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OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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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-nine volumes of opinions published covered the years 1977 through 2005. The present volume covers 2006. Volume 30 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

Legal Authorities Supporting the Activities of the National Security Agency Described by the President

The activities described by the President, in which he has authorized the National Security Agency to intercept international communications into or out of the United States of persons linked to al Qaeda or an affiliated terrorist organization are lawful in all respects.

The President's use of his constitutional authority, as supplemented by statute in the Authorization for Use of Military Force enacted on September 18, 2001, is consistent with the Foreign Intelligence Surveillance Act and is also fully protective of the civil liberties guaranteed by the Fourth Amendment.

January 19, 2006

LETTER FOR THE MAJORITY LEADER
UNITED STATES SENATE

Dear Mr. Leader:

As the President recently described, in response to the attacks of September 11th, he has authorized the National Security Agency ("NSA") to intercept international communications into or out of the United States of persons linked to al Qaeda or an affiliated terrorist organization. The attached paper has been prepared by the Department of Justice to provide a detailed analysis of the legal basis for those NSA activities described by the President.

As I have previously explained, these NSA activities are lawful in all respects. They represent a vital effort by the President to ensure that we have in place an early warning system to detect and prevent another catastrophic terrorist attack on America. In the ongoing armed conflict with al Qaeda and its allies, the President has the primary duty under the Constitution to protect the American people. The Constitution gives the President the full authority necessary to carry out that solemn duty, and he has made clear that he will use all authority available to him, consistent with the law, to protect the Nation. The President's authority to approve these NSA activities is confirmed and supplemented by Congress in the Authorization for Use of Military Force ("AUMF"), enacted on September 18, 2001. As discussed in depth in the attached paper, the President's use of his constitutional authority, as supplemented by statute in the AUMF, is consistent with the Foreign Intelligence Surveillance Act and is also fully protective of the civil liberties guaranteed by the Fourth Amendment.

It is my hope that this paper will prove helpful to your understanding of the legal authorities underlying the NSA activities described by the President.

ALBERTO R. GONZALES
Attorney General

WHITE PAPER*

As the President has explained, since shortly after the attacks of September 11, 2001, he has authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. This paper addresses, in an unclassified form, the legal basis for the NSA activities described by the President ("NSA activities").

I. Summary

On September 11, 2001, the al Qaeda terrorist network launched the deadliest foreign attack on American soil in history. Al Qaeda's leadership repeatedly has pledged to attack the United States again at a time of its choosing, and these terrorist organizations continue to pose a grave threat to the United States. In response to the September 11th attacks and the continuing threat, the President, with broad congressional approval, has acted to protect the Nation from another terrorist attack. In the immediate aftermath of September 11th, the President promised that "[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every tool of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terrorist network." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), 2 *Pub. Papers of Pres. George W. Bush* 1140, 1142 (2001). The NSA activities are an indispensable aspect of this defense of the Nation. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, these activities provide the United States with an early warning system to help avert the next attack. For the following reasons, the NSA activities are lawful and consistent with civil liberties.

The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility. The President has made clear that he will exercise all

* Editor's Note: For purposes of publication, some of the citations in this White Paper (primarily the internet citations) have been updated from the version sent to Congress. A version of the original is available in H.R. Rep. No. 109-384, at 6–54 (Mar. 7, 2006).

authority available to him, consistent with the Constitution, to protect the people of the United States.

In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland. In its first legislative response to the terrorist attacks of September 11th, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th in order to prevent "any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C. § 1541) ("AUMF"). History conclusively demonstrates that warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF. The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.

The AUMF places the President at the zenith of his powers in authorizing the NSA activities. Under the tripartite framework set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring), presidential authority is analyzed to determine whether the President is acting in accordance with congressional authorization (category I), whether he acts in the absence of a grant or denial of authority by Congress (category II), or whether he uses his own authority under the Constitution to take actions incompatible with congressional measures (category III). Because of the broad authorization provided in the AUMF, the President's action here falls within category I of Justice Jackson's framework. Accordingly, the President's power in authorizing the NSA activities is at its height because he acted "pursuant to an express or implied authorization of Congress," and his power "includes all that he possesses in his own right plus all that Congress can delegate." *Id*. at 635.

The NSA activities are consistent with the preexisting statutory framework generally applicable to the interception of communications in the United States—the Foreign Intelligence Surveillance Act ("FISA"), *as amended*, 50 U.S.C. §§ 1801–

1862 (2000 & Supp. II 2002), and relevant related provisions in chapter 119 of title 18.[1] Although FISA generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA. *See* 50 U.S.C. § 1809(a) (prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized by statute"). The AUMF, as construed by the Supreme Court in *Hamdi* and as confirmed by the history and tradition of armed conflict, is just such a statute. Accordingly, electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA and falls within category I of Justice Jackson's framework.

Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes in harmony to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally-authorized armed conflict with al Qaeda. Indeed, were FISA and Title III interpreted to impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt. In fact, if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context. Importantly, the FISA Court of Review itself recognized just three years ago that the President retains constitutional authority to conduct foreign surveillance apart from the FISA framework, and the President is certainly entitled, at a minimum, to rely on that judicial interpretation of the Constitution and FISA.

Finally, the NSA activities fully comply with the requirements of the Fourth Amendment. The interception of communications described by the President falls within a well-established exception to the warrant requirement and satisfies the Fourth Amendment's fundamental requirement of reasonableness. The NSA activities are thus constitutionally permissible and fully protective of civil liberties.

II. Background

A. The Attacks of September 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental

[1] Chapter 119 of title 18, which was enacted by title III of the Omnibus Crime Control and Safe Streets Act of 1968, *as amended*, 18 U.S.C. §§ 2510–2521 (2000 & Supp. IV 2005), is often referred to as "Title III."

flight, were hijacked by al Qaeda operatives. Two of the jetliners were targeted at the Nation's financial center in New York and were deliberately flown into the Twin Towers of the World Trade Center. The third was targeted at the headquarters of the Nation's Armed Forces, the Pentagon. The fourth was apparently headed toward Washington, D.C., when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow on the Government of the United States—to kill the President, the Vice President, or members of Congress. The attacks of September 11th resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. These attacks shut down air travel in the United States, disrupted the Nation's financial markets and government operations, and caused billions of dollars in damage to the economy.

On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The same day, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th, which the President signed on September 18th. AUMF § 2(a). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and in particular recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl. Congress emphasized that the attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id*. The United States also launched a large-scale military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's base of operations in Afghanistan. Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the assistance of the Northern Alliance, toppled the Taliban regime.

As the President made explicit in his Military Order of November 13, 2001, authorizing the use of military commissions to try terrorists, the attacks of September 11th "created a state of armed conflict." Military Order § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO—for the first time in its 46-year history—invoked article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be

considered an attack against them all." North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *see also* Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001) ("it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty") (available at http://www.nato.int/docu/speech/2001/s011002a.htm, last visited Aug. 12, 2014). The President also determined in his Military Order that al Qaeda and related terrorists organizations "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and concluded that "an extraordinary emergency exists for national defense purposes." Military Order § 1(c), (g), 66 Fed. Reg. at 57,833–34.

B. The NSA Activities

Against this unfolding background of events in the fall of 2001, there was substantial concern that al Qaeda and its allies were preparing to carry out another attack within the United States. Al Qaeda had demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks, and it was suspected that additional agents were likely already in position within the Nation's borders. As the President has explained, unlike a conventional enemy, al Qaeda has infiltrated "our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan and elsewhere." The President's News Conference, 41 *Weekly Comp. Pres. Doc.* 1885, 1885 (Dec. 19, 2005). To this day, finding al Qaeda sleeper agents in the United States remains one of the paramount concerns in the War on Terror. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September the 11th." *Id*. at 1886.

The President has acknowledged that, to counter this threat, he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The same day, the Attorney General elaborated and explained that in order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (statement of Attorney General Gonzales) (available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html, last visited Aug. 12, 2014). The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic

terrorist attack on the United States. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." President's News Conference, 41 *Weekly Comp. Pres. Doc.* at 1885.

The President has explained that the NSA activities are "critical" to the national security of the United States. *Id.* at 1886. Confronting al Qaeda "is not simply a matter of [domestic] law enforcement"—we must defend the country against an enemy that declared war against the United States. *Id.* at 1885. To "effectively detect enemies hiding in our midst and prevent them from striking us again . . . we must be able to act fast and to detect conversations [made by individuals linked to al Qaeda] so we can prevent new attacks." *Id.* The President pointed out that "a 2-minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives." *Id.* The NSA activities are intended to help "connect the dots" between potential terrorists. *Id.* In addition, the Nation is facing "a different era, a different war . . . people are changing phone numbers . . . and they're moving quick." *Id.* at 1891. As the President explained, the NSA activities "enable[] us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to detect and prevent." *Id.* at 1887. "This is an enemy which is quick, and it's lethal. And sometimes we have to move very, very quickly." *Id.* at 1889. FISA, by contrast, is better suited "for long-term monitoring." *Id.* at 1887.

As the President has explained, the NSA activities are "carefully reviewed approximately every 45 days to ensure [that they are] being used properly." *Id.* at 1885. These activities are reviewed for legality by the Department of Justice and are monitored by the General Counsel and Inspector General of the NSA to ensure that civil liberties are being protected. *Id.* at 1891. Leaders in Congress from both parties have been briefed more than a dozen times on the NSA activities. *Id.* at 1889.

C. The Continuing Threat Posed by Al Qaeda

Before the September 11th attacks, al Qaeda had promised to attack the United States. In 1998, Osama bin Laden declared a "religious" war against the United States and urged that it was the moral obligation of all Muslims to kill U.S. civilians and military personnel. *See* Osama bin Laden, Ayman al-Zawahiri, et al., *Fatwah Urging Jihad Against Americans*, published in al-Quds al-Arabi (Feb. 23, 1998) ("to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim") (translation available at http://www.fas.org/irp/world/para/docs/980223-fatwa.htm, last visited Aug. 12, 2014). Al Qaeda carried out those threats with a vengeance; they attacked the U.S.S. Cole in

Yemen, the United States Embassy in Nairobi, and finally the United States itself in the September 11th attacks.

It is clear that al Qaeda is not content with the damage it wrought on September 11th. As recently as December 7, 2005, Ayman al-Zawahiri professed that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). Indeed, since September 11th, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. *See, e.g.*, Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 24, 2004) (warning United States citizens of further attacks and asserting that "your security is in your own hands"); Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 18, 2003) ("We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States"); Ayman Al-Zawahiri, videotape released on the Al-Jazeera television network (Oct. 9, 2002) ("I promise you [addressing the 'citizens of the United States'] that the Islamic youth are preparing for you what will fill your hearts with horror"). Given that al Qaeda's leaders have repeatedly made good on their threats and that al Qaeda has demonstrated its ability to insert foreign agents into the United States to execute attacks, it is clear that the threat continues. Indeed, since September 11th, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people.

III. Analysis

A. The President Has Inherent Constitutional Authority To Order Warrantless Foreign Intelligence Surveillance

As Congress expressly recognized in the AUMF, "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces, U.S. Const. art. II, § 2, and authority over the conduct of the Nation's foreign affairs. As the Supreme Court has explained, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

To carry out these responsibilities, the President must have authority to gather information necessary for the execution of his office. The Founders, after all, intended the federal government to be clothed with all authority necessary to protect the Nation. *See, e.g.*, *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (explaining that the federal government will be "cloathed with all the powers requisite to the complete execution of its trust"); *id.* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society . . . . The powers requisite for attaining it must be effectually confided to the federal councils."). Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation's foreign affairs. *See, e.g.*, *The Federalist* No. 70, at 471–72 (Alexander Hamilton); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) ("this [constitutional] grant of war power includes all that is necessary and proper for carrying these powers into execution") (citation omitted). Thus, it has been long recognized that the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns. *See, e.g.*, *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *Curtiss-Wright*, 299 U.S. at 320 ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."); *Totten v. United States*, 92 U.S. 105, 106 (1876) (President "was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy").

In reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes. Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. *See, e.g.*, *United States v. U.S. Dist. Ct.*, 444 F.2d 651, 669–71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). In a memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

> You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You

> are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as possible to aliens.

Id. at 670 (app. A). President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Attorney General advised that "it is as necessary as it was in 1940 to take the investigative measures" authorized by President Roosevelt to conduct electronic surveillance "in cases vitally affecting the domestic security." *Id*. Indeed, while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that "the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution*." *Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Comm. on Intelligence*, 95th Cong. 15 (1978) (emphasis added); *see also Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring) ("Wiretapping to protect the security of the Nation has been authorized by successive Presidents."); *cf*. *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103d Cong. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes").

The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power*.") (emphasis added); *accord, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation).

In *United States v. United States District Court*, 407 U.S. 297 (1972) (the "*Keith*" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly *domestic* threats to security—such as domestic political violence and other crimes. But the Court in the *Keith* case made clear that it was not addressing the President's authority to conduct *foreign* intelligence surveillance without a warrant and that it was expressly reserving that

question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308; *see also id.* at 321–22 & n.20 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."). That *Keith* does not apply in the context of protecting against a foreign attack has been confirmed by the lower courts. After *Keith*, each of the three courts of appeals that have squarely considered the question have concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g.*, *Truong Dinh Hung*, 629 F.2d at 913–14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425–26.

From a constitutional standpoint, foreign intelligence surveillance such as the NSA activities differs fundamentally from the domestic security surveillance at issue in *Keith*. As the Fourth Circuit observed, the President has uniquely strong constitutional powers in matters pertaining to foreign affairs and national security. "Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs." *Truong*, 629 F.2d at 914; *see id*. at 913 (noting that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities"); *cf. Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").[2]

The present circumstances that support recognition of the President's inherent constitutional authority to conduct the NSA activities are considerably stronger than were the circumstances at issue in the earlier courts of appeals cases that recognized this power. All of the cases described above addressed inherent executive authority under the foreign affairs power to conduct surveillance in a peacetime context. The courts in these cases therefore had no occasion even to consider the fundamental authority of the President, as Commander in Chief, to gather intelligence in the context of an ongoing armed conflict in which the United

[2] *Keith* made clear that one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained: "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Keith*, 407 U.S. at 314; *see also id.* at 320 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."). Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents.

States already had suffered massive civilian casualties and in which the intelligence gathering efforts at issue were specifically designed to thwart further armed attacks. Indeed, intelligence gathering is particularly important in the current conflict, in which the enemy attacks largely through clandestine activities and which, as Congress recognized, "pose[s] an unusual and extraordinary threat," AUMF pmbl.

Among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans abroad, *see, e.g.*, *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g.*, *Prize Cases*, 67 U.S. at 668. *See generally Ex parte Quirin*, 317 U.S. 1, 28 (1942) (recognizing that the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. 67 U.S. at 670; *see also Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). Indeed, "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted). In exercising his constitutional powers, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation's enemies in a time of armed conflict.

B. The AUMF Confirms and Supplements the President's Inherent Power to Use Warrantless Surveillance Against the Enemy in the Current Armed Conflict

In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President's constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its

allies. The broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force. The history of the President's use of warrantless surveillance during armed conflicts demonstrates that the NSA surveillance described by the President is a fundamental incident of the use of military force that is necessarily included in the AUMF.

1. The Text and Purpose of the AUMF Authorize the NSA Activities

On September 14, 2001, in its first legislative response to the attacks of September 11th, Congress gave its express approval to the President's military campaign against al Qaeda and, in the process, confirmed the well-accepted understanding of the President's Article II powers. AUMF § 2(a).[3] In the preamble to the AUMF, Congress stated that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., and thereby acknowledged the President's inherent constitutional authority to defend the United States. This clause "constitutes an extraordinarily sweeping recognition of independent presidential *constitutional* power to employ the war power to combat terrorism." Michael Stokes Paulsen, Youngstown *Goes to War*, 19 Const. Comment. 215, 252 (2002). This striking recognition of presidential authority cannot be discounted as the product of excitement in the immediate aftermath of September 11th, for the same terms were repeated by Congress more than a year later in the Authorization for Use of Military Force Against Iraq Resolution of 2002. Pub. L. No. 107-243, pmbl., 116 Stat. 1498, 1500 (Oct. 16, 2002) ("the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States"). In the context of the conflict with al Qaeda and related terrorist organizations, therefore, Congress has acknowledged a broad executive authority to "deter and prevent" further attacks against the United States.

The AUMF passed by Congress on September 14, 2001, does not lend itself to a narrow reading. Its expansive language authorizes the President "to use *all necessary and appropriate force* against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a) (emphases added). In the field of foreign affairs, and particularly that of war powers and national security, congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the Executive Branch. *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 293–303 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–45 (1950); *cf. Loving v. United States*, 517 U.S. 748, 772 (1996) (noting that the usual "limitations on delegation [of congressional powers]

[3] America's military response began before the attacks of September 11th had been completed. *See The 9/11 Commission Report* 20 (2004). Combat air patrols were established and authorized "to engage inbound aircraft if they could verify that the aircraft was hijacked." *Id*. at 42.

do not apply" to authorizations linked to the Commander in Chief power); *Dames & Moore v. Regan*, 453 U.S. 654, 678–82 (1981) (even where there is no express statutory authorization for executive action, legislation in related field may be construed to indicate congressional acquiescence in that action). Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is maximum because "it includes all that he possesses in his own right plus all that Congress can delegate," *id*. at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under *Youngstown*.

It is also clear that the AUMF confirms and supports the President's use of those traditional incidents of military force against the enemy, wherever they may be—on United States soil or abroad. The nature of the September 11th attacks—launched on United States soil by foreign agents secreted in the United States—necessitates such authority, and the text of the AUMF confirms it. The operative terms of the AUMF state that the President is authorized to use force "in order to prevent any future acts of international terrorism against the United States," *id*., an objective which, given the recent attacks within the Nation's borders and the continuing use of air defense throughout the country at the time Congress acted, undoubtedly contemplated the possibility of military action within the United States. The preamble, moreover, recites that the United States should exercise its rights "to protect United States citizens both *at home* and abroad." *Id*. pmbl. (emphasis added). To take action against those linked to the September 11th attacks involves taking action against individuals within the United States. The United States had been attacked on its own soil—not by aircraft launched from carriers several hundred miles away, but by enemy agents who had resided in the United States for months. A crucial responsibility of the President—charged by the AUMF and the Constitution—was and is to identify and attack those enemies, especially if they were in the United States, ready to strike against the Nation.

The text of the AUMF demonstrates in an additional way that Congress authorized the President to conduct warrantless electronic surveillance against the enemy. The terms of the AUMF not only authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks; it also authorized the President to "determine[]" the persons or groups responsible for those attacks and to take all actions necessary to prevent further

attacks. AUMF § 2(a) ("the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons") (emphasis added). Of vital importance to the use of force against the enemy is locating the enemy and identifying its plans of attack. And of vital importance to identifying the enemy and detecting possible future plots was the authority to intercept communications to or from the United States of persons with links to al Qaeda or related terrorist organizations. Given that the agents who carried out the initial attacks resided in the United States and had successfully blended into American society and disguised their identities and intentions until they were ready to strike, the necessity of using the most effective intelligence gathering tools against such an enemy, including electronic surveillance, was patent. Indeed, Congress recognized that the enemy in this conflict poses an "unusual and extraordinary threat." AUMF pmbl.

The Supreme Court's interpretation of the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), strongly supports this reading of the AUMF. In *Hamdi*, five members of the Court found that the AUMF authorized the detention of an American within the United States, notwithstanding a statute that prohibits the detention of U.S. citizens "except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *See Hamdi*, 542 U.S. at 519 (plurality opinion); *id*. at 587 (Thomas, J., dissenting). Drawing on historical materials and "longstanding law-of-war principles," *id*. at 518–21, a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization "known to have supported" al Qaeda "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id*. at 518; *see also id*. at 587 (Thomas, J., dissenting) (agreeing with the plurality that the joint resolution authorized the President to "detain those arrayed against our troops"); *accord Quirin*, 317 U.S. at 26–29, 38 (recognizing the President's authority to capture and try agents of the enemy in the United States even if they had never "entered the theatre or zone of active military operations"). Thus, even though the AUMF does not say anything expressly about detention, the Court nevertheless found that it satisfied section 4001(a)'s requirement that detention be congressionally authorized.

The conclusion of five Justices in *Hamdi* that the AUMF incorporates fundamental "incidents" of the use of military force makes clear that the absence of any specific reference to signals intelligence activities in the resolution is immaterial. *See id.* at 519 ("[I]t is of no moment that the AUMF does not use specific language of detention.") (plurality opinion). Indeed, given the circumstances in which the AUMF was adopted, it is hardly surprising that Congress chose to speak about the President's authority in general terms. The purpose of the AUMF was for Congress to sanction and support the military response to the devastating terrorist attacks that had occurred just three days earlier. Congress evidently thought it

neither necessary nor appropriate to attempt to catalog every specific aspect of the use of the forces it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress's judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore*, 453 U.S. at 678. Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalogue in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President's core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

Hamdi thus establishes the proposition that the AUMF "clearly and unmistakably" authorizes the President to take actions against al Qaeda and related organizations that amount to "fundamental incident[s] of waging war." 542 U.S. at 519 (plurality opinion); *see also id*. at 587 (Thomas, J., dissenting). In other words, "*[t]he clear inference is that the AUMF authorizes what the laws of war permit*." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2092 (2005) (emphasis added). Congress is presumed to be aware of the Supreme Court's precedents. Indeed, Congress recently enacted legislation in response to the Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004)—which was issued the same day as the *Hamdi* decision—removing habeas corpus jurisdiction over claims filed on behalf of confined enemy combatants held at Guantanamo Bay. Congress, however, has not expressed any disapproval of the Supreme Court's commonsense and plain-meaning interpretation of the AUMF in *Hamdi*.[4]

[4] This understanding of the AUMF is consistent with Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion). In addition to constituting a fundamental and accepted incident of the use of military force, the NSA activities are consistent with the law of armed conflict principle that the use of force be necessary and proportional. *See* Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 115 (1995). The NSA activities are proportional because they are minimally invasive and narrow in scope, targeting only the international communications of persons reasonably believed to be linked to al Qaeda, and are designed to protect the Nation from a devastating attack.

2. Warrantless Electronic Surveillance Aimed at Intercepting Enemy Communications Has Long Been Recognized as a Fundamental Incident of the Use of Military Force

The history of warfare—including the consistent practice of Presidents since the earliest days of the Republic—demonstrates that warrantless intelligence surveillance against the enemy is a fundamental incident of the use of military force, and this history confirms the statutory authority provided by the AUMF. Electronic surveillance is a fundamental tool of war that must be included in any natural reading of the AUMF's authorization to use "all necessary and appropriate force."

As one author has explained:

> It is *essential* in warfare for a belligerent to be as fully informed as possible about the enemy—his strength, his weaknesses, measures taken by him and measures contemplated by him. This applies not only to military matters, but . . . anything which bears on and is material to his ability to wage the war in which he is engaged. *The laws of war recognize and sanction this aspect of warfare.*

Morris Greenspan, *The Modern Law of Land Warfare* 325 (1959) (emphases added); *see also* Memorandum for Members of the House Permanent Select Committee on Intelligence, from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* at 6 (Jan. 3, 2006) ("Certainly, the collection of intelligence is understood to be necessary to the execution of the war."). Similarly, article 24 of the Hague Regulations of 1907 expressly states that "the employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible." *See also* 2 L. Oppenheim, *International Law* § 159 (7th ed. 1952) ("War cannot be waged without all kinds of information, about the forces and the intentions of the enemy . . . . To obtain the necessary information, it has always been considered lawful to employ spies . . . ."); Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) ("Every belligerent has a right . . . to discover the signals of the enemy and . . . to seek to procure information regarding the enemy through the aid of secret agents."); *cf.* J.M. Spaight, *War Rights on Land* 205 (1911) ("[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever. . . . Spies . . . are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service.") (internal quotation marks omitted).

In accordance with these well-established principles, the Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g.*, *Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and

counseling against judicial interference with such matters); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."). Chief Justice John Marshall even described the gathering of intelligence as a military duty. *See Tatum v. Laird*, 444 F.2d 947, 952–53 (D.C. Cir. 1971) ("As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . . '") (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), *rev'd on other grounds*, 408 U.S. 1 (1972).

The United States, furthermore, has a long history of wartime surveillance—a history that can be traced to George Washington, who "was a master of military espionage" and "made frequent and effective use of secret intelligence in the second half of the eighteenth century." Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence* 11 (2002); *see generally id*. at 11–23 (recounting Washington's use of intelligence); *see also Haig v. Agee*, 471 U.S. 159, 172 n.16 (1981) (quoting General Washington's letter to an agent embarking upon an intelligence mission in 1777: "The necessity of procuring good intelligence, is apparent and need not be further urged."). As President in 1790, Washington obtained from Congress a "secret fund" to deal with foreign dangers and to be spent at his discretion. Jeffreys-Jones, *Cloak and Dollar* at 22. The fund, which remained in use until the creation of the Central Intelligence Agency in the mid-twentieth century and gained "longstanding acceptance within our constitutional structure," *Halperin v. CIA*, 629 F.2d 144, 158–59 (D.C. Cir. 1980), was used "for all purposes to which a secret service fund should or could be applied for the public benefit," including "for persons sent publicly and secretly to search for important information, political or commercial," *id.* at 159 (quoting 7 Reg. Deb. 295 (Feb. 25, 1831) (statement of Senator John Forsyth)). *See also Totten*, 92 U.S. at 107 (refusing to examine payments from this fund lest the publicity make a "secret service" "impossible").

The interception of communications, in particular, has long been accepted as a fundamental method for conducting wartime surveillance. *See, e.g.*, Greenspan, *Land Warfare* at 326 (accepted and customary means for gathering intelligence "include air reconnaissance and photography; ground reconnaissance; observation of enemy positions; *interception of enemy messages, wireless and other*; examination of captured documents; . . . and interrogation of prisoners and civilian inhabitants") (emphasis added). Indeed, since its independence, the United States has intercepted communications for wartime intelligence purposes and, if necessary, has done so within its own borders. During the Revolutionary War, for example, George Washington received and used to his advantage reports from

American intelligence agents on British military strength, British strategic intentions, and British estimates of American strength. *See* Jeffreys-Jones, *Cloak and Dollar* at 13. One source of Washington's intelligence was intercepted British mail. *See* Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his generals "contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on." *Id*. at 32 ("From that point on, Washington was privy to British intelligence pouches between New York and Canada."); *see generally* Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities (the "Church Committee"), S. Rep. No. 94-755, bk. VI, at 9–17 (Apr. 23, 1976) (describing Washington's intelligence activi–ties).

More specifically, warrantless electronic surveillance of wartime communications has been conducted in the United States since electronic communications have existed, i.e., since at least the Civil War, when "[t]elegraph wiretapping was common, and an important intelligence source for both sides." G.J.A. O'Toole, *The Encyclopedia of American Intelligence and Espionage* 498 (1988). Confederate General J.E.B. Stuart even "had his own personal wiretapper travel along with him in the field" to intercept military telegraphic communications. Samuel Dash et al., *The Eavesdroppers* 23 (1971); *see also* O'Toole, *American Intelligence* at 121, 385–88, 496–98 (discussing Civil War surveillance methods such as wiretaps, reconnaissance balloons, semaphore interception, and cryptanalysis). Similarly, there was extensive use of electronic surveillance during the Spanish-American War. *See* Bruce W. Bidwell, *History of the Military Intelligence Division, Department of the Army General Staff: 1775–1941*, at 62 (1986). When an American expeditionary force crossed into northern Mexico to confront the forces of Pancho Villa in 1916, the Army "frequently intercepted messages of the regime in Mexico City or the forces contesting its rule." David Alvarez, *Secret Messages* 6–7 (2000). Shortly after Congress declared war on Germany in World War I, President Wilson (citing only his constitutional powers and the joint resolution declaring war) ordered the censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines. *See* Exec. Order No. 2604 (Apr. 28, 1917), *in* 17 *A Compilation of the Messages and Papers of the Presi-dents* 8254, 8254 (new series 1921). During that war, wireless telegraphy "enabled each belligerent to tap the messages of the enemy." Bidwell, *Military Intelligence Division* at 165 (quoting statement of Col. W. Nicolai, former head of the Secret Service of the High Command of the German Army, *in* W. Nicolai, *The German Secret Service* 21 (1924)).

As noted in Part III.A, on May 21, 1940, President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities, including spying, against the United States. In addition, on December 8, 1941, the day after the attack on Pearl Harbor, President Roosevelt gave the Director of the FBI "temporary powers to direct all news censorship and to *control all other*

telecommunications traffic in and out of the United States." Jack A. Gottschalk, *"Consistent with Security" . . . A History of American Military Press Censorship*, 5 Comm. & L. 35, 39 (1983) (emphasis added). *See* Memorandum for the Secretaries of War, Navy, State, and Treasury, the Postmaster General, and the Federal Communications Commission from Franklin D. Roosevelt (Dec. 8, 1941). President Roosevelt soon supplanted that temporary regime by establishing an office for conducting such electronic surveillance in accordance with the War Powers Act of 1941. *See* Pub. L. No. 77-354, § 303, 55 Stat. 838, 840–41 (Dec. 18, 1941); Gottschalk, *Military Press Censorship*, 5 Comm. & L. at 40. The President's order gave the government of the United States access to "communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country." *Id.*; *see also* Exec. Order No. 8985, § 1, 6 Fed. Reg. 6625, 6625 (Dec. 19, 1941). In addition, the United States systematically listened surreptitiously to electronic communications as part of the war effort. *See* Dash, *Eavesdroppers* at 30. During World War II, signals intelligence assisted in, among other things, the destruction of the German U-boat fleet by the Allied naval forces, *see id.* at 27, and the war against Japan, *see* O'Toole, *American Intelligence* at 32, 323–24. In general, signals intelligence "helped to shorten the war by perhaps two years, reduce the loss of life, and make inevitable an eventual Allied victory." Carl Boyd, *American Command of the Sea Through Carriers, Codes, and the Silent Service: World War II and Beyond* 27 (1995); *see also* Alvarez, *Secret Messages* at 1 ("There can be little doubt that signals intelligence contributed significantly to the military defeat of the Axis."). Significantly, not only was wiretapping in World War II used "extensively by military intelligence and secret service personnel in combat areas abroad," but also "by the FBI and secret service in this country." Dash, *Eavesdroppers* at 30.

In light of the long history of prior wartime practice, the NSA activities fit squarely within the sweeping terms of the AUMF. The use of signals intelligence to identify and pinpoint the enemy is a traditional component of wartime military operations—or, to use the terminology of *Hamdi*, a "fundamental and accepted . . . incident to war," 542 U.S. at 518 (plurality opinion)—employed to defeat the enemy and to prevent enemy attacks in the United States. Here, as in other conflicts, the enemy may use public communications networks, and some of the enemy may already be in the United States. Although those factors may be present in this conflict to a greater degree than in the past, neither is novel. Certainly, both factors were well known at the time Congress enacted the AUMF. Wartime interception of international communications made by the enemy thus should be understood, no less than the wartime detention at issue in *Hamdi*, as one of the basic methods of engaging and defeating the enemy that Congress authorized in approving "*all* necessary and appropriate force" that the President would need to defend the Nation. AUMF § 2(a) (emphasis added).

* * * * *

Accordingly, the President has the authority to conduct warrantless electronic surveillance against the declared enemy of the United States in a time of armed conflict. That authority derives from the Constitution, and is reinforced by the text and purpose of the AUMF, the nature of the threat posed by al Qaeda that Congress authorized the President to repel, and the long-established understanding that electronic surveillance is a fundamental incident of the use of military force. The President's power in authorizing the NSA activities is at its zenith because he has acted "pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

C. The NSA Activities Are Consistent with the Foreign Intelligence Surveillance Act

The President's exercise of his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy, as confirmed and supplemented by statute in the AUMF, is fully consistent with the requirements of the Foreign Intelligence Surveillance Act ("FISA").[5] FISA is a critically important tool in the War on Terror. The United States makes full use of the authorities available under FISA to gather foreign intelligence information, including authorities to intercept communications, conduct physical searches, and install and use pen registers and trap and trace devices. While FISA establishes certain procedures that must be followed for these authorities to be used (procedures that usually involve applying for and obtaining an order from a special court), FISA also expressly contemplates that a later legislative enactment could authorize electronic surveillance outside the procedures set forth in FISA itself. The AUMF constitutes precisely such an enactment. To the extent there is any ambiguity on this point, the canon of constitutional avoidance requires that such ambiguity be resolved in favor of the President's authority to conduct the communications intelligence activities he has described. Finally, if FISA could not be read to allow the President to authorize the NSA activities during the current congressionally authorized armed conflict with al Qaeda, FISA would be unconstitutional as applied in this narrow context.

1. The Requirements of FISA

FISA was enacted in 1978 to regulate "electronic surveillance," particularly when conducted to obtain "foreign intelligence information," as those terms are defined in section 101 of FISA, 50 U.S.C. § 1801. As a general matter, the statute requires that the Attorney General approve an application for an order from a

[5] To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute "electronic surveillance," as defined by FISA, 50 U.S.C. § 1801(f).

special court composed of Article III judges and created by FISA—the Foreign Intelligence Surveillance Court ("FISC"). 50 U.S.C. §§ 1803–1804. The application must demonstrate, among other things, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. *Id.* § 1805(a)(3)(A). It must also contain a certification from the Assistant to the President for National Security Affairs or an officer of the United States appointed by the President with the advice and consent of the Senate and having responsibilities in the area of national security or defense that the information sought is foreign intelligence information and cannot reasonably be obtained by normal investigative means. *Id.* § 1804(a)(7). FISA further requires the government to state the means that it proposes to use to obtain the information and the basis for its belief that the facilities at which the surveillance will be directed are being used or are about to be used by a foreign power or an agent of a foreign power. *Id.* § 1804(a)(4), (a)(8).

