proper administration of the immigration laws requires additional time. The statute gives no indication that Congress attributed any less importance to discretionary immigration-related determinations entrusted to the Attorney General and his designees than it did to non-discretionary functions such as securing travel documents and finding a country willing to accept an alien. Thus, in our view, the Attorney General is not rigidly bound by the 90-day requirement even in situations where it theoretically would be possible to remove an alien and a foreign country has already signaled its willingness to accept him.

Our conclusion that such an implicit exception to the 90-day deadline should be understood under the statute is also buttressed by the INS's longstanding conclusion that it has implied authority under the statute to refrain from removing aliens within the removal period essentially as a matter of prosecutorial discretion. *See* Memorandum to Regional Directors, etc., from Doris Meissner, Commissioner, Immigration and Naturalization Service, *Re: Exercising Prosecutorial Discretion* at 1 (Nov. 12, 2000) ("INS Prosecutorial Discretion Memorandum"). The INS exercises this discretion even with respect to "executing a removal order," *id.* at 2, despite the fact that doing so will often result in non-compliance with the directive of section 241(a)(1)(A) requiring the Attorney General to remove all aliens within 90 days of the time that a removal order becomes final.

The INS typically exercises its prosecutorial discretion with respect to the execution of final orders of removal through two means. First, 8 C.F.R. § 241.6 provides that an alien "under a final order of deportation or removal" may apply for a stay of removal by filing form I-246. The regulation further provides that "in his or her discretion and in consideration of factors listed in 8 CFR 212.5 and section 241(c) of the Act," certain INS officials "may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate." Although the statutory factors referenced by the regulation appear in provisions that apply only to aliens "applying for admission" and "arriving at a port of entry of the United States" respectively, *see* INA §§ 212(d)(5)(A), 241(c)(2), the INS appears to construe its authority to grant stays to extend more broadly to *all* aliens under a final order of deportation or removal. The instructions accompanying form I-246 state, without limitation, that "[y]ou may file this application if you have been ordered deported or removed from the United States and you wish to obtain a stay of deportation or removal under the provisions of 8 CFR 241.6." Moreover, it is clear that the regulation's cross-references to

statutory provisions are intended only to borrow lists of relevant factors to be considered, not to limit the scope of the regulation to the scope of the statutory provisions. Thus, broad stay authority exercised by the INS pursuant to 8 C.F.R. § 241.6 cannot be derived from any statutory source, but rather is derived from the INS's extra-statutory prosecutorial discretion authority. *See* INS Prosecutorial Discretion Memorandum at 6 (referring to "whether to stay an order of deportation" as one potential exercise of prosecutorial discretion).

Second, the INS may at times exercise its prosecutorial discretion authority by granting a longer-term "deferred action" with respect to the order of removal. The power to grant such deferred action has been "developed [by the INS] without express statutory authorization." 6 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 72.03[2][h] (rev. ed. 2002). Nevertheless, it has been acknowledged by, and appears to have received the blessing of, the courts. *See Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (noting that "[a]t each stage the Executive has discretion to abandon the endeavor" of immigration proceedings, at any time up to and including the execution of removal orders); *Johns v. Dep't of Justice*, 653 F.2d 884, 890 (5th Cir. 1981) ("The Attorney General is given discretion by express statutory provisions, in some situations, to ameliorate the rigidity of the deportation laws. In other instances, as the result of implied authority, he exercises discretion nowhere granted expressly. By express delegation, and by practice, the Attorney General has authorized the INS to exercise his discretion. . . . The Attorney General also determines whether (1) to refrain from (or, in administrative parlance, to defer in) executing an outstanding order of deportation, or (2) to stay the order of deportation. Although such a stay is usually designed to give a deportee a reasonable amount of time to make any necessary business or personal arrangements, both the length of and reason for the stay lie entirely within the discretion of the Attorney General or his delegate.").

The INS thus has long treated the apparent statutory mandate that aliens be removed within the removal period as having implied exceptions and has long exercised its prosecutorial discretion in such a manner as to refrain from removing aliens within the removal period. If that approach is correct (which we need not decide here), and if deferral and stay considerations such as the conservation of limited INS resources, humanitarian concerns, and law-enforcement needs constitute sufficient grounds to refrain from removing an alien within the removal period as directed by section 241(a)(1)(A), then it would seem to follow *a fortiori* that the considerations described above (which are directly relevant to the proper execution of the immigration laws) certainly provide a sufficient basis for a similar implicit exception from the 90-day removal deadline.

Thus, we conclude that the statute permits the Attorney General to delay the removal of an alien beyond the removal period when the failure to effect removal is directly related to the administration of the immigration laws and policies of the United States. This does not give the Attorney General carte blanche to delay an

alien's removal excessively. The delay must be based upon reasons related to the proper implementation of the immigration laws. And as the Court established in *Zadvydas*, where the alien is detained, the Attorney General must complete the removal process within "a period reasonably *necessary* to secure removal," 533 U.S. at 699–700 (emphasis added), a period that the Court concluded presumptively runs for 180 days.[12] This reading of the statute accords the Attorney General the time that he reasonably requires to carry out his immigration-related duties thoroughly and effectively. We could not purport here to define in the abstract a comprehensive list of all the activities that are related to the enforcement of the immigration laws and the completion of which could justify delaying an alien's removal beyond the 90-day time period. At a minimum, delays in removal that are attributable to actions taken by the Attorney General for the purposes discussed above relating to delays *within* the 90-day period—namely, investigating whether and to what extent an alien has terrorist connections—satisfy this standard.

Whether an alien can be detained after the expiration of the 90-day removal period is determined by section 241(a)(6). As explained above, under the reading of section 241(a)(6) that we have assumed for purposes of this portion of our analysis, that provision authorizes the Attorney General to detain aliens who fall into the listed classes and who, despite an order of removal, are still in the country beyond the removal period. Among the classes of aliens who may be detained are aliens who pose a threat to national security or the foreign policy of the United States as set forth in section 237(a)(4) and aliens who are otherwise determined by the Attorney General to be a risk to the community or unlikely to comply with an order of removal. Again, as noted above, *Zadvydas* makes clear that if an alien is detained pending removal beyond the removal period, the Attorney General must act within a period "reasonably *necessary* to secure removal." *Zadvydas*, 533 U.S. at 699–700 (emphasis added). Presumptively, a reasonable period lasts for six months, but the Court made clear that in cases involving suspected terrorism, the same limitations would likely not apply. We cannot attempt here to provide bright-line guidance in the abstract concerning the permissible duration of detention. That may well depend on facts in a particular case.

PATRICK F. PHILBIN
*Deputy Assistant Attorney General*
*Office of Legal Counsel*

[12] We address here solely a decision to refrain from removing an alien by the 90-day deadline with a view to effecting removal at a later date. A decision in the exercise of prosecutorial discretion not to execute an order of removal at all need not be subject to the same limitations and might be subject to almost absolute discretion of the Attorney General. *See generally* INS Prosecutorial Discretion Memorandum; *see also Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483 (1999) ("[a]t each stage the Executive has discretion to abandon the endeavor" of pursuing removal). We express no view on that issue here.

# NLRB Quorum Requirements

The National Labor Relations Board may issue decisions even when only two of its five seats are filled, if the Board, at a time when it has at least three members, delegates all its powers to a three-member group and the two remaining members are part of this group and both participate in the decisions.

March 4, 2003

MEMORANDUM OPINION FOR THE SOLICITOR
NATIONAL LABOR RELATIONS BOARD

Your office has asked for our opinion whether, having delegated all of its powers to a group of three members, the National Labor Relations Board ("Board") may issue decisions and orders in unfair labor practice and representation cases once three of the five seats on the Board have become vacant.[1] We believe that the Board may issue such decisions and orders if the two remaining members are part of the three-member group to which the Board delegated all of its powers and if they both participate in such decisions and orders.[*]

## I.

The Board consists of five members, who are appointed by the President with the advice and consent of the Senate and serve staggered terms of five years. 29 U.S.C. § 153(a) (2000). The Board may "delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* § 153(b). Although a "vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board," the Board is subject to quorum requirements: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to" the provision on delegation to groups of three or more members. *Id.*

The "primary function of the Board is to adjudicate any contested issues that arise in . . . unfair labor practice and representation cases, i.e. to issue final decisions and orders in the cases, usually after an initial or recommended decision has been issued by an administrative law judge (in unfair labor practice cases), or by a hearing officer or regional director (in representation cases)." Board Letter at

[1] Letter for Jay Bybee, Assistant Attorney General, Office of Legal Counsel, from Henry S. Breiteneicher, Acting Solicitor, National Labor Relations Board, *Re: Request for OLC Opinion* (May 16, 2002) ("Board Letter"). In accordance with our Office's policies, the Board has agreed to be bound by the present opinion. *Id.* at 7.

[*] Editor's Note: In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2640 (2010), the Supreme Court reached a contrary conclusion, interpreting section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), to require "that the delegee group [of Board members] *maintain* a membership of three in order for the delegation to remain valid" (emphasis in original).

3–4 (footnotes omitted); *see* 29 U.S.C. §§ 158, 159 (2000). As a matter of prudence, when the membership on the Board has fallen to two members, the Board has not issued decisions and orders in such cases. Board Letter at 2. The Board has not attempted to resolve whether a Board with three serving members could delegate its powers to itself as a three-member group and, when the membership of the Board and of the group fell to two, continue to issue decisions and orders on the theory that a quorum of two for the three-member group would remain. *See id.* at 2–3.[2]

## II.

In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.

### A.

The statute permits the Board to "delegate to any group of three . . . members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). In the proposed arrangement, the three remaining members of the Board would constitute themselves a "group" of the Board and would delegate to that group "all of the [Board's] powers." The statute further declares that, where the Board has delegated power to a group of three or more members, a quorum of the group shall be two members. *Id.* The provision for a two-member quorum of such a group is an express exception to the requirement that a quorum of the Board shall be three members: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated" by the Board. *Id.* Moreover, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise *all* of the powers of the Board." *Id.* (emphasis added).[3] We therefore conclude that the plain terms of section 153(b) provide that the Board could form a "group" that could exercise all of the Board's powers as long as it had a quorum of two members.

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[2] The Board Letter might be read to leave open the possibility that the last two members, even without a delegation from three members, could act as a group with a two-member quorum. Because only "[t]he Board is authorized to delegate to any group of three or more members any or all of [its] powers" and "three members of the Board shall, at all times, constitute a quorum of the Board," 29 U.S.C. § 153(b), it is unclear how the remaining two members could take action in those circumstances.

[3] In the construction of an Act of Congress, "unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1 (2000). Thus, the provision under which "[a] vacancy in the Board shall not impair the right of the remaining members," 29 U.S.C. § 153(b), also applies to more than one vacancy, as long as the quorum requirement is met. *Cf. R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (interpreting term "vacancies").

There is judicial authority for reading this statute to mean that the departure of one member of a three-member group designated by the Board would not prevent the remaining two members from acting. In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit upheld the decision of a three-member group when one member's resignation had become effective on the day that the group's decision had been issued. The court ruled that even if the resignation precluded the member from taking part in the decision, "a decision by two members of the panel would still be binding." *Id.* at 122. The court relied specifically on section 153(b)'s provision that two members of a group to which the Board has delegated powers shall constitute a quorum. *Id*. (referring to section 153(b) as section 3(b) of the National Labor Relations Act). In defining the term "quorum," the court drew an analogy to cases where courts having three members "have issued decisions by a quorum of two judges when the third died or was ill." *Id.* (citations omitted). In these cases, "[c]ourts have interpreted 'quorum' to mean the 'number of the members of the court as may legally transact judicial business.'" *Id.* (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)). Applying the analogy to the Board, the Ninth Circuit held that "[u]nder the view that 'quorum' means the number of members that may legally transact business, the Board's decision in this case is valid . . . because a 'quorum' of two panel members supported the decision." *Id.* The resignation of one member thus did not take away the remaining members' power to act.

We note that the legislative history of the statute, though far from exact on this point, is consistent with the view that delegations to groups of members may be used to ensure the Board's capacity to accomplish its business—a capacity that would otherwise be destroyed in the circumstances you have posited. The provision on delegations to groups of three or more members was first enacted in 1947 as part of the Taft-Hartley Act. The bill, as passed by the House, provided for a Board of three members—the same number as under prior law. *See* 93 Cong. Rec. 3549 (1947). The Senate bill called for expanding the Board to seven members, of whom four would be a quorum, and allowing delegation to any group of three members, of whom two would be a quorum. *See* S. Rep. No. 80-105, at 33 (1947). The purpose of this arrangement was to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with the problems of administration[,] personnel, expenditures, and the preparation of the budget." *Id.* at 8. The conference committee, without giving any reasons, settled on a Board of five members, but retained the provisions for delegations to groups of three. H.R. Conf. Rep. No. 80-510, at 37 (1947). The intent thus seems to have been generally to enable the Board to handle more cases by dividing itself into panels. As the District of Columbia Circuit declared in a case upholding the National Mediation Board's delegation of its authority to a single member expected to remain in office, "it would seem that if the [National Mediation] Board can use its authority to delegate in order to

operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1340 n.26 (D.C. Cir. 1983).[4]

**B.**

We recognize that, here, the Board would be creating a three-member "group" with the intent that it operate as a two-member group upon the departure of the third member. In *Photo-Sonics*, where the Ninth Circuit upheld the decision of a group whose membership had fallen to two, the Board evidently had not created the three-member group with the intent that it function with only two members, and there appears even to have been a dispute whether in fact only two members of the group had participated in the decision. 678 F.2d at 122. Furthermore, in *Photo-Sonics*, the Board as a whole continued to have four members, even after one member of the "group" resigned. *See* 254 Decisions and Orders of the National Labor Relations Board, at III (1982). Here, the Board itself would lack its quorum of three members, and the proposed arrangement would be designed with the purpose of dealing with that situation.

Nevertheless, the statute provides that once a delegation is made to a group of three or more members, the quorum of the group becomes two. It imposes no requirement that the group continue to have three members, as long as the two-member quorum continues. Furthermore, even if the three-member quorum of the Board as a whole no longer exists, a prior delegation of the Board would remain valid, because a vacancy in the position of a delegating authority does not invalidate prior delegations of institutional power by that authority. *See, e.g.*, *Yardmasters*, 721 F.2d at 1343; *Champaign Cnty. v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979); *but see Yardmasters*, 721 F.2d at 1346–47 (Wald, J., dissenting). In addition, when the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a "group" in cases where one member will be disqualified, and then proceeding to a decision with a quorum of the two members able to participate. Board Letter at 5–6. This practice suggests that three-member groups may be constituted even when it is foreseen that only two members will actually participate in a decision.

We also recognize that our conclusion arguably is in tension with dictum in *Yardmasters*. There, a divided panel of the District of Columbia Circuit held that a

[4] *But cf. Hunter v. Nat'l Mediation Bd.*, 754 F.2d 1496, 1498 n.1 (9th Cir. 1985) (because the final administrative action in the case was taken by a quorum of the NMB, the court does not "reach the question of the limits of NMB authority to delegate powers in the event of . . . vacancies" and "adopt[s] the rationale of *Yardmasters* only insofar as necessary for [the] conclusion that interim actions by [the single Board member] did not affect the ultimate validity" of the NMB's action); *Scheduled Skyways, Inc. v. Nat'l Mediation Bd.*, 738 F.2d 339, 341 (8th Cir.) (the "question of one-member certification" had become moot, and the court did not reach the issue), *appeal dismissed*, 746 F.2d 456 (1984).

single member of the National Mediation Board ("NMB"), acting under a delegation, could exercise the powers of that body when vacancies on the NMB temporarily had deprived it of its statutory quorum. The court ruled that the statutory provision allowing for delegation did not limit the powers that could be delegated; that the loss of a quorum on the NMB did not vitiate the delegation, because the statute provided that vacancies on the NMB would not affect the powers of the remaining members; and that the delegation did not conflict with the quorum requirement, because the statutory provision on delegation provided an independent mode for the NMB to conduct its business, apart from transacting business at NMB meetings. In answering the dissenting judge's argument that a single member could abuse the powers vested in the NMB, the court stressed that, "[u]nlike the National Labor Relations Board, the [NMB] is not principally engaged in substantive adjudications" and "does not adjudicate unfair labor practices or seek to enforce individual rights under [its governing statute]." 721 F.2d at 1345. The court might thus be understood to have disapproved of the use of delegations to deal with the lack of a quorum where an agency exercises the sort of substantive power that is vested in the Board. The court, however, did not analyze the statute applicable to the Board, and, under this statute, there is a separate *quorum* requirement for a three-member group. The arrangement that would be used to deal with vacancies on the Board, therefore, would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum. The possible abuse of the delegation power that the dissenting judge raised in *Yardmasters*, and the majority sought to avoid, would not arise under the statute governing the Board.

M. EDWARD WHELAN III
*Principal Deputy Assistant Attorney General*
*Office of Legal Counsel*

# Scope of the Attorney General's Authority to Assign Duties Under 21 U.S.C. § 878(a)(5)

Under 21 U.S.C. § 878(a)(5), the Attorney General may authorize the Drug Enforcement Administration to investigate possible violations of federal law, even if those violations do not concern the narcotics laws.

March 24, 2003

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This memorandum will confirm our oral advice that, under 21 U.S.C. § 878(a)(5) (2000), the Attorney General may authorize the Drug Enforcement Administration ("DEA") to investigate possible violations of federal criminal law, whether or not they arise from investigations of possible narcotics violations. Reaching this conclusion, we disavow an earlier opinion in which our Office arrived at the contrary result. Memorandum for George W. Calhoun, Senior Counsel, Office of the Associate Attorney General, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of State and Local Law Enforcement Officers Under 21 U.S.C. 878* (June 29, 1988) ("1988 Opinion").

Under 21 U.S.C. § 878(a), the Attorney General may authorize any officer or employee of the DEA or any state or local law enforcement officer to undertake the following activities:

> (1) carry firearms;
>
> (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
>
> (4) make seizures of property pursuant to the provisions of this subchapter; and
>
> (5) perform such other law enforcement duties as the Attorney General may designate.

Under the general delegation of the Attorney General's powers in 28 C.F.R. § 0.15 (2002), you may exercise the Attorney General's authority under subsection (a)(5)

to enable the DEA to "perform such other law enforcement duties as the Attorney General may designate." The DEA asked you to approve its participation in the investigation of possible federal crimes relating to a series of killings by a sniper in the Washington, D.C., metropolitan area.

Our 1988 Opinion concluded that "section 878(a)(5) pertains to general law enforcement work which, while not limited to the investigation of the drug laws, nevertheless arises from or is supplementary to it." 1988 Opinion at 3; *see also* Memorandum for Arnold I. Burns, Deputy Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Federal Bureau of Investigation (FBI) Authority to Deputize State and Local Law Enforcement Officers in Drug Enforcement Investigations* (July 24, 1987) (section 878 enables the DEA officers and employees and state and local law enforcement officers to "perform other law enforcement duties in controlled substance investigations as determined by the Attorney General"). We based this conclusion on the "placement [of section 878] within the Comprehensive Drug Abuse Prevention and Control Act." *Id.* We also argued that the legislative history of the provision "is not inconsistent with this conclusion." *Id.* Although the 1988 Opinion directly addressed the Attorney General's conferring authority on state and local law enforcement officials, its reasoning was equally applicable to grants of authority to the DEA; and indeed the 1988 Opinion cited, in support of its conclusion, "the established principle that a *federal* agency is precluded from using appropriated funds to finance activities that lie outside of that agency's statutory purpose." *Id.* at 3 n.3 (emphasis added; citation omitted). Here, because the sniper investigation has no known link to any drug offense, the 1988 Opinion would preclude authorizing the DEA's participation under section 878.[1]

Section 878(a)(5) permits the Attorney General to assign the DEA "such other law enforcement duties as the Attorney General may designate." By its terms, the provision does not limit these "law enforcement duties" to narcotics cases, and "[a]bsent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive." *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In its breadth, subsection (a)(5) contrasts with subsection (a)(4), which specifically refers to narcotics offenses by stating that the Attorney General may authorize officials to "make seizures of property pursuant to the provisions of this subchapter." It contrasts, too, with various other provisions of the same subchapter. *See* 21 U.S.C. §§ 871(a) (2000) (delegation of any "functions under this subchapter"); 871(b) (authority to issue rules "for the efficient execution of [the Attorney General's] functions under this subchapter"); 871(c) (acceptance of gifts "for the purpose of

[1] We do not address whether another means might be available to enable the DEA to participate in the investigation, *see* 28 U.S.C. §§ 509 and 510 (2000), and what consequences, under appropriations law, would follow from the use of such other means.

preventing or controlling the abuse of controlled substances"); 872(a) (2000) (educational and research programs relating to laws concerning drugs). "'[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.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The language of section 878(a)(5) thus gives no warrant for restricting the provision to the investigation of offenses connected with narcotics cases.

The legislative history, moreover, confirms what the words of the statute say. According to the House Report, subsection (a)(5) "is not aimed at any particular function, but provides the Attorney General with flexibility in the utilization of enforcement personnel wherever and whenever the need arises." H. Rep. No. 91-1444, pt. I, at 53–54 (1970). The Senate Report uses similar language, although omitting the phrase "wherever and whenever the need arises." S. Rep. No. 91-613, at 30 (1969). The legislative intent was thus to give the Attorney General broad flexibility, without regard to the "particular function" to be performed.

In 1988, we relied on the "inclusion of subsection (a)(5) in the Comprehensive Drug Abuse Prevention and Control Act" to arrive at the conclusion that the provision allows the Attorney General to confer additional powers only in connection with narcotics cases. 1988 Opinion at 3. Whatever weight the inclusion of the provision in that statute would deserve if the statutory language were unclear, the clear statutory language dictates the result we reach. In 1988, we also dismissed the legislative history, by arguing that "there is no indication in the [House Committee] report that Congress intended section 878(a)(5) to give the Attorney General authority to use state and local law enforcement personnel [the subject of that opinion] for needs which did not arise in the course of a Title 21 drug investigation." 1988 Opinion at 3. By the same token, however, the legislative history in no way suggests any limitation to investigations under title 21 but instead uses language that is far more general: the authority to be conferred is "not aimed at any particular function," is intended to give the Attorney General "flexibility," and (according to the House Report) enables the Attorney General to use law enforcement personnel "wherever and whenever the need arises." The legislative history, accordingly, squares with and reinforces the statutory language.[2]

[2] At the same time Congress enacted section 878(a)(5), it broadened the existing arrest authority of DEA agents, so that they could make arrests for any offenses against the United States, not just for drug offenses. 21 U.S.C. § 878(a)(3); *see* H. Rep. No. 91-1444, pt. I, at 53. The reasoning of the 1988 Opinion would appear to limit this authority to arrests arising from offenses connected with narcotics cases. Our reasoning here, however, entails the conclusion that subsection (a)(3) is not so restricted.

We therefore believe that, under 21 U.S.C. § 878(a)(5), the Attorney General may authorize the DEA to investigate federal crimes that are unconnected to narcotics cases.

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

# Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church

The Establishment Clause does not bar the award of historic preservation grants to the Old North Church or to other active houses of worship that qualify for such assistance, and the section of the National Historic Preservation Act authorizing the provision of historic preservation assistance to religious properties listed on the National Register of Historic Places is constitutional.

April 30, 2003

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF THE INTERIOR

You have asked us whether the Establishment Clause of the First Amendment permits the Department of the Interior ("DOI") to provide grants for preservation of historic structures that, although open to the general public, are also used for religious purposes. In the National Historic Preservation Act, Congress expressly provided that DOI's authority to award grants for the preservation of properties listed in the National Register of Historic Places, *see* 16 U.S.C. § 470a(e)(3) (2002), extends to grants "for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant." *Id*. § 470a(e)(4). Accordingly, on September 27, 2002, the National Park Service ("Park Service") awarded such a grant to the Old North Church, where lanterns were hung on the eve of the Revolutionary War—"One, if by land, and two, if by sea"—signaling to Paul Revere whether the British were approaching by land or water. Shortly thereafter, however, the Park Service reversed its position, relying on a 1995 opinion of this Office advising that a reviewing court, applying then-current Establishment Clause precedent, would likely invalidate the provision of a historic preservation grant to an active church. *See Constitutionality of Awarding Historic Preservation Grants to Religious Properties*, 19 Op. O.L.C. 267 (1995) ("1995 Opinion"). You have asked whether the 1995 Opinion reflects our understanding of the law today. For the reasons set forth below, we conclude that the Establishment Clause does not bar the award of historic preservation grants to the Old North Church or other active houses of worship that qualify for such assistance, and that the section of the National Historic Preservation Act that authorizes the provision of historic preservation assistance to religious properties is constitutional.

