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EDITOR
Nathan A. Forrester

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Attorneys General

John D. Ashcroft
Alberto R. Gonzales

Assistant Attorneys General
Office of Legal Counsel

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Daniel L. Levin (Acting)

Deputy Assistant Attorneys General
Office of Legal Counsel

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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-eight volumes of opinions published covered the years 1977 through 2004. The present volume covers 2005. Volume 29 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.

Opinion of the Attorney General in Volume 29

Opinions of the Office of Legal Counsel in Volume 29

OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Treatment of Expunged State Convictions Under the Immigration and Nationality Act

Under the definition of "conviction" contained in the Immigration and Nationality Act, for a conviction not involving a first-time simple possession of narcotics, an alien remains convicted, and thus removable under the Act, notwithstanding a subsequent state action to vacate or set aside the conviction that does not reflect a judgment about the merits of the underlying adjudication of guilt.

January 18, 2005

OPINION IN DEPORTATION PROCEEDINGS

The Board of Immigration Appeals ("BIA" or "Board") referred its decision in this matter for my review pursuant to 8 C.F.R. § 3.1(h)(1)(ii) (1997).[1] In its decision, the BIA determined that a new federal definition of "conviction" did not undermine Attorney General precedent that held that a person convicted of a firearms offense under state law is not subject to deportation under section 241(a)(2)(C) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(2)(C) (1994),[2] if that conviction has been subsequently "expunged." Pending my decision, the BIA reversed itself and concluded that the new federal definition of "conviction" means that an alien remains convicted notwithstanding a subsequent state action to expunge the conviction. *In re Roldan*, 22 I. & N. Dec. 512, 523 (B.I.A. 1999). The Ninth Circuit subsequently reversed the BIA's decision in *Roldan* with respect to aliens convicted of first-time drug possession offenses under state law. *Lujan-Armendariz v. INS*, 222 F.3d 728, 750 (9th Cir. 2000). The Ninth Circuit's decision does not affect the applicability of *Roldan* to firearms offenses, but, in light of the Ninth Circuit's decision, I find it appropriate to certify the Board's decision and set forth clearly the Executive Branch's interpretation of the relevant statute.

For the reasons stated below, I find that the new federal definition of "conviction" means that for a conviction not involving first-time simple possession of narcotics, an alien remains convicted, and thus removable under current section 237 of the INA, notwithstanding a subsequent state action to vacate or set aside the conviction. The BIA's decision is reversed and remanded.

[1] Now 8 C.F.R. § 1003.1(h)(1)(ii) (2004).

[2] After the initial deportation order was entered in this matter, former section 241 of the Immigration and Nationality Act was redesignated as section 237 by section 305(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-598. The redesignated provision has been codified, with modifications that are not relevant here, as section 1227 of title 8, U.S. Code.

I.

A.

Erick Marroquin-Garcia entered the United States without inspection in 1980. He adjusted to the status of lawful permanent resident alien pursuant to section 245A of the INA in December of 1989. *See* 8 U.S.C. § 1255a (1994). He pleaded guilty to unlawful possession of a firearm under California law on October 22, 1990. He was convicted in state court and placed on five years' probation. The state court ordered, as conditions of probation, that Marroquin-Garcia spend 365 days in the county jail and pay $100 restitution and the costs of his probation. *In re Marroquin,* A90 509 015, slip op. at 2 (B.I.A. Feb. 21, 1997).

The Immigration and Naturalization Service ("INS") instituted deportation proceedings against Marroquin-Garcia on the basis of his state firearms conviction. On September 13, 1994, an immigration judge ordered Marroquin-Garcia deportable pursuant to what was then section 241(a)(2)(C) of the INA. *See Marroquin* at 2. At that time, section 241(a)(2)(C) of the INA stated in pertinent part that "[a]ny alien who at any time after entry is convicted under any law of purchasing . . . possessing, or carrying . . . any weapon, part, or accessory, which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable." 8 U.S.C. § 1251(a)(2)(C) (1994).

During the pendency of his appeal to the BIA, Marroquin-Garcia filed a motion in the Superior Court for the County of Los Angeles for relief pursuant to section 1203.4(a) of the California Penal Code. Section 1203.4(a) provides, *inter alia*, that

> [i]n any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty . . . [and] the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code.

The Superior Court granted Marroquin-Garcia's motion for relief under this expungement statute on December 18, 1994, and ordered Marroquin-Garcia's

"felony charge reduced . . . to a misdemeanor," his plea of guilty set aside and vacated, and the complaint against him dismissed. *Marroquin* at 2.

Relying on the BIA's decision in *In re Luviano*, 21 I. & N. Dec. 235 (B.I.A. 1996), Marroquin-Garcia argued on appeal to the BIA that the expungement of his conviction meant that he had not been "convicted" for purposes of section 241(a)(2)(C) of the INA. As discussed more fully below, the BIA had held in *Luviano* that prior Attorney General opinions compelled the conclusion that an alien whose conviction for a non-narcotics-related offense had been expunged pursuant to section 1203.4(a) of the California Penal Code had not been "convicted" for purposes of section 241(a)(2)(C) of the INA. 21 I. & N. Dec. at 237 (citing *In re Ibarra-Obando*, 12 I. & N. Dec. 576 (B.I.A. 1966; A.G. 1967)); *In re G–*, 9 I. & N. Dec. 159 (B.I.A. 1960; A.G. 1961). At the time the BIA was deciding *Marroquin*, the Board's decision in *Luviano* was pending before the Attorney General. In light of a new federal definition of "conviction," enacted in section 322(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628, the BIA decided Marroquin-Garcia's appeal rather than wait for the Attorney General's decision in *Luviano.* In *Marroquin*, the BIA concluded that the new federal definition of conviction did not affect the Board's decision in *Luviano* and therefore that decision was still controlling. Hence, the BIA found Marroquin-Garcia could not be deported based on the firearms offense. *Marroquin* at 6.

Before addressing the merits of the Board's decision, I will first review the relevant history of this issue in greater detail.

B.

Prior to the enactment of the new federal statutory definition, the INA did not define "conviction." The federal courts, the Attorney General, and the BIA were therefore provided with little legislative guidance as to how to interpret the statutory provisions that subjected to deportation those persons who had been "convicted" of certain types of offenses. Two distinct lines of Attorney General precedent developed that addressed the effect of an expungement on a conviction that would otherwise provide a basis for an order of deportation under the federal immigration laws. Before discussing these lines of precedent, however, I must clarify the term "expungement." Throughout this opinion I will use the term expungement to refer to the process of clearing a defendant's record of a prior conviction. This expungement is achieved generally through two means: either a statute permits a deferred adjudication of a conviction such that a judgment is never entered, or a court vacates or sets aside a judgment of conviction from the books under a rehabilitative statute. As the Ninth Circuit has described the difference,

> [under a] "vacatur" or "set-aside" [statute], a formal judgment of conviction is entered after a finding of guilt, but then is erased after the defendant has served a period of probation or imprisonment and his conviction is ordered dismissed by the judge. . . . [Under a] "deferred adjudication" [statute], no formal judgment of conviction or guilt is ever entered. Instead, after the defendant pleads or is found guilty, entry of conviction is deferred, and then during or after a period of good behavior, the charges are dismissed and the judge orders the defendant discharged.

Lujan-Armendariz v. INS, 222 F.3d 728, 735 n.11 (9th Cir. 2000).

Returning to the Attorney General precedents, first, there were Attorney General decisions that held that aliens who had been convicted of what section 241(a)(4) of the INA termed "crimes of moral turpitude," such as forgery or fraud, were not subject to deportation if their convictions had been expunged. *See Ibarra-Obando*, 12 I. & N. Dec. 576; *In re G–*, 9 I. & N. Dec. 159. Second, there was an Attorney General decision that held that aliens who had been convicted of what section 241(a)(11) termed "narcotics offenses," such as the distribution of marijuana, were subject to deportation even if their conviction had been expunged. *See In re A–F–*, 8 I. & N. Dec. 429 (B.I.A., A.G. 1959).[3] In 1970, Congress carved out a narrow exception for simple federal possession offenses when it enacted the Federal First Offender Act ("FFOA"). The FFOA applies only to first-time drug offenders who are guilty only of simple possession. It expunges such convictions (after the successful completion of a probationary period) and was intended to lessen the harsh consequences of certain drug convictions, including their effects on deportation proceedings. Under the FFOA, no legal consequences may be imposed following expungement as a result of the defendant's former conviction. 18 U.S.C. § 3607 (2000). After considering the effect of the FFOA, the BIA announced an exception to the holding of *In re A–F–*, finding that a first-time simple drug possession offender, whose conviction was set aside pursuant to a state statute, would not be deported if he or she would have been eligible for treatment under the FFOA had the charges been filed in federal court. *See In re Manrique*, 21 I. & N. Dec. 58, 64 (B.I.A. 1995); *In re Werk,* 16 I. & N. Dec. 234, 235–36 (B.I.A. 1977).

At the time that the BIA decided *Luviano*, neither of the existing lines of administrative precedent addressed directly the circumstance at issue in *Luviano*, which concerned the effect of an expungement on a person who had been convict-

[3] There, the Attorney General held that Congress's progressive strengthening of the deportation laws with respect to aliens who had committed narcotics offenses that would subject them to deportation under what was then section 241(a)(11) of the INA revealed Congress's intent to subject such aliens to deportation even if their convictions had been technically "expunged" pursuant to section 1203.4(a) of the California Penal Code.

ed of what the former section 241(a)(2)(C) termed a "firearms" offense. Nevertheless, the BIA concluded in *Luviano* that the prior Attorney General opinions had established a rule that applied to all convictions that were not narcotics-related and that had been expunged. The BIA concluded that this rule precluded such convictions from serving as the basis for an order of deportation.

After the BIA issued its decision in *Luviano*, Congress enacted section 322(a) of IIRIRA, which amended the INA to define the term "conviction" for the first time. The new definition provides:

> [t]he term "conviction" means with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where
>
> > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> >
> > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's theory to be imposed.

IIRIRA § 322(a), 110 Stat. at 3009-628; INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2000). Because Congress passed the new federal statutory definition during the pendency of respondent's appeal, the new statutory definition of "conviction" applies here. *See* IIRIRA § 322(c), 110 Stat. at 3009-629 (explaining that the new statutory definition shall apply "to convictions . . . entered before, on, or after the date of the enactment of [IIRIRA]"). On May 31, 1996, after the enactment of IIRIRA, the Commissioner of the INS referred the Board's decision in *Luviano* to the Attorney General.

The Attorney General's review of the *Luviano* decision was pending at the time Marroquin-Garcia's appeal came to the BIA, but in light of the new federal definition in IIRIRA, the BIA concluded that it should decide the merits of Marroquin-Garcia's appeal, rather than wait for the Attorney General's decision in *Luviano.* In construing this new federal definition, the BIA determined that the statutory text did not make clear whether, or to what extent, Congress intended to treat expunged convictions, of any type, as "convictions" for purposes of the immigration laws. The BIA therefore turned to the legislative history. It relied primarily on a joint explanatory statement in the conference report to the IIRIRA that addressed the new definition. *See Marroquin* at 4–5. The joint explanatory statement made particular mention of the BIA's pre-*Luviano* decision in *In re Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988), in which the BIA had established rules for determining whether a state court's decision to *withhold* an adjudication of guilt prior to the entry of a formal judgment of conviction—as opposed to vacating or setting aside a conviction already entered—precludes a judge's or jury's finding of guilt, or a defendant's plea of guilty, from being deemed a "conviction" under

the INA.[4] H.R. Conf. Rep. No. 104-828, at 199, 223 (1996). The BIA noted that, in contrast to the joint explanatory statement's relatively detailed discussion of *Ozkok*, "there was no discussion whatsoever" of the BIA and Attorney General decisions that had established the rules for determining whether formal judgments of conviction that had been entered and subsequently vacated or set aside constituted "convictions" under the INA. *Marroquin* at 5.

The BIA concluded from the joint explanatory statement's express reference to *Ozkok*, and its failure to mention the other type of expungement decisions, that Congress did not intend for the INA's new definition of "conviction" to supplant *Luviano*'s rule for determining whether a state court conviction that had been formally entered, but subsequently vacated or set aside, constituted a "conviction" under the INA. *Id.* The BIA determined that the new statutory definition of "conviction" simply codified and refined the rules that the BIA had set forth in *Ozkok*, for determining whether, the circumstance in which a formal judgment of conviction has been withheld prior to entry, a finding of guilt constitutes a "conviction" under the INA. *Id.* The BIA therefore held that, notwithstanding the new federal statutory definition of "conviction," *Luviano* continued to control when a conviction had been vacated or set aside, and thus Marroquin-Garcia had not been "convicted" for purposes of section 241(a)(2)(C) of the INA because his conviction for a non-narcotics-related offense had been set aside pursuant to the same California expungement law in *Luviano*. *Marroquin* at 6.

The BIA referred this matter for my review as well. "If the Attorney General ultimately determines that a conviction for a firearms offense survives for immigration purposes despite a state procedure for expungement, the [Immigration and Naturalization] Service is free to reinstate deportation proceedings against the respondent here," the BIA explained. *Id.* "At present, however, the [Immigration and Naturalization] Service cannot seek the respondent's deportation under section 241(a)(2)(C) of the Act on the basis of a criminal case in which the plea of guilty has been set aside and vacated and the charges have been dismissed." *Id.*

After the BIA referred its decision in this case to me, the Board issued its opinion in *Roldan*. In that case, the BIA considered whether an expunged narcotics conviction could form the basis for an order of deportation in light of the new definition of conviction in IIRIRA. Although *Roldan* appears to involve a deferred adjudication,[5] the BIA found "it necessary to reconsider . . . the effect to be given

[4] Over the years, the BIA had wrestled with the question of when a "conviction" occurs under state statutes providing for varying degrees of deferred adjudication. It settled on a three-factor definition in *Ozkok*. Under *Ozkok*, an alien was considered "convicted" when: (1) the alien had been found guilty or pleaded guilty or nolo contendere or had admitted sufficient facts to warrant a finding of guilty; (2) the judge had ordered some form of punishment; and (3) a judgment of guilt could be entered without further proceedings relating to guilt if the person violated terms of his probation or other court order. 19 I. & N. Dec. at 551–52.

[5] *See id.*, 22 I. & N. Dec. at 514 ("the [state court] withheld adjudication of judgment, sentenced him to 3 years' probation and imposed several monetary penalties"); *id.* ("the respondent filed a motion

to *any* state action, whether it is called setting aside, annulling, vacating, cancellation, expungement, dismissal, discharge, etc., of the conviction, proceedings, sentence, charge, or plea, that purports to erase the record of guilt of an offense pursuant to a state rehabilitative statute," 22 I. & N. Dec. at 520. The BIA determined that Congress intended to establish a uniform federal rule that precluded the recognition of subsequent state rehabilitative expungements of convictions. More precisely, the BIA found that because Congress clearly intended that an alien with a deferred adjudication should be considered convicted, Congress also must have intended that an alien with a "technical erasure of the record of conviction" should be considered convicted. *Id.* at 521. As the BIA stated,

> [i]t simply would defy logic for us, in a case concerning a conviction in a state which effects rehabilitation through the technical erasure of the record of conviction, to provide greater deference to that state's determination that a conviction no longer exists. Under either scenario, the state has decided that it does not consider the individual convicted based on the application of a rehabilitative statute.
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> . . . Congress clearly does not intend that there be different immigration consequences accorded to criminals fortunate enough to violate the law in a state where rehabilitation is achieved through the expungement of records evidencing what would otherwise [have been] a conviction under section 101(a)(48)(A), rather than in a state where the procedure achieves the same objective simply through deferral of judgment.

Id. Based on its examination of the statutory text and legislative history, the BIA concluded that it would "interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." *Id.* at 523. The BIA qualified its holding by noting that its decision did not address the situation where a state court vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation. *Id.* The BIA thus overruled *Luviano* and *Marroquin*. *Id.* at 512.

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in the Idaho state court for early release from probation and dismissal of the charge in accordance with the withheld judgment"); *id.* at 530 (Board Member Villageliu, dissenting in part and concurring in part, joined by Chairman Schmidt and Board Members Rosenberg and Guendelsberger) (characterizing majority's discussion of IIRIRA's definition in relation to vacated convictions as dicta). *But see id.* at 513 (describing respondent as "a first offender whose guilty plea was vacated").

In *Lujan-Armendariz*, the Ninth Circuit considered the BIA's decision in *Roldan*. The court was skeptical of the BIA's conclusion that the new definition covered vacated or set-aside convictions as well as deferred adjudications. *See id.*, 222 F.3d at 742. The Ninth Circuit noted that the amendment said nothing about vacated convictions and could well be interpreted to establish only when a conviction occurred without determining what might be the effect of a later expungement. *Id.* at 741–42. The court did not decide this issue, however, and concluded instead that because the new definition in IIRIRA did not repeal the FFOA, equal protection principles mandated that aliens whose convictions had been expunged pursuant to state law were still entitled to the same treatment as those whose convictions had been expunged under federal law. *Id.* at 748–50. Therefore, an alien could not be deported based on a state conviction of simple possession where that conviction was expunged by the state, if a federal simple possession conviction could have been expunged under the FFOA. In other words, because the new definition of conviction did not repeal the FFOA, if an alien's conviction for a simple possession narcotics offense was expunged under a state equivalent of the FFOA, that conviction could not serve as the basis for an order of deportation, because, had the alien received the expungement under the FFOA, that conviction could not form the basis for the order of deportation. *See id.* at 750.

With this history in mind, I now turn to the question of the proper interpretation of "conviction," at least with respect to non-narcotics cases.

II.

A.

As set forth above, the relevant statutory provision defines a "conviction" to be "a formal adjudication of guilt of the alien entered by a court." INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). This definition, though broad, is clearly not intended to encompass convictions that have been formally entered but subsequently reversed on appeal or in a collateral proceeding for reasons pertaining to the factual basis for, or procedural validity of, the underlying judgment. *Cf. In re P–*, 9 I. & N. Dec. 293 (A.G. 1961) (concluding that conviction set aside pursuant to writ of *coram nobis* for a constitutional defect could not serve as basis for order of deportation). Subsequently set-aside convictions of this type fall outside the text of the new definition because, in light of the subsequent proceedings, they cannot be considered formal adjudications of the alien's guilt.

This same logic, however, suggests that a different conclusion is warranted for convictions such as the one at issue in this case. As was noted in dissent in *Luviano*, state laws that authorize the subsequent expungement of a conviction typically do so for reasons that are entirely unrelated to the legal propriety of the underlying judgment of conviction—reasons, in other words, that are unrelated to concerns about the factual basis for, or the procedural validity of, the conviction.

21 I. & N. Dec. at 247–48 (Board Member Hurwitz dissenting, joined by Board Member Vacca). These state expungement laws authorize a conviction to be expunged in order to serve rehabilitative ends and without reference to the merits of the underlying adjudication of guilt. *Id.* Such expunged convictions would appear, therefore, to survive as formal adjudications of guilt entered by a court.

Here, the state expungement law that provided relief for Marroquin-Garcia permits state courts to provide relief to all convicted defendants who seek it and have either completed their terms of probation or have been discharged prior to the termination of their probation. *See* Cal. Penal Code § 1203.4(a).[6] It affords a remedy that is readily distinguishable from, for example, an appellate court's reversal of a conviction on the merits, which is available only to persons who can demonstrate that the entry of the initial conviction was in error. Consistent with this conclusion, section 1203.4(a) of the California Penal Code does not, for purposes of California law, "eradicate a conviction or purge [the] defendant of the guilt established thereby." *Adams v. Cnty. of Sacramento*, 1 Cal. Rptr. 2d 138, 141 (Cal. Ct. App. 1991); *accord id*. (explaining that the provision "'was never intended to obliterate the fact that defendant has been 'finally adjudged guilty of a crime'") (quoting *Meyer v. Bd. of Med. Exam'rs*, 206 P.2d 1085 (1949)). Indeed, a defendant who receives relief from the California provision still remains subject to certain state law civil disabilities that result from the initial entry of a formal adjudication of guilt, i.e., the entry of a judgment of conviction.[7]

For these reasons, the relief provided by the California expungement law does not reflect a judgment about the merits of the underlying adjudication of guilt. It does not provide relief equivalent to a decision on appeal (or in a collateral proceeding) that reverses or vacates a judgment of conviction for insufficiency of

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[6] Section 1203.4(a) of the California Penal Code also authorizes state courts to provide the same relief in any "case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section."