FISA was the first congressional measure that sought to impose restrictions on the Executive Branch's authority to engage in electronic surveillance for foreign intelligence purposes, an authority that, as noted above, had been repeatedly recognized by the federal courts. *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Penn. L. Rev. 793, 810 (1989) (stating that the "status of the President's inherent authority" to conduct surveillance "formed the core of subsequent legislative deliberations" leading to the enactment of FISA). To that end, FISA modified a provision in Title III that previously had disclaimed any intent to have laws governing wiretapping interfere with the President's constitutional authority to gather foreign intelligence. Prior to the passage of FISA, section 2511(3) of title 18 had stated that "[n]othing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3) (1970). FISA replaced that provision with an important, though more limited, preservation of authority for the President. *See* Pub. L. No. 95-511, § 201(b), (c), 92 Stat. 1783, 1797 (1978), *as added*, 18 U.S.C. § 2511(2)(f) (Supp. IV 2005) (carving out from statutory regulation only the acquisition of intelligence information from "international or foreign communications" and "foreign intelligence activities . . . involving a foreign electronic communications system" as long as they are accomplished "utilizing a means other than electronic surveillance as defined in section 101" of

FISA). Congress also defined "electronic surveillance," 50 U.S.C. § 1801(f), carefully and somewhat narrowly.[6]

In addition, Congress addressed, to some degree, the manner in which FISA might apply after a formal declaration of war by expressly allowing warrantless surveillance for a period of fifteen days following such a declaration. Section 111 of FISA allows the President to "authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811.

The legislative history of FISA shows that Congress understood it was legislating on fragile constitutional ground and was pressing or even exceeding constitutional limits in regulating the President's authority in the field of foreign intelligence. The final House Conference Report, for example, recognized that the statute's restrictions might well impermissibly infringe on the President's constitutional powers. That report includes the extraordinary acknowledgment that "[t]he conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court." H.R. Conf. Rep. No. 95-1720, at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. But, invoking Justice Jackson's concurrence in the Steel Seizure Case, the Conference Report explained that Congress intended in FISA to exert whatever power Congress constitutionally had over the subject matter to restrict foreign intelligence surveillance and to leave the President solely with whatever inherent constitutional authority he might be able to invoke against

[6] FISA's legislative history reveals that these provisions were intended to exclude certain intelligence activities conducted by the National Security Agency from the coverage of FISA. According to the report of the Senate Judiciary Committee on FISA, "this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States." S. Rep. No. 95-604, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of "electronic surveillance" was crafted for the same reason. *See id*. at 33–34, 1978 U.S.C.C.A.N. at 3934–36. FISA thereby "adopts the view expressed by the Attorney General during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation." *Id*. at 64, 1978 U.S.C.C.A.N. at 3965. Such legislation placing limitations on traditional NSA activities was drafted, but never passed. *See National Intelligence Reorganization and Reform Act of 1978: Hearings Before the S. Select Comm. on Intelligence*, 95th Cong. 999–1007 (1978) (text of unenacted legislation). And Congress understood that the NSA surveillance that it intended categorically to exclude from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The report specifically referred to the Church Committee report for its description of the NSA's activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965–66 n.63, which stated that "the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans . . . ." S. Rep. No. 94-755, bk. II, at 308 (1976). Congress's understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures is notable.

Congress's express wishes. *Id.* The Report thus explains that "[t]he intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Rep. No. 95-604, at 64, *reprinted in* 1978 U.S.C.C.A.N. at 3966 (same); *see generally* Elizabeth B. Bazen & Jennifer K. Elsea, Cong. Research Serv., *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 28–29 (Jan. 5, 2006). It is significant, however, that Congress did not decide conclusively to continue to push the boundaries of its constitutional authority in wartime. Instead, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA's express procedures and during which Congress would have the opportunity to revisit the issue. *See* 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency").

2. FISA Contemplates and Allows Surveillance Authorized "By Statute"

Congress did not attempt through FISA to prohibit the Executive Branch from using electronic surveillance. Instead, Congress acted to bring the exercise of that power under more stringent congressional control. *See, e.g.*, H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. Congress therefore enacted a regime intended to supplant the President's reliance on his own constitutional authority. Consistent with this overriding purpose of bringing the use of electronic surveillance under *congressional* control and with the commonsense notion that the Congress that enacted FISA could not bind future congresses, FISA expressly contemplates that the Executive Branch may conduct electronic surveillance outside FISA's express procedures if and when a subsequent statute authorizes such surveillance.

Thus, section 109 of FISA prohibits any person from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*." 50 U.S.C. § 1809(a)(1) (emphasis added). Because FISA's prohibitory provision broadly exempts surveillance "authorized by statute," the provision demonstrates that Congress did not attempt to regulate through FISA electronic surveillance authorized by Congress through a subsequent enactment. The use of the term "statute" here is significant because it strongly suggests that *any* subse-

quent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA's standard procedural requirements. *Compare* 18 U.S.C. § 2511(1) ("Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . . .") (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals "conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*") (emphasis added). In enacting FISA, therefore, Congress contemplated the possibility that the President might be permitted to conduct electronic surveillance pursuant to a later-enacted statute that did not incorporate all of the procedural requirements set forth in FISA or that did not expressly amend FISA itself.

To be sure, the scope of this exception is rendered less clear by the conforming amendments that FISA made to chapter 119 of title 18—the portion of the criminal code that provides the mechanism for obtaining wiretaps for law enforcement purposes. Before FISA was enacted, chapter 119 made it a criminal offense for any person to intercept a communication except as specifically provided in that chapter. *See* 18 U.S.C. § 2511(1)(a), (4)(a). Section 201(b) of FISA amended that chapter to provide an exception from criminal liability for activities conducted pursuant to FISA. Specifically, FISA added 18 U.S.C. § 2511(2)(e), which provides that it is not unlawful for "an officer, employee, or agent of the United States . . . to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act." Similarly, section 201(b) of FISA amended chapter 119 to provide that "procedures in this chapter [or chapter 121 (addressing access to stored wire and electronic communications and customer records)] and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted." *Id.* § 2511(2)(f) (Supp. IV 2005).[7]

The amendments that section 201(b) of FISA made to title 18 are fully consistent, however, with the conclusion that FISA contemplates that a subsequent statute could authorize electronic surveillance outside FISA's express procedural requirements. Section 2511(2)(e) of title 18, which provides that it is "not unlawful" for an officer of the United States to conduct electronic surveillance "as authorized by" FISA, is best understood as a safe-harbor provision. Because of section 109, the protection offered by section 2511(2)(e) for surveillance "authorized by" FISA extends to surveillance that is authorized by any other statute and therefore excepted from the prohibition of section 109. In any event, the purpose of section 2511(2)(e) is merely to make explicit what would already have been

[7] The bracketed portion was added in 1986 amendments to section 2511(2)(f). *See* Pub. L. No. 99-508, § 101(b)(3), 100 Stat. 1848, 1850.

implicit—that those authorized by statute to engage in particular surveillance do not act unlawfully when they conduct such surveillance. Thus, even if that provision had not been enacted, an officer conducting surveillance authorized by statute (whether FISA or some other law) could not reasonably have been thought to be violating Title III. Similarly, section 2511(2)(e) cannot be read to require a result that would be manifestly unreasonable—exposing a federal officer to criminal liability for engaging in surveillance authorized by statute, merely because the authorizing statute happens not to be FISA itself.

Nor could 18 U.S.C. § 2511(2)(f), which provides that the "procedures in this chapter . . . and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . may be conducted," have been intended to trump the commonsense approach of section 109 and preclude a subsequent congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)'s reference to "exclusive means" reflected the state of statutory authority for electronic surveillance in 1978 and cautioned the President not to engage in electronic surveillance outside congressionally sanctioned parameters. It is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "one legislature cannot abridge the powers of a succeeding legislature"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); *Lockhart v. United States*, 546 U.S. 142, 147–48 (2005) (Scalia, J., concurring) (collecting precedent); 1 William Blackstone, *Commentaries* *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not"). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way.

Far from a clear statement of congressional intent to bind itself, there are indications that section 2511(2)(f) cannot be interpreted as requiring that *all* electronic surveillance and domestic interception be conducted under FISA's enumerated procedures or those of chapter 119 of title 18 until and unless those provisions are repealed or amended. Even when section 2511(2)(f) was enacted (and no subsequent authorizing statute existed), it could not reasonably be read to preclude all

electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 165–68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the "exclusive" procedures of section 2511(2)(f), i.e., FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context. Indeed, FISA appears to have recognized this issue by providing a defense to liability for any official who engages in electronic surveillance under a search warrant or court order. *See* 50 U.S.C. § 1809(b). (The practice when FISA was enacted was for law enforcement officers to obtain search warrants under the Federal Rules of Criminal Procedure authorizing the installation and use of pen registers. *See S. 1667, A Bill to Amend Title 18, United States Code, with Respect to the Interception of Certain Communications, Other Forms of Surveillance, and for Other Purposes: Hearing Before the Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 57 (1985) (prepared statement of James Knapp, Deputy Assistant Attorney General, Criminal Division).[8])

In addition, section 2511(2)(a)(ii) authorizes telecommunications providers to assist officers of the government engaged in electronic surveillance when the Attorney General certifies that "no warrant or court order is required by law [and] that all statutory requirements have been met." 18 U.S.C. § 2511(2)(a)(ii).[9] If the Attorney General can certify, in good faith, that the requirements of a subsequent statute authorizing electronic surveillance are met, service providers are affirmatively and expressly authorized to assist the government. Although FISA does

[8] Alternatively, section 109(b) may be read to constitute a "procedure" in FISA or to incorporate procedures from sources other than FISA (such as the Federal Rules of Criminal Procedure or state court procedures), and in that way to satisfy section 2511(2)(f). But if section 109(b)'s defense can be so read, section 109(a) should also be read to constitute a procedure or incorporate procedures not expressly enumerated in FISA.

[9] Section 2511(2)(a)(ii) states:

> Notwithstanding any other law, providers of wire or electronic communication service, . . . are authorized by law to provide information, facilities, or technical assistance to persons authorized by law to intercept . . . communications or to conduct electronic surveillance, as defined [by FISA], if such provider . . . has been provided with . . . a certification in writing by [specified persons proceeding under Title III's emergency provision] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

allow the government to proceed without a court order in several situations, *see* 50 U.S.C. § 1805(f) (emergencies); *id*. § 1802 (certain communications between foreign governments), this provision specifically lists only Title III's emergency provision but speaks generally to Attorney General certification. That reference to Attorney General certification is consistent with the historical practice in which Presidents have delegated to the Attorney General authority to approve warrantless surveillance for foreign intelligence purposes. *See, e.g.*, *United States v. U.S. Dist. Ct.*, 444 F.2d 651, 669–71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). Section 2511(2)(a)(ii) thus suggests that telecommunications providers can be authorized to assist with warrantless electronic surveillance when such surveillance is authorized by law outside FISA.

In sum, by expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f).

3. The AUMF Is a "Statute" Authorizing Surveillance Outside the Confines of FISA

The AUMF qualifies as a "statute" authorizing electronic surveillance within the meaning of section 109 of FISA.

First, because the term "statute" historically has been given broad meaning, the phrase "authorized by statute" in section 109 of FISA must be read to include joint resolutions such as the AUMF. *See Am. Fed'n of Labor v. Watson*, 327 U. S. 582, 592–93 (1946) (finding the term "statute" as used in 28 U.S.C. § 380 to mean "a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction"); *Black's Law Dictionary* 1410 (6th ed. 1990) (defining "statute" broadly to include any "formal written enactment of a legislative body," and stating that the term is used "to designate the legislatively created laws in contradistinction to court decided or unwritten laws"). It is thus of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill. *See, e.g.*, *Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (joint resolutions are to be construed by applying "the rules applicable to legislation in general"); *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889) (joint resolution had "all the characteristics and effects" of statute that it suspended); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y 2002) (in analyzing the AUMF, finding that there is "no relevant constitutional difference between a bill and a joint resolution"), *rev'd on other grounds sub nom. Rumsfeld v. Padilla*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004); *see also* Letter for John Conyers, Jr., U.S. House of Representatives, from Laurence

H. Tribe at 3 (Jan. 6, 2006) (term "statute" in section 109 of FISA "of course encompasses a joint resolution presented to and signed by the President").

Second, the longstanding history of communications intelligence as a fundamental incident of the use of force and the Supreme Court's decision in *Hamdi v. Rumsfeld* strongly suggest that the AUMF satisfies the requirement of section 109 of FISA for statutory authorization of electronic surveillance. As explained above, it is not necessary to demarcate the outer limits of the AUMF to conclude that it encompasses electronic surveillance targeted at the enemy. Just as a majority of the Court concluded in *Hamdi* that the AUMF authorizes detention of U.S. citizens who are enemy combatants without expressly mentioning the President's long-recognized power to detain, so too does it authorize the use of electronic surveillance without specifically mentioning the President's equally long-recognized power to engage in communications intelligence targeted at the enemy. And just as the AUMF satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained "except pursuant to an Act of Congress," so too does it satisfy section 109's requirement for statutory authorization of electronic surveillance.[10] In authorizing the President's use of force in response to the September 11th attacks, Congress did not need to comb through the United States Code looking for those restrictions that it had placed on national security operations during times of peace and designate with specificity each traditional tool of military force that it sought to authorize the President to use. There is no historical precedent for such a requirement: authorizations to use military force traditionally have been couched in general language. Indeed, prior administrations have interpreted joint resolutions declaring war and authorizing the use of military force to authorize expansive collection of communications into and out of the United States.[11]

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[10] It might be argued that Congress dealt more comprehensively with electronic surveillance in FISA than it did with detention in 18 U.S.C. § 4001(a). Thus, although Congress prohibited detention "except pursuant to an Act of Congress," it combined the analogous prohibition in FISA (section 109(a)) with section 2511(2)(f)'s exclusivity provision. *See* Letter for Bill Frist, Majority Leader, U.S. Senate, from Curtis A. Bradley et al. at 5 n.6 (Jan. 9, 2006) (noting that section 4001(a) does not "attempt[] to create an exclusive mechanism for detention"). On closer examination, however, it is evident that Congress has regulated detention far more meticulously than these arguments suggest. Detention is the topic of much of the Criminal Code, as well as a variety of other statutes, including those providing for civil commitment of the mentally ill and confinement of alien terrorists. The existence of these statutes and accompanying extensive procedural safeguards, combined with the substantial constitutional issues inherent in detention, *see, e.g.*, *Hamdi*, 542 U.S. at 574–75 (Scalia, J., dissenting), refute any such argument.

[11] As noted above, in intercepting communications, President Wilson relied on his constitutional authority and the joint resolution declaring war and authorizing the use of military force, which, as relevant here, provided "that the President [is] authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1. The authorization did not explicitly mention interception of communications.

Moreover, crucial to the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack is the fact that the Executive can act quickly, decisively, and flexibly as needed. For Congress to have a role in that process, it must be able to act with similar speed, either to lend its support to, or to signal its disagreement with, proposed military action. Yet the need for prompt decisionmaking in the wake of a devastating attack on the United States is fundamentally inconsistent with the notion that to do so Congress must legislate at a level of detail more in keeping with a peacetime budget reconciliation bill. In emergency situations, Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force. That is precisely what Congress did when it passed the AUMF on September 14, 2001—just three days after the deadly attacks on America. The Capitol had been evacuated on September 11th, and Congress was meeting in scattered locations. As an account emerged of who might be responsible for these attacks, Congress acted quickly to authorize the President to use "all necessary and appropriate force" against the enemy that he determines was involved in the September 11th attacks. Under these circumstances, it would be unreasonable and wholly impractical to demand that Congress specifically amend FISA in order to assist the President in defending the Nation. Such specificity would also have been self-defeating because it would have apprised our adversaries of some of our most sensitive methods of intelligence gathering.[12]

Section 111 of FISA, 50 U.S.C. § 1811, which authorizes the President, "[n]otwithstanding any other law," to conduct "electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress," does not require a different reading of the AUMF. *See also id.* § 1844 (same provision for pen registers); *id.* § 1829 (same provision for physical searches). Section 111 cannot reasonably be read as Congress's final word on electronic surveillance during wartime, thus permanently limiting the President in all circumstances to a mere fifteen days of warrantless military intelligence gathering targeted at the enemy following a declaration of war. Rather, section 111 represents Congress's recognition that it would likely have to return to the subject and provide additional authorization to conduct warrantless electronic surveillance

[12] Some have suggested that the Administration declined to seek a specific amendment to FISA allowing the NSA activities "because it was advised that Congress would reject such an amendment," Letter for Bill Frist, Majority Leader, U.S. Senate, from Curtis A. Bradley et al. at 4 & n.4 (Jan. 9, 2005), and they have quoted in support of that assertion the Attorney General's statement that certain members of Congress advised the Administration that legislative relief "would be difficult, if not impossible." *Id*. at 4 n.4. As the Attorney General subsequently indicated, however, the difficulty with such specific legislation was that it could not be enacted "without compromising the program." *See Transcript of Attorney General Alberto R. Gonzales and Homeland Security Secretary Michael Chertoff Press Briefing on Need for Senate to Reauthorize the USA PATRIOT Act* (Dec. 21, 2005), (available at http://www.justice.gov/ag/readingroom/surveillance5.pdf, last visited Apr. 11, 2014).

outside FISA during time of war. The Conference Report explicitly stated the conferees' "inten[t] that this [fifteen-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063. Congress enacted section 111 so that the President could conduct warrantless surveillance while Congress considered supplemental wartime legislation.

Nothing in the terms of section 111 disables Congress from authorizing such electronic surveillance as a traditional incident of war through a broad, conflict-specific authorization for the use of military force, such as the AUMF. Although the legislative history of section 111 indicates that in 1978 some members of Congress believed that any such authorization would come in the form of a particularized amendment to FISA itself, section 111 does not require that result. Nor could the Ninety-Fifth Congress tie the hands of a subsequent congress in this way, at least in the absence of far clearer statutory language expressly requiring that result. *See supra* Part III.C.2; *compare, e.g.*, War Powers Resolution § 8, 50 U.S.C. § 1547(a) ("Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes [such] introduction . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter."); 10 U.S.C. § 401 (stating that any other provision of law providing assistance to foreign countries to detect and clear landmines shall be subject to specific limitations and may be construed as superseding such limitations "only if, and to the extent that, such provision specifically refers to this section and specifically identifies the provision of this section that is to be considered superseded or otherwise inapplicable"). An interpretation of section 111 that would disable Congress from authorizing broader electronic surveillance in that form can be reconciled neither with the purposes of section 111 nor with the well-established proposition that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 135; *see supra* Part III.B.2. For these reasons, the better interpretation is that section 111 was not intended to, and did not, foreclose Congress from using the AUMF as the legal vehicle for supplementing the President's existing authority under FISA in the battle against al Qaeda.

The contrary interpretation of section 111 also ignores the important differences between a formal declaration of war and a resolution such as the AUMF. As a historical matter, a formal declaration of war was no longer than a sentence, and thus Congress would not expect a declaration of war to outline the extent to which Congress authorized the President to engage in various incidents of waging war. Authorizations for the use of military force, by contrast, are typically more detailed and are made for the *specific purpose* of reciting the manner in which Congress has authorized the President to act. Thus, Congress could reasonably expect that an authorization for the use of military force would address the issue of wartime surveillance, while a declaration of war would not. Here, the AUMF

declares that the Nation faces "an unusual and extraordinary threat," acknowledges that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and provides that the President is authorized "to use all necessary and appropriate force" against those "he determines" are linked to the September 11th attacks. AUMF pmbl., § 2. This sweeping language goes far beyond the bare terms of a declaration of war. *Compare*, *e.g.*, Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 ("First. That war be, and the same is hereby declared to exist . . . between the United States of America and the Kingdom of Spain.").

Although legislation that has included a declaration of war has often also included an authorization of the President to use force, these provisions are separate and need not be combined in a single statute. *See*, *e.g.*, *id*. ("Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, *to such extent as may be necessary to carry this Act into effect*.") (emphasis added). Moreover, declarations of war have legal significance independent of any additional authorization of force that might follow. *See*, *e.g.*, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 75 (2d ed. 1996) (explaining that a formal state of war has various legal effects, such as terminating diplomatic relations, and abrogating or suspending treaty obligations and international law rights and duties); *see also id.* at 370 n.65 (speculating that one reason to fight an undeclared war would be to "avoid the traditional consequences of declared war on relations with third nations or even . . . belligerents").

In addition, section 111 does not cover the vast majority of modern military conflicts. The last declared war was World War II. Indeed, the most recent conflict prior to the passage of FISA, Vietnam, was fought without a formal declaration of war. In addition, the War Powers Resolution, enacted less than five years before FISA, clearly recognizes the distinctions between formal declarations of war and authorizations of force and demonstrates that, if Congress had wanted to include such authorizations in section 111, it knew how to do so. *See, e.g.*, 50 U.S.C. § 1544(b) (attempting to impose certain consequences 60 days after reporting the initiation of hostilities to Congress "unless the Congress . . . has declared war *or has enacted a specific authorization for such use*" of military force) (emphasis added). It is possible that, in enacting section 111, Congress intended to make no provision for even the temporary use of electronic surveillance without a court order for what had become the legal regime for most military conflicts. A better reading, however, is that Congress assumed that such a default provision would be unnecessary because, if it had acted through an authorization for the use of military force, the more detailed provisions of that authorization would resolve the

extent to which Congress would attempt to authorize, or withhold authorization for, the use of electronic surveillance.[13]

* * * * *

The broad text of the AUMF, the authoritative interpretation that the Supreme Court gave it in *Hamdi*, and the circumstances in which it was passed demonstrate that the AUMF is a statute authorizing electronic surveillance under section 109 of FISA. When the President authorizes electronic surveillance against the enemy pursuant to the AUMF, he is therefore acting at the height of his authority under *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

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[13] Some have pointed to the specific amendments to FISA that Congress made shortly after September 11th in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 204, 218, 115 Stat. 272, 281, 291 (2001), to argue that Congress did not contemplate electronic surveillance outside the parameters of FISA. *See* Memorandum for Members of the House Permanent Select Committee on Intelligence, from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* at 6–7 (Jan. 3, 2006). The USA PATRIOT Act amendments, however, do not justify giving the AUMF an unnaturally narrow reading. The USA PATRIOT Act amendments made important corrections in the general application of FISA; they were not intended to define the precise incidents of military force that would be available to the President in prosecuting the current armed conflict against al Qaeda and its allies. Many removed long-standing impediments to the effectiveness of FISA that had contributed to the maintenance of an unnecessary "wall" between foreign intelligence gathering and criminal law enforcement; others were technical clarifications. *See In re Sealed Case*, 310 F.3d 717, 725–30 (FISA Ct. Rev. 2002). The "wall" had been identified as a significant problem hampering the government's efficient use of foreign intelligence information well before the September 11th attacks and in contexts unrelated to terrorism. *See, e.g.*, *Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* 710, 729, 732 (May 2000); U.S. General Accounting Office, GAO-01-780, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited* 3, 31 (July 2001). Finally, it is worth noting that Justice Souter made a similar argument in *Hamdi* that the USA PATRIOT Act all but compelled a narrow reading of the AUMF. *See* 542 U.S. at 551 ("It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil [in the USA PATRIOT Act] would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado."). Only Justice Ginsburg joined this opinion, and the position was rejected by a majority of justices.

Nor do later amendments to FISA undermine the conclusion that the AUMF authorizes electronic surveillance outside the procedures of FISA. Three months after the enactment of the AUMF, Congress enacted certain "technical amendments" to FISA which, *inter alia*, extended the time during which the Attorney General may issue an emergency authorization of electronic surveillance from 24 to 72 hours. *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314, 115 Stat. 1394, 1402 (2001). These modifications to FISA do not in any way undermine Congress's previous authorization in the AUMF for the President to engage in electronic surveillance outside the parameters of FISA in the specific context of the armed conflict with al Qaeda.

4. The Canon of Constitutional Avoidance Requires Resolving in Favor of the President's Authority Any Ambiguity About Whether FISA Forbids the NSA Activities

As explained above, the AUMF fully authorizes the NSA activities. Because FISA contemplates the possibility that subsequent statutes could authorize electronic surveillance without requiring FISA's standard procedures, the NSA activities are also consistent with FISA and related provisions in title 18. Nevertheless, some might argue that sections 109 and 111 of FISA, along with section 2511(2)(f)'s "exclusivity" provision and section 2511(2)(e)'s liability exception for officers engaged in FISA-authorized surveillance, are best read to suggest that FISA requires that subsequent authorizing legislation specifically amend FISA in order to free the Executive from FISA's enumerated procedures. As detailed above, this is not the better reading of FISA. But even if these provisions were ambiguous, any doubt as to whether the AUMF and FISA should be understood to allow the President to make tactical military decisions to authorize surveillance outside the parameters of FISA must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise.

It is well established that the first task of any interpreter faced with a statute that may present an unconstitutional infringement on the powers of the President is to determine whether the statute may be construed to avoid the constitutional difficulty. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring). Moreover, the canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Thus, courts and the Executive Branch typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President's Commander in Chief powers.

Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President's exercise of his constitutionally assigned duties as Commander in Chief. Constitutional avoidance principles require

interpreting FISA, at least in the context of the military conflict authorized by the AUMF, to avoid these questions, if "fairly possible." Even if Congress intended FISA to use the full extent of its constitutional authority to "occupy the field" of "electronic surveillance," as FISA used that term, during peacetime, the legislative history indicates that Congress had not reached a definitive conclusion about its regulation during wartime. *See* H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency"). Therefore, it is not clear that Congress, in fact, intended to test the limits of its constitutional authority in the context of wartime electronic surveillance.

Whether Congress may interfere with the President's constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question. As explained in Part III.A, it had long been accepted at the time of FISA's enactment that the President has inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes. Congress recognized at the time that the enactment of a statute purporting to eliminate the President's ability, even during peacetime, to conduct warrantless electronic surveillance to collect foreign intelligence was near or perhaps beyond the limit of Congress's Article I powers. The NSA activities, however, involve signals intelligence performed in the midst of a congressionally authorized armed conflict undertaken to prevent further hostile attacks on the United States. The NSA activities lie at the very core of the Commander in Chief power, especially in light of the AUMF's explicit authorization for the President to take *all* necessary and appropriate military action to stop al Qaeda from striking again. The constitutional principles at stake here thus involve not merely the President's well-established inherent authority to conduct warrantless surveillance for foreign intelligence purposes during peacetime, but also the powers and duties expressly conferred on him as Commander in Chief by Article II.

Even outside the context of wartime surveillance of the enemy, the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear. As explained above, the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. The source of this authority traces to the Vesting Clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The Vesting Clause "has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its

enumerated powers." *The President's Compliance With the "Timely Notification "Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160–61 (1986) ("*Timely Notification Requirement*").

Moreover, it is clear that some presidential authorities in this context are beyond Congress's ability to regulate. For example, as the Supreme Court explained in *Curtiss-Wright*, the President "*makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. at 319. Similarly, President Washington established early in the history of the Republic the Executive's absolute authority to maintain the secrecy of negotiations with foreign powers, even against congressional efforts to secure information. *See id.* at 320–21. Recognizing presidential authority in this field, the Executive Branch has taken the position that "congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and . . . statutes infringing the President's inherent Article II authority would be unconstitutional." *Timely Notification Requirement*, 10 Op. O.L.C. at 164.

There are certainly constitutional limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution, within the United States. As explained above, intelligence gathering is at the heart of executive functions. Since the time of the Founding it has been recognized that matters requiring secrecy—and intelligence in particular—are quintessentially executive functions. *See, e.g.*, *The Federalist* No. 64, at 435 (John Jay) (Jacob E. Cooke ed. 1961) ("The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."); *see also Timely Notification Requirement*, 10 Op. O.L.C. at 165; *cf. New York Times Co. v. United States*, 403 U.S. 713, 729–30 (1971) (Stewart, J., concurring) ("[I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense.").

Because Congress has rarely attempted to intrude in this area and because many of these questions are not susceptible to judicial review, there are few guideposts for determining exactly where the line defining the President's sphere of exclusive authority lies. Typically, if a statute is in danger of encroaching upon exclusive powers of the President, the courts apply the constitutional avoidance canon, if a construction avoiding the constitutional issue is "fairly possible." *See, e.g.*, *Egan*, 484 U.S. at 527, 530. The only court that squarely has addressed the relative powers of Congress and the President in this field suggested that the balance tips decidedly in the President's favor. The Foreign Intelligence Surveillance Court of

Review recently noted that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, "assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*[14] Although the court did not provide extensive analysis, it is the only judicial statement on point, and it comes from the specialized appellate court created expressly to deal with foreign intelligence issues under FISA.

But the NSA activities are not simply exercises of the President's general foreign affairs powers. Rather, they are primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue. The NSA activities, moreover, have been undertaken specifically to prevent a renewed attack at the hands of an enemy that has already inflicted the single deadliest foreign attack in the Nation's history. The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874); *The Federalist* No. 74, at 500 (Alexander Hamilton). "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not "*interfere[] with the command of the forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

The Executive Branch uniformly has construed the Commander in Chief and foreign affairs powers to grant the President authority that is beyond the ability of Congress to regulate. In 1860, Attorney General Black concluded that an act of Congress, if intended to constrain the President's discretion in assigning duties to an officer in the army, would be unconstitutional:

> As commander-in-chief of the army it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have the power of

[14] In the past, other courts have declined to express a view on that issue one way or the other. *See, e.g.*, *Butenko*, 494 F.2d at 601 ("We do not intimate, at this time, any view whatsoever as the proper resolution of the possible clash of the constitutional powers of the President and Congress.").

> appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.

Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468 (1860). Attorney General Black went on to explain that, in his view, the statute involved there could probably be read as simply providing "a recommendation" that the President could decline to follow at his discretion. *Id*. at 469–70.[15]

Supreme Court precedent does not support claims of congressional authority over core military decisions during armed conflicts. In particular, the two decisions of the Supreme Court that address a conflict between asserted wartime powers of the Commander in Chief and congressional legislation and that resolve the conflict in favor of Congress—*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—are both distinguishable from the situation presented by the NSA activities in the conflict with al Qaeda. Neither supports the constitutionality of the restrictions in FISA as applied here.

Barreme involved a suit brought to recover a ship seized by an officer of the U.S. Navy on the high seas during the so-called "Quasi War" with France in 1799.

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[15] Executive practice recognizes, consistent with the Constitution, some congressional control over the Executive's decisions concerning the Armed Forces. *See, e.g.*, U.S. Const. art. I, § 8, cl. 12 (granting Congress power "to raise and support Armies"). But such examples have not involved congressional attempts to regulate the actual conduct of a military campaign, and there is no comparable textual support for such interference. For example, just before World War II, Attorney General Robert Jackson concluded that the Neutrality Act prohibited President Roosevelt from selling certain armed naval vessels and sending them to Great Britain. *See Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484, 496 (1940). Jackson's apparent conclusion that Congress could control the President's ability to transfer war material does not imply acceptance of direct congressional regulation of the Commander in Chief's control of the means and methods of engaging the enemy in conflict. Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Truman Administration readily conceded that, if Congress had prohibited the seizure of steel mills by statute, Congress's action would have been controlling. *See* Brief for Petitioner at 150, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Nos. 744 and 745). This concession implies nothing concerning congressional control over the methods of engaging the enemy.

Likewise, the fact that the Executive Branch has, at times, sought congressional ratification after taking unilateral action in a wartime emergency does not reflect a concession that the Executive lacks authority in this area. A decision to seek congressional support can be prompted by many motivations, including a desire for political support. In modern times, several administrations have sought congressional authorization for the use of military force while preserving the ability to assert the unconstitutionality of the War Powers Resolution. *See, e.g.*, Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq (Jan. 14, 1991), 1 *Pub. Papers of Pres. George Bush* 40, 40 (1991) ("[M]y request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."). Moreover, many actions for which congressional support has been sought—such as President Lincoln's action in raising an army in 1861—quite likely fall primarily under Congress's core Article I powers.

The seizure had been based upon the officer's orders implementing an act of Congress suspending commerce between the United States and France and authorizing the seizure of American ships bound *to* a French port. The ship in question was suspected of sailing *from* a French port. The Supreme Court held that the orders given by the President could not authorize a seizure beyond the terms of the statute and therefore that the seizure of the ship not in fact bound *to* a French port was unlawful. 6 U.S. at 177–78. Although some commentators have broadly characterized *Barreme* as standing for the proposition that Congress may restrict by statute the means by which the President can direct the Nation's Armed Forces to carry on a war, the Court's holding was limited in at least two significant ways. First, the operative section of the statute in question applied only to *American* merchant ships. *See id*. at 170 (quoting Act of February 9, 1799). Thus, the Court simply had no occasion to rule on whether, even in the limited and peculiar circumstances of the Quasi War, Congress could have placed some restriction on the orders the Commander in Chief could issue concerning direct engagements with enemy forces. Second, it is significant that the statute in *Barreme* was cast expressly, not as a limitation on the conduct of warfare by the President, but rather as regulation of a subject within the core of Congress's enumerated powers under Article I—the regulation of foreign commerce. *See* U.S. Const., art. I, § 8, cl. 3. The basis of Congress's authority to act was therefore clearer in *Barreme* than it is here.

Youngstown involved an effort by the President—in the face of a threatened work stoppage—to seize and to run steel mills. Congress had expressly considered the possibility of giving the President power to effect such a seizure during national emergencies. It rejected that option, however, instead providing different mechanisms for resolving labor disputes and mechanisms for seizing industries to ensure production vital to national defense.

For the Court, the connection between the seizure and the core Commander in Chief function of commanding the Armed Forces was too attenuated. The Court pointed out that the case did not involve authority over "day-to-day fighting in a theater of war." *Id.* at 587. Instead, it involved a dramatic extension of the President's authority over military operations to exercise control over an industry that was vital for producing equipment needed overseas. Justice Jackson's concurring opinion also reveals a concern for what might be termed foreign-to-domestic presidential bootstrapping. The United States became involved in the Korean conflict through President Truman's unilateral decision to commit troops to the defense of South Korea. The President then claimed authority, based upon this foreign conflict, to extend presidential control into vast sectors of the domestic economy. Justice Jackson expressed "alarm[]" at a theory under which "a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." *Id.* at 642.

Moreover, President Truman's action extended the President's authority into a field that the Constitution predominantly assigns to Congress. *See id*. at 588 (discussing Congress's commerce power and noting that "[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control"); *see also id*. at 643 (Jackson, J., concurring) (explaining that Congress is given express authority to "'raise and *support* Armies'" and "'to *provide* and *maintain* a Navy'") (quoting U.S. Const. art. I, § 8, cls. 12, 13). Thus, *Youngstown* involved an assertion of executive power that not only stretched far beyond the President's core Commander in Chief functions, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.[16]

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. As explained above, it is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress. Moreover, the theme that appeared most strongly in Justice Jackson's concurrence in *Youngstown*—the fear of presidential bootstrapping—does not apply in this context. Whereas President Truman had used his inherent constitutional authority to commit U.S. troops, here Congress expressly provided the President sweeping authority to use "all necessary and appropriate force" to protect the Nation from further attack. AUMF § 2(a). There is thus no bootstrapping concern.