## I.

### A.

Your request for advice involves the Save America's Treasures program ("Program"), which is administered by the Park Service working together with the States. The Program, established in 1998 pursuant to the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6 (2000), provides matching grants for preservation of "the enduring symbols of American tradition that define us as a nation." *See* Letter for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from William G. Myers III, Solicitor, Department of the Interior, at 3 (Jan. 24, 2003) ("Myers Letter"); Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 425 (2001). Matching Save America's Treasures grants are available for work on "nationally significant intellectual and cultural artifacts and nationally significant historic structures and sites." *FY 2002 Federal Save America's Treasures Grants—Guidelines and Application Instructions* at 1 ("Guidelines"), *available at* http://www.pcah.gov/sat/SAT2002.html. In a typical year, approximately 70 percent of the Save America's Treasures grants are awarded for the preservation of historic structures or sites, and 30 percent are awarded for museum and archival collections. Past grantees include Frank Lloyd Wright's Taliesin Estate in Spring Green, Wisconsin, the Star Spangled Banner at the Smithsonian Institute, Thomas Jefferson's papers at the Massachusetts Historical Society, and the ancient cliff dwellings of Mesa Verde National Park in Colorado. Myers Letter at 2. Funding for the Program is provided by the Historic Preservation Fund, which was created by the NHPA. *See* 16 U.S.C. § 470h.

Four types of entities, including both public and private institutions, are eligible to apply for Save America's Treasures grants: federal agencies that receive funding under DOI appropriations legislation; units of state and local government; federally recognized Indian tribes; and organizations that are tax-exempt under section 501(c)(3) of the Internal Revenue Code. Guidelines at 1. Representatives of the Park Service review and rank applications on the basis of extensive criteria, primarily related to historical significance.[1] Most important, as a "threshold criterion," the applicant must demonstrate the property's "national significance," as that term is defined by the Guidelines. *Id*. at 3.[2] Reduced to its essentials, this

[1] Representatives of the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute for Museum and Library Services review applications for funding of museum and archival collections under the Program.

[2] "The quality of national significance is ascribed to . . . historic properties that possess exceptional value, or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States, that possess a high degree of integrity and:

requires a showing that the property possesses "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," that it possesses "a high degree of integrity," and that it is associated with events, persons, ideas, or ideals that are especially significant in American history. *Id*. In addition, the property must have been either designated as a National Historic Landmark or listed as a place of "national significance" in the National Register of Historic Places ("National Register"), or be provisionally eligible for such designation or listing. *Id*. at 3–4.[3]

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> "That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent the broad patterns of United States history and culture and from which an understanding and appreciation of those patterns may be gained; or,
>
> "That are associated importantly with the lives of persons nationally significant in the United States history or culture; or,
>
> "That represent great historic, cultural, artistic or scholarly ideas or ideals of the American people; or,
>
> "That embody the distinguishing characteristics of a resource type
>
> > "that is exceptionally valuable for the study of a period or theme of United States history or culture; or
> >
> > "that represents a significant, distinctive and exceptional entity whose components may lack individual distinction but that collectively form an entity of exceptional historical, artistic or cultural significance (e.g., an historic district with national significance), or
> >
> > "that outstandingly commemorate or illustrate a way of life or culture; or,
>
> "That have yielded or may be likely to yield information of major importance by revealing or by shedding light upon periods or themes of United States history or culture."

Guidelines at 3.

[3] To establish a historic structure's eligibility for the National Register, an applicant must first demonstrate the building's "significance in American history, architecture, archeology, engineering, and culture" in light of its "integrity of location, design, setting, materials, workmanship, feeling, and association." 36 C.F.R. § 60.4 (2002) ("*National Register criteria for evaluation*"). Eligibility for the National Register also requires that a building be one that:

> (a) is "associated with events that have made a significant contribution to the broad patterns of our history";
>
> (b) is "associated with the lives of persons significant in our past";
>
> (c) "embod[ies] the distinctive characteristics of a type, period, or method of construction, or that represent[s] the work of a master, or that possess[es] high artistic values, or that represent[s] a significant and distinguishable entity whose components may lack individual distinction"; or
>
> (d) "ha[s] yielded, or may be likely to yield, information important in prehistory or history."

*Id*. Nominations to the National Register may be made by the State Historic Preservation Office, by federal agencies, or jointly by state and federal authorities. *See id*. §§ 60.6, 60.9, 60.10. A property may be listed in the National Register for local, regional, or national significance, but a listing for national significance must satisfy more stringent criteria.

In addition to "national significance," applicants for Save America's Treasures grants must also demonstrate that the historic property is "threatened" or "endangered," or that it has an "urgent preservation and/or conservation need." Guidelines at 3. Moreover, the proposed project "must address the threat and must have educational, interpretive, or training value and a clear public benefit (for example, historic places open for visitation or collections available for public viewing or scholarly research)." *Id*. The project must be "feasible (i.e., able to be accomplished within the proposed activities, schedule and budget described in the application), and the applicant must demonstrate ability to complete the project and match the Federal funds." *Id*. Once a project has met the threshold criterion of "national significance," the threat to the structure amounts to 30 percent of its total

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Designation as a National Historic Landmark requires satisfying more stringent criteria than those that must be satisfied for listing in the National Register. DOI regulations provide:

> The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:
>
> (1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or
>
> (2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or
>
> (3) That represent some great idea or ideal of the American people; or
>
> (4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
>
> (5) That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or
>
> (6) That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

36 C.F.R. § 65.4(a) (2002). These evaluations, while "reflect[ing] both public perceptions and professional judgments," are "undertaken by professionals, including historians, architectural historians, archeologists and anthropologists familiar with the broad range of the nation's resources and historical themes." *Id*. § 65.4. "The final decision on whether a property possesses national significance," however, "is made by the Secretary on the basis of documentation including the comments and recommendations of the public who participate in the designation process." *Id*. In addition, a property's designation as a National Historic Landmark automatically results in its being listed in the National Register. *Id*. § 60.1(b).

evaluation score; how the project addresses the threat amounts to 30 percent of its score; the educational value of the project amounts to 10 percent of its score; and the applicant's ability to meet budget and secure the non-federal matching funds amounts to 30 percent of its score. *Id*. at 4.

After the Park Service completes its ranking of applicants, a Grants Selection Panel ("Panel") further reviews the ranked applications and recommends grantees to the Secretary of the Interior. Myers Letter at 2. The Panel comprises federal employees, selected by the Park Service, with professional expertise in fields such as history, preservation, conservation, archeology, and curatorship. *Id*. In order to insulate the panel members from external influence, DOI does not disclose their identity to the public. *Id*. If the Secretary agrees with the Panel's recommendations, the Park Service informs the applicants of the results. *Id*.[4]

Applicants that qualify for a grant under the substantive criteria discussed above must also satisfy a number of administrative requirements before commencing their projects. For example, because projects funded by the Program are "undertakings" within the meaning of the Historic Preservation Act, *see* 16 U.S.C. § 470f, the Park Service requires that grant recipients consult with their State Historic Preservation Officer prior to the receipt of funds. *See* 36 C.F.R. pt. 800 (2002); Guidelines at 2. In addition, grant recipients must agree to encumber the title to their property with a 50-year covenant, enforceable by the State Historic Preservation Office (or another entity designated by the Park Service), that runs with the land and provides that the owners "shall repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places." Guidelines at 3. Finally, because Save America's Treasures grants are provided "only for the benefit of the public," "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least 12 days a year during the 50-year term of the preservation easement or covenant." *Id*.

As further conditions of assistance, Save America's Treasures grantees must also keep detailed records of their expenditures and are subject to audit by the government to ensure that the Save America's Treasures grants are spent only for designated purposes. 16 U.S.C. § 470e. The Act expressly requires grantees to maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that

[4] The Program's appropriations legislation purports to require that "all projects to be funded shall be approved by the House and Senate Committees on Appropriations prior to the commitment of grant funds," Department of the Interior and Related Agencies Appropriations Act 2002, Pub. L. No. 107-63, 115 Stat. 414, 425 (2001), and the Program's guidelines state that a list of successful applicants is forwarded "to the House and Senate Committees on Appropriations for concurrence." Guidelines at 3. This provision, however, is unenforceable. *See INS v. Chadha*, 462 U.S. 919 (1983).

portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit." *Id*. In fulfillment of these requirements, the Secretary of the Interior requires that grant recipients sign agreements that obligate them to secure matching, non-federal funds; to seek reimbursement for incurred costs (grant funds are provided after the reimbursable expenditures have been incurred); and to submit to rigorous auditing and record-keeping requirements. Myers Letter at 3. These requirements ensure that grantees do not use federal funds for unauthorized purposes.

The guidelines that currently govern applications for Save America's Treasures grants expressly bar funding of "[h]istoric properties and collections associated with active religious organizations (for example, restoration of an historic church that is still actively used as a church)." Guidelines at 2. In contrast, the NHPA provides that "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant." 16 U.S.C. § 470a(e)(4). Likewise, although current DOI regulations governing inclusion in the National Register provide that properties "owned by religious institutions or used for religious purposes" are "[o]rdinarily" deemed ineligible for the National Register, those regulations contain an exception for "religious property deriving primary significance from architectural or artistic distinction or historical importance." 36 C.F.R. § 60.4 ("*Criteria considerations*"). No such exception appears in the Program's guidelines. Thus, as the Program now stands, a religious property may be listed in the National Register or designated as a National Historic Landmark—and subjected to any regulatory requirements that may attend that designation[5]—but may not receive federal funding for preservation.

**B.**

On April 3, 2002, the Old North Foundation ("Foundation") applied to the Park Service for a Save America's Treasures grant to preserve the Old North Church in Boston, Massachusetts.[6] The Old North Church is most famously associated with

[5] Although listing on the National Register does not itself trigger any federal regulatory restrictions, numerous states and local governments impose extensive restrictions on historic properties. *See, e.g.*, Daniel R. Mandelker, *Land Use Law* §§ 11.22–11.34 (3d ed. 1993); Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 Urb. Law. 405, 409 (1998) ("Many historic preservation ordinances (or state law) require a person to obtain approval from either the local commission or the governing body of the city or county to alter a historic property, or the exterior of a structure on that property, or to place, construct, maintain, expand, or remove a structure on the property."); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city").

[6] The Foundation, a nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, was established to develop educational programs that address "issues relating to freedom in the life of

Paul Revere's ride to warn colonists of the impending arrival of British troops on the eve of the Revolutionary War. Revere arranged for a signal to be sent by lanterns hung from the Old North Church's steeple—"One, if by land, and two, if by sea." On the night of April 18, 1775, the Church's sexton, Robert Newman, climbed the steeple and hung two lanterns, signaling to the Sons of Liberty and to Revere—then crossing the Charles River toward Charleston—that the British Regulars were moving up the River to Cambridge, from which they would later march on Lexington. On reaching Charleston, Revere raced by horseback across the Middlesex countryside to notify the colonists that the British were coming—summoning the Nation's first militia. The "shot heard 'round the world" was fired the following day, commencing the Revolutionary War. *See generally* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); Henry Wadsworth Longfellow, *Paul Revere's Ride*, *in The Home Book of Verse* 2,422 (selected & arranged by Burton E. Stevenson, 9th ed. 1950). Recognizing the importance of these events, the Park Service has described the Old North Church as "an icon in American history," *see* http://www.nr.nps.gov/writeups/66000776.nl.pdf, and as "one of America's most cherished landmarks," both "[h]istorically and architecturally," *see* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance). The Church has been listed as a "religious facility" in the National Register of Historic Places since the Register's creation in 1966. It was designated as a National Historic Landmark in 1967. *See* http://tps.cr.nps.gov/nhl/detail.cfm?resourceId=585&resourceType=Building.

Construction of the Old North Church began in 1723 and was completed in 1745. Inspired by the design of Sir Christopher Wren's London churches, the Church was built in the Georgian style on a piece of pastureland near the crown of Copp's Hill, the highest elevation in the North End of Boston. *See* National Register of Historic Places Inventory—Nomination Form, Part 7 (Description); http://www.nr.nps.gov/writeups/66000776.nl.pdf (describing the Old North Church as "a superb example of colonial Georgian architecture"). The Old North Church was located close to the wharfs and warehouses of sea captains and merchants settling in the area. It contains the first maiden peal of church bells heard in North America, and its first guild of bell-ringers was formed in 1750 by Paul Revere, then a fifteen-year-old Congregationalist and founding member of the Church. *See* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); http://www.oldnorth.com/guid.htm; http://www.nps.gov/bost/Old_North_Church.htm.

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the nation," and in particular to "support the maintenance of Old North Church and its associated buildings as a symbol of freedom." Myers Letter at 3. It sought a grant award under the competitive program established by DOI's 2002 appropriations bill, which designated $30 million for historic preservation grants in fiscal year 2002. 115 Stat. at 425.

The Old North Church still contains the original window through which Robert Newman left the Church after hanging the lanterns on April 18, 1775. Although it was covered with brick in 1815, the window was rediscovered during restoration work in 1989. It now houses the Church's "Third Lantern," which was lit by President Ford on April 18, 1975, as a symbol of freedom and renewed resolve for the next century of the nation's life. Among other items of historical significance, the Church also houses the first bust of President George Washington; a plaque commemorating the 1736 visit of Charles Wesley, a preacher, hymn-writer, and co-founder of the Methodist Church; an 18th-century organ and two 18th-century chandeliers; a plaque commemorating the heroism of British Major John Pitcairn at the Battle of Bunker Hill; and the Bay Pew, which is decorated in a manner common during the early days of the Republic. *See* National Register of Historic Places Inventory—Nomination Form, Part 7 (Description); http://www.oldnorth.com/hist.htm.

The Old North Church also operates a museum and gift shop and is open to the general public for tours and other purposes from 9 a.m. to 5 p.m. daily. National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance). For example, the Church offers school groups a basic tour that provides introductory background on the Church's involvement in the American Revolution. The Old North Church also offers a "Behind the Scenes" tour that provides a more in-depth view of the Church and its history, and "Paul Revere Tonight," a dramatic presentation that focuses on the relationship between Revere and the Church. The gift shop sells hundreds of books on these and related historical topics. According to the Park Service, visiting the Old North Church "bring[s] to life the American ideals of freedom of speech, religion, government, and self-determination." *See* http://www.nps.gov/bost/; *see also* http://www.oldnorth.com/sginfo.htm#tours.

Although the Old North Church is open to the general public for many purposes, it also remains "an active Episcopal church" that is "a mission of the Episcopal Diocese of Massachusetts." *See* http://www.oldnorth.com; *see also* http://www.oldnorth.com/info.htm. The Church has approximately 150 members, and its programs and activities include adult education, choir, and various community outreaches. It holds two services on Sunday morning, worships according to the Book of Common Prayer, and administers Christian rites such as baptism. It has a dozen full- or part-time staff members. The bishop of the Diocese is the rector of the Old North Church, and he is represented by the vicar, who, acting for the bishop, oversees its activities and staff. *Id.*; *see also* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance).

The Old North Church is governed by the Corporation of Christ Church in the City of Boston. Its board includes nine members of the congregation, plus the vicar and the bishop, and meets monthly to oversee the operations of the church and the historic site. The Church's board is separate, however, from the board of

the Foundation, which comprises mostly non-church members and assists with the management of historic site programs and building preservation. *See* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); http://www.oldnorth.com/info.htm.

The Foundation sought a grant from the Park Service to prevent deterioration of the structure, to repair the Old North Church's windows, to preserve the Church's early-18th- and 19th-century glass, and to restore natural ventilation to the building. The last significant maintenance of the Church's windows occurred in 1912, and the Foundation concluded that the building would lose its remaining historic glass and suffer water leakage absent timely restoration efforts. In addition, windows that were installed in the 1970s had a deleterious effect on the original windows, by trapping moisture and heat and leading to high building temperatures during summer months. The Foundation estimated that the proposed project, which was to be completed in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties, *see* 36 C.F.R. pt. 68 (2002), would add a century or more to the expected life of the windows. Moreover, the ventilation improvements would improve the atmosphere for the numerous tourists who visit the Old North Church. Myers Letter at 3.

The Old North Church was one of 389 organizations that submitted applications for historic preservation grants in 2002. The Park Service reviewed its application and concluded that it was an "ideal candidate for a Save America's Treasures Grant, given its standing and importance in the history of America." Myers Letter at 3. On September 27, 2002, the Park Service informed the Foundation that its application had been accepted and that it would receive a grant of $317,000. Less than one month later, however, after requesting a revised budget and description of the scope of work from the Foundation, the Park Service notified the Foundation that it was withdrawing its award on the ground that the Old North Church is owned by a religious organization and used by an active religious congregation. *Id*. The Park Service based its reversal on the 1995 Opinion of this Office, which stated that "a court applying current precedent is most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause." 19 Op. O.L.C. at 273.

**C.**

The 1995 Opinion responded to an inquiry from then-Solicitor of the Department of the Interior John Leshy, who asked this Office to analyze the constitutionality of providing grants to preserve historic properties used for religious purposes. The opinion acknowledged that the question was a "very difficult one," that the line between permissible and impermissible assistance was "hard to discern," and that "the Supreme Court's jurisprudence in this area is still developing." 19 Op.

O.L.C. at 273. It concluded, however, that a reviewing court applying then-existing precedent would likely invalidate the provision of a historic preservation grant to a religious property that is actively used for worship. *Id*. at 267, 273.

The 1995 Opinion reasoned that a "two-part rule . . . govern[s] direct financial support of religious institutions." *Id*. at 268. First, it stated that direct aid may be given to "non-pervasively sectarian" religious institutions, provided the aid is not used to fund "specifically religious activity" and is "channeled exclusively to secular functions." *Id*. Second, it explained that there are institutions—"pervasively sectarian" institutions—"in which 'religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission.'" *Id*. at 269 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). Because "most if not all active houses of worship" would qualify as "pervasively sectarian" institutions, in which the "secular and religious functions" are "inextricably intertwined," the government may not provide direct aid to them "with or without restrictions," because the aid will inevitably end up advancing religion. *Id*. In addition, the 1995 Opinion reasoned, to the extent that it is possible to distinguish between the religious and secular components of a church—the difficulty of which may be compounded by the relationship between architectural design and theological doctrine—any governmental effort "to identify those elements of a house of worship that do not have 'direct religious import' could well involve the kind of 'monitoring for the subtle or overt presence of religious matter' prohibited by the Establishment Clause." *Id*. at 270. In support of this reasoning, the 1995 Opinion cited Supreme Court decisions involving direct aid to religious organizations, and in particular *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which imposed certain restrictions on the government's provision of construction, maintenance, and repair aid to properties used by religious educational institutions.

The 1995 Opinion distinguished historic preservation grants from other sorts of benefits to religious institutions that have been sustained in recent decisions on the ground that the latter were "generally available to all interested parties, on a religion-neutral and near-automatic basis." 19 Op. O.L.C. at 271 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–45 (1995); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 757–59, 763 (1995); *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 252 (1990)). As the opinion stated:

> Historic preservation grants, by contrast, do not appear to be generally available in the same sense. Properties, including religious properties, qualify for initial listing on the Historic Register only if they meet subjective criteria pertaining to architectural and artistic distinction and historical importance. Once listed, properties are eligible to compete for grants based on additional measures of "project wor-

> thiness" established by the states. Participation by pervasively sectarian institutions in this kind of competitive grant program raises special concerns, absent in cases like *Rosenberger*, *Pinette*, and *Mergens*, that application of necessarily subjective criteria may require or reflect governmental judgments about the relative value of religious enterprises.

*Id*. at 271–72.

Since 1995, this Office has given advice that casts doubt on the continuing validity of the 1995 Opinion. Most important, in 2002 we opined that it was constitutional for the Federal Emergency Management Agency ("FEMA") to provide direct federal disaster assistance for the rebuilding of the Seattle Hebrew Academy, a religious school. *See Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, 26 Op. O.L.C. 114 (2002) ("2002 Opinion"). We explained that the aid at issue was made available on the basis of neutral criteria to a broad class of beneficiaries defined without reference to religion and including not only educational institutions but a host of other public and private institutions as well. We further reasoned that the FEMA program was amenable to neutral application, and that the evidence demonstrated that FEMA exercised its discretion in a neutral manner. Thus, we concluded that provision of disaster assistance to the Academy could not be materially distinguished from aid programs that are constitutional under longstanding Supreme Court precedents establishing that religious institutions are fully entitled to receive generally available government benefits and services, such as fire and police protection. *Id.* at 122–132.

In so ruling, we expressly noted that the 1995 Opinion "did not consider whether the rule of [*Tilton* and *Nyquist*] should apply where the grants at issue are available to a wide array of nonprofit institutions, rather than being limited to educational institutions." 2002 Opinion, 26 Op. O.L.C. at 127 n.13. "[T]o the extent that the [1995 Opinion] failed to consider the possibility that the rule of *Tilton* and *Nyquist* does not apply where direct aid is more generally available than was the aid in those cases," we observed, "it does not represent our current thinking, which is set forth in this Memorandum." *Id*. In addition, we explained, "significant portions" of the reasoning of *Tilton* and *Nyquist* are "subject to serious question in light of more recent decisions." *Id*. at 126 n.13. For example, we stated that "the 'pervasively sectarian' doctrine, which comprised the basis for many of the Court's Establishment Clause decisions in the early 1970s (including *Nyquist*, 413 U.S. at 774–75), no longer enjoys the support of a majority of the Court," which now requires proof of "*actual* diversion of public support to religious uses" and rejects "presumptions of religious indoctrination." *Id*.

## II.

You asked us to determine whether the NHPA's authorization of grants to historically significant religious properties is constitutional, and in particular whether the Establishment Clause poses a barrier to the Park Service's provision of Save America's Treasures grants to religious structures such as the Old North Church. There is no Supreme Court precedent that directly controls this specific issue. For three interrelated reasons, however, we conclude that the Establishment Clause does not pose a barrier to the Park Service's provision of such aid.[7]

*First*, the federal government has an obvious and powerful interest in preserving all sites of historic significance to the nation, without regard to their religious or secular character. The context in which this issue arises distinguishes the Program from programs of aid targeted to education, which have been subjected to especially rigorous scrutiny by the Supreme Court. *Second*, eligibility for historic preservation grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. All sorts of historic structures—from private homes to government buildings—are eligible for preservation grants. *Third*, although the criteria for funding require a measure of subjective judgment, those criteria are amenable to neutral application, and there is no basis to conclude that those who administer the Program will do so in a manner that favors religious institutions. Thus, we believe that the provision of historic preservation grants to religious structures such as the Old North Church cannot be materially distinguished from the provision of disaster assistance to religious schools, which we have already approved, or from other aid programs that are constitutional under longstanding precedents establishing that religious institutions are fully entitled to receive widely available government benefits and services. For similar reasons, no reasonable observer would view the Park Service's provision

[7] Under the general framework of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), a law violates the Establishment Clause if it lacks a "secular legislative purpose," has a "primary effect" of advancing religion, or results in an "excessive entanglement" between government and religion. *See also Agostini v. Felton*, 521 U.S. 203, 232–35 (1997) (reformulating the *Lemon* test by incorporating its "entanglement" prong into its "effects" prong). As in most cases involving aid to religious institutions, the central question here is whether allowing religious structures such as the Old North Church to receive historic preservation assistance would advance religion (an "effects" inquiry), and we will focus primarily on cases that bear on that question. As for *Lemon*'s "purpose" prong, it is clear that allowing a range of historic religious and nonreligious structures to receive preservation grants serves the secular purpose of preserving our cultural heritage. *See* 16 U.S.C. § 470a(e)(4) ("[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant"). As for *Lemon*'s "entanglement" prong, there is no basis to conclude that allowing active religious structures to receive aid would "excessively entangle" church and state, since there is no more governmental monitoring of aid recipients here than in other cases in which the Court has not questioned the provision of aid under *Lemon*'s entanglement prong. *Cf., e.g.*, *Agostini*, 521 U.S. at 232–35; *Mitchell v. Helms*, 530 U.S. 793 (2000).

of a Save America's Treasures grant to an otherwise eligible religious structure as an endorsement of religion.