[7] Section 1203.4(a) of the California Penal Code provides that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." In addition, the provision states that "the order [granting relief] does not relieve [the defendant] of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery." Finally, the provision provides that "[d]ismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or contro1 any firearm capable of being concealed upon the person or prevent his or her conviction under Section 12021." California law further provides that numerous professional and business licenses may be denied, revoked, or suspended as a result of a conviction, notwithstanding that fact that it has been expunged pursuant to section 1203.4(a). *See Luviano*, 21 I. & N. Dec. at 246–47 (Board Member Hurwitz dissenting, joined by Board Member Vacca); *see also Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002) (noting that "California Penal Code section 1203.4(a) provides only a limited expungement even under state law"); *Garcia-Gonzales v. INS*, 344 F.2d 804, 808 (9th Cir. 1965) (explaining that it is "sheer fiction to say that the conviction is 'wiped out' or 'expunged'" by section 1203.4(a)).

the evidence or for procedural errors at trial. It serves only to ameliorate certain of the punitive consequences that attend a court's legally valid finding of guilt. Even though the initial judgment of conviction has been set aside pursuant to section 1203.4(a), the merits of the underlying judgment have not been called into question and adverse legal consequences continue to follow from it. Thus, that judgment would still appear to fall squarely within the plain language of the new federal statutory definition of "conviction," which defines a "conviction" under the INA to be "a formal judgment of guilt of the alien entered by a court." INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

The conclusion that the phrase "a formal judgment of guilt of the alien entered by a court" should be construed to encompass, by its plain terms, convictions that have been vacated or set aside pursuant to expungement statutes like section 1203.4(a) finds additional support in the treatment that the new federal statutory definition of "conviction" accords an "adjudication of guilt [that] has been withheld." *Id.* The new federal statutory definition of "conviction" clearly provides that a defendant who has been found guilty by a judge or jury, or has pleaded guilty, has been "convicted" for purposes of the INA if the judge has "withheld a formal adjudication of guilt" but has nevertheless imposed penalties or restraints upon the defendant's liberty. *Id.* This part of the new federal statutory definition of "conviction" ensures that a defendant who has been found guilty of unlawful conduct, and has been punished for that conduct, will not avoid deportation by utilizing a state court procedure that spares the defendant from technically being adjudged "convicted."

The congressional determination that even some state court decisions to withhold adjudications of guilt prior to the entry of a judgment of conviction should be counted as convictions under the INA supports the more modest conclusion that the phrase "a formal judgment of guilt of the alien entered by a court" encompasses judgments of conviction that, at least in the ordinary case, have been entered but then vacated or set aside for reasons that do not go to the legal propriety of the original judgment and that continue to impose some restraints or penalties upon the defendant's liberty. A conviction that has been vacated or set aside pursuant to a law like the California statute ordinarily does not differ in substance from the type of state court decision to withhold an adjudication of guilt prior to entry that Congress has explicitly deemed to constitute a "conviction." The relief that the court provides in each type of case does nothing to call into question the propriety of the underlying adjudication of guilt.

Indeed, this case well illustrates the point. Even though Marroquin-Garcia's conviction has been set aside under section 1203.4(a), the underlying judgment of guilt still counts as a "conviction" under California law, and he not only has been subjected to punishment as a consequence of that conviction but also remains subject to various civil disabilities as well. The existence of these continuing legal disabilities certainly suggests that, for purposes of determining whether the initial

adjudication of guilt may serve as the basis for an order of deportation, the expungement in question should not be equated with a court's setting aside a conviction on the merits in a collateral proceeding or on appeal.

Because even an "adjudication of guilt [that] has been withheld" may constitute a "conviction" under the new federal definition that Congress has enacted, there would appear to be no reason to construe the phrase "a formal judgment of guilt entered against the alien by a court" to exclude expunged convictions of the type at issue here. Indeed, in light of the treatment that the new federal statutory definition accords certain state court decisions to withhold an adjudication of guilt prior to the entry of a conviction, the conclusion that the new federal statutory definition fails to encompass the broad category of expunged convictions identified in *Luviano* would lead to anomalous results.

For example, an alien defendant who requested a state court to withhold an adjudication of guilt prior to the entry of a conviction could in many cases be subject to deportation. By contrast, an alien who was equally culpable of the same offense but waited until after the conviction had been entered to seek the relief that a provision such as the California expungement law may provide would not be subject to deportation. Under such an approach, a convicted alien who had been found guilty, had served a substantial period of time in prison, and whose conviction had been subsequently vacated, could end up in a more favorable position for purposes of federal immigration law than an alien who had never had a conviction entered against him or her and had never served any time in prison for the offense. It is doubtful that Congress would have intended to provide greater relief under the immigration laws to alien defendants who had been convicted and served long prison terms than to equally culpable alien defendants who had never been formally convicted and who had been subject to comparatively minor restraints on their liberty. There would appear to be little basis, therefore, for construing the seemingly plain definition of "conviction" that Congress has now enacted to accord such disparate treatment to equally culpable aliens.[8]

B.

As discussed above, the Ninth Circuit reached a different conclusion only with respect to a narcotics offense that would have fallen within the Federal First Offender Act had the charges been brought in federal court. *See Lujan-*

[8] My conclusion is, as was demonstrated in the Board's decision in *Roldan*, 22 I. & N. Dec. at 514–19, consistent with a proper reading of the legislative history underlying the enactment of 8 U.S.C. § 1101(a)(48)(A). Congress "deliberately broaden[ed]" the meaning of conviction and made guilt—not rehabilitation—the dispositive factor in determining whether an individual is to be removed from the United States. H.R. Conf. Rep. No. 104-828, at 224 (1996). Legislators noted that "there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and who Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction." *Id.*

Armendariz, 222 F.3d at 750. With respect to offenses that do not fall within the FFOA or a state equivalent, the Ninth Circuit held that the BIA's interpretation in *Roldan*—i.e., that the new definition of conviction covers vacated or set aside state convictions as well as deferred adjudications—was a permissible construction of the new statutory definition of conviction. *See Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001). And other circuits to address the issue have agreed with the BIA that a vacated conviction falls within the new definition of conviction. *See Renteria-Gonzalez v. INS*, 322 F.3d 804, 812–14 (5th Cir. 2002) (applying plain meaning of new IIRIRA definition to find that vacated federal conviction for trafficking in aliens remained conviction for purposes of INA); *United States v. Campbell,* 167 F.3d 94, 98 (2d Cir. 1999) (applying the plain language of new definition to find that vacated conviction for possession of controlled substance constituted conviction for sentencing purposes; "no provision excepts from this definition a conviction that has been vacated").

Because this case does not involve a conviction for a narcotics offense and a subsequent rehabilitation either under the FFOA or state law, I do not decide whether the Ninth Circuit was correct in concluding that the new definition of conviction did not repeal the FFOA, and therefore, as the Ninth Circuit held, equal protection guarantees require that an alien with a state conviction who would have been eligible for FFOA relief had the conviction been rendered in federal court receive the same treatment as a alien with a federal conviction. I do note, however, that at least three circuits disagree with the Ninth Circuit. *See Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003) (concluding that "it seems plain that rational-basis review is satisfied here"); *Gill v. Ashcroft*, 335 F.3d 574, 579 (7th Cir. 2003) (finding Ninth Circuit's decision "untenable" and declining to follow it); *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697–99 (8th Cir. 2002) (disagreeing with Ninth Circuit and declining to address possible repeal of FFOA by IIRIRA because no equal protection violation for treating alien convicted under state law differently from alien convicted under federal law where the sentences were dissimilar and Congress could have intended to provide relief only for federal convictions, over which Congress would have control). Indeed, although the BIA acquiesces in the decision in the Ninth Circuit, it correctly declines to follow it outside of that circuit. *See In re Salazar-Regino*, 23 I. & N. Dec. 223, 235 (B.I.A. 2002) ("[E]xcept in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under section 101(a)(48)(A) of the [INA].").[*]

There remains the final question whether the expungement that Marroquin-Garcia received in this case removes that conviction from the scope of the new federal statutory definition of "conviction." As has already been noted, section

[*] Editor's Note: The Ninth Circuit subsequently overruled *Lujan-Armendariz* in *Nunez-Reyes v. Holder*, 646 F.3d 684, 689 (9th Cir. 2011) (en banc), stating that "we now agree with the BIA and our sister circuits."

1203.4*(*a) of the California Penal Code does not serve to provide relief that is based on a judgment about the legal propriety of the underlying judgment of conviction. It merely provides a means by which certain defendants who have been lawfully convicted and subjected to punishment may be relieved of many, though not all, of the remaining legal consequences that normally attend an adjudication of guilt. Therefore, notwithstanding the relief that petitioner received under section 1203.4(a) of the California Penal Code, he has been "convicted" for purposes of what was then section 241(a)(2)(C) of the INA.

JOHN D. ASHCROFT
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Application of Record Destruction Requirements to Information Received From the National Instant Criminal Background Check System

Under the laws governing destruction of background check information, the Bureau of Alcohol, Tobacco, Firearms, and Explosives—which routinely receives and retains certain information from the National Instant Criminal Background Check System whenever the NICS determines that an individual seeking to purchase a firearm may not lawfully receive a firearm—does not have to destroy that information if the NICS later overturns that determination.

January 11, 2005

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

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") routinely receives and retains certain information from the National Instant Criminal Background Check System ("NICS") whenever the NICS determines that an individual seeking to purchase a firearm may not lawfully receive a firearm. You have asked whether, under the laws governing destruction of background check information, ATF must destroy that information if the NICS later overturns that determination.[1] We conclude that these laws do not require ATF to do so in such circumstances.

I.

The Brady Handgun Violence Prevention Act ("Brady Act") required the Attorney General to "establish a national instant criminal background check system that any licensee may contact . . . for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate [certain federal laws] or State law." Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993). The Attorney General has carried out this mandate by establishing and maintaining the NICS within the Federal Bureau of Investigation ("FBI"). *See* 28 C.F.R. §§ 25.1 & 25.3 (2004).

Another section of the Brady Act (§ 102(b) (codified at 18 U.S.C. § 922(t)(1) (2000))), requires federally licensed firearms dealers ("FFLs" or "licensees") in most cases to contact the NICS before selling a firearm to a person. Upon receiving an inquiry, the NICS checks certain databases and in the ordinary course immediately issues one of two determinations: (1) a "proceed," which indicates that the NICS has no information that the firearm transfer would be unlawful, and that the transfer is

[1] *See* Memorandum for the Office of Legal Counsel, Department of Justice, from Stephen R. Rubenstein, Acting Chief Counsel, Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, *Re: Request for an Opinion* (undated) ("ATF Opinion Request").

allowed, or (2) a "denied," which indicates that the person is prohibited from receiving a firearm, and that the transfer is not allowed. *See id.*; 28 C.F.R. §§ 25.2 & 25.6(c)(1) (2004) (defining these terms and describing responses that the NICS may provide); *National Instant Criminal Background Check System Regulation*, 69 Fed. Reg. 43,892, 43,897 (July 23, 2004) ("Currently, approximately 74 percent of all transactions are completed immediately and approximately 92 percent are completed while the FFL is still on the telephone with the FBI NICS Section."). In some cases, however, the NICS issues a "delayed" response, indicating that it has been unable to determine immediately whether or not the transaction may proceed, and that the inquiry remains "open." 28 C.F.R. §§ 25.2 & 25.6(c)(1); *see* 69 Fed. Reg. at 43,900–01 (to be codified at 28 C.F.R. § 25.9(b)(1)(ii)). But if the NICS has not issued a denial within three business days, the restriction on transfer by the licensee expires. *See* 18 U.S.C. § 922(t)(1)(B)(ii). The NICS may, however, continue to investigate the person and subsequently determine that the transfer should not have been permitted, in which case it issues a "delayed denial."

The FBI keeps records of all NICS background checks in an automated "audit log," a chronological record of NICS activities that includes, among other information concerning an inquiry, the name of the potential gun purchaser. 28 C.F.R. § 25.9(b)(1) (2004); *see* 69 Fed. Reg. at 43,900–01 (to be codified at 28 C.F.R. § 25.9(b)(1)); *see generally NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000) (discussing audit log and upholding it against various challenges). When a denial issues, the FBI, pursuant to regulations it has issued under the Privacy Act, 5 U.S.C. § 552a (2000), routinely forwards the audit log information for that inquiry to ATF's Brady Operations Branch. "Routine Use C" of the FBI's Privacy Act regulations for the NICS provides:

> If, during the course of any activity or operation of the system authorized by the regulations governing the system (28 CFR, part 25, subpart A), any record is found by the system which indicates, either on its face or in conjunction with other information, a violation or potential violation of law (whether criminal or civil) and/or regulation, the pertinent record may be disclosed to the appropriate agency/organization/task force . . . charged with the responsibility of investigating, prosecuting, and/or enforcing such law or regulation, *e.g.*, disclosure of information from the system to the ATF . . . regarding violations or potential violations of 18 U.S.C. § 922(a)(6). (This routine use does not apply to the NICS Index.)

Privacy Act of 1974; Notice of Modified System of Records, 63 Fed. Reg. 65,223, 65,226–27 (Nov. 25, 1998). Routine Use C was established pursuant to advice provided by this Office, *see Brady Act Implementation Issues*, 20 Op. O.L.C. 57, 59–61 (1996), and, as of July 2004, substantially the same language appears in the regulations implementing the NICS, 69 Fed. Reg. at 43,901 (to be codified at 28

C.F.R. § 25.9(b)(2)(i)); *see also id*. at 43,895 ("This change is consistent with Routine Use C in the NICS Privacy Act Notice"). When the NICS issues a standard denial (that is, within the three-day period that a firearms licensee must wait), ATF's Brady Operations Branch forwards the audit log information to an ATF field office for investigation only if it meets certain criteria. However, when the NICS issues a delayed denial, the Operations Branch automatically forwards the information, because of the significant possibility that a person prohibited from receiving a firearm has already done so. In either case, once the audit log information arrives at the field office, an ATF agent opens a case file (of which the information becomes one part) and commences an investigation. Should ATF concur in the NICS's conclusion, it may be necessary for ATF to retrieve firearms from the purchaser.

In some instances, the NICS overturns a denial after the FBI has transferred to ATF the audit log information regarding that denial. The NICS might overturn a denial at any time and for a number of reasons. A change in state law can create a large number of overturned denials by eliminating a disability that had been based on state law; in addition, some firearms disabilities, such as certain restraining orders, are by their nature temporary, *see* 28 C.F.R. § 25.9(a). Sometimes new information indicates that the NICS's initial denial was incorrect. Or the NICS may simply discover that it made an error.[2] The Brady Act provides an appeal and correction procedure by which a denied person may challenge a denial that he believes was in error. *Id.* § 103(g), 107 Stat. at 1542; 28 C.F.R. § 25.10 (2004).

Several laws limit the information that may be retained regarding background checks in general and overturned denials in particular. First, section 922(t)(2) of title 18 requires that

> [i]f receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall—
>
> (A) assign a unique identification number to the transfer;
>
> (B) provide the licensee with the number; and
>
> (C) *destroy all records of the system with respect to the call* (other than the identifying number and the date the number was assigned) *and all records of the system relating to the person or the transfer*.

(Emphasis added.)

Second, an appropriations rider contained in section 615 of the Consolidated Appropriations Act, 2005, prohibits the use of federal funds for

[2] *See* ATF Opinion Request at 1, 8.

> any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate [18 U.S.C. § 922(g) or § 922(n)], or State law.

Pub. L. No. 108-447, § 615(2), 118 Stat. 2809, 2915 (2004). This rider was first enacted for fiscal year 2004. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 617(a)(2), 118 Stat. 3, 95. In regulations implementing section 922(t)(2) and the 2004 rider, the Attorney General has provided that, if the NICS has issued a "proceed," the FBI must within 24 hours destroy "all identifying information submitted by or on behalf of the transferee" and must within 90 days destroy "[a]ll other information," except the identification number assigned to the transfer and the date that the number was assigned. 69 Fed. Reg. at 43,901 (to be codified at 28 C.F.R. § 25.9(b)(1)(iii)). If the NICS has issued a denial, the FBI does not destroy the information. If a NICS inquiry remains open, the NICS may retain the information for up to 90 days. *See id.*

Third, section 103(i) of the Brady Act (which has not been codified) limits the ability of the government to retain information in connection with the background check system that section 103(b) requires the Attorney General to establish, by providing:

> No department, agency, officer, or employee of the United States may—
>
> > (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
> >
> > (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code or State law, from receiving a firearm.

Brady Act § 103(i), 107 Stat. at 1542, *reprinted in* 18 U.S.C. § 922 note.

In the case of an overturned denial, the NICS would be required to destroy the relevant audit log information (except for the identifying number and the date it was assigned). You have asked whether ATF must do likewise with its copy of

that audit log information, previously received from the NICS. You have explained that ATF wishes to maintain its copy in the relevant investigative case file so that it may have "complete records of [its] enforcement actions in case those actions are later challenged." ATF Opinion Request at 9. For example, when ATF files criminal charges against a denied person or seizes a firearm from a denied person, and then the denial is overturned, that person may challenge ATF's actions. You are concerned that, in such cases, "[w]ithout the records reflecting the initial NICS denial and the actions that flowed from the initial denial, it will be difficult for ATF to vigorously defend its actions." *Id.*

II.

The laws discussed above do not require ATF to destroy the NICS audit log information in its case files concerning a denial that NICS has overturned. Section 922(t)(2)'s requirement that "the system" destroy "all records of the system" does not require ATF to destroy its copy of this information, because ATF is not and does not operate "the system" to which this section refers; nor are ATF's case files "records of the system." 18 U.S.C. § 922(t)(2). For similar reasons, the appropriations rider does not prevent ATF from keeping its files relating to overturned denials, because such files are not part of "any system to implement subsection 922(t)." 118 Stat. at 2915. Finally, under section 103(i) of the Brady Act, ATF's retention of overturned denial files neither involves a "require[ment]" that any third party transfer records to a government facility nor creates a "system for . . . registration." 107 Stat. at 1542.

A.

The text of section 922(t)(2) does not impose an obligation upon ATF with regard to the case files that you have described. That text obligates only "the system" to destroy records, and requires the system to destroy only "records of the system": When "receipt of a firearm would not violate [certain federal laws] or State law," the text states, "*the system*" must "assign a unique identification number," "provide the licensee with the number," and "*destroy all records of the system* with respect to the call . . . and . . . the person or the transfer." 18 U.S.C. § 922(t)(2) (emphases added).

In the context of section 922(t) and the closely related section 103 of the Brady Act, "the system" is a term of art referring to the NICS—"the national instant criminal background check system." *Id.* § 922(t)(1). Section 922(t)(1) refers to the Attorney General's notification of licensed federal firearms dealers, "under section 103(d) of the Brady . . . Act," "that *the* national instant criminal background check *system* is established." *Id*. (emphases added). It then prohibits such dealers from transferring a firearm to someone who is not a licensee "unless . . . before the completion of the transfer, the licensee contacts *the* national instant criminal

background check *system*." *Id.* § 922(t)(1)(A) (emphases added). It thereafter refers simply to "the system" three times. In context, the meaning must be that particular system named immediately beforehand; the shorthand makes no sense otherwise. That same shorthand phrase—"the system"—appears in the immediately following section 922(t)(2) at issue here, and it appears in the same context as in section 922(t)(1), referring to the system regarding transfers by firearms licensees. It must therefore be taken to have the same meaning. Later paragraphs of section 922(t) likewise use "the system" and the fuller phrase ("the national instant criminal background check system") interchangeably. *See id.* § 922(t)(4)–(6). And no provision in section 922(t) uses "the system" with any apparent meaning other than to refer to the NICS. Likewise, various provisions of uncodified section 103, to which section 922(t) expressly refers, speak simply of "the system" when discussing requirements for the NICS, *see* Brady Act § 103(d), (e), (f) & (i), 107 Stat. at 1541–42, and the Attorney General's regulations implementing section 103 define "System" as "the National Instant Criminal Background Check System," 28 C.F.R. § 25.2. *See Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) ("identical words used in different parts of the same act are intended to have the same meaning") (internal quotation omitted).

The statutory language and the regulations governing the NICS indicate that an entity is included within the NICS if and to the extent that it performs functions that Congress has assigned to "the system." The "system" that Congress required to be established under the Brady Act is one "that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would" be unlawful. Brady Act § 103(b), 107 Stat. at 1541. It is "contact[ed]" by a licensee, "assign[s]" an identification number to the requested transfer, "provide[s]" that number to the licensee, and "notifie[s]" the licensee of a denial. 18 U.S.C. § 922(t)(1) & (2). Thus, the system includes the FBI's "NICS Operations Center," which "receives telephone or electronic inquiries from FFLs to perform background checks [and] makes . . . determination[s] . . . whether the receipt or transfer of a firearm would be in violation of Federal or state law." 28 C.F.R. § 25.2. The system also includes state and local law enforcement Points of Contact—known as POCs—which act as "intermediar[ies] between an FFL and the federal databases," "receive NICS background check requests from FFLs, . . . perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified [for] possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check." *Id.*; *see also id.* § 25.9(d) (describing which "records of state and local law enforcement units serving as POCs will be subject to the Brady Act's requirements for destruction"); *NRA*, 216 F.3d at 138 (assuming that POCs are part of "the system" and subject to the Brady Act's document destruction requirement except when the information is also subject to state law retention requirements).

ATF is not an element of the NICS and does not perform these functions on behalf of the NICS. ATF is not contacted by FFLs regarding prospective transfers; does not assign or provide the identification numbers; does not conduct the search of records to determine whether prospective transfers would be lawful; does not make those determinations; and does not notify FFLs of such determinations. Thus, section 922(t)(2), in providing that "the system shall" do certain things, including destroying certain records regarding approved transfers, imposes no obligation on ATF with regard to its case files.