Finally, *Youngstown* cannot be read to suggest that the President's authority for engaging the enemy is less extensive inside the United States than abroad. To the contrary, the extent of the President's Commander in Chief authority necessarily depends on where the enemy is found and where the battle is waged. In World War II, for example, the Supreme Court recognized that the President's authority as Commander in Chief, as supplemented by Congress, included the power to capture and try agents of the enemy in the United States, even if they never had "entered the theatre or zone of active military operations." *Quirin*, 317 U.S. at 38.[17]

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[16] *Youngstown* does demonstrate that the mere fact that executive action might be placed in Justice Jackson's category III does not obviate the need for further analysis. Justice Jackson's framework therefore recognizes that Congress might impermissibly interfere with the President's authority as Commander in Chief or to conduct the Nation's foreign affairs.

[17] It had been recognized long before *Youngstown* that, in a large-scale conflict, the area of operations could readily extend to the continental United States, even when there are no major engagements of armed forces here. Thus, in the context of the trial of a German officer for spying in World War I, it was recognized that "[w]ith the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations" during the war, particularly in the port of New York, and that a spy in the United States might easily have aided the "hostile operation" of U-boats off the coast. *United States ex rel. Wessels v. McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920).

In the present conflict, unlike in the Korean War, the battlefield was brought to the United States in the most literal way, and the United States continues to face a threat of further attacks on its soil. In short, therefore, *Youngstown* does not support the view that Congress may constitutionally prohibit the President from authorizing the NSA activities.

The second serious constitutional question is whether the particular restrictions imposed by FISA would impermissibly hamper the President's exercise of his constitutionally assigned duties as Commander in Chief. The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA.[18] Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation—to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not "fairly possible," FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. In that event, FISA would purport to prohibit the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history. A statute may not "*impede* the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); *see also id.* at 696–97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. *See also In re Sealed Case*, 310 F.3d at 742 (explaining that "FISA could not encroach on the President's constitutional power").

Application of the avoidance canon would be especially appropriate here for several reasons beyond the acute constitutional crises that would otherwise result. First, as noted, Congress did not intend FISA to be the final word on electronic surveillance conducted during armed conflicts. Instead, Congress expected that it would revisit the subject in subsequent legislation. Whatever intent can be gleaned from FISA's text and legislative history to set forth a comprehensive scheme for regulating electronic surveillance during peacetime, that same intent simply does not extend to armed conflicts and declared wars.[19] Second, FISA was enacted during the Cold War, not during active hostilities with an adversary whose mode of operation is to blend in with the civilian population until it is ready to strike.

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[18] In order to avoid further compromising vital national security activities, a full explanation of the basis for the President's determination cannot be given in an unclassified document.

[19] FISA exempts the President from its procedures for fifteen days following a congressional declaration of war. *See* 50 U.S.C. § 1811. If an adversary succeeded in a decapitation strike, preventing Congress from declaring war or passing subsequent authorizing legislation, it seems clear that FISA could not constitutionally continue to apply in such circumstances.

These changed circumstances have seriously altered the constitutional calculus, one that FISA's enactors had already recognized might suggest that the statute was unconstitutional. Third, certain technological changes have rendered FISA still more problematic. As discussed above, when FISA was enacted in 1978, Congress expressly declined to regulate through FISA certain signals intelligence activities conducted by the NSA. *See supra* Part III.C.1 & n.6.[20] These same factors weigh heavily in favor of concluding that FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the branches.

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As explained above, FISA is best interpreted to allow a statute such as the AUMF to authorize electronic surveillance outside FISA's enumerated procedures. The strongest counterarguments to this conclusion are that various provisions in FISA and title 18, including section 111 of FISA and section 2511(2)(f) of title 18, together require that subsequent legislation must reference or amend FISA in order to authorize electronic surveillance outside FISA's procedures and that interpreting the AUMF as a statute authorizing electronic surveillance outside FISA procedures amounts to a disfavored repeal by implication. At the very least, however, interpreting FISA to allow a subsequent statute such as the AUMF to authorize electronic surveillance without following FISA's express procedures is "fairly possible," and that is all that is required for purposes of invoking constitutional avoidance. In the competition of competing canons, particularly in the context of an ongoing armed conflict, the constitutional avoidance canon carries much greater interpretative force.[21]

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[20] Since FISA's enactment in 1978, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

[21] If the text of FISA were clear that nothing other than an amendment to FISA could authorize additional electronic surveillance, the AUMF would impliedly repeal as much of FISA as would prevent the President from using "all necessary and appropriate force" in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are "capable of coexistence." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). Under this standard, an implied repeal may be found where one statute would "unduly interfere with" the operation of another. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976). The President's determination that electronic surveillance of al Qaeda outside the confines of FISA was "necessary and appropriate" would create a clear conflict between the AUMF and FISA. FISA's restrictions on the use of electronic surveillance would preclude the President from doing what the AUMF specifically authorized him to do: use all "necessary and appropriate force" to prevent al Qaeda from carrying out future attacks

D. The NSA Activities Are Consistent With the Fourth Amendment

The Fourth Amendment prohibits "unreasonable searches and seizures" and directs that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The touchstone for review of government action under the Fourth Amendment is whether the search is "reasonable." *See, e.g.*, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

As noted above, *see* Part III.A, all of the federal courts of appeals to have addressed the issue have affirmed the President's inherent constitutional authority to collect foreign intelligence without a warrant. *See In re Sealed Case*, 310 F.3d at 742. Properly understood, foreign intelligence collection in general, and the NSA activities in particular, fit within the "special needs" exception to the warrant requirement of the Fourth Amendment. Accordingly, the mere fact that no warrant is secured prior to the surveillance at issue in the NSA activities does not suffice to render the activities unreasonable. Instead, reasonableness in this context must be assessed under a general balancing approach, "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The NSA activities are reasonable because the government's interest, defending the Nation from another foreign attack in time of armed conflict, outweighs the individual privacy interests at stake, and because they seek to intercept only international communications where one party is linked to al Qaeda or an affiliated terrorist organization.

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against the United States. The ordinary restrictions in FISA cannot continue to apply if the AUMF is to have its full effect; those constraints would "unduly interfere" with the operation of the AUMF.

Contrary to the recent suggestion made by several law professors and former government officials, the ordinary presumption against implied repeals is overcome here. *Cf.* Letter for Bill Frist, Majority Leader, U.S. Senate, from Curtis A. Bradley et al. at 4 (Jan. 9, 2006). First, like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765–66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. *See* 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the implied repeal canon either would not apply at all or would apply with significantly reduced force. Second, the AUMF was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. As discussed above, in these circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

1. The Warrant Requirement of the Fourth Amendment Does Not Apply to the NSA Activities

In "the criminal context," the Fourth Amendment reasonableness requirement "usually requires a showing of probable cause" and a warrant. *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). The requirement of a warrant supported by probable cause, however, is not universal. Rather, the Fourth Amendment's "central requirement is one of reasonableness," and the rules the Court has developed to implement that requirement "[s]ometimes . . . require warrants." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also, e.g.*, *Earls*, 536 U.S. at 828 (noting that the probable cause standard "is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions") (internal quotation marks omitted).

In particular, the Supreme Court repeatedly has made clear that in situations involving "special needs" that go beyond a routine interest in law enforcement, the warrant requirement is inapplicable. *See Vernonia*, 515 U.S. at 653 (there are circumstances "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also McArthur*, 531 U.S. at 330 ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). It is difficult to encapsulate in a nutshell all of the different circumstances the Court has found to qualify as "special needs" justifying warrantless searches. But one application in which the Court has found the warrant requirement inapplicable is in circumstances in which the government faces an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement. One important factor in establishing "special needs" is whether the government is responding to an emergency that goes beyond the need for general crime control. *See In re Sealed Case*, 310 F.3d at 745–46.

Thus, the Court has permitted warrantless searches of property of students in public schools, *see New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (noting that warrant requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"), to screen athletes and students involved in extracurricular activities at public schools for drug use, *see Vernonia*, 515 U.S. at 654–55; *Earls*, 536 U.S. at 829–38, to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 634 (1989), and to search probationers' homes, *see Griffin*, 483 U.S. 868. Many special needs doctrine and related cases have upheld *suspicionless* searches or seizures. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (implicitly relying on special needs doctrine to uphold use of automobile

checkpoint to obtain information about recent hit-and-run accident); *Earls*, 536 U.S. at 829–38 (suspicionless drug testing of public school students involved in extracurricular activities); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449–55 (1990) (road block to check all motorists for signs of drunken driving); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (road block near the border to check vehicles for illegal immigrants); *cf. In re Sealed Case*, 310 F.3d at 745–46 (noting that suspicionless searches and seizures in one sense are a greater encroachment on privacy than electronic surveillance under FISA because they are not based on any particular suspicion, but "[o]n the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning"). To fall within the "special needs" exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary general crime control. *See, e.g.*, *Ferguson v. Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of "special needs, beyond the normal need for law enforcement," where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant. *Vernonia*, 515 U.S. at 653. The Executive Branch has long maintained that collecting foreign intelligence is far removed from the ordinary criminal law enforcement action to which the warrant requirement is particularly suited. *See, e.g.*, *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103d Cong. 62, 63 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[I]t is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities. . . . [W]e believe that the warrant clause of the Fourth Amendment is inapplicable to such [foreign intelligence] searches."); *see also In re Sealed Case*, 310 F.3d at 745. The object of foreign intelligence collection is securing information necessary to protect the national security from the hostile designs of foreign powers like al Qaeda and affiliated terrorist organizations, including the possibility of another foreign attack on the United States. In foreign intelligence investigations, moreover, the targets of surveillance often are agents of foreign powers, including international terrorist groups, who may be specially trained in concealing their activities and whose activities may be particularly difficult to detect. The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation.[22]

[22] Even in the domestic context, the Supreme Court has recognized that there may be significant distinctions between wiretapping for ordinary law enforcement purposes and domestic national security surveillance. *See United States v. U.S. Dist. Ct.*, 407 U.S. 297, 322 (1972) ("*Keith*") (explaining that

In particular, the NSA activities are undertaken to prevent further devastating attacks on our Nation, and they serve the highest government purpose through means other than traditional law enforcement.[23] The NSA activities are designed to enable the government to act quickly and flexibly (and with secrecy) to find agents of al Qaeda and its affiliates—an international terrorist group which has already demonstrated a capability to infiltrate American communities without being detected—in time to disrupt future terrorist attacks against the United States. As explained by the Foreign Intelligence Surveillance Court of Review, the nature of the "emergency" posed by al Qaeda "takes the matter out of the realm of ordinary crime control." *In re Sealed Case*, 310 F.3d at 746. Thus, under the "special needs" doctrine, no warrant is required by the Fourth Amendment for the NSA activities.

2. The NSA Activities Are Reasonable

As the Supreme Court has emphasized repeatedly, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118–19 (quotation marks omitted); *see also Earls*, 536 U.S. at 829. The Supreme Court has found a search reasonable when, under the totality of the circumstances, the importance of the governmental interests outweighs the nature and quality of the intrusion on the individual's Fourth Amendment interests. *See Knights*, 534 U.S. at 118–22. Under the standard balancing of interests analysis used for gauging reasonableness, the NSA activities are consistent with the Fourth Amendment.

"the focus of domestic [security] surveillance may be less precise than that directed against more conventional types of crime" because often "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency"); *see also United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (reading *Keith* to recognize that "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations"). Although the Court in *Keith* held that the Fourth Amendment's warrant requirement does apply to investigations of purely *domestic* threats to national security—such as domestic terrorism, it suggested that Congress consider establishing a lower standard for such warrants than that set forth in Title III. *See id.* at 322–23 (advising that "different standards" from those applied to traditional law enforcement "may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens"). *Keith*'s emphasis on the need for flexibility applies with even greater force to surveillance directed at *foreign* threats to national security. *See* S. Rep. No. 95-701, at 16 ("Far more than in domestic security matters, foreign counterintelligence investigations are 'long range' and involve 'the interrelation of various sources and types of information.'") (quoting *Keith*, 407 U.S. at 322). And flexibility is particularly essential here, where the purpose of the NSA activities is to prevent another armed attack against the United States.

[23] This is not to say that traditional law enforcement has no role in protecting the Nation from attack. The NSA activities, however, are not directed at bringing criminals to justice but at detecting and preventing plots by a declared enemy of the United States to attack it again.

With respect to the individual privacy interests at stake, there can be no doubt that, as a general matter, interception of telephone communications implicates a significant privacy interest of the individual whose conversation is intercepted. The Supreme Court has made clear at least since *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a substantial and constitutionally protected reasonable expectation of privacy that their telephone conversations will not be subject to governmental eavesdropping. Although the individual privacy interests at stake may be substantial, it is well recognized that a variety of governmental interests—including routine law enforcement and foreign-intelligence gathering—can overcome those interests.

On the other side of the scale here, the government's interest in engaging in the NSA activities is the most compelling interest possible—securing the Nation from foreign attack in the midst of an armed conflict. One attack already has taken thousands of lives and placed the Nation in state of armed conflict. Defending the Nation from attack is perhaps the most important function of the federal government—and one of the few express obligations of the federal government enshrined in the Constitution. *See* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion* . . . .") (emphasis added); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("If war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."). As the Supreme Court has declared, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

The government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting one-end foreign communications where there is "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (statement of Attorney General Gonzales) (available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html, last visited Aug. 12, 2014); *cf. Edmond*, 531 U.S. at 44 (noting that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack" because "[t]he exigencies created by th[at] scenario[] are far removed" from ordinary law enforcement). The United States has already suffered one attack that killed thousands, disrupted the Nation's financial center for days, and successfully struck at the command and control center for the Nation's military. And the President has stated that the NSA activities are "critical" to our national security. President's News Conference, 41 *Weekly Comp. Pres. Doc.* at 1886. To this day, finding al Qaeda sleeper agents in the United States remains one of the preeminent concerns of the war on terrorism. As the President has explained,

"[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September 11th." *Id.*

Of course, because the magnitude of the government's interest here depends in part upon the threat posed by al Qaeda, it might be possible for the weight that interest carries in the balance to change over time. It is thus significant for the reasonableness of the NSA activities that the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days. This process of reauthorization ensures a periodic review to evaluate whether the threat from al Qaeda remains sufficiently strong that the government's interest in protecting the Nation and its citizens from foreign attack continues to outweigh the individual privacy interests at stake.

Finally, as part of the balancing of interests to evaluate Fourth Amendment reasonableness, it is significant that the NSA activities are limited to intercepting international communications where there is a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This factor is relevant because the Supreme Court has indicated that in evaluating reasonableness, one should consider the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663; *see also Earls*, 536 U.S. at 834 ("Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."). That consideration does not mean that reasonableness requires the "least intrusive" or most "narrowly tailored" means for obtaining information. To the contrary, the Supreme Court has repeatedly rejected such suggestions. *See, e.g.*, *Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") (internal quotation marks omitted); *Vernonia*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."). Nevertheless, the Court has indicated that some consideration of the efficacy of the search being implemented—that is, some measure of fit between the search and the desired objective—is relevant to the reasonableness analysis. The NSA activities are targeted to intercept international communications of persons reasonably believed to be members or agents of al Qaeda or an affiliated terrorist organization, a limitation which further strongly supports the reasonableness of the searches.

In sum, the NSA activities are consistent with the Fourth Amendment because the warrant requirement does not apply in these circumstances, which involve both "special needs" beyond the need for ordinary law enforcement and the inherent authority of the President to conduct warrantless electronic surveillance to obtain foreign intelligence to protect our Nation from foreign armed attack. The touchstone of the Fourth Amendment is reasonableness, and the NSA activities are

certainly reasonable, particularly taking into account the nature of the threat the Nation faces.

IV. Conclusion

For the foregoing reasons, the President—in light of the broad authority to use military force in response to the attacks of September 11th and to prevent further catastrophic attack expressly conferred on the President by the Constitution and confirmed and supplemented by Congress in the AUMF—has legal authority to authorize the NSA to conduct the signals intelligence activities he has described. Those activities are authorized by the Constitution and by statute, and they violate neither FISA nor the Fourth Amendment.

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts With the General Services Administration

The Miscellaneous Receipts Act allows the General Services Administration to retain as a "refund to appropriations" the entire amount representing actual damages paid by the Sprint Corporation and Worldcom, Inc. in settlement for overcharging the federal government for telecommunications services under contracts with GSA.

January 10, 2006

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

The Sprint Corporation ("Sprint") and Worldcom, Inc. (known as "MCI") have settled claims for overcharging the federal government for telecommunications services under contracts with the General Services Administration ("GSA"). The Justice Department has remitted to GSA the amount of the settlement received by the United States that represents the actual damages. You have asked whether the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2000), allows GSA to retain this amount in its Information Technology Fund ("IT Fund" or "Fund"), or whether, instead, GSA should remit the money to the general fund of the Treasury or seek a means of allocating some or all of it among the numerous agencies that received telecommunications services pursuant to the GSA contracts. We conclude that the IT Fund may retain this entire settlement amount as a "refund to appropriations."

I.

GSA is charged with "procur[ing] and supply[ing] personal property and nonpersonal services for executive agencies to use in the proper discharge of their responsibilities," which includes authority to "contract for public utility services" as the representative of executive agencies. 40 U.S.C. § 501(b)(1) (Supp. II 2002); *see id.* § 501(c). To finance GSA's provision of "information technology resources to federal agencies," Congress established the IT Fund, a revolving fund operating "without fiscal year limitation." 40 U.S.C. § 322(c) (Supp. II 2002).[1] The Admin-

[1] What is now known as the IT Fund dates from 1962. *See* Pub. L. No. 87-847, 76 Stat. 1117 (1962) (codified at 5 U.S.C. § 630g-1 (Supp. IV 1959–62)). Congress capitalized the initial fund with an appropriation of $10,000,000, *see Appendix to the Budget of the United States Government for the Fiscal Year Ending June 30, 1964*, at 728 (1963), and provided that the fund would be maintained by "advances and reimbursements" from agencies using telecommunications services "at rates determined by the [GSA] Administrator to approximate the costs [of the fund]," and by any "refunds or recoveries resulting from operations of the fund," including "receipts from carriers and others for loss of or damage to property," 76

istrator of GSA is authorized, "[i]n operating the Fund," to "enter into multiyear contracts, not longer than 5 years, to provide information technology hardware, software, or services," as long as certain conditions are met, 40 U.S.C. § 322(e)(1) (Supp. II 2002), and also retains his authority under section 501, *see id.* § 322(e)(2).

The GSA Administrator must determine the Fund's cost and capital requirements for each fiscal year, and these requirements "may include" (1) amounts "needed to purchase . . . information processing and transmission equipment, software, systems, and operating facilities necessary to provide services"; (2) amounts "resulting from operations of the Fund, including the net proceeds from the disposal of excess or surplus personal property and receipts from carriers and others for loss or damage to property"; and (3) any money "appropriated, authorized to be transferred, or otherwise available to the Fund." *Id.* § 322(b)(1). The Administrator must submit a plan concerning these requirements to the Director of the Office of Management and Budget ("OMB") "for review and approval." *Id.* § 322(b)(2). If the Director approves the plan, the Administrator must establish "rates, consistent with the approval, to be charged to agencies for information technology resources provided through the Fund." *Id.* § 322(d). You have explained that "[r]ates in the cost and capital plan are set at levels to ensure a fair and equitable allocation of GSA's costs," both "direct costs for services acquired, and GSA's overhead and internal costs of operations." Letter for Steven Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from George N. Barclay, Acting General Counsel, General Services Administration at 5 (May 12, 2005) ("Barclay Letter"). "After the close of each fiscal year," GSA must "transfer[] to the Treasury as miscellaneous receipts" "any uncommitted balance remaining in the Fund, after making provision for anticipated operating needs" as determined by OMB. 40 U.S.C. § 322(f).

In 1998 and 1999, GSA's Federal Technology Service entered into contracts, known collectively as the FTS2001 contracts, with Sprint and MCI to provide telecommunications services. The contracts provided for the delivery of services to agencies government-wide and nation-wide. GSA negotiated and executed the contracts; was responsible for any dispute or discrepancy between a customer agency and a provider; provided customer support; and supplied legal, accounting, and technical services to the agencies. *See* Barclay Letter at 1–2, 6.

The FTS2001 contracts allowed GSA's customer agencies to place orders for services directly with the telecommunications providers. GSA set rates for these agencies pursuant to its authority under section 322(d), and these rates consisted of the charges imposed by the providers plus a percentage fee to cover GSA's expenses for "overhead" associated with the contracts and "capital maintenance of

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Stat. at 1117. The current version of the IT Fund statute dates from 2002. *See* Pub. L. No. 107-217, § 322, 116 Stat. 1062, 1076–77 (2002).

the IT Fund." *Id.* at 2. The agencies could choose to be either "centrally billed" by GSA or "directly billed" by the providers. For centrally billed agencies, GSA would pay the providers from the IT Fund; the percentage fee was imbedded in GSA's invoices to each agency. For directly billed agencies, the providers included the percentage GSA fee in their bills and remitted this amount to GSA. Approximately 91% of the services for the relevant time period were centrally billed. The remaining 9% were directly billed. *See id.*

Sprint and MCI were sued by a relator under the False Claims Act, 31 U.S.C. § 3729(a) (2000), for overcharging the government for charges that the providers incurred for use of local telephone networks. The Department of Justice intervened in the suit on behalf of GSA to recover the overcharges. "The precise amount of actual damages is not known," you have explained, "because of the number of agencies participating under the contracts and the way in which the billing was performed. The contracts covered the entire nation, and [the relevant local charges] vary between counties and even within counties depending on time of day and type of line. Charges also changed depending on the contract year . . . ." Barclay Letter at 2–3. Likewise, although there are "invoices and underlying data for each agency," these "were not susceptible to individual analysis to determine the specific overcharge related to each line and service," and it is therefore "impossible to determine the exact amount by which each customer agency was overcharged." But the Justice Department (acting on behalf of GSA), the providers, and the relator negotiated a settlement in which the providers agreed to pay both actual and exemplary damages, and the parties agreed on an estimate of actual damages "based on averages and negotiations." Just as the precise overall amount of actual damages is not known, so also is it "impossible to determine . . . the proportion of the settlements attributable to individual agencies." After deducting the relator's share and an amount to cover its own costs, the Department remitted to GSA approximately $24.5 million from the settlement amount representing actual damages. *Id.* at 3. GSA wishes to retain this amount in the IT Fund "to apply to [future] government-wide telecommunications needs." *Id.* at 1. Neither OMB nor "the user agency representatives on the Interagency Management Council" objected to this plan. *Id.* at 3. You are not seeking to retain in the IT Fund the portions of the settlement attributable to exemplary damages. *Id.* at 3 n.1.

II.

For the reasons explained below, the Miscellaneous Receipts Act ("MRA" or "Act") does not prohibit GSA from retaining in the IT Fund the settlement amount representing actual damages. Although no other statute specifically supersedes the Act's generally applicable requirements in this context, so as to justify GSA's retaining the settlement money in the Fund, GSA may nevertheless retain this amount under the "refunds" exception to the Act.

A.

The Miscellaneous Receipts Act requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). The reference to depositing "in the Treasury" could be considered ambiguous because it does not specify whether the money should be deposited into the general fund of the Treasury or instead into an agency-specific fund. *See Apportionment of False Claims Act Recoveries to Agencies*, 28 Op. O.L.C. 25, 27 n.5 (2004) ("*FCA Recoveries*"). But the longstanding view of the Executive Branch, shared by the Comptroller General,[2] has been that it requires the former. As early as 1909, the Comptroller of the Treasury, interpreting an earlier version of the Act, opined that "[d]epositing [moneys] in the Treasury to the credit of an appropriation would not be paying them into the Treasury within the meaning of this section." Letter for the Secretary of the Navy from the Comptroller of the Treasury, 50 MS. Comp. Dec. 1, 4 (July 2, 1909); *see also FCA Recoveries*, 28 Op. O.L.C. at 27 n.5. The Comptroller General similarly takes the view that "agencies ordinarily are required to deposit moneys they receive for the use of the United States in the general fund of the Treasury as miscellaneous receipts." *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, 69 Comp. Gen. 260, 261 (1990) ("*FEMA*").

Congress in the Act was "curb[ing] Executive discretion in the handling of public moneys and . . . ensur[ing] that all expenditures would be authorized by Congress." Memorandum for the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Legislation Regarding FBI Undercover Operations* at 5 (July 27, 1978) ("*FBI Operations*"). The original version of the Act "was expressly designed to ensure that the Executive did not reduce the congressional prerogative over public funds." Memorandum for Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of 31 U.S.C. § 3302(b) on the Settlement Authority of the Attorney General* at 13 n.8 (Mar. 25, 1983). We have particularly noted that it was Congress's purpose to codify the "anti-augmentation principle"—the principle that an agency may not augment its appropriations from outside sources without statutory authority. *E.g.*, Memorandum for James G. McAdams, III, Counsel for Intelligence Policy, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Disposition of Funds at Conclusion of Joint FBI/DOD Undercover Operations* at 2–3 (June 27, 1997); *see also FCA Recoveries*, 28 Op.

[2] The Comptroller General is an agent of Congress. Therefore, as we have repeatedly stated, although his views often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies, or officers of the Executive Branch.

O.L.C. at 27 n.5 (discussing "the anti-augmentation principle," "derived from the Constitution," that "an agency may not augment its appropriations from outside sources without statutory authority").

Consistent with these principles, the Executive Branch has for many years recognized two situations in which the Act would not require an agency to deposit money received "for the Government" into the general fund: (1) when Congress has specifically authorized the agency to retain such money, or (2) when the money can be considered a refund. In the first situation, Congress simply supersedes its own general statute with a specific statute—"creat[ing] an exception to the MRA" that gives "an agency . . . statutory authority to direct funds elsewhere." *Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries*, 22 Op. O.L.C. 251, 251, 254 (1998) ("*Veterans' Health Care*"); *see id*. at 254 (concluding that Congress created such an exception for the Veterans Affairs Medical Care Collections Fund by providing that certain "'[a]mounts recovered or collected'" under the Federal Medical Care Recovery Act "'shall be deposited in the fund'") (quoting 38 U.S.C. § 1729A(b)); *see also FBI Operations* at 6 (recognizing the "usual Congressional practice of formulating an explicit exception to the broad reach of [the MRA] on those occasions where [Congress] believes one necessary").

The second situation involves an exception for "refunds to appropriations," recognized by the Executive Branch since at least 1950. *FCA Recoveries*, 28 Op. O.L.C. at 27. The Treasury Department in that year defined "[r]efunds to appropriations" as "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances." Treasury Department—General Accounting Office Joint Regulation No. 1, § 2(b) (Sept. 22, 1950), *reprinted in* 30 Comp. Gen. 595 (1950); *see also Veterans' Health Care*, 22 Op. O.L.C. at 254 (recognizing exception under Act "when receipts qualify as 'repayments' to an appropriation"). Similarly, in the practice of the Comptroller General, "'[t]he term "refund" . . . embraces a category of mostly nonstatutory exceptions in which the receipt is directly related to, and is a direct reduction of, a previously recorded expenditure.'" *FCA Recoveries*, 28 Op. O.L.C. at 27 (quoting 2 General Accounting Office, *Principles of Federal Appropriations Law* 6-109 (2d ed. 1992) ("GAO Redbook")). More broadly, the Comptroller General has "defined refunds to include refunds of advances, collections for overpayments made, adjustments for previous amounts disbursed, or recoveries of erroneous disbursements from appropriation or fund accounts that are directly related to, and reductions of, previously recorded payments from the accounts." *FEMA*, 69 Comp. Gen. at 262 (internal quotation marks and emphasis omitted). The refunds exception mitigates the force of requiring deposits into the general fund of the Treasury. The exception is grounded in, guided by, and furthers the anti-augmentation principle: An agency that recovers an amount it erroneously paid from an appropriation or fund account essentially returns to the position it had occupied based upon the authorization of

Congress. *See FCA Recoveries*, 28 Op. O.L.C. at 27 n.5; *see also Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor*, B-302366, 2004 WL 1812721, at *3 (Comp. Gen. July 12, 2004) (refunds "simply restore[] to the appropriation amounts that should not have been paid from the appropriation").

B.

One provision in 40 U.S.C. § 322 might be invoked to support the view that Congress has specifically authorized GSA to retain the settlement amounts at issue. Section 322(b)(l)(B) states that the IT Fund's cost and capital requirements "may include amounts . . . resulting from operations of the Fund, including the net proceeds from the disposal of excess or surplus personal property and *receipts from carriers and others for loss or damage to property*." 40 U.S.C. § 322(b)(l)(B) (emphasis added). We do not see a basis for reading the general reference to "amounts . . . resulting from operations of the Fund" as sufficient authorization to retain damages recovered in a settlement, but one might read the more specific reference to "receipts from carriers and others for loss" as broadly including within the Fund's cost and capital requirements from its operations any reimbursement for erroneously paid amounts of money, and thus necessarily contemplating that such amounts received as damages in litigation would be paid into the Fund. *See* Barclay Letter at 3–5.

We doubt, however, that the language will bear that construction. At the very least, the language is insufficiently clear to establish an exception for such reimbursements from the Miscellaneous Receipts Act's general requirement. First, the phrase "receipts . . . for loss or damage to property" may refer to compensation received (for example, from shippers) for loss of or damage to the government's property. Although this meaning would be clearer if Congress had instead referred to "loss *of* or damage to property," as the statute establishing the IT Fund did until 1986, *see* Pub. L. No. 99-591, sec. 821(a)(1), § 110(a)(2)(B), 100 Stat. 3341, 3341-341 (1986) (emphasis added); *see also supra* note 1, the difference is not material. The immediately preceding language of section 322(b)(l)(B) refers to proceeds from disposal of the Fund's "personal property," suggesting that the subparagraph as a whole addresses property rather than all funds. And other statutes appear to use interchangeably the phrases "loss *of* or damage to property" and "loss or damage to property." *See, e.g.*, 49 U.S.C. § 13906 (2000) (emphasis added).[3] Second, the phrase "carriers and others" does not in context clearly include providers of telecommunications services, such that reimbursement by a provider for a false claim could be considered a "receipt" from a "carrier." Rather,

[3] In addition, we are aware of no indication that Congress, in revising the IT Fund statute in 1986, intended to change its meaning.

the phrase may well refer to common carriers or "others" similarly charged with transporting or handling government property. The word is used in that sense in the related 40 U.S.C. § 501(c) (discussed in Part I), where "carriers" are described as those who provide "transportation . . . services."

Thus, the reference in section 322(b)(1)(B) to "receipts from carriers and others for loss or damage to property" is reasonably read in context to refer to receipts for government property lost or damaged by, or while in the custody of, government contractors. The Comptroller of the Treasury, in the opinion discussed above in Part II.A, used such language in this sense, referring to "the amount collected from carriers for loss or damage to freight while in transit." 50 MS. Comp. Gen. at 1; *see id.* at 3 (referring to "moneys received from carriers for loss or damages to freight lost while in transit"). More recently, the Government Accountability Office has treated the phrase "loss or damage to property" as interchangeable with the phrase "loss of or damage to property," and understood both as referring to receipts that could be used "to repair or replace the property." GAO Redbook at 6-123. We therefore read section 322(b)(1)(B) as not creating an exception to the Miscellaneous Receipts Act that would permit GSA to retain the settlement amount in the IT Fund.

C.

GSA may nevertheless retain in the Fund the false-claims settlement for actual damages under the Act's exception for refunds. This entire settlement amount plainly constitutes a collection for overpayments within the definition of "refund" discussed above, and that amount therefore need not be deposited into the general fund of the Treasury. We recently determined in a similar case that, "in the context of false claims paid out of a revolving fund . . . , the 'collections for overpayments made' prong of the refund exception allows the agency to retain single damages." *FCA Recoveries*, 28 Op. O.L.C. at 27 (quoting *FEMA*, 69 Comp. Gen. at 262). We agreed with the conclusion in the Comptroller General's *FEMA* decision that FEMA could retain in its revolving National Insurance Development Fund "that portion of a damage award or settlement obtained pursuant to the False Claims Act that would reimburse the Fund for losses suffered as a result of a policyholder's false claims." *FEMA*, 69 Comp. Gen. at 260; *see also Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 WL 230221, at *1 (Comp. Gen. Feb. 14, 2000) ("*TVA*") ("TVA should deposit into the [TVA] Fund any recoveries of actual damages it incurred as a result of a false claim (i.e., single damages), as well as any costs it incurred in investigating the false claim.").

Moreover, the IT Fund is the most appropriate account to receive the refund. It was the IT Fund from which GSA directly paid the charges, and thus any overcharges, for the vast majority of services—the approximately 91% of services that were centrally billed. The Fund's retention of the settlement amount for actual damages is therefore a collection of an overpayment by that Fund at least to the

(unknown but presumably large) extent that that lump sum represents overcharges of centrally billed services, *see FCA Recoveries*, 28 Op. O.L.C. at 27 (discussing collections for overpayments made by revolving funds); such retention is likewise a "recover[y]" by the IT Fund of "erroneous disbursements" and is "directly related to, and [a] reduction[] of, previously recorded payments from the account[]," *FEMA*, 69 Comp. Gen. at 262 (internal quotation marks and emphasis omitted).

It is immaterial that GSA, as part of the rates it imposed on its customer agencies pursuant to section 322(d), charged the centrally billed agencies for the telecommunications services provided to them under the contracts, and thus that the IT Fund presumably was reimbursed by these customer agencies for many of the payments to the providers. The applicability of the refund exception is not eliminated simply because a fund may have recouped its losses from another source. Indeed, a contrary view would mean, notwithstanding our own and the Comptroller General's precedents, that the refund exception would not apply to revolving funds that are permitted to set the rates of contributions and deposit the contributions into the fund. Moreover, in this particular case, the rate-setting authority in section 322(d) does not require (even if it might allow) GSA to reimburse agencies for, essentially, an unexpected reduction in costs. Rather, consistent with practice in other situations when rates were set too high, *see* Barclay Letter at 5, the agencies will benefit from the settlement in the future from the ability of the IT Fund to provide more services or charge lower rates. (Similarly, when rates are too low, the Fund generally absorbs the shortfall in the short term. *Id*.)