We explain below why these factors are sufficient to sustain the Program. If there were any remaining doubt as to its constitutionality, however, that doubt would be dispelled by the Program's numerous statutory and regulatory safeguards that ensure that federal funds are not used to advance religion. In particular, the Program contains rigorous auditing requirements to ensure that grants are spent only for authorized purposes related to historic preservation, not for the conduct of worship services. Although we do not believe that such restrictions are necessary in the context of a program involving aid made available to such a wide variety of public and private institutions, their existence further supports our conclusion that there is no constitutional infirmity here.

**A.**

As an initial matter, we believe it is important to bear in mind the context in which this constitutional question has arisen. The Park Service has a substantial interest in facilitating the preservation of *all* sites of historic significance to the nation, without regard to their religious or secular character. This interest, moreover, distinguishes the grants here from programs of aid targeted to education, which the Supreme Court has subjected to far more rigorous scrutiny than aid to other sorts of religious institutions. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (noting "particular [establishment] concerns that arise in the context of public elementary and secondary schools"); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000) (Souter, J., dissenting) (noting that "two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools"); *Nyquist*, 413 U.S. at 772. As explained in greater detail below, most of the Court's Establishment Clause decisions rendered since *Everson v. Board of Education*, 330 U.S. 1 (1947), have concerned aid provided solely to educational institutions as a class (in many cases, moreover, this aid was directed toward the educational process itself), and these decisions rest in part on the theory that aid directed solely to schools might reasonably be perceived as advancing the educational mission of those that receive it. *See, e.g.*, *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in judgment). Given that a large percentage of private schools are religious, the Court has been sensitive to the possibility that direct funding solely of schools might amount to an attempt to fund religious indoctrination. The same cannot be said where, as here, a program is available to all manner of institutions. The aid at issue here is provided in return for the benefit of public access to a broad array of historically significant properties—some public, some private, some secular, some religious. Under the Court's precedents, such programs are not subjected to the special scrutiny reserved for programs of aid targeted to schools. *See Bowen v. Kendrick*, 487 U.S. 589, 613–18 (1988).

**B.**

We regard it as especially significant that eligibility for historic preservation grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. Ever since 1947, the year of its first modern Establishment Clause decision in *Everson*, the Supreme Court has indicated that religious institutions are entitled to receive "general government services" made available on the basis of neutral criteria. 330 U.S. at 17. *Everson* held that the Establishment Clause does not bar students attending religious schools from receiving generally available school busing services provided by the government. In reaching its decision, the Court explained that even if the evenhanded provision of busing services increased the likelihood that some parents would send their children to religious schools, the same could be said of other "general state law benefits" that were even more clearly constitutional because they were equally available to all citizens and far removed from the religious function of the school. *Id*. at 16. As examples, the Court cited "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," concluding:

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

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

We believe that a Save America's Treasures grant is analogous to aid that qualifies as "general government services" approved by the Court in *Everson*. To be sure, such aid is not available to *all* citizens or buildings—and thus is not as broadly available as, say, utility services. But as we observed in the 2002 Opinion (26 Op. O.L.C. at 127), there is no principled reason why the constitutionality of an aid program should turn on whether the aid is provided to *all* citizens rather than, say, a wide array of organizations that falls somewhat short of the entire populace. There is a range of aid programs that are not as "general" as aid

provided universally, but yet are not as circumscribed as aid to education,[8] and Save America's Treasures grants admittedly fall within this middle ground. But such grants are not available only to educational institutions or, for that matter, to just a few classes of buildings. Rather, they are available to all kinds of private non-profit institutions, along with federal, state, local, and tribal governmental entities; and they may lawfully be used to rehabilitate *any* structure—be it a meeting house, a concert hall, a museum, a school, a house, a barn, a barracks, a government office building, or a church—that satisfies the generally applicable criteria for funding.[9] Accordingly, we think that the "'circumference'" of the Program can fairly be said to "'encircle[] a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.'" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J.)). As the Court explained in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Accord Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges").

Put another way, the aid here is more closely analogous to the provision of "general" government aid like that sanctioned by the Court in *Everson* (and many times since, *see, e.g.*, *Nyquist*, 413 U.S. at 781–82) than to the construction grants at issue in *Tilton* and *Nyquist*, which were available only to schools. *See Nyquist*, 413 U.S. at 782 (distinguishing more general services from construction grants on the ground that general services are "provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions" (citation omitted)); *cf.* Church Arson Prevention Act of 1996, Pub. L. No. 104-

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

[9] In this respect the Program here, viewed as a whole, is even less susceptible to religious favoritism than the FEMA program we recently considered. In the FEMA statutes, Congress made a value judgment that certain types of institutions—and only those institutions—should be eligible for federally funded rehabilitation assistance in the wake of a natural disaster. This judgment entailed a determination that certain institutions were especially worthy of support, and there was some risk (if remote) that Congress included private schools (most of which are religious) in order to channel support to religious education. There is no such risk here.

155, 110 Stat. 1392 (creating a program that provides low-income reconstruction loans to nonprofit organizations, including churches, destroyed by arson motivated by racial or religious animus). As Justice Brennan expressed the point in *Texas Monthly*: "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14–15 (plurality opinion) (footnote omitted).

*Walz v. Tax Commission*, 397 U.S. 664 (1970), strongly supports our conclusion. There the Court rejected an Establishment Clause challenge to a property tax exemption made available not only to churches, but to several other classes of nonprofit institutions, such as "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id*. at 673; *see also id*. at 667 n.1. In upholding the tax exemption, the Court relied in part upon its breadth: the exemption did "not single[] out one particular church or religious group or even churches as such," but rather was available to "a broad class of property owned by nonprofit, quasi-public corporations." *Id*. at 673. As the Court stated in reference to *Everson*, if "buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses." *Id*. at 671. Thus, just as a broad category of beneficiary institutions was sufficient to sustain the inclusion of religious institutions in the tax benefit in *Walz*—which, after all, substantially benefitted churches' *property*—we believe the breadth of eligibility for the Program here weighs heavily in favor of the constitutionality of a Save America's Treasures grant to the Old North Church.

The broad class of beneficiaries that are eligible for the Program here—including not only private non-profit groups, but state and local governmental units, Indian tribes, and numerous federal agencies, each of which may seek funding to preserve *any and all kinds* of historic structures—confirms that the Program's effect is not to advance religion. In contrast to the education-specific aid at issue in many of the foregoing cases, the historic preservation assistance provided by the Park Service serves goals entirely unrelated to inculcating religious values—namely, preservation of buildings that played an important role in our nation's history and that are (by virtue of their public or private nonprofit status) most in need of assistance. *Cf. Mitchell*, 530 U.S. at 883 (Souter, J., dissenting) ("[D]epending on the breadth of distribution, looking to evenhandedness is a way of asking whether a benefit can reasonably be seen to aid religion in fact; we do not regard the postal system as aiding religion, even though parochial schools get mail."). Indeed, although a number of churches can be expected to qualify for assistance under the Program, we do not expect that churches will

amount to a large percentage of grantees.[10] In recent years, structures preserved with funding provided by the Program include Revolutionary War barracks in Pennsylvania, a railroad complex in West Virginia, a Shaker village in New Hampshire, a courthouse in North Carolina, a theater in Massachusetts, a farmhouse and slave quarters in Maryland, a Frank Lloyd Wright home in Illinois, an art museum in Texas, a state capitol building in Nebraska, a hotel in Florida, a school in Utah, and a hospital in New York—to name just a few. The variety of structures that have been rehabilitated confirms the common sense notion that historical events happen in all sorts of places. There is no basis for concern that the Program will become a subterfuge designed to direct public money to churches, or to engage in any other sort of religious favoritism.

**C.**

This brings us to the third consideration important to the Program's constitutionality: the neutrality of the criteria for selecting Save America's Treasures grantees. In the Program here, government officials must make a number of subjective judgments about a structure's cultural importance. Initially, they must determine whether a structure is "nationally significant"—e.g., whether it possesses "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," and whether it is associated with events, persons, ideas, or ideals that are significant in American history. Guidelines at 3. Moreover, they must conclude that the structure is "threatened," that the project has "educational, interpretive, or training value," and that the project has "a clear public benefit." *Id*. Insofar as reasonable people may disagree about whether a religious structure meets these criteria, there is some potential for favoritism of religion in their application.

As noted in the 2002 Opinion (26 Op. O.L.C. at 127 n.13), we believe that the degree to which officials administering public aid have discretion to favor (or disfavor) religious institutions—and, far more important, the manner in which they exercise that discretion—are relevant to the aid's constitutionality. Ever since *Everson*, the Court has made clear that one of the core purposes of the Establishment Clause is to prevent the government from favoring religion over non-religion, 330 U.S. at 16, and aid that is made available on the basis of discretionary criteria entails a greater risk of such favoritism than, say, aid made available on a

[10] We are not suggesting that an aid program has the unlawful effect of advancing religion merely because a large number of its beneficiaries are religious in nature. The Supreme Court has repeatedly repudiated the view that the percentage of a program's religious beneficiaries is relevant to its constitutionality under the Establishment Clause. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002) (stating that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations"); *accord Agostini*, 521 U.S. at 229; *Mueller v. Allen*, 463 U.S. 388, 391, 401 (1983); *Mitchell*, 530 U.S. at 812 n.6 (plurality opinion).

per capita basis. For example, a program that authorized government officials to dole out aid solely on the basis of their assessment of what organizations' programs would best serve "the public interest" would entail a significant risk of favoritism.

Without more, however, the fact that an organization's eligibility for aid depends in part on satisfying subjective criteria is insufficient to invalidate the aid. Provided the criteria are amenable to neutral application, the program at issue is facially valid. *See generally United States v. Salerno*, 481 U.S. 739, 745 (1987) (a facial challenge will be sustained only if "no set of circumstances exists under which the Act would be valid"). As Judge Posner has explained: "[t]o exclude [a religious organization] from . . . competition [for government contracts or assistance] on the basis of a speculative fear that [government] officers might recommend [a] program because of their own . . . faith would involve the sacrifice of a real good to avoid a conjectured bad. It would be perverse if the Constitution required this result." *Freedom From Religion Found. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003). Thus, while the exercise of religious favoritism in applying the eligibility criteria for a program would constitute an as-applied constitutional violation of the program, it would not invalidate the program on its face. *Id*. (explaining that the "danger" that determining eligibility for a program "would involve discretionary judgments possibly influenced by the religious preferences of the agency or public employees doing the rating" will not invalidate a program unless the danger has "materialized"). There is no reason to presume that, based on a neutral application of subjective criteria, religious institutions will never be qualified to receive aid.

Each of the eligibility criteria here is plainly amenable to neutral application. First, the criterion of "national significance"—which in turn depends on such factors as whether the structure has "exceptional value or quality in illustrating [the nation's] intellectual and cultural heritage," or whether it is associated with events or persons that are significant in American history—is predominantly a matter of architectural and historical significance. To be sure, there may be cases at the margins where the historians and other experts who assess applications for Save America's Treasures grants disagree about the importance of a building in our nation's history. But we understand that there are many more cases where there is little to no difference of opinion. It is hard to imagine anyone disputing, for example, that projects to preserve National Historic Landmarks such as Mount Vernon and Monticello are worthy of federal support on account of those homes' association with Presidents Washington and Jefferson. Similarly, there will be cases in which the experts will agree that a church holds a special place in our nation's history, whether because of its association with historic events (like the civil rights movement) or historic figures (like Paul Revere). Frank Lloyd Wright's Unity Temple in Oak Park, Illinois may have an active congregation and hold weekly worship services, but that does not diminish its significance as a

model of the Prairie School of architectural design or as a contribution to 20th-century American architecture generally. Nor do we think many would question the Park Service's conclusion that Old North Church is an "ideal candidate for a Save America's Treasures Grant, given its standing and importance in the history of America." Myers Letter at 3.

The second criterion that must be satisfied before an applicant may receive assistance—whether a structure is "threatened," "endangered," or otherwise has an "urgent preservation and/or conservation need" (Guidelines at 3)—is quite amenable to neutral application. Based on our review of the Guidelines and our discussions with DOI officials, we understand that Park Service officials make this assessment primarily on the basis of the physical condition of the structure and the financial resources available to the applicant. Such an inquiry is strictly secular and does not involve the government in an assessment of a structure's religious value. The same is true of the requirement that a project be "feasible." This requires only that the applicant be "able to . . . accomplis[h] [the project] within the proposed activities, schedule and budget described in the application," and to "match the Federal funds." *Id*.

The third main criterion for receiving assistance—whether the project has "educational, interpretive, or training value"—is somewhat more subjective, but the fact that a structure is used for religious purposes or closely associated with religious activities does not mean that its preservation lacks educational value, particularly when that value is based on its role in U.S. history. Among the thousands of items in its collection, the National Gallery of Art houses 581 works containing explicitly religious themes, including at least 107 works depicting the crucifixion of Jesus; 32 works depicting various prophetic figures such as Elijah and Jeremiah; and works such as Marc Chagall's "Jew with a Torah." *See* http://www.nga.gov/collection/srchsub.htm (subject search: religious); http://www.nga.gov/search/search.htm#artist (title search: crucifixion). Display of these works, many of which were created for specific religious institutions or events, may "advance" religion in the sense that exposure to any artistic work might influence the viewer. But the works are chosen on the basis of their artistic merit and historical significance, and they serve to educate the public regarding a certain genre of artistic expression or period in world history. Similarly, throughout our nation's history, religion and people of faith have influenced societal views on issues ranging from the abolition of slavery to women's suffrage to the justification for, and conduct of, war. The Supreme Court has long acknowledged that the study of religion, when presented neutrally as part of a secular program of public education (e.g., in history or literature classes), is fully consistent with the First Amendment. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963). Public school libraries are therefore free to use public money to purchase works such as the Bible, the Koran, Chaim Potak's *The Chosen*, or John Milton's *Paradise Lost* for their stacks. Such works have religious themes, but they are also significant as

historical and literary works, and providing them for students to study has a secular educational purpose and effect. Likewise, we see no reason why providing federal funds to enable the public to visit a church where significant historical events occurred necessarily has any less educational value than funding the preservation of other sites that are significant in our nation's past.

The final criterion for obtaining assistance—whether funding the project would provide "a clear public benefit"—appears quite subjective at first glance. One could argue that it is impermissible for government officials to determine that society will receive a "clear public benefit" from the government's funding of the preservation of a church that is actively used for religious purposes. Without further guideposts to assist them in making this judgment, public officials might decide to favor particular religious structures (or religious structures in general) on the ground that the activities that take place in those structures are, in their opinion, beneficial to society at large. And one of the core purposes of the Religion Clauses is to disable the government from assessing the validity of religious truths or the value of religious activities. *See generally Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–20 (1976); *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714–16 (1981).

On closer examination, however, it is clear that the officials who administer Save America's Treasures grants do not determine a project's "clear public benefit" on the basis of subjective judgments about its religious value. Rather, a project that satisfies the other criteria for receiving a Save America's Treasures grant is deemed to provide a "clear public benefit" by virtue of being open to the public—whether "for visitation," "public viewing," or "scholarly research." Guidelines at 3. Thus, the Park Service's conclusion that the public will benefit from a project is not based on an assessment of the public value of the *religious* activities or character of the church, or for that matter of any of its *current* activities; it is based on the public value of being able to view, and learn from, the building and its place in our nation's history—on its accessibility to ordinary Americans. The conclusion that viewing the structure would be beneficial to the public derives from the structure's historical value, not its religious value. That is a valid, neutral basis for funding a project.

In summary, although the requirements that applicants must satisfy to obtain a Save America's Treasures grant are somewhat subjective, they are quite amenable to neutral application. This fact, together with the diverse makeup of structures that have been preserved under the Program, indicates that the Program is not "skewed towards religion." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986).

**D.**

For all these reasons, we also do not believe that a reasonable observer would perceive an endorsement of religion in the government's evenhanded provision of historic preservation assistance for maintenance of a church building that holds a significant place in our nation's history. *See Mitchell*, 530 U.S. at 842–44 (O'Connor, J., concurring in judgment).[11] In a direct aid program limited to a narrower class of recipients such as schools, one could argue that if a school "uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement." *Id*. at 843. The notion is that, where the government provides education-specific aid, it is fair to say that the government is providing the assistance because of the content of the funded education. Such a presumption of governmental endorsement is not present, however, where the aid is provided to a wide array of public and private buildings because of historic events that once took place therein, and where the government is indifferent to the religious or secular orientation of the building. Moreover, we think a reasonable observer—one informed about the purpose, history, and breadth of the Program, *see Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)—would understand that the federal government is not paying for religious activity; it is paying to preserve a structure that played a role in our development as a nation, so that the public can visit it and learn about our heritage. That is not an endorsement of religion.

Similarly, our conclusion that the Park Service may provide historic preservation grants to structures such as the Old North Church is consistent with the underlying purposes of the Religion Clauses. They are designed to minimize, to the extent practicable, the government's influence over private decisions and matters involving religion, and the Supreme Court has repeatedly explained that governmental assistance must not be structured in a way that creates a financial incentive for people to change their religious (or nonreligious) behavior. *Zelman*, 536 U.S. at 653–54; *Agostini v. Felton*, 521 U.S. 203, 230–31 (1997); *Witters*, 474 U.S. at 487–88. Under the prior system, only structures used solely for nonreligious purposes were eligible for federal preservation grants. Churches with historically significant buildings had a powerful financial incentive to eliminate their religious programs and religious speech, effectively resigning themselves to the role of museums: unless they did so, they were ineligible for any assistance. Under the new rule, by contrast, churches have no incentive to bend their practices in a secular direction to receive aid.

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

**E.**

Our conclusion regarding the constitutionality of providing historic preservation grants to religious structures such as the Old North Church is bolstered by the fact that the Program at issue has a number of requirements designed to ensure that the government funds only those aspects of preservation that produce a secular benefit. To begin with, under the NHPA, properties that are owned by religious institutions or used for religious purposes are eligible for Save America's Treasures grants only if they "deriv[e] primary significance from architectural or artistic distinction or historical importance," 36 C.F.R. § 60.4(a), and "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, *provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant*," 16 U.S.C. § 470a(e)(4) (emphasis added). Thus, the Park Service may provide grants for the preservation of religious structures only insofar as such preservation protects those structures' *historically significant* components.

Other aspects of the Program ensure that Save America's Treasures grants are provided "only for the benefit of the public," Guidelines at 3, by mandating that, for fifty years, grantees keep open to the public all portions of rehabilitated structures that are not visible from the public way. *Id*. at 2 (mandating that "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least 12 days a year during the 50-year term of the preservation easement or covenant"). Furthermore, grant recipients must agree to encumber the title to their property with a 50-year covenant requiring that the owners "repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places." *Id*. To ensure compliance with these requirements, Save America's Treasures grantees must keep detailed records of their expenditures and are subject to rigorous audit by the government to ensure that the Save America's Treasures grants are spent only for designated purposes. 16 U.S.C. § 470e (grantees must maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit"); Myers Letter at 3.

These statutory and regulatory requirements make clear that Save America's Treasures grants may not be used to promote religion (16 U.S.C. § 470a(e)(4)); that they may be used only to preserve the historically significant portions of eligible properties (*id*.); and that rehabilitated portions of eligible structures must

be available for public viewing (Guidelines at 3). All of this is to say that the Program does not permit direct funding of religious activity. To be sure, one could argue that where a federal grant rehabilitates a building that is not only open for public tours, but also used for religious worship, the effect is ultimately to subsidize worship. But such a subsidy is indirect and remote, and that is not what the subsidy is for; rather, the subsidy is provided solely for the benefit to the public of being able to view a structure that played an important role in the history of the United States.[12] Accordingly, we think it is more reasonable to view the grant as akin to a "fee-for-services" transaction—in exchange for an easement that ensures 50 years of public access to the historic structure, the federal government pays a portion of the cost of preserving it.[13]

## III.

Some might contend that the Supreme Court's decisions in *Tilton* and *Nyquist*, which involved construction and maintenance aid to religious schools, should be read to support the conclusion that historic preservation grants to active churches would violate the Establishment Clause. For the reasons set forth below, we disagree.

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[12] Although in some contexts "direct cash aid" might raise special concerns, *see Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring in judgment), we note that the Save America's Treasures grant monies are not distributed until particular, reimbursable expenses have already been incurred by the grantee (*see* Myers Letter at 3), and that the rigorous auditing and record-keeping requirements discussed in the text ensure that the funds are used only for authorized purposes. Accordingly, there is no basis for concern that the money at issue will be diverted to non-Program purposes.

[13] The variety of other ways in which the Park Service might constitutionally provide assistance that would serve to rehabilitate a structure like the Old North Church confirms that there is no strict bar to the sort of assistance at issue here. For example, suppose that the Park Service negotiated a deal pursuant to which it paid the Church a fixed sum in exchange for an agreement to remain open to the public daily and free of charge. Such a fee-for-services transaction would directly "benefit" the Old North Church, and the Church might well exact a price from the government that would cover not only the cost of allowing public tours, but of maintaining the Church for use by its parishioners. But it would be clear that the Park Service was paying only for public access to a historic structure, and we do not think there is any serious question that such a program would be constitutional. Indeed, such a fee-for-services transaction would not be materially different from other sorts of transactions that the government routinely enters into with religious organizations—e.g., land trades, *see* H.R. 1113, 108th Cong. (2003) ("To authorize an exchange of land at Fort Frederica National Monument, and for other purposes")—where the religious organization has something of value that the government wishes to obtain. The case of Ebenezer Baptist Church, where Dr. Martin Luther King, Jr. preached a number of his most famous sermons on the subject of civil disobedience and race relations, is illustrative. We understand that the Park Service made a deal with that church whereby the church agreed to lease its historic building to the Park Service for 99 years, enabling the Park Service to conduct public tours of the church. In consideration for its rights as lessee, the Park Service provided the church with an adjacent parcel of land where the church has built a new sanctuary. Thus, the church has directly benefitted—by obtaining title to a valuable plot of real property—from providing public access to a church that is historically important as a window into the role of black churches in the civil rights movement.

In *Tilton*, the Court sustained the provision of federal construction grants to religious colleges insofar as the program at issue barred aid to facilities "'used for sectarian instruction or as a place for religious worship,'" but invalidated such grants insofar as the program permitted funding the construction of buildings that might someday be used for such activities. *See* 403 U.S. at 675, 683 (plurality opinion) (citations omitted). The Court concluded that a 20-year limitation on the statutory prohibition on the use of buildings for religious activities was insufficient because "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id*. The Court therefore held that the religious use restriction had to run indefinitely. *Id*.

Similarly, *Nyquist* involved a program that provided maintenance and repair grants to religious elementary and secondary schools. The grants at issue were limited to 50 percent of the amount spent for comparable expenses in the public schools, but the Court invalidated the program. "No attempt [was] made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court stated, and the 50 percent restriction would not necessarily prevent rehabilitation of entire religious schools. 413 U.S. at 774. The Court thus concluded that such aid would have the effect of advancing religion, in violation of *Lemon*'s second prong. *Id.*

These holdings, so far as they go, have not been expressly overruled, even where public aid is given to both religious and nonreligious schools on the basis of neutral criteria. *See Mitchell*, 530 U.S. at 856–57 (O'Connor, J., concurring in judgment). Thus, they might be thought to support a broader argument that providing historic preservation grants to restore a church building that is actively used for religious purposes would violate the Establishment Clause. Under this argument, insofar as a grant used to rehabilitate a church's building would ultimately support its use for secular *and* religious purposes—i.e., for both public tours and religious worship—such aid would be unlawful.