Furthermore, the materials in ATF's case files are not "records of the system," even if those files contain information that originated with the NICS and thus began as such records. That is why, as noted above, the NICS forwards the audit log information to ATF pursuant to regulations allowing certain disclosure of NICS records *outside of that system* and expressly referring to "disclosure of information *from* the system *to* the ATF"—not to movement of records within the system. 63 Fed. Reg. at 65,227 (emphasis added); *see also* 69 Fed. Reg. at 43,901 (to be codified at 28 C.F.R. § 25.9(b)(2)(i)). ATF field agents who receive the audit log information from the NICS (via the Brady Operations Branch) concerning denied transactions open independent case files, of which that information constitutes a part, and the agents use it in conducting their independent investigation. The contents of those files, including information obtained from outside ATF, thus become records of ATF, not of any originating agency or system of records. *See Privacy Act of 1974; Systems of Records*, 68 Fed. Reg. 3551, 3553 (Jan. 24, 2003) (describing ATF's "Criminal Investigation Report System," which is a system of ATF records for purposes of the Privacy Act, and which includes agents' case files); ATF Opinion Request at 7 ("'Case Files (Investigative Files)' [are] 'records . . . maintained at the field division as a result of investigations of violations of Federal alcohol, tobacco, and firearms and explosives statutes and other investigations required by law.'") (quoting ATF Records Control Schedule, April 5, 2002). For this reason as well, section 922(t)(2) does not impose an obligation on ATF to destroy information in its case files concerning overturned denials.

B.

The appropriations rider, section 615(2), calls for a similar analysis and conclusion. That provision prohibits the use of federal funds for "any system to implement subsection 922(t) . . . that does not require and result in the destruction of any identifying information submitted by or on behalf of any person" not prohibited from possessing or receiving a firearm, within 24 hours after that determination is communicated to an FFL. The rider thus prohibits the use of funds for a "system" and expressly defines the "system" in question as one implementing section 922(t). The ATF case files in question, however, even if they constitute a single

"system" in some sense, *see* 68 Fed. Reg. at 3553, are not designed "to implement subsection 922(t)," 118 Stat. at 2915. Thus, the rider does not restrict any use of funds by ATF with regard to those files or require ATF to destroy any information in those files upon the overturning of a denial by the NICS.

As shown above, the only existing "system to implement subsection 922(t)" is the NICS, the system to which section 922(t) itself expressly and exclusively refers. ATF is not a part of the NICS. And even if the rider, by referring to "any" system, might be read to contemplate creation of another implementing system for section 922(t), we see no basis for concluding that the ATF case files are such a system or that the contents of the ATF files constitute records or information of such a thing. As you have explained, the purpose of the case files is to facilitate ATF's independent investigations in furtherance of its law enforcement duties; they contain "documents relating to [an] investigation." ATF Opinion Request at 7 (quoting ATF Records Control Schedule). Thus, the use of money in furtherance of ATF's work is not use for a system to implement section 922(t).

Nor do we read the rider to require *the NICS* to ensure the destruction of information possessed by ATF as a condition to *the NICS's* use of appropriations. While the rider is not entirely clear whether it requires the destruction only of identifying information within the system or also requires NICS to reach out and ensure the destruction of identifying information that has properly been transferred outside of the system, the text seems to focus on the internal operations of the system and thus suggests the former. In our view, it simply creates a specific deadline for destroying certain records already subject to section 922(t)(2)'s destruction requirement; it does not impose a distinct and more far-reaching destruction requirement. This reading harmonizes well with section 922(t)(2), which already imposes a broad destruction requirement but lacks any deadline for such destruction.

The backdrop against which Congress first passed the rider bolsters this understanding. The duration of the NICS's retention of its audit log information concerning allowed transactions had been a subject of litigation and repeated regulatory revision, events of which Congress can be presumed to have been aware and which it likely intended to address. *See NRA*, 216 F.3d at 126 (noting revisions); *id*. at 127–28 (concluding that section 922(t)(2)(C) need not be read to require *immediate* destruction of information). Furthermore, at the time Congress first enacted the rider, the FBI had put Congress on notice that NICS information was being transferred, pursuant to Routine Use C, to entities such as ATF for law enforcement purposes. *See* 63 Fed. Reg. at 65,226–27. In view of this preexisting agency practice, had Congress wished to require the destruction of additional information—outside of "the system"—not already subject to section 922(t)(2)'s destruction requirement, one would expect the rider to have said so simply and directly.

Furthermore, the Attorney General, in his implementing regulations for the NICS, has likewise interpreted the rider as simply imposing a deadline for carrying out section 922(t)(2)'s destruction requirement. Within the section of the regulations concerning retention and destruction of records, he has provided that, for NICS audit log records regarding allowed transactions, "all identifying information submitted by or on behalf of the transferee will be destroyed within 24 hours." 69 Fed. Reg. at 43,901 (to be codified at 28 C.F.R. § 25.9(b)(1)(iii)). In issuing this provision, he explained that "[t]he [rider] simply reduces the record retention time for records subject to the Brady Act's record destruction requirement; it does not expand the records that are subject to the destruction requirement." *Id*. at 43,898; *see id.* at 43,893 (the rider "addresses the time within which *the NICS* is required to destroy certain information") (emphasis added). For the reasons we have given, even if the rider could reasonably be read otherwise, the Attorney General's interpretation is reasonable, and it merits deference pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *See id.* at 842–43 (holding that a court must uphold an agency's interpretation of a statute that it administers unless "the intent of Congress is clear" as to the "precise question at issue" or the agency's interpretation is "unreasonable").[3]

C.

Lastly, neither paragraph of section 103(i) of the Brady Act prohibits ATF from maintaining audit log information in a case file in the event of an overturned denial. The first paragraph, section 103(i)(1), prohibits the government from "requir[ing] that any record or portion thereof generated by the system established under this section be recorded at or transferred" to a government facility. Brady Act § 103(i)(1), 107 Stat. at 1542, *reprinted in* 18 U.S.C. § 922 note. In our view, this paragraph forbids the government from requiring *third parties*, such as firearms dealers, to record certain NICS information at, or transfer it to, a governmental facility. It does not prohibit the government itself from recording that information. Interpreting section 103(i)(1) to do so would make it impossible to square this paragraph with other provisions of the Brady Act that authorize, and in

[3] An agency's interpretation of a particular statutory provision "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Congress has delegated authority to the Attorney General generally to make rules carrying the force of law in this area, *see* 18 U.S.C. § 926(a) (2000) (providing authority to promulgate rules regarding chapter of 18 U.S.C. that includes section 922), and also has required that he make rules with regard to the NICS, *see* Brady Act § 103(h), 107 Stat. at 1542 (requiring the Attorney General to "prescribe regulations to ensure the privacy and security of the information of the system established under this section"). In *NRA*, 216 F.3d at 126–27, the D.C. Circuit recognized the Attorney General's authority under *Chevron* to interpret section 922(t), to which the rider expressly relates, and *Chevron* applies to an agency's construction of its appropriations bill, *see Kimberlin v. Dep't of Justice*, 318 F.3d 228, 231–32 (D.C. Cir. 2003).

some cases require, the government to make records of NICS transactions. For example, section 103(g) requires the Attorney General to entertain challenges to, and to correct, certain "records of the system." 107 Stat. at 1542. Section 103(i)(2) permits the NICS to establish a firearms registry "with respect to persons prohibited . . . from receiving a firearm." *Id.* And 18 U.S.C. § 922(t)(2)(C) requires the NICS, for allowed transactions, to "destroy all records of the system . . . *other than* the identifying number and the date the number was assigned." (Emphasis added.) These provisions, which contemplate the government's requiring its employees to create records at a government facility, preclude reading section 103(i)(1) to impose a restriction on the government, as opposed to third parties. In addition, NICS checks could not even be processed without the system temporarily recording information about a proposed transaction. This is the interpretation to which the Attorney General has adhered in litigation and that the D.C. Circuit has found not unreasonable. *See NRA*, 216 F.3d at 131 (holding that paragraph (1) does not unambiguously prohibit the government from recording NICS information in an audit log, and crediting the Attorney General's interpretation). For the reasons given, we concur in that interpretation. Thus, section 103(i)(1) does not prohibit ATF from maintaining audit log information in its case files.

Section 103(i) next, in its second paragraph, provides that the government may not "use [the NICS] to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited . . . from receiving a firearm." Brady Act § 103(i)(2), 107 Stat. at 1542. As you have explained ATF's actions, ATF is not implementing any "system for . . . registration." The purpose of ATF's retention of the audit log information in independent case files appears to be a bona fide effort to facilitate ATF's carrying out of its law enforcement duties, not any purpose of "registration of firearms, firearms owners, or firearm transactions or dispositions." Nor does a "system for . . . registration" appear at all likely to be a result of ATF's practice. You have explained that the number of records in question—those involving "the small number of cases where denials were overturned and independent case files were opened"—represents only "a minute fraction of the audit log." ATF Opinion Request at 11. Yet the audit log *as a whole* has been held by the D.C. Circuit (correctly in our view) not to be unambiguously prohibited by section 103(i)(2) because, among other things, it "represents only a tiny fraction of the universe of firearm owners" and, given that it only records *requests* for transfers, does not even indicate whether an "approved gun purchaser[] actually completed a transaction." *NRA*, 216 F.3d at 131. It is true that information in the case files concerning an overturned denial will be retained for a much longer period than information in the audit log concerning an approved transaction—at the time of the *NRA* decision, the latter was retained for six months; now, it is retained for no more than 90 days or, in some cases, 24 hours—but given the small number of ATF records at issue, we see no reason to reach a contrary conclusion.

III.

Accordingly, and based on our understanding of the facts as presented, we conclude that nothing contained in the laws discussed above prohibits ATF from retaining in its case files NICS audit log information concerning an overturned denial. Please let us know if we may provide any further assistance.

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

Status of the Director of Central Intelligence Under the National Security Intelligence Reform Act of 2004

At the time the National Security Intelligence Reform Act of 2004 takes effect, the then-current Director of Central Intelligence would not require a new appointment to the office of Director of the Central Intelligence Agency should the President wish him to serve in that position.

January 12, 2005

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

The National Security Intelligence Reform Act of 2004 (the "Intelligence Reform Act") restructures the management of the intelligence community. Among other things, the Intelligence Reform Act abolishes the title "Director of Central Intelligence" ("DCI") and assigns certain of the functions currently performed by the DCI to an office entitled "Director of National Intelligence" ("DNI") and certain of those functions to an office entitled "Director of the Central Intelligence Agency" ("DCIA"). You have asked whether, at the time the Intelligence Reform Act becomes effective, the current DCI would require a new appointment to the office of DCIA should the President wish him to serve in that position. We conclude that a new appointment would not be required.

I.

The current DCI was nominated by the President and confirmed by the Senate. Under current law, the DCI "(1) serve[s] as head of the United States intelligence community; (2) act[s] as the principal adviser to the President for intelligence matters related to the national security; and (3) serve[s] as head of the Central Intelligence Agency." National Security Act of 1947 ("NSA") § 102(a), 50 U.S.C. § 403(a) (2000).

On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 ("IRTPA"), title I of which is the Intelligence Reform Act. The Intelligence Reform Act will take effect some time in the next six months. IRTPA § 1097, 118 Stat. at 3698. At that time, a position with the title DCI will no longer exist; instead, there will be a DNI and a DCIA. *Id.* § 1011(a) (new NSA §§ 102(a) & 104A(a)), 118 Stat. at 3644, 3660. Both of those positions, the Intelligence Reform Act provides, "shall be appointed by the President, by and with the advice and consent of the Senate." *Id.* § 1011(a) (new NSA §§ 102(a) & 104A(a)), 118 Stat. at 3644, 3660.

You have asked whether, in light of these statutory changes, when the Intelligence Reform Act takes effect the then-current DCI would require a new appointment if the President wishes him to serve as DCIA. Our analysis of the applicable

statutory and constitutional provisions leads us to conclude that a new appointment would not be required.

II.

Although the Intelligence Reform Act does not speak directly to this question, we believe the better reading of the statute is that it does not require a new appointment of the then-current DCI if the President wishes him to serve as DCIA. That conclusion is reinforced by the fact that a contrary reading would raise serious constitutional questions—Congress cannot remove a sitting officer except by impeachment or by abolishing the position. A comparison of the duties of the DCIA and DCI shows that the position has not been abolished. Consequently, a new appointment is not required.

A.

1.

Our conclusion follows, first, from a comparison of the statutory functions and duties of the DCIA and the DCI. Such a comparison shows that the office of DCIA is substantially the same office as that of DCI, albeit with a new title and a reduction of duties. Because the office is the same and because Congress did not clearly indicate a contrary intent, we conclude that Congress did not intend to require a new appointment of the then-current DCI to serve as DCIA.

Like the current DCI, the DCIA will "(1) serve as the head of the Central Intelligence Agency" and will "(2) carry out" various other "specified" "responsibilities" related to intelligence collection. *Compare* IRTPA § 1011(a) (new NSA § 104A(c)), 118 Stat. at 3660, *with* NSA § 102(a), 50 U.S.C. § 403(a). In particular, the DCIA will:

> (1) collect intelligence through human sources and by other appropriate means, [but] shall have no police, subpoena, or law enforcement powers or internal security functions;
>
> (2) correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence;
>
> (3) provide overall direction for and coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to undertake such collection and, in coordination with other departments, agencies, or elements of the United States Government which are authorized to undertake such collection, ensure that the most effective

> use is made of resources and that appropriate account is taken of the risks to the United States and those involved in such collection; and
>
> (4) perform such other functions and duties related to intelligence affecting the national security as the President or the [DNI] may direct.

IRTPA § 1011(a) (new NSA § 104A(d)), 118 Stat. at 3660–61. All of these duties are by statute currently performed by the DCI. *See* NSA § 103(d), 50 U.S.C. § 403-3(d). Moreover, the DCIA, like the DCI, will have authority to terminate CIA employees in the interest of national security, IRTPA § 1011(a) (new NSA § 104A(e)), 118 Stat. at 3661; NSA § 104(h), 50 U.S.C. § 403-4(h) (2000 & Supp. III 2004); and to coordinate relationships with the intelligence services of foreign governments, IRTPA § 1011(a) (new NSA § 104A(f)), 118 Stat. at 3661; NSA § 104(e), 50 U.S.C. § 403-4(e).

Likewise, section 1077—a "conforming amendment[]"—amends the Central Intelligence Agency Act of 1949 (50 U.S.C. §§ 403a–403s) to provide that the same authorities granted to the DCI under that Act will belong to the DCIA, including authorities related to procurement, travel and allowances, personnel, property, admission of essential aliens, appropriations, and acceptance of gifts, among others. 118 Stat. at 3695. Indeed, section 1081(b) of the Intelligence Reform Act provides:

> Any reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the Director's capacity as the head of the Central Intelligence Agency in any law, regulation, document, paper, or other record of the United States shall be deemed to be a reference to the Director of the Central Intelligence Agency.

118 Stat. at 3696.

The DCIA, to be sure, will not serve as head of the intelligence community or as principal adviser to the President for intelligence matters; those roles—greatly enhanced under the Intelligence Reform Act—will be assigned to the newly established DNI. *See id.* § 1011 (new NSA §§ 102 *et seq.*). Yet, *every* duty and responsibility to be discharged by the DCIA under the Intelligence Reform Act is presently discharged by the DCI in his role as head of the CIA, and this broad substantive continuity clearly indicates that the office of DCIA is the same office as that of the DCI, albeit with reduced duties and a new title.

Neither a new title, nor reduced duties, nor a requirement that the DCIA be appointed "by the President by and with the advice and consent of the Senate" implies an intent to create a new office or otherwise require a new appointment. An office is more than a title; it is essentially a collection of duties and authorities. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 140–42 (1996) ("*Separation of Powers*"); Edward Corwin, *The President:*

Office and Powers, 1789–1984, at 85 (5th ed. 1984). Even where the title changes, the office may continue if the duties and authorities continue in a recognizable form, particularly where the duties and authorities are simply reduced. And if the office was Senate-confirmed under its former title, Congress by simply continuing that requirement when changing the title and reducing duties does not indicate an intent to create a new office and thereby require a new appointment; rather, it merely retains a characteristic of the prior position.

Indeed, Congress has frequently changed an office's title, reduced its duties or authorities, and retained a requirement of Senate confirmation under analogous circumstances—without any suggestion that it thereby created a new office or otherwise purported to require a new appointment. For example, in the National Security Act of 1947, Congress renamed the Secretary of War the Secretary of the Army; reduced his powers by transferring his control over the Air Force to a new Secretary of the Air Force; and retained the requirement of Senate confirmation. Yet that act did not suggest that the Secretary of War would have to be reappointed, and the incumbent Secretary of War continued in office as Secretary of the Army without his name being resubmitted to the Senate. *See* NSA §§ 205(a), 207(f), 61 Stat. 495, 501, 503; 93 Cong. Rec. 9393 (July 19, 1947) (Kenneth Royall confirmed as Secretary of War; no subsequent submission for him to serve as the Secretary of Army after the NSA took effect). Likewise, in 1979, Congress renamed the Secretary of Health, Education, and Welfare the Secretary of Health and Human Services; reduced her powers by transferring her education duties to a new Secretary of Education; and retained the requirement of Senate confirmation. Again, the statute did not suggest any need for a new appointment, and the incumbent Secretary of Health, Education, and Welfare continued in office as Secretary of Health and Human Services without her name being resubmitted to the Senate. *See* Department of Education Organization Act, Pub. L. No. 96-88, §§ 301, 509, 93 Stat. 668, 677–79, 695 (1979); 125 Cong. Rec. 21137, 21143 (July 27, 1979) (Patricia Roberts Harris confirmed as Secretary of Health, Education, and Welfare; no subsequent submission for her to serve as Secretary of Health and Human Services after Organization Act took effect). *See also Crenshaw v. United States*, 134 U.S. 99, 101, 109 (1890) (holding that law providing that "all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets'" instead of "'cadet midshipmen,'" and modifying the scope of their duties by restricting the circumstances under which they would be commissioned upon graduation, did not create a new office or appoint its occupants).

Similarly, Congress in creating the Department of Defense reduced the powers of three formerly principal officers—the Secretaries of the Army, Navy, and Air Force—and put them under the control of the secretary of the newly created Department of Defense (while retaining their titles and requirement to be Senate-confirmed) without requiring reappointment. *See* National Security Act Amendments of 1949, Pub. L. No. 81-216, §§ 3, 4, 10(a), 12(f), 63 Stat. 578, 579, 585. Congress has in other ways reduced duties without any suggestion that it was

creating a new office. *See, e.g.*, Act of April 30, 1798, ch. 35, § 5, 1 Stat. 553, 554 (reducing powers of the Secretary of War by transferring certain of them to the secretary of the newly created Navy Department, without requiring reappointment of the War Secretary); *cf. United States v. San Jacinto Tin Co.*, 125 U.S. 273, 284 (1888) (assuming that the "legislative body which created the office" may place "restrictions . . . upon the exercise of . . . authority by" that officer, without it becoming a new office). It also has changed titles without any suggestion that it was creating a new office. *See, e.g.*, Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68, 68 (redesignating Secretary for the Department of Foreign Affairs as Secretary of State, and somewhat increasing duties, without requiring reappointment).

Given that the DCIA position appears, based on the duties, transitional provisions, and historical examples discussed above, to be a continuation of the office of DCI, as head of the CIA, one would expect Congress to have clearly conveyed its purpose if it nevertheless meant to require the then-current DCI to be reappointed in order to serve as the DCIA. By way of comparison, when Congress passed legislation requiring Senate confirmation for the pre-existing positions of Director and Deputy Director of the Office of Management and Budget (legislation that President Nixon vetoed), Congress expressly provided that "no individual shall hold either such position thirty days after [the enactment] date unless he has been so appointed." S. 518, 93d Cong. (1973). Indeed, it was primarily this provision (discussed further below) that led the President to veto the bill. *See* Senate Confirmation of OMB Director and Deputy Director: The President's Message to the Senate Vetoing Bill Requiring Senate Confirmation of the Two Positions, 9 *Weekly Comp. Pres. Doc.* 681 (May 18, 1973) ("Senate Confirmation of OMB Director and Deputy Director").

2.

The Intelligence Authorization Act for Fiscal Year 2005, Pub. L. No. 108-487, 118 Stat. 3939 (2004) (the "Authorization Act") does not change our conclusion. Section 803(b) of the Authorization Act states:

> (1) During the period beginning on the date of the enactment of this Act and ending on the date of the appointment of the Director of the Central Intelligence Agency under section 104A of the National Security Act of 1947, as amended by section 1011(a) of the National Security Intelligence Reform Act of 2004, the Director of Central Intelligence may, acting as the head of the Central Intelligence Agency, discharge the functions and authorities provided in this Act, and the amendments made by this Act, to the Director of the Central Intelligence Agency.
>
> (2) Upon the appointment of an individual as Director of the Central Intelligence Agency under section 104A of the National Security Act

> of 1947, as so amended, any reference in this Act, or in the classified annex to accompany this Act, to the Director of Central Intelligence as head of the Central Intelligence Agency shall be deemed to be a reference to the Director of the Central Intelligence Agency.