The situation is similar to that in *FEMA*, where the Comptroller General held that, under the refund exception, FEMA could deposit into its revolving National Insurance Development Fund amounts from a False Claims Act suit that reimbursed it for improper payments from the Fund to holders of FEMA's insurance policies. Yet the Fund was funded by, among other sources, "insurance premiums, fees and related charges," 69 Comp. Gen. at 261, and the Comptroller General thus recognized that "[i]n practice, the losses the Fund suffers and the administrative costs FEMA incurs to administer the crime insurance and riot reinsurance programs are borne by program beneficiaries," *id*. at 263; *see also FCA Recoveries*, 28 Op. O.L.C. at 28 (recognizing that revolving funds at issue "authorize[ed] payments both into and out of [the funds] with no fiscal year limitation"). The Comptroller General did not suggest that the award must be directly provided to the program beneficiaries. Similarly, the Comptroller General has held that the Tennessee Valley Authority could, under the refund exception, retain in its TVA Fund awards representing the losses from false claims, and recognized that such retention would "fully reimburse" both the TVA "and its customers for their losses." *TVA*, 2000 WL 230221, at *3. He did not suggest that the TVA Fund must directly pass on any of the recovery to its customers. So also here, the IT Fund, by retaining amounts representing a refund for excessive payments made to the

providers, is made whole and, as a result, also benefits its customer agencies, for which the Fund exists.

In addition, as in *FEMA* and *TVA*, and as suggested by the discussion above of rates and cost fluctuations, GSA was not a mere conduit for payments under the FTS2001 contracts: GSA negotiated and executed the contracts (being the only governmental entity that was a party to the contracts); guaranteed payment from the IT Fund (and thus was liable whether or not the customer agency paid the Fund); actually made the initial payment for the overwhelming majority of services, without regard to whether it had received any reimbursement from the relevant customer agency; and provided customer and technical support to the customer agencies, including, as noted, assisting the Justice Department in the litigation. GSA did not simply pass through the providers' charges, but rather charged the customer agencies rates that it "set at levels to ensure a fair and equitable allocation of GSA's costs of operating FTS programs (direct costs for services acquired, and GSA's overhead and internal costs of operations) as well as providing sufficient capital maintenance." Barclay Letter at 5. Although, in *Rebates From Travel Management Center Contractors*, 65 Comp. Gen. 600 (1986), and *Accounting for Rebates From Travel Management Center Contractors*, 73 Comp. Gen. 210 (1994), the Comptroller General concluded that rebates received by GSA from travel management centers must be provided to the federal agencies that had used the centers, in both of those cases, GSA apparently was nothing more than a mediator. GSA did negotiate with the travel centers to collect rebates on travel, but was not itself party to any of the travel center contracts, and did not even serve as a conduit for payment for the agencies that were. 65 Comp. Gen. at 601. Each federal agency arranged its own travel directly with the travel centers and, pursuant to its own contract, paid the centers directly from its own appropriations. *Id*. Indeed, each agency's rebate was tied directly to that agency's volume of travel. Barclay Letter at 7.[*]

It does not alter our conclusion that some of the settlement amount might be considered to represent overcharges for the 9% of services for which payment was made directly by agencies, rather than the IT Fund. The mere fact that these moneys were not directly paid out by the IT Fund is not conclusive. We have previously determined that an agency may retain the portion of a False Claims Act damages award representing amounts that were never actually disbursed from the

[*] Editor's Note: In preparing this opinion for publication, we noticed errors in the description of the two Comptroller General opinions discussed in this paragraph. Notably, GSA was a party to the contracts with the travel management centers and did serve as a conduit for payment by the agencies in certain cases. 65 Comp. Gen. at 601. Although the specific descriptions of the opinions should therefore not be relied on, the errors do not affect the paragraph's conclusion that the Comptroller General opinions are distinguishable because GSA's role in both of those cases was more limited than in the matter addressed in this opinion. The agencies, not GSA, were ultimately responsible for the payments to the travel management centers and made those payments out of their own appropriations.

agency's revolving fund, where those amounts could still be considered losses to the fund. *See FCA Recoveries*, 28 Op. O.L.C. at 27–28 (reduced interest income, as well as additional interest expense, and administrative, investigative, and litigation costs caused by the false claim). The ultimate question for fulfilling the purpose of the refund exception is how the agencies affected by the overcharges can best be made whole and returned to the position that Congress intended for them; or, to put it differently, the question is whether any improper augmentation would occur if the refund were allocated in a particular way. *See id.* at 28 ("allowing the agency to retain interest on single damages and the administrative costs of false claims would not be an improper augmentation of the agency's appropriation"); *FEMA*, 69 Comp. Gen. at 263 ("only by allowing FEMA to credit the Fund with an amount that will cover all of its losses, including the principal amount of the false claims that were paid, interest on that amount, plus any administrative expenses that the Fund incurred in paying or recovering these amounts, will the Fund be 'made whole' for its losses in this case"); *Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action*, 62 Comp. Gen. 678, 682 (1983) (holding that Bureau of Prisons could use moneys recovered from breach of contract that exceeded amount paid under the contract, in order to fund a replacement contract, because the agency would be "made whole at no additional expense to the taxpayer").

Here, the purpose of the refund exception is best served if the entire amount of damages is allowed to be retained by the IT Fund. Although, as noted, there are invoices for each agency, it appears that, because of the peculiarity of the overcharges and the nature of the settlement, it is not possible to determine how much (if at all) any given agency was overcharged, or even how much (if any) of the overcharges involved the small number of directly billed agencies. *See* Barclay Letter at 2–3. The settlements "were negotiated on behalf of the government as a whole," not agency by agency, "and given the methodology of determining settlement amounts, it is not possible to assign exact amounts to individual agencies." *Id.* at 6; *see also id.* at 7–8 ("given that the settlements were reached based on negotiation and statistical evidence, there is no way to determine what each individual agency's exact percentage of the total overpayment was"). Thus, there is no reason to believe, as far as we are aware, that 9% of the settlement would represent overcharges for the 9% of services that were directly billed, and in any event the settlement agreements themselves do not make such a division.

What is clear, however, is that the entire settlement amount for actual damages represents a refund to the government for overcharges of telecommunications services. Where there is no credible way to allocate any specific portion to the directly paying agencies, it is more consistent with the policy of the refund exception—i.e., making the agencies whole pursuant to the anti-augmentation principle—for the portion of any overcharges that might be allocable to them to be used by the government as a refund of telecommunications overcharges in some fashion, by being retained by the IT Fund, than to be deposited into the general

fund of the Treasury. The funds retained in the IT Fund will by statute be used for the benefit of these agencies: "to efficiently provide information technology resources to federal agencies and to efficiently manage, coordinate, operate, and use those resources." 40 U.S.C. § 322(c)(1). GSA therefore seeks to retain this settlement amount in the Fund "to apply to government-wide telecommunications needs," Barclay Letter at 1, and "lower future costs for all customer agencies," *id*. at 3. This use of the recovered funds is ensured—and any augmentation concern is further mitigated—by section 322(f), which, as noted in Part I, requires that at the close of each fiscal year the IT Fund must transfer any excess funds to the Treasury as miscellaneous receipts.

Furthermore, even, for agencies directly billed by the providers, it was GSA rather than the agencies that was the party to the contracts with the providers, and it was the GSA's IT Fund that "paid the bills to the companies" "if an agency failed to meet its obligation." Barclay Letter at 6. Even when the directly billed agencies did pay the providers, they were paying the rates that had been set by GSA and thus were benefiting from GSA's services. And even though this small minority of agencies left it to the providers to forward the percentage fee to GSA, their rate payments were still part of the overall scheme of the IT Fund and the FTS2001 contracts that the Fund financed. Correspondingly, refunds retained by the IT Fund will benefit the directly billed agencies in the future just as they will benefit the centrally billed agencies. They are among "all [the] customer agencies" that will benefit from "lower future costs." *Id*. at 3. We therefore conclude that the IT Fund may retain the entirety of the approximately $24.5 million settlement it has received from the Justice Department that represents actual damages.

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

Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208

Under 18 U.S.C. § 208, a nonprofit organization does not have a "financial interest" in a particular matter solely by virtue of the fact that the organization spends money to advocate a position on the policy at issue in the matter.

January 11, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF GOVERNMENT ETHICS

The primary criminal statute dealing with financial conflicts of interest, 18 U.S.C. § 208 (2000), prohibits a federal employee from participating in certain governmental matters if he or she is an officer or director of an organization that has a "financial interest" in the "particular matter." You have asked whether a nonprofit organization has a financial interest in a particular matter solely by virtue of the fact that the organization spends money to advocate a position on the policy at issue in the matter.[1] We conclude that a nonprofit organization does not have such a "financial interest" merely because it spends money on advocacy.

I.

Section 208(a) forbids an officer or employee in his official capacity from participating "personally and substantially" in (among other things) any "particular matter in which, to his knowledge, . . . [an] organization in which he is serving as officer [or] director . . . has a financial interest." If the organization has a "financial interest," a federal employee serving on the board of the organization must recuse himself from any involvement in that particular matter, unless he can take advantage of a waiver or exemption issued under 18 U.S.C. § 208(b). Your question concerns employees who serve on the boards of nonprofit organizations that engage in advocacy with respect to particular matters pending before the employees' agencies. The question recently has arisen in two contexts.

In the first context, an official is considering service on the board of the Senior Executives Association ("SEA"). SEA describes itself as "a nonprofit professional association that promotes ethical and dynamic public service by fostering an outstanding career executive corps, advocates the interests of career federal executives (both active and retired), and provides information and services to SEA members." *See* Senior Executives Association, *About SEA*, http://seniorexecs.org

[1] Letter for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, Acting Director, Office of Government Ethics (Sept. 20, 2004) ("OGE Letter").

(last visited June 2, 2005). In "advocat[ing] the interests of career federal executives," *id.*, "SEA has taken and continues to take and advance positions" on certain issues involving the pay of federal employees in the senior executive service, Letter for Marilyn L. Glynn, Acting Director, Office of Government Ethics ("OGE"), from William L. Bransford, General Counsel, SEA, *Re: Membership on a Professional Association's Board by an Executive Branch Official* at 1 (Aug. 9, 2004) ("SEA Letter"). The official contemplating service on the SEA board already serves on "his Department's Executive Resources Board, which has, among other functions, responsibility for formulating or contributing to the formulation of the Department's recommendation" to the Office of Personnel Management ("OPM") regarding the senior executive service pay system. SEA Letter at 1. If, therefore, the official joins the SEA board, and if SEA has a "financial interest" in a matter involving senior executive pay (e.g., the establishment of a new system of pay), the official (absent a waiver) would have a criminal conflict of interest if he participated in the Executive Resources Board's consideration of the issue.

In the second context, employees of the National Oceanic and Atmospheric Administration ("NOAA") are serving in their private capacities as Councilors of the American Meteorological Society ("AMS"). Letter for Marilyn L. Glynn, Acting Director, Office of Government Ethics, from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce, *Re: Request for Guidance on the Application of 18 U.S.C. § 208* (Sept. 10, 2004) ("Commerce Letter"). "AMS is a . . . nonprofit organization that promotes the development and dissemination of information and education on atmospheric and related oceanic sciences." *Id.* at 1. A Councilor of AMS "serv[es] on the governing body of the organization, which is the equivalent to service as a member of a board of directors," and, therefore, we assume (without deciding) that a Councilor would be a "director" or "officer" within the meaning of section 208(a). AMS issues "policy statements . . . on issues in which NOAA has an interest, such as meteorological drought, atmospheric ozone, and hurricane research and forecasting." *Id.* The NOAA employees serving as Councilors of AMS "likely will participate in [the] consideration of these issues on a policy level in the course of performing their official duties at NOAA." *Id.* at 1–2. Once again, absent a waiver, they would be disqualified under the criminal conflict of interest statute from such participation if AMS has a financial interest in these matters.[2]

[2] In analyzing these issues, we have obtained the views of the Department of the Interior, the Department of Agriculture, the Department of Health and Human Services, the Environmental Protection Agency, the National Science Foundation, and the National Aeronautics and Space Administration, in addition to the views of OGE and the Department of Commerce. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Sue Ellen Wooldridge, Solicitor, Department of the Interior, *Re: Financial Interests Under 18 U.S.C. § 208* (Mar.

II.

We conclude that nonprofit organizations such as SEA and AMS do not have a financial interest in a particular matter solely by virtue of spending money to advocate a position on the policy under consideration in that matter.[3]

A.

Section 208(a), in essentially its present form, was enacted in 1962 as part of a general revision of criminal laws on conflicts of interest. Pub. L. No. 87-849, 76 Stat. 1119, 1124 (1962). The earlier version of the law provided criminal penalties for any federal official who was "directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership or other business entity," and who was "employed or act[ed] as an officer or agent of the United States for the transaction of business with such business entity." 18 U.S.C. § 434 (1958). The revision of 1962 extended the reach of the statute in several respects. Nevertheless, the current text of section 208(a), under the most natural interpretation, indicates that the prohibition does not apply to the policy interest that a nonprofit organization has in a government decision. Section 208(a) provides that, absent a waiver under section 208(b),

> whoever, being an officer or employee of the executive branch of the United States Government, . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application,

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10, 2005); Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Nancy S. Bryson, General Counsel, Department of Agriculture, *Re: Advocacy of Non-Profit Organizations and 18 U.S.C. 208(a)* (Mar. 16, 2005); Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Ann R. Klee, General Counsel, Environmental Protection Agency (Mar. 16, 2005); Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Lawrence Rudolph, General Counsel, and Charles S. Brown, Assistant General Counsel and Designated Agency Ethics Official, National Science Foundation (Mar. 16, 2005); Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from R. Andrew Falcon, Acting Associate General Counsel for General Law, With the approval of Michael C. Wholley, General Counsel, National Aeronautics and Space Administration (Mar. 22, 2005); Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Edgar M. Swindell, Associate General Counsel for Ethics and Designated Agency Ethics Official, Department of Health and Human Services (May 19, 2005).

[3] We do not address here the interest that a for-profit entity, owing a duty to promote the financial interests of its owners, might have in a matter on which it engages in advocacy on behalf of itself or its clients or that might arise if an entity (whether for-profit or nonprofit) receives, or expects to receive, payment specifically for its advocacy. Thus, the possible interest of a lobbying firm or law firm is beyond the scope of this opinion.

> request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, . . . [or] [an] organization in which he is serving as officer, director, trustee, general partner or employee, . . . has a financial interest[,]

has committed a crime punishable by fine and imprisonment. 18 U.S.C. § 208(a). A disqualifying interest under the statute, therefore, is a "financial interest" "in" a "particular matter." *See Ethics Issues Raised by the Retention and Use of Flight Privileges by FAA Employees*, 28 Op. O.L.C. 237, 239 (2004) ("FAA Opinion").

As ordinarily understood, the interests that AMS and SEA as organizations have in the matters you describe are *policy* interests in the questions being addressed by the government, not *financial* interests in the resolution of those questions. An "interest" in the sense of a "conflict of interest" is an "advantage or profit of a financial nature." *Black's Law Dictionary* 828 (8th ed. 2004). For example, an individual has an interest "[i]n a suit or action" when he has "[a] relation to the matter in controversy, or to the issue of the suit, in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind inclining the person to favor one side or the other." 33 C.J. *Interest* 262 (1924) (footnotes omitted). And an interest is a *financial* one when it is *pecuniary*—when it "pertain[s] to *monetary* receipts and expenditures." *Random House Dictionary of the English Language* 719 (2d ed. 1987) (emphasis added). However, AMS and SEA care about these matters, and spend money to advocate in favor of their preferred outcome, because they support or oppose certain policies, not because the policies at issue will have a financial or pecuniary impact on AMS and SEA as organizations. An organization that has no *financial* reason to prefer one outcome over another would not commonly be referred to as having a "financial interest" in the particular matter.

OGE's regulatory interpretation of section 208 reinforces this view. OGE's regulations interpret the words "financial interest" "in" "a particular matter" to require a link between a governmental matter and a *pecuniary gain or loss* to the employee or specified entity. A disqualifying financial interest is "the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter." 5 C.F.R. § 2640.103(b) (2005).[4] *See* FAA Opinion, 28 Op. O.L.C. at 239–40; OGE, *Letter to Designated Agency Ethics Official*, Informal Advisory Ltr. 85x10, 1985 WL 57309, at *2 (July 15). Thus, for example, section 208 does not require an employee of the Department of Interior who owns transportation bonds issued by the State of Minnesota to recuse himself

[4] Our Office concurred in OGE's regulatory definition. *See* 61 Fed. Reg. 66,830, 66,830 (Dec. 18, 1996); 28 C.F.R. § 0.25(i) (2004).

from all matters involving the State of Minnesota, only matters that hold the potential for pecuniary gain or loss to the employee. *See* 5 C.F.R. § 2640.103(b) (example 1).

This Office's opinions have drawn a distinction between a "financial interest" and interests that do not involve a pecuniary gain or loss from the resolution of a question. For example, a 1970 opinion by then-Assistant Attorney General Rehnquist distinguished between the *policy* interest that an association representing coal producers had in various Federal Power Commission natural gas proceedings—"an interest of a non-financial kind in the outcome of . . . [the] proceedings" that implicated the coal association's "major purpose"—and a *financial* interest in those proceedings, which the coal association did not have. Memorandum for John W. Dean, III, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Commissioner Carl E. Bagge's Continued Service as Commissioner of the Federal Power Commission Until February 1, 1971* at 4 (Dec. 10, 1970) ("Rehnquist Opinion").

Against this interpretive backdrop, we cannot conclude that SEA or AMS has a financial interest in the particular matters that are the focus of advocacy by the organizations, as opposed to a mere policy interest in the questions being addressed by the government. The organizations' advocacy expenditures do not constitute a gain or a loss. They do not arise from the pursuit of any financial or economic interests, but only from the pursuit of certain policy goals.[5]

Nor is there any other apparent basis on which to conclude that either organization has a financial interest. In particular, while SEA's members may reap a gain or suffer a loss as a result of a new pay system, the potential for a gain or loss to SEA members as individuals does not disqualify SEA as an organization. Furthermore, whether or not a federal employee's interest in his own federal compensation generally constitutes a disqualifying financial interest under section 208, OGE has issued an exemption, in most circumstances, for the "financial interest aris[ing] from Federal Government . . . salary or benefits." *See* 5 C.F.R. § 2640.203(d) (2005).[6]

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[5] This conclusion is bolstered by the several examples in OGE's regulations of situations where a "financial interest" might arise, none of which resembles expenses for mere advocacy. The regulation states that a "disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate," or "might derive from a salary, indebtedness, job offer, or any similar interest." 5 C.F.R. § 2640.103(b) (2005). OGE's regulations also provide illustrations that give other examples of "financial interests," such as land ownership, the "volume and profitability of [a] doctor's private practice," and a grant of funds, *id*. §§ 2635.402(b)(2) (example 1), 2640.103(b) (examples 2, 3), and none of these interests, too, resembles a mere expenditure on advocacy. *See also* Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1133 (1963) (a research grant to a nonprofit organization is a "financial interest").

[6] In issuing this exemption, OGE noted the "somewhat differing interpretations" of section 208 that have been advanced regarding a federal employee's interest in his own compensation. *See* 60 Fed. Reg. 44,706, 44,707 (Aug. 28, 1995).

Because an SEA member may participate in matters involving the pay system for senior executives (so long as he does not make determinations that individually or specially affect his own salary and benefits, or determinations that individually or specially affect the salary and benefits of another person specified in section 208, *see* 5 C.F.R. § 2640.203(d)), we cannot say that SEA has a financial interest by virtue of its members' interests.

Any other financial consequences for SEA or AMS that may flow from these matters are speculative. If OPM reached a decision regarding pay for senior executives that accorded with SEA's proposals and arguments, the possibility that SEA had influenced that outcome might attract potential members to join SEA, thus possibly increasing its resources, but OPM's rejection of the proposals and arguments might have the same effect, since potential members who agree with SEA's position might then believe that they should do more to support an organization advancing that position. In either case, SEA might gain members. Conversely, while the failure of SEA's position might lead some members to drop their membership, success might also lead some members to believe that the main purpose of their membership had been achieved and that they could leave the organization. In either case, SEA might lose members. Or perhaps the success or failure of SEA's positions would have no effect at all on membership. The same reasoning could be applied to AMS's advocacy of scientific or research-related policies that government agencies might adopt or reject.[7]

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[7] We previously considered somewhat similar issues in the Rehnquist Opinion. There, a commissioner of the Federal Power Commission ("FPC") had accepted future employment with the National Coal Association ("NCA"), a trade association of coal producers. NCA "engage[d] in typical trade association activity—lobbying, research, gathering of statistical data." *Id.* at 1. The Rehnquist Opinion stated that the Commissioner

> has not accepted a position with a coal producer, but with NCA, which neither markets nor produces coal. It is the financial interest of *NCA* which determines disqualification under section 208. Certainly NCA has an interest of a non-financial kind in the outcome of various FPC natural gas proceedings: the outcome of these proceedings may have an impact on coal production, and the stimulation of such production is NCA's major purpose. We do not believe, however, that NCA's interest in any given rate or certification proceeding can fairly be characterized as a "financial interest," within the meaning of section 208.

Id. at 4. The Rehnquist Opinion went on to consider the argument that NCA would have a "financial interest" in gas proceedings because "NCA's assessments against members are based upon their coal production, and NCA's total income will therefore vary as coal production varies." *Id.* at 5. It concluded, however, "that this relationship is too tenuous and speculative to be regarded as a 'financial interest' of the type prohibited by section 208." *Id*. Even if the Commissioner were going to work for a coal producer, "the impact of any particular natural gas proceedings on the coal producer would vary from case to case, and would depend on the competitive relationships between the producers involved," and "[t]he interest of NCA in such proceedings is even more remote." Lower gas rates might mean lower coal prices rather than greater coal production, and in any event there would be no "necessary correlation between natural gas rates in a particular area and the *total* membership production upon which NCA's income rests." *Id*. (emphasis in original). There, as here, any effect on the financial

The Executive Branch has long taken the position, however, that an employee or other person covered by section 208 has a financial interest in a particular matter only when government action in the particular matter will have a "direct and predictable effect" on the employee's financial interest. *See, e.g.*, 5 C.F.R. § 2640.103(a) (2005); *Advisory Committees—Food and Drug Administration—Conflicts of Interest (18 U.S.C. § 208)*, 2 Op. O.L.C. 151, 155 (1978). A 1963 memorandum from the President to the heads of the executive departments and agencies, issued just a few months after section 208 took effect, stated that a special government employee "should in general be disqualified from participating as such in a matter of any type the outcome of which will have *a direct and predictable effect* upon the financial interests covered by the section." Memorandum to the Heads of Executive Departments and Agencies from the President, 28 Fed. Reg. 4539, 4543 (May 7, 1963) (emphasis added). This same interpretation was incorporated in the Federal Personnel Manual shortly thereafter. *See id.* ch. 735, app. C, at 4 (1988 ed.; added 1965).

The direct-and-predictable effect test also finds support in the traditional legal understanding of what it means to have an "interest" in a proceeding. For example, a financial interest in a proceeding for purposes of judicial disqualification traditionally has required a proximate link between the proceeding and the financial interest. "[A] judge is disqualified," one court explained, "in any litigation where he has any certain, definable, pecuniary, or proprietary interest which will be *directly affected* by the judgment that may be rendered." *In re Honolulu Consol. Oil Co.*, 243 F. 348, 352 (9th Cir. 1917) (emphasis added). "The term 'interested in the case' means a *direct* interest in the case or matter to be adjudicated so that the result must, necessarily, affect his personal or pecuniary loss or gain." *Ex parte Largent*, 162 S.W.2d 419, 426 (Tex. Crim. App. 1942) (emphasis added); *see also Goodspeed v. Great W. Power Co. of Cal.*, 65 P.2d 1342, 1345 (Cal. Dist. Ct. App. 1937) ("It means an interest *direct, proximate*, inherent in the instant event.") (emphasis added).[8] Thus, while it has been suggested that the direct-and-predictable effect test is a gloss on the statutory text, the test reflects a fair construction of the statute's terms in light of their established meaning at the time Congress enacted section 208.[9]

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interests of an organization's members would not necessarily affect the finances of the organization itself.

[8] In Part II.B.1, we further discuss both the traditional understanding of "interest," as it bears on judicial disqualification and other matters relating to litigation, and the application in those contexts of a test similar to the "direct and predictable" effect test.

[9] OGE relies "on what appears to be a plain reading of 18 U.S.C. § 208." "In cases where an outside organization stipulates that it is spending money to advocate its interests before the Government," OGE explains, "it is difficult to conclude that the organization does not have a financial interest that would be affected directly and predictably by the Government matter." OGE Letter at 3. Furthermore, in OGE's "'long-standing view,'" "the outcome of a 'particular matter,' such as a rulemaking proceeding

OGE's regulations define a "direct effect" as "a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest." 5 C.F.R. § 2635.402(b)(1)(i) (2005). While "[a]n effect may be direct even though it does not occur immediately," it is not direct "if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter." *Id*. A matter will have a "predictable effect," according to OGE's regulations, if "there is a real, as opposed to a speculative possibility that the matter will affect the financial interest," *id*. § 2635.402(b)(1)(ii), though the regulations do not require that "the magnitude of the gain or loss" be known or that the dollar amount be substantial, *id*. Here, we do not believe that a nonprofit organization's expenditure of money to advocate a policy position establishes that the government's action will have a "direct effect" on a financial interest of the organization.

B.

Two other considerations support the conclusion that organizations do not have a financial interest in a matter simply because they expend money on advocacy. First, no pecuniary gain or loss to the organization will flow from a particular *action* or *outcome* in the matters, rather than from the *process* by which the government considers the matters. Second, neither organization at issue here falls within the class of persons upon which these matters are focused, even though such a connection is typical where an organization has a financial interest. These two considerations, while not essential to an analysis under section 208 or dispositive of the issues under that provision, offer additional support for our conclusion.

1.

The significance of whether financial consequences will flow from a particular *action* or *outcome* in the matter is reflected in the 1963 presidential memorandum that gave rise to the direct-and-predictable effect test. The presidential memorandum references matters "*the outcome of which* will have a direct and predictable effect upon the financial interests covered by the section." 28 Fed. Reg. at 4543 (emphasis added); *see also* Federal Personnel Manual ch. 735, app. C, at 4.

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affecting the members of an industry, 'can have a direct and predictable effect on the financial interests of an industry trade association' because it prompts the association 'to expend resources to undertake a lobbying effort.'" *Id*. (quoting OGE, *Letter to an Alternate Designated Agency Ethics Official*, Informal Advisory Ltr. 98x2, 1987 WL 1007766, at *2 (Mar. 5). For the reasons set out above, we cannot agree that these expenditures alone constitute a "financial interest" of the organization or association.

Several of our opinions have described the test in terms of the outcome. For example, the Rehnquist Opinion concluded that a trade association representing coal producers had "an interest of a non-financial kind in the *outcome* of various [Federal Power Commission] natural gas proceedings" because "the *outcome* of these proceedings may have an impact on coal production, and the stimulation of such production is [the National Coal Association's] major purpose," but that the interest in these proceedings did not qualify as a *financial* interest. *Id.* at 4 (emphases added). A 1976 opinion issued by this Office explained that "we have taken the position in the past that a Federal employee does not have a 'financial interest' in a particular matter coming before him unless there is a reasonable possibility that the *resolution* of the particular matter would have a 'direct and predictable effect' on an organization in which he owns an interest or holds or is seeking a position." Memorandum for Kenneth A. Lazarus from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Appointment of Chairman of the President's Committee on Science and Technology* at 3 (July 12, 1976) (emphasis added). A 1977 opinion determined whether an employee had a financial interest in a matter involving real property by asking whether the employee had "a financial interest in the *outcome* of the quiet title action." *Conflict of Interest—Litigation Involving a Corporation Owned by Government Attorney*, 1 Op. O.L.C. 7, 7 (1977) (emphasis added). And an opinion issued two years later concluded that an Assistant Secretary of Agriculture was unlikely to have a financial interest in matters involving the union that employed her husband, but explained that, "if a situation did arise in which the *outcome* of a matter might have a direct and predictable effect on his income from the union or on any other personal financial interest, then [the Assistant Secretary] would have to refrain from participating in it." *Conflict of Interest—Financial Interest (18 U.S.C. § 208)—Husband and Wife*, 3 Op. O.L.C. 236, 238 (1979) (emphasis added).

Similarly, OGE's regulations define "financial interest" as "the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental *action* on the particular matter," 5 C.F.R. § 2640.103(b) (emphasis added), and describe the necessary "direct effect" as "a close causal link between any *decision or action* to be taken in the matter and any expected effect of the matter on the financial interest," *id.* § 2640.103(a)(3)(i) (emphasis added). *See* FAA Opinion at 240; OGE, Informal Advisory Letter 85x10, 1985 WL 57309, at *2. In each of the examples of a disqualifying financial interest described in the regulations, the employee stood to gain or lose depending on the outcome of the matter or some particular action to be taken. For instance, an employee's ownership of transportation bonds issued by the State of Minnesota does not create a disqualifying interest in Minnesota's application for wildlife funds because "*approval or disapproval of the grant*"—i.e., the outcome of the particular matter—"will not in any way affect the current value of the bonds or have a direct and predictable effect on the State's ability or willingness to honor its obligation to

pay the bonds when they mature." 5 C.F.R. § 2640.103(b) (example 1) (emphasis added).

A focus on particular actions or outcomes, moreover, reflects the traditional legal understanding of the terms "interest in a matter," "interest in a proceeding," and similar terms (e.g., "interest in a case" or "interest in an action"), which provided the background against which Congress legislated when it enacted section 208 in 1962. *See Morissette v. United States*, 342 U.S. 246, 263 (1952). In particular, the law governing the analogous issue of mandatory judicial recusal historically focused on whether the judge or similar officer had an interest in the case or proceeding, which was understood to mean "a financial . . . interest that could be affected by the *outcome* of the case." Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.20, at 148–49 (3d ed. 2000) (emphasis added). It required "a definite, material, financial stake in the direct outcome of the particular case." *Goodspeed*, 65 P.2d at 1345; *see also Worth v. Benton Cnty. Cir. Ct.*, 89 S.W.3d 891, 896 (Ark. 2002) ("[T]o be a disqualifying interest, the prospective liability, gain, or relief to the judge must turn on the outcome of the suit."); *Williams v. Viswanathan*, 65 S.W.3d 685, 689–90 (Tex. App. 2001) (citing cases dating back more than a century to support this rule).[10]

The same meaning attached in other contexts, as well. For example, an "interest in the matter" for purposes of a statutory right to intervene was traditionally understood to mean an interest "in the matter in litigation and of such a direct and

[10] Congress enacted the first judicial disqualification statute in 1792. That statute, which remained in effect in substantially the same form until 1974, required that "in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge" to disqualify himself. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79; *see also* Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090 (amending the statute to include as additional grounds for disqualification bias or prejudice, which, unlike pecuniary interest, was not a recognized ground for disqualification at common law); Act of June 25, 1948, ch. 646, § 455, 62 Stat. 907, 908 (extending the statute to justices and appellate court judges; rephrasing as "any case in which he has a substantial interest"). These words were interpreted by reference to English common law, *see Spencer v. Lapsley*, 61 U.S. (20 How.) 264 (1857), and were understood to refer to a direct pecuniary interest in the outcome of the matter. *See, e.g.*, *In re Honolulu Consol. Oil Co.*, 243 F. 348, 353 (9th Cir. 1917) (a judge is disqualified under section 455 where he is "concerned in interest in the result of th[e] suit"); *In re Grand Jury Investigation*, 486 F.2d 1013, 1016 (3d Cir. 1973) (judge not substantially interested in a case because, among other reasons, he did not have "a special interest in the outcome of th[e] case"). The judicial disqualification statute was rewritten in 1974 to reflect the new Canon 3C of the Model Code of Judicial Conduct adopted in 1972. Under the new statute (still codified at 28 U.S.C. § 455 (2000)), a judge must disqualify himself if, among other reasons, "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy [for example, in an in rem proceeding] or in a party to the proceeding, or any other interest that could be substantially affected by *the outcome of the proceeding*." *Id.* § 455(b)(4) (emphasis added). "Financial interest" as used in section 455 is a term of art that means, with certain exceptions, "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party." *Id.* § 455(d)(4).

immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Bernheimer v. Bernheimer*, 196 P.2d 813, 814 (Cal. Dist. Ct. App. 1948). A potential appellant was "interested in a suit" if it had "a direct and substantial interest in the outcome." *People ex rel. Poage v. Walsh*, 174 N.E. 881, 882 (Ill. 1931). And a disqualifying interest for purposes of determining a witness's interest in an adjudication of a will was "a legal or pecuniary interest in the outcome of the suit." *Fortner v. McCorkle*, 50 S.E.2d 250, 252 (Ga. Ct. App. 1948). "[T]he test" was "whether the witness will gain or lose by the direct legal operation and effect of the judgment." *State v. Robbins*, 213 P.2d 310, 315 (Wash. 1950).[11]

The Supreme Court's opinion in *Tumey v. Ohio* illustrates well the historical distinction between the financial consequences flowing from a proceeding and the financial consequences flowing from the *outcome* of a proceeding. In *Tumey*, the Court held that it violated due process for a mayor to preside over a case in mayor's court where the mayor would receive payment for his services only if he convicted the defendant—i.e., where the mayor had a "direct pecuniary interest in the outcome" of the case. 273 U.S. 510, 535 (1927). In determining what constituted "due process of law," the Court examined the common law of judicial disqualification, and found "no cases at common law" whereby "inferior judicial officers were dependant upon the conviction of the defendant for receiving their compensation." *Id.* at 524. However, there were cases at common law where a judge would have a pecuniary stake in the case that did not depend on the outcome of the case, for example where a judge received daily wages collected from the parties regardless of the outcome. *Id.* at 524–25. A direct pecuniary interest in the outcome of the case, by contrast, was disqualifying at common law, and thus could not be regarded as due process of law. *Id.* at 526, 531. *See also In re Murchison*, 349 U.S. 133, 136 (1955) ("no man can be a judge in his own case and no man is permitted to try cases where he has *an interest in the outcome*") (emphasis added).