We are unable to adopt such a broad reading of *Tilton* and *Nyquist* for several reasons. First, as noted in the 2002 Opinion (26 Op. O.L.C. at 129), *Tilton* and *Nyquist* are in considerable tension with a more recent line of cases holding that the Free Speech Clause does not permit the government to deny religious groups equal access to *the government's own property*, even where such groups seek to use the property "'for purposes of religious worship or religious teaching.'" *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). *See Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993); *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central Sch*., 533 U.S. 98 (2001); *see also Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). Providing religious groups with access to property is a form of direct aid, and allowing such groups to conduct worship services plainly "advances" their religious mission. The Court, however, has consistently refused to *permit* (let

alone require) state officials to deny churches equal access to public school property on the basis of these officials' argument "that to permit its property to be used for religious purposes would be an establishment of religion." *Lamb's Chapel*, 508 U.S. at 394. Indeed, the Court has extended these cases to require equal *funding* of religious expression, reasoning that "[e]ven the provision of a meeting room . . . involve[s] governmental expenditure" for "upkeep, maintenance, and repair of the facilities." *See Rosenberger*, 515 U.S. at 842–43; *see also Prince ex rel. Prince v. Jacoby*, 303 F.3d 1074, 1085–86 (9th Cir. 2002) (extending the principles of *Rosenberger* to monetary and other benefits provided to student groups that are entitled to meet on school grounds under the Equal Access Act). Inasmuch as the Court has approved governmental expenditures for the maintenance and upkeep of facilities used for religious expression and worship, we decline to adopt a reading of *Tilton* and *Nyquist* that would create needless tension with later holdings. Indeed, insofar as the basis for treating a structure owned by a religious institution differently from a structure owned by a nonreligious institution is the religious *instruction* that takes place within its four walls—its *speech* and *viewpoint*—such discrimination directly implicates the Free Speech Clause. *See Rosenberger*, 515 U.S. at 828–31.

Furthermore, *Tilton* and *Nyquist* essentially sanction discrimination between private institutions that are identically situated but for their religious status—and in that respect are in tension with the Court's free exercise jurisprudence. The law in *Tilton* required colleges that applied for federal construction aid to provide 20 years of secular educational services in exchange for such assistance. Upon completion of their 20-year obligation, secular colleges that participated in the program were free to use buildings built with federal money for whatever purposes advanced their mission, regardless of whether such uses provided any benefit to the government. By contrast, religious colleges that earned the right to federal aid by providing the same 20 years of educational services—services that, again, were required by law to be secular—could not use a structure built with federal money to further *their* mission. In one sense, it could be argued that this was equal treatment, because neither religious nor secular colleges could use federal assistance for religious purposes. But it is more accurate to say that it was discrimination against institutions with religious worldviews: secular institutions were free to use government aid to foster their philosophical outlooks; religious institutions were not. The same can be said of the program at issue in *Nyquist*, under which secular private schools were free to use grants "given largely without restriction on usage" to advance their missions, but religious institutions were not. 413 U.S. at 774. Even after *Employment Division v. Smith*, 494 U.S. 872 (1990), such differential treatment is in considerable tension with the Free Exercise Clause. *See id*. at 877 (government may not "impose special disabilities on the basis of religious views or religious status"); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free

Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special and burdensome treatment" would violate the Free Exercise Clause).[14]

Finally, the Supreme Court's Establishment Clause jurisprudence has greatly evolved since the Court's decisions in *Tilton* and *Nyquist* were rendered, and many of the legal principles that supported those decisions have been discarded. In 1985, for example, the Court struck down programs under which the government provided religious and other schools with teachers who offered remedial instruction to disadvantaged children. *See Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The Court reasoned that teachers in the program might "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." *Ball*, 473 U.S. at 385. In *Agostini*, however, the Court overruled *Aguilar* and substantial portions of *Ball*, explaining that the Court had abandoned the presumption that placing public employees in religious schools "inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. Similarly, in the 1970s the Court held that the state could not provide any "substantial aid to the educational function of [religious] schools," reasoning that such aid "necessarily results in aid to the sectarian school enterprise as a whole." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *accord Wolman v. Walter*, 433 U.S. 229, 250 (1977). In *Agostini* and *Mitchell*, however, the Court expressly abandoned that view, overruling *Meek* and *Wolman*. *See Agostini*, 521 U.S. at 225; *Mitchell*, 530 U.S. at 808, 835–36 (plurality opinion); *id*. at 837, 851 (O'Connor, J., concurring in judgment). In addition, other portions of *Nyquist* have been substantially narrowed or overruled. As the Court stated in *Zelman*, "[t]o the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid

[14] We are not suggesting that religion must always be treated the same as non-religion; that sort of formal neutrality has never commanded the support of the Supreme Court, and it would be inconsistent with the established principle that *the government* may not advance religion in ways that it is free to advance many secular ideals, *see, e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"); *Santa Fe*, 530 U.S. at 302 ("there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (quoting *Mergens*, 496 U.S. at 250 (plurality opinion))), as well as the principle that the government must sometimes accommodate religious practices in circumstances where it would not be required to accommodate similar secular practices, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 216–17 (1972). But where the government treats *private* parties differently on the basis of their religious status or viewpoint, such differential treatment is subject to more rigorous scrutiny. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–37; *McDaniel v. Paty*, 435 U.S. 618 (1978).

directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662.

Perhaps more important, recent Supreme Court decisions have brought the demise of the "pervasively sectarian" doctrine that comprised the basis for numerous decisions from the 1970s, such as *Tilton* and *Nyquist*, and the 1995 Opinion of this Office. As noted above, that doctrine held that there are certain religious institutions in which religion is so pervasive that *no* government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose. That doctrine, however, no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell*, *see* 530 U.S. at 825–29 (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, *see id*. at 857–58 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of *actual* diversion of public support to religious uses to invalidate direct aid to schools and explaining that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause"). *See also Columbia Union Coll. v. Oliver*, 254 F.3d 496, 502–04 (4th Cir. 2001) (explaining that the pervasively sectarian test is no longer valid in light of the holdings of six Justices in *Mitchell*). Justice O'Connor has rejected the view that aid provided to religious primary and secondary schools will invariably advance the schools' religious purposes, and that view is the foundation of the pervasively sectarian doctrine.

For all of these reasons, the reach of *Tilton* and *Nyquist* cannot be extended beyond their narrow holdings. And, for the reasons set forth in Part II, those holdings plainly do not control the question we address.

## IV.

For the foregoing reasons, we conclude that the Establishment Clause does not prevent the Department of the Interior from providing historic preservation grants to the Old North Church or to other active houses of worship that satisfy the generally applicable criteria for funding under the Program.

M. EDWARD WHELAN III
*Acting Assistant Attorney General*
*Office of Legal Counsel*

# Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee

Civilian executive branch employees do not violate 18 U.S.C. § 603 by contributing to a President's authorized re-election campaign committee.

May 23, 2003

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether our 1995 opinion that 18 U.S.C. § 603 (2000) would not bar civilian executive branch employees from making contributions to a President's authorized re-election campaign committee[1] retains continued vitality in light of the D.C. Circuit's opinion in *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995).

In our 1995 opinion, we construed the scope of the exception to section 603 coverage set forth in subsection (c) of section 603. Subsection (c) provides that the prohibition set forth in subsection (a) shall generally not apply to "any activity of an employee (as defined in section 7322(1) of title 5)." 18 U.S.C. § 603(c). Section 7322(1) of title 5 of the United States Code in turn defines "employee" to mean (in relevant part) "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency other than the General Accounting Office . . . but does not include a member of the uniformed services." 5 U.S.C. § 7322(1) (2000). We concluded that the subsection (c) exception "applies to the entire executive branch with the possible exception of members of the uniformed services." 19 Op. O.L.C. at 106–07. Under this analysis, employees of the White House Office could make contributions to a President's authorized re-election campaign committee without violating section 603.

In *Haddon*, the D.C. Circuit ruled that the Executive Residence was not an "executive agency" within the meaning of 42 U.S.C. § 2000e-16 (2000). Section 2000e-16(a) proscribes (among other things) racial discrimination against employees in "executive agencies as defined in section 105 of Title 5." In the course of determining that the Executive Residence was not an "executive agency" within the meaning of section 105, the court offered reasoning that would appear equally applicable to the White House Office. *See Haddon*, 43 F.3d at 1489–90.

There is arguable tension between our 1995 opinion, which treats the White House Office as an "Executive agency" for purposes of 5 U.S.C. § 7322(1), and *Haddon*, which suggests that the White House Office is not an "Executive agency" for purposes of 5 U.S.C. § 105 (2000) (which definition, by its terms, is "[f]or the

[1] *Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers From Making Contributions to a President's Authorized Re-Election Campaign Committee*, 19 Op. O.L.C. 103 (1995).

purpose of this title"—i.e., title 5). For the following reasons, we think that the 1995 opinion continues to apply with full force in its limited realm.

First, the 1995 opinion was issued some four months *after* the ruling in *Haddon.* We have good reason to believe that this Office was aware of *Haddon* at the time the 1995 opinion was issued, and we therefore regard the omission of any discussion of *Haddon* in that opinion to be the result of a considered decision that *Haddon* did not bear meaningfully on the issue, rather than an oversight.

Second, although under *Haddon* the term "Executive agency" in section 105 of title 5 would not include the President, the Vice President, the White House Office, and certain other entities within the Executive Office of the President, *cf. Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (in absence of express statement by Congress, statute should not be read to apply to President); 3 U.S.C. ch. 2 (addressing White House operations separate from title 5), there would have been good reason to regard *Haddon* as not bearing significantly on the meaning of 5 U.S.C. § 7322(1). The definition of "employee" in section 7322(1) expressly excludes "the President and the Vice President." There would be no purpose to this exclusion if the President and Vice President were not otherwise understood to be "holding office in . . . an Executive agency" for purposes of section 7322(1). In addition, the exception to the substantive restriction on political activities in 5 U.S.C. § 7324(a) applies to certain employees who are "paid from an appropriation for the Executive Office of the President." *Id.* § 7324(b)(2)(B)(i). This provision appears to presuppose that employees paid by the Executive Office of the President (which includes employees of the White House Office) are employees of an "Executive agency" under section 7322(1). More generally, a reading of section 7322(1) that excluded employees of the White House Office from its scope might be thought to produce highly anomalous results. If the White House Office is not an "Executive agency" under section 7322(1), then employees of the White House Office would be entirely free from the restrictions of the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993) ("HARA"), and would be able to engage in all sorts of partisan political activity. Indeed, HARA would no longer forbid a White House Office employee to "use his official authority or influence for the purpose of interfering with or affecting the result of an election," 5 U.S.C. § 7323(a)(1) (2000), or "run for the nomination or as a candidate for election to a partisan political office," *id.* § 7323(a)(3). In sum, as a result of features that appear to be unique to section 7322(1) and HARA generally, there are (and were at the time the 1995 opinion was issued) powerful reasons to conclude that the term "Executive agency" in section 7322(1) does not have the same meaning that section 105 of title 5 generally assigns it (and that cases like *Haddon* recognize) for the purpose of title 5.

Third, for similar reasons, even if *Haddon* were given a robust reading, the rule of lenity would appear to require that the section 603(c) exception be construed to apply to all civilian Executive Branch employees. Under this rule, "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' . . .

and . . . 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)).

M. EDWARD WHELAN III
*Acting Assistant Attorney General*
*Office of Legal Counsel*

# Designation of Acting Director of the Office of Management and Budget

The President's designation of an employee to act as Director of OMB under the Vacancies Reform Act, 5 U.S.C. §§ 3345–3349d, is itself the appointment of an inferior officer and satisfies the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, even if the employee had not earlier been an "Officer of the United States."

June 12, 2003

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have asked us to memorialize our advice that the President may designate, as the Acting Director of the Office of Management and Budget ("OMB"), an official serving as the Executive Associate Director of OMB.

## I.

The Director of OMB is appointed by the President, with the advice and consent of the Senate. 31 U.S.C. § 502(a) (2000). When the position of Director is vacant, the Deputy Director is authorized to act in that position. *Id.* § 502(b)(2). At present, both positions are vacant, and your question is whether the President, under the Vacancies Reform Act, 5 U.S.C. §§ 3345–3349d (2000), may designate OMB's Executive Associate Director to act as Director.[1]

The Vacancies Reform Act provides three means by which a Senate-confirmed position may be temporarily filled on an acting basis. First, the "first assistant to the office" may act. 5 U.S.C. § 3345(a)(1). Second, the President may designate, as the acting official, a Senate-confirmed officer from any agency. *Id.* § 3345(a)(2). Third, the President may designate any "officer or employee" who

[1] Under 31 U.S.C. § 502(f), if the positions of Director and Deputy Director are both vacant, "the President may designate an officer of [OMB] to act as Director." Because the various officials identified in section 502 are described as "officers," *id.* § 502(e), and those appointed under the Director's general hiring authority are described as "employees," *id*. § 521, the President's authority to name "an officer" of OMB as Acting Director under section 502(f) appears limited to the OMB officials identified in section 502. We understand that the Executive Associate Director is not one of the "officers" under that provision. Section 502(f), however, is not the exclusive statutory authority for temporarily filling the office of Director. Under 5 U.S.C. § 3347, the Vacancies Reform Act is itself the exclusive statutory means for temporarily filling vacancies in Senate-confirmed offices, except where another statute specifically provides for the President, a court, or the head of an executive department to name an acting officer, as 31 U.S.C. § 502(f) does. The Vacancies Reform Act does not provide, however, 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 Vacancies Reform Act may still be used: "In any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105-250, at 17 (1998).

has served in the agency for at least 90 days in the preceding 365 days, in a position for which the rate of pay is GS-15 or higher. *Id.* § 3345(a)(3).[2]

We are informed that the Executive Associate Director would meet the statutory standards for designation under 5 U.S.C. § 3345(a)(3): namely, he has served in OMB for at least 90 of the 365 days preceding the vacancy in the office of Director, and his position during that time was one for which the pay was at least equal to a GS-15 rate. Thus, so far as the statute is concerned, the current Executive Associate Director of OMB is fully qualified to be designated as Acting Director.

## II.

Use of the Vacancies Reform Act in these circumstances could raise the question whether someone who is not already an "Officer[] of the United States" could temporarily fill a position that is an "Office" under the Appointments Clause of the Constitution.[3] U.S. Const. art. II, § 2, cl. 2. It is possible that the Executive Associate Director, although not an "officer" for purposes of 31 U.S.C. § 502, is already an "Officer of the United States" for purposes of the Appointments Clause, but we assume *arguendo* that he is not. The potential problem is that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'" *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), *see also Edmond v. United States*, 520 U.S. 651, 662 (1997), and therefore must have been appointed in compliance with the Appointments Clause. The employees who serve in acting positions would appear to exercise such authority, *see Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987) (an Acting Administrator of a Department of Justice component had authority to discharge employees because he was properly appointed as the Deputy Administrator, a statutory office), and would therefore be subject to this requirement.

In our view, the President's designation of an employee of OMB to act as Director under the Vacancies Reform Act would itself be the appointment of an inferior officer and would satisfy the Appointments Clause. Although the Appointments Clause provides generally that "Officers of the United States" must be appointed by the President, with the advice and consent of the Senate, it further

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[2] An employee serving under the Vacancies Reform Act would be subject to the time limits in that statute, 5 U.S.C. § 3346, while an officer serving under 31 U.S.C. § 502(f) would not be so limited and could serve as long as is reasonable under the circumstances. *See Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287 (1977).

[3] This question does not arise for anyone who is already an "Officer of the United States" and who was appointed after the enactment of the Vacancies Reform Act, as any duties arising under the Vacancies Reform Act can be regarded as part and parcel of the office to which he was appointed. *See Weiss v. United States*, 510 U.S. 163, 174 (1994). (The same would be true for anyone who was appointed before enactment of the Vacancies Reform Act and whose acting duties pursuant to that Act were germane to his office. *See id.* at 174–76.)

provides that "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." U.S. Const. art. II, § 2, cl. 2. To assess the constitutionality of the proposed designation, we must answer two questions: first, whether the Acting Director of OMB is a principal officer, who must have been appointed by the President with the advice and consent of the Senate, or whether he is an inferior officer who could be appointed by the President alone; and second, if he is an inferior officer, whether he has been "appoint[ed]" as such by the President, within the meaning of the Appointments Clause. *Id.*

**A.**

Under the principles of the Supreme Court's decisions in *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988), and *Edmond*, 520 U.S. at 662, 663, the Director of OMB is a principal officer. He is subject to removal by no one except the President. *See Keim v. United States*, 177 U.S. 290, 293 (1900) ("[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment"). His responsibilities cover a wide range of fiscal and management matters, reach throughout the Executive Branch, and permit him to make policy of the greatest importance. *See, e.g.*, 31 U.S.C. § 502(a) (Director's authority over subordinates in OMB whose responsibilities are set out in 31 U.S.C. §§ 503, 504). His tenure is not limited in time to the completion of any particular task. And he is to administer OMB "[u]nder the direction of the President," rather than some official below the President. *Id.* § 502(a).[4]

Although the position of Director is a principal office, we believe that an Acting Director is only an inferior officer.[5] In *United States v. Eaton*, 169 U.S. 331 (1898), the Supreme Court held that Congress could vest the appointment of a "vice consul" in the President alone and could provide that the vice consul would act for the consul, even though the consul was a principal officer: "Because the

[4] When Congress first passed a bill to subject the Director of OMB to Senate confirmation, President Nixon vetoed it, principally on the ground that the bill would unconstitutionally have removed the incumbent appointed by the President alone, but also on the ground that the "nature of the position[]," involving "advice and staff support in the performance of [the President's] budgetary and management responsibilities," conflicted with making the position Senate-confirmed. *Pub. Papers of Pres. Richard M. Nixon* at 539–40 (1973). The history of the position before it was Senate-confirmed, along with the considerations about its "nature," might be argued to show that the office is not a "principal" one. However, although appointment with Senate confirmation would not refute this argument (since that mode of appointment is the default for all officers, principal and inferior), President Nixon wrote before the decisions in *Morrison* and *Edmond*, and we therefore do not question here that the Director of OMB is a principal officer.

[5] Arguably, an acting official is not an "officer" because of the temporary nature of his duties. *See, e.g.*, *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *Appointment of Department of Interior Associate Deputy Secretary*, No. B-290,233, 2002 WL 31388352, at *3 (Oct. 22) (General Counsel, GAO). However, such an argument seems problematic, especially where the acting official is temporarily the head of an agency and otherwise occupies a permanent full-time position in the United States government.

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. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered." *Id.* at 343 (quoted with approval in *Morrison*, 487 U.S. at 672–73). This conclusion, we believe, is not called into question by the Court's statement in *Edmond* that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. The Court held only that "[g]enerally speaking" an inferior officer is subordinate to an officer other than the President. *Id.* at 662. Moreover, *Edmond* did not deal with temporary officers and cited *Eaton* with apparent approval. *Id.* at 661. Under *Eaton*, we believe, the Acting Director of OMB is an inferior officer.

**B.**

Under the Vacancies Reform Act, the President "may direct an officer or employee of [an] Executive agency to perform the functions and duties of [a] vacant office," provided that the officer or employee has served, for at least 90 days during the year before the vacancy, in a position for which the pay is at least the level of GS-15. 5 U.S.C. § 3345(a)(3). By its express terms, this provision can enable an "employee" to act in the vacant position of a Senate-confirmed officer. In our view, an "employee" so empowered is, temporarily, a properly appointed inferior Officer of the United States.[6]

Under the Appointments Clause, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone." U.S. Const. art. II, § 2, cl. 2. Under the provision of the Vacancies Reform Act that would be used here, 5 U.S.C. § 3345(a)(3), Congress has vested in "the President (and only the President)" the power to name an employee who will be an acting officer. Congress thus has employed one of the modes by which it may provide for appointment of an inferior officer.

We recognize, of course, that the Vacancies Reform Act does not use the language of appointment. Under 5 U.S.C. § 3345(a)(3), the President "direct[s]" an employee to perform duties. We recognize, too, that the Supreme Court's decision in *Weiss* placed considerable stress on Congress's use of the terms "detail" and "assign" in statutes governing military officers when it held that Congress had not required a separate appointment for military judges to serve on courts martial: "Congress repeatedly and consistently distinguished between an office that would

[6] We do not address whether any official who becomes an acting officer pursuant to 5 U.S.C. § 3345(a)(1) has thereby been appointed to hold a temporary office.

require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer." 510 U.S. at 172.

We nonetheless believe that the "directs" language of the Vacancies Reform Act should be understood to provide the means for an appointment of an employee as an acting officer. The principle of constitutional avoidance requires a construction of the statute that removes serious constitutional doubt: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted). The Vacancies Reform Act, by its plain terms, allows an "employee" to carry out the "functions and duties" of an "officer of an Executive agency" who "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). By understanding the President's "direct-[ion]" under 5 U.S.C. § 3345(a)(3) to involve an appointment of an employee as an inferior officer, we avoid the serious constitutional issue that could be raised by a mere employee's "exercising significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. For similar reasons, we believe that *Weiss* does not foreclose our conclusion here. The Court's discussion was in the context of establishing that the appointment of military judges did not violate the Appointments Clause. We would not readily extend that analysis to a different context, where it would raise a question about the constitutionality of a statute. Furthermore, because the Vacancies Reform Act, unlike the statute at issue in *Weiss*, aims at maintaining the continuity of government, including in emergencies, we would not impute to Congress any intent to make the efficacy of its statute depend on the characterization of the President's action, as between an assignment of duties and an appointment.

M. EDWARD WHELAN III
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*Office of Legal Counsel*

# VA's Authority to Fill Certain Prescriptions Written by Non-VA Physicians

The Department of Veterans Affairs is authorized to fill prescriptions written by non-VA physicians for veterans placed on VA waiting lists.

July 3, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERAN AFFAIRS

You have asked us whether the Department of Veterans Affairs ("VA") is barred by statute from generally filling prescriptions written by non-VA physicians for veterans on VA's lengthy waiting list. For the reasons stated below, we conclude that VA is not so barred.

## I.

You have advised us that the number of veterans who have requested care from the VA is greatly in excess of the number that VA can care for at the present time. As a result, the number of veterans who have to wait more than six months before they can receive care in a VA facility has recently been above 200,000 and remains very high. Some of these veterans have received care from non-VA physicians and then sought to obtain the prescription medication benefits included in VA's uniform benefit package. But in light of legal opinions of VA's Office of General Counsel dating back to 1983, VA has generally declined to fill prescriptions written by non-VA physicians. Instead, VA has required veterans with such prescriptions to schedule examinations in the backlogged VA facilities. Such examinations typically involve a months-long wait and impose additional burdens on the VA system.

In 1991, VA's Office of General Counsel reissued as a "Precedent Opinion" an opinion that it had previously issued in 1983. In that opinion, your Office determined that the provision then codified at 38 U.S.C. § 612(h) (1982)—and now revised and codified at 38 U.S.C. § 1712(d) (2000)—was "the exclusive legal authority for providing a veteran with drugs and medicines prescribed by the veteran's private physician, when the VA has no involvement, fee basis or otherwise, in the treatment of the veteran." Vet. Aff. Op. Gen. Couns. Prec. 41-91 (Mar. 11, 1991), 1991 VAOPGCPREC LEXIS 1183, at *14 ("1991 VA Opinion"). In 2002, your Office considered whether intervening changes in the law—particularly, the Veterans' Health Care Eligibility Reform Act of 1996, Pub. L. No. 104-262, 110 Stat. 3177 (1996) ("Eligibility Reform Act")—altered the conclusion of your 1991 opinion and determined that they did not. Your Office reaffirmed its position that "VA does not have legal authority to furnish veterans with medications prescribed by private physicians when VA has no other in-

volvement in the care of the veteran." Vet. Aff. Op. Gen. Couns. Adv. 19-02 (2002) ("2002 VA Opinion").