Id. § 803(b), 118 Stat. at 3962–63. Section 803(a) provides the same authority for the DCI with respect to the functions and authorities of the DNI under the Authorization Act. The conferees' joint explanatory statement on section 803 indicates, consistently with the terms of section 803 itself, that it was meant to "clarif[y] how certain authorities shall be exercised, and who shall exercise them, during the transitional period between enactment of this Act, its effective date, the appointment of certain officers, and the enactment and effective date of the [Intelligence Reform Act]." H.R. Conf. Rep. No. 108-798, at 34 (2004). Presumably this language was necessary because, as section 803(b)(1) suggests, the Authorization Act takes effect upon enactment and refers throughout to the DNI and DCIA, yet the Intelligence Reform Act, which creates those titles, does not take effect until sometime later. *See id.*

In view of section 803's language and purpose, we do not believe it fairly can be read together with the Intelligence Reform Act to require a new appointment simply because it provides (in section 803(b)(1)) who may exercise certain authority under the Authorization Act in the transitional period until "the appointment" of a DCIA and (in section 803(b)(2)) how "any" references to the DCI remaining in the Authorization Act should be read "[u]pon the appointment" of a DCIA. Section 803's operative terms relate to the Authorization Act, not the Intelligence Reform Act. It provides, in permissive terms, that the DCI "may" "discharge the functions and authorities provided in this Act"—i.e., provided in the Authorization Act—during the transition period. We would not expect Congress to attempt to require a new appointment under a separate piece of legislation in such an obscure manner, especially with respect to such an important office.

Moreover, section 803 is a "savings provision[]." Pub. L. No. 108-487, § 803, 118 Stat. at 3962 (title of section). Its purpose is to ensure that some officer (the DCI) is able to exercise the authorities granted under the Authorization Act to the DNI and DCIA, not to restrict or otherwise address the President's authority to retain the current officer charged with running the CIA. In view of this purpose, the reference in section 803(b)(1) to "the date of the appointment of the [DCIA]" is best read to mean "the date on which all actions necessary to create and fill the office of DCIA have been taken." If the current DCI remains in his current office, that date is the effective date of the Intelligence Reform Act. By contrast, because the DNI, unlike the DCIA, is a new office, the appointment requires both the Intelligence Reform Act to take effect and the President to nominate, and the Senate to confirm, a new officer as the DNI. The broad language of section 803(b), in referring to appointment, was necessary to take account of the possibility that

the then-current DCI would not remain in office until the Intelligence Reform Act went into effect; it was not intended to require a new appointment in the event he did.

B.

Our conclusion is reinforced by the fact that a contrary conclusion would raise serious constitutional doubts. As the Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), the Constitution vests in the President, to the exclusion of Congress, the authority to remove an officer of the United States before the expiration of his term. There are two recognized exceptions: Congress may remove an officer through impeachment, and Congress may abolish an office altogether, thereby effectively removing the officer. *See Morrison v. Olson*, 487 U.S. 654, 686 (1988) ("the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove'"); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that officers of the United States may not be removed by Congress other than through impeachment). Furthermore, Congress may not accomplish a removal through "ripper" legislation, whereby Congress ostensibly abolishes an office while simultaneously recreating it and requiring a new appointment. *See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25, 26 (1987). For example, in vetoing the bill, mentioned above, requiring the incumbent Director and Deputy Director of the Office of Management and Budget to be reappointed subject to Senate confirmation, President Nixon explained:

> I do not dispute Congressional authority to abolish an office or to specify appropriate standards by which the officers may serve. When an office is abolished, the tenure of the incumbent in that office ends. But the power of the Congress to terminate an office cannot be used as a back-door method of circumventing the President's power to remove. With its abolition and immediate re-creation of two offices, [this bill] is a device—in effect and perhaps in intent—to accomplish Congressional removal of the incumbents who lawfully hold those offices.

Senate Confirmation of OMB Director and Deputy Director, 9 *Weekly Comp. Pres. Doc.* at 681. That veto was sustained. 119 Cong. Rec. 16503, 16764 (1973). The following year, Congress passed legislation requiring Senate confirmation of any future Director or Deputy Director of the Office of Management and Budget, but not the incumbent officers. That bill was approved. Act of Mar. 2, 1974, Pub. L. No. 93-250, 88 Stat. 11.

While the DCIA under the Intelligence Reform Act is not the exact recreation of the DCI—as its powers are reduced—it is, as explained above, the clear

continuation of that office in its capacity as head of the CIA. Thus, the same constitutional defect would obtain here were the statute interpreted to require a new appointment. The Constitution does not permit Congress to remove an officer while continuing his office, even with somewhat reduced duties.[1]

In view of these serious constitutional doubts, even if the statutory analysis were substantially less clear, we would avoid interpreting the Intelligence Reform Act to require a new appointment for the then-current DCI. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," it is appropriate to "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

C.

We have also considered, and rejected, the possibility that the DCI position instead continues as the DNI. While the DNI position resembles the DCI in significant respects (like the DCI, the DNI will serve as head of the intelligence community and as the principal adviser to the President on intelligence matters related to national security), the responsibilities and authority of the DNI in that role are considerably greater than the DCI's. Indeed, the desire to create a more robust head of the intelligence community was a driving force behind the legislation. *See* H.R. Conf. Rep. No. 108-796, at 241 (2004) ("This legislation in part implements the recommendations of the . . . '9/11 Commission' . . . . includ[ing] reorganization of the U.S. Intelligence Community by creating an empowered Director of National Intelligence"). By contrast, as noted above, all of the DCIA's responsibilities and authority as head of the CIA are currently exercised by the DCI.

Congress provided that the current DCI may not serve as *both* the DNI and the DCIA: The "individual serving in the position of Director of National Intelligence," the Intelligence Reform Act states, "shall not, while so serving, also serve as the Director of the Central Intelligence Agency or as the head of any other element of the intelligence community." IRTPA § 1011(a) (new NSA § 102(c)), 118 Stat. at 3644. Given that Congress clearly intended to prohibit the current DCI from serving as both the DNI and the DCIA, that the functions of the DCIA are nearly identical to the current functions of the DCI as head of the CIA, and that the functions of the DNI are substantially different from the current functions of the DCI as head of the intelligence community, the statute most naturally suggests that

[1] As discussed below, there may be cases where the *addition* of duties to an office will result in the establishment of a new office requiring a new appointment. We do not believe that the mere *reduction* of duties can ever result in a new office requiring a new appointment. We need not definitively resolve this issue, however. It is clear that the removal of certain duties from the position of DCI here does not render the position of DCIA a new office requiring a new appointment for constitutional purposes.

the office of DCI is continued in the office of DCIA, albeit with a new title and reduced responsibilities, and not in the office of DNI.

We need not—and do not—decide whether the result would have been different if, instead of establishing two positions (the DCIA and the DNI), the Intelligence Reform Act had simply assigned the authorities of the new DNI to the existing DCI. We decide only that where, as here, the Intelligence Reform Act establishes two positions, one of which (the DCIA) exercises only powers currently exercised by the pre-existing office and the other of which (the DNI) exercises considerable additional powers, it is the former that is the continuation of the pre-existing office.[2]

Accordingly, we conclude that when the Intelligence Reform Act takes effect the then-current DCI would not require a new appointment to serve as DCIA.

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

[2] Constitutional concerns are relevant to this conclusion as well—here, concerns related to the Appointments Clause. U.S. Const. art. II, § 2. It is well established that "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." *Separation of Powers*, 20 Op. O.L.C. at 157. 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"). But where Congress has simply "increase[d] the power and duties of" positions that continue to exist, and the new duties are "germane to the offices already held by" the incumbents, the Court has found no infirmity. *Shoemaker*, 147 U.S. at 301; *see also id*. at 289 (Congress may "entrust 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. *See Separation of Powers*, 20 Op. O.L.C. at 157–59. In this case, although the "additional duties" of the DNI appear to be "germane" to those of the DCI, *see Shoemaker*, 147 U.S. at 301, the additions are considerable. There is at least a question whether Congress could confer such additions on the officer who is currently DCI. *Cf. Separation of Powers*, 20 Op. O.L.C. at 158 (in discussing germaneness test, considering whether officers' functions with the additional duties "could be said" to have been "'within the contemplation of those who were in the first place responsible for their appointment and confirmation'") (quoting *Legislation Authorizing the Transfer of Federal Judges From One District to Another*, 4B Op. O.L.C. 538, 541 (1980)); *Shoemaker*, 147 U.S. at 301 (finding new duties neither "dissimilar to" *nor* "outside the sphere of" prior duties); *Olympic Fed. Sav. & Loan Ass'n v. Dir., 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). By contrast, the reduction or limitation of duties does not create the risk of a congressional appointment. *See Separation of Powers*, 20 Op. O.L.C. at 157 n.92. Thus, by resolving the statutory question as we do, we avoid the need to address a possible constitutional problem.

Religious Objections to the Postal Service Oath of Office

Section 1011 of title 39 of the United States Code specifies an oath of office that all Postal Service officers and employees must take. Title VII of the Civil Rights Act of 1964 does not require the Postal Service to depart from the dictates of section 1011 in order to accommodate (beyond what is required by section 1011) prospective employees who raise bona fide religious objections to taking this oath.

The Religious Freedom Restoration Act does not require any further accommodation in response to three common objections to taking this oath.

February 2, 2005

MEMORANDUM OPINION FOR THE VICE PRESIDENT AND GENERAL COUNSEL
UNITED STATES POSTAL SERVICE

Congress has long required that all officers and employees of the United States Postal Service, before entering into any duties or receiving any salary, take and subscribe a set oath. Its words are now specified in 39 U.S.C. § 1011 (2000). That statute allows a prospective employee to "affirm" rather than "swear" the oath but does not otherwise provide for alteration. You have asked whether, and if so under what circumstances, the Postal Service is required either by Title VII of the Civil Rights Act of 1964 or by the Religious Freedom Restoration Act ("RFRA") to depart from the dictates of section 1011 in order to further accommodate prospective employees who raise bona fide religious objections to taking this oath. We first conclude that Title VII does not require any further accommodation, because it does not permit any departure from a federal statutory mandate. We also conclude that RFRA does not require any further accommodation in response to three common objections: without questioning the sincerity of the religious views behind those objections, we nevertheless conclude from an analysis of the terms of the statutory oath that, properly understood, the oath does not in those circumstances burden a person's exercise of religion.[1]

I.

Since the Civil War, Congress has mandated a set oath of office as a condition precedent for employment with the federal government, including employment in the Post Office, and this oath has included the pledges that one will "support and defend the Constitution of the United States, against all enemies, foreign and domestic" and "bear true faith and allegiance to the same." *See* An Act to prescribe an Oath of Office, and for other Purposes, ch. 128, 12 Stat. 502, 502 (1862);

[1] It is conceivable that, under some additional objection, the oath could be said to substantially burden a particular person's exercise of religion; should the Postal Service conclude that that has happened, RFRA may, depending on the details of the objection, require a limited accommodation.

see also An Act to amend the Laws relating to the Post-Office Department, ch. 71, § 2, 12 Stat. 701, 701–02 (1863) (adding to this oath for all persons employed by Post Office). As Attorney General Speed wrote of the Civil War era statutes, "the ability to take the oath, and the fact that the oath is taken, are qualifications as well for employe[e]s and contractors as for officers in the Post Office Department." *Le Baron's Case*, 11 Op. Att'y Gen. 498, 500 (1866). The present general oath for federal officers appears at 5 U.S.C. § 3331 (2000). Congress has separately specified the oath for the Postal Service, in 39 U.S.C. § 1011, although it is identical (but for omitting the concluding sentence, "So help me God"). Section 1011 requires as follows:

> Before entering upon their duties and before receiving any salary, all officers and employees of the Postal Service shall take and subscribe the following oath or affirmation:
>
> > "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter."

From time to time, the Postal Service faces religious objections to this requirement. We understand from you and the Civil Division of this Department that three objections in particular recur. First, some prospective employees object to affirming that they will "support . . . the Constitution," stating that they object to placing allegiance to a temporal power above allegiance to God. Second, others object to affirming that they will "defend the Constitution," stating that they object to promising to take up arms or use force in defense of the country. Third, still others object to affirming that they will "bear true faith and allegiance" to the Constitution, stating that they object to placing allegiance to a temporal power above allegiance to God. *See* Letter for M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, Vice President, General Counsel, United States Postal Service at 2 (May 29, 2003) ("May USPS Letter") (explaining that "great majority" of objections involve "support" and "defend"); Memorandum for Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, from Peter D. Keisler, Assistant Attorney General, Civil Division at 2 (Oct. 23, 2003) ("Civil Division Memo") (including "true faith and allegiance" as among the "most typical objections" and describing objection as same as objection to "support"); *see also Anderson v. Frank*, No. 91-C-292, slip op. at 2 (E.D. Wis. Nov. 20, 1992) (rejecting Title VII challenge to Postal Service oath, involving claims that "defend" suggested military service and "true faith and allegiance" suggested "devotion to an entity other than God").

Initially, you asked only whether Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2000), requires the Postal Service to accommodate religious objections. *See* Letter for Jay Bybee, Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, Vice President, General Counsel, United States Postal Service at 2 (Apr. 25, 2003) ("April USPS Letter"). Subsequently, you asked that we also consider RFRA, 42 U.S.C. §§ 2000bb–2000bb-4 (2000). *See* May USPS Letter at 2. Because of the involvement of the Civil Division and the Equal Employment Opportunity Commission ("EEOC") in the *Anderson* case cited above, we have solicited and received their views, although the EEOC has formally limited its views to "the application of Title VII." Letter for Howard C. Nielson, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Associate Legal Counsel, EEOC at 1 n.1 (Jan. 8, 2004). The Civil Rights Division of this Department and the Office of Personnel Management did not submit views in response to our requests. We first address Title VII and then turn to RFRA.

II.

The section of Title VII regulating employment by the federal government provides that "[a]ll personnel actions affecting employees or applicants for employment . . . in the United States Postal Service . . . shall be made free from any discrimination based on . . . religion." 42 U.S.C. § 2000e-16(a).[2] Although this language does not plainly require accommodation of religious practice—as opposed to simply prohibiting affirmative "discrimination based on" such practice—Congress, as the Supreme Court has explained, has "incorporated [such a requirement] into the statute, somewhat awkwardly, in the definition of religion." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986). That definition provides as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[3] Title VII thus, through

[2] A provision in the Postal Reorganization Act provides: "Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with . . . employees . . . shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a) (2000). Subsection (b) does not list Title VII as applying. Subsequent to enacting section 410, however, Congress amended Title VII to include the language quoted in the main text, expressly applying it to the Postal Service. Although Congress did not then also amend section 410, it is well established that Title VII applies to the Postal Service. *See, e.g.*, *Loeffler v. Frank*, 486 U.S. 549 (1988); *see also Grandison v. USPS*, 696 F. Supp. 891, 894 (S.D.N.Y. 1988) (explaining the history).

[3] Part of the awkwardness (although not at issue in *Ansonia*) is the arguable exclusion of the federal government from this definition, because Title VII excludes "the United States" from its definition of "employer." 42 U.S.C. § 2000e(b). But the Postal Service does not contend that section 2000e(j) does

the interaction of these two sections, is understood to require federal employers in "[a]ll personnel actions" to "reasonably accommodate to" an employee's religious practices, unless so accommodating would impose "undue hardship." *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (explaining that "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear"). Any accommodation that would cause an employer to bear "more than a *de minimis* cost" imposes "undue hardship." *Id*. at 84; *see Ansonia*, 479 U.S. at 67 (same). And the cost need not be economic. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134–35 (1st Cir. 2004).

Title VII does not require (or permit) the Postal Service, in response to religious objections, to depart from the oath of office mandated by 39 U.S.C. § 1011, because for the Postal Service to violate a federal statute would impose "undue hardship" as a matter of law. Nothing in the relevant provisions of Title VII either expressly or implicitly provides for the disregard of a congressional mandate in the name of reasonably accommodating to religious practices: Section 2000e(j) contains no "notwithstanding any other law" language; nor does it otherwise suggest that it overrides other federal law, such as RFRA does by expressly "appl[ying] to all Federal law," 42 U.S.C. § 2000bb-3(a). *Cf. TWA*, 432 U.S. at 79 (holding that, in absence of "a clear and express indication from Congress" to the contrary, it would cause undue hardship under section 2000e(j) for an employer to violate "an agreed-upon seniority system" in an "otherwise valid" collective bargaining contract). Furthermore, as you have noted, *see* April USPS Letter at 2, the Postal Service, as a component of the Executive Branch of the federal government, has a background constitutional duty, derivative from the President's, to take care that the laws be faithfully executed. *See* U.S. Const. art. II, § 3. The Postal Service oath is and long has been among those laws and thus within that duty, and we see no basis in the text of Title VII for discerning any implicit intent to alter that oath's express obligation.

The presidential guidelines that we discuss more fully in our RFRA analysis in the next part take the same view. In addressing Title VII's requirement of reasonable accommodation, they recognize that undue hardship is imposed if the accommodation "would cause an actual cost to the agency or to other employees or an actual disruption of work, *or . . . is otherwise barred by law*." Office of the Press Secretary, The White House, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* § 1.C (Aug. 14, 1997) ("1997 Guidelines," or "Guidelines") (emphasis added).

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not apply, and courts repeatedly have applied its obligation to the Postal Service. *E.g.*, *Mann v. Frank*, 7 F.3d 1365, 1368–70 (8th Cir. 1993); *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 774–75 (9th Cir. 1986) (per curiam). We therefore assume for purposes of this memorandum that section 2000e(j) applies.

The courts in similar circumstances have uniformly understood section 2000e(j) in this way. The issue has arisen most frequently with prospective employees' religiously based refusals to provide social security numbers, notwithstanding federal requirements to do so. The Ninth Circuit in *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (1999), held that "accommodation would cause 'undue hardship' as a matter of law," *id*. at 831, laying down the rule "that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law," *id*. at 830. *Sutton* reaffirmed *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984), in which the court had held that it would cause undue hardship to accommodate a Sikh machinist's practice of wearing a beard, because doing so would expose the employer to liability under state workplace safety rules.[4] *See also EEOC v. Sambo's of Ga.*, 530 F. Supp. 86 (N.D. Ga. 1981) (similar, involving state food service rules). The Eighth Circuit in *Seaworth v. Pearson*, 203 F.3d 1056 (2000) (per curiam), followed *Sutton* in holding that accommodating an objection to providing one's social security number would cause undue hardship because it would violate the Internal Revenue Code. *Id*. at 1057. The Fourth and Tenth Circuits also have taken the same view. *See Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F. Supp. 2d 414, 419 (E.D. Va.) ("Courts have consistently agreed that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law."), *aff'd*, 15 F. App'x 172, 2001 WL 912673, at *1 (4th Cir. Aug. 14, 2001) (per curiam) (affirming on reasoning of district court); *Weber v. Leaseway Dedicated Logistics, Inc.*, 5 F. Supp. 2d 1219, 1223 (D. Kan. 1998) ("undue hardship is shown if an accommodation would cause the employer to violate the law"), *aff'd*, 166 F.3d 1223, 1999 WL 5111, at *1 (10th Cir. Jan. 7, 1999) (per curiam) (affirming on this ground); *see also EEOC v. Allendale Nursing Ctr.*, 996 F. Supp. 712, 717–18 (W.D. Mich. 1998) (finding undue hardship in social security number case).[5]

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[4] The question whether it would cause "undue hardship" to violate a law is distinct from the question whether, as some courts have held, Title VII requires accommodation of employees subject to union shop agreements who conscientiously object to paying union dues. *See, e.g.*, *Tooley v. Martin-Marietta Corp*., 648 F.2d 1239, 1242 (9th Cir. 1981). Federal law merely permits union shop agreements that require collection of union dues; it does not require them.

[5] Many of the cited cases also have held, in the alternative, that an employer's mere compliance with a governmental mandate is not an employment requirement (in the words of section 2000e-16(a), a "personnel action[]") and therefore cannot form the basis for a prima facie case. *See Seaworth*, 203 F.3d at 1057 ("the IRS, not defendants, imposed the requirement"); *Baltgalvis*, 132 F. Supp. 2d at 418–19 ("the requirement that Ms. Baltgalvis provide her SSN to her employer is one imposed by federal law and merely implemented by" the employer); *Allendale Nursing*, 996 F. Supp. at 717 ("Rhoads' dispute is with the IRS or SSA, not with her employer."). *See also* Civil Division Memo at 6 ("Title VII governs adverse personnel actions, not statutes."). But in *Sutton* and *Weber*, although the district courts followed this rule, the courts of appeals did not affirm on this ground, merely holding that accommodation would impose undue hardship. *See Sutton*, 192 F.3d at 830–31; *Weber*, 1999 WL 5111, at *1.