Section 208 was enacted against the background of this traditional understanding of what it means to have an interest in a matter. Even if an expenditure on advocacy could constitute a "financial interest" in a particular proceeding, it would be, at most, a financial interest in the *process* by which the matter is considered

[11] *See also, e.g.*, *Spencer v. Wilsey*, 71 N.E.2d 804, 809 (Ill. App. Ct. 1947) ("The interest which will render a witness incompetent [under a 'dead man's statute'] must be such an interest in the judgment or decree that a pecuniary gain or loss will come to him directly as the immediate result of the judgment or decree."); *Weber v. City of Cheyenne*, 97 P.2d 667, 669 (Wyo. 1940) ("'Interest,' within the meaning of this rule [for determining real party in interest], means material interest, an interest in issue and to be affected by the decree, as distinguished from mere interest in the question involved, or mere incidental interest."); *cf. Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 173 (1957) ("interested party" for purposes of statutory right to be heard in an agency proceeding was "a legal right or interest that will be injuriously affected by the order," i.e., the action to be taken in or outcome of the proceeding).

rather than in the outcome of the proceeding. The absence of any pecuniary interest by SEA or AMS in a particular decision, action, or outcome in the matters at issue reinforces the conclusion that section 208 does not apply to their expenditures on advocacy.

One might argue that placing weight on the decision or outcome at issue is inconsistent with the examples of particular matters specifically enumerated in section 208(a). The statute refers to "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter." Although it is true that some of the matters specified can be intermediate steps in a larger proceeding, that does not contradict our conclusion that it is the potential outcome that typically will determine whether section 208 can be invoked. The statute covers even "particular matters" that may be terminated before all the possible steps in a process have occurred, but all of the steps, if they occur, typically make up a single "particular matter." *See United States v. Jewell*, 827 F.2d 586, 587–88 (9th Cir. 1987).

The view that intermediate steps would be separate "particular matters" would undercut our understanding of the term "particular matter" for purposes of related statutes. For example, 18 U.S.C. § 207 (2000 & Supp. II 2002) imposes a permanent post-employment ban on representing a party in a "particular matter" in which an individual participated as a government employee. Were a charge and a criminal trial different particular matters, an employee who prepared the charge against a company could, after leaving the government, defend the company at the trial of that charge without violating section 207, on the theory that the charge and the trial were not the same particular matter. The term "particular matter" has not been construed to compel such a surprising and unwarranted result. *See* 5 C.F.R. § 2637.201(c)(4) (2005) ("The same particular matter may continue in another form or in part."); *id.* (example 2) (an application for a wiretap and the prosecution of a person overheard during the wiretap are part of the same particular matter). Our reading of these words, moreover, makes good sense: Section 208 specifically enumerates charges, accusations, and arrests in order to give examples of matters that are "particular" in the sense of being focused on specific individuals or entities or a discrete and identifiable class of individuals and entities, not to suggest that various intermediate steps in an overall proceeding constitute discrete particular matters.[12]

[12] It is possible to have a financial interest in an intermediate step in a matter without having an interest in the final outcome. For example, a person who has a contractual right to a fee if the government initiates a rulemaking would have a financial interest in that intermediate step, without regard to the outcome. Because the intermediate step would be part of a larger matter, however, such a person would have an interest in that entire, larger matter.

2.

Typically, moreover, a person or entity that has a financial interest in a matter will be within the category of persons or entities on which the "particular matter" is focused. Although we do not conclude that this fact must be present if section 208 is to apply, its absence with respect to SEA and AMS is further confirmation of our conclusion that section 208 does not apply here.

A "particular matter" includes "only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1); *see also* Memorandum for C. Boyden Gray, Counsel to the President, from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. § 208 to General Policy Deliberations, Decisions, and Actions Relating to Iraq's Recent Invasion of Kuwait* at 3 (Aug. 8, 1990) (same). The term encompasses matters that involve specific parties, such as a government enforcement action against a specific organization, as well as matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *See* 5 C.F.R. § 2640.103(a)(1) (example 3); *id*. § 2635.402(b)(3) (example 2).

The definition of "particular matter" provides a useful tool in analyzing the difficult question of what qualifies as a direct and predictable effect of a decision or outcome in a matter. OGE's regulations explain that,

> [i]f a particular matter involves a specific party or parties, *generally the matter will at most only have a direct and predictable effect . . . on a financial interest of the employee in or with a party*, such as the employee's interest by virtue of owning stock. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's financial interests through ownership of stock in an affiliate, parent, or subsidiary of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on an employee's financial interest in another company listed as a subcontractor in the proposal of one of the competing offerors.

Id. § 2635.402(b)(1) note (emphasis added). Logic dictates that the same principle operates even when a particular matter is not limited to specific parties, but extends to a discrete and identifiable class of persons. In most circumstances, the outcome of a particular matter will not have a direct and predictable effect on a

nonprofit organization outside of the discrete and identifiable class of persons or entities upon which the proceeding is focused.

In view of this guidance, it stretches section 208 beyond its limit to conclude that SEA and AMS have financial interests in particular matters that are simply the focus of their advocacy. If an organization were to spend money to issue a press release containing its views on a lawsuit to which it was not a party, we could not say, consistent with this guidance, that it would have a financial interest in the case. The parties to the case might have a financial interest; others whose financial interests would be affected by a particular decision or outcome in the case might have a financial interest; but the rest of the public at large, including non-profit organizations that have policy interests in the case, would not have a financial interest simply by virtue of expressing a view about the case, even if such an organization expends resources to express that view. The same reasoning applies here. The executive pay matter in which SEA has an advocacy interest is not directed at nonprofit organizations like SEA; it is focused on federal employees in the Senior Executive Service. Nor are the science policies described in Commerce's letter focused on regulation of nonprofit organizations like AMS.

III.

A.

Nor does this Office's FAA Opinion compel us to conclude that section 208 applies here. The FAA Opinion, to be sure, describes a "financial interest" as "an interest 'pertaining to monetary receipts and expenditures,'" 28 Op. O.L.C. at 239 (citation omitted), and the nonprofit organizations here are making monetary expenditures for advocacy. That opinion also states that "one has a financial interest in a governmental matter only when the particular matter can affect one's finances—i.e., one's monetary receipts and expenditures." *Id.* at 240. The FAA Opinion correctly stated that a required expenditure can give rise to a financial interest. But, in that opinion, it was the outcome of a particular matter that we suggested could give rise to a financial interest in the matter, under circumstances that would surely qualify as a "loss" to the employee (being forced to pay for air travel previously provided free of charge). Specifically, we suggested that an FAA employee who had flight privileges with an airline would have a financial interest in a matter that could result in an airline's losing its ability to fly.

Indeed, one might argue that the FAA Opinion construed the words "financial interest" too broadly. Under one possible definition of "financial interest," a monetary expenditure alone would *never* qualify because a financial interest is a "property interest," such as an equity stake in something. *See Black's Law Dictionary* 828 (8th ed. 2004) (second definition of "interest," defining the word to mean "[a] legal share in something; all or part of a legal or equitable claim to or

right in property <right, title, and interest>"); *The American Heritage Dictionary of the English Language* 912 (4th ed. 2000) (an "interest" is, among other things, "[a] right, claim, or legal share: *an interest in the new company*"). We do not believe, however, that the statute uses "interest" exclusively in this sense of the word. Section 208(a) requires a "financial interest" "in" a "matter," as opposed to a "financial interest" in property or a party, and one does not typically refer to a "legal share" in a matter. *Compare* 18 U.S.C. § 208(a) (requiring a determination whether an employee has a financial interest *in a matter*) *with* 18 U.S.C. § 434 (1958) (section 208(a)'s predecessor, requiring a determination whether an employee has an "interest[] in the pecuniary profits or contracts of any corporation . . . or other business entity"). Nor would the narrower definition cover some seemingly obvious examples of a financial interest, such as the interest of a defendant in a potential judgment against him in a tort action.

We believe, instead, that section 208(a) incorporates a broader understanding of "interest"—a concern based upon the potential for pecuniary gain or loss. 5 C.F.R. § 2640.103(b). An interest *in a matter*, then, is "[a] relation to the matter in controversy . . . in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind inclining the person to favor one side or the other." 33 C.J. *Interest* 262 (1924) (footnotes omitted). Whatever the precise formulation (which we need not resolve here), an expenditure, just like a stock or a bond, can give rise to an interest in a matter, but, as noted, only if a particular action or outcome in the matter holds the potential for a financial gain or a loss to the organization. Only then will the organization have a sufficient *financial* reason for wanting a particular result in the matter.[13]

[13] For the difference between the two definitions of "interest," one involving a share in property and the other a relation giving rise to prospective gain or loss, *see* Restatement (First) of Property § 5 (1936) (in effect when section 208 was enacted) ("Note on the Use of the Word Interest in the Restatement: Throughout all the Restatements the word 'interest' is used to denote one of three things: a legal relation, a human desire, and return for the use of money. When the word is used in the last sense the context clearly indicates the meaning. With this exception throughout all the Restatements, except the restatement of Torts, 'interest' is used as defined in this Section; that is, as a word denoting a legal relation or relations. In restating the law of Torts it has been found necessary to use the word 'interest' to denote any human desire. (*See* Restatement of Torts § 1). The two different meanings of the word correspond to existing differences in common and legal usage. When it is said that 'A has sold his interest in Blackacre,' the word is used as it is used in this and other Restatements except the Restatement of Torts; when it is said that 'A has an interest in being free from bodily harm' the word is used as it is used throughout the Restatement of the Law of Torts."); 33 C.J. *Interest* 261–62 (1924) ("As applied to property. The chief use of the term 'interest' seems to be to designate some right attached to property which either cannot, or need not, be defined with precision. It means such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings . . . . In a suit or action. A relation to the matter in controversy, or to the issue of the suit, in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind inclining the person to favor one side or the other; such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit; the benefit which a person

Neither is our conclusion inconsistent with the general understanding that an organization has a financial interest in a matter when it formally intervenes to assert the financial interests of its members. The Rehnquist Opinion stated that "[i]f a pending proceeding [before the FPC] involved intervention by NCA as in [*Natural Gas Pipeline Co. of Am.*, 33 F.P.C. 545 (1965)], or [*Great Lakes Gas Transmission Co.*, 37 F.P.C. 1070 (1967)], participation by [the Commissioner] in the Commission's consideration and decision would obviously be ruled out." Rehnquist Opinion at 4 n.3. Earlier, the Rehnquist Opinion described the financial interest of coal producers in natural gas rates and then cited the two FPC proceedings as support for the proposition that "[t]he interest of coal producers in natural gas rate and certification proceedings has in past years (though not recently) been manifested by their direct intervention, through NCA, in such proceedings." *Id.* at 4. The Rehnquist Opinion thus treated such formal intervention as a means by which the members of the outside organization asserted their financial interests, with the outside organization standing in the shoes of the members. In these circumstances, the outside organization, as the surrogate for its members, could well be found to have a "financial interest" in the proceeding, and a government employee to whom section 208(a) imputes the financial interest of the outside organization would therefore have to recuse himself.

This understanding of formal intervention, however, has no application in the present context. According to Commerce's letter, AMS does not intervene in governmental proceedings involving science policy; it merely issues policy statements. Even if AMS were to intervene in some sufficiently formal manner, AMS's members are not financially interested. They have only a policy interest in the questions being addressed by the government, not a financial or pecuniary interest in the resolution of those questions. AMS, therefore, would not be representing the financial interests of its members. SEA, by contrast, submitted comments in the informal rulemaking involving the establishment of a new pay system for senior executives, and SEA resembles a typical trade association in that it advocates on behalf of the financial interests of its members. However, we need not decide whether SEA's submitting comments in an informal rulemaking constitutes a sufficiently formal intervention to impute the financial interests of its members to SEA, because, as we explained above, SEA's members themselves do not have a disqualifying financial interest in matters regarding the pay system for senior executives. A federal employee's interest in his own federal compensation

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has in the matter about to be decided and which is in issue between the parties.") (footnotes omitted); *Persky v. Greever*, 202 S.W.2d 303, 306 (Tex. Civ. App. 1947) ("The word 'interest' has more than one meaning, depending upon the manner of its use and the context of the sentence, phrase of grouped words, or subject matter under consideration. An interest may well be said to exist in an action which creates or determines a liability or pecuniary loss or gain, depending upon the result of a trial in court.").

generally does not constitute a disqualifying financial interest under section 208, because OGE has issued an exemption, over a wide range of circumstances, for the "financial interest aris[ing] from Federal Government . . . salary or benefits"—the sort of financial interest that SEA might assert on behalf of its members. 5 C.F.R. § 2640.203(d). Given that an SEA member may participate in matters involving the pay system for senior executives (so long as he does not make determinations that individually or specially affect his own salary and benefits, or determinations that individually or specially affect the salary and benefits of another person specified in section 208, 5 C.F.R. § 2640.203(d)), we cannot say that SEA itself would have a disqualifying financial interest merely by virtue of representing its members' interests.

B.

Concluding that section 208 encompasses a nonprofit organization's expenditures on advocacy would have untoward consequences. If expenditures on advocacy alone gave rise to a financial interest that implicates section 208(a), the statute would disqualify an employee whenever an organization in which the employee is a director makes any expenditure, even a minimal one, with respect to an issue that might come before him in his official capacity.[14] If, for example, an organization had a meeting to consider whether to take a position on the issue and spent some small amount of money—indeed, perhaps if two salaried employees of the organization, during the time for which the organization pays them, briefly discussed the possibility of taking a position, or if the organization did nothing more than issue a press release—a federal employee who serves on the organization's board would be disqualified from his agency's work on that issue (at least absent a waiver). By logic, the same principle, moreover, would apply to spending on advocacy by *individual* federal employees, as well as organizational spending. Were an employee to purchase a bumper sticker or yard sign expressing an opinion on a policy at issue in a governmental matter, that employee might have a financial interest in the matter under such reasoning.

It seems unlikely that Congress intended for this *criminal* conflict-of-interest statute to reach so far. What led to the regulation of financial interests was the economic temptation to put a finger on the scale that exists when an employee has a financial reason to prefer a particular outcome. But when a government actor has no *financial* temptation, however slight, to prefer one outcome over another, the financial justification for requiring recusal disappears. And, while there are many potential non-financial reasons for requiring a government actor to recuse

[14] The statute would apply, however, only if the employee had knowledge of the organization's financial interest. 18 U.S.C. § 208(a) (covering particular matters "in which, to [the employee's] knowledge . . . [an] organization in which he is serving as . . . director . . . has a financial interest").

himself—bias, prejudice, social relationship with the parties, etc.—section 208 singles out only financial interests. "The simplest reason," explained the influential Bar Association Report that led to the enactment of section 208, "is that it is better to control whatever fraction of improper behavior is attributable to economic motives than to control none. The second reason is that regulatory schemes have to be administered. Restrictions on outside economic affiliations can be written with reasonable particularity and enforced with moderate predictability." Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 17 (1960). Both reasons suggest that section 208 does not reach the advocacy expenditures at issue here.

At any rate, even if section 208 were ambiguous with respect to the question presented, because section 208 is a penal statute, the law requires that it receive a strict construction. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 18 (1926) (interpreting section 208's predecessor). This rule is "not merely a convenient maxim of statutory construction," but "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited," *Dunn v. United States*, 442 U.S. 100, 112 (1979), and in the separation of powers principle that "'legislatures and not courts should define criminal activity,'" *Ratzlaf v. United States*, 510 U.S. 135, 148–49 (1994) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). And the rule surely applies here, where construing the words "financial interest in a particular matter" to include mere policy-motivated expenditures on advocacy would expand the criminal conflict of interest law beyond its traditional application.

Accordingly, we conclude that SEA and AMS do not have financial interests in the matters you have described.

IV.

Although section 208(a) may not apply in these circumstances, government employees are under a separate duty to "avoid any actions creating the *appearance* that they are violating the law or . . . ethical standards." 5 C.F.R. § 2635.101(b)(14) (2005) (emphasis added); *see* Exec. Order No. 12674, § 101(n) (Apr. 12, 1989), 3 C.F.R. 215 (1989 Comp.), *as amended by* Exec. Order No. 12731 (Oct. 17, 1990), 3 C.F.R. 306 (1990 Comp.); *see also* 5 C.F.R. § 2635.502 (2005). Among the relevant ethical standards is an obligation to "act impartially and not give preferential treatment to any private organization or individual," 5 C.F.R. § 2635.101(b)(8), and a prohibition against an employee's use of "his public office . . . for the private gain of . . . persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member," *id.* § 2635.702. Citing the predecessor version of these provisions, Exec. Order No. 11222, § 201(c) (May 8, 1965), 3 C.F.R. 130, 131 (1965 Supp.), the Rehnquist

Opinion observed that "[w]hile [the Commissioner] in our judgment cannot be viewed as having the type of *financial* interest covered by 18 U.S.C. 208, the fact remains that NCA does have a direct non-financial interest in any matters affecting coal in its competitive fight with natural gas" and that "even assuming all good faith on [the Commissioner's] part, his participation in the direct regulation of the chief competitor of NCA's members is likely to suggest an inference of preferential treatment or loss of independence which could be difficult to dispel." *Id.* at 6–7. Here, too, when an outside organization on whose board a government employee serves is actively advocating a position, particularly where it devotes a large portion of its budget to such advocacy, the employee's official participation in his agency's work on the same issue may "suggest an inference of preferential treatment or loss of independence" giving rise to an appearance of partiality for purposes of the ethical rules.

As we wrote in the FAA Opinion, OGE takes the view that it "'is not in a position to decide for an agency whether a reasonable person would question the impartiality of [an] employee's participation in a particular matter,'" FAA Opinion, 28 Op. O.L.C. at 244–45 (quoting OGE, *Letter to an Agency Ethics Advisor*, Informal Advisory Ltr. 00x4, 2000 WL 33407281, at *3 (Apr. 11)), and "[t]he same generally holds for this Office; the question of an appearance problem is best left to the employee and the agency based on the facts of a particular case," *id*. at 245. Nevertheless, we note that, on the facts presented to us, there is a substantial question whether it would create the appearance of a conflict for an agency employee who is a director of SEA to participate in an official capacity in deciding on recommendations for the agency's senior executive pay system. SEA apparently is engaged in a broad and active campaign involving communications directly to the agencies of the federal government, in which SEA advances positions about the system for senior executive pay. For example, when OPM issued a notice of proposed rulemaking to prescribe the standards for senior executive pay, 69 Fed. Reg. 45,536 (July 29, 2004), SEA filed a set of comments in response. *See* Comments of the Senior Executives Association on the Proposed Rule Regarding "Senior Executive Service Pay and Performance Awards and Aggregate Limitation on Pay" (undated). SEA lists its "Current Objectives" on its website, and advocacy about the new senior executive pay system used to be the first objective on the list, *see* Senior Executives Association, http://seniorexecs.org (last visited June 2, 2005), and remains one of the objectives, *see id.* (last visited Jan. 11, 2006).[15] At the same time, the Executive Resources Board on which the

[15] To the extent that SEA represents its members' interests in the pay system, a director's official role in the matter might not raise an appearance problem, because the regulatory exemption for an employee's actions affecting his own pay or benefits "constitute[s] a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs or operations." 5 C.F.R. § 2635.501 note (2005). But, apart

employee has served in his official capacity makes recommendations regarding the senior executive pay system. SEA Letter at 1. If an outside organization in which an employee is a director has been advocating its views directly to the federal government on a matter that the organization has identified as especially significant, there is a significantly heightened risk that the employee, by taking a personal and substantial role in the same matter, will at least appear less than independent in his judgments for purposes of 5 C.F.R. § 2635.101(b), and that risk, along with other factors such as the importance of the particular employee's role in the government's deliberations, calls for serious consideration by the employee's agency.[16]

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from this representation of its members' financial interests, SEA as an organization has a substantial policy interest in the SES pay system that raises a separate concern about the appearance of an SEA director's taking part in such agency deliberations.

[16] In contrast, AMS appears in some instances only to have issued public statements about matters identified in the Commerce Letter, rather than directly communicating with federal agencies. *See* Commerce Letter at 2 n.2.

Divestiture of Stock and Purchase of Government Bonds by an Incoming Secretary of the Treasury

The incoming Secretary of the Treasury may purchase government bonds with the proceeds of a stock sale pursuant to a certificate of divestiture properly issued under 26 U.S.C. § 1043 and without violating the prohibition of 31 U.S.C. § 329, provided that he purchases the bonds after his commission is signed by the President but before he takes the oath of office or enters on his duties as Secretary of the Treasury.

June 22, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion on whether and how an incoming Secretary of the Treasury may buy government bonds with the proceeds of a stock sale pursuant to a "certificate of divestiture" under 26 U.S.C. § 1043 (2000) consistent with 31 U.S.C. § 329 (2000), which forbids the Secretary from "be[ing] involved in buying or disposing of obligations of a State or the United States Government."[1] We believe that a certificate of divestiture under 26 U.S.C. § 1043 would be available when the President signs the incoming Secretary's commission, but that the incoming Secretary would not become subject to 31 U.S.C. § 329 until he takes the oath of office or otherwise begins his duties. Accordingly, we conclude that the incoming Secretary may purchase government bonds pursuant to a certificate of divestiture properly issued under 26 U.S.C. § 1043 and without violating the prohibition of 31 U.S.C. § 329, provided that he purchases the bonds after his commission is signed by the President but before he takes the oath of office or enters on his duties as Secretary of the Treasury.

I.

The President has nominated Henry M. Paulson, Jr., to be Secretary of the Treasury: Mr. Paulson is currently the Chairman and Chief Executive Officer of The Goldman Sachs Group, Inc. ("Goldman Sachs"), and holds a large stake in the stock of that company. The Office of Government Ethics ("OGE") has determined that, to comply with conflict of interest rules and standards, Mr. Paulson will have to sell this stock if he becomes the Secretary.

Recognizing the extraordinary tax liability that incoming officers and employees of the government might incur when forced to sell property for such reasons,

[1] Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics (June 9, 2006). Your question covers the Secretary of the Treasury and the Treasurer of the United States, both of whom are subject to 31 U.S.C. § 329. In this opinion, we refer to the Secretary, but our analysis would cover both officers.

Congress has provided a mechanism for deferral of the tax. The President or the Director of OGE may issue a "certificate of divestiture" to "an eligible person," which the statute defines as "an officer or employee of the executive branch of the Federal Government." 26 U.S.C. § 1043(a), (b)(1). The issuance of such a certificate is predicated on a finding that "divestiture of specific property is reasonably necessary to comply with any Federal conflict of interest statute, regulation, rule, or executive order (including section 208 of title 18, United States Code), or requested by a congressional committee as a condition of confirmation." 26 U.S.C. § 1043(b)(2). The certificate permits deferral of federal tax on the sale of the property if the proceeds of the sale are invested in "permitted property," defined as "any obligation of the United States or any diversified investment fund approved by regulations issued by the Office of Government Ethics." *Id*. § 1043(a), (b)(3).

We are informed that the sale of Mr. Paulson's stock will generate a large sum of money; that it would be unduly risky to invest the entire sum in equities or equity funds; and that he therefore would invest a portion in less risky securities, including government bonds. Such bonds are ordinarily "permitted property" under a certificate of divestiture. *See id*. § 1043(b)(3). When Mr. Paulson becomes Secretary of the Treasury, however, he will be subject to another provision, 31 U.S.C. § 329(a)(1)(D), under which "the Secretary of the Treasury and the Treasurer may not . . . be involved in buying or disposing of obligations of a State or the United States Government." An officer who violates the prohibition in section 329 "shall be fined $3,000, removed from office, and thereafter may not hold an office of the Government." *Id*. § 329(a)(2).

We understand that before May 2002 the two statutes were reconciled through interpretations under which the term "officer or employee" in 26 U.S.C. § 1043 was taken to apply when a Secretary or Treasurer was confirmed by the Senate and commissioned by the President, but the terms "Secretary of the Treasury and the Treasurer" in 31 U.S.C. § 329 were taken to apply only when those incoming officials took the oath of office. Thus, under these interpretations, after the President signed the commission of an incoming Secretary of the Treasury or Treasurer, the official could receive a certificate of divestiture, sell the conflicting investments, and purchase government bonds with the proceeds of the sale, as long as he completed this process before taking the oath of office. In 2002, however, we issued an opinion concluding that the conflict of interest laws under title 5 and title 18 of the U.S. Code apply to an incoming official when he becomes an "officer or employee" under the definitions in title 5, *see* 5 U.S.C. §§ 2104, 2105 (2000), and that a person becomes an officer or employee as defined in title 5 only when he begins the duties of the office. *Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service*, 26 Op. O.L.C. 32 (2002) ("2002 Opinion"). Because a certificate of divestiture may be issued when an "officer or employee" has to sell property to comply with the conflict of interest requirements under titles 5 and 18, our 2002 Opinion raises the question whether the terms "officer or

employee" in 26 U.S.C. § 1043 must now be given the same meaning as in titles 5 and 18. If so, a certificate of divestiture could not be issued until the incoming Secretary had begun his duties, and, as explained below, 31 U.S.C. § 329 at that time would forbid rolling over the sale proceeds into government bonds.

II.

A.

We believe the term "officer" in 26 U.S.C. § 1043 is best interpreted in light of the purposes of the law, and consistent with the traditional holding of the Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to include an incoming officer whose commission has been signed by the President but who has not yet taken the oath of office or entered on the duties of the office.[2]

The term "officer" is susceptible of different meanings depending on the context in issue. According to the traditional understanding explained by the Supreme Court in *Marbury*, a person becomes an "officer" once his appointment to the office is complete, and the President completes the appointment by signing the commission. Chief Justice Marshall in *Marbury* wrote that, when the President signs the commission, "the *officer* is appointed," 5 U.S. at 157 (emphasis added), and that the appointment "create[s] the officer," *id*. at 156.[3] *See also Appointment of Midshipman at Naval Academy—Revocation*, 28 Op. Att'y Gen. 180, 187 (1910) (characterizing *Marbury* as holding that when the appointment was complete, Marbury "was . . . an officer").[4] The appointee's undertaking the duties of the office is irrelevant to this use of the term "officer." For that reason, "[w]hen a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy." *Marbury*, 5 U.S. at 161–62.

As Justice Joseph Story wrote, "[t]he *officer* appointed [by the signing of the commission] has then conferred on him legal rights, which cannot be resumed [by

[2] We do not here construe the meaning of "employee" in 26 U.S.C. § 1043.

[3] There is a doctrine that, where an appointee would serve at the pleasure of the President, the President may reconsider his decision to appoint the officer even after the commission is signed and may still decline to make the appointment by arresting the commission in his office—i.e., before it leaves the immediate control of the President. *See Case of Franklin G. Adams*, 12 Op. Att'y Gen. 304, 306 (1867). Once the commission leaves the President's office, however, this doctrine would not apply.

[4] One sentence in the 2002 Opinion stated that appointment "does not *ipso facto* make the appointed person an officer or employee" under *Marbury*, 26 Op. O.L.C. at 36, but the context of the sentence was a treatment of need for an appointee to accept the office before its duties and powers become his. The passage cited an Attorney General opinion treating acceptance of an office as "the assumption of official responsibility." *See Acceptance of a Promotion*, 12 Op. Att'y Gen. 229, 230 (1867).

the President]." Joseph Story, *Commentaries on the Constitution of the United States* 573 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833) (emphasis added). Thus, relying in part on *Marbury*, we have concluded that "where two officers in the same body are commissioned on different dates, the officer commissioned first is the senior." *Determination of Date of Commencement of Service of Federal Officers—Renegotiation Board*, 1 Op. O.L.C. 121, 121 (1977). And, although the current rule is different, *Marbury* states that "the salary of the *officer* commences from his appointment" on the date of the commission. 5 U.S. at 161 (emphasis added); *but see Term of Judicial Salaries*, 7 Op. Att'y Gen. 303, 307 (1855) (the statement in *Marbury* "is not good law in the broad generality of the proposition").

By contrast, someone becomes an "officer or employee" for purposes of titles 5 and 18 of the U.S. Code only when he begins his official duties. See 2002 Opinion, 26 Op. O.L.C. at 32. Under 5 U.S.C. § 2104, an officer is defined as someone (1) "required by law to be appointed in the civil service by [the President; a court of the United-States, the head of an Executive agency; or the Secretary of a military department] acting in an official capacity," (2) "engaged in the performance of a Federal function under authority of law or an Executive act," and (3) "subject to the supervision" of the President or the head of an executive agency or military department. This special definition leads to the conclusion that, until someone is actually performing a federal function under the supervision of a federal official, he is not yet an "officer" within the meaning of section 2104. And although title 18 does not define the term, we have relied on the title 5 definition of "officer" and "employee" as "'the most obvious source of a definition' for title 18 purposes." 2002 Opinion, 26 Op. O.L.C. at 32 (quoting *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. O.L.C. 150, 154 (1993) ("*Fishery Management Councils*") (quoting *Status of an Informal Presidential Advisor as a "Special Government Employee,"* 1 Op. O.L.C. 20, 20 (1977) ("*Informal Presidential Advisor*")).

The 2002 Opinion, which set out this view of the meaning of the terms "officer" and "employee," observed that we had applied the title 5 statutory definitions of "officer" and "employee" to the conflict of interest restrictions in Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees, 3 C.F.R. 215 (1989 Comp.), and the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635 (2006). *See* 2002 Opinion, 26 Op. O.L.C. at 33 (citing *Fishery Management Councils*, 17 Op. O.L.C. at 150 n.2, 158). We explained our earlier reasoning:

> First, we noted that we had turned to the title 5 definitions for guidance in interpreting the criminal conflict of interest laws, and "[b]ecause the objectives of the Order and its implementing regulations are closely related to those of the conflicts statutes, we [thought] it reasonable to look to title 5's definition of 'employee'

> when elucidating the Order." *Id*. at 154 (citation omitted). Second, the Executive Order adopts the definition of "agency" from title 5, with certain exceptions, Exec. Order No. 12674, § 503(c); and "[w]e [thought] it unlikely that the Order was intended to cover personnel who were employed by 'agencies' within the meaning of title 5 but who were not themselves 'employees' within the same title." 17 Op. O.L.C. at 154. Third, while the Executive Order states generally that it is based on the authority vested in the President "by the Constitution and laws of the United States," Exec. Order No. 12674, pmbl., but does not specify the authorizing statutes, "the most obvious statutory source of authority" is the President's power under title 5 to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301 (2000), and this authority brings into play the definition of "employee" in title 5. 17 Op. O.L.C. at 154.

2002 Opinion, 26 Op. O.L.C. at 33. In using the three-part test from title 5 to interpret conflict of interest restrictions found outside that title, we thus relied on the purposes of, as well as underlying legal authorities for, these other restrictions. Similarly, in applying the three-part test to the criminal conflict of interest restrictions in title 18, we underscored the specific nature of criminal prohibitions. We observed that the rule of lenity weighed in favor of not diluting the test and thus broadening the application of the criminal sanctions in ways that could have harsh results. *Id*. at 34.

Section 1043 of the federal tax code does not regulate the conduct of officials but offers a means to facilitate their compliance with the ethics laws, including compliance required as a condition of entering into office. In light of this purpose, we believe that the term "officer" in section 1043 is best read to have the traditional meaning laid down in *Marbury v. Madison*. An incoming official must have the capacity to avoid conflicts from the moment he begins service, where the circumstances so demand. He may, for example, own substantial amounts of stock that would create a financial conflict under 18 U.S.C. § 208(a) (2000) in an area where he would need to take urgent action immediately upon assuming the duties of his office. If the official's holdings would be sufficiently "substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer," he would be ineligible for a waiver under 18 U.S.C. § 208(b)(1). Foreseeing such a problem, and bearing in mind the obligation of officers and employees "to avoid any actions creating [even] the appearance that they are violating the law or the ethical standards promulgated pursuant to" the President's direction, *see* Exec. Order No. 12674, § 101(n), 3 C.F.R. at 216, *as amended by* Exec. Order No. 12731, 3 C.F.R. 306, 308 (1990 Comp.), the incoming official would need to divest himself of his holdings before entering on his duties. But unless there is some period, before he undertakes the duties of his office, during which he is an "officer" under 26 U.S.C. § 1043 and thus eligible for

a certificate of divestiture, he may lack any practical means to divest that property. Indeed, the unavailability of a certificate of divestiture for such officers would be "a significant disincentive to the acceptance of high level policy-making positions in the government because of the financial burdens imposed by reason of the recognition of gain," *To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform* 25 (1989), and might dissuade some officials from consenting to serve. If, however, a certificate of divestiture may be granted when the President signs the commission but before the officer begins his duties, such a consequence—which we cannot believe Congress intended—can be avoided.

The language of section 1043, moreover, reveals that the provision is, in part, specifically designed to deal with incoming officials. A certificate of divestiture is available not only if the Director of OGE finds divestiture necessary to avoid conflicts of interest—a determination that might apply to either incoming or incumbent officials—but also specifically is available if divestiture is "requested by a congressional committee as a condition of confirmation." 26 U.S.C. § 1043(b)(2)(A). This specific focus on incoming officials reinforces the conclusion that section 1043 should be read to permit an official to resolve conflicts before he begins work.

Under 26 U.S.C. § 1043(b)(2), a certificate of divestiture can be issued only if a sale of property is "reasonably necessary to comply with any Federal conflict of interest statute, regulation, rule, or executive order (including section 208 of title 18, United States Code), or requested by a congressional committee as a condition of confirmation." Given the purposes of section 1043, we believe that this judgment can be made as of when the incoming official becomes an "officer" in the traditional sense just outlined. The Director of OGE, at that point, can determine whether the officer, to achieve compliance with federal conflict of interest rules upon his beginning the duties of his office, needs to divest himself of any property holdings.[5]

This interpretation, as we understand the facts, accords with existing practice as to the timing of certificates of divestiture. OGE's view has long been that the Director could issue a certificate when the President signed the incoming officer's commission. The present issue is, therefore, whether this interpretation should be overturned because of our 2002 Opinion, which found that the conflict of interest laws under titles 5 and 18 do not apply to an incoming officer until he begins the duties of his office. Our interpretation here gives the term "officer" a different meaning in 26 U.S.C. § 1043 from the meaning that the term has in the conflict of interest laws in title 5 and title 18. Arguably, given the absence of a statutory

[5] Section 1043 also includes a cross-reference to a definition in title 18, but it does so only to say that a "special Government employee as defined in section 202 of title 18" is not eligible for a certificate of divestiture. 26 U.S.C. § 1043(b)(1)(A). The cross-reference would not support any inference that the meanings of terms in title 18 should apply to section 1043.

definition governing the provision in title 26, the title 5 definition could be "the most obvious source of a definition," just as we concluded it was for title 18. A certificate of divestiture may be issued when an "officer or employee" has to sell property to comply with the conflict of interest requirements, most of which are in or pursuant to titles 5 and 18, and it therefore might be argued that section 1043 should incorporate the same meaning of "officer" that applies under those titles and is ultimately traced to 5 U.S.C. § 2104. We nonetheless conclude that employing a different interpretation of the term "officer" in the context of section 1043 is fully consistent with the differing purposes of this provision and the conflict of interest laws of titles 5 and 18. Furthermore, although the 2002 Opinion reached its conclusion on the basis of the express statutory definition of "officer" in title 5 and the longstanding interpretation that title 18 should be given the same meaning, we noted that our interpretation "enable[d] an appointee to wind up his private affairs in an orderly manner (presumably in consultation with the Administration) and therefore [could] be critical to recruiting qualified appointees in the first place." 26 Op. O.L.C. at 37. The issuance of a certificate of divestiture upon the President's signing of the commission, but before the officer's entering on his duties, serves the same ends.[6]

B.