## II.

Title 38 confers on the VA Secretary broad authority to determine the services provided to veterans. Paragraphs (1) and (2) of section 1710(a) provide that the Secretary "shall furnish" to particular classes of veterans those "medical services" "which the Secretary determines to be needed." 38 U.S.C. § 1710(a)(1), (2) (2000). Paragraph (3) further provides that for any veteran not covered by paragraphs (1) and (2), the Secretary "may . . . furnish . . . medical services . . . which the Secretary determines to be needed." *Id*. § 1710(a)(3). The statutory definition of "medical services" includes, among other things, "medical examination, treatment, and rehabilitative services," 38 U.S.C. § 1701(6) (Supp. I 2002).

We believe that, except insofar as otherwise barred, the Secretary's general statutory authority is plainly broad enough to enable VA to fill prescriptions written by non-VA physicians for veterans who have been placed on VA's waiting list for examinations. First, the filling of prescriptions is, or can reasonably be determined to be, a "medical service" because it constitutes "treatment." Companion provisions in this same statutory scheme recognize that medications are "furnished . . . for the treatment of" disabilities and conditions, 38 U.S.C. § 1722A(a)(1) (2000), and that "such drugs and medicines as may be ordered on prescription of a duly licensed physician" are part of the "treatment of [an] illness or injury," *id*. § 1712(d). Indeed, VA's Office of General Counsel has itself stated that "provision of drugs and medicines is medical treatment." 1991 VA Opinion at *6.[1] Second, the Secretary has discretion to determine "to be needed" the filling of prescriptions written by non-VA physicians for those veterans on VA's waiting list. Such a determination would (in the absence of any other bar) trigger the Secretary's duty under paragraphs (1) and (2) of section 1710(a), and his power under paragraph (3) of that section, to have VA fill the prescriptions. Third, in light of the existing backlog of veterans seeking VA care, a decision by the Secretary to authorize VA to fill prescriptions written by non-VA physicians for those veterans on VA's waiting list would be consistent with the statutory directive that "the Secretary shall, to the extent feasible, design, establish and manage health care programs in such a manner as to promote cost-effective delivery of health care services in the most clinically appropriate setting." 38 U.S.C. § 1706(a) (2000).

Your Office has suggested several possible reasons why this result might not follow. First, invoking the maxim *expressio unius est exclusio alterius*, your Of-

[1] Notwithstanding this statement, the 1991 VA Opinion relied on the *absence* of legislative history and the *expressio unius* maxim discussed below to conclude that provision of drugs and medicines ordered by private non-VA physicians is not medical treatment.

fice has read section 1712(d) as providing "the exclusive legal authority for providing a veteran with drugs and medicines prescribed by the veteran's private physician, when the VA has no involvement, fee basis or otherwise, in the treatment of the veteran." 1991 VA Opinion at *6–*7, *14. We do not believe that this is the best reading of section 1712(d). Section 1712(d) provides in part:

> The Secretary shall furnish to each veteran who is receiving additional compensation or allowance under chapter 11 of this title, or increased pension as a veteran of a period of war, by reason of being permanently housebound or in need of regular aid and attendance, such drugs and medicines as may be ordered on prescription of a duly licensed physician as specific therapy in the treatment of any illness or injury suffered by such veteran.

38 U.S.C. § 1712(d). In short, section 1712(d) specifically requires the filling of prescriptions written by private physicians for certain classes of veterans. We note, however, that it does not expressly provide that it sets forth the exclusive circumstances in which the Secretary is required to fill such prescriptions, much less the exclusive circumstances in which the Secretary is allowed to fill such prescriptions. Moreover, given the broad authority that section 1710(a) confers on the Secretary, we do not think that the *expressio unius* canon applies here to require that section 1712(d) be read as somehow implicitly limiting that broad authority.[2]

Second, your Office has pointed to legislative history associated with the Eligibility Reform Act—specifically, to a statement in the committee report of the House bill that was merged with a Senate bill when the Act was passed. In the context of refuting projections by the Congressional Budget Office ("CBO") that provisions of the bill would result in substantial new demand for VA medical services and benefits, the House report stated: "It is critical to note that H.R. 3118, like existing law, would not permit VA simply to serve as a veterans' 'drug store', providing medications, prosthetic devices, or other medical supplies prescribed by a private physician who has no affiliation or contractual relationship with the VA." H.R. Rep. No. 104-690, at 17 (1996). This legislative history might be thought to indicate that Congress did not intend section 1710(a) to authorize the Secretary to provide the prescription services at issue.

We do not find this legislative history probative of the meaning of section 1710(a). Insofar as it might be thought to mean that the Secretary may not provide the prescription services at issue, we do not think that it can be squared with the expansive text of section 1710(a). *See Circuit City Stores, Inc. v. Adams*, 532 U.S.

[2] The fact that section 1712(d), unlike section 1710(a), appears to require filling of prescriptions whether or not the Secretary determines the filling of the prescriptions to be necessary further suggests that the obligation imposed under section 1712(d) is not of the same class or type as the obligations and powers under section 1710(a). This would provide an additional reason why the *expressio unius* canon would not apply.

105, 119 (2001) ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision."); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). We note, further, that the statement in the House report is not specifically addressed to section 1710(a) (or to any other provision of the Act) but is instead designed to counter CBO's $3 billion projections of the House bill's costs. *See* H.R. Rep. No. 104-690, at 15, 17, 19. We therefore consider it especially suspect. In any event, the prescription authorization at issue here does not fit the "drug store" analogy. The prescription services at issue here would be authorized only for "waiting list" veterans and only for drugs "which the Secretary determines to be needed," not for any veteran who wanted to fill a prescription.

Third, the 2002 opinion argues that the provision of law stating that the "primary function of the [Veterans Health] Administration is to provide a complete medical and hospital service for the medical care and treatment of veterans," 38 U.S.C. § 7301(b) (2000), "has historically been interpreted to mean that Congress intended VA to furnish services needed to treat an eligible veteran through VA facilities and personnel." 2002 VA Opinion ¶ 8. Because VA would be providing the "medical service" at issue—i.e., filling the prescriptions—through VA facilities and personnel, we do not see how this argument has any bearing here.

Finally, your Office has suggested that it would be anomalous for the Secretary to be required to charge a copayment amount for medication furnished the veteran "on an outpatient basis for the treatment of a non-service-connected disability or condition," 38 U.S.C. § 1722A(a)(1), but not to be required to be charged a copayment for medication prescribed by a non-VA physician for such a disability or condition. But any such anomaly vanishes if, as seems to us permissible,[3] the Secretary may regard the VA's filling of a prescription issued by a non-VA physician to be service "on an outpatient basis" for which a copayment would be required under section 1722A(a)(1). In any event, even if that anomaly were to remain, we would not see it as providing a sufficient basis for overriding our reading of section 1710(a).

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*Office of Legal Counsel*

[3] The VA regulations appear to contemplate only two broad categories of care or service: "inpatient hospital care" and "outpatient medical care." *See* 38 C.F.R. § 17.108(a)–(c). Since VA clearly would not be furnishing the prescriptions in question on an "inpatient" basis, it is reasonable to conclude that they are furnished on an "outpatient" basis.

# Interpretation of Section 586 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act

Existing statutory provisions that prohibit or impose mandatory restrictions on the public release of information are not overridden by section 586 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2003, which requires the President to order federal agencies "to expeditiously declassify and release to the victims' families" information regarding the murders of certain Americans in El Salvador and Guatemala. Provisions that permit but do not require the government to withhold information are, however, overridden by section 586.

It is permissible to interpret the scope of the information covered by section 586 to be limited to classified information.

July 18, 2003

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This memorandum responds to your Office's request for our opinion on two questions concerning the interpretation of section 586 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2003, Pub. L. No. 108-7, 117 Stat. 11, 215–16 (Feb. 20, 2003) ("Foreign Operations Appropriations Act"). Section 586 requires the President to order federal agencies "to expeditiously declassify and release to the victims' families" information regarding the murders of certain Americans in El Salvador and Guatemala. Your Office has asked (1) whether the directive to release information overrides existing statutory provisions prohibiting or limiting the public release of information, and (2) whether it is permissible to interpret the scope of the information covered by section 586 to be limited to currently classified information. For the reasons set forth below, we conclude that existing statutory provisions that prohibit or impose mandatory restrictions on the public release of information are not overridden by section 586, but that provisions that permit but do not require the government to withhold information are overridden. We also conclude that it is permissible to interpret the scope of the information covered by the statutory directive to be limited to classified information.

## I.

Section 586 was enacted as part of the Foreign Operations Appropriations Act on February 20, 2003. It provides as follows:

> (a) Information relevant to the December 2, 1980, murders of four American churchwomen in El Salvador, and the May 5, 2001, murder of Sister Barbara Ann Ford and the murders of other American

> citizens in Guatemala since December 1999, should be investigated and made public.
>
> (b) Not later than 45 days after enactment of this Act, the President shall order all Federal agencies and departments, including the Federal Bureau of Investigation, that possess relevant information, to expeditiously declassify and release to the victims' families such information, consistent with existing standards and procedures on classification, and shall provide a copy of such order to the Committees on Appropriations.
>
> (c) In making determinations concerning declassification and release of relevant information, all Federal agencies and departments should use the discretion contained within such existing standards and procedures on classification in support of releasing, rather than withholding, such information.
>
> (d) All reasonable efforts should be taken by the American Embassy in Guatemala to work with relevant agencies of the Guatemalan Government to protect the safety of American citizens in Guatemala, and to assist in the investigations of violations of human rights.

We believe that your first question is controlled by the text of subsection (b), which directs the President, within 45 days of enactment, to order federal agencies "that possess relevant information, to expeditiously declassify and release to the victims' families such information, consistent with existing standards and procedures on classification."[1] Significantly, this subsection does not directly impose disclosure requirements on any agency, nor does it purport to modify existing statutory mandates to which any agency is subject. Rather, the statutory language by its terms directs only the issuance of an order by the President. It neither purports to override any other statute, nor grants the President authority to do so. And the President does not otherwise possess the authority to disregard constitutionally valid statutes; such statutes may be overridden only pursuant to the legislative process set forth in Article I, Section 7 of the Constitution. We therefore conclude that the President's order, and the obligations it imposes on the agencies, are limited by existing statutory authorities and restrictions. Where other statutes prohibit or impose mandatory restrictions on the public disclosure of

[1] In his signing statement concerning section 586, Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 Weekly Comp. Pres. Doc. 225, 227 (Feb. 24, 2003), President Bush delegated his responsibility to issue the order to the Attorney General, who implemented the statutory directive by issuing a memorandum to the heads of all federal departments and agencies, dated April 4, 2003. The substance of that memorandum does not bear directly on the questions that you have asked us to address.

information, the order issued pursuant to section 586 cannot require a different result.

Our conclusion is reinforced by the "cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). To find that section 586 overrides statutes prohibiting or restricting the disclosure of information, in the absence of any express language to that effect, would be to find an implied repeal of those statutes. However, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Under our reading, section 586 is certainly reconcilable with existing statutory disclosure restrictions: where existing statutes prohibit or impose mandatory restrictions on disclosure, full effect is given to those statutes; where disclosure is not so prohibited or restricted, the order issued pursuant to section 586 is controlling. *See id.* at 551 ("when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective").

Different analysis governs statutes that permit, but do not require, agencies to withhold information from the public. Such statutes do not restrict the Executive's authority to release information; rather, they allow discretion either to withhold or disclose information. Because the President has the authority to order agencies to release information that could be withheld pursuant to discretionary statutes of this sort, we conclude that section 586 requires him to do so, subject to his constitutional prerogative to withhold information, the disclosure of which would impair the performance of his constitutional duties, *see* Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 Weekly Comp. Pres. Doc. 225, 227 (Feb. 24, 2003) (the Attorney General "shall ensure that [section 586] is implemented in a manner consistent with the President's constitutional authority to withhold information, the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties"), and "consistent with existing standards and procedures on classification," Pub. L. No. 108-7, § 586(b), 117 Stat. at 215–16.[2]

[2] While section 586 permits agencies to withhold information "consistent with existing standards and procedures on classification," Pub. L. No. 108-7, § 586(b), 117 Stat. at 215–16, it also informs the application of these standards and procedures in certain respects. First, it suggests that agencies "should use the discretion contained within such existing standards and procedures on classification in support of releasing, rather than withholding [relevant] information." *Id.* § 586(c). Second, the requirement that the President order agencies "to expeditiously declassify and release" relevant information, *id.* § 586(b), appears to require that agencies expedite declassification determinations.

## II.

We believe that the text of section 586 is ambiguous with respect to your second question. On the one hand, section 586(a), which refers to "[i]nformation relevant to the December 2, 1980, murders of four American churchwomen in El Salvador, and the May 5, 2001, murder of Sister Barbara Ann Ford and the murders of other American citizens in Guatemala since December 1999," can be understood to define the scope of the information covered by subsection (b). On the other hand, the operative language of subsection (b) requires only that the President order the agencies "to expeditiously declassify and release" information "consistent with existing standards and procedures on classification." A natural implication of this directive's grammatical structure and emphasis on classification is that it refers only to documents that are currently classified. The remaining provisions of section 586 do not clearly resolve this ambiguity, with the result that the statute can be read in two different ways.

The reading that would entail a broader scope for the covered information would rely on subsection (a), as well as subsection (b)'s reference to federal agencies "that possess relevant information." If subsection (a) is understood to define "relevant information," and if this portion of subsection (b) in turn is viewed as controlling without reference to other text, then both classified and unclassified information would be covered by the President's order. As explained more fully below, however, this reading creates certain grammatical difficulties since subsection (b)'s subsequent references to declassification and existing standards and procedures on classification cannot be read literally to apply to unclassified information. Nevertheless, we believe this broader reading to be a reasonable interpretation of the statute.

We believe it equally reasonable, however, to interpret the directive of section 586 to be limited to classified information. This narrower reading is supported by the grammatical structure of the operative language of subsection (b). Not only must the President direct agencies to both "declassify *and* release" the contemplated information, he must also direct that they do both "consistent with existing standards and procedures on classification." Were subsection (b) intended to cover both classified and unclassified information, one would not expect the former phrase to be cast in the conjunctive, since unclassified information cannot be declassified, but only released. And if the conjunctive is not to be understood literally, one would expect the latter phrase to be placed so as to modify only "declassify," since existing standards and procedures on classification would not govern the release of currently unclassified information.

Technical grammatical considerations aside, this reading of section 586 also seems to follow from the statute's emphasis on classified information. In addition to subsection (b)'s focus on declassification and the standards and procedures on classification, the immediately following provision, subsection (c), is also centered on classified information: it directs that "[i]n making determinations concerning

*declassification* and release," agencies "should use the discretion contained within such existing standards and procedures on *classification* in support of releasing, rather than withholding, such information."

Under this narrower interpretation, section 586 is understood to be focused on a perceived need for an expedited effort to declassify and release classified information on the murders in El Salvador and Guatemala. On this view, subsection (b)'s reference to "Federal agencies and departments . . . that possess relevant information" may be understood not to delineate the scope of the President's order but rather to identify the agencies to which it should be directed. Section 586(a) may be similarly understood not as a substantive definition but as an indication of Congress's desire that information regarding these murders "should be investigated and made public." It is quite possible that Congress believed that the principal obstacle to achieving these ends is the government's lengthy and piecemeal declassification process. Congress may well have believed that most unclassified information has already been released on those murders, or that existing law, such as the Freedom of Information Act,[3] provides adequate means of obtaining unclassified information. Section 586 can thus be understood as a targeted response to the important, but discrete, problems posed by classified information. On this understanding, the statute advances *purposes* set forth in subsection (a), but it does so through the calibrated *means* of overriding waiting periods and other delays relating to the declassification process and suggesting that declassification discretion should be exercised in favor of releasing, rather than withholding, relevant information.

We believe the Executive may permissibly choose to interpret the directive of section 586 to be limited to classified information. Because subsection (b) directs the issuance of an order implementing section 586, we believe that the statute necessarily confers interpretive authority to resolve statutory ambiguities. *See* U.S. Const. art. II, § 3 (President "shall take Care that the Laws be faithfully executed"); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866) (President's "exercise of the power to see that the laws are faithfully executed" is not subject to judicial control, at least where anything is "left to discretion" or there is "room for the exercise of judgment"); *cf. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). We need not resolve the precise scope of the interpretive authority conferred, however. In light of the grammatical structure of the operative language in subsection (b), the focus of subsections (b) and (c) on classification, and the

[3] The Freedom of Information Act requires government agencies to make their records available to non-governmental requesters, *see* 5 U.S.C. § 552(a)(3)(A) (2000), subject to certain exemptions that authorize agencies to withhold requested records, *see id.* § 552(b). Of particular pertinence here is Exemption One, which authorizes the withholding of all properly classified information. *See id.* § 552(b)(1).

eminent plausibility of the narrower interpretation of the statute, we believe it to be permissible under any standard that might apply.

HOWARD C. NIELSON, JR.
*Deputy Assistant Attorney General*
*Office of Legal Counsel*

# Eligibility of Unlegitimated Children for Derivative Citizenship

An alien child who was born out of wedlock and whose paternity has not been established by legitimation is eligible for derivative citizenship under section 320 of the Immigration and Naturalization Act at the time the child's mother becomes a naturalized citizen.

July 24, 2003

MEMORANDUM OPINION FOR THE ACTING PRINCIPAL LEGAL ADVISOR
BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

Section 320(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1431(a), as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000) ("CCA"), provides automatic United States citizenship to a child born outside the United States upon the satisfaction of a specified set of conditions. One of these conditions is that "[a]t least one parent of the child is a citizen of the United States, whether by birth or naturalization." INA § 320(a)(1), 8 U.S.C. § 1431(a)(1). Your predecessor agency, the Immigration and Naturalization Service, asked for our opinion whether this condition is satisfied for an alien child who was born out of wedlock and whose paternity has not been established by legitimation at the time the child's mother becomes a naturalized citizen.[1] For the reasons stated below, we conclude that it is.

## I.

The term "derivative citizenship" refers to citizenship that a child may derive *after birth* through the naturalization of a parent. *See* 7 C. Gordon et al., *Immigration Law and Procedure* § 98.03[1] (2003). It is distinct from the acquisition of citizenship *at birth*, including the "citizenship by descent" that may be conferred on a child born abroad to a citizen parent. *See id*.; *see also* INA § 301(c), (d), (e), (g), 8 U.S.C. § 1401(c), (d), (e), (g) (2000) (examples of INA provisions conferring citizenship by descent).

In enacting the INA in 1952, Congress expressly provided that an alien child who was born out of wedlock outside the United States and whose paternity had not been established by legitimation could acquire derivative citizenship through

[1] Memorandum for Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Bo Cooper, General Counsel, Immigration and Naturalization Service, *Re: Children Born Out-of-Wedlock and Eligibility for Derivative Citizenship Under the Child Citizenship Act (CCA), Pub. L. 106-395 (October 30, 2000)* (Aug. 21, 2001). Because the same issue arises with respect to passport applications, we subsequently solicited the views of the Department of State, which responded by letter dated February 28, 2003.

the naturalization of his mother. Section 321 of the INA set forth the conditions for automatic derivative citizenship of children born outside the United States of alien parents. Where the alien parents were still alive and married, section 321 required as a condition the naturalization of both parents. But section 321 also accommodated other situations. Among other things, section 321 specifically provided that a child born outside the United States of alien parents "becomes a citizen of the United States upon fulfillment of the following conditions:"

> (1) "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation";
>
> (2) the naturalization of the mother "takes place while such child is under the age of sixteen years"; and
>
> (3) the child "is residing in the United States pursuant to a lawful admission for permanent residence at the time of the [mother's] naturalization . . . or thereafter begins to reside permanently in the United States while under the age of eighteen years."

INA § 321, 66 Stat. 163, 245 (1952). Section 320 of the INA separately addressed automatic derivative citizenship for a child born outside the United States of one alien parent and one citizen parent; it provided as one of the conditions of such citizenship that the alien parent be naturalized before the child turned 18. Section 101(c)(1) of the INA in turn defined "child" for purposes of subchapter III of the INA, which included section 321.

In enacting the CCA in 2000, Congress created a new section 320 that sets forth the conditions for automatic derivative citizenship for the two categories of children born outside the United States—those born of alien parents and those born of one alien parent and one citizen parent—that had been governed by former sections 321 and 320, respectively. The new section 320 significantly broadens the class of children eligible for automatic citizenship by requiring that no more than one parent need be a citizen. Section 320 now provides:

> A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
>
> (2) The child is under the age of eighteen years.

> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

INA § 320, 8 U.S.C. § 1431. The CCA did not amend section 101(c)(1), which continues to define "child" for purposes of subchapter III of the INA, which now includes new section 320.

**II.**

Unlike former section 321, new section 320 does not specifically address the eligibility of children born out of wedlock for derivative citizenship. Rather, it generally confers automatic derivative citizenship on any "child" when a custodial parent is or becomes a citizen and when its age and residency requirements are satisfied. Whether an alien child who was born out of wedlock and whose paternity has not been established by legitimation is eligible under the CCA for derivative citizenship upon the mother's naturalization therefore depends on the scope of the definition of the term "child" in section 101(c)(1).

Section 101(c)(1) provides:

> The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

INA § 101(c)(1), 8 U.S.C. § 1101(c)(1) (2000).

We understand the words "legitimated," "legitimation," and "legitimating" in this definition to refer to the formal legal process of establishing a child's paternity. This understanding is consistent with former section 321(a)(3), which, as noted above, in conjunction with this same definition of "child," established as one condition of derivative citizenship that "the paternity of the child has not been established by legitimation." The fact that section 101(c)(1) itself treats mothers and fathers differently by allowing legitimation "under the law of the child's residence or domicile, or under the law of the father's residence or domicile," but not under the law of the mother's, further supports our reading that "legitimation" refers to the establishment of paternity. We therefore will use "legitimated" and

"unlegitimated" as shorthand terms to refer, respectively, to a child whose paternity has been established by legitimation and to a child whose paternity has not been so established.

**A.**

The question whether the unlegitimated offspring of an alien mother is a "child" within the meaning of section 101(c)(1) is complicated by the fact that section 101(c)(1) is poorly drafted. Among other things, section 101(c)(1) runs in circles by using the term it is defining—"child"—as part of the substantive definition of that same term. Worse, it fails to establish any coherent relationship between its "means" phrase ("*means* an unmarried person under twenty-one years of age") and its 110-word "includes" phrase ("*includes* a child legitimated . . ."). Ordinarily, one would expect an "includes" phrase to clarify that the scope of a "means" phrase is *broader* than might be evident (i.e., "includes" more than it unambiguously "means"). In section 101(c)(1), however, the substance of the "includes" phrase in no way elucidates, and in fact appears entirely unrelated to, possible meanings of "unmarried person under twenty-one years of age." Instead, the arguable purpose of the "includes" phrase is to provide some sort of implied *exception* to the "means" phrase by *excluding* from the definition of "child" some set of "unmarried person[s] under twenty-one years of age" that it does not say is included.[2]

We discern four possible approaches to section 101(c)(1):

*Approach 1*: Under a strictly literal reading, the "includes" phrase would be understood not to limit the "means" phrase, so that any "unmarried person under twenty-one years of age" would be a "child." It is true that this approach would render the entire "includes" phrase surplusage, but this approach could be defended on the ground that the phrase is in fact cast as surplusage.

The three other approaches would construe—or, more candidly, rewrite—section 101(c)(1) to reflect competing versions of what the definition supposedly means. Under these approaches, the "includes" phrase would be recast as an exception to the general definition of "child."

*Approach 2*: Under one rewriting, section 101(c)(1) might be understood to mean:

> The term "child" means an unmarried person under twenty-one years of age, except that (A) it shall include any such person legitimated under the law of the such person's residence or domicile, or

[2] The two "except" clauses appended to the "includes" phrase are also poorly structured. Because they relate only to adopted children, not to legitimated children, we do not address them here. Paragraphs (B) and (C) of our rewriting of section 101(c)(1) in Approach 2 offer one view of what these clauses may have been intended to mean.