One might argue that the rule of these cases depends on the exposure of an accommodating employer to potential liability, whereas the Postal Service would not (as far as we are aware) face any liability for failing to enforce fully the oath that section 1011 requires. We reject any such argument. The Tenth and Ninth Circuits have done the same, at least implicitly. The Tenth Circuit in *Weber* bifurcated its analysis, first holding that "[r]equiring Defendant to violate these laws in order to accommodate Plaintiff would result in undue hardship," 1999 WL 5111, at *1, and then separately holding that requiring "an employer to subject itself to potential fines *also* results in undue hardship," *id*. at *2 (emphasis added). The Ninth Circuit in *Sutton* stated the rule without mentioning possible liability, and quoted only the former part of *Weber*. 192 F.3d at 830–31. No court has suggested that it would have decided differently had the employer not faced potential liability, and the courts have easily rejected arguments that the hardship from disregarding another law was de minimis even when the burden of accommodating would have been minimal: In social security cases, the employer could apply for a waiver from the requirement to submit a number, would apparently face only a $50 penalty for violating it, and might be able to avoid the requirement by treating the plaintiff as an independent contractor. *See Seaworth*, 203 F.3d at 1057–58; *Baltgalvis*, 132 F. Supp. 2d at 419; *Allendale Nursing*, 996 F. Supp. at 717–18; *see also Hommel v. Squaw Valley Ski Corp.*, 89 F. App'x 650, 2004 WL 473956, at *1 (9th Cir. Mar. 11, 2004) (per curiam) (applying rule of *Sutton*). Moreover, even if these cases had turned on potential civil liability, we would not lightly conclude that it was a de minimis cost for a part of the federal government to disregard a federal law, even if it suffered no quantifiable cost for doing so.

III.

Having concluded that Title VII does not require the Postal Service to accommodate religious objections to the oath that section 1011 mandates, we consider whether RFRA requires any such accommodation. RFRA provides that "Government shall not *substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b) (emphases added). After determining that RFRA applies to the Postal Service's enforcement of the oath statute, we explain that, in three common objections that you and the Civil Division have identified, the oath, properly interpreted, does not in fact "substantially burden" the religious views at issue and therefore that RFRA does

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Although the existence of a prima facie case is a question analytically prior to that of the imposition of undue hardship, we decline to reach it, given that the rule regarding undue hardship is sufficient to resolve your question.

not require an accommodation in those situations. We then explain how the Postal Service should address any other bona fide religious objections that it may receive, concluding that, if a substantial burden should be shown, the Postal Service would have a compelling interest in imposing the oath but may, as the least restrictive means of furthering the governmental interest, need to make a limited modification, guided by the principles that we outline.

A.

RFRA broadly applies to the "Government," which includes not only entities but also officers of those entities and persons acting under color of law, *see id*. § 2000bb-2(1), and "to all Federal law, and the implementation of that law, whether statutory or otherwise," regardless of its date of enactment, *id*. § 2000bb-3(a). The Postal Service is part of the federal government, *see, e.g.*, 39 U.S.C. § 201 (2000) (creating Postal Service as an "establishment of the executive branch of the Government of the United States"), and thus part of the "Government" for purposes of RFRA. And the oath that 39 U.S.C. § 1011 requires is a federal statutory law. By the terms of the statute, then, RFRA would seem to apply to the Postal Service's obligations under section 1011.[*]

On the mere question whether RFRA applies, *Brown v. GSA*, 425 U.S. 820 (1976), does not color the interpretation of the relevant statutory text, quoted above, and that text is broad and clear. Furthermore, the 1997 Guidelines resolve any doubt in the affirmative. They provide that "where an agency's work rule imposes a substantial burden on a particular employee's exercise of religion, the agency . . . should grant the employee an exemption from that rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest," *id.* § 1.C, and that "[i]n the Federal Government workplace, if neutral workplace rules . . . impose a substantial burden on a particular employee's exercise of religion, [RFRA] requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest," *id*. § 2.E. *See also id*. § 2.B (including RFRA in discussion of law governing federal hiring and firing).

[*] Editor's Note: The published version of this opinion omits two paragraphs, which reflect the views of the Civil Division and which are protected by the deliberative process privilege. Neither paragraph is necessary for the discussion here, which is limited to the applicability of RFRA and which does not address the separate issue of the remedies that may or may not be available to federal employees under RFRA. *Cf. Francis v. Mineta*, 505 F.3d 266, 270, 272 (3d Cir. 2007) (holding the applicability of RFRA's legal standard does not answer the separate question of which statute provides the appropriate remedial scheme, and that Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, "provides the exclusive remedy for job-related claims of federal religious discrimination").

When issued in 1997, the Guidelines plainly bound the internal operations of the civilian Executive Branch. The President of the United States, in whom "[t]he executive Power" is "vested," U.S. Const. art. II, § 1, announced their issuance. Remarks Announcing Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1102 (1997). He simultaneously issued a memorandum "directing the heads of executive departments and agencies . . . to comply with the *Guidelines*" and admonishing "[a]ll civilian executive branch agencies, officials, and employees [to] follow [them] carefully." Memorandum on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), 2 *Pub. Papers of Pres. William J. Clinton* 1104, 1104 (1997). The Guidelines were apparently distributed that day—at his direction—by the Office of Personnel Management, *see id*. at 1103, 1104, and they were posted on the White House website.

The 1997 Guidelines still apply. Presidential directives do "not automatically lapse upon a change of administration," but rather, "unless otherwise specified . . . remain effective until subsequent presidential action is taken." *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29, 29 (2000). They "remain in force, unless otherwise specified, pending any future presidential action." *Id*. Although the Guidelines were not published in the Federal Register, this omission does not appear to affect their continuing force. *See id*. Nothing in the Guidelines or the issuing materials "otherwise specifie[s]" that the President intended a limited duration, and we are aware of no "presidential action" to revoke them.[6]

B.

In order for any duty of accommodation to arise under RFRA, a governmental action must "substantially burden" a person's "exercise of religion." 42 U.S.C. § 2000bb-1(b).[7] RFRA indicates, in Congress's findings, that it seeks through this language and the rest of its requirements to codify the standard that the Supreme Court applied to claims under the Free Exercise Clause of the Constitution's First Amendment beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963), and continu-

[6] The Guidelines appeared at www.whitehouse.gov/WH/New/html/19970819-3275.html, which now leads to a message stating that the file cannot be found and that "many files associated with the previous administration have been removed." They remain available at www.fedlabor.org/LR_News/religion.htm.

Editor's Note: The Guidelines are no longer available at either link but, as of October 1, 2014, can be found at http://clinton2.nara.gov/WH/New/html/19970819-3275.html.

[7] RFRA defines "exercise of religion" as "religious exercise," 42 U.S.C. § 2000bb-2(4), which the cross-referenced Religious Land Use and Institutionalized Persons Act defines to "include[ ] any exercise of religion, whether or not compelled by, or central to, a system of religious belief," *id*. § 2000cc-5(7)(A) (2000).

ing up to, but excluding, *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb.

A governmental action does not impose a *substantial* burden for purposes of RFRA if it imposes *no* burden because it does not actually conflict with an individual's religious exercise. As the Court during that pre-*Smith* period observed: "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985). The Court rejected a claim that being required to receive the minimum wage "would violate the religious convictions" of the purported volunteers of a religious organization who objected to receiving a cash wage (rather than just benefits), because the labor statute, as its definition of "wage" established, "does not require the payment of cash wages." The imposition of the requirement therefore would not have burdened this religious tenet. *Id*. at 303–04. The Court similarly rejected a claim that imposing the statute's recordkeeping requirement would burden the volunteers' religion, because that claim "rests on a misreading of the Act," which imposed no such requirement on the volunteers. *Id*. at 304 n.27. Of course, the government generally may not inquire into a person's religious beliefs, apart from determining that they are in fact "religious" and are sincerely held. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713–16 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 209, 215–16 (1972); *see also Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989) ("States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause."). But as the Court's analysis in *Alamo* indicates, the government may objectively evaluate the alleged intersection between a given bona fide religious belief and the governmental action, and determine whether they in fact conflict.

Because there is no actual conflict, no substantial burden exists under RFRA when prospective employees raise any of the three common objections to the Postal Service oath of office described in Part I. As explained there, persons have objected to pledging to (1) "support . . . the Constitution," (2) "defend the Constitution," and (3) "bear true faith and allegiance to" the Constitution on the ground that doing so would violate their sincerely held religious views. When these terms are properly understood, however, it is clear that the oath does not conflict with the particular views involved and thus does not impose a burden on persons raising these objections. As the Civil Division puts it: "There is no doubt that the fundamental tenets of some religions forbid military service or placing an allegiance to a temporal power over God. . . . [T]he reason why there is no burden on religion here . . . is that applicants who object to the oath are mistaken in thinking that it asks them to violate these tenets of their religion." Civil Division Memo at 4. Or, as the Court put it in similar circumstances: "We . . . fail to perceive how application of the" oath statute "would interfere with [applicants']

right to freely exercise their religious beliefs." *Alamo*, 471 U.S. at 304–05. We consider each of these phrases of the oath in turn.

First, pledging that one will "support . . . the Constitution of the United States against all enemies, foreign and domestic," 39 U.S.C. § 1011, does not burden the religious exercise of persons who object to subordinating their allegiance to God to their allegiance to a temporal power. This phrase says nothing of one's relation to God and in fact lists only temporal enemies.

Instead, the "support" phrase requires only that a person abide by the nation's constitutional system of government and its laws. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court explained that a provision of a Georgia oath—requiring state legislators to affirm that they "support[ed] the Constitution of this State and of the United States"—simply called for a willingness to abide by our "constitutional processes of government." *Id*. at 129, 135. The Court reiterated this view in *Cole v. Richardson*, 405 U.S. 676 (1972), noting that such language merely paraphrases the oath that the Constitution requires for all federal and state legislators and officers—who must be "bound by Oath or Affirmation to support this Constitution," U.S. Const. art. VI, cl. 3—and pointing out that even justices dissenting in prior oath cases had agreed that a "support" oath merely "requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully." 405 U.S. at 682 (citation omitted). The Court "recognized that the purpose leading legislatures to enact such oaths . . . was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system." *Id*. at 684. In sum, "the connotatively active word 'support' has been interpreted to mean simply a commitment to abide by our constitutional system." *Id*.

Second, pledging that one will "defend the Constitution against all enemies, foreign and domestic," as section 1011 requires, does not burden the religious exercise of persons who object to resorting to arms. It makes no mention of arms or war. Rather, the phrase is the mirror of the pledge to "support" the Constitution: One promises not only to "support" the Constitution generally, but also—in a manner not specified—to oppose those who do not "support" it. "Support and defend," used together, are effectively a unitary phrase.

Again, the Supreme Court has made this clear. In *Girouard v. United States*, 328 U.S. 61 (1946), just after the close of World War II, the Court interpreted the naturalization oath's similar pledge—that one will "defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"—as not precluding the naturalization of an alien who, as a Seventh-Day Adventist, refused to take up arms in defense of the country. *See id*. at 62 (quoting former 8 U.S.C. § 735(b)). The oath did not "in terms require that [aliens] promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship." *Id*. at 64. The Court was unwilling to "read [such a requirement] into the Act by implication," in part because of the nation's long history of providing

exemptions from military service for conscientious objectors: "we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms." *Id*.; *see also id*. at 66–67 (similar). Congress had, through such exemptions, recognized "that even in time of war one may truly *support and defend* our institutions though he stops short of using weapons of war." *Id*. at 67 (emphasis added). In *Cole*, the Court further concluded that "defend" does not require military service as a non-combatant. A state oath of office required employees to pledge to "uphold and defend the Constitution of the United States of America" and to "oppose the overthrow of the government of the United States of America . . . by force, violence, or by any illegal or unconstitutional method." 405 U.S. at 677–78 (footnote omitted). In sustaining the oath against a free speech challenge, the Court explained that such language "was simply a recognition that ours is a government of laws and not of men" and "involved an affirmation of organic law and rejection of the use of force to overthrow the government." *Id*. at 682–83 (internal quotation marks and footnote omitted). The Court found the "uphold and defend" clause "indistinguishable from the oaths that this Court has recently approved," including in *Bond*. *Id*. at 683.

This interpretation finds further support in the present naturalization oath statute, which expressly continues the tradition that *Girouard* invoked. The statute requires separate pledges to "support and defend" and "to bear arms," while allowing alternative formulations of the latter—and only the latter—for any person "opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief." One alternative involves "noncombatant service"; the other involves "work of national importance under civilian direction." 8 U.S.C. § 1448(a) (2000). Thus, Congress itself has indicated that it does not understand "defend" to refer to military service.

Finally, pledging that one will "bear true faith and allegiance to" the Constitution does not burden the exercise of religion of persons who object to subordinating their allegiance to God to their allegiance to the United States. Although the quoted phrase arguably presents a closer question than "support," properly understood it simply reinforces the immediately preceding "support and defend" clause, by requiring that one pledge an honest and faithful commitment to the Constitution as opposed to *other temporal powers*—not as opposed to God. This reading too finds support in the naturalization oath statute, as well as in the Constitution's Test Oath Clause and the related tradition.

Congress has mandated a pledge containing the following elements, among others, for the naturalization oath: "(2) to renounce and abjure absolutely and entirely *all allegiance and fidelity* to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to *support and defend* the Constitution and the laws of the United States against all enemies, foreign and domestic; [and] (4) to *bear true faith and allegiance* to the same." *Id*. (emphases added). The similarity between the phrases "bear true faith

and allegiance" and "renounce . . . all allegiance and fidelity" suggests that both relate only to temporal powers (given that the latter phrase plainly does), and that "faith" is used in the sense of faithfulness, rather than in the sense of belief or with any reference to one's religious obligations. *Cf. Girouard*, 328 U.S. at 64 ("Refusal to bear arms is not necessarily a sign of *disloyalty or a lack of attachment* to our institutions. One may serve his country *faithfully and devotedly*, though his religious scruples make it impossible for him to shoulder a rifle.") (emphases added); 4 U.S.C. § 4 (2000) (Pledge of Allegiance, including pledge of "allegiance" to country "under God"). In addition, the sequence of these three elements suggests that a promise to "bear true faith and allegiance" to the Constitution is the culmination of, and thus similar in kind to, the preceding pledges: One turns *away* from one's prior association with another temporal power; then turns *toward* the Constitution of the United States in lieu of the former power; and then, finally, promises to be steadfast in that turning. This understanding of "bear true faith and allegiance" in context is why the Court could describe an oath containing "support," "defend," and "bear true faith and allegiance" as "in no material respect different from" an oath simply to "support" the Constitution. *Girouard*, 328 U.S. at 65.

The Test Oath Clause, which immediately follows and qualifies the Constitution's requirement of a "support" oath, compels the same interpretation. That clause mandates that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. *See Biklen v. Bd. of Educ.*, 333 F. Supp. 902, 908 (N.D.N.Y. 1971) ("There is no doubt that the free exercise of religion was in the framers' mind at this point—the oath was mandated but religious tests were proscribed."), *aff'd*, 406 U.S. 951 (1972). To read the phrase "bear true faith and allegiance" in the Postal Service oath as requiring a pledge to subordinate one's allegiance to God to his allegiance to the government would be to read the oath as "probing religious beliefs," *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961), and thus effectively imposing a religious test (more precisely, an *anti*-religious test). Because "[t]he test oath is abhorrent to our tradition," we should not find that Congress imposed one by implication, in an oath that does not clearly do so. *See Girouard*, 328 U.S. at 69.

Even apart from the specifics of the Test Oath Clause—*Torasco*, for example, technically rested on the Free Exercise Clause, *see* 367 U.S. at 496, as it struck down a *state* test oath—to interpret the phrase "bear true faith and allegiance" as indicating anything at all regarding one's attitude or loyalty to God would bring it into conflict with longstanding tradition in the United States against requiring a person to place allegiance to country above allegiance to God. As James Madison famously put it in his *Memorial and Remonstrance*, written on the eve of the Framing:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate

> Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it *with a saving of his allegiance to the Universal Sovereign*.

James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 *The Papers of James Madison* 298, 299 (1785) (Robert A. Rutland et al. eds., 1973) (emphasis added). The Court in *Girouard* reiterated this understanding and applied it to an oath: "'the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning who have been unwilling to sacrifice their religious convictions, and, in particular, those who have been conscientiously opposed to war and *who would not yield what they sincerely believed to be their allegiance to the will of God*'—these considerations make it impossible to conclude 'that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath . . . .'" 328 U.S. at 65 (Hughes, C.J., dissenting) (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (emphasis added)); *see also id*. at 68 ("Throughout the ages men have suffered death *rather than subordinate their allegiance to God* to the authority of the State.") (emphasis added).

For the foregoing reasons, the Postal Service oath does not conflict with the religious views at issue in the three objections that you and the Civil Division have described. Section 1011 therefore does not, under RFRA, impose a substantial burden on the religious exercise of a person raising one of those objections, and RFRA therefore does not require or permit the Postal Service to depart from section 1011 in response to them.[8]

C.

A prospective employee could of course raise an objection to the Postal Service oath based on other sincere religious views. In addressing such an objection, the Postal Service will need to apply the elements of RFRA, considering (1) whether the statutory oath, properly interpreted, actually and substantially burdens the applicant's bona fide exercise of religion, such that the Postal Service must consider an accommodation, 42 U.S.C. § 2000bb-1(a); and (2) if the oath does impose a substantial burden on that applicant, whether that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," *id*. § 2000bb-1(b). Although we cannot answer the first question in the abstract, below we provide some guidance

[8] The Postal Service has met with "considerable success" by attempting to explain the oath's meaning to applicants who raise objections. *See* May USPS Letter at 2. Such efforts perpetuate "our happy tradition of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971) (citations omitted).

for addressing it. Whatever the details of a particular substantial burden that might be shown, however, the Postal Service would have a compelling interest in requiring an oath of office to ensure a prospective employee's support for the Constitution and commitment faithfully to discharge his duties. In considering in a particular case whether the oath as Congress has written it is the least restrictive means of furthering that compelling interest, the Postal Service, in light of that interest, may not dispense with the statutory oath altogether and should proceed consistently with the principles that we set out below in concluding this subpart. In addition, the Postal Service should feel free to contact us for further guidance when an objection other than one of the three detailed above arises.

The question whether a person would be substantially burdened in the exercise of his religion by having to take the statutory oath—notwithstanding religious objections to some or all of it—in order to obtain employment with the Postal Service is not an easy one to answer, particularly in the abstract. But the general contours of that standard are fairly well established, and the 1997 Guidelines touch on the question.

Sherbert indicated that a governmental action that is otherwise neutral toward religion substantially burdens a person's exercise of religion if the action can be analogized to "a fine imposed . . . for" that exercise. 374 U.S. at 404; *see Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988) (contrasting "indirect coercion or penalties" with "incidental effects of government programs," and noting inexact "line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs").[9] The leading Supreme Court exposition of the *Sherbert* standard is from *Thomas*, in which the Court struck down the denial of unemployment benefits to a person who quit his private sector job for religious reasons:

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

[9] Any law that did target religion as such presumably would be invalid under the Free Exercise Clause even post-*Smith*, regardless of the substantiality of the burden. *See Sherbert*, 374 U.S. at 402; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–33 (1993). Cases addressing such oaths of office, *see Torcaso*, 367 U.S. 488 (pre-*Sherbert*, oath requiring belief in God held to violate Free Exercise Clause), or similar requirements, *see Rutan v. Republican Party*, 497 U.S. 62, 76–79 (1990) (post-*Smith*, free speech challenge to patronage hiring held to state claim), are thus outside the *Sherbert* framework and not dispositive under RFRA.

450 U.S. at 717–18; *see Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (similar, employing this language); *see also, e.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982) (concluding that obligation to pay social security taxes substantially burdened Amish); *Yoder*, 406 U.S. at 218 (concluding that misdemeanor statute compelling school attendance substantially burdened Amish). As a circuit court applying this case law under RFRA recently summarized: "A statute burdens the free exercise of religion if it 'put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs,' including when it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.' A substantial burden must be more than an 'inconvenience.'" *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) (citations omitted); *see also Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19–22 (1st Cir. 2004); *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir.), *reh'g denied*, 265 F.3d 1072, 1073–74 (2001).

In addition, the President has, through the 1997 Guidelines, interpreted RFRA such that an oath of office could, in some circumstances, impose a substantial burden and require modification of the oath—an interpretation that, as explained in the previous subpart, binds the Executive Branch. In the subsection discussing the general rules concerning accommodation of religious exercise, and after setting out the elements of RFRA, the Guidelines provide the following example: "An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to take a loyalty oath whose form is religiously objectionable." Guidelines § 1.C, ex. (b). The details of the hypothetical religious objection and burden (including possible accommodations) are not provided, and different Jehovah's Witnesses may have different sincere beliefs, *see, e.g.*, *Thomas*, 450 U.S. at 711, 715–16, including regarding oaths, *see Bessard v. Cal. Cmty. Colls.*, 867 F. Supp. 1454 (E.D. Cal. 1994).[10] The Postal Service, in considering possible burdens, should proceed consistently with these *Guidelines* as long as they remain in force, as well as with the general caselaw we have set out above.

Should the Postal Service conclude that a substantial burden exists in a particular case, there would nevertheless be a compelling interest in ensuring, including through an oath, that prospective employees both supported the Constitution and were committed to faithfully performing their jobs. The clear evidence of the compelling interest in ensuring support for the Constitution through an oath is the inclusion of such a requirement in the Constitution, not only for members of Congress and principal officers but also for "all judicial and executive officers," both federal and state, and all state legislators. Such persons "shall be bound by

[10] The objection in *Bessard*, although not entirely clear, appears to have been to professing *any* sort of faith or allegiance to a temporal power, even if subordinate to one's faith and allegiance to God. *See* 867 F. Supp. at 1456–58, 1462, 1465. It was therefore distinct from the objection we discussed in Part III.B.

Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3. The Constitution itself, in the Fourteenth Amendment, emphasizes the importance of this requirement by making certain actions that are inconsistent with the oath—"engag[ing] in insurrection or rebellion against" the Constitution, or giving "aid or comfort to the enemies thereof"—and done by one who had "previously taken" it the basis for barring him from holding any state or federal office. *Id*. amend. XIV, § 3. And the First Congress demonstrated the requirement's importance by implementing it through its very first enactment. *See* An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

The courts have similarly recognized that the Founders' inclusion of the requirement of a "support" oath in the Constitution (and of a slightly different oath for the President) reflects a governmental interest of the highest order. As the Supreme Court explained in *American Communications Association v. Douds*:

> Clearly the Constitution permits the requirement of oaths by office-holders to uphold the Constitution itself. The obvious implication is that those unwilling to take such an oath are to be barred from public office. For the President, a specific oath was set forth in the Constitution itself. Art. II, § 1. And Congress has detailed an oath for other federal officers. Obviously the Framers of the Constitution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved.

339 U.S. 382, 415 (1950) (footnote omitted). The court in *Biklen*, affirmed by the Supreme Court, *see* 406 U.S. at 951, described a "support" oath for state teachers as "uniquely constitutional since it is mandated by the United States Constitution itself," and quoted a pre-Civil War case explaining that both the inclusion of the oath requirement and its placement as "'the last and closing clause of the Constitution'" demonstrated the Founders' "'anxiety to preserve [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority.'" 333 F. Supp. at 907 (quoting *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1859)).

The oath at issue in *Biklen*, like that required by section 1011, also included a pledge to "faithfully discharge" one's duties. *See id*. at 903 n.1. The court, after acknowledging *Sherbert*, recognized a compelling interest in both clauses, treating them together: "That the state has a compelling interest in assuring the fitness and dedication of its teachers is a self-evident proposition. Accordingly, it may demand that those aspiring to labor in the sensitive area of the classroom be willing to affirm their support of its government systems" through such a "promissory" oath that "does not inquire into one's present beliefs, political or religious. . . . Likewise, the state, like any employer, has the right (and obligation) to require that its employees give assurance of their willingness to perform their duties to the best of their ability." *Id*. at 909. The state was denying the plaintiff a

job as a teacher not because she was a Quaker, but because she refused to affirm her support and her commitment to "do her best as a teacher. The state has a demonstrable and compelling interest that she at least do this." *Id*.; *see id*. at 906–07 (similar). *See also Cole*, 405 U.S. at 681 (recognizing that Court has "upheld the constitutionality of oaths, addressed to the future, promising constitutional support in broad terms").

The *Biklen* court's discussion of the compelling governmental interest in a pledge to "faithfully discharge" one's duties is reinforced by the long pedigree of such oaths in the United States. *Cf. Personal Satisfaction of Immigration and Nationality Act Oath Requirement*, 21 Op. O.L.C. 72, 74 (1997) (in concluding, under the Rehabilitation Act, that personally taking the naturalization oath is an "essential" requirement for naturalization, noting that, since 1790, "Congress always has required some form of an oath of allegiance"). Although the Constitution mandates an oath to "faithfully execute" one's duties only on the President, *see* U.S. Const. art. II, § 1, cl. 8, Congress in establishing the first executive departments consistently required, in addition to the constitutionally mandated "support" oath, that all officers and employees also pledge to faithfully execute their duties. *E.g.*, An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, § 3, 1 Stat. 28, 29 (1789) ("well and faithfully . . . execute"); An Act to establish an Executive Department, to be denominated the Department of War, ch. 7, § 3, 1 Stat. 49, 50 (1789) ("well and faithfully . . . execute"); An Act to establish the Post-Office and Post Roads within the United States, ch. 7, § 4, 1 Stat. 232, 234 (1792) ("faithfully perform," and abstain from anything forbidden by postal laws); *see also* An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. at 24 (similar for initial congressional officers).

This dual compelling interest in ensuring minimal loyalty and conscientious conduct plainly includes the Postal Service, many of whose employees have unique access both to the mail—which contains valuable items such as social security checks, tax returns, and correspondence—and to public and private buildings. *See United States v. Lamb*, 6 F.3d 415, 421 (7th Cir. 1993) ("a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust"); *USPS v. Am. Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984) ("Any postal position which handles mail is one entrusted with items of importance and value by the public. Envelopes containing government checks or items which are insured disclose to all who see them the valuable items inside."); *USPS v. Nat'l Ass'n of Letter Carriers*, 631 F. Supp. 599, 601 (D.D.C. 1986) ("The inexorability of the mails, upon which literally millions depend daily, is equally compromised whether postal workers are derelict in their duties for reasons of avarice, indolence, or distractive vices . . . ; the mails are simply too important.").

Given this compelling interest, should the Postal Service conclude, in light of pre-*Smith* caselaw and the 1997 Guidelines, that a substantial burden exists in a particular case, it also would need to consider the "least restrictive means" of furthering that interest. Without attempting to conduct that analysis in the abstract, we believe that at least the following three principles should be considered. First, as the Constitution indicates, the key phrase in a loyalty oath is that one will "support this Constitution." Only for the President does the Constitution indicate a need for greater obligations in this area, requiring him to pledge that he "will to the best of my Ability, *preserve, protect and defend* the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8 (emphasis added). The cases addressing loyalty oaths likewise focus on the "support" language. When an oath contains additional or different language addressing the subject, the courts effectively read it as if it contained only the "support" language. In *Girouard*, the Court took an oath essentially identical to the first half of the Postal Service oath, with both "support and defend" and "bear true faith and allegiance," and interpreted it as "in no material respect different from" the constitutional oath. 328 U.S. at 65–66; *see Cole*, 405 U.S. at 682–84 (same with "uphold and defend" oath); *see also Biklen*, 333 F. Supp. at 909–10; *Bessard*, 867 F. Supp. at 1465.

Second, the Constitution already provides one—but only one—accommodation of its requirement of a "support" oath: It allows a would-be official to "affirm" rather than "swear." (The Postal Service oath allows the same alternative, as do the general definitions of "oath" and "sworn" in 1 U.S.C. § 1 (2000).) This constitutional accommodation suggests that others, which would lead to an oath less burdensome than the one that the Constitution itself requires, would not adequately further the interest.

Third, both *Biklen* and the early statutes, discussed above, suggest that the Postal Service oath's "faithfully discharge" clause is as essential as the "support" language to furthering the compelling interest. The consistent practice of Congress—since the 1790s—in requiring at least a pledge of faithful performance from prospective Post Office officers and employees (in addition to the support oath) reinforces this understanding. *See* An Act to establish the Post-Office and Post Roads within the United States, 1 Stat. at 234 (1792); An Act to establish the Post-office and Post-roads within the United States, ch. 23, § 4, 1 Stat. 354, 358 (1794); An Act to establish the Post-Office of the United States, ch. 43, § 2, 1 Stat. 733, 733 (1799); An Act regulating the Post-office Establishment, ch. 37, § 2, 2 Stat. 592, 593–94 (1810); An Act to reduce into one the several acts establishing and regulating the Post-office Department, ch. 64, § 2, 4 Stat. 102, 103 (1825).

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

Application of the Emoluments Clause to a Member of the President's Council on Bioethics

A member of the President's Council on Bioethics does not hold an "Office of Profit or Trust" within the meaning of the Emoluments Clause of the Constitution.

March 9, 2005

MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have asked whether a member of the President's Council on Bioethics holds an "Office of Profit or Trust" under the Emoluments Clause of the Constitution, Article I, Section 9, Clause 8. As we previously advised you, we conclude that he does not. This memorandum memorializes and expands upon our earlier advice.

I.

On November 28, 2001, the President issued Executive Order 13237, 3 C.F.R. 821 (2001 Comp.), creating the President's Council on Bioethics (the "Council" or "Bioethics Council"). The purpose of the Bioethics Council is to "advise the President on bioethical issues that may emerge as a consequence of advances in biomedical science and technology." *Id.* § 2(a). The Council is composed of 18 members "appointed by the President from among individuals who are not officers or employees of the Federal Government." *Id.* § 3(a). Each member serves a two-year "term of office," subject to re-appointment. *Id.* § 3(c). Members of the Council may be compensated "to the extent permitted by Federal law" and "may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Government service (5 U.S.C. 5701–5707), to the extent funds are available," *id.* § 4(d); pursuant to these provisions, we understand that each member receives $250 in compensation per day of work in addition to travel expenses. Although they are not required to do so by the Executive Order, we understand that members of the Council take an oath of office. We also understand that members of the Council do not have access to classified information.

The Council serves in a purely "advisory role." *Id.* § 2(a). It may, for example, "conduct inquiries, hold hearings, and establish subcommittees," *id.* § 4(b), and "conduct analyses and develop reports or other materials," *id.*, but it is "not . . . responsible for the review and approval of specific projects or for devising and overseeing regulations for specific government agencies," *id.* § 2(d). Nor does the Executive Order give the Council subpoena authority or the authority to implement any of its recommendations, whether at the President's direction or otherwise. In short, although the Council may offer its views to the President, it is

without power to implement those views or execute any other governmental authority.

The question before us is whether membership on the Council—which, as explained, is a purely advisory position that carries with it no power to execute any governmental authority, significant or otherwise, and has no access to classified information—is "any Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. U.S. Const. art. I, § 9, cl. 8. We conclude that it is not.

II.

The Emoluments Clause of the Constitution provides in pertinent part that

> no Person holding any *Office of Profit or Trust under [the United States]*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8 (emphasis added).[1] We conclude that membership on the Council is not "any Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. We first conclude that in order to qualify as an "Office of Profit or Trust under [the United States]," a position must, first and foremost, be an "Office under the United States." Next, we conclude that it is well-established that a purely advisory position is not an "Office under the United States" and, hence, not an "Office of Profit or Trust under [the United States]." Because a purely advisory position is not an "Office," we need not precisely define whether or to what extent the words "of Profit or Trust" narrow the category of offices governed by the Emoluments Clause.

A.

In order to hold an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause, an individual must hold an "Office . . . under [the United States]." This conclusion follows from the text of the Emoluments Clause. It is further confirmed by the ratification history of the Clause, which is admittedly limited, and by its early applications. Finally, our conclusion is confirmed by every judicial decision that has addressed the issue.

The text of the Emoluments Clause suggests that an "Office of Profit or Trust under [the United States]" must be an "Office under the United States." As

[1] In full, Article I, Section 9, Clause 8 states: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

discussed below, to the extent that the phrase "of Profit or Trust" is relevant, it may serve to narrow an "Office . . . under [the United States]" to those that are "of Profit or Trust," or an "Office of Profit or Trust" may be synonymous with an "Office . . . under [the United States]," but it is clear that the words "of Profit or Trust" do not expand coverage of the Emoluments Clause beyond what would otherwise qualify as an "Office . . . under [the United States]." This conclusion is apparent first and foremost by the phrase "Office of Profit or Trust under [the United States]" itself, which by its terms suggests that an office of profit or trust is necessarily a type of "Office . . . under [the United States]"—either one of "Profit" or one of "Trust." It is also confirmed by the remainder of the Emoluments Clause. In particular, the Emoluments Clause uses the term "Office" twice: first, in its reference to "any Office of Profit or Trust under [the United States]," and second, in its reference to "any present, Emolument, Office, or Title, of any kind whatever." The second reference—to "any . . . Office . . . of any kind whatever"—suggests that the first reference—to "any Office of Profit or Trust under [the United States]"—is narrower, not broader, than the second. Taken as a whole, then, the text of the Emoluments Clause suggests that an "Office of Profit or Trust under [the United States]" must, at a minimum, be an "Office under the United States." This conclusion is confirmed by the ratification history and early applications of the Emoluments Clause as well as relevant case law.

That the phrase "Office of Profit or Trust under [the United States]" is meant to be no more expansive than the phrase "Office under the United States" is confirmed by the limited discussion by the Framers and ratifiers of the Constitution as to the original understanding of the Emoluments Clause. This limited discussion reflects the assumption that the phrase "Office of Profit or Trust" was understood to be synonymous with the term "Office," with no particular emphasis placed on the additional words "of Profit or Trust." Governor Randolph, for example, who had attended the Philadelphia convention, explained to the Virginia ratifying convention that the Emoluments Clause

> restrains any persons *in office* from accepting of any present or emolument, title or office, from any foreign prince or state. This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit *any one in office* from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the King of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence,

> and diminished that mutual friendship, which contributed to carry us through the war.

3 *The Records of the Federal Convention of 1787*, at 327 (Max Farrand ed., rev. ed. 1966) (emphases added) (footnote omitted) ("*Records*"). Likewise, according to Madison's notes, the Emoluments Clause was proposed at the convention by Charles Pinckney, who "urged the necessity of preserving *foreign Ministers & other officers* of the U.S. independent of external influence and moved to insert [the Emoluments Clause]." 2 *Records* at 389 (emphasis added).[2] These two statements are the only contemporaneous explanations of the Emoluments Clause that we have discovered, and both reflect an understanding that it encompasses public "offices" generally.

The early applications of the Emoluments Clause likewise reflect the assumption that an "Office of Profit or Trust" is synonymous with the term "Office under the United States." The Fifth Congress, for example, was the first to face an issue involving the Emoluments Clause when, in 1798, Thomas Pinckney asked Congress for permission to retain small presents he received from the Kings of Great Britain and Spain upon his departure from Europe after serving as Ambassador to those countries. *See* 8 Annals of Cong. 1582 (1798); David. P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 281 (1997). Congress refused to give permission. *See* 7 Annals of Cong. 553 (Senate granting consent); 8 *id*. at 1593 (House refusing consent). In the debate that ensued, the participants seemed to assume that the term "Office of Profit or Trust" was synonymous with "officer of the United States" (and further, that the Emoluments Clause was aimed primarily at ambassadors and foreign ministers). The statement of Representative Bayard is illustrative. He observed with respect to an identical provision found in the Articles of Confederation[3]:

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[2] According to Madison's notes, the Clause was proposed by "Mr. Pinckney." Madison's custom was to refer to Charles Pinckney as "Mr. Pinckney" and to refer to Charles Cotesworth Pinckney (Charles Pinckney's cousin and fellow delegate from South Carolina) as "Genl. Pinckney," as Charles Cotesworth Pinckney completed his Revolutionary War service as a brevet brigadier general. *Compare, e.g.*, *id*. (statement of "Mr. Pinckney"), *with* 2 *id.* at 373 (statement of "Genl. Pinckney").

[3] Article VI of the Articles of Confederation provided: "[N]or shall any person holding *any office of profit or trust under the United States*, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign State." Articles of Confederation art. VI, 1 Stat. 5 (1778) (emphasis added). An earlier draft of the Articles contained broader language that would have prohibited "*any Servant or Servants of the United States*" from accepting any such "Present, Emolument, Office, or Title." Articles of Confederation art. IV (July 12, 1776 draft), *in* 5 *Journals of the Continental Congress* 547 (1904–37) (emphasis added). By substituting the phrase "any person holding an office of profit or trust under the United States" for the phrase "any Servant or Servants of the United States," the drafters may have intended to narrow the scope of the clause to a particular type of government servant, which is consistent with our conclusion. *Cf*. Articles of Confederation art. IV (Aug. 20, 1776 draft), *in* 5 *Journals of the Continental Congress* 675 (noting this change, without explanation). We have found no additional drafting history or practice regarding the parallel phrase in the Articles of Confederation that would further illuminate the question before us.

> Under the old articles of Confederation, a like provision was in being, only that the receipt of presents by our Ministers was positively forbidden, without any exception about leave of Congress; but their being allowed to be received under the present Government, by the consent of Congress, shows that they might be received in certain cases. He had indeed, been informed that, notwithstanding the prohibition under the former Constitution, presents were frequently received by Ministers; for, though persons holding *offices* were forbidden to receive presents, the moment their *office* ceased, and they became private individuals, they were no longer prohibited from receiving any presents which might be offered to them. Under these circumstances he thought the resolution ought to be agreed to.

8 Annals of Cong. 1583–84 (emphases added).

Likewise, in 1817, Secretary of State John Quincy Adams issued instructions to the United States ambassador to England forbidding U.S. foreign ministers from accepting gifts from a foreign government:

> The acceptance of such presents by ministers of the United States is expressly prohibited by the constitution; and even if it were not, while the United States have not adopted the custom of *making* such presents to the diplomatic agents of foreign Powers, it can scarcely be consistent with the delicacy and reciprocity of intercourse between them, for the ministers of the United States to receive such favors from foreign Princes, as the ministers of those Princes never can receive from this Government in return. The usage, exceptionable in itself, can be tolerated only by its reciprocity. It is expected by the President, that every offer of such present which may, in future, be made to any public minister or *other officer of this Government*, abroad, will be respectfully, but decisively declined.

H.R. Rep. No. 23-302, at 3 (1834) (reprinting Adams's instructions) (second emphasis added). On one occasion in 1834 when these instructions were not followed, President Jackson asked Congress to consent to a particular gift. President Jackson noted:

> I deem it proper on this occasion to invite the attention of Congress to the presents which have heretofore been made to our *public officers*, and which have been deposited under the orders of the Government in the Department of State.

Letter to the Senate and House of Representatives (Jan. 6, 1834), *in* 3 *A Compilation of the Messages and Papers of the Presidents* 1256, 1256 (James D. Richardson ed., 1897) (emphasis added). He then explained:

> The provision of the Constitution which forbids any *officer*, without the consent of Congress, to accept any present from any foreign power may be considered as having been satisfied by the surrender of the articles to the Government, and they might now be disposed of by Congress to those for whom they were originally intended, or to their heirs, with obvious propriety in both cases, and in the latter would be received as grateful memorials of the surrender of the present.

Id. at 38 (emphasis added).

Finally, the judicial decisions addressing the meaning of the phrase "office of profit or trust," mostly state court cases, and leading treatises, all state or assume that an "office of profit or trust" must be a public "office." *See, e.g.*, *Shepherd v. Commonwealth*, 1 Serg. & Rawle 1, 9 (Pa. 1814) (a "commissioner of the Commonwealth" did not hold an "office of profit under th[e] Commonwealth" because he did not hold an "office"); *Opinion of the Justices*, 3 Me. (Greenl.) 481, 481–82 (1822) (an "agent[] for the preservation of timber on the public lands" did not hold an "office of profit under th[e] State" because he did not occupy an "office" of any sort); *Commonwealth ex rel. Bache v. Binns*, 17 Serg. & Rawle 219, 220 (Pa. 1828) (a printer selected by the U.S. Secretary of State to print congressional reports did not hold an "office of profit . . . or trust, under the government of the United States" because the position of printer was not an "office"); *Shelby v. Alcorn*, 36 Miss. 273, 290 (1858) (a levee commissioner held a "civil office of profit under th[e] State" because he occupied a "civil office" "under the State"); *In re Corliss*, 11 R.I. 638, 641 (1876) (commissioners on the U.S. Centennial Commission held an "office of trust" because "they are, properly speaking, officers, and . . . the places which they hold are offices"); *State ex rel. Gilson v. Monahan*, 84 P. 130, 133 (Kan. 1905) (the director of a drainage district did not hold an "office of public trust" because he did not hold a "public office"; "[t]he words 'office of public trust'" in the Kansas Constitution "are equivalent to 'public office'"); *Kingston Assocs., Inc. v. LaGuardia*, 156 Misc. 116, 118–19, 121 (N.Y. Sup. Ct. 1935) (an advisory position was not a "civil office of honor, trust, or emolument under . . . the United States" because it lacked an "indispensable attribute of public office"); Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 13 (1890) ("*Law of Public Offices*") (defining an "Office of Profit" as a type of "office"); *id*. § 16 (same for "Office of Trust"); 3 Joseph Story, *Commentaries on the Constitution* §§ 1345–46 (1833; reprint 1991) ("[T]he [Emoluments Clause] is highly important, as it puts it out of the power of *any officer of the government* to wear borrowed honours, which shall enhance his supposed importance abroad by a titular dignity at home.") (emphasis added); 1 St. George Tucker, *Blackstone's Commentaries* 295–96 & n.* (1803; reprint 1996) ("*Tucker's Blackstone*") ("In the reign of Charles the second of England, that prince, and almost all his officers of state were either actual pensioners of the court

of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly, proverbially disgraceful to his memory. The economy which ought to prevail in republican governments, with respects to salaries and other emoluments of office, might encourage the offer of presents from abroad, if the constitution and laws did not reprobate their acceptance. Congress, with great propriety, refused their assent to one of their ministers to a foreign court, accepting, what was called the usual presents, upon taking his leave: a precedent which we may reasonably hope will be remembered by all future ministers, and ensure a proper respect to this clause of the constitution [the Emoluments Clause], which on a former occasion is said to have been overlooked."); *see also Oath of Clerks in the Executive Departments*, 12 Op. Att'y Gen. 521, 521–22 (1868) (the phrase "office of honor or profit" in the Act of July 2, 1862, ch. 128, 12 Stat. 502, includes only those who "are within the legal designation of officers"). Indeed, we are aware of no judicial decision that has even suggested that a government position that fails to qualify as a public "office" could nevertheless qualify as an "office of profit or trust."