In keeping with the longstanding interpretation of the Treasury Department, we believe that, for purposes of 31 U.S.C. § 329, Mr. Paulson will not become "[t]he Secretary of the Treasury" until he takes the oath of office or enters on the duties of the office. This understanding of the meaning of "[t]he Secretary of the Treasury" accords with the purposes of 31 U.S.C. § 329. The provision, in substantially the same form, was enacted in 1789 as part of the statute creating the Treasury Department. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (1789).[7] It was intended to prevent Treasury officials from "speculating in the public funds." See 1 Annals of Cong. 611 (1789) (statement of the sponsor, Rep. Aedanus Burke); *see also Treasurer of the United States—Philippine Land Purchase Bonds*,

[6] We recognize that some agencies of the government do not insist that incoming officials achieve immediate compliance with provisions that forbid them from holding or trading in particular kinds of property. On the other hand, the Treasury Department has consistently taken the view, both under 31 U.S.C. § 329 and under the statute on the Comptroller and Deputy Comptroller of the Currency, 12 U.S.C. § 11 (2000), that these statutory bars apply immediately to incoming officials upon their taking the oaths of office.

[7] As originally enacted, the provision stated that officials at the Treasury Department could not "be concerned in the purchase or disposal of any public securities of any State, or of the United States." 1 Stat. at 67. This language remained in the statute until 1982, when the current language was substituted "to eliminate unnecessary words and for consistency in the revised title" 31. 31 U.S.C. § 329 note. The 1982 amendment was "not [to] be construed as making a substantive change in the law[] replaced." Pub. L. No. 97-258, § 4(a), 96 Stat. 884, 1067 (1982).

25 Op. Att'y Gen. 98, 99 (1903) ("The obvious purpose of [the] law, as shown throughout the section, is to prohibit personal interest in such bond issues and certain other affairs and business, and private emolument or gain in the transaction of *any* business in the Treasury Department."). Perhaps one motive for the provision was a concern that officials in the Treasury would buy state bonds whose value would be increased if the United States (as it later did) assumed the debts incurred by the states in the Revolutionary War. Ideas about assumption were circulating even before the creation of the Treasury Department, *see* Stanley Elkins & Eric McKitrick, *The Age of Federalism* 112–13, 117–21 (1993); Ron Chernow, *Alexander Hamilton* 225 (2004); and the scope of the prohibition, which reaches trading in bonds but not the mere holding of them, suggests a focus on the use of inside information. *See also* William Maclay, *The Journal of William Maclay, United States Senator from Pennsylvania 1789–1791*, at 173–74 (Frederick Ungar Publishing 1965) (1890) (protesting against "a system of speculation for . . . engrossing certificates" of public debt). In any event, if an incoming Treasury Secretary completes his transactions in government bonds before he takes the oath or enters on the duties of his office, he cannot "speculat[e] in the public funds." He can have no opportunity to take any official action as Secretary, or use any nonpublic information, to gain any advantage in the trade.[8]

III.

It follows, therefore, that if the Director of OGE issues a certificate of divestiture upon the President's signing of Mr. Paulson's commission, Mr. Paulson will be able to sell his Goldman Sachs stock and buy government bonds pursuant to that certificate, provided he completes these transactions before he takes the oath of office or enters on his duties as Secretary of the Treasury.

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[8] An OGE regulation, which addresses the use of a certificate of divestiture, includes, as an example, the following:

> The Secretary of Treasury sells certain stock after receiving a Certificate of Divestiture and is considering reinvesting the proceeds from the sale into U.S. Treasury securities. However, because the Secretary of Treasury is prohibited by 31 U.S.C. 329 from being involved in buying obligations of the United States Government, the Secretary cannot reinvest the proceeds in such securities. However, she may invest the proceeds in a diversified mutual fund.

5 C.F.R. § 2634.1006(a), ex. 2 (2006) (citation omitted). By its terms, this example covers "[t]he Secretary of Treasury" but does not specify when an incoming official assumes that office.

Application of the Appointments Clause to a Statutory Provision Concerning the Inspector General Position at the Chemical Safety and Hazard Investigation Board

A statutory provision declaring that the Inspector General of the Environmental Protection Agency "shall, by virtue of such appointment, also hold the position of Inspector General" of the Chemical Safety and Hazard Investigation Board does not violate the Appointments Clause of the Constitution, because it constitutes the permissible addition of germane duties to an office, rather than appointment to a new office.

July 27, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Congress has provided that the Inspector General of the Environmental Protection Agency ("EPA") "shall, by virtue of such appointment, also hold the position of Inspector General" of the Chemical Safety and Hazard Investigation Board ("CSHIB" or "Board"). Pub. L. No. 109-54, 119 Stat. 499, 543 (2005). The Board has requested our opinion on whether this provision violates the Constitution's Appointments Clause, U.S. Const. art. II, § 2, cl. 2, on the ground that Congress, rather than the President or an appropriate department head, has thereby appointed the EPA Inspector General to the distinct office of Inspector General of the Board. In considering this question, we have received and benefited from extensive submissions by both the Board and the EPA Inspector General. We conclude that the provision is constitutional. It constitutes the permissible addition of germane duties to an office, rather than appointment to a new office.

I.

Congress established the Board in the 1990 amendments to the Clean Air Act, codified in relevant part at 42 U.S.C. § 7412(r)(6) (2000). The members of the Board are appointed by the President, with the advice and consent of the Senate, to five-year terms. *Id*. § 7412(r)(6)(B).

The Board has three primary statutory duties: (1) to "investigate . . . , determine and report" the facts and cause "of any accidental release [of a 'hazardous substance into the ambient air,' *id*. § 7412(r)(2)] resulting in a fatality, serious injury or substantial property damages"; (2) to "issue periodic reports" to various entities, "including the [EPA] and the [Department of Labor's] Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage," in which the Board is to recommend changes in regulation or policy by the EPA or the Labor Department in this area; and (3) to "establish by regulation" binding rules for "reporting accidental releases into the ambient air." *Id*. § 7412(r)(6)(C). Under certain circumstances, the EPA or

the Labor Department is required to respond with reasons for rejecting any Board recommendation or at least to consider the Board's recommendations. *Id*. § 7412(r)(6)(H)–(K). The EPA must "provide to the Board such support and facilities as may be necessary for operation of the Board" and is authorized to enforce the Board's reporting regulations; the Board in turn "may use any information gathering authority of [EPA] under this chapter," *id*. § 7412(r)(6)(P), (O) & (M), although it has its own statutory authority to gather information, *id*. § 7412(r)(6)(L). Finally, the Board is not "responsible to or subject to supervision or direction, in carrying out any duties under this subsection, of any officer or employee or agent of the [EPA], the Department of Labor or any agency." *Id*. § 7412(r)(6)(R).[1] Although Congress established the Board in 1990, the Board received no funding until Fiscal Year 1998. *See* Pub. L. No. 105-65, 111 Stat. 1344, 1368 (1997).

The Inspector General Act ("IG Act") creates an Inspector General ("IG"), appointed by the President with the advice and consent of the Senate, and a corresponding Office of Inspector General, for the Executive Branch departments and enumerated major agencies, administrations, and other "establishments," including the EPA. 5 U.S.C. app., IG Act §§ 2, 3 & 11 (2000). For several other "designated Federal entities," a category that includes Amtrak and many regulatory commissions, the Act creates an IG, with a corresponding Office, appointed by the head of the entity rather than the President. *Id*. § 8G.

IGs have the duties (1) to "audit[] and investigat[e] . . . the programs and operations" of their agencies; (2) to seek ways "to promote economy, efficiency, and effectiveness in the administration of," and "to prevent and detect fraud and abuse in," the "programs and operations" of their agencies; and (3) "to provide a means for keeping the head[s]" of their agencies, as well as Congress, "informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action." *Id*. § 2 (stating purposes); *see id*. § 4(a) (specifying duties). We have explained that "Congress intended the [IG] to be an objective official free from general regulatory responsibilities who investigated the employees and operations of the Department, as well as its contractors, grantees, and other recipients of federal funds, so as to root out waste and fraud." *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. O.L.C. 54, 55 (1989) ("*IG Authority*").

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[1] When signing the 1990 amendments, the President noted "serious constitutional concerns" with provisions, now codified at 42 U.S.C. § 7412(r)(6)(B) & (R) (2000), that restrict presidential removal of Board members and review of and policy guidance to the Board (provisions he believed "severable") and that "invade the deliberative processes of the executive branch" by requiring the Board to transmit its reports to Congress concurrently with their transmission within the Executive Branch. *See* Statement on Signing the Bill Amending the Clean Air Act (Nov. 15, 1990), 2 *Pub. Papers of Pres. George Bush* 1602, 1603–04 (1990). These provisions do not affect our analysis.

Under the IG Act, an entity that is neither an enumerated department or other establishment nor a designated federal entity falls into the residual category of "Federal entity." 5 U.S.C. app., IG Act § 8G(a)(1). The head of a "Federal entity" must prepare annually a report stating "whether there has been established in the Federal entity an office that [would] meet the requirements" for an IG Office in a designated federal entity. *Compare id.* § 8G(h)(2)(A) *with id*. § 8G(b). If not, the report must "specif[y] the actions taken by the Federal entity otherwise to ensure that audits are conducted of its programs and operations." *Id*. § 8G(h)(2)(B).

As it is not specifically listed in the IG Act, the Board falls into this residual category. But in successive appropriations for the Board beginning with Fiscal Year 2001, Congress provided that "there shall be an [IG] at the Board who shall have the duties, responsibilities, and authorities specified in the Inspector General Act of 1978." Pub. L. No. 106-377, app. A, 114 Stat. 1441, 1441A-36 (2000). Congress repeated this language in the 2002 appropriation, adding "hereafter" at the beginning. Pub. L. No. 107-73, 115 Stat. 651, 679 (2001). Congress further provided that "an individual appointed to the position of the [IG] of the Federal Emergency Management Agency (FEMA) shall, by virtue of such appointment, also hold the position of [IG] of the Board." 114 Stat. at 1441A-36. FEMA then had a presidentially appointed IG. 5 U.S.C. app., IG Act § 11(2). For Fiscal Year 2004, following FEMA's absorption into the new Department of Homeland Security, Congress transferred the Board's IG function to the EPA IG, by providing that "the individual appointed to the position of [IG] of the [EPA] shall, by virtue of such appointment, also hold the position of [IG] of the Board." Pub. L. No. 108-199, 118 Stat. 3, 399 (2004). Congress has repeated this provision for Fiscal Years 2005 and 2006. See Pub. L. No. 108-447, 118 Stat. 2809, 3322 (2004); Pub. L. No. 109-54, 119 Stat. at 543.

II.

As explained below, we find no violation of the Appointments Clause in Congress's transfer of the Board's IG function to the EPA IG. After setting out the applicable rules, we resolve two preliminary questions and then show how Congress's direction to the EPA IG to serve as Board IG is the addition of germane duties to the office of EPA IG, which is permissible under the Appointments Clause.

A.

The Constitution's Appointments Clause provides for offices to be "established by law." U.S. Const. art. II, § 2, cl. 2; *see also United States v. Maurice*, 26 F. Cas. 1211, 1213–14 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice). That clause also provides four specific means of appointing persons to hold established offices. The default is that officers be appointed by the President with the advice

and consent of the Senate, but 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. As the Supreme Court has put it, "That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt." *United States v. Germaine*, 99 U.S. 508, 510 (1878); *see Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (same); *see also id*. at 128–31 (discussing proposals rejected at the Constitutional Convention to vest appointment power in Congress). Thus, Congress may create offices, and may choose among a few means of filling inferior offices, but may not itself fill any office subject to the Appointments Clause.

Given this division of authority, "a statute creating a new office *and* conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 157 (1996) ("*Separation of Powers*") (emphasis added). As a corollary, Congress may not "alter the duties and powers of existing offices . . . to achieve substantially the same result." *Id*.; *see Shoemaker v. United States*, 147 U.S. 282, 300 (1893) ("[W]hile Congress may create an office, it cannot appoint the officer."); *Weiss v. United States*, 510 U.S. 163, 174 (1994) (Congress may not "circumvent[] the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office"); Pres. James Buchanan, Letter to the House of Representatives (June 25, 1860), *in* 7 *A Compilation of the Messages and Papers of the Presidents* 3128, 3129 (James D. Richardson ed., 1897) ("It has been alleged . . . that this clause is unconstitutional because it has created a new office and has appointed Captain Meigs to perform its duties. If it had done this, it would have been a clear question, because Congress have no right to appoint to any office."). But where Congress has simply "increase[d] the power and duties of" positions, and the new duties are "germane to the offices already held by" the incumbents, the Supreme Court has found no infirmity. *Shoemaker*, 147 U.S. at 301; *see also id*. at 289 (Congress may "intrust the performance of particular duties to officials already charged with duties of the same general description") (describing holding of lower court); *Weiss*, 510 U.S. at 174–76; *id*. at 195–96 (Scalia, J., concurring in part and concurring in judgment). This Office has concurred in that view. *Separation of Powers*, 20 Op. O.L.C. at 157–59; *Status of the Director of Central Intelligence Under the National Security Intelligence Reform Act of 2004*, 29 Op. O.L.C. 28, 36 n.2 (2005) ("*Status of DCI*").

We have indicated that it is helpful, in applying *Shoemaker*'s "germaneness" test, to ask whether an officer's functions, with the addition by Congress to his original duties, "could be said" to have been "'within the contemplation of those who were in the first place responsible for [his] appointment and confirmation,'"

and we also have considered "the reasonableness of assigning the new duties 'in terms of efficiency and institutional continuity.'" *Separation of Powers*, 20 Op. O.L.C. at 158 (quoting *Legislation Authorizing the Transfer of Federal Judges From One District to Another*, 4B Op. O.L.C. 538, 541 (1980) ("*Transfer of Federal Judges*")). *Shoemaker* itself restated its germaneness test in two parts, concluding that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." 147 U.S. at 301. The latter phrase suggests an inquiry into what the appointing authority reasonably could have anticipated as within the "sphere of" an office at the time of the last appointment before its duties increased. *Cf. Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1193 (D.D.C. 1990) (finding violation where Congress largely continued powers of three-person board but consolidated them in single, designated, pre-existing officer); *Weiss*, 510 U.S. at 175 (in applying germaneness analysis to military officers holding the position of military judge, looking to a "long tradition" of the roles of military officers "in the operation of the military justice system"). In advising that it would not violate the Appointments Clause to merge the Court of Claims and the Court of Customs and Patent Appeals without reappointing the judges, we reasoned "that the functions of judges on the new court were sufficiently like those in the positions being abolished to view the legislative redesignations as a modification of an existing position under *Shoemaker*," and added that "it could be said that the judges' functions on the merged court were within the contemplation of those who were in the first place responsible for their appointment and confirmation." *Transfer of Federal Judges*, 4B Op. O.L.C. at 541.

B.

Before reaching the germaneness inquiry with regard to the Board, we must resolve two preliminary questions. First, Congress has not conferred new duties on a particular person which would plainly violate the Constitution. It has conferred new duties on a particular office, regardless of who may hold it: Whoever holds one particular IG office (first at FEMA and then at EPA) also assumes the IG duties for the Board. Congress has, through the language of the Fiscal Year 2002 appropriation, permanently established the position of Board IG. Yet it has continued to designate the EPA IG to fill that position in annual appropriations (and it conceivably could seek to re-assign the duty each year). Should that practice continue, one might argue that each annual provision works a new Appointments Clause violation.[2] But the question whether such uses of annual

[2] Although Congress has power to add to or subtract from the duties of an office, it conceivably could abuse that power to the point of unconstitutionality. The issue would be similar to one that can arise with Congress's power to abolish an office. Congress may do so, even though such action

appropriations violate or would violate the Appointments Clause begs the question we must answer under *Shoemaker*. If the position of IG of the Board is properly understood as an addition to the duties of the EPA IG rather than the creation of a new office, then Congress in annually so providing is merely repeating the same permissible grant of authority to the EPA IG, which is within its rights. The limit to such a practice in the context of the Appointments Clause is imposed by the germaneness test itself, not by any separate rule.

Second, one might think it unnecessary to consider germaneness when legislation uses words that establish a distinct position and designate the incumbent of an existing office to hold that new position. Here, Congress has provided that "hereafter there shall be an Inspector General at the Board," 115 Stat. at 679, and "an Inspector General" does, in general, hold a distinct office. Furthermore, Congress has, in assigning the functions of the Board IG to the EPA IG, consistently referred to "the position" of Board IG, e.g., 118 Stat. at 398, a term that could be a synonym for "office." The term "position" may suggest more than a mere addition of duties to the office of EPA IG. It may be argued in this way that Congress has created a new office.

The better view, however, is that one must look not to the labels that Congress has used but to the particular duties that it has added to an office; the germaneness test is the proper mechanism for assessing this question. The Appointments Clause speaks of the power to appoint "Officers." An officer holds an office, and an "office" for purposes of the Clause "is essentially a collection of duties and authorities," rather than "a title" or label. *Status of DCI*, 29 Op. O.L.C. at 30–31; *see United States v. Hartwell*, 73 U.S. 385, 393 (1867) ("The term ['office'] embraces the ideas of tenure, duration, emolument, and duties."). Thus, we have concluded that the position of Director of the Central Intelligence Agency, created by intelligence-reform legislation, is merely "a continuation of the office of" Director of Central Intelligence, notwithstanding a change in title, reduction of duties, and some other changes. Our conclusion rested primarily on a comparison of duties. *See Status of DCI*, 29 Op. O.L.C. at 31–32. When Congress adds rather than subtracts duties, there is a risk that it has created a new office and purported to fill it, which the Constitution forbids. But the way to answer that question is through a germaneness analysis of the duties in issue. *Id*. at 36 n.2.

The facts and reasoning of *Shoemaker* confirm this duties-based approach. There, Congress had created a five-member commission with authority to select and to secure the purchase of land for Rock Creek Park in the District of Columbia. The statute provided "[t]hat the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be

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effectively removes an officer. But Congress may not abuse this power through "ripper" legislation, by nominally abolishing one office, simultaneously creating a "new" but essentially identical office, and then requiring a new appointment. *See Status of DCI*, 29 Op. O.L.C. at 34–35.

appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission." Act of Sept. 27, 1890, ch. 1001, § 2, 26 Stat. 492, 492 (1890). Congress had created five new positions of "commissioner"; three of the commissioners were to be selected in the way that officers ordinarily are appointed, yet Congress had designated the remaining two commissioners to be the holders of certain existing offices.

The Shoemakers thus had a credible objection "that two members of the commission were appointed by Congress." 147 U.S. at 288. They argued that "the act itself defines these park commissioners to be public officers, because it prescribes that three of them are to be civilians, to be nominated by the President and confirmed by the Senate," and "the other two are likewise 'officers,' whose appointment should have" conformed to the Appointments Clause. *Id*. at 300. Yet the Supreme Court unanimously rejected this argument:

> [W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.
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> . . . .
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> [I]n the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

Id. at 301. The Court considered not the different titles of commissioner, Chief of Engineers, and Engineer Commissioner, but rather the relationship of the "additional duties" and increased "power and duties" of a commissioner to the preexisting "official duties" of those military offices. Although the three civilian commissioners might hold offices, it did not follow that the two *ex officio* commissioners each held a new, additional office. The lower court likewise had reasoned "that it was not unconstitutional for the legislature to intrust the performance of particular duties to officials already charged with duties of the same general description." *Id*. at 289. A focus on form likely would have produced a different result.

The Supreme Court again followed a duties-based analysis a hundred years later in *Weiss*. Congress had created the distinct positions of military judges (who presided over courts-martial) and provided for them to be selected from among qualified military officers. As military officers, the judges already had been appointed by the President with the advice and consent of the Senate, but they

were to be selected as judges by a Judge Advocate General, not the head of a department. 510 U.S. at 167–68. In addition, there was no dispute that military judges "act as 'Officers' of the United States." *Id*. at 169. Yet, as in *Shoemaker*, the Court concluded unanimously that another appointment was not needed, rejecting the argument "that the position of military judge is so different from other positions to which [a military] officer may be assigned." *Id*. at 170. The Court made two factual points: (1) "[a]lthough military judges obviously perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system," and (2) "the position of military judge is less distinct from other military positions than the office of full-time civilian judge is from other offices in civilian society." *Id*. at 175.

C.

Thus, one cannot answer the Appointments Clause question simply by noting Congress's reference to the "position" of Board IG. The question, instead, is whether the duties of IG of the Board are "germane" to those of the EPA IG. We conclude that they are.

The general duties of the Board IG and the EPA IG are defined identically, by the same statute. The duties of the EPA IG, since the office's creation, have been defined by those sections of the Act that set out the duties of any IG. *See* 5 U.S.C. app., IG Act § 4(a) (defining "the duty and responsibility of each [IG]"); *id*. § 2 (stating purposes of IG Offices); *id*. § 11(2) (requiring an IG, with the duties defined in section 4, for the EPA). These common duties, as explained above in Part I, include conducting audits, making certain kinds of recommendations and reports, and conducting investigations "so as to root out waste and fraud." *IG Authority*, 13 Op. O.L.C. at 55. In creating the position of Board IG, Congress simply cross-referenced these same duties, stating that he "shall have the duties, responsibilities, and authorities specified in the Inspector General Act of 1978, as amended." 115 Stat. at 679.

It does not follow that Congress could assign to any existing IG the position of IG at any other department, agency, or entity. We previously have said, for example, that it is a close question (one we declined to decide) whether Congress may provide that a federal judge, upon completing a temporary administrative assignment, would have the option to return to his home district or circuit or, instead, serve in the District of Columbia Circuit. *Transfer of Federal Judges*, 4B Op. O.L.C. at 538. Even though "service as a judge on one federal court is surely 'germane' to judicial service on another," we recognized that a judge's "appointment and confirmation are predicated on the expectation that he will in fact be serving in that district or circuit." *Id*. at 540. Similarly, here the IG Act defines the duties of an IG "with respect to the establishment within which his Office is

established." 5 U.S.C. app., IG Act § 4(a); *see also id*. § 3(a) ("Each [IG] shall report to and be under the general supervision of the head of the establishment involved"); *id*. § 8G(b) & (d) (IG office to be created "in each designated Federal entity," with the IG being supervised by the head of that entity). And we have advised informally, in commenting on pending legislation, that it would violate the Appointments Clause to add to the Office of Special Inspector General for Iraq Reconstruction, without reappointment, duties relating to relief and reconstruction in Louisiana and elsewhere arising out of Hurricane Katrina.

It is enough to recognize that, not only do the Board IG and the EPA IG have the same general statutory duties, but in addition these two positions involve entities that have closely related functions and a history of interacting, and the addition of Board IG duties to the EPA IG does not work a significant increase in the duties of the EPA IG.

First, it is not as if an IG from one agency were being given additional duties as IG for another unrelated agency. In carrying out his IG duties for the EPA and the Board, the EPA IG addresses similar operational matters. The provisions of the Clean Air Act summarized above in Part I indicate that the Board's functions serve the regulatory missions of the EPA and the Labor Department. Indeed, the Board's investigations, rulemaking proposals, and reporting roles are, under the statute, aimed at assisting the EPA and Labor in reducing the risk of future hazardous chemical releases. The Board's regulatory authority involves promulgating rules that require reporting of such releases. Those rules in turn enable the Board to perform the investigations that lead to its recommendations to the two agencies that do have primary regulatory responsibility over these matters—the EPA and the Labor Department. And it appears from the statute that the Board's mission has a greater connection with the work of the EPA than the Labor Department.[3]

Second, as explained above in Part I, the Board is merely an undesignated "Federal entity" under the IG Act, rather than a department, enumerated agency, or even a designated federal entity. And the IG Act contemplates that at least audits of undesignated federal entities should be conducted in some fashion. *See* 5 U.S.C. app., IG Act § 8G(h)(2). The performance of IG functions for an undesignated federal entity by an IG who exists pursuant to the IG Act, and whose pre-existing duties involve, as here, subjects similar to those involved in the additional IG functions, could (at least presumptively) be said to be within the contemplation of those who were responsible for that IG's appointment. *See Separation of Powers*, 20 Op. O.L.C. at 158. Such additional duties likely are not "outside the sphere of," and are "of the same general description" as, his pre-existing duties, *Shoemaker*, 147 U.S. at 301, 289, and the addition likely is reasonable in terms of efficiency, *see Separation of Powers*, 20 Op. O.L.C. at 158.

[3] We have no occasion to answer the moot question of the germaneness of the duties of the Board IG to those of the former FEMA IG.

Furthermore, the EPA IG has received little additional staff, resources, or salary to carry out the additional duties of Board IG, and this fact tends to confirm that the increase in duties is not significant. A significant addition to an office's duties is more likely to be outside the sphere of its existing duties, *see Status of DCI*, 29 Op. O.L.C. at 36 n.2, and thus to "amount to assuming a new 'Offic[e]' within the meaning of" the Appointments Clause, *Weiss*, 510 U.S. at 196 (Scalia, J., concurring). Here, however, in establishing the position of Board IG, Congress has required the IG who received that function to use personnel of his existing IG Office rather than establish a new IG Office for the Board, and has barred him from appointing any individuals to positions within the Board. *See, e.g.*, 115 Stat. at 679 (FY 2002); 118 Stat. at 399 (FY 2004). Similarly Congress has not appropriated separate funds for the Board IG; instead, it has left the EPA IG to carry out his duties with regard to the Board from his appropriation for the EPA IG Office. In its Fiscal Year 2001 appropriation, for example, Congress included no funds for the Board IG in its appropriation for the Board, provided a $10,000,000 appropriation for the FEMA IG, and added that the FEMA IG "shall also serve as" the Board IG. 114 Stat. at 1441A-36 & A-46. Since transferring the Board IG function to the EPA IG, Congress has continued to include no money for the Board IG in its appropriations for the Board. *See, e.g.*, 118 Stat. at 399. Instead, in conference reports on appropriations bills for the EPA, the congressional conferees have expressed views on how much of its appropriation the EPA IG Office should spend on the Board IG function and have requested that the EPA include in its budget requests an amount sufficient to carry out this function. *See, e.g.*, H.R. Rep. No. 108-401, at 1127 (2003). Under these circumstances, combined with both the general and specific similarities in duties, there is no reason to conclude that Congress has appointed the EPA IG to a new and distinct office rather than simply adding germane duties to his existing office.

The Board does, in addition to being an entity distinct from the EPA, operate with a statutory protection against any responsibility to, or supervision or direction by, officers or employees of the EPA, *see* 42 U.S.C. § 7412(r)(6)(R); *see also id.* § (6)(A) (referring to Board as "independent"), but that independence does not make the duties of the Board IG any less germane to the pre-existing duties of the EPA IG. As a statutory matter, Congress is free to revise this independence, such as by separately providing—as it has in the appropriations provisions at issue—that an officer in the EPA shall have certain duties with regard to the Board. Nor can there be any statutory objection to the EPA IG's "supervising" his own work as Board IG: The role of Board IG is not one of the functions or duties established for the Board in section 7412 and therefore is not subject to the provision regarding lack of direction or supervision by EPA officers. *See id.* § 7412(r)(6)(R).

The question is whether it is relevant to the constitutional germaneness analysis that Congress first granted this independence and then (arguably) removed some of it by assigning the function of Board IG to the EPA IG. Congress's initial grant

of statutory independence might be said to have placed the duties of any Board IG outside the sphere of the EPA IG's duties and not within the reasonable contemplation of the President and Senate in appointing the EPA IG. One might argue that the President and Senate, in determining the suitability of an appointee for the office of EPA IG, did not have a reasonable opportunity to determine whether he possessed appropriate qualifications for carrying out the duties of Board IG.

Whatever the merits of such an argument in general, it does not apply here, because the statutory independence of the Board involves its operational, programmatic duties under section 7412(r)(6), which do not include the functions of its IG. Although an IG does have broad powers of auditing and investigation, *see* 5 U.S.C. app., IG Act §§ 4(a) & 6, these are distinct from program operating authority, which he expressly does not have. *See id.* § 9(a)(2) (prohibiting the transfer of any "program operating responsibilities" to an IG); *id.* § 8G(b) (in creating IG for designated federal entities, "there shall not be transferred to such office any program operating responsibilities"). Rather, "Congress intended the [IG] to be an objective official free from general regulatory responsibilities." *IG Authority*, 13 Op. O.L.C. at 55. An IG also cannot take personnel action against an agency officer or employee outside of his direct subordinates. 5 U.S.C. app., IG Act §§ 6(a)(6), (b)(2). Apart from auditing and investigating, he merely reports and recommends action to his agency's head, *id.* §§ 4(a), 5(a) & (d), or in certain cases to the Attorney General, *id.* § 4(d). It is for the agency head, not the IG, to direct and supervise an agency's officials. Even an IG's narrow authority over his direct subordinates, *see id.* § 6(a)(7), is irrelevant here, where the Board IG has, by statute, no distinct office or staff. Moreover, lest these statutory limits be transgressed, the IG Act requires that the EPA IG in his role as Board IG report to and be under the general supervision of the Board, not the EPA Administrator or his deputy. *See id.* § 3(a) ("Each [IG] shall report to and be under the general supervision of the head of the establishment involved"); *id.* § 8G(d) (same with IGs in a designated federal entity). In this regard, the EPA IG will have two distinct masters—the Board and the EPA Administrator—but only one for each role. And the EPA IG is removable by, and thus ultimately accountable to, not the Administrator but the President, *see id.* § 3(b), to whom the Board could appeal. Much as the EPA cannot be said to be under the supervision or direction of, or responsible to, its IG—else the Administrator would be a subordinate of the IG—the Board is not under the supervision or direction of, or responsible to, the Board IG, and thus not under an EPA officer. Thus, in the area of IG duties, there is no background rule of Board independence from the EPA that might affect the Appointments Clause analysis.

Finally, a contrary view of the relevance of the Board's operational independence likely would prevent Congress from assigning to any IG office that is not vacant the duties of Board IG, given that the statute prohibits "any . . . agency" from supervising or directing the Board's operations. 42 U.S.C. § 7412(r)(6)(R).

Congress would have been required either to establish a separate IG (with staff) for a micro-agency that has a budget of $9.2 million, *see* 119 Stat. at 543, and (we understand) approximately 40 employees, or to create the position of Board IG pending the next vacancy in and appointment to some other IG office. Such a choice, if not absurd, is at least counter-intuitive. We see no basis in the Appointments Clause for forcing Congress into it.

For all of these reasons, there is no violation of the Appointments Clause in Congress's provision for the position of Board IG.

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

Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime

A presidential pardon granted under Article II, Section 2 of the Constitution does not automatically expunge Judicial or Executive Branch records relating to the conviction or underlying offense.

August 11, 2006

MEMORANDUM OPINION FOR THE UNITED STATES PARDON ATTORNEY

You have asked us whether a presidential pardon granted under Article II, Section 2 of the Constitution has the effect of automatically expunging Judicial or Executive Branch records relating to the conviction or underlying offense. *See* Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Roger C. Adams, Pardon Attorney (June 1, 2005). We conclude that it does not.

I.

The Pardon Clause authorizes the President "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2. Previous opinions of this Office and of the Attorney General have extensively discussed the nature of pardons and their consequences for a wide variety of statutory disabilities. *See,* e.*g.*, *Effects of a Presidential Pardon*, 19 Op. O.L.C. 160 (1995) (concluding that a pardon precludes the Attorney General from deporting criminal aliens and removes state firearms disabilities imposed as a result of a conviction of a federal crime); Memorandum for Andrew Oehmann, Executive Assistant to the Attorney General, from Norbert Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of Pardon on Disability to Hold Federal Office* (Aug. 12, 1963); *Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Army*, 39 Op. Att'y Gen. 132 (1938) (despite pardon, convicted felon could be barred from enlisting in the Army); *Army—Enlistment—Pardon*, 22 Op. Att'y Gen. 36 (1898) (pardon did not preclude application of statute prohibiting reenlistment of soldier whose previous service had not been "honest or faithful"). As these opinions confirm, a presidential pardon removes, either conditionally or unconditionally, the punitive legal consequences that would otherwise flow from conviction for the pardoned offense. A pardon, however, does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct. A pardon, therefore, does not by its own force expunge judicial or administrative records of the conviction or underlying offense.

Chief Justice Marshall defined a presidential pardon as an act of grace that "exempts the individual, on whom it is bestowed, from the punishment the law

inflicts for a crime he has committed." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). "It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court." *Id*. at 160–61. In that sense, a presidential pardon is in contrast to a pardon by act of parliament in England, of which "a court must ex officio, take notice" because "it is considered as a public law; having the same effect on the case as if the general law punishing the offense had been repealed or annulled." *Id*. at 163.

The Executive Branch's long-held understanding of the scope of the pardon power reflects that view. In a previous opinion prepared for the Pardon Attorney, we concluded that although "a pardon removes or prevents the attachment of all consequences that are based on guilt for the offense," that "does not mean that a pardoned person cannot be held accountable for the conduct underlying the offense by a governmental entity seeking to determine suitability for a position of confidence or trust, adherence to a code of conduct, or eligibility for a benefit." *Effects of a Presidential Pardon*, 19 Op. O.L.C. at 165. This distinction between the consequences flowing from the *conviction* and those flowing from the *conduct* underlying the conviction is well established. In 1898, Attorney General Griggs opined that "whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz. that his service was not honest and faithful." *Army—Enlistment—Pardon*, 22 Op. Att'y Gen. at 39. *See also Naval Service—Desertion—Pardon*, 31 Op. Att'y Gen. 225, 227 (1918) ("An unconditional pardon abates whatever punishment flows from the commission of the pardoned offense, but can not in the nature of things eradicate the *factum* which is made a criterion of the fitness.").