> under the law of the father's residence or domicile, whether in the United States or elsewhere, only if the legitimation takes place before the person reaches the age of 16 years and only if such person was in the legal custody of the legitimating parent or parents at the time of such legitimation; (B) it shall include (other than for purposes of section 1431 of this title) any such person adopted in the United States only if the adoption takes place before the person reaches the age of 16 years (or, if the person meets the definition of 'child' under subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section, before the person reaches the age of 18 years) and only if such person was in the legal custody of the adopting parent or parents at the time of such adoption; and (C) it shall include, for purposes of section 1431 of this title, any such person adopted in the United States only if such person meets the definition of 'child' under paragraph (E) or (F) of subsection (b)(1) of this section.

Under this rewriting, paragraph (A) (the only paragraph that directly bears on our question) would provide that only certain *legitimated* persons did not fall within the definition. Therefore, under this reading, any *unlegitimated* person who is unmarried and under 21 would be a "child."

*Approach 3*: Under a competing reading—the reading that, as we understand it, your Bureau and the Department of State both favor—paragraph (A) would provide only that certain persons *claiming citizenship through their fathers* did not fall within the definition:

> The term "child" means an unmarried person under twenty-one years of age, except that (A) with respect to a person claiming citizenship through the person's father, it shall include a person born out of wedlock only if such person was legitimated under the law of the person's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, before reaching the age of 16 years and while in the legal custody of the legitimating parent or parents . . . .

Under this reading, any unlegitimated person who is unmarried and under 21 would be a "child" (as would be any legitimated person claiming citizenship through the person's mother or satisfying the requirements of paragraph (A)).

*Approach 4*: Alternatively, section 101(c)(1) could be understood to exclude from its scope all persons *born out of wedlock* (whether legitimated or unlegitimated) who are not specified in the "includes" phrase. The relevant portion of this rewriting might read:

> The term "child" means an unmarried person under twenty-one years of age, except that (A) it shall include any such person who was born out of wedlock only if such person was legitimated under the law of such person's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, before reaching the age of 16 years and only if such person was in the legal custody of the legitimating parent or parents at the time of such legitimation . . . .

Under this reading, no unlegitimated person would qualify as a "child" under paragraph (A).

**B.**

It is, happily, unnecessary for us to further parse the text of section 101(c)(1), for former section 321(a)(3) provides a ready answer to the question whether an unlegitimated person may qualify as a "child" under section 101(c)(1). Because former section 321(a)(3) specifically contemplated the situation where a "*child* was born out of wedlock and the paternity of the *child* has not been established by legitimation" (emphasis added), it is indisputable that before enactment of the CCA the term "child" in section 101(c)(1) included unmarried persons under the age of 21 who were born out of wedlock and unlegitimated. And because the CCA did not modify the definition of "child" in section 101(c)(1), it follows *a fortiori* that the term "child" continues to include unmarried persons under the age of 21 who were born out of wedlock and who are unlegitimated.

We therefore must eliminate from the list of possible approaches to section 101(c)(1) Approach 4, under which no unlegitimated person would qualify as a "child." Under each of the three remaining approaches, any unlegitimated person who is unmarried and under age 21 would be a "child." We therefore need not decide among these three approaches.[3]

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[3] If the Secretary of Homeland Security were to adopt Approach 3 by regulation, we expect that any court reviewing whether that position is consistent with section 101(c)(1) and section 320 would be very likely to conclude that it is. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844–46 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); INA § 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3) (2000) (charging Secretary with "the administration and enforcement [with certain exceptions] of this chapter and all other laws relating to the immigration and naturalization of aliens," and directing Secretary to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter"). Although we recognize that this approach results in differential treatment of fathers and mothers of children born out of wedlock—i.e., only certain legitimated children may seek derivative citizenship through their fathers, whereas both legitimated and unlegitimated children may seek derivative citizenship through their mothers—we believe that this approach would also withstand scrutiny under the Equal Protection Clause, at least so long as the legitimation requirement does not in a particular case create an "inordinate and unnecessary hurdle[]" for fathers. *Nguyen v. INS*, 533 U.S. 53, 70 (2001) (upholding INA section 309); *see also id.* at 63 (noting that "[f]athers and mothers are not similarly situated with regard to the proof of biological

**C.**

Because any unlegitimated person who is unmarried and under age 21 is a "child" under section 101(c)(1), it follows that the naturalization of the child's mother satisfies the parental-citizenship condition to derivative citizenship set forth in section 320(a)(1).

Our conclusion is consistent both with the statutory history of derivative citizenship and with the CCA's legislative history. Because former section 321 set forth as a usual condition of derivative citizenship "[t]he naturalization of both parents," it had been necessary for former section 321 to address specifically certain circumstances, including that of unlegitimated children, where the condition of naturalization of both parents was regarded as unreasonable. Because new section 320 significantly broadens the class of children eligible for automatic citizenship by requiring that no more than one parent need be a citizen, its rule is plainly broad enough to cover unlegitimated children, and it therefore is unsurprising that it does not specifically address them.

According to the House committee report on the CCA (originally titled the "Adopted Orphans Citizenship Act"), the purpose of the CCA was to "modif[y] the provisions of the Immigration and Nationality Act governing acquisition of United States citizenship by certain children born outside of the United States, principally by providing citizenship automatically to such children." H.R. Rep. No. 106-852, at 3 (2000), *reprinted in* 2000 U.S.C.C.A.N. 1499, 1500. The report noted that "[c]urrent law can beneficially be streamlined in a way that will benefit families with foreign-born children." *Id.* at 4, 2000 U.S.C.C.A.N. at 1501; *see also* 146 Cong. Rec. 18493 (Sept. 19, 2000) (statement of Rep. Smith) (bill "designed to streamline the acquisition of United States citizenship by foreign children after they are adopted by American citizens"). Although "[t]he bill as introduced dealt solely with foreign-born adopted children," the final version was to "provide[] the same automatic citizenship upon entry for foreign-born children of a U.S. citizen(s) who are not considered citizens at birth under current law," including "children receiving citizenship on the basis of a parent(s) naturalizing." H.R. Rep. No. 106-852 at 5, 2000 U.S.C.C.A.N. at 1502. Neither the report nor the floor debate indicates any intention to eliminate this benefit for children who were born out of wedlock and who remain unlegitimated.

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parenthood"). *See also Barthelemy v. Ashcroft*, 329 F.3d 1062, 1068 (9th Cir. 2003) (rejecting equal protection challenge to former INA section 321(a)(3) and noting that "fathers must often take affirmative steps to legitimate their children under the laws of various states and nations, but mothers typically legitimate their children by giving birth").

## III.

An alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship under new section 320. Specifically, when the mother of such child becomes a naturalized citizen, the child satisfies the condition that "[a]t least one parent of the child is a citizen of the United States, whether by birth or naturalization." INA § 320(a)(1), 8 U.S.C. § 1431(a)(1).

M. EDWARD WHELAN III
*Acting Assistant Attorney General*
*Office of Legal Counsel*

# Authority of Chief Financial Officer Under FY 2003 HUD Appropriations

Provisions of the Department of Housing and Urban Development Appropriations Act for FY 2003 did not assign all responsibility for appropriations law matters to HUD's Chief Financial Officer to the exclusion of the General Counsel.

August 12, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This memorandum responds to your request for our opinion concerning the proper interpretation of certain appropriations provisions for the Department of Housing and Urban Development ("HUD") contained in the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 ("2003 Act"). Title II of division K of that Act contained the salaries and administration provisions of the fiscal year 2003 appropriations for HUD. Those provisions included certain appropriations earmarked for HUD's Office of the Chief Financial Officer ("OCFO").

You have asked whether these appropriations provisions exclusively assigned all responsibility for appropriations law matters at HUD to HUD's Chief Financial Officer ("CFO"), effectively barring HUD's General Counsel from exercising any responsibilities with respect to appropriations matters. We conclude that the provisions in question do not have that effect. They provide the CFO with (or at least condition funding on the CFO's being provided (1)) exclusive authority to investigate potential or actual violations of federal appropriations law by HUD officials or components, but they do not provide exclusive authority or responsibility with respect to all other matters or issues concerning federal appropriations statutes that may arise at HUD.[1]

## I.

Under the general salary and administrative expenses appropriation for HUD, the 2003 Act provided that $21,000,000 was to be made available to the CFO "exclusively for activities to implement appropriate funds control systems, including . . . establishment of a division of appropriations law within the Office of the Chief Financial Officer." 2003 Act, 117 Stat. at 499. After listing several additional provisions respecting the OCFO, and providing for the transfer of "no

[1] You have not asked us, and we therefore do not address, whether the provisions addressed in this memorandum are permanent substantive obligations imposed on HUD or are merely conditions to the fiscal year 2003 appropriations. Our discussion assumes *arguendo* the former, and we therefore do not reiterate the alternative language of conditions where it would otherwise be appropriate to do so.

fewer than four appropriations law attorneys from the Legislative Division of the Office of Legislation and Regulations, Office of General Counsel to the OCFO," the 2003 Act then stated:

> *Provided further*, That, notwithstanding any other provision of law, hereafter, the Chief Financial Officer of the Department of Housing and Urban Development shall, in consultation with the Budget Officer, have *sole authority to investigate potential or actual violations under the Anti-Deficiency Act (31 U.S.C. 1341 et seq.) and all other statutes and regulations related to the obligation and expenditure of funds made available in this, or any other Act*; shall determine whether violations exist; and shall submit final reports on violations to the Secretary, the President, the Office of Management and Budget and the Congress in accordance with applicable statutes and Office of Management and Budget circulars: *Provided further*, That the Chief Financial Officer shall establish positive control of and maintain adequate systems of accounting for appropriations and other available funds as required by 31 U.S.C. 1514: *Provided further*, That for the purpose of determining whether a violation exists under the Anti-Deficiency Act (31 U.S.C. 1341 et seq.), the point of obligation shall be the executed agreement or contract.

*Id*. at 499–500 (emphasis added). The 2003 Act also made the funding subject to the conditions that the CFO appoint qualified personnel to conduct investigations; establish minimum qualifications for personnel that may be appointed to conduct investigations; and establish guidelines, timeframes, policies, and procedures for the conduct of investigations of "potential and actual violations of the Anti-Deficiency Act and all other statutes and regulations governing the obligation and expenditure of funds made available in this or any other Act." *Id*. at 500.

**II.**

Apparently responding to certain communications from the staff of the House Appropriations Committee, HUD's Deputy Assistant Secretary for Congressional Relations recently set forth HUD's construction of the above-quoted provisions of the 2003 Act in a letter to Senator Christopher Bond:

> The initial reaction of the Department to both the statutory and conference report language was that the OCFO now has sole authority over all potential or actual violations of all appropriations laws. Pursuant to conversations with staff from the House Committee on Appropriations the congressional intent of the statutory and conference report language was clarified to mean that the CFO now also has sole authority in all matters of appropriations law, whether or not

> the issues involve potential or actual violations. The Department will meet both the letter and spirit of the conference report by transferring all appropriations law responsibilities, beyond just potential or actual appropriations law violations, from the OGC to the OCFO.

Letter for Christopher S. Bond, Committee on Appropriations, U.S. Senate, from William M. Himpler, Deputy Assistant Secretary for Congressional Relations, Department of Housing and Urban Development, at 2 (Mar. 13, 2003).

In a subsequent letter to the Office of Management and Budget ("OMB"), however, Senator Bond strongly disagreed with HUD's interpretation of the OCFO appropriations provisions. Senator Bond stated in relevant part:

> This interpretation of the "Salaries and Expenses" account language is contrary to the House and Senate agreement on the Conference, the understanding of the Senate, the initial understanding of HUD (see HUD Letter dated March 13th) and the plain reading of the statutory language and the reports (see attachments) of the Act. . . . This interpretation and subsequent implementation will substantially undermine and erode the authority of the General Counsel to ensure HUD can meet its legal requirements in a consistent and effective manner.

Letter for Philip Perry, General Counsel, Office of Management and Budget, from Christopher S. Bond, Committee on Appropriations, U.S. Senate, at 1 (May 9, 2003).

A memorandum on this issue prepared by HUD's General Counsel expresses essentially the same view contained in Senator Bond's letter. *See* Memorandum for William M. Himpler, Deputy Assistant Secretary for Congressional Relations, from Richard A. Hauser, General Counsel, Department of Housing and Urban Development, *Re: Final Report to Appropriation Committees on Appropriation Law Functions* (Mar. 13, 2003). The General Counsel's memorandum states: "We strongly disagree with the interpretation that the [2003 Act] and accompanying Conference Report provide for all appropriations law functions and responsibilities to be under the jurisdiction of the CFO. The Act and the Conference Report do not support that interpretation." *Id*. Although the General Counsel stated that the 2003 Act gives the CFO "sole authority to investigate and determine potential or actual violations of the Antideficiency Act and other fiscal statutes," he asserted that "[t]his is the extent of the authority conferred on the CFO." *Id*.

In response to these conflicting interpretations of the OCFO appropriations provisions in the 2003 Act, you have asked this Office to determine the correct interpretation of those provisions.

## III.

It is clear that the foregoing provisions of the 2003 Act give the CFO extensive and exclusive authority (subject to obligatory consultation with the Budget Officer) to conduct and control investigations of potential and actual violations of the Anti-Deficiency Act ("ADA") and other appropriations laws and regulations within HUD. In that respect, the most pertinent language in the statute provides that the CFO "shall, in consultation with the Budget Officer, have sole authority *to investigate* potential or actual *violations* under the Anti-Deficiency Act (31 U.S.C. 1341 et seq.) and all other statutes and regulations related to the obligation and expenditure of funds made available in this or any other Act." 2003 Act, 117 Stat. at 499 (emphasis added).

We find no basis in the text of these provisions, however, to support the broader contention that the CFO was given sole authority, exclusive of the HUD General Counsel and his Office, to provide advice, counsel, or analysis for the Secretary or other HUD components on all matters and issues of appropriations law. The extensive investigative authority respecting actual or potential violations of law that was indisputably granted to the CFO simply cannot be equated with the exclusive authority to interpret, analyze, and provide advice respecting the federal appropriations laws for HUD and its components. Many matters concerning the federal appropriations laws at a department like HUD (e.g., determining the effect on HUD or its components of a binding judicial or administrative decision interpreting the federal appropriations laws) may arise without regard to the occurrence, or even the suspicion, of a violation of such laws. Moreover, none of the other detailed provisions of the 2003 Act concerning the appropriations and authorities of the CFO states or establishes that the CFO is to exercise the same exclusive authority over all other appropriations law matters that he exercises over the investigation of violations of such laws. Although the language of these provisions is somewhat cumbersome and wordy, we do not find it ambiguous in this respect.

Because the text of these statutory provisions is clear on this question, we need not resort to legislative history to ascertain their meaning. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). In any event, our conclusion is consistent with pertinent legislative history concerning this provision. *See* H.R. Conf. Rep. No. 108-10, at 1427 (2003); H.R. Rep. No. 107-740, at 79 (2002) (House Appropriations Committee). These reports reinforce, rather than contradict, the import of the CFO provision's text: the CFO was given sole authority to investigate violations of the ADA and other appropriations laws. They do not state or indicate that Congress intended, contrary to the statute's text, to give the CFO exclusive authority at HUD with regard to all other matters or issues concerning federal appropriations law.

Finally, there is some suggestion in the documents provided us that the post-enactment statements of congressional staff, purporting to clarify the intent and meaning of the statutory provisions in issue, were given considerable weight by some officials in implementing those provisions. It is clear that such post-enactment statements are entitled to no weight in determining the meaning of a statute. *See, e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (post-passage statements of legislators not entitled to any weight).

M. EDWARD WHELAN III
*Acting Assistant Attorney General*
*Office of Legal Counsel*

# Temporary Filling of Vacancies in the Office of United States Attorney

Two statutes that provide for the temporary filling of vacancies in the office of United States Attorney, 28 U.S.C. § 546 and 5 U.S.C. §§ 3345–3349d, operate independently, and either or both may be used for a particular vacancy.

September 5, 2003

MEMORANDUM OPINION FOR THE DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

We are providing a set of questions and answers that address the means for temporarily filling vacancies in the office of United States Attorney. We hope that this guidance, in this form, will be of practical benefit as vacancies arise.

Q1. Is 28 U.S.C. § 546 the exclusive means for filling U.S. Attorney vacancies? Or is the Vacancies Reform Act also applicable?

A1. Both statutes are available.

Under section 546, when the office of United States Attorney becomes vacant, "the Attorney General may appoint a United States attorney for the district" in which the vacancy has occurred. 28 U.S.C. § 546(a). A United States Attorney appointed under this authority may serve until a successor is appointed by the President and has qualified or "the expiration of 120 days after appointment by the Attorney General." *Id.* § 546(c)(1), (2). When the authority under section 546 is used, the person appointed by the Attorney General or the district court is a United States Attorney and is not just acting in the position. *See United States v. Gantt*, 194 F.3d 987, 999 n.5 (9th Cir. 1999) ("Section 546(d) appointments are fully-empowered United States Attorneys, albeit with a specially limited term, not subordinates assuming the role of 'Acting' United States Attorney.")

The Vacancies Reform Act, 5 U.S.C. §§ 3345–3349d, is the general authority under which acting officials may perform the functions and duties of a vacant Senate-confirmed office.

By its terms, section 546 does not exclude the naming of an acting United States Attorney. It does not even deal with "acting" officials but with fully vested United States Attorneys, albeit ones who serve shortened terms. Conversely, the Vacancies Reform Act, which was passed after section 546, states that it is, with certain exceptions, "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) (emphasis added), but section 546 does not provide for *acting* United States Attorneys and is not covered by this provision on exclusivity. Thus, both section 546 and the Vacancies Reform

Act are available for temporarily filling a vacancy in the position of United States Attorney.

Q2. Under the Vacancies Reform Act (and Department of Justice regulations, *see* 28 C.F.R. § 0.137 (2003)), is the First Assistant U.S. Attorney the person that automatically, by operation of law, would become Acting U.S. Attorney under 5 U.S.C. § 3345(a)(1)?

A2. Generally yes, in the absence of a prior Attorney General appointment of a United States Attorney under 28 U.S.C. § 546 or a prior presidential designation of an acting United States Attorney under 5 U.S.C. § 3345(a)(2) or (3).

Under the Vacancies Reform Act, the President (and no one else) could designate as Acting United States Attorney an official already holding a Senate-confirmed position, 5 U.S.C. § 3345(a)(2), or an official who had served in the Department for at least 90 days of the previous 365-day period in a position for which the pay was at least the minimum level for GS-15. 5 U.S.C. § 3345(a)(3). In the absence of such a presidential designation, the "first assistant" to the office of United States Attorney would serve, *id.* § 3345(a)(1), except that a first assistant may not act if he has been first assistant for less than 90 days in the 365-day period before the vacancy *and* the President nominates him for the vacant position, *id.* § 3345(b)(1)(A). Under the Department's regulations, each "office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate ('PAS office') shall have a First Assistant" under the Vacancies Reform Act, 28 C.F.R. § 0.137(b), and "[w]here there is a position of Principal Deputy to the PAS office, the Principal Deputy shall be the first assistant," *id.* Otherwise, the Attorney General names the first assistant in writing. *Id.* United States Attorneys' offices frequently have a "First Assistant United States Attorney," who is the principal deputy to the United States Attorney. Only the occupant of that position could serve as Acting United States Attorney under the "first assistant" provision in 5 U.S.C. § 3345(a)(1).

Q3. How does the 210-day Vacancies Reform Act time limit on Acting U.S. Attorneys interact with the 120-day limit on interim United States Attorneys under section 546? When do the time periods commence running?

A3. The two time limits operate independently. The Vacancies Reform Act provides a complex set of rules for the time during which an acting official may serve, 5 U.S.C. § 3346, *see Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 66–70 (1999) (Questions and Answers Nos. 22–38), but for present purposes it is sufficient to note that the basic 210-day period for service begins to run "on the date the vacancy occurs." 5 U.S.C. § 3346(a)(1). By contrast, section 546 provides that when the Attorney General appoints a United States Attorney, the United States Attorney's service continues until "the expiration of 120 days after appointment by the Attorney General under this

section." 28 U.S.C. § 546(c)(2). We previously have concluded that "[t]he 120-day time period, by the terms of the statute, unambiguously begins with the Attorney General's appointment." *Starting Date for Calculating the Term of an Interim United States Attorney*, 24 Op. O.L.C. 31, 31–32 (2000). We noted that this conclusion was also consistent with the general principles of appointment law and with the assumptions of the courts addressing section 546. *Id.* (citing *United States v. Colon-Munoz*, 192 F.3d 210, 216 (1st Cir. 1999); *In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1139 (D. Mass. 1987)).

Q4. May an acting United States Attorney (acting under the Vacancies Reform Act) be replaced by a United States Attorney appointed by the Attorney General under section 546? What about an acting United States Attorney who has served for more than 120 days?

A4. A United States Attorney appointed by the Attorney General under section 546 may replace an acting United States Attorney irrespective of whether the acting United States Attorney has served for more than 120 days. As explained in A1, neither statute by its terms excludes the use of the other, and the different type of official to be chosen—an acting United States Attorney in one case, a full-fledged United States Attorney in the other—weighs against inferring any such exclusion. Furthermore, because the 120-day period under section 546 does not begin until the Attorney General makes an appointment, the two statutes can operate in sequence even when, for example, an acting United States Attorney has reached a 210-day limit and lost his power to act. Nor would anything in the statutes preclude the same person from acting as United States Attorney and then receiving an appointment under section 546.

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*Office of Legal Counsel*

# Equal Employment Opportunity Commission Actions Against Public Employers to Enforce Settlement or Conciliation Agreements

The Equal Employment Opportunity Commission lacks the authority to initiate an action in federal court against a public employer to enforce a settlement or conciliation agreement negotiated by the EEOC during its administrative process.

September 8, 2003

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

This memorandum responds to your Office's request for our opinion regarding whether the Equal Employment Opportunity Commission ("EEOC") has the authority to initiate an action in federal court against a public employer to enforce a settlement or conciliation agreement negotiated by the EEOC during its administrative process. We examine the issue in light of the Attorney General's presumptively plenary authority over litigation on behalf of the United States, as well as the corollary principle that statutory exceptions to this authority are narrowly construed. We conclude that, because the relevant statutes do not clearly and unambiguously grant the EEOC authority to sue public employers to enforce settlement or conciliation agreements, any such actions must be brought by the Attorney General.

## I. Background

### A. The Attorney General's Litigating Authority

Any analysis concerning the litigating authority of an Executive Branch agency must begin with the presumption that the Attorney General retains "full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 48 (1982) ("*Attorney General as Chief Litigator*"). This authority is rooted in common law and tradition, *see Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458–59 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866), as well as the constitutional grant of all executive power to the President and the duty of the President to "take Care that the Laws be faithfully executed," *see* U.S. Const. art. II, §§ 1, 3.

Enforcing the nation's laws through litigation is an unquestionably executive function. Because the President "alone and unaided could not execute the laws," he does so "by the assistance of" the Attorney General, over whom the President exerts "general administrative control." *Myers v. United States*, 272 U.S. 52, 117 & 161–64 (1926). Centralizing federal litigation authority facilitates presidential

management and supervision of the various policies of Executive Branch agencies and departments as they are implicated in litigation. Centralization also ensures coordination in the development of positions taken by the government in litigation and consideration of the impact of litigation on the government as a whole. Because of the Attorney General's government-wide perspective on matters affecting the conduct of litigation in the Executive Branch, he is uniquely suited to carry out these functions. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278–80 (1888); *Attorney General as Chief Litigator*, 6 Op. O.L.C. at 54–55.