Because a position must qualify as a public "office" in order to constitute an "Office of Profit or Trust," it is unnecessary for us to resolve definitively whether and to what extent the phrase "of Profit or Trust" narrows the category of public offices that are governed by the Emoluments Clause. Nevertheless, a few general observations may be warranted, as they confirm that the phrase does not expand the Emoluments Clause beyond public "offices" generally.

That phrase seems to be a term that had a technical significance at English common law. "Offices of profit" in England were offices to which a salary attached and in which the holder had a proprietary interest. As such, these offices were heritable, could be executed through hired deputies, and, in some cases, sold. *See* J.J.S. Wharton, *Wharton's Law Lexicon* 712 (14th ed. 1938) (defining "an office or place of profit under the Crown" as "an office held direct from the crown which nominally carries a salary"); Giles Jacob, *A New Law Dictionary*, tit. Office (9th ed. 1772) (describing an "office[] of profit" as a type of "office" that has "fee or profit appurtenant to it," and explaining that "an assise lay at Common law for an . . . office of profit, [but] for an office of charge and no profit, an assise does not lie"); *see also* 2 William Blackstone, *Commentaries* *36 (describing "offices" as "incorporeal hereditaments"); 1 William Holdsworth, *A History of English Law* 248 (7th ed. 1956) (noting the introduction of the proprietary concept of offices into the colonies).

"Offices of trust," by contrast, were offices that, because they required "the exercise of discretion, judgment, experience and skill," *Law of Public Offices* § 16, were not heritable and could not be deputized or sold. *See* 2 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 895 (1883) ("Public offices are either offices of trust, which cannot be performed by deputy . . . , or ministerial offices, which may be performed by deputy."); 2 T. Cun-

ningham, *A New and Complete Law Dictionary*, tit. Office (London, 2d ed. 1771) (discussing the prohibition against selling "offices of trust"); 2 Blackstone, *Commentaries* at *36–37 (explaining that an "office[] of public trust cannot be granted for a term of years," presumably because it might be inherited during the term by someone incompetent to perform it, "but ministerial offices may be so granted; for those may be executed by deputy" should the holder be incompetent to perform it). The English tradition of heritable offices that could be sold or executed entirely by hired deputies was rejected in this country after the Revolution. *See, e.g.*, Vt. Const. of 1777, ch. II, § 33, *reprinted in* 6 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3747 (1909; reprint 1993) ("[T]here can be no necessity for, nor use in, establishing offices of profit, the usual effect of which are dependence and servility, unbecoming freemen, in the possessor or expectants."). Yet, the phrase "of profit or trust"—which, given the English tradition, had greater significance at the time—was incorporated into the emoluments clause contained in the Articles of Confederation, *see* Articles of Confederation art. VI, 1 Stat. 5 (1778), and, by virtue thereof, was later incorporated into the Constitution's Emoluments Clause, among other laws.

In other words, as later American sources confirm, to the extent that the phrase "of Profit or Trust" adds to the meaning of the term "Office," it narrows it, with "Profit" referring to offices for which the officeholder is paid, and "Trust" to offices the duties of which are particularly important. *See Corliss*, 11 R.I. at 642 (concluding that a position was not an "office of profit" because the holder of the position received no compensation, but that it was an "office of trust" because the holder "was intrusted with a large supervisory and regulative control of the property"); *Town of Meredith v. Ladd*, 2 N.H. 517, 519 (1823) ("[T]he office of constable is an office of trust [because] many important duties are devolved upon it, bonds are executed for fidelity, and in some places the income from it is very considerable."); *Shepherd*, 1 Serg. & Rawle at 9 (the position held by a state commissioner was not an office "of profit" "because he did not receive a cent as commissioner"). *See also Law of Public Offices* §§ 13, 16 (defining an "Office of Profit" as "[a]n office to which salary, compensation or fees are attached," and an "Office of Trust" as "[a]n office whose duties and functions require the exercise of discretion, judgment, experience and skill"). *Cf. Doty v. State*, 6 Blakf. 529, 530 (Ind. 1843) (rejecting distinction between office of "trust" and office of "profit" as "merely verbal," noting that "[a]ll offices of profit are necessarily offices of trust; and must, therefore be included in those of the latter description").[4]

[4] The Constitution also references an "Office of honor," U.S. Const. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.")—a term that arguably includes offices that are not "of profit" or "of trust." We do not definitively resolve the meaning of this term. We note, however, that it historically has been understood to encompass offices to which no fees,

As mentioned, however, we need not definitively resolve the meaning of the phrase "of Profit or Trust," because a position is not an "Office of Profit or Trust under [the United States]" if it is not, at the least, an "Office . . . under [the United States]." And, as we shall explain below, a purely advisory position is not an "Office . . . under [the United States]."

B.

Although we do not here attempt to define comprehensively the meaning of an "Office under the United States," it is clear that a purely advisory position does not qualify. This conclusion follows from the Executive Branch's historical and longstanding understanding of that phrase, confirmed by an 1898 report of a Judiciary Committee of the House of Representatives. And it is also confirmed by the uncontradicted weight of judicial authority. Accordingly, we conclude that a purely advisory position is not an "office" and therefore not an "Office of Profit or Trust under [the United States]."

The Executive Branch has long been of the view that a purely advisory position is not a public "office." This view has been expressed most clearly in opinions from this Office addressing the meaning of the Ineligibility and Incompatibility Clauses of the Constitution. The Ineligibility Clause provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to *any civil Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been encreased during such time.

U.S. Const. art. I, § 6, cl. 2 (emphasis added). The Incompatibility Clause provides:

> [N]o Person holding *any Office under the United States*, shall be a Member of either House during his Continuance in Office.

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profits, or salary attach, *see Law of Public Offices* § 15 (an "honorary office" is "an office to which no compensation attaches"); *State ex rel. Clark v. Stanley*, 66 N.C. 59, 63 (1872) ("Where no salary or fees are annexed to the office, it is a naked office—honorary,—and is supposed to be accepted, merely for the public good."); *Dickson v. People ex rel. Brown*, 17 Ill. 191, 193–95 (1855) (holding that the director of a state "institution for the education of the deaf and dumb," a position for which "[t]here are no fees, perquisites, profits or salary," occupied an "office of honor"), and that the Attorney General has interpreted the statutory phrase "office of honor or profit" as synonymous with an "officer of the United States" under the Appointments Clause, *see Oath of Clerks in the Executive Departments*, 12 Op. Att'y Gen. 521, 521–22 (1868) (interpreting the phrase "office of honor or profit" in the Act of July 2, 1862, ch. 128, 12 Stat. 502, to include only those who "are within the legal designation of officers" as defined by the Supreme Court's Appointments Clause cases).

Id. (emphasis added).[5] Whether referring to the need to exercise "some portion of the sovereign functions of Government," or the need to exercise "significant authority pursuant to the laws of the United States," we have consistently concluded that a purely advisory position is neither a "civil Office under the Authority of the United States" nor an "Office under the United States," because it is not an "office" at all. To be an "office," a position must at least involve some exercise of governmental authority, and an advisory position does not.

In 1989, for example, then Assistant Attorney General Barr concluded that an advisory commission that "perform[s] only advisory or ceremonial functions" is not an "office" within the meaning of the Incompatibility and Ineligibility Clauses because members of such commissions do not "exercis[e] significant authority pursuant to the laws of the United States." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 & n.2 (1989). Likewise, in 1969, then Assistant Attorney General Rehnquist concluded that the Staff Assistant to the President did not hold a civil office within the meaning of the Ineligibility Clause, observing that the term "office" meant

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[5] Notably, the Emoluments Clause and the Incompatibility and Ineligibility Clauses share a common purpose—the prevention of public corruption. *See, e.g.*, 3 *Records* at 327 (statement of Gov. Randolph) (The Emoluments Clause "is provided to prevent corruption."); 3 Story, *Commentaries* §§ 1345–46 (The Emoluments Clause "is founded in a just jealousy of foreign influence of every sort."); 1 *Tucker's Blackstone* at 295–96 & n.* (explaining that the Emoluments Clause is rooted in the recognition that "[c]orruption is too subtle a poison to be approached, without injury"); 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 370 (Jonathan Elliot ed., 2d. ed. 1836) ("*Elliot's Debates*") (Madison, June 14, 1788) (The Ineligibility Clause "guards against abuse by taking away the inducement to create new offices, or increase the emolument of old offices."); 2 Story, *Commentaries* § 864 ("The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of disinterestedness."); 2 *Elliot's Debates* at 475 (James Wilson, Penn. Ratifying Convention, Dec. 4, 1787) (the Incompatibility Clause seeks to prevent corruption by ensuring that "the mere acceptance of an office, as a bribe, effectually destroys the end for which it was offered"); *id*. at 484 ("The great source of corruption, in [England], is, that persons may hold offices under the crown, and seats in the legislature, at the same time."); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Personnel?*, 79 Cornell L. Rev. 1045, 1077 (1994) ("The Incompatibility Clause was motivated by worries about British-style corruption. The Framers did not perceive it as having much to do with the separation of powers or with Presidential independence."); *id*. at 1051 ("Interestingly, the [Incompatibility] Principle seems to have been grounded less in separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of 'bribing' Members of Parliament [] and judges with joint appointments to lucrative executive posts. This practice was repeated in the colonies, which, after independence, enacted strict constitutional bans on plural office holding. . . . [The Incompatibility Clause was] intended [to] function as a constitutional ethics rule . . . [but had the] wholly unappreciated and unintended consequence of foreclosing 'parliamentary' government in this country by making the President's Cabinet and Administration much more independent of Congress."). *Compare Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157–58 (1982) (declining to read the Emoluments Clause *in pari materia* with the Appointments Clause primarily because the two clauses serve different purposes, with the former being an anti-corruption measure and the latter grounded in separation of power principles).

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

Memorandum for Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 9, 1969) (quoting 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907)) (emphasis added). *See also Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207 & n.2 (1984) (noting that congressmen could serve on presidential commission if "purely executive functions" were separated from "advisory functions" and congressional participation was limited to the advisory functions); Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Draft Bill to Establish a Select Commission on Drug Interdiction and Enforcement* at 4 (Aug. 23, 1983) ("The Commission's duties appear to be 'investigative and informative' in nature. Thus, . . . the holding of membership on the Commission by Members of the Committees on the Judiciary[] raise[s] no constitutional issue under the . . . Incompatibility Clause[]."); *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 203 (1983) (concluding that appointment of members of Congress to a commission on deregulation of international ocean shipping would "not implicate the Incompatibility Clause of the Constitution," because the commission was "purely advisory": it would "make a comprehensive study of particular issues . . . and submit a report making recommendations to Congress and the President" but would "possess no enforcement authority or power to bind the Government"); Memorandum for Sanford M. Litvack, Assistant Attorney General, Antitrust Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Report to the President by the White House Commission on Small Business* at 2–3 (July 1, 1980) ("If the recommended Board is to exercise any significant Executive authority pursuant to the laws of the United States, it could not include . . . members of Congress . . . among its membership [under the Incompatibility Clause]."); *Office—Compensation*, 22 Op. Att'y Gen. 184, 187 (1898) ("The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the ideas of 'tenure, duration, emolument, and duties,' and suggests that the last should be continuing or permanent, not occasional or temporary."); *Congressmen and Senators—Eligibility to Civil Offices*, 26 Op. Att'y Gen. 457, 458–59 (1907) (members of Congress could serve on the Board of Managers of the Soldiers' Home because its members are selected by Congress and are not "Federal officers").

This view, moreover, is identical to that espoused by the Judiciary Committee of the House of Representatives in 1898. There, the House of Representatives passed a resolution directing the Judiciary Committee to report whether any member of the House has "accepted any office under the United States" and whether "the acceptance of such office under the United States has vacated the seat of the Member" pursuant to the Incompatibility Clause. The Judiciary Committee concluded that membership on "a commission created by law to investigate and report, but having no legislative, judicial, or executive powers," did not constitute an office within the meaning of the Incompatibility Clause. 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907). The committee's report explained that an "office":

> involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted.
>
> Therefore, mere power to investigate some particular subject and report thereon, or to negotiate a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer.
>
> 'It (public office) implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office.'
>
> . . . .
>
> The duties of the commissioners appointed under the statutes (to which attention will be called[)], are not continuing or permanent; they have no place of business for the public use, or even for their own use; they give no bond and take no oath. In fact, they are mere agents appointed by direction of Congress for the purpose of gathering information and making recommendations for its use if the Congress sees fit to avail itself of the labors of the commission. The commissioners appointed under these statutes or resolutions can not be compelled to attend or act, and in the broadest sense they are mere agents of the Congress. These commissioners are not to execute any standing laws which are the rules of action and the guardians of rights, nor have they the right or power to make any such law, nor can they interpret or enforce any existing law.

Id. at 607–08.

Finally, the uncontradicted weight of judicial authority confirms that a purely advisory position is not a public "office." These authorities list several factors

relevant to determining whether a position amounts to a public "office," including whether it involves the delegation of sovereign functions, whether it is created by law or by contract, whether its occupant is required to take an oath, whether a salary or fee is attached, whether its duties are continuing and permanent, the tenure of its occupant, and the method of appointment. *See, e.g.*, *Law of Public Offices* §§ 1–9 (describing factors and citing cases); *Wise v. Withers*, 7 U.S. (3 Cranch.) 331, 336 (1806); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823); *In re Attorney Oaths*, 20 Johns. (N.Y.) 492, 492 (1823); *Bunn v. People ex rel. Laflin*, 45 Ill. 397, 405 (1867). But they likewise make clear that the sine qua non of a public "office" is the exercise of some portion of delegated sovereign authority. *See Law of Public Offices* §§ 1, 4.

One case, arising out of New York, bears particular emphasis, because it most directly addresses the question at hand. In *Kingston Assocs., Inc. v. LaGuardia*, 156 Misc. 116, 121 (N.Y. Sup. Ct. 1935), the court held that a purely advisory position was not a "civil office of honor, trust, or emolument under the Government of the United States" within the meaning of the Greater New York Charter, which prohibited certain city officials from accepting such an office. At issue was whether Mayor Fiorello LaGuardia had forfeited the mayoralty by accepting a position on the federal Advisory Committee on Allotments. The court described several factors relevant to the question whether the federal advisory position was an "office" within the meaning of the charter, including whether the occupant was required to take an oath, whether the position involved a salary, and the duration of the position. *Id*. at 120–21. Dispositive, however, was the absence of any delegated sovereign authority: "There is . . . one indispensable attribute of public office, namely, the right to exercise some portion of the sovereign power." *Id*. at 121. "Clearly," the court explained, "the members of the Advisory Committee on Allotments possess none of the powers of the sovereign," because "[t]he right to recommend amounts to nothing more than the right to advise . . . . [and] [t]he making of a recommendation does not constitute the exercise of an executive function." *Id*. at 123. The court thus held that the advisory committee position was not an "office" at all and hence that Mayor LaGuardia had not forfeited the mayoralty.

Innumerable other authorities likewise make clear that an indispensable element of a public "office" is the exercise of some portion of delegated sovereign authority, which, as *Kingston* and other authorities (discussed below) make clear, is absent with respect to a purely advisory position. As early as 1822, for example, the Maine Supreme Court held that an "agent[] for the preservation of timber on the public lands" did not occupy an "office of profit under th[e] State" because it was not an "office" of any sort, explaining:

> We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, con-

> stitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others.

Opinion of the Justices, 3 Greenl. (Me.) 481, 482 (1822). A leading late-19th century treatise on public offices is to like effect, defining an "office" as:

> the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. . . . *The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government*, to be exercised by him for the benefit of the public.

Law of Public Offices §§ 1, 4 (emphasis added); *see also id*. § 4 ("Unless the powers conferred are of this nature[—involving the delegation of some sovereign function—]the individual is not a public officer."). And other authorities supporting this proposition are numerous and uniform.[6] Indeed, although not every

[6] *See, e.g.*, *Sheboygan Co. v. Parker*, 70 U.S. 93, 96 (1865) (individuals appointed by county as special agents for issuing bonds were not "county officers" because "[t]hey do not exercise any of the political functions of county officers, such as levying taxes, &c.," and "[t]hey do not exercise 'continuously, and as part of the regular and permanent administration of the government, any important public powers, trusts, or duties'"); *Hall v. Wisconsin*, 103 U.S. 5, 9 (1880) (commissioner appointed by county to make a scientific survey did not hold a public office, noting that under state law, the term "civil officer" "embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided"); *Byrne's Adm'rs v. Stewart's Adm'rs*, 3 S.C. Eq. (Des.) 466, 478 (1812) (the "office of solicitor" is not a public office because "he does not possess any portion of the public authority"); *Commonwealth ex rel. Bache v. Binns*, 17 Serg. & Rawle 219, 244 (Pa. 1828) (opinion of Tod, J.) (printer of congressional reports does not hold an "office . . . of profit or trust, under the government of the United States," noting that an "office" requires "a delegation of a portion of the sovereign power"); *In re J.L. Dorsey*, 7 Port. 293 373 (Ala. 1838) (opinion of Ormond, J.) (the term "office" refers "to those who exercise an office or place of honor or profit under the State government, and by authority derived from it"); Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* 163 (1903) ("A public office . . . is the right, authority and duty conferred by law . . . [wherein] an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public . . . . It finds its source and limitation in some act of expression of governmental power."); James L. High, *A Treatise on Extraordinary Legal Remedies* 581 (3d ed. 1896) ("An office, such as to properly come within the legitimate scope of an information in the nature of a quo warranto, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for

reported decision explicitly ties a public "office" to the exercise of some portion of sovereign authority, we have not found a single case in which an individual was deemed to hold such an "office," including one "of profit or trust," where he was invested with no delegated sovereign authority, significant or otherwise.[7]

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the time being, and which is exercised for the benefit of the public."); *United States ex rel. Boyd v. Lockwood*, 1 Pin. 359, 363 (Wisc. Terr. 1843) ("An office is where, for the time being, a portion of the sovereignty, legislative, executive or judicial, attaches, to be exercised for the public benefit. That the office of judge of probate of Crawford county is an office within this definition, there can be no question."); *Bunn v. People ex rel. Laflin*, 45 Ill. 397, 406 (1867) (commissioners supervising construction of a statehouse did not hold an "office" because they had not "the slightest connection with the exercise of any portion of the executive power, or of any departmental powers"); *Eliason v. Coleman*, 86 N.C. 235, 239–40 (1882) (chief engineer of the Western North Carolina Railroad did not hold an "office," defined as "'a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public'"); *Commonwealth v. Swasey*, 133 Mass. 538, 541 (1882) (the city physician holds a "public office" because he "is by virtue of his office a member of the board of health, which is invested with important powers to be exercised for the safety and health of the people"); *State v. Kennon*, 7 Ohio St. 546, 562–63 (1857) (panel authorized to appoint, supervise and remove other government officials occupied "offices" because they were charged with "exercis[ing] continuously, and as part of the regular and permanent administration of the government, important public powers, trusts, and duties"); *Shelby v. Alcorn*, 36 Miss. 273, 292 (1858) (a "levee commissioner" is a "civil office of profit" because "[c]lothed with a portion of the power vested in [the executive] department, the commissioner, in the discharge of his proper functions, exercises as clearly sovereign power as the governor, or a sheriff, or any other executive officer, when acting within his appropriate sphere").

[7] In some such cases, the individual deemed to hold an "office" clearly exercised sovereign authority. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 164 (1803) (describing the position of justice of the peace for the District of Columbia, which carried with it substantial governmental authority, as among the "offices of trust, of honor or of profit"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (an "agent of fortifications," whose duties included "disburs[ing] money placed in their hands" in accordance with "the orders of the engineer department," "provid[ing] materials and workmen deemed necessary for the fortifications," and "pay[ing] the labourers em–ployed," occupied an "office" and was an "Officer of the United States"); *Wise v. Withers*, 7 U.S. (3 Cranch.) 331, 336 (1806) (a "justice of the peace" for the District of Columbia was an "officer under the government of the United States" within the meaning of a statute exempting such officers from militia duty); *In re Corliss*, 11 R.I. 638, 640–41 (1876) (holding that commissioners of the United States Centennial Commission held an "Office of Trust" under U.S. Const. art. II, § 1, cl. 2, where their statutorily created duties were to "'prepare and superintend the execution of a plan for holding the [centennial] exhibition'"; work with a finance board "'to raise and disburse funds'"; make regulations setting entrance and admission or otherwise "'affecting the rights privileges, or interests of the exhibitors, or of the public'"; and "'have power to control, change, or revoke all . . . grants'" "'conferring rights and privileges'" relating to the exhibition or its grounds and buildings); *United States v. Hartwell*, 73 U.S. 385, 392–93 (1867) (holding that a "clerk" in the office of the "assistant treasurer of the United States . . . at Boston" was a "public officer[]" within the meaning of a criminal embezzlement statute that applied to, among others, "'[a]ll officers and other persons charged . . . with the safe-keeping, transfer and disbursement of the public money,'" where the clerk was "subject to the duty, to keep safely the public moneys of the United States"); *Town of Meredith v. Ladd*, 2 N.H. 517, 519 (1823) ("[H]ere the office of constable is an office of trust . . . because both ex-officio and by precepts, a constable is empowered to arrest criminals under certain circumstances and by execution to seize either the person or property of small debtors."). In others, an individual who apparently did exercise some sovereign authority was nonetheless deemed not to hold a public "office" because he did not satisfy other elements of an "office"; for example, his duties were not continuing and permanent. *See, e.g.*, *United States v. Germaine*, 99 U.S. 508, 512 (1879) (a "civil surgeon" was not an "officer of

In light of the overwhelming authority discussed above, we conclude that a purely advisory position is not an "Office under the United States," and hence not an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause.