In developing our views, we have endorsed the formulation that appears in Professor Samuel Williston's seminal article on pardons:

> The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualification. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915). This passage is quoted in part in *Effects of a Presidential Pardon*, 19 Op. O.L.C. at 164.

In 1963, we applied this understanding of the pardon power when confronted with the question whether a presidential pardon would lift a prohibition on holding

"any office of honor, trust, or profit under the United States" imposed as a result of a conviction under 18 U.S.C. § 281 (1952). *See Effect of Pardon on Disability to Hold Federal Office*. We concluded that although a pardon for that offense would remove the statutory disability, it "would not obliterate all reference to the past conduct of the person pardoned." *Id.* at 1. Accordingly, the pardonee would henceforth be *eligible* to hold a federal office—which he would not have been without the pardon—but would not be entitled to be considered as if he had never engaged in the criminal conduct that led to the conviction. Put simply, a pardon "does not change the past and does not do away with the facts underlying the conviction." *Id.* at 7.

Our previous opinions thus strongly suggest that a pardon does not by its own force require the expungement of all records of a criminal conviction. The one federal case addressing the nature of a presidential pardon and the resulting relationship between pardon and judicial expungement reached the same conclusion. *United States v. Noonan*, 906 F.2d 952 (3d Cir. 1990), involved an expungement motion brought by a man convicted, and later pardoned, for failing to submit for military induction. The court of appeals held that the President's pardon "does not eliminate [the] conviction and does not 'create any factual fiction' that Noonan's conviction had not occurred to justify expunction of his criminal court record." *Id*. at 960. Instead, expungement of judicial records is an extraordinary remedy, which the courts are willing to grant only where "the harm to the individual caused by the continued existence of the records" outweighs "the governmental interest in maintenance of the records." *Id.* at 957. The court reasoned that a rule granting presidential pardons the necessary effect of expunging records would be difficult, if not impossible, to square with that individualized determination.[1]

Noonan also noted the well-accepted understanding, both in the American tradition and in the English tradition from which our Pardon Clause borrows, *see Wilson*, 32 U.S. (7 Pet.) at 159–60, that although pardons relieve the offender of whatever legal disabilities would otherwise attach to the conviction, they do not simultaneously "raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted." *Noonan*, 906 F.2d at 958–60 (quoting *R. v. Foster*, 1 Q.B. 115, 129 (1984)); *see also Hirschberg v. CFTC*, 414 F.3d 679, 682 (7th Cir. 2005) ("[T]he legal effect of a presidential

[1] As you have pointed out, *Noonan*'s value as precedent may have been called into question by the Third Circuit's subsequent decision in *United States v. Dunegan*, 251 F.3d 477 (3d Cir. 2001). There, the court held that "in the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record." *Id*. at 480. The Third Circuit pointed out that because *Noonan* skipped over this threshold inquiry, the opinion does not stand for the proposition that federal courts necessarily have jurisdiction to entertain motions for expungement. *Id*. at 479. Although *Dunegan* certainly suggests that the court in *Noonan* exceeded its authority in addressing the merits of the expungement issue, it does not cast doubt on the soundness of *Noonan*'s legal reasoning.

pardon is to preclude further punishment for the crime, but not to wipe out the fact of conviction."). Most, but not all, state courts have reached a similar conclusion with respect to state pardons. *See R.J.L. v. State*, 887 So. 2d. 1268, 1278–80 (Fla. 2004) (reporting that of the nine states whose courts have considered the issue, six have concluded that a pardoned individual is *not* entitled to records expungement). The Florida Supreme Court in *R.J.L.* adopted the majority position, holding that "a pardon does not have the effect of erasing guilt so that a conviction is treated as though it had never occurred." *Id.* at 1281.

A further obstacle to observing a necessary link between pardon and disregarding the historical fact of conviction is that there appears to be no single understanding of what "expungement" means. Expungement has been defined in many ways, some overlapping and some inconsistent. An expungement order may require the physical destruction of records, *United States v. Johnson*, 941 F.2d 1102, 1111 (10th Cir. 1991), or simply be "similar to an order not to report a conviction," *United States v. Sweeney*, 914 F.2d 1260, 1262 (9th Cir. 1990). The Supreme Court has recognized that state expungement statutes vary:

> Some speak of expunging the conviction, others of "sealing" the file or of causing the dismissal of the charge. The statutes also differ in their actual effect. Some are absolute; others are limited. Only a minority address questions such as whether the expunged conviction may be considered in sentencing for a subsequent offense or in setting bail on a later charge, or whether the expunged conviction may be used for impeachment purposes, or whether the convict may deny the fact of his conviction.

Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 121–22 (1983). In short, the Court concluded, the variable uses of expungement by the States "provide nothing less than a national patchwork." *Id.*[2]

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[2] Very few federal statutes touch upon expungement. Under the Federal Sentencing Guidelines, "expunged convictions" are not counted toward a defendant's criminal history "but may be considered under § 4A1.3 (Adequacy of Criminal History Category)." U.S. Sentencing Guidelines Manual § 4A1.2(j) (2005); *see id.* § 4A1.3(a)(1). Under section 4A1.3, "if reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted." *Id*. To create uniformity in the treatment of "expunged convictions," an application note to the Sentencing Guidelines provides:

> Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, i.e., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted.

Id. § 4A1.2, cmt. n.10 (2005).

The primary support for concluding that a pardon requires expungement of all official references to the pardoned crime appears in dicta in the Supreme Court's decision in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866). Garland was an Arkansas attorney who served as a member of the Confederate Congress during the Civil War. He received a full pardon from President Lincoln for his activities, but was still barred by federal statute from practicing before the Supreme Court because he could not take the requisite oath that he had never given aid to enemies of the United States. After holding that the statute requiring the oath was an unconstitutional bill of attainder, the Supreme Court addressed the nature of a pardon:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender: and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.

Id. at 380–81. As this Office has previously explained, however, Garland's broad statement has "not been applied literally by the courts, including the Supreme Court." *Effect of Pardon on Disability to Hold Federal Office* at 5. Indeed, as the Third Circuit observed in Noonan, it was not long before the Supreme Court "made clear that it was not accepting the Garland dictum that a pardon 'blots out of existence the guilt.'" 906 F.2d at 958. The Court's decision in *Carlesi v. New York*, 233 U.S. 51 (1914), considered the effect of a pardon on a state's habitual-offender law. The Court observed that application of the law would be unconstitutional to the extent it took "into consideration a prior conviction of an offense committed by the same offender . . . despite a pardon," if it were "in any just sense a punishment for such prior crime." *Id.* at 57. In contrast, however, the Court made clear that the prior offense could be used "as a circumstance of aggravation"—and could thus lead to an enhanced penalty for a new crime—"even although for such past offenses there had been a pardon granted." *Id.* at 59. This distinction makes sense only if a pardon does not preclude consideration of the underlying offense in making subsequent decisions about the pardonee, and is incompatible with the conclusion that a pardon blots out all record of the crime.

In subsequent cases, the Supreme Court backed even further away from *Garland*'s expansive dictum. Thus, in *Burdick v. United States*, 236 U.S. 79 (1915), which addressed whether a would-be pardonee could refuse a pardon, the Court wrote that a pardon "carries an imputation of guilt; acceptance a confession of it." *Id.* at 94. This understanding seems inconsistent with *Garland*'s suggestion that a pardoned individual is made as innocent as one who never committed the crime in the first place. Similarly, Justice Holmes's observation for the Court in *Biddle v. Perovich*, 274 U.S. 480, 486 (1927), that a pardon is "the determination of the ultimate authority that the public welfare will be better served by inflicting less

than what the judgment fixed," suggests that although a pardon lessens the legal effects of a criminal judgment, it does not erase that judgment as historical fact.

II.

It follows from this analysis that pardon and expungement are distinct actions. A pardon may in some cases affect the question of expungement, but such effect will depend, among other things, on which branch of the government possesses the records. Because "the power to pardon is an executive prerogative of mercy, not of judicial record-keeping," a pardon has no immediate effect on the Judiciary or judicial records. *Noonan*, 906 F.2d at 955. For similar reasons, courts rarely order expungement of Executive Branch records: "The President, not the district court, runs the executive branch—and it is he who decides how that branch will function." *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 699 (5th Cir. 1997) ("There is no constitutional basis for a 'right to expungement'" of Executive Branch records.). The Seventh Circuit, in *United States v. Janik*, 10 F.3d 470 (7th Cir. 1993), held that a petition for expungement of Executive Branch records must be made directly to the Executive Branch because "federal courts are without jurisdiction to order an Executive Branch agency to expunge what are admittedly accurate records of a person's indictment and conviction." *Id*. at 472. The majority of circuits have found that federal courts do have the power to enter an expungement order against the Executive Branch, but even they warn "expungement should rarely, if ever, be employed by the courts against executive agencies." *Sealed Appellant*, 130 F.3d at 698.

On the other hand, an order to seal or destroy Executive Branch records may come from the President rather than the courts. The President may craft a pardon to fit particular circumstances.[3] In rare cases, Presidents have chosen to grant pardons that state the reason for granting the pardon, such as the President's conclusion that the evidence upon which conviction rested is questionable or that the pardonee is innocent of the offense.[4] Pardons that address the innocence of the

[3] For example, "the President may grant a pardon on the condition that the offender pay any court-ordered restitution imposed before the pardon was issued." *Effects of a Presidential Pardon*, 19 Op. O.L.C. at 168 n.7. On the other hand, the President can issue a pardon commonly labeled "A Full and Unconditional Pardon," which does not impose any requirements. It is the President's prerogative to pardon prior to conviction, after conviction, or only after the sentence has been served. *See id*. at 164 ("Throughout the Nation's history, Presidents have asserted the power to issue pardons prior to conviction, and the consistent view of the Attorneys General has been that such pardons have as full an effect as pardons issued after conviction.").

[4] President Lyndon Johnson prefaced a pardon by stating, "Whereas it has been made to appear to me that the said Carl Hirdler Buck was unjustly convicted of the aforesaid offense and is innocent of said charge; that he did not commit any of the acts charged; that his acts, deeds or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia; and that he did not by misconduct or neglect cause or bring about his own prosecution," a pardon "is in order." Pardon of Carl Hirdler Buck (Sept. 10, 1965). President Franklin Roosevelt prefaced a pardon with less certain language, stating that a pardon was appropriate because

pardonee have not to date also commanded expungement of Executive Branch records of the offense. If a President chose simultaneously to issue a pardon and order the Executive Branch to expunge any such records, we believe that order would have the effect intended, subject to any statutory constraints on executive record-keeping.[5] Even in that case, however, the pardon would not automatically expunge the records; it would be the President's separate expungement order that would require administrative agencies to take action.

Understood this way, a presidential pardon does not operate to erase automatically the records relating to the pardoned offense. The relevant judicial and executive records preserve an important set of historical facts concerning the individual's criminal history. Those records may describe the circumstances of the offense and the charges brought against the accused, as well as a court's ultimate disposition of the government's case. None of those facts or circumstances is automatically erased or altered by a subsequent pardon. The pardon instead eliminates any punitive consequences that would otherwise flow from the individual's guilt. But where the facts and circumstances of the underlying conduct continue to be relevant for a variety of decisions that may ultimately be made about the pardonee, the records memorializing and verifying those facts continue to exist and can help ensure that such decisions are made fairly and accurately.

In reaching this conclusion, we do not suggest that a pardon could never be relevant in determining whether to expunge Judicial or Executive Branch records. We conclude only that a pardon does not expunge such records automatically and therefore that the relevant record-keeper is not obliged by virtue of a pardon to purge its files of all references to the pardoned offense.

MICHELLE E. BOARDMAN
Deputy Assistant Attorney General
Office of Legal Counsel

"it has been made to appear to me that there is grave doubt of the guilt of the said William F. Leishear of the crime of which he was convicted." Pardon of William F. Leishear (Oct. 12, 1942).

[5] "The Attorney General shall . . . acquire, collect, classify, and preserve identification, criminal identification, crime, and other records," and shall "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, including the United States Sentencing Commission, the States, cities, and penal and other institutions." 28 U.S.C. § 534(a)(1), (a)(4) (2000 & Supp. V 2005). At least one statute simultaneously provides for the expungement of criminal records under certain circumstances and the preservation of non-public records by the Department of Justice. The non-public record is kept in part in order to foreclose a second expungement. *See* 18 U.S.C. § 3607(b) (2000) ("A nonpublic record of . . . a conviction that is the subject of an expungement order under [this section], shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in [one section] or the expungement provided in" another.).

Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement

An aspect of the proposed agreement between the United States and Canada settling various disputes regarding trade in softwood lumber products, in which duties now held by the United States would be distributed by a private foundation to "meritorious initiatives" related to, among other things, timber-reliant communities, would not violate the Government Corporation Control Act or the Miscellaneous Receipts Act.

August 22, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
UNITED STATES TRADE REPRESENTATIVE

The United States and Canada have negotiated an agreement settling various disputes regarding trade in softwood lumber products. You have asked whether one aspect of the proposed settlement, in which duties now held by the United States would be distributed by a private foundation to "meritorious initiatives" related to, among other things, timber-reliant communities, would violate the Government Corporation Control Act, 31 U.S.C. § 9102 (2000), or the Miscellaneous Receipts Act, *id*. § 3302(b). We conclude that this aspect of the settlement would not violate either statute. We express no opinion on other features of the settlement agreement.

I.

One of the disputes regarding trade in softwood lumber products involves the "Byrd Amendment" to title VII of the Tariff Act of 1930. *See* Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1549A-73 (2000) (codified at 19 U.S.C. § 1675c (2000)). That Amendment requires the Commissioner of the United States Bureau of Customs and Border Protection ("Customs") to deposit into "special accounts" in the United States Treasury "all antidumping and countervailing duties (including interest earned on such duties) that are assessed after the effective date [of the statute]" under antidumping or countervailing duty orders entered by the Commissioner. *Id*. § 1675c(e). Customs must annually distribute the duties in these special accounts to "affected domestic producers" as a "continued dumping and subsidy offset." *Id*. § 1675c(a).[1]

[1] Congress repealed the Byrd Amendment in the Deficit Reduction Act of 2005 but provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would, but for [the repeal,] be distributed under [the Byrd Amendment] shall be distributed as if [the Byrd Amendment] had not been repealed." Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006).

Several producers and exporters of softwood lumber products ("Canadian Producers") have challenged in the United States Court of International Trade the application of the Byrd Amendment to goods imported into the United States from Canada. The Canadian Producers have argued that such application violates a clear statement requirement of the North American Free Trade Agreement ("NAFTA") Implementation Act under which any amendment to title VII of the Tariff Act "shall apply to goods from a NAFTA country only to the extent specified in the amendment." 19 U.S.C. § 3438 (2000). In April 2006, the court held that "Customs has violated U.S. law, specifically a provision of the NAFTA Implementation Act in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico, 19 U.S.C. § 3438." *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1326 (Ct. Int'l Trade 2006).[2] We understand that the Canadian Producers also have challenged before a NAFTA arbitration panel the authority of the United States to collect the antidumping and countervailing duties to which the Byrd Amendment applies.

The settlement that the United States, through the Trade Representative ("USTR"), has negotiated with Canada would, among other things, terminate numerous suits in various forums regarding trade in softwood lumber products. *See generally* Draft Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America (Aug. 1, 2006) ("Settlement Agreement" or "Agreement"). The Settlement Agreement would enter into force only if the parties to the disputes identified in the Agreement execute a "Termination of Litigation Agreement," which is "a full and complete settlement of the issues raised by all of the parties." Settlement Agreement art. II; *id*. annex 2A. In addition, although the *Canadian Lumber* suit would not be terminated, the Settlement Agreement would terminate the application of the Byrd Amendment to duties involving softwood lumber products from Canada, by having the United States agree to revoke the applicable antidumping and countervailing duty orders. The United States would refund to certain "Importers of Record" (the vast majority of whom are Canadian Producers) or to their designees the funds concerning such products held in special accounts (approximately $5 billion). *Id*. art. III. According to the Agreement, most of the Importers of Record are expected to enter into escrow arrangements with the Government of Canada or its agent to sell their rights to the refunds and accrued interest to Canada in exchange for an immediate lump sum payment from Canada equal to approximately 80% of the deposits and interest. An additional $1 billion (approximately equal to the remaining 20% of the refunds) would be distributed, via the Government of Canada or its agent, to three escrow accounts identified by the United States, "whose beneficiaries are respectively": (1) "members of the Coalition for Fair Lumber Imports," (2) "a binational industry council" whose creation Canada and

[2] The court also dismissed for lack of standing the Government of Canada, which had joined the Canadian Producers as a plaintiff. *See Canadian Lumber*, 425 F. Supp. 2d at 1349–52.

the United States would encourage, and (3) "meritorious initiatives in the United States identified by the United States in consultation with Canada as described in Article XIII(A)." From that $1 billion, Canada would "distribute . . . $US 450 million for the meritorious initiatives account." *Id*. annex 2C; *see also id*. art. XIII (discussing the council and the meritorious initiatives) & annex 13.

Your question involves this "meritorious initiatives account." The Settlement Agreement generally describes as follows the uses to which the $450 million shall be put:

> The funds shall support meritorious initiatives in the United States related to:
>
> (a) educational and charitable causes in timber-reliant communities;
>
> (b) low-income housing and disaster relief; or
>
> (c) educational and public-interest projects addressing: (i) forest management issues that affect timber-reliant communities; or (ii) the sustainability of forests as sources of building materials, wildlife habitat, bio-energy, recreation, and other values.

Id. art. XIII(A)(2). Article XIII further provides that "[b]y September 1, 2006, the United States, in consultation with Canada, shall identify the meritorious initiatives to receive the funds that are to be set aside for that purpose under Annex 2C." *Id*.; *see also id*. annex 2C ("meritorious initiatives in the United States" are to be "identified by the United States in consultation with Canada as described in Article XIII(A)").

Your office has explained that the "beneficiary" of the third escrow account is not precisely "meritorious initiatives" themselves but rather a foundation that will control the "meritorious initiatives account" receiving the $450 million. The foundation will distribute these funds consistent with the three categories listed in Article XIII(A)(2).

The Settlement Agreement is silent on how the United States will identify this foundation, except to state the date—September 1—by which it should be done. Even if a later date is used in the final version of the Agreement, you expect that the deadline for identifying the foundation will predate the effective date of the Agreement, although identification of the foundation is not a condition for the Agreement to enter into force. *See* Settlement Agreement art. II. Beyond that, your office has explained to us as follows how the United States plans to proceed:

> Th[e] foundation will be established in accordance with the terms of the settlement agreement by a board of directors of non-government employees (which will include two non-voting Canadian board

> members). Those directors will also control the foundation once it is established.
>
> The directors will be chosen by a bi-partisan group of non-government employees who are identified by USTR after consultation with the Presidential Personnel Office and with interested members of Congress. Neither the bi-partisan group nor the board members selected by this bi-partisan group will receive government appointments. Neither will they be subject to direction and control by any federal official. Although the bi-partisan group will be vetted by the Presidential Personnel Office, the board members selected by this bi-partisan group will not . . . themselves be vetted by the White House or by . . . any government agency.

E-mail for C. Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, from David Apol, Office of the General Counsel, United States Trade Representative (July 28, 2006). You have since informed us that the White House Council on Environmental Quality ("CEQ") has been working with USTR in choosing the bipartisan group. Apart from the requirements quoted above—that the directors be "non-government employees," receive no "government appointments," and not be "subject to direction and control by any federal official"; and that the choice of directors not be vetted by any government agency, including the White House—there will be no restrictions on whom the bipartisan group may select as directors. You have asked whether the establishment of this foundation, and the foundation's using its portion of the settlement funds to support "meritorious initiatives," are consistent with the Government Corporation Control Act and the Miscellaneous Receipts Act. We address each statute in turn.

II.

The Government Corporation Control Act ("GCCA") provides in relevant part that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. We assume that the foundation will be "a corporation." But based on the facts described above, we conclude that it will almost certainly not be "establish[ed] or acquire[d]" by an agency; and that, even it if were, the foundation clearly will not "act as an agency." Accordingly, the GCCA does not require a specific authorizing law.[3]

[3] Neither the "bi-partisan group of non-government employees . . . identified by USTR" to choose the foundation's board of directors nor the directors themselves would be subject to the conflict of interest restrictions applicable to officers and employees in the Executive Branch. In a 2002 opinion, we summarized those laws and rules and explained that, to be subject to them, a person must be "required by law to be appointed in the civil service by [the President, a court of the United States, the

In answering this question, we rely on our extensive analysis of the GCCA in a published opinion in 2000, which in turn followed earlier, unpublished analyses from 1995 and 1990. *See Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212 (2000) ("NASA Opinion"); *see also id*. at 214 n.1 (discussing earlier opinions). With regard to the phrase "establish or acquire," we there explained that "an agency probably cannot be said, within the meaning of the [GCCA], to have established or acquired a corporation to act as an agency unless the government *holds an ownership interest or exercises legal control*." *Id*. at 215 (emphasis added; internal quotation marks omitted). We treated this rule as conclusive for the question of "acquir[ing]" a corporation, but recognized that the term "establish" was somewhat ambiguous, particularly given that, prior to a recodification, the statute had referred to establishing, creating, or organizing a corporation. *Id*. at 216 n.2. We therefore further advised that, "even where there is no such ownership or control[,] an agency should *avoid excessive government involvement* in the formation or operation of a corporation in the absence of a law authorizing the agency to do so." *Id*. at 215 (emphasis added). An agency could "*encourage* private parties to form a corporation" and "*make suggestions* about the substance of the corporate charter or by-laws," *id.* (emphases added), but should leave the corporation "free to adopt and change its charter and by-laws to the same extent as any other non-government corporation," *id*. (internal quotation marks omitted).

Applying these standards, we concluded that the National Aeronautics and Space Administration had not "acquired" a particular corporation because it "does not own stock or any other equity interest and, to our knowledge, has no representative on the corporation's Board of Directors." A mere "contractual right" of NASA "to cash payments that are determined by reference to the value of the corporation's stock"—the gain-sharing benefit in question—did not create ownership or legal control. With regard to "establish," we concluded that NASA was not "excessively" involved in the formation and operation of the corporation because the corporation was "created by private investors who have no direct or

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head of an Executive agency, or the Secretary of a military department] acting in an official capacity" or "appointed in the civil service by one of [a larger category of officials] acting in an official capacity"; (2) "engaged in the performance of a Federal function under authority of law or an Executive act"; and (3) "subject to the supervision" of a federal official. *Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service*, 26 Op. O.L.C. 32, 33 (2002). The bipartisan group would, at least, probably not satisfy the first element, and would certainly not satisfy the third. Regarding the third, we have explained that "a person . . . hired to conduct a study using his own judgment and resources and then turn over the end product to the agency . . . would probably be regarded as an independent contractor" rather than an employee. *Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee,"* 1 Op. O.L.C. 20, 21 (1977). The bipartisan group, even if it might be understood to be "turn[ing] over" to USTR its "end product" of a board of directors (a debatable proposition), would be using its own judgment and resources. Similarly, the directors themselves would, at least, not meet the first and third elements of the test set out in the 2002 opinion.

indirect association with NASA"; it "was formed without any support or encouragement from NASA"; it "adopted its by-laws and charter without any input from NASA"; and it "remains free to make its own business decisions and to change its by-laws and charter as appropriate without interference or approval by NASA." There was no "evidence of any government involvement in the company's formation or operation," even though NASA and the corporation had collaborated since the corporation's formation and the corporation depended on that collaboration. We specifically reaffirmed the permissibility of "joint activities with private corporations" by agencies, "so long as the agency acts exclusively in the interest of the United States." *Id.* at 216.

A similar analysis applies here and should lead to the same conclusions, even though the federal government will have some role in the foundation's formation. As you have explained the process, neither USTR nor any other entity of the federal government will hold an ownership interest in or exercise legal control over the foundation. No governmental entity or official will own any stock or equity interest in the foundation. Nor is the involvement of the United States in the foundation's formation "excessive." Although USTR (and CEQ) are arguably more involved initially in the foundation's creation than NASA was with the corporation in our NASA Opinion, their role is limited to choosing the bipartisan group that will in turn select the foundation's board of directors. They will have no control over whom the bipartisan group selects and no control over the directors once the group has selected them; the bipartisan group even would be free to select themselves as the initial directors so long as the group in fact made this decision independently of any governmental direction (whether from USTR, CEQ, or others)—such that the United States could not be said to have named the directors and thereby itself organized the foundation. Finally, under our NASA Opinion governmental involvement in not only the "formation" but also the "operation" of a corporation is relevant, and here the directors in operating the foundation would remain free to adopt and change the foundation's charter and by-laws (including revising the board itself) to the same extent as any other non-government corporation and to make its own business decisions. Based on these facts, USTR's involvement should be understood as encouraging the formation of the corporation through selection of the bipartisan group. As indicated in the NASA Opinion, we have approved at least this much involvement. The role of the Presidential Personnel Office in consulting on the selection of the bipartisan group is even more distant and does not raise any additional issue.

Although we thus think that the better view is that no agency will "establish or acquire" the contemplated foundation, we need not answer that question definitively here, because the foundation clearly will not "act as an agency." This is a separate, additional requirement (albeit one that is related and somewhat overlapping analytically) for the GCCA to apply, and it is not met here. Again we follow our NASA Opinion, as well as a subsequent analysis that reaffirmed this aspect of

the NASA Opinion. *See Status of National Veterans Business Development Corporation*, 28 Op. O.L.C. 70, 76–78 (2004) ("NVBDC Opinion").

The term "agency" for purposes of title 31, of which the GCCA is a part, is defined as "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101 (2000). In our NASA Opinion, we explained: "In common usage, an instrumentality is a thing through which a person or entity acts. The term implies both [1] that the thing is *controlled* by another actor and [2] that the thing is or may be deliberately *used* to accomplish the actor's objectives." 24 Op. O.L.C. at 218–19 (emphases added; internal quotation marks omitted). Based on this understanding, as well as the usage of the term "instrumentality" in other legal contexts, we have used a four-factor test "in deciding whether a corporation is a government instrumentality": (1) "whether the entity was created by the government"; (2) "the extent of government control over its operations"; (3) "the purposes for which it was created and the functions it performs"; and (4) "the source of the entity's funding." *Id*. at 219. The final factor "is more important here than it might be in other contexts," because "the purpose of the [GCCA] was to assert greater federal dominion over the financial affairs of entities controlling federal funds." *Id*. at 219 n.4 (internal quotation marks omitted). *See also* NVBDC Opinion, 28 Op. O.L.C. at 76–77 (reiterating and applying four-factor test to the first use of the term "agency" in the GCCA).

In the NASA Opinion, we concluded that the corporation in question did not "act as an agency" because (1) it was "created by private individuals who are not associated with NASA"; (2) "NASA owns no part of [the corporation] and exercises no control over its operations"; (3) the corporation "was not formed for NASA's exclusive benefit, nor to carry out any statutory function delegated to the agency by Congress"; and (4) the corporation "is funded by private sources, not funds drawn from the federal Treasury or other federal assets." 24 Op. O.L.C. at 220–21. By contrast, in our NVBDC Opinion, we determined that the National Veterans Business Development Corporation was an "agency," and thus subject to the GCCA, because it (1) was "created by the government" (namely, by statute); (2) was subject to "a considerable degree of control" by the government (the voting members of its board being appointed by the President and the non-voting members being Executive Branch officers); (3) was established "to perform functions on behalf and for the benefit of the United States" (providing various statutorily mandated services to veterans); and (4) "receives federal appropriations, even as it seeks to develop private sources of funds." 28 Op. O.L.C. at 77–78 (quotations omitted).

Under that analysis, it is clear that the foundation will not "act as an agency" within the meaning of the GCCA. First, largely for the reasons given above with regard to the question of acquiring or establishing a corporation, the foundation is not going to be "created by the government." Unlike with the NVBD Corporation, the foundation is not being created by statute (or even by the Settlement Agree-

ment). In the NASA Opinion, we found the first factor not satisfied because the corporation "was created by private individuals who are not associated with NASA," even though it was "formed in response to NASA's published notice of its intent to enter collaborative . . . commercial agreements with private business partners." 24 Op. O.L.C. at 220. Similarly, here, as described above in Part I, the bipartisan group that selects the foundation's directors will be "non-government employees"; neither the group nor the directors "will receive government appointments"; "neither will they be subject to direction and control by any federal official"; and the choice of directors will not be vetted by any federal entity. You have not expressly stated that the directors too will be non-government employees, but that is implicit in their receiving no government appointments, not being subject to federal direction or control, and not being vetted. Although, much as with the corporation at issue in the NASA Opinion, the foundation would not be formed but for some governmental action, and the government could prevent its creation by not proceeding with the settlement (as could Canada and others), "but for" governmental involvement does not equal *creation by* the government.

Second, for the reasons discussed above with regard to ownership, legal control, and involvement in operations, the extent of any governmental control over the foundation's operations after its establishment appears negligible at most.

Third, the purpose of the foundation is not to perform functions on behalf of and for the benefit of the United States. In contrast with the NVBD Corporation, here no statutory mandate or purpose is at issue. In the NASA Opinion, even though NASA would benefit from the collaborative agreement with the corporation, we found this factor not satisfied because the corporation was "not formed for NASA's exclusive benefit, nor to carry out any statutory function delegated to the agency by Congress." 24 Op. O.L.C. at 221. Similarly here, the foundation's purpose is to receive funds over which the United States disclaims any ownership interest (because of the Byrd Amendment) and to disburse these funds for the benefit of private entities. The United States may indirectly benefit only because the foundation's establishment provides one of the many pieces of a comprehensive settlement in which it has an interest, but this incidental benefit—which also accrues to Canada and all of the other entities who settle their suits as part of the Agreement—does not amount to a governmental function or purpose.

Finally, although the proper way to characterize the source of the foundation's funding is not beyond dispute—the ownership of those funds is one of the matters to be resolved—for purposes here it is best characterized as funding from private entities, not the United States. The United States has never asserted a claim to the $450 million held in the special accounts that will eventually reach the foundation, and the immediate source from which the foundation will receive those funds will not be the United States but rather the Government of Canada, as explained above in Part I. In addition, and in contrast to the NVBD Corporation, the foundation will receive no appropriated funds. The one countervailing fact is the decision of the

Court of International Trade in *Canadian Lumber*, which could lead to the duties held pursuant to the Byrd Amendment reverting to the General Fund of the Treasury. Thus, one could say that, in some sense, the United States has a claim on the money that will fund the foundation. But the United States disagrees with this view, and thus disclaims any interest in the funds; in addition, pursuant to the NAFTA arbitration noted above in Part I, there also is a question whether the United States had authority even to collect the duties, and we understand that the United States foresees a low probability of success in that forum. In nearly every respect, the strongest claims to the money in the special accounts are those of private parties—either the Canadian exporters or the domestic producers. Under those facts, there is little if any basis for considering the $450 million to be "federal funds," *see* NASA Opinion, 24 Op. O.L.C. at 219–20 & n.4, for purposes of the GCCA.

Thus, not only is the foundation not being acquired or established by the federal government, but it also will not be acting as an agency of the federal government. For both of these reasons, the foundation is not subject to the GCCA.

III.

The Miscellaneous Receipts Act ("MRA") requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This provision constrains the government's ability to enter into settlements involving payments not made into the General Fund of the Treasury. In 1980, we said that it would violate the MRA for the United States to settle a suit it had brought against a polluter by requiring the polluter to donate money to an environmental organization designated by the government, rather than pay a penalty. Under the MRA, "[t]he fact that no cash actually touches the palm of a federal official is irrelevant . . . if a federal agency [1] could have accepted possession and [2] retains discretion to direct the use of the money." *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980).

To avoid the government's constructively "receiving money for the Government" through a settlement, we have consistently advised that (1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement. *See, e.g.*, Memorandum for the Files, from Rebecca Arbogast, Attorney-Adviser, Office of Legal Counsel, *Miscellaneous Receipts Act and Criminal Settlements* (Nov. 18, 1996) (advice transmitted to U.S. Attorneys' offices). If these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be "receiving money for the Government." In our 1980 opinion,

for example, we recommended a restructured settlement "that attributes the entire sum of money received to our co-plaintiff, the Commonwealth of Virginia," which had "an independent claim to these damages" and an independent right to compensation for oil spills. "If the damages are received and directed to a charity by the state plaintiff, [the MRA] would not be implicated." 4B Op. O.L.C. at 688–89.

In the ordinary settlement implicating the MRA, the United States has brought a claim against a private party for funds in the form of damages or penalties. Here the reverse is the case. Although the same general principles under the MRA apply notwithstanding this difference, we find no violation in the planned arrangement for the foundation.

Initially, it is doubtful that the United States, even though having physical custody of the special accounts under the Byrd Amendment, "could . . . accept[] possession" of those funds "for the Government," such that the MRA would create an issue. As explained above in Part II, the United States disclaims any interest in the funds, and the strongest claims are those of private parties. The real issue in dispute is to whom the United States should give the funds—to private American parties pursuant to the Byrd Amendment, or to the Canadian Producers as a refund pursuant to federal law, *see, e.g.*, 19 U.S.C. § 1673f (2000) (permitting the "refund[s]" of duties that were improperly assessed). Just as there is little if any basis for considering the $450 million to be federal funds for purposes of the GCCA, so also here, and by analogy to our 1980 opinion, there is little basis for attributing any of the $450 million to the United States. Nevertheless, because it is conceivable—if the Court of International Trade decision is not appealed or is affirmed, and the United States wins the NAFTA arbitration—that the special account funds could become United States funds, it is prudent, as you have recognized, to analyze under the MRA's requirements the provisions for the $450 million pursuant to the Agreement.

Here, the arrangement for the foundation and the transfer of the $450 million would easily satisfy both of the MRA's requirements. First, we understand that the Settlement Agreement would be executed before any party admits liability—and certainly before the United States claims or is conceded any right to the funds. Second, no governmental agency will exercise any control of the funds after the settlement has been executed, because the foundation and any further detail regarding "meritorious initiatives" will be "identified" by the United States prior to execution, as we explained above in Part I (in light of the MRA, you should ensure that this occurs); the foundation's directors will control the foundation; and the directors will not be subject to direction and control by any federal official.