Congress codified the Attorney General's preeminent role in litigation for the United States in 1870, when it first created the Department of Justice and placed the Attorney General at its head. *See* Act of June 22, 1870, ch. 150, 16 Stat. 162.[1] The current version of the relevant law reads:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to the officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 516 (2000). Similarly, section 519 provides that "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 519 (2000).[2] In codifying the Attorney General's otherwise plenary litigating authority,

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[1] By that legislation, "Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney-General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government . . . ." *Perry v. United States*, 28 Ct. Cl. 483, 491 (1893). Congress did so in several ways, including by providing that "solicitor[s]" from various department and agencies "shall be transferred from the Departments with which they are now associated to the Department of Justice; and . . . shall exercise their functions under the supervision and control of the head of the Department of Justice." Act of June 22, 1870, § 3, 16 Stat. at 162. Congress also granted the Attorney General supervisory authority over the U.S. Attorneys and over "all other attorneys and counselors employed in any cases or business in which the United States may be concerned." *Id.* § 16, 16 Stat. at 164. *See generally Attorney General as Chief Litigator*, 6 Op. O.L.C. at 48–51.

[2] Further centralizing the conduct of litigation on behalf of the United States, President Roosevelt issued Executive Order 6166, "the [p]urpose of section 5 of [which], among other things, was to transfer responsibility for the prosecution of criminal proceedings and suits by or against the United States in civil matters to the Department of Justice." *Sullivan v. United States*, 348 U.S. 170, 173 (1954). Section 5 of this Order, which remains in effect today, reads:

> *Claims By or Against the United States*
>
> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

Congress did provide a limited exception where "otherwise authorized by law." 28 U.S.C. §§ 516, 519. Nevertheless, in light of the constitutional and policy considerations supporting centralized control of the federal government's litigation, only "a clear and unambiguous expression of the legislative will" suffices to establish an exception to the Attorney General's exclusive authority to litigate on behalf of the United States. *United States v. Morgan*, 222 U.S. 274, 282 (1911); *see also United States v. Hercules, Inc.*, 961 F.2d 796, 798–99 (8th Cir. 1992) ("The Supreme Court has indicated . . . that the statutory authority of the Attorney General to control litigation is not diminished without a clear and unambiguous directive from Congress.") (citations omitted); *Attorney General as Chief Litigator*, 6 Op. O.L.C. at 48 (The Attorney General retains "full plenary authority" over all litigation to which the United States is a party "absent clear legislative directives to the contrary."); *cf.* 28 U.S.C. § 1345 (2000) ("[T]he district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof *expressly authorized to sue* by Act of Congress.") (emphasis added).

Although admittedly the case law is not entirely uniform, courts have, consistent with this interpretive principle, repeatedly rejected claims that agencies, rather than the Attorney General, have the authority to pursue litigation, "in the absence of an express congressional directive." *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (holding that only the Attorney General, and not the Secretary of Labor, had authority to petition the court for an injunction to enforce its inspection authority); *see also FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968) (holding that only the Attorney General, and not the FTC, had power to seek court enforcement of FTC subpoenas because Congress had not "specific[ally] authoriz[ed]" it to do so); *United States v. Santee Sioux Tribe*, 135 F.3d 558, 562–63 (8th Cir. 1998) (holding that the Attorney General has the authority to enforce National Indian Gaming Commission orders because the relevant statute was silent on the issue). This Office has likewise rejected claims of independent litigation authority ungrounded in clear and unambiguous statutory text. *See*, *e.g.*, *Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities*, 7 Op. O.L.C. 57, 59 (1983) ("*EEOC Litigation Authority Against State and Local Governments*") (concluding that the EEOC lacked authority to present its views in court independently of the Attorney General in litigation against public employers); *see generally Attorney General as Chief Litigator*, 6 Op. O.L.C. at 56 ("[T]he 'otherwise authorized by law' language creating the exception to the Attorney General's

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> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Exec. Order No. 6166 (1933), *reprinted in* 5 U.S.C. § 901 note (2000).

authority in 28 U.S.C. §§ 516 and 519 has been narrowly construed to permit litigation by agencies only when statutes explicitly provide for such authority.").

Furthermore, courts have construed statutory grants of independent litigating authority to confer such authority only with respect to the particular proceedings to which the statutory provision refers, and not as a broad authorization for the agency to conduct litigation in which it is interested generally. *See, e.g.*, *Marshall*, 584 F.2d at 672–76 (holding that congressional authorization to the Secretary of Labor to bring suit under certain circumstances would not be interpreted to authorize the Secretary to institute litigation to enforce investigatory orders); *ICC v. Southern Ry. Co.*, 543 F.2d 534, 536–39 (5th Cir. 1976), *aff'd*, 551 F.2d 95 (1977) (en banc) (holding that congressional authorization of the ICC to intervene in enforcement suits and to continue such suits "unaffected by the action or nonaction of the Attorney General" as well as grants to the district courts of jurisdiction over suits for injunctions "upon complaint of the Commission" did not vest the ICC with authority to institute actions for injunctions) (citations and quotations omitted). Once again, this Office has followed the same interpretive practice. *See, e.g.*, *Authority of the Equal Employment Opportunity Commission to Conduct Defensive Litigation*, 8 Op. O.L.C. 146, 156 (1984) ("*EEOC Defensive Litigation Authority*") (concluding that the congressional grant to the EEOC of authority to bring suits against private employers does not authorize it to conduct defensive litigation in suits brought "in connection with its federal sector administrative enforcement and adjudicative responsibilities, as well as in suits brought by its own employees challenging Commission personnel decisions").

### B. The EEOC's Litigating Authority

An examination of the EEOC's litigation authority begins with 42 U.S.C. § 2000e-4:[3]

> There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys.

[3] Pursuant to these provisions, the EEOC enforces the substantive guarantees not only of Title VII but also of other fair employment legislation, including Title I of the Americans With Disabilities Act, 42 U.S.C. § 12112 (2000), under which the question addressed in this opinion arose.

42 U.S.C. § 2000e-4(b)(1) (2000) (emphasis added). Besides establishing the position of General Counsel, the statute also authorizes the appointment of additional attorneys to represent the Commission other than in the Supreme Court:

> Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

*Id.* § 2000e-4(b)(2).

These provisions give the EEOC, through sections 2000e-5 and 2000e-6, the power to initiate certain actions. The EEOC may also intervene in certain suits brought by individuals:

> The Commission shall have power . . . to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

*Id.* § 2000e-4(g)(6).

Section 2000e-5, referenced in sections 2000e-4(b)(1) and (g)(6), provides for the initiation of investigations and actions. Individuals may file a charge against their employers with the EEOC alleging an "unlawful employment practice." 42 U.S.C. § 2000e-5(a) & (b) (2000). Members of the EEOC may also file a charge. *Id.* § 2000e-5(b). The EEOC then notifies the employer of the charge and investigates the allegations to determine whether "there is reasonable cause to believe that the charge is true." *Id.* In cases in which a preliminary EEOC investigation reveals "that prompt judicial action is necessary to carry out the purposes of the Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge." *Id.* § 2000e-5(f)(2). Absent this need, the EEOC completes its investigation within 120 days. *Id.* § 2000e-5(b). If it finds no reasonable cause to credit the veracity of the allegations, it dismisses the charge. *Id.* If, on the other hand, the EEOC determines that there is such reasonable cause, it attempts to eliminate the unlawful practice "by informal methods of conference, conciliation, and persuasion." *Id.* The EEOC also encourages settlement prior to its reasonable cause determination. 29 C.F.R. § 1601.20 (2002). Agreements resolving the EEOC's concerns reached after a reasonable cause determination are called "conciliation agreements," while those reached prior to such a determination are generally

called "predetermination settlements." *See EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982); 42 U.S.C. § 2000e-5(b).[4]

If the EEOC does not reach an agreement with the employer, it may "bring a civil action against any respondent not a government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1). In the case of public employers, however, "the Commission shall take no further action and refer the case to the Attorney General who may bring a civil action." *Id.* If the EEOC or the Attorney General chooses not to file suit, the aggrieved individual may bring a civil action against the employer. In cases brought by individuals, "the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action." *Id.* Finally, "[i]n any case in which an employer . . . fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order." *Id.* § 2000e-5(i).

Section 2000e-6, referenced in connection with the General Counsel's litigating authority under section 2000e-4(b)(1), authorizes the EEOC and the Attorney General to bring "pattern or practice" suits against employers. As originally enacted, section 2000e-6 authorized only the Attorney General to bring such suits. *See* 42 U.S.C. § 2000e-6(a) (2000). In 1972, Congress amended this section to transfer this function of the Attorney General to the EEOC two years after enactment "unless the President submits, and neither House of Congress vetoes, a reorganization plan." *Id.* § 2000e-6(c).[5] The President submitted such a plan in 1978, transferring back to the Attorney General the exclusive power to bring "pattern or practice" suits against state or local governments, or political subdivisions. President's Reorganization Plan No. 1, § 5, 43 Fed. Reg. 19,809, 92 Stat. 3781 (1978), *reprinted in* 42 U.S.C. § 2000e-4 note. Later that year, the President issued Executive Order 12068, implementing the reorganization plan. 3 C.F.R. 209 (1979). The EEOC retained the authority to litigate "pattern or practice" actions against private employers.

[4] One court has concluded that the EEOC's litigating authority turns on this temporal distinction. *See Pierce Packing*, 669 F.2d at 608 (distinguishing predetermination settlements from conciliation agreements and holding that the EEOC had no authority to sue to enforce predetermination settlements even against a private employer). Our analysis, however, applies equally to both predetermination settlements and conciliation agreements.

[5] Although the clause in section 2000e-6 purporting to give Congress the power to veto the President's reorganization plan is unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983), we have previously concluded that this provision is severable from the remainder of the act granting the President reorganization authority. *See EEOC Defensive Litigation Authority*, 8 Op. O.L.C. at 149 n.6.

## II. Analysis

### A. The EEOC's Authority to Enforce Settlement or Conciliation Agreements Against Public Employers

Your Office has asked us to examine the EEOC's authority to bring actions against public employers to enforce predetermination settlement or conciliation agreements negotiated by the EEOC during its administrative process. Because Congress has provided no clear and unambiguous directive authorizing the EEOC to bring such suits, we conclude that actions to enforce these agreements against public employers are exclusively the province of the Attorney General.

With one possible exception not relevant here,[6] sections 2000e-5 and 2000e-6 define the full scope of the EEOC's litigating authority. *See EEOC Litigation Authority Against State and Local Governments*, 7 Op. O.L.C. at 61–62; *EEOC Defensive Litigation Authority*, 8 Op. O.L.C. at 149–50. The grants of litigating authority in sections 2000e-4(b)(1) and (g)(6) expressly incorporate the limitations of sections 2000e-5 and 2000e-6. Furthermore, while section 2000e-4(b)(2) does not expressly refer to these provisions, we have previously concluded "that the limitations on the General Counsel's authority which are set forth in § 2000e-4(b)(1) necessarily are incorporated into the 'litigation authority' granted Commission attorneys in § 2000e-4(b)(2)," *EEOC Defensive Litigation Authority*, 8 Op. O.L.C. at 149. As we explained, a contrary reading, which "would grant Commission attorneys authority which supersedes that of the General Counsel, under whose supervision they work, pursuant to § 2000e-4(b)(1)," *id*. at 150, "would be contrary to congressional intent, the rule that exceptions to the Attorney General's plenary litigating authority are to be narrowly construed, and the plain language of the statute," *EEOC Litigation Authority Against State and Local Governments*, 7 Op. O.L.C. at 61–62 (footnote omitted).

Neither section 2000e-5 nor section 2000e-6 clearly and unambiguously vests the EEOC with authority to sue to enforce predetermination settlement or conciliation agreements. *See* 42 U.S.C. §§ 2000e-5 & 2000e-6. By contrast, these sections explicitly vest the EEOC with litigating authority in a variety of other circumstances. For instance, section 2000e-5(i) specifically grants the EEOC authority to initiate proceedings to enforce court orders issued in litigation brought under section 2000e-5, including, presumably, settlements entered by court order. *See id.*

[6] Section 2000e-9 provides that "[f]or the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply." 42 U.S.C. § 2000e-9 (2000). Section 161, which sets forth the investigatory powers of the National Labor Relations Board, authorizes the Board to issue subpoenas, and provides, "[i]n case of contumacy or refusal to obey a subpoena," for judicial enforcement "upon application by the Board." 29 U.S.C. § 161(1) & (2) (2000). In light of these provisions, one court has concluded that the EEOC, like the NLRB, may seek court enforcement of its subpoenas. *See EEOC v. Ill. State Tollway Auth.*, 800 F.2d 656, 658 (7th Cir. 1986). We express no opinion on the correctness of this decision.

§ 2000e-5(i). Congress's express allocation of authority to bring such ancillary litigation in this context strongly weighs against finding an implicit grant of analogous authority in those provisions of the statute that authorize the EEOC to negotiate agreements during its administrative process. On the contrary, the reticulate statutory text and structure make clear that where Congress wanted to grant the EEOC independent litigating authority it did so explicitly, as is required for any law derogating from the Attorney General's power to litigate on behalf of the United States.

Furthermore, these statutory provisions nowhere specifically authorize the EEOC to bring an action against a public employer under any circumstance. On the contrary, all statutory references to litigation against public employers expressly reserve such actions to the Attorney General and, conversely, nearly every grant of litigating authority to the EEOC is explicitly limited to suits against private employers.[7] *See* 42 U.S.C. § 2000e-4(g)(6) ("The Commission shall have power . . . to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision."); *id.* § 2000e-5(f)(1) (requiring that in the case of public employers, the EEOC "shall take no further action and shall refer the case to the Attorney General who may bring a civil action."); *id.* (authorizing intervention in case brought by an individual plaintiff by "the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision"); *id.* § 2000e-5(f)(2) (authorizing actions for preliminary injunctions by "the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision"); *id.* § 2000e-6 & President's Reorganization Plan No. 1, § 5 (authorizing only the Attorney General to pursue "pattern or practice" actions against government employers). In short, as we have previously concluded, "statutory analysis . . . demonstrates conclusively that the EEOC lacks authority to prosecute, intervene in, or otherwise appear in, public sector [antidiscrimination] litigation on its own behalf." *EEOC Litigation Authority Against State and Local Governments*, 7 Op. O.L.C. at 64; *see also Proposed Change in EEOC Regulations Concerning Right-to-Sue Notices for Public Sector Employees*, 23 Op. O.L.C. 224, 229 (1999) ("While carrying over to governmental cases the EEOC's administrative function in the initial processing of charges and its important role in seeking to obtain voluntary compliance through conciliation,

[7] Only one clear grant of litigation authority is not expressly so limited. *See* 42 U.S.C. § 2000e-5(i) (granting the EEOC the power to sue employers to enforce court orders). In addition, to the extent that 42 U.S.C. § 2000e-9 can be read as a grant of litigating authority, *see supra* note 6, it also is not expressly limited to private employers, and one court has upheld the EEOC's authority to sue public employers under this provision. *See Ill. State Tollway Auth.*, 800 F.2d at 660. Neither section 2000e-5(i) nor section 2000e-9 mentions suits against public employers, however, and we express no opinion as to whether these sections authorize such suits. In all events, neither provision authorizes the EEOC to sue a public employer to enforce a predetermination settlement or conciliation agreement.

Congress unequivocally conferred sole litigating authority in such cases on the Attorney General.").

Our conclusion is also consistent with the rationales underlying the presumption in favor of the Attorney General's control over all litigation, including consistency and coordination of government litigation positions. Enforcement of predetermination settlement or conciliation agreements is not merely a matter of straightforward contract interpretation and may implicate the meaning of the substantive provisions of antidiscrimination law. For instance, agreements have included promises by the employer that it will, in the future, act consistently with Title VII. *See, e.g.*, *EEOC v. Cleveland State Univ.*, 1982 U.S. Dist. LEXIS 11885, at *2 (N.D. Ohio Jan. 13).[8] Suits to enforce such agreements, like the action in *Cleveland State*, involve questions of whether the employer has conformed to the substantive requirements of federal antidiscrimination law.

### B. Cases Allowing EEOC Enforcement of Settlement or Conciliation Agreements

Although several courts have permitted the EEOC to bring actions to enforce predetermination settlement or conciliation agreements, their reported decisions have involved private employers and thus not confronted the EEOC's authority to enforce such agreements against state and local government entities.[9] *See, e.g.*, *EEOC v. Henry Beck Co.*, 729 F.2d 301 (4th Cir. 1984); *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567 (5th Cir. 1983); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038 (7th Cir. 1982); *cf. EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979) (entertaining EEOC suit to enforce conciliation agreement without discussion). Whatever the merit of their holdings as to private employers,[10] we do not find these decisions helpful in determining whether the EEOC has authority to bring suit to enforce predetermination settlement or conciliation agreements against public employers given the pervasive and unequivocal distinction drawn by 42 U.S.C. § 2000e between suits against public and private employers.

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[8] The agreement in that case read in part: "All hiring, promotion practices, and other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion or national origin in violation of Title VII of the Civil Rights Act of 1964 as amended." 1982 U.S. Dist. LEXIS 11885, at *2.

[9] The only opinions—both unpublished district court decisions—that do involve EEOC suits against public employers to enforce negotiated agreements reach conflicting results. The court that considered the issue of the EEOC's power to sue public employers dismissed the EEOC's action on the ground that the EEOC lacked such authority. *See EEOC v. State Univ. of N.Y., Upstate Medical Univ.*, No. 5:02-CV-0820 (NPM) (N.D.N.Y. Jan. 30, 2003). The other court did not consider the issue and allowed the action to proceed. *See Cleveland State*, 1982 U.S. Dist. LEXIS 11885, at *6–*8.

[10] Despite these decisions and the comparatively broad scope of the EEOC's authority to litigate against private employers, we note that no statutory provision specifically authorizes the EEOC to sue to enforce predetermination settlement or conciliation agreements even against private entities. Regardless, we do not here address the EEOC's authority to bring such actions.

These decisions, furthermore, have not considered the question of which part of the Executive Branch—the EEOC or the Attorney General—is authorized to sue to enforce predetermination settlement or conciliation agreements. Rather, they have held only that these agreements are judicially enforceable, *see Safeway Stores*, 714 F.2d at 574; *cf. Ruedlinger v. Jarrett*, 106 F.3d 212 (7th Cir. 1997) (allowing an individual to sue to enforce a settlement agreement against a private employer), and that suits to enforce them are within the jurisdiction of the federal courts because they are not merely contract actions but arise directly under Title VII, *see, e.g.*, *Henry Beck*, 729 F.2d at 305–06; *Safeway Stores*, 714 F.2d at 572; *Liberty Trucking*, 695 F.2d at 1044; *see also* 42 U.S.C. § 2000e-5(f)(3) ("Each United States district court . . . shall have jurisdiction of actions brought under this subchapter."). Because these decisions nowhere address the distinct and more specific question presented here, *see Marshall*, 584 F.2d at 676 ("[T]he issue is not whether the United States could initiate such a suit in the district court but whether the Secretary [of Labor] can."), it remains an "open one," *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (holding that the Federal Election Commission had no authority to litigate in the Supreme Court without the authorization of the Justice Department despite the fact that the agency had done so previously); *see also United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.) ("[T]he Court does not consider itself as bound by" a "*sub silentio*" assumption of "jurisdiction.").

Finally, these decisions appear to be driven less by the text of section 2000e than by policy considerations, specifically a perceived need to provide a forum in which agreements can be enforced in order to effectuate the statute's emphasis on conciliation and voluntary resolution of discrimination complaints. *See Henry Beck*, 729 F.2d at 305–06 (stressing the importance of the EEOC's ability to "function as an efficient conciliator"); *Liberty Trucking*, 695 F.2d at 1043 ("This statutory scheme [emphasizing conciliation] will be undermined by a holding that the federal courts lack jurisdiction over suits seeking enforcement of conciliation agreements."); *Safeway Stores*, 714 F.2d at 573 ("If conciliation agreements were unenforceable, there is little question that this primary role of voluntary compliance would be undermined."). Of course, such concerns cannot override the constitutional and statutory presumption that the authority to litigate belongs to the Attorney General. *See, e.g.*, *NRA Political Victory Fund*, 513 U.S. at 95–96 (acknowledging the "sound policy reasons [that] may exist for providing the FEC with independent litigating authority in [the Supreme] Court" but holding that these considerations cannot override the lack of statutory language doing so). In all events, so long as the Attorney General may sue to enforce predetermination settlement and conciliation agreements, these practical concerns need not arise.

## III. Conclusion

We conclude that the EEOC lacks the authority to initiate an action in federal court against a public employer to enforce predetermination settlement or conciliation agreements reached by the EEOC during the administrative process. Our conclusion is compelled by the language of the statute authorizing the EEOC's enforcement activities, as well as the well-settled, constitutionally-grounded interpretive principle that, absent a specific and unambiguous directive to the contrary, the United States' litigating authority resides with the Attorney General.

HOWARD C. NIELSON, JR.
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*Office of Legal Counsel*

# Holdover and Removal of Members of Amtrak's Reform Board

A member of Amtrak's Reform Board whose statutory term has expired may not hold over in office until a successor is appointed.

The President may remove a member of the Amtrak Reform Board without cause.

September 22, 2003

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether a member of Amtrak's Reform Board whose statutory term has expired may hold over in office until a successor is appointed. We believe that he may not. You have also asked whether the President may remove a member without cause. We believe that the President has that power.

## I.

Under the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (1997) ("Amtrak Act" or "Act"), Amtrak is a rail carrier "operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(1), (2) (2000). It is under the direction of a "Reform Board," which "consist[s] of 7 voting members appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years." *Id.* § 24302(a). Under the Act, it "is not a department, agency, or instrumentality of the United States Government," *id.* § 24301(a)(3), and "to the extent consistent with [the Act], the District of Columbia Business Corporation Act (D.C. Code §§ 29-301 *et seq.*) appl[ies]," *id.* § 24301(e).

The Act does not provide that a member of the Reform Board may hold over after his five-year term expires. We believe, therefore, that when a member's term expires, he may no longer sit on the Reform Board:

> By the common law, as well as by the statutes of the United States, and the laws of most of the States, when the term of office to which one is elected or appointed expires, his power to perform its duties ceases. This is the general rule.
>
> The term of office of a district attorney of the United States is fixed by statute at four years. When this four years comes round, his right or power to perform the duties of the office is at an end, as completely as if he had never held the office.

*Badger v. United States*, 93 U.S. 599, 601 (1876) (citation omitted). As the Supreme Court similarly stated in *United States v. Eckford's Executors*, 42 U.S. (1 How.) 250, 258 (1843), "[a]t the end of [the statutory] term, the office becomes vacant, and must be filled by a new appointment."

The Executive Branch recognizes the same rule. The opinions of our Office have followed it. *See* Memorandum for John P. Schmitz, Deputy Counsel to the President, from John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expiration of the Term of the Chairman of the Federal Reserve System* at 1 (July 5, 1991) (because "[t]here is no statutory provision allowing the Chairman to hold over upon the expiration of his term," "that office will become vacant when Mr. Greenspan's term as Chairman expires"); *Federal Reserve Board—Vacancy With the Office of the Chairman—Status of the Vice Chairman (12 U.S.C. §§ 242, 244)*, 2 Op. O.L.C. 394, 395 (1978) ("Because the incumbent is not entitled to continue to exercise his powers absent reappointment, a vacancy in the position results."). And a long line of prior opinions by the Attorneys General reached the same conclusion. *See Reappointment of the District of Columbia Rent Commissioners*, 33 Op. Att'y Gen. 43, 44 (1921) ("The general rule is that where Congress has not authorized an officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then have been made."); *Interstate Commerce Commission—Term of Office*, 25 Op. Att'y Gen. 332, 332–33 (1905); *Chiefs of Bureaus in the Navy Department*, 17 Op. Att'y Gen. 648, 649 (1884); *Liability of Sureties on Official Bond*, 15 Op. Att'y Gen. 214, 214–15 (1877); *Resignation of Office*, 14 Op. Att'y Gen. 259, 261–62 (1873); *Secretary of New Mexico*, 12 Op. Att'y Gen. 130 (1867); *Tenure of Navy Agents*, 11 Op. Att'y Gen. 286, 286–87 (1865) (overruling *Naval Officers Hold Over Till Successors Are Qualified*, 2 Op. Att'y Gen. 713 (1835)).