C.

This conclusion is generally consistent with the past opinions of this office. First, this office's more recent opinions have concluded that membership on certain advisory committees did not amount to an "Office of Profit or Trust." *See Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123, 123 (1996) (members of Advisory Committee on International Economic Policy did not hold an "Office of Profit or Trust"); *Application of the Emoluments Clause to "Representative" Members of Advisory Committees*, 21 Op. O.L.C. 176 (1997) ("'representative' members" of an advisory committee did not hold an "Office of Profit or Trust"). These opinions "reject[ed] the sweeping and unqualified view," *Advisory Committee on International Economic Policy*, 20 Op. O.L.C. at 123, expressed in dictum five years earlier, that all federal advisory committee positions were covered by the Emoluments Clause, *see Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65, 68 (1991). Although a 1993 opinion concluded that members of an advisory committee did hold an "Office of Profit or Trust," that entity, while nominally called an "advisory committee," was, in fact, a "Federal agency established by statute" with certain statutorily assigned powers and functions. *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 117, 123 n.10 (1993).

Second, the great majority of other opinions issued by this office, mostly prior to 1982, equated an "Office of Profit or Trust" under the Emoluments Clause with

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the United States" within the meaning of a federal extortion statute because his duties were not "continuing and permanent," but "occasional or temporary," and noting that "[h]e is but an agent of the [C]ommissioner [of Pensions], appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties"); *Auffmordt v. Hedden*, 137 U.S. 310, 326–27 (1890) (a "merchant appraiser" selected by a customs collector to conduct an appraisal of goods is not an "officer of the United States" within the meaning of the Appointments Clause because "his position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily"); *Ex Parte William Pool*, 2 Va. Cas. 276, 280 (1821) (holding that a state justice of the peace with the power to arrest was not an "officer" because his duties were not regular and permanent), *but see id*. at 290–91 (dissenting opinion) (arguing that the authority of justices of the peace "to grant warrants of arrest against persons accused of crimes or offences against the Laws of the United States, to examine, bail, or commit the accused, compel the attendance of witnesses, recognize them to appear to give evidence under pain of imprisonment," made them officers under the Appointments Clause of the Constitution); *Shepherd v. Commonwealth*, 1 Serg. & Rawle 1, 8–9 (Pa. 1814) (holding that a commissioner charged with issuing binding decisions regarding state compensation for claimants to certain lands did not hold an office because the position was special or temporary). Such cases stand for the uncontroversial proposition that while some exercise of sovereign authority is a necessary element of an "office," it is not of itself a sufficient one.

an "officer of the United States" under the Appointments Clause.[8] As the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), however, an "officer of the United States" exercises "*significant authority* pursuant to the laws of the United States," *id*. at 126 (emphasis added). A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under the analysis of these opinions, would not be an office under the Emoluments Clause either. Accordingly, our conclusion is consistent with these opinions as well.

Finally, a small handful of this Office's opinions issued after 1982, do create some confusion as to what amounts to an "Office of Profit or Trust." Much of this confusion stems from a 1982 opinion, in which we abandoned this Office's longstanding position that an "Office of Profit or Trust" under the Emoluments Clause was synonymous with an "officer of the United States" under the Appointments Clause, relying primarily upon the differing purposes of the two clauses. *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) (noting that the Appointments Clause "finds its roots in separation of powers principles" whereas "[t]he Emoluments Clause, on the other hand, is designed 'to exclude corruption and foreign influence'").[9] In the 1982 opinion and on three subsequent occasions

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[8] *See, e.g.*, Memorandum for Laurence H. Silberman, Deputy Attorney General, from Mary C. Lawton, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Ability of Intermittent Consultant to United States to Hold Similar Position under Foreign Government* at 4 (Aug. 7, 1974) (concluding that, because a part-time consultant "would not be an officer in the constitutional sense," "[t]he prohibitions of [the Emoluments Clause] would not apply to him"); Memorandum for Peter Strauss, General Counsel, Nuclear Regulatory Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 2 n.1 (July 26, 1976) (reading "the term 'Office' as it appears in [the Emoluments Clause] . . . in pari materia with the term 'Officers' as it appears in Art. II, § 2 [the Appointments Clause]"); Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of a Foreign National to the National Voluntary Service Advisory Council* (May 10, 1974); *Offices of Trust*, 15 Op. Att'y Gen. 187 (1877); *Foreign Diplomatic Commission*, 13 Op. Att'y Gen. 537 (1871); *Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department*, 27 Op. Att'y Gen. 219 (1909); *Field Assistant on the Geological Survey—Acceptance of an Order from the King of Sweden*, 28 Op. Att'y Gen. 598 (1911); Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* (Oct. 4, 1954). *See also Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 & n.2 (1987) (relying upon pre-1982 opinion equating "Office of Profit or Trust" with "Officer of the United States" under the Appointments Clause) (citing *Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department*, 27 Op. Att'y Gen. 219 (1909)).

[9] The 1982 opinion also stated that the "language . . . of the two provisions [is] significantly different" and suggested that all federal employees held an "Office of Profit or Trust" under the Emoluments Clause. *Id*. at 157–58. That opinion, however, undertook no analysis of the text of either the Appointments Clause or the Emoluments Clause, and we have since retreated from the suggestion that all federal employees held an "Office of Profit or Trust." *See, e.g.*, *Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123 (1996) (some special government employees do not hold an

we suggested that individuals with access to sensitive, national security-related information held "Office[s] of Profit or Trust" under the Emoluments Clause, without further analyzing the extent of governmental authority exercised by these federal employees.[10] Because these opinions did not analyze the extent of the governmental authority exercised by these federal employees, they could be taken to suggest that such analysis was not necessary to determining whether or not these individuals held an "Office of Profit or Trust."

This is not, however, how we understand these opinions. Rather, it is at least arguable that the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public "office." Such a conclusion, for example, finds some support in the Supreme Court's *Hartwell* decision, wherein the Court held that a clerk in the Treasury Department "charged with the safe-keeping of public money" was a "public officer" within the meaning of a federal anti-embezzlement statute, *Hartwell*, 73 U.S. at 393, noting that he "was appointed by the head of a department within the meaning of [the Appointments Clause]," *id*. at 393–94 & n.9. *See also id*. at 394 (describing the clerk as a "subordinate officer[]"). By analogy, it could be argued that a federal government employee charged with safeguarding sensitive national security-related information would likewise be a public officer charged with the exercise of some governmental authority. *See, e.g.*, Exec. Order No. 12958, §§ 4.1–4.3 (procedures for safeguarding classified information) (as amended); 32 C.F.R. § 2003.20 (2003) (all person-

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"Office of Profit or Trust"); *Application of the Emoluments Clause to "Representative" Members of Advisory Committees*, 21 Op. O.L.C. 176 (1997) (same); *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 99 (1986) (noting that although "this Office expressed the view in 1982 that the Emoluments Clause applies to all government employees, . . . the clause need not be read so broadly to resolve the matter at hand").

[10] *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. at 157–58 (Nuclear Regulatory Commission employee "involve[d] [in] the [NRC's] assessment of operating [nuclear] reactors," "a field where . . . secrecy is pervasive"); *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 99 (1986) (part-time Nuclear Regulatory Commission employee who is "furnish[ed] [by the NRC] with various materials and documentation," whose position "requires a security clearance," and who "may develop or have access to sensitive and important, perhaps classified, information"); Letter for James A. Fitzgerald, Assistant General Counsel, Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 5 (June 3, 1986) (among other things, fact that employee has access to classified information indicates that he holds an office of profit or trust); Memorandum for James H. Thessin, Assistant Legal Adviser for Management, Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army* at 3 (Aug. 29, 1988) (civilian aide to the Secretary of the Army has "access to classified information, and receive[s] a security orientation concerning . . . responsibilities in receiving, handling, and protecting classified information") (quotations omitted).

Editor's Note: The June 3, 1986 letter for the Assistant General Counsel of the Nuclear Regulatory Commission is the unpublished version of *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96 (1986), also cited in this footnote.

nel granted access to classified information must sign nondisclosure agreement acknowledging that "all classified information . . . [subject to] th[e] Agreement is now and will remain the property of . . . the United States Government"); *cf. Snepp v. United States*, 444 U.S. 507, 510, 512 (1980) (a CIA agent's access to sensitive information imposed upon him a "fiduciary obligation" to safeguard that information, noting that the unauthorized disclosure of such information "impairs the CIA's ability to perform its statutory duties"). In this regard, it is noteworthy that our opinion concluding that membership on the Advisory Committee on International Economic Policy was not an "Office of Profit or Trust" expressly relied on the fact that the members "[did] not have access to classified information." *Advisory Committee on International Policy*, 20 Op. O.L.C. at 123. In the end, however, we need not definitively resolve whether these four opinions reached the correct result, for as we have explained, a member of the President's Bioethics Council does not have access to classified information and does not otherwise exercise any governmental authority.

III.

Accordingly, we conclude that membership on the President's Bioethics Council, a purely advisory position without access to classified information, is not an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause.

NOEL J. FRANCISCO
Deputy Assistant Attorney General
Office of Legal Counsel

Whether Appropriations May Be Used for Informational Video News Releases

The "covert propaganda" prohibition in appropriations statutes does not apply where there is no advocacy of a particular viewpoint, and therefore it does not apply to the legitimate provision of information concerning the programs administered by an agency, such as through an informational video news release.

A recent, contrary opinion of the Comptroller General is not binding on the Executive Branch.

March 11, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSELS OF THE EXECUTIVE BRANCH

The Comptroller General, the head of the Government Accountability Office ("GAO"), recently circulated a memorandum to Executive Branch departments and agencies purporting "to remind agencies of the constraints imposed by the publicity or propaganda prohibition [contained in appropriations laws] on the use of prepackaged news stories." *See Prepackaged News Stories*, B-304272, 2005 WL 608427 (Comp Gen.). This memorandum is being distributed to ensure that general counsels of the Executive Branch are aware that the Office of Legal Counsel ("OLC") has interpreted this same appropriations law in a manner contrary to the views of GAO, and to provide a reminder that it is OLC that provides authoritative interpretations of law for the Executive Branch.

Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986). We refer you instead to an opinion issued by OLC in July 2004, which provides the definitive Executive Branch position on the issues addressed in the GAO memorandum. *See Expenditure of Appropriated Funds for Informational Video News Releases*, 28 Op. O.L.C. 109 (2004).

As we explain in our July 2004 opinion, most appropriations statutes enacted since 1951 have contained general prohibitions on the use of appropriated funds for "publicity or propaganda purposes." Over the years, GAO has interpreted "publicity or propaganda" restrictions to preclude use of appropriated funds for, among other things, so-called "covert propaganda." GAO has explained that publications that are "misleading as to their origin *and* reasonably constitute[] 'propaganda' within the common understanding of that term" are forbidden "covert propaganda." 66 Comp. Gen. 707, 709 (1987) (emphasis added). Consistent with that view, OLC determined in 1988 that a statutory prohibition on using appropriated funds for "publicity or propaganda" precluded undisclosed agency funding of advocacy by third-party groups. We stated that "covert attempts to mold opinion through the undisclosed use of third parties" would run afoul of restrictions on using appropriated funds for "propaganda." *Legal Constraints on*

Lobbying Efforts in Support of Contra Aid and Ratification of the lNF Treaty, 12 Op. O.L.C. 30, 40 (1988).

In our July 2004 opinion, we examined whether informational video news releases ("VNRs") prepared by the Department of Health and Human Services constituted "propaganda." VNRs are the television equivalent of the printed press release. They can be a cost-effective means to distribute information through local news outlets, and their use by private and public entities has been widespread since the early 1990s, including by numerous federal agencies. We concluded in our opinion that the prohibition on using funds for "propaganda" did not extend to VNRs that did not constitute advocacy for any particular position or view. The opinion reasoned that the purely informational nature of the VNRs at issue distinguished them from the undisclosed advocacy that OLC had discouraged in our 1988 opinion. Our 2004 opinion disagreed with a May 2004 GAO legal opinion (cited in the recent GAO memorandum), in which GAO had concluded that the same VNRs constituted impermissible "covert propaganda" even though, as GAO recognized, the VNRs were informational in content and did not involve advocacy.

OLC does not agree with GAO that the "covert propaganda" prohibition applies simply because an agency's role in producing and disseminating information is undisclosed or "covert," regardless of whether the content of the message is "propaganda." Our view is that the prohibition does not apply where there is no advocacy of a particular viewpoint, and therefore it does not apply to the legitimate provision of information concerning the programs administered by an agency. This view is supported by the legislative history, which indicates that informing the public of the facts about a federal program is not the type of evil with which Congress was concerned in enacting the "publicity or propaganda" riders. Thus, OLC disagrees with the Comptroller General's conclusion, as stated in his recent memorandum, that "agencies may not use appropriated funds to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television viewing audience that the agency was the source of those materials. It is not enough that the contents of an agency's communication may be unobjectionable." *Prepackaged News Stories*, 2005 WL 608427, at *2.

The Comptroller General's conclusion fails to recognize the distinction between "covert propaganda" and purely informational VNRs, which do not constitute "propaganda" within the common meaning of that term and therefore are not subject to the appropriations restriction. Agencies are responsible for reviewing their VNRs to ensure that they do not cross the line between legitimate governmental information and improper government-funded advocacy.

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6

Covered entities and those persons rendered accountable by general principles of corporate criminal liability may be prosecuted directly under 42 U.S.C. § 1320d-6, and the knowingly element of the offense set forth in that provision requires only proof of knowledge of the facts that constitute the offense.

June 1, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
AND THE SENIOR COUNSEL TO THE DEPUTY ATTORNEY GENERAL

You have asked jointly for our opinion concerning the scope of 42 U.S.C. § 1320d-6 (2000), the criminal enforcement provision of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA"). Specifically, you have asked, first, whether the only persons who may be directly liable under section 1320d-6 are those persons to whom the substantive requirements of the subtitle, as set forth in the regulations promulgated thereunder, apply—i.e., health plans, health care clearinghouses, certain health care providers, and Medicare prescription drug card sponsors—or whether this provision may also render directly liable other persons, particularly those who obtain protected health information in a manner that causes a person to whom the substantive requirements of the subtitle apply to release the information in violation of that law. We conclude that health plans, health care clearinghouses, those health care providers specified in the statute, and Medicare prescription drug card sponsors may be prosecuted for violations of section 1320d-6. In addition, depending on the facts of a given case, certain directors, officers, and employees of these entities may be liable directly under section 1320d-6, in accordance with general principles of corporate criminal liability, as these principles are developed in the course of particular prosecutions. Other persons may not be liable directly under this provision. The liability of persons for conduct that may not be prosecuted directly under section 1320d-6 will be determined by principles of aiding and abetting liability and of conspiracy liability. Second, you have asked whether the "knowingly" element of section 1320d-6 requires only proof of knowledge of the facts that constitute the offense or whether this element also requires proof of knowledge that the conduct was contrary to the statute or regulations. We conclude that "knowingly" refers only to knowledge of the facts that constitute the offense.[1]

[1] In reaching the conclusions discussed below, we have considered the views expressed in your submissions concerning the questions you have asked. *See* Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Paul B. Murphy, Associate Deputy Attorney General, *Re: Request for Office of Legal Counsel Opinion on the Scope of the Criminal Medical Records Privacy Statute, 42 U.S.C. § 1320d-6* (Jan. 16, 2004); Letter for Jack L. Goldsmith III, Assistant

I.

Congress enacted the Administrative Simplification provisions of HIPAA to improve "the efficiency and effectiveness of the health care system" by providing for the "establishment of standards and requirements for the electronic transmission of certain health information." 42 U.S.C. § 1320d note (2000). These provisions added a new "Part C: Administrative Simplification" to title XI of the Social Security Act and have been codified at 42 U.S.C. §§ 1320d–1320d-8 (2000). Part C directs the Secretary of the Department of Health and Human Services ("HHS") to "adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically." *Id.* § 1320d-2(a)(1); *see also id.* § 1320d-2(b)(1) (requiring the Secretary to adopt standards concerning unique health identifiers); *id.* § 1320d-2(c)(1) (same with respect to code sets); *id.* § 1320d-2(d)(1) (same with respect to security); *id.* § 1320d-2(e)(1) (same with respect to electronic signatures); *id.* § 1320d-2(f) (same with respect to transfer of information among health plans). Various provisions of this part further specify the standards to be adopted, the factors the Secretary must consider, the procedures for promulgating the standards, and the timetable for their adoption. *Id.* §§ 1320d-1–1320d-3. Pursuant to this authority, the Secretary has adopted standards and specifications for implementing them. *See* 45 C.F.R. pts. 160–164 (2004).

Attorney General, Office of Legal Counsel, from Alex M. Azar II, General Counsel, Department of Health and Human Services, *Re: Request by the Office of Legal Counsel for HHS Views on 42 U.S.C. § 1320d-6* (Mar. 18, 2004); Memorandum for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Christopher A. Wray, Assistant Attorney General, Criminal Division, *Re: Criminal Division Position on the Scope of the Criminal Medical Records Privacy Statute, 42 U.S.C. § 1320d-6* (May 27, 2004) (attaching Memorandum for File, from Ian C. Smith DeWaal, Senior Counsel, Criminal Division, *Re: CRM response to HHS-OGC Letter* (May 20, 2004)); Letter for Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel, from Alex M. Azar II, General Counsel, Department of Health and Human Services (Aug. 6, 2004); E-mail for John C. Demers, Attorney-Adviser, Office of Legal Counsel, from Ian C. Smith DeWaal, Senior Counsel, Criminal Division, *Re: 42 U.S.C. 1320d-6* (Nov. 15, 2004) (with attachment); Letter for John C. Demers, Attorney-Adviser, Office of Legal Counsel, from Paula M. Stannard, Deputy General Counsel, Department of Health and Human Services (Dec. 21, 2004); Letter for John C. Demers, Attorney-Adviser, Office of Legal Counsel, from Paula M. Stannard, Deputy General Counsel, Department of Health and Human Services, *Re: Scope of Enforcement Under 42 U.S.C. § 1320d-6; Draft Opinion of December 17, 2004—Request for Comments* (Dec. 23, 2004); Memorandum for File, from Ian C. Smith DeWaal, Senior Counsel, Criminal Division, *Re: Comments on the Revised OLC Draft Opinion on the HIPAA Criminal Medical Privacy Statute* (transmitted Feb. 18, 2005); Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from John McKay, United States Attorney for the Western District of Washington, *Re: Scope of Criminal Prosecutions under HIPAA* (Mar. 17, 2005); Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Michael Sullivan, United States Attorney for the District of Massachusetts, *Re: Scope of Criminal Prosecutions under HIPAA* (Mar. 20, 2005); Letter for John C. Demers, Attorney-Adviser, Office of Legal Counsel, from Paula M. Stannard, Deputy General Counsel, Department of Health and Human Services, *Re: Scope of 42 U.S.C. § 1320d-6* (May 5, 2005). We appreciate the thoroughness and thoughtfulness of these submissions.

Section 1320d-1 specifies the persons to whom the standards apply:

> Any standard adopted under this part shall apply, in whole and in part, to the following persons:
>
> (1) A health plan.
>
> (2) A health care clearinghouse.
>
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title.

See also 45 C.F.R. § 160.102(a) (with respect to general administrative requirements, "[e]xcept as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to" the entities listed in section 1320d-1); *id.* § 162.100 (same with respect to additional administrative requirements); *id.* § 164.104 (same with respect to security and privacy regulations). The regulations refer to each of these three groups of persons as a "covered entity." *Id.* § 160.103. To this list of persons to whom the standards apply, Congress later added Medicare prescription drug card sponsors. Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, § 101(a)(2), 117 Stat. 2071, 2144 ("For purposes of the program under this section, the operations of an endorsed program are covered functions and a prescription drug card sponsor is a covered entity for purposes of applying part C of title XI and all regulatory provisions promulgated thereunder. . . .") (codified at 42 U.S.C. § 1395w-141(h)(6)(A) (Supp. III 2004)).

Various statutes and regulations define these four categories of covered entities. A "prescription drug card sponsor" is "any nongovernmental entity that the Secretary [of HHS] determines to be appropriate to offer an endorsed discount card program" including "a pharmaceutical benefit management company" and "an insurer." 42 U.S.C. § 1395w-141(h)(1)(A)(i), (iii) (Supp. III 2004). A "health plan" is "an individual or group plan that provides, or pays the cost of, medical care." *Id.* § 1320d(5) (2000). A "health care clearinghouse" is an "entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements." *Id.* § 1320d(2). Finally, a "health care provider" is any "person furnishing health care services or supplies," including a "provider of services" and a "provider of medical or other health services." *Id.* § 1320d(3). These latter two terms are further defined in 42 U.S.C. § 1395x (2000). A "provider of services" is a "hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, [or] hospice program . . . ." *Id.* § 1395x(u). And a "provider of medical and other health services" is any person who provides any of a long list of such services, including "physicians' services," "services and supplies . . . furnished as

an incident to a physician's professional service