A separate but related question is the relevance of decisions of the Comptroller General determining that agencies did not have authority to require violators owing penalties to the Government to fund research projects in lieu of paying the penalties into the Treasury. *See* Letter for John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House

of Representatives, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1); Letter for John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, B-247155, 1992 WL 726317 (Comp. Gen. Jul. 7); *Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 70 Comp. Gen. 17 (1990) ("NRC Opinion"). In those decisions, the Comptroller General read the agency's statutory authority to "compromise" or "mitigate" monetary penalties owed to a governmental agency as "not empower[ing] [the agency] to impose punishments unrelated to prosecutorial objectives," such as "contribut[ing] funds to an institution that . . . has no relationship to the violation and has suffered no injury from the violation." *E.g.*, NRC Opinion, 70 Comp. Gen. at 19. A broader interpretation, he explained, would permit the agencies to augment their appropriations by funding pet projects, and would therefore "require us to infer that the Congress intended to allow [the agencies] to circumvent 31 U.S.C. § 3302 and the general rule against augmentation of appropriations." *Id.*

These decisions are inapposite here. First, given the posture of the suits to be settled—involving the atypical scenario of the United States being a defendant and acting pursuant to longstanding refund authority regarding customs duties—there is no issue here of the scope of the authority of the United States to "compromise" or "mitigate" civil penalties. Second, the MRA does not apply here, for the reasons given above. There is thus no issue of a possible statutory exception to the MRA.

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

Jurisdiction of Integrity Committee When Inspector General Leaves Office After Referral of Allegations

The Integrity Committee has authority to review, refer for investigation, and report findings with respect to administrative allegations of wrongdoing made against a former Inspector General when the Committee receives the allegations during the subject's tenure as Inspector General, even if the subject later leaves office.

September 5, 2006

MEMORANDUM OPINION FOR THE CHAIRMAN OF THE INTEGRITY COMMITTEE OF THE PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY

You have asked us whether the Integrity Committee of the President's Council on Integrity and Efficiency ("Integrity Committee" or "Committee") has authority to review, refer for investigation, and report findings with respect to administrative allegations of wrongdoing made against a former Inspector General ("IG"), when the Committee received the allegations during the subject's tenure as Inspector General and the allegations relate to actions taken while in office. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Chris Swecker, Chairman, Integrity Committee, President's Council on Integrity and Efficiency at 3 (Oct. 24, 2005) ("Referral Letter"). We conclude that the Committee has continuing authority with respect to allegations the Committee received while the subject of the allegations was serving as Inspector General, even if the subject leaves office after receipt of those allegations.

I.

The President's Council on Integrity and Efficiency ("Council" or "PCIE"), as established by Executive Order 12301 in March 1981, consisted of specified Inspectors General and other federal officials. 3 C.F.R. 144 (1981 Comp.). In a May 1992 executive order, the President expanded the membership of the Council to include all presidentially appointed Inspectors General and other government officials. Exec. Order No. 12805, 3 C.F.R. 299 (1992 Comp.). In the same order, the President established the parallel Executive Council on Integrity and Efficiency ("ECIE"), which includes all "civilian statutory Inspectors General not represented on the PCIE." *Id.* § 2(b)(2). The Deputy Director for Management of the Office of Management and Budget is the Chairperson of both groups. Originally, the PCIE and ECIE were charged with developing plans to help eliminate waste and fraud in governmental programs, assisting in the establishment of a corps of effective Inspector General staff members, and related matters. Exec. Order No. 12301, § 2; Exec. Order No. 12805, § 3. Later, the Chairperson of the

PCIE and ECIE established the Integrity Committee as a component of the two councils composed of certain Council members. Referral Letter at 2.

In 1996, the President expanded the authority and mandate of the Councils to undertake investigative functions through the Integrity Committee. Exec. Order No. 12993, 3 C.F.R. 171 (1996 Comp.). Executive Order 12993 authorizes the Integrity Committee to address certain "administrative" (i.e., non-criminal) allegations[1] against Inspectors General, as well as administrative allegations against staff members of an Office of Inspector General ("OIG") whose investigation might pose a conflict of interest for the OIG in which they serve. *Id.* pmbl. The order directs that the Integrity Committee, "[t]o the extent permitted by law, and in accordance with this order, . . . shall receive, review, and refer for investigation allegations of wrongdoing against IGs and certain staff members of the OIGs." *Id.* § 1(a). The order directs that the Integrity Committee "shall review all allegations of wrongdoing it receives against an IG who is a member of the PCIE or ECIE, or against a staff member of an OIG acting with the knowledge of the IG or when the allegation against the staff person is related to an allegation against the IG." *Id.* § 2(a).[2] Once an allegation is received, the Integrity Committee is required to "determine if there is a substantial likelihood that the allegation . . . discloses a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds or abuse of authority." *Id.* § 2(c). If the Integrity Committee determines that an allegation "does not warrant further action, it shall close the matter" and notify the Chairperson of the PCIE/ECIE of its determination. *Id.* § 2(d). If the Integrity Committee determines that the allegation meets that standard, however, it must take one of two actions. Ordinarily, the Committee "shall refer the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." *Id.* § 2(c). If, however, "a potentially meritorious administrative allegation cannot be referred to an agency of the executive branch with appropriate jurisdiction over the matter, the Integrity Committee shall certify the matter to its Chair, who shall cause a thorough and timely investigation of the allegation to be conducted in accordance with this order." *Id.*

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[1] The Integrity Committee has defined "administrative misconduct" to mean "noncriminal misconduct, or misconduct the Public Integrity Section declines to pursue on a criminal basis, that evidences a violation of any law, rule, or regulation; or gross mismanagement; gross waste of funds; or abuse of authority, in the exercise of official duties or while acting under color of office." Policy and Procedures for Exercising the Authority of the Integrity Committee of the President's Council on Integrity and Efficiency at 7 (Nov. 5, 2004) ("Policy and Procedures").

[2] The order also directs Inspectors General to "refer" administrative allegations against "senior staff member[s]" to the Committee when "review of the substance of the allegation cannot be assigned to an agency of the executive branch with appropriate jurisdiction over the matter" and the Inspector General "determines that an objective internal investigation, or the appearance thereof, is not feasible." Exec. Order No. 12993, § 2(b).

Executive Order 12993 authorizes the Director of the FBI, through his designee, who serves as Chairperson of the Integrity Committee, to "consider" administrative allegations and "where appropriate, to investigate" them. At the request of the Chairperson, federal agencies may detail personnel to the Committee, including personnel from various OIGs, who will be "subject to the control and direction of the Chairperson, to conduct an investigation." *Id.* § 3(b). At the conclusion of the investigation, a report is to be issued to the Integrity Committee (either by the Chairperson or, if the matter was referred for investigation to an agency, the head of that agency). *Id.* § 4. Reflecting the fact that an Inspector General is supervised by the head of the agency in which he serves, *see* 5 U.S.C. app., Inspector General ("IG") Act § 3(a) (2000 & Supp. III 2003), the Chairperson of the PCIE/ECIE may disseminate such a report to the head of the agency employing the subject for possible adverse action. Exec. Order No. 12993, § 4(d). The agency head must then certify to the Chairperson that he has personally reviewed the report and indicate what action (if any) has been taken and what further action is being considered. *Id.*

You have informed us that the Integrity Committee received allegations regarding a sitting Inspector General and initiated the procedures contemplated by Executive Order 12993. Because the Committee has jurisdiction over only non-criminal allegations, the Committee, following its written procedures, first referred the allegations to the Public Integrity Section of the Department of Justice's Criminal Division. The Public Integrity Section declined to pursue a criminal investigation and returned the matter to the Committee.[3] The Committee then determined that there was a "substantial likelihood that the allegations disclose a gross waste of funds or abuse of authority." Referral Letter at 3. Based on that determination, the Integrity Committee referred the matter for investigation by the Inspector General of another agency. Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Chris Swecker, Chairman, Integrity Committee, President's Council on Integrity & Efficiency at 1 (Dec. 19, 2005).[4]

[3] The Integrity Committee's written procedures establish this initial referral procedure in order to sort criminal allegations from the non-criminal matters over which the Committee has jurisdiction. *See* Policy and Procedures at 6–7. If the Department of Justice declines prosecution, the Committee makes a determination regarding whether further investigation is warranted pursuant to section 2(c) of the Order. *See id*.

[4] A few weeks after being notified that the Integrity Committee had referred the allegations to another agency's IG, the subject of the investigation formally requested that the Integrity Committee refer the matter to a different agency's IG for investigation. The Committee granted that request shortly after the subject of the investigation left office. E-mail for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from William Corcoran, Public Integrity Section, Criminal Division (Apr. 17, 2006).

Nearly three months after the Committee made its "substantial likelihood" determination and referred the matter for investigation, the Inspector General whose conduct is at issue left office. *See* E-mail for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from William Corcoran, Public Integrity Section, Criminal Division (Mar. 21, 2006) ("Corcoran E-mail"). The Committee has asked this Office for an opinion on whether it may continue to pursue administrative allegations against the former Inspector General based on allegations of wrongdoing that allegedly occurred (and that the Committee received) while the subject of the investigation was in office.[5] Referral Letter at 3.

II.

The Constitution vests the President with "[t]he executive Power" of the United States, U.S. Const. art. II, § 1, and enjoins him to "take Care that the Laws be faithfully executed." *Id.* § 3. To assist the President in the discharge of his duties, the Constitution authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Officers of the United States," and authorizes the President, acting alone, to appoint "such inferior Officers," as Congress specifies. *Id.* § 2. Although the Constitution is silent about the President's authority to remove those whom he has appointed, the Supreme Court has held that ordinarily, "the power of appointment carrie[s] with it the power of removal." *Myers v. United States*, 272 U.S. 52, 119 (1926); *see also id.* at 164 (noting President's "general administrative control of those executing the laws"); *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (explaining that the President, at least to some degree, must be able "to control or supervise" Executive Branch personnel in order to discharge his constitutional duty to take care that the laws are faithfully executed). "The reason for the principle is 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." *Myers*, 272 U.S. at 119. As the Court has explained, "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122.

By the same token, the Constitution gives the President the "inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance." *Procedures for Investigating Allegations Concerning Senior Administration Officials*, 6 Op.

[5] This memorandum does not address whether the Integrity Committee would have authority to act when an IG leaves office before the Committee receives any allegations about that person's conduct in office.

O.L.C. 626, 628 (1982) ("*Senior Administration Officials*"). Even in the absence of any congressional authorization, therefore, the President may investigate allegations of misconduct and other lesser forms of inefficiency or infidelity by Executive Branch officers and employees. *See* Memorandum for the Attorney General, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Authority of the Federal Bureau of Investigation to Undertake Non-Criminal Investigations of the Inspectors General* at 3 (May 26, 1993) ("Koffsky Memorandum"). Because "each Inspector General ultimately is responsible to the President" and "each is subject to removal by the President," *id.* at 4 (citing 5 U.S.C. app., IG Act § 3(b)), "the President may take the actions necessary to investigate allegations of non-criminal misconduct by Inspectors General as an incident of his authority as head of the Executive Branch." *Id.*

The President's authority to "oversee the performance of . . . appointees in office"—and specifically, the authority to investigate them—may be delegated. *Senior Administration Officials*, 6 Op. O.L.C. at 631 & n.13. *See generally* Memorandum from Office of Legal Counsel, *Re: President's Authority to Delegate Functions* at 3 (Jan. 24, 1980) (concluding that the President generally has the inherent authority to delegate the performance of functions vested in him to the extent "reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of the government"). Executive Order 12993 delegates to the Integrity Committee part of the President's inherent authority, the power to receive and investigate allegations of non-criminal wrongdoing by Inspectors General (and, under certain circumstances, OIG staff members). While the authority to investigate Executive Branch officials presumably can be created or supplemented by statute, *see generally Morrison v. Olson*, 487 U.S. at 695–96, we are aware of no statute investing the Integrity Committee with such authority.[6] Rather, the Integrity Committee's investigative power is

[6] The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1001 (codified at 5 U.S.C. app. (2000 & Supp. III 2003)) ("IG Act"), does not vest the Integrity Committee with authority to conduct investigations; indeed, Inspectors General and OIG personnel have only limited statutory authority to investigate allegations outside their agencies on a detail basis. We noted in our 1982 opinion that "the Inspector General Act authorizes an Inspector General and his staff to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency or department in which the Office is located." *Senior Administration Officials*, 6 Op. O.L.C. at 629. *See generally* 5 U.S.C. app., IG Act § 4(a). We explained that "funds appropriated for the activities of an Office of Inspector General in one agency would ordinarily not be available to conduct an investigation into allegations of misconduct by personnel in another agency." 6 Op. O.L.C. at 629. Thus, we concluded that "[t]here is no authority under the Inspector General Act, or under any appropriations act of which we are aware, for an Assistant Inspector General for Investigations, or any member of an Inspector General's staff, to conduct investigations which do not 'relate to' the 'programs and operations' of the agency in which he is employed." *Id*. at 629 n.9. We noted, however, that personnel in one agency's Office of Inspector General "might lawfully be directed by his

entirely a product of Executive Order 12993. It therefore has only such authority to investigate that is granted by that order. *See Senior Administration Officials*, 6 Op. O.L.C. at 628–29.

Soon after the creation of the President's Council on Integrity and Efficiency, this Office made clear that (in the absence of a legislative enactment) a presidential delegation was the exclusive potential source of authority to investigate Inspectors General and OIG staff members. *See id.* at 628–30. In 1982, this Office evaluated a PCIE proposal to have "non-criminal allegations" of wrongdoing by Inspectors General referred to the PCIE for initial consideration and potential investigation. *Id*. at 627. We concluded that, while one provision of the executive order creating the PCIE "might be interpreted to authorize the Council to develop procedures to investigate misconduct by Inspectors General," *id.* at 629 n.7, that order had not provided to the PCIE any explicit authority to coordinate or to conduct investigations of Inspectors General. *See* Exec. Order No. 12301 (authorizing the PCIE to develop policy proposals for streamlining government and eliminating waste, but not mentioning the power to investigate). We could not "construe [the order] . . . to bestow authority on the Council actually to conduct such investigations," because "[s]uch a delegation of substantive presidential authority to an agency *not otherwise authorized to engage in such activities* would, in our view, have to be explicit." 6 Op. O.L.C. at 629 n.7 (emphasis added). Because the executive order was not explicit, we concluded that it "does not accomplish such a delegation." *Id.* at 628–29. Since then, the President explicitly delegated some investigatory authority to the Committee in Executive Order 12993, and so it is no longer the case that the Committee is "not otherwise authorized to engage in such activities." *Id.* at 629 n.7.

The sole mechanism that Executive Order 12993 provides for the Integrity Committee to obtain jurisdiction over allegations is through the referral of those allegations to the Committee under section 2 of that order. It states:

> The Integrity Committee shall review all allegations of wrongdoing it receives against an IG who is a member of the PCIE or ECIE or against a staff member of an OIG acting with the knowledge of the IG or when the allegation against the staff person is related to an al-

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own agency to investigate . . . allegations against another Inspector General on a detail basis." *Id*. at 629–30 & nn. 10–11.

Nor does the FBI have statutory authority to conduct investigations of administrative allegations. We concluded in a 1993 opinion that 28 U.S.C. § 533, which authorizes the Attorney General to direct the FBI to "conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General," did not permit him "to direct the FBI to conduct investigations of non-criminal misconduct by the Inspectors General." Koffsky Memorandum at 1. We noted, however, that "the President may direct the FBI to undertake investigations into non-criminal allegations against the Inspectors General." *Id*. at 5.

> legation against the IG, except that where an allegation concerns a member of the Integrity Committee, that member shall recuse himself from consideration of the matter.

Exec. Order No. 12993, § 2(a).

The language of section 2(a) does not itself clearly indicate whether, for the Integrity Committee to have jurisdiction, the IG must be a member of the PCIE or ECIE only at the time allegations are received or whether the IG must still be serving at some later point when the allegations are reviewed for the Integrity Committee to exercise jurisdiction over allegations. Other language in section 2 is more illuminating. Section 2(c) states that "[t]he Integrity Committee *shall determine* if there is a substantial likelihood that the allegation, *referred to it* under paragraph[] (a) . . . of this section, discloses a violation of any law" or other misconduct or abuse "and *shall refer* the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." (Emphases added.) Allegations that the Integrity Committee receives against a then-sitting IG are properly understood to be "referred to" it when they are received. *See The American Heritage College Dictionary* 1146–47 (3d ed. 1997) ("refer" means, among other things, "[t]o submit (a matter in dispute) to an authority for arbitration, decision, or examination"); *Webster's Third New International Dictionary* 1907 (1993) ("to send or direct for treatment, aid, information, decision"). The mandatory language of section 2(c) indicates that the Integrity Committee's obligation to make a determination of probable merit—and to refer potentially meritorious allegations for investigation—arises when an allegation against a then-sitting IG is "referred to it under paragraph[] (a)." The unqualified, expansive, and mandatory language of the first half of section 2(a) ("*shall* review *all* allegations of wrongdoing it receives"), together with the language of section 2(c), thus indicates that the relevant decision point is the time of receipt. Executive Order 12993 is thus most naturally read to permit the Integrity Committee to retain jurisdiction over allegations against an IG who is a member of the PCIE or ECIE at the time of the allegations' receipt, even if he leaves office soon afterwards. In addition, sections 2(c) and 2(d) explicitly establish a mechanism for disposing of allegations that the Integrity Committee determines not to be "potentially meritorious"; the failure explicitly to provide for disposing of allegations involving a subject who is no longer a member of the PCIE or ECIE could reasonably be interpreted as an indication that the Integrity Committee is obligated to assess the likely merits of all allegations that it properly receives under section 2(a).

There is also another basis for concluding that the Integrity Committee retains jurisdiction in this matter. We understand that the Inspector General who is the subject of the Committee's pending investigation remained a member of the PCIE for nearly three months after the Committee made its determination that the allegations against him likely had merit under section 2(c) of the order and referred them for investigation. *See* Corcoran E-mail. The order provides without

qualification that if the Integrity Committee determines there is a "substantial likelihood that the allegation" has merit, it "*shall refer* the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." Exec. Order No. 12993, § 2(c) (emphasis added). Thus, under the mandatory language of the order, once the Integrity Committee determined that there was a "substantial likelihood that the allegation[s]" against the then-sitting member of the PCIE had merit, the Committee was authorized—indeed, obligated—to refer the allegations for investigation. The remaining terms of the delegation likewise speak in mandatory and unqualified terms, directing specific actions with respect to any allegations the Committee has referred for investigation. *See, e.g.*, *id.* § 4(a) ("The report containing the results of the investigation conducted under the supervision of the Chair of the Integrity Committee shall be provided to the members of the Integrity Committee for consideration."), *id.* § 4(b) ("the head of an agency" receiving allegations for investigation "shall provide a report to the Integrity Committee"), *id.* § 4(c) ("The Integrity Committee shall assess the report received under [section 4](a) or (b) . . . and determine whether the results require forwarding of the report, with Integrity Committee recommendations, to the Chairperson of the PCIE/ECIE for resolution."), *id.* § 4(e) ("The Chairperson of the PCIE/ECIE shall report to the Integrity Committee the final disposition of the matter."). The language of the order does not suggest that a potentially meritorious allegation would not be investigated because the subject of the allegation departs after the Committee has made its determination of likely merit and referred the matter for investigation. Accordingly, we conclude that an Inspector General's departure after a determination of likely merit and referral under section 2(c) does not divest the Committee of authority over pending allegations.[7]

Some provisions of Executive Order 12993 might be read to suggest that, even if the Integrity Committee properly received allegations against an Inspector General then serving on the PCIE, it loses the authority to initiate an investigation upon the subject's departure from that post. For example, section 1(a) of the order provides that "the Integrity Committee shall receive, review, and refer for investigation allegations of wrongdoing against IGs"; section 3(a) likewise provides that the Chairperson of the Integrity Committee "is authorized and directed to consider and, where appropriate, to investigate administrative allega-

[7] Although it presents a closer question, for similar reasons, we believe that the Integrity Committee would have authority to receive new allegations after an Inspector General has left office, if those allegations are related to matters that the Committee already had properly received under section 2(a), or if they are related to allegations for which there already has been a determination of probable merit under section 2(c). Executive Order 12993 contemplates that an investigation will be conducted of potentially meritorious allegations the Committee has properly received. *Id.* §§ 1(a), 2(b)(2), 2(c). The order appears to contemplate that any such investigation will be "thorough and timely." *Id*. § 2(c). It is reasonable to conclude that a "thorough" investigation would consider new allegations related to the original referral that came to the attention of investigators during the course of their inquiry.

tions against the IGs," and the term "the IGs" might be read to include only current Inspectors General. However, the term "IGs," when not used in conjunction with language suggesting the term applies only to incumbents, easily could be read to include a person who was being investigated for actions taken while serving as Inspector General, even if he had since left that post. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341–45 (1997) (concluding that term "employees" in 42 U.S.C. § 2000e-3(a) includes former employees); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 6 (1st Cir. 1998) (holding that agency reasonably concluded that term "employees" in Family and Medical Leave Act includes former employees; "absent an express 'temporal qualifier,' such as 'current,' Congress' use of the word 'employees' does not inherently exclude former and prospective employees") (internal citation omitted); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 330–31 (D.C. Cir. 1991) (holding that term "employees" in Age Discrimination in Employment Act includes former employees). Although we do not give this factor determinative weight, the conclusion that the Integrity Committee could continue to oversee an investigation after receipt of allegations (and after a determination of probable merit) is consistent with the stated purposes of Executive Order 12993, which include "to ensure that administrative allegations against IGs . . . are appropriately and expeditiously investigated and resolved." *Id.* pmbl. If the Committee were required to relinquish jurisdiction over a matter even after the Committee had "review[ed]" the allegations, *id.* § 2(a), and "determine[d]" that that there is a substantial likelihood that they have merit, *id.* § 2(c), the subject of an investigation could both potentially delay the investigation and affect the choice of investigating authority through the timing of his resignation. Unnecessary cost and delays could result if another investigative authority were required to begin the investigation anew after substantial progress already had been made under the auspices of the Integrity Committee. Although, as noted below, conflict of interest concerns may be obviated by the Inspector General's departure, under such circumstances, interests in efficiency would counsel in favor of the Committee's retaining jurisdiction over the matter until its conclusion.

Other provisions of Executive Order 12993 also might be read to permit the Committee to exercise jurisdiction only over investigations involving sitting IGs. Section 4(d) provides for an agency head to supply certain information "[w]here the Chairperson of the PCIE/ECIE determines that dissemination of the report to the head of the subject's employing agency or entity is appropriate." Section 4(e) provides that "[t]he Chairperson of the PCIE/ECIE shall report to the Integrity Committee the final disposition of the matter, including what action, if any, has been or is to be taken by the head of the subject's employing agency or entity." One might argue that the references to "the head of the subject's employing agency or entity" suggest that the order contemplates that the subject of the investigation would still be serving in the government. We do not believe those provisions provide sufficient basis for limiting the scope of the Committee's authority to persons still serving as Inspectors General. Neither of those two

provisions purports to apply in every case; one simply provides for dissemination of a report to the head of the subject's employing agency *if* doing so "is appropriate," and the other simply requires a report of what action "if any" has been or is to be taken by the head of that agency. Thus, neither provision suggests that in all instances the person being investigated must still be employed by a government agency for the investigation to go forward.

While the departure of an Inspector General after allegations are referred does not affect the authority of the Integrity Committee to oversee the investigation, it very well may affect decisions that the Committee makes with respect to the investigation. For example, if the Committee determines "there is a substantial likelihood that" an allegation it has received has merit, it is required to "refer the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." Exec. Order No. 12993, § 2(c). The Inspector General's office where the subject served may have been disqualified from being the "appropriate jurisdiction" to receive the investigation while the subject was in office. The departure of the Inspector General who is the subject of the investigation may well remove that disability so that "the agency of the executive branch with appropriate jurisdiction over the matter," *id.*, is the agency where the subject previously served as Inspector General. Which agency or agencies may have "appropriate jurisdiction" over the current investigation is not a question presented by your request, however, and so we do not resolve the issue here.

III.

For the reasons discussed above, we conclude that under Executive Order 12993, the Integrity Committee has authority to pursue allegations that it receives against an incumbent Inspector General, even if the subject of the investigation then leaves office.

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Applicability of the Miscellaneous Receipts Act to Personal Convenience Fees Paid to a Contractor by Attendees at Agency-Sponsored Conferences

"Personal convenience" fees that attendees at agency-sponsored conferences pay to private contractors are not subject to the Miscellaneous Receipts Act.

November 22, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

Many agencies, including within the Department of Commerce, host public conferences where agency officials can exchange ideas and information with peers outside the agency on topics relating to the agency's statutory mission. Often the agencies hire a private contractor to help plan and administer these conferences. The contractor may collect fees from conference attendees to cover its costs of providing certain goods and services to the attendees. You have asked whether these fees are subject to the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b) (2000). We conclude that they are not.

I.

In sponsoring a conference, you have explained, it is common for an agency to hire a contractor, paid out of appropriated funds, to manage logistics. It also has been common for agencies to authorize such a contractor (1) to provide meals, lodging, refreshments, and other goods and services to conference attendees and (2) to charge the attendees a "personal convenience" fee to cover the costs of these items. You distinguish the fees collected under such a scenario from fees that a contractor might collect for the agency, to cover the agency's costs in hosting the conference.[1] Agencies within the Department of Commerce have generally had little if any say in the amount of any fee. Sometimes, they have required the contractor to make food available to conference attendees and have retained the right to some input to ensure against lavish arrangements or excessive charges that would discourage attendance, but otherwise they have left the contractor free to deal directly with the attendees. Any fees are collected at the discretion of the contractor, not at the direction of the government.

[1] Whether an agency could pay the cost of personal convenience items from its appropriations is a separate question, which we do not address. As you recognize, 31 U.S.C. § 1345 forbids an agency in many cases from using an appropriation for "travel, transportation, and subsistence expenses for a meeting." *See generally Use of Appropriations to Pay Travel Expenses of International Trade Administration Fellows*, 28 Op. O.L.C. 269 (2004).

This practice was called into question by the Comptroller General's 2005 opinion in *Matter of: National Institutes of Health—Food at Government-Sponsored Conferences*, B-300,826, 2005 WL 502825 ("*NIH*"). That opinion addressed whether an agency could charge and retain a registration fee to defray the costs of meals and light refreshments at a conference that the Institutes were hosting. The Comptroller General advised that, under the MRA, the Institutes could not retain any fee. He added: "Nor could NIH authorize its contractor to charge a fee to offset costs, because, pursuant to [the MRA], a contractor receiving money for the government may not retain funds received for the government to pay for the conference costs." *Id*. at *6. The Comptroller General did not explain why, in such situations, the contractor would be "an official or agent of the Government" under the MRA in receiving payment from attendees for its services to attendees, or why those fees that the contractor received would be received "for the Government." *See* 31 U.S.C. § 3302(b). He did recognize, however, that "the participants may cover the costs of their food using their own personal funds." *NIH*, 2005 WL 502825, at *6.

The Comptroller General reiterated this position in *Contractors Collecting Fees at Agency-Hosted Conferences*, B-306,663, 2006 WL 39435 ("*Contractors*"). He stated that "when an agency lacks statutory authority to charge a fee at a conference and retain the proceeds, neither the agency hosting a conference, *nor a contractor on behalf of the agency*, may do so." *Id*. at *1 (emphasis added). You question why, if attendees may purchase meals, lodging, and refreshments "using their own personal funds," a contractor could not offer such items to the attendees and then retain the attendees' payments from their own personal funds.

II.

We agree that a private contractor may, consistent with the MRA, retain fees it receives from conference attendees for goods and services such as meals, lodging, and refreshments that the contractor provides to the attendees. The MRA requires as follows: "[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). In the circumstances you have described, the fees are not received "for the Government" but rather collected by contractors for their own use.[2]

[2] Because we answer your question on this basis, we need not determine whether the contractors could be considered "agent[s] of the Government" in their receipt of the fees, or whether the government constructively "receive[s]" the fees, *see generally Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980). On the former question, there is an argument from one of the sanctions for violating the MRA—removal "from office," 31 U.S.C. § 3302(d)—that a contractor, not holding any "office," cannot be subject to the MRA. The D.C. Circuit has employed this reasoning. *See Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 511 (D.C. Cir. 1999) ("This sanction makes no sense with respect to a private actor like Network Solutions."); *cf.*

The most natural reading of the phrase "for the Government" in the MRA is that it describes something intended to be used by the government. *See* 6 *Oxford English Dictionary* 24 (Clarendon 2d ed. 1989) (defining "for" as "[i]ntroducing the intended recipient, or the thing to which something is intended to belong, or in connexion with which it is to be used"); *cf. Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 968 (4th Cir. 1984) (affirming injunction against contracts between Federal Aviation Administration and airlines under which the FAA waived certain fees and airlines deposited money into a trust fund: "the Trust was an attempt by the FAA to divert funds from their *intended destination*—the United States Treasury") (emphasis added). This interpretation is bolstered by the MRA's statutory history and this Office's interpretation of the MRA's earlier language. In its original form, that act provided as follows:

> [T]he gross amount of all duties received from customs, from the sales of public lands, and from all miscellaneous sources, for *the use of* the United States, shall be paid by the officer or agent receiving the same into the treasury of the United States at as early a day as practicable.

Act of Mar. 3, 1849, ch. 110, § 1, 9 Stat. 398, 398 (emphasis added). The phrase "for the use of the United States" remained in the act for 133 years, until Congress in 1982 amended a large portion of title 31, as discussed below.

The reference to "use" indicated that the money must be intended for use by, or meant to cover an obligation or expense of, the United States. Thus this Office in 1978 explained that the phrase "for the use of the United States" in the MRA "has been interpreted to require that the funds in question are 'to be used in bearing the expense of the administration of the Government and paying the obligations of the United States.'" Memorandum for the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Legislation Regarding FBI Undercover Operations* at 4 (July 27, 1978) ("*Undercover Operations*") (quoting *Disposition of Excess Railway Operating Income*, 33 Op. Att'y Gen. 316, 321 (1922)). We added that "funds must be available to the United States for

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Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def., 87 F.3d 1356, 1361 (D.C. Cir. 1996) (referring to the MRA's "requirement that a Government official 'receiving money for the Government from any source' deposit the money in the Treasury"). On the other hand, section 3302(d) also includes forfeiture as a sanction, which might be available against a non-officer, and the D.C. Circuit's reading does not clearly give content to the term "agent," as distinct from "official." The concept of "[a]gency encompasses a wide and diverse range of relationships and circumstances," including but not limited to the relationship between "employer and employee." Restatement (Third) of Agency § 1.01 cmt. c (2006). This Office has not previously resolved the meaning of the term "agent" in the MRA. *Cf.* Memorandum for the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Legislation Regarding FBI Undercover Operations* at 4, 8 (July 27, 1978) (using "agent" in the sense of FBI Special Agents and suggesting curing an MRA problem involving income received in the FBI's undercover business operations by instead "associat[ing] with a private business").

disposition on its own behalf." *Id*. And in applying the MRA, we noted that "the funds in issue are at the disposal of the United States" and that "[t]his availability . . . must mean that they were received 'for the use of the United States.'" *Id*. *See also id*. at 6 (purpose of MRA was to "require Congressional control of all funds that are available to the United States for disbursement, regardless of the source of the funds or the reason the funds were surrendered to the United States").

In 1982, in re-codifying the MRA at its present location in section 3302, Congress shortened the phrase to its current form by (among other things) deleting "the use of." Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 948. But the 1982 statute itself explained that Congress's purpose was simply "[t]o revise, codify, and enact *without substantive change* certain general and permanent laws, related to money and finance." *Id*. at 877 (emphasis added). This Office repeatedly has recognized that the 1982 revision of the MRA was not intended to work any substantive changes but rather to eliminate unnecessary words. *E.g.*, *Application of 31 U.S.C. § 3302(b) to Settlement of Suit Brought by the United States*, 7 Op. O.L.C. 36, 37 n.3 (1983). This understanding also finds support in the background principle that "'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912)).

With this understanding of the MRA's text, it is clear that personal convenience fees, such as you have described, are not money received "for the Government." Rather, they are "for" the event planner. The fees are not used, and are not intended to be used, by or for the benefit of the host agency that hires the event planner. The host agency makes no claim to the fees; apart from the question of the MRA's applicability, the planner "is under no duty to turn over any portion to the federal government," but rather "the monies belong to" the contractor. *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 511 (D.C. Cir. 1999). The conference attendees pay the fees to the event planner so that they can obtain meals, lodging, and refreshments from the planner. The planner in turn accepts the fees to cover its costs in providing these goods and services to the attendees. The fees are not "available to the United States for disposition on its own behalf," *Undercover Operations* at 4, "at the disposal of the United States," *id*., or "surrendered to the United States," *id*. at 6.

Nor do the personal convenience fees compensate the event planner for any contractual obligation that the host agency owes to it, or enable the agency to avoid expending appropriations on "services that statutes required the agenc[y] to perform." *Thomas*, 176 F.3d at 511. In *Thomas*, the court approved retention by the private Network Solutions of fees it collected for registering internet domain names because, among other things, performing such registration was not a duty of the National Science Foundation. Similarly, the Comptroller General has recog-

nized that a "government official or agent is deemed to receive money for the government under the [MRA] *if the money is to be used to bear the expenses of the government or pay government obligations*." *SBA's Imposition of Oversight Review Fees on PLP Lenders*, B-300,248, 2004 WL 77861, at *7 (emphasis added). The Comptroller General concluded that the Small Business Administration ("SBA") had violated the MRA by imposing fees on lenders of SBA-guaranteed loans for reviews that the SBA was required by statute to conduct, and which the lenders paid to contractors who helped to conduct the reviews, because "the review fees paid by the lenders substitute for payment that SBA would otherwise make." *Id*. at *9. In the two subsequent Comptroller General opinions discussed above in Part I, the Comptroller General cited this 2004 opinion in general, without discussion. *See NIH*, 2005 WL 502825, at *6; *Contractors*, 2006 WL 39435, at *1. Here, the host agency has no obligation, statutory or contractual, to provide meals, lodging, or refreshments to conference attendees. The fees are not "to be used in bearing the expenses of the administration of the Government and paying the obligations of the United States," *Undercover Operations* at 4 (internal quotation marks omitted), or by an agency "to offset expenses" of its operations, *id*. at 8. Thus, the personal convenience fees are not received "for the Government" and so are not subject to the MRA.

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