We are aware of only one argument for the position that, in the circumstances here, this rule should not apply. The District of Columbia Business Corporation Act ("D.C. Business Corporation Act") provides that "[e]ach director [of a for-profit corporation] shall hold office for the term for which elected or until a successor shall have been elected and qualified." D.C. Code Ann. § 29-101.33 (2001). The Act establishing Amtrak makes the D.C. Business Corporation Act applicable "to the extent consistent with" the Amtrak Act, 49 U.S.C. § 24301(e), and, according to the argument, it would be consistent with the Amtrak Act for the members of the Reform Board, having served their statutory terms, to hold over under the provision of District of Columbia law.[1]

[1] The Amtrak statute actually refers to "D.C. Code § 29-301 et seq.," and although that citation at one time would have referred to provisions about for-profit corporations, the citation now refers to the provisions governing non-profit corporations. *See* D.C. Code § 29-301 note (2001) (referring to 1981 edition). The provision of District of Columbia law governing for-profit corporations, by its terms, does not fit the situation of Amtrak's Reform Board. That provision states that a director may continue to serve "until a successor shall have been elected and qualified." D.C. Code § 29.101.33 (2001). Amtrak's Reform Board, however, is appointed, not elected. The provision on non-profit corporations,

We believe that this argument would be mistaken. In order to determine whether, and to what extent, a provision of the D.C. Business Corporation Act is "consistent with" the Amtrak Act, we must first determine what the Amtrak Act, standing alone, means and must then ascertain whether the provision of the D.C. Business Corporation Act supplements—or instead conflicts with—that meaning. In view of the well-established principle that an appointee may not continue past his term unless the statute provides for him to hold over, we believe that the Amtrak Act's specification of a simple five-year term affirmatively excludes the existence of holdover rights. Congress passed the Act against the background of the longstanding interpretation on holdover rights, and "we may presume 'that our elected representatives, like other citizens, know the law.'" *Dir., Ofc. of Workers' Comp. Progs. v. Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97 (1979)). *See also Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117 (2002) ("Congress being presumed to have known of this settled judicial treatment"). Furthermore, the federal statute at one time expressly allowed a director to hold over after his term had ended, until a new director was selected, *see* 49 U.S.C. § 24302(a)(2)–(4) (1994), but Congress later deleted this provision, *compare* Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 906 (1994), *with* Pub. L. No. 105-134, § 411(a), 111 Stat. 2570, 2588 (1997). The holdover rights under the D.C. Business Corporation Act therefore do not fill in a term that the Amtrak Act leaves open, but instead conflict with that statute's rejection of holdover rights.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 385 (1995), where the Supreme Court held that Amtrak is part of the federal government for purposes of the First Amendment but ordinarily is treated, for statutory purposes, as a corporation under the laws of the District of Columbia, the Court noted that the statutory provisions governing Amtrak are nevertheless contrary to District of Columbia law "with respect to many matters of structure and power, including the manner of selecting the company's board of directors." The Court listed, as an instance where the federal statute conflicts with District of Columbia law, the provision that, at the time, set a four-year term for a director. *Id*. So, too, the provision of the Act that now sets a simple five-year term is inconsistent with, and therefore is not supplemented by, District of Columbia law.

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by contrast, uses the language "until his successor shall have been elected or appointed." D.C. Code § 29.301.19(c). We find it unnecessary to attempt to resolve which part of the District of Columbia law of corporations—the part governing for-profit corporations or the part governing non-profits—applies to Amtrak "to the extent consistent with" the Amtrak Act, because, as we explain below, the holdover rights under each are not consistent with the Amtrak Act.

## II.

We believe that the President, even without cause, may remove a member of Amtrak's Reform Board. As a general matter, the power of appointment "carrie[s] with it the power of removal." *Myers v. United States*, 272 U.S. 52, 119 (1926). This "rule of constitutional and statutory construction" recognizes that "those in charge of and responsible for administering functions of government who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint." *Id. See also Sampson v. Murray*, 415 U.S. 61, 70 n.17 (1974); *Keim v. United States*, 177 U.S. 290, 293–94 (1900); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). The power of removal aids the President in carrying out his constitutional duty to exercise "the executive Power" and "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. *See Morrison v. Olson*, 487 U.S. 654, 689–90 (1988).

This structural principle, we believe, applies to Amtrak. Although for statutory purposes Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), the Supreme Court in *Lebron* held, in the context of claims that Amtrak had violated the First Amendment, that it is "an agency of the Government, for purposes of the constitutional obligations of the Government . . . when the [Government] has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees." 513 U.S. at 399. Applying *Lebron*, our Office has concluded that "[w]e can conceive of no principled basis for distinguishing between the status of a federal entity vis-à-vis constitutional obligations relating to individual rights and vis-à-vis the structural obligations that the Constitution imposes on federal entities." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 n.70 (1996) (citation omitted) ("*Constitutional Separation of Powers*"). A fundamental element of Executive Branch structure is that presidential appointees are subject to removal by the President.

Congress provided no express restriction against removal, without cause, of members of the Reform Board. Because the removal power is a principal means by which the President carries out the executive power and takes care that the laws be faithfully executed, we do not believe that any restriction on the President's removal authority should be inferred. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.").

To be sure, in *Wiener v. United States*, 357 U.S. 349 (1958), the Supreme Court did infer a tenure protection from statutory silence. There, the Court held that the President could not remove, without cause, a member of the War Claims Commission, "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise.'" *Id.*

at 354–55 (citation omitted). The Court reasoned that the "intrinsic judicial character of the task with which the Commission was charged" could not be squared with tenure at the pleasure of the President.[2] *Id.* The Amtrak Reform Board runs a business; it is not an adjudicatory body. Consequently, there is no ground for inferring any tenure protection for the Reform Board's members under the reasoning of *Wiener*.

In *Constitutional Separation of Powers*, we analyzed the cases about removal restrictions and concluded that "[i]n situations in which Congress does not enact express removal limitations, . . . the executive branch should resist any further application of the *Wiener* rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory." 20 Op. O.L.C. at 170 (footnote omitted). However, even if we were to concede that removal restrictions sometimes may be inferred for officers whose duties are not wholly adjudicatory, such as the members of the "independent" regulatory commissions, the Reform Board lacks some critical characteristics of the multi-member boards whose members the lower courts have assumed to be tenure-protected despite the absence of any express statutory limit on removal. The members of the Reform Board do not serve staggered terms; they are not subject to political balance requirements, although the President is to consult with both the majority and minority leaders in making his selections; and they do not engage in regulation through agency adjudication and rulemaking.[3] *Cf. FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (the Federal Election Commission was "likely correct" that "the President can remove the commissioners only for good cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms"); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) ("[F]or purposes of this case, we accept appellants' assertion in their brief, that it is commonly understood that the President may remove a commissioner [of the Securities and Exchange Commission] only for 'inefficiency, neglect of duty, or malfeasance in office.'"). Even if the independent regulatory commissions are taken as a model, no tenure protection could be found here.

Nevertheless, in *Lebron*, the Supreme Court suggested that the President might not be able to remove Amtrak's directors at all:

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[2] Although the Court's later decision in *Morrison v. Olson*, 487 U.S. 654 (1988), stated that an officer's function is only one consideration in deciding whether an express statutory protection of tenure is constitutional, *id.* at 691, the Court in *Morrison* did not address the role of an officer's function when tenure protection might be inferred from statutory silence.

[3] Furthermore, the President is authorized to appoint to the Reform Board the Secretary of Transportation, 49 U.S.C. § 24302(a)(2)(ii), an official who plainly may be removed by the President without cause, and we understand that, in the practical application of this provision, the Secretary is understood to serve on the Reform Board only as long as he holds the office of Secretary.

> [Amtrak] is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission and the Securities and Exchange Commission, which are run by Presidential appointees with fixed terms. It is true that the directors of Amtrak, unlike commissioners of the independent regulatory agencies, are not, by the explicit terms of the statute, removable by the President for cause, and are not impeachable by Congress. But any reduction in the immediate accountability for Amtrak directors vis-à-vis regulatory commissioners seems to us of minor consequence for present purposes—especially since, by the very terms of the chartering Act, Congress's "right to repeal, alter, or amend this chapter at any time is expressly reserved."

513 U.S. at 398 (citation omitted). The Court's discussion of the President's control over Amtrak's directors, we believe, was dictum. It was not essential to the conclusion in *Lebron* because the Court found that the government exercises control over Amtrak *even if* the President has less authority than over the independent regulatory agencies. Further, the passage starts from incorrect premises and arrives at an incorrect conclusion. The commissioners of the Federal Communications Commission and the Securities and Exchange Commission are not "by the explicit terms of the statute[s], removable by the President for cause." In each case the statute is silent on removal. *See* 15 U.S.C. § 78d(a) (2000); 47 U.S.C. § 154(a), (c) (2000). Thus, in each case, the President's power follows from the general principles that we have set out above and not from an explicit statutory grant of power. The power of *Congress* to revoke Amtrak's charter, moreover, while relevant to whether Amtrak is part of the government for constitutional purposes, does not enable the *President* to carry out his constitutional responsibilities. To discharge those responsibilities, the President needs the power of removal, and he has that power even in the absence of a statutory provision that confers it upon him.

M. EDWARD WHELAN III
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# Compliance of Direct Recording Electronic Voting Systems With Help America Vote Act and Americans With Disabilities Act

A direct recording electronic voting system that produces a contemporaneous paper record, which is not accessible to sight-impaired voters but which allows sighted voters to confirm that their ballots accurately reflect their choices before the system officially records their votes, would be consistent with the Help America Vote Act and with title II of the Americans with Disabilities Act, so long as the voting system provides a similar opportunity for sight-impaired voters to verify their ballots before those ballots are finally cast.

October 10, 2003

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

This memorandum responds to your Office's request of August 12, 2003, for our opinion on whether a direct recording electronic ("DRE") voting system may, consistent with the Help America Vote Act and the Americans with Disabilities Act, produce a contemporaneous paper record, not accessible to sight-impaired voters, that allows voters to confirm that their ballots accurately reflect their choices before the system officially records their votes. Based on the information you have provided us, we conclude that this proposed voting system would be consistent with both Acts, so long as the DRE voting system provides a similar opportunity for sight-impaired voters to verify their ballots before those ballots are finally cast.[1]

## I.

Many states are expanding the use in elections of DRE voting systems, which allow voters to enter their choices on an electronic screen in the voting booth. The DRE machines also allow a voter to confirm his ballot before it becomes an officially recorded vote by providing a "summary screen" listing all of the voter's choices. After viewing the summary screen, the voter may either cast his ballot or else go back and make corrections. On newer DRE machines, an auditory component announces the ballot choices and the contents of the electronic

[1] In so concluding, we are not sanctioning the use of any particular DRE voting system. Indeed, our understanding of how such systems will actually work is necessarily limited by the fact that most of them are still at the design stage. The addition (or elimination) of certain features, or their use in particular ways, may result in a voting system that does not provide a similar opportunity for disabled voters to access and participate in the voting system. As explained in greater detail below, such a system would be inconsistent with the Help America Vote Act.

summary screen, allowing sight-impaired voters to verify and cast their ballots without assistance and in complete privacy.

In response to concerns that the DRE voting systems may be vulnerable to tampering, the State of California is considering adopting DRE machines that would produce a contemporaneous paper record for each voter in addition to the electronic summary screen. *See* Letter for Joseph Rich, Voting Section Chief, Civil Rights Division, from Randy Riddle, Chief Counsel, California Secretary of State (July 8, 2003). This paper record would summarize the voter's choices, and would be printed before the voter finally casts his ballot. In some cases, the paper record might also be preserved as a means to count votes in case of a recount or election contest. But in other cases, the paper record would serve solely to inform the voter of his choices before finally casting his ballot—serving the same function as the DRE electronic summary screen.

## II.

Because the paper record produced by the DRE machines in question will not be produced in a format accessible to sight-impaired voters, you have asked for our opinion whether such a voting system would violate either the Help America Vote Act or title II of the Americans with Disabilities Act. We will address each statute in turn.

### A.

Under the Help America Vote Act of 2002 ("HAVA"), all "voting systems" used in an election for federal office must meet specified federal requirements by January 1, 2006. *See* 42 U.S.C. §§ 15481–15485 (Supp. II 2003). One of these requirements is that voting systems "shall . . . permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted." 42 U.S.C. § 15481(a)(1)(A)(i). DRE voting systems comply with this mandate by providing a final summary screen before the voter asks the machine to officially record his vote, as well as an auditory component that informs sight-impaired and illiterate voters of the summary screen's contents. The production of a contemporaneous paper record is not necessary for the voting system to comport with section 15481(a)(1)(A)(i), but it does afford an additional means for a voter to verify his choices before casting his vote.

HAVA further provides that "[t]he voting system shall . . . be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides *the same opportunity for access and participation* (including privacy and independence) as for other voters." 42 U.S.C. § 15481(a)(3)(A) (emphasis added). Some may object that sight-impaired voters will have no opportunity to access or use the contemporaneous paper records

generated by DRE machines, as the paper record is not produced in Braille, and the DRE systems do not currently convert the paper into an audible format accessible to the sight-impaired. We do not, however, believe that this feature contravenes section 15481(a)(3)(A).

What section 15481(a)(3)(A) requires is that each "voting system" be accessible to disabled persons in a manner that provides "the same opportunity" for access and participation that other voters have. We will assume for the sake of argument that the paper record produced by DRE machines is included as part of the "voting system" as defined in section 15481(b),[2] although we note that this is not entirely clear and may depend on precisely what functions the paper record serves beyond providing a means for voters to verify their ballots before they are cast.[3] But even if one indulges this assumption, the statutory issue would not be

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[2] Section 15481(b) provides:

> In this section, the term "voting system" means—
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> (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
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> (A) to define ballots;
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> (B) to cast and count votes;
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> (C) to report or display election results; and
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> (D) to maintain and produce any audit trail information; and
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> (2) the practices and associated documentation used—
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> (A) to identify system components and versions of such components;
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> (B) to test the system during its development and maintenance;
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> (C) to maintain records of system errors and defects;
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> (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
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> (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

42 U.S.C. § 15481(b) (emphasis added).

[3] Paper would appear not to be "mechanical, electromechanical, or electronic equipment." While 42 U.S.C. § 15481(b)(1) includes in its reach all "documentation" used to "support" such equipment, we do not think it likely that a paper record whose sole function is to allow voters to verify their choices would be "used" for any of the purposes delineated in section 15481(b)(1)(A)–(D). Another possible category for such a paper record is section 15481(b)(2)(E), but it is important to emphasize that the "notices, instructions, forms, or paper ballots" referred to in section 15481(b)(2)(E) are not themselves part of the "voting system"; rather, the "practices and associated documentation" used to make these materials available to the voter are part of the voting system.

A paper record that would also be used for auditing purposes in the event of a recount or election challenge is more likely to be part of the "voting system" in section 15481(b)(1), because it would be used to "count votes," 42 U.S.C. § 15481(b)(1)(B), as well as "to maintain and produce any audit trail information," *id.* § 15481(b)(1)(D).

This threshold issue will depend on the precise facts of each voting system, so we leave it for another day and assume, *arguendo*, that the paper record can be pigeonholed into one of the nine categories listed in 42 U.S.C. § 15481(b)(1)–(2).

whether the paper record is accessible to the sight-impaired, but whether the entire DRE voting system is accessible in a manner that provides disabled voters "the same opportunity for access and participation" that other voters enjoy. 42 U.S.C. § 15481(a)(3)(A). We must therefore evaluate a disabled person's opportunity to participate in the voting system holistically, rather than scrutinizing his opportunity to access the system's discrete components or parts.

Furthermore, the use of the word "same" in section 15481(a)(3)(A) does not mean "identical"; if HAVA were read to require an identical opportunity for access and participation among non-disabled voters and voters with every type of disability, it would mandate the impossible. A serious disability will necessarily result in a voting experience that differs in some manner from that enjoyed by non-disabled voters. Nothing can be done, for example, to enable blind voters to visually interact with their ballot as sighted voters can. And we do not read HAVA to force all sighted persons to use voting technology with no visual dimension whatsoever (such as a voice-activated box that navigates voters through the ballot via a series of audible commands). That approach would not comply with section 15481(a)(3)(A) because such a voting system, in its efforts to produce "identical" opportunities among the sighted and the blind, would be entirely inaccessible to the hearing-impaired. What is more, equating the word "same" in section 15481(a)(3)(A) with "identical" would prohibit the very audio components in DRE voting systems that enable the sight-impaired to vote in privacy, because voters with other types of disabilities, such as the hearing-impaired, could not access these accommodations and would therefore lack an identical "opportunity" to participate in the voting system. We therefore construe the word "same" to mean "similar in kind, quality, quantity, or degree." *See American Heritage Dictionary of the English Language* 1539 (4th ed. 2000). So long as a disabled person can access and participate in the essentials of a voting system—such as the ability to cast a ballot in privacy with a full opportunity to review the ballot before casting it—his opportunity to access and participate in the voting system is sufficiently "similar in kind, quality, quantity, or degree" to that enjoyed by non-disabled persons. The fact that the precise means by which he may access and participate in those essentials differs from those available to non-disabled persons does not deprive him of the "same opportunity" to participate in the voting system—if it did, no voting system could ever comply with HAVA.

So long as DRE voting systems provide sight-impaired voters with audio equipment that enables them to verify their ballots before they are cast, we conclude that the provision of a contemporaneous paper record to assist sighted voters in verifying their ballots does not run afoul of HAVA.[4] The essentials of such a voting system—including the ability to verify one's ballot—are available to disabled and non-disabled voters alike, giving them the "same opportunity" for

[4] This analysis assumes, of course, that the audio device, the summary screen, and the paper record are all reliable methods of verification.

access and participation under section 15481(a)(3)(A). Knowledge of the contents of the paper record is simply one of the *means* by which a sighted voter may verify his ballot before casting it, and DRE voting systems satisfy section 15481(a)(3)(A) so long as they provide a comparable means for sight-impaired voters to achieve this essential end.

It is true that sighted voters will have more than one method by which they may verify their ballot before casting it: they can view both the electronic summary screen as well as the paper record produced by the DRE machine. Sight-impaired voters, by contrast, can only listen to an audio description of the summary screen, and have no independent way of knowing the contents of the paper record before casting their vote. Nevertheless, we do not believe that providing a greater number of methods by which sighted voters can verify their ballots deprives blind voters of the "same opportunity" for access and participation in the voting system, so long as the means available to such disabled persons are adequate to ensure similar access to and participation in the essentials of the voting system. The ability to verify one's ballot before casting it *is* essential, *cf.* 42 U.S.C. § 15481(a)(1)(A)(i), but the availability of multiple techniques by which to do so is not. Disability accommodations often result in a greater range of methods by which non-disabled persons can accomplish their goals, yet such accommodations are not deemed to deny equal opportunities for disabled persons for that reason alone. Consider a building that provides both a set of stairs and a wheelchair ramp to its outdoor entrance. Non-disabled persons have more means to enter the building (they can use either the stairs or the ramp), while the wheelchair-bound person can use only the ramp. But no one would contend that such a building has deprived disabled persons of the "same opportunity" to access the building. That is because the essential requirement of access—the ability to get to the front door—is available to all. The means to achieve that end differ, and non-disabled persons have a greater number of options, but provision of the ramp suffices to provide disabled persons with a similar (though not "identical") opportunity. So too with the DRE voting systems, as you have described them.

**B.**

Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000). Only a "qualified individual with a disability" ("QID")—defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services

or the participation in programs or activities provided by a public entity," *id.* § 12131(2)—is protected by title II.

The first task is to identify the relevant "service," "program," or "activity" at issue. This step is essential, because one cannot be a QID under section 12131(2) except in relation to a specific "service," "program," or "activity." A title II complainant must show that he meets the essential eligibility requirements either to receive a "service," or to participate in a "program" or "activity," provided by a public entity. Without such a showing, there can be no violation of section 12132.[5]

A title II complainant could plausibly assert that the paper record itself is a "service" that blind individuals are eligible to "receive." (The ADA does not define the term "services," but we will assume *arguendo* that "services . . . provided by a public entity" encompass the paper record produced by the DRE voting system.) All voters, disabled or not, receive the paper record any time they vote on a DRE machine, so there is no need to explore whether accommodations beyond the realm of reason are necessary to make such persons "eligible" to receive the paper record. *See* 42 U.S.C. § 12131(2). This suffices to establish a sight-impaired voter as a QID under section 12131(2), but title II is not breached unless the sight-impaired person is either denied the benefits of the paper record, or is subjected to discrimination by a public entity. *See id.* § 12132.

To the extent the paper record provides sighted voters with an opportunity to check their ballots, this does not deny a benefit to sight-impaired voters, because the DRE machines' auditory component already provides a means for such voters to verify their ballots before casting them. But more importantly, given that *all* voters were fully capable of confirming their ballot before the advent of paper-producing DRE machines (either by viewing the summary screen, or using the machine's audio capacity), we do not think the paper record provides any "benefit" at all in this regard. *See American Heritage Dictionary* 168 (defining "benefit" as "an advantage; help; aid"). We reject any construction of the term "benefit" in section 12132 that includes the provision of a means to accomplish a task that all persons could fully and effectively perform without such provision. In cases where the paper record is used by election officials for auditing purposes, this "benefit" of the paper record is not withheld from sight-impaired voters—all paper records, regardless of the voter's disability status, would be used in the event of a recount or election challenge and would protect the integrity of that voter's ballot.

[5] At least one decision from a court of appeals has disclaimed any need to determine whether a government function can be characterized as a "service," "program," or "activity" when adjudicating title II claims. *See Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) ("Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into 'needless hair-splitting arguments.'") (citation omitted). For the reasons explained above, this approach cannot be reconciled with the text of title II. Nor can it be reconciled with *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 1174–76 (9th Cir. 1999), which *Barden* did not cite.

A sight-impaired voter could also claim that voting is a "program" or "activity" in which he is eligible to participate. *See* 42 U.S.C. § 12131(2). But however one defines the "benefits" of voting, we cannot see how the provision of a paper record denies these "benefits" to sight-impaired QIDs. Even if the paper record is utterly useless to sight-impaired voters, those voters still enjoy every "benefit" of voting that they would have had under the non-paper-producing DRE machines. One might contend that our understanding of the "benefits" of voting should vary depending on the technology employed, and that the "activity" of voting on a paper-producing DRE machine includes added "benefits" unknown to those voting on other equipment. But even under this approach, the only conceivable "benefit" that one might claim is denied to sight-impaired voters is the provision of multiple means by which to verify one's ballot. For the reasons explained above, we do not regard this as a "benefit" under section 12132. The Attorney General has emphasized that section 12132 does not require a public entity to make each of its existing facilities accessible to individuals with disabilities when administering a service, program, or activity, *see* 28 C.F.R. § 35.150(a)(1) (2003), which confirms our view that the failure to make each and every means of access or participation available to disabled persons is not the "denial of a benefit" under section 12132.

As to whether sight-impaired voters are "subject to discrimination" by a public entity that uses the DRE voting system: the DRE machines indeed treat sight-impaired voters differently, as they must engage an auditory component while voting, while sighted persons can simply look at the screen. Mere dissimilar treatment, however, does not by itself constitute "discrimination" under title II. All disability accommodations treat the disabled differently than non-disabled persons, but section 12132 does not prohibit the very accommodations mandated by the ADA. *See* 28 C.F.R. § 35.130(c) ("Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities"). Rather, to be "subjected to discrimination" under section 12132, a QID must not only be treated differently, but the discrimination must also leave the QID worse off than if the dissimilar treatment had never occurred. *See Olmstead v. Zimring*, 527 U.S. 581, 599–601 (1999) (concluding that unjustified institutional isolation of persons with disabilities is "discrimination" under section 12132 because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of individuals"). We think that any dissimilar treatment of QIDs resulting from a public entity's decision to use handicapped-accessible voting equipment falls into the category of permissible accommodation, rather than impermissible "discrimination," under title II of the ADA.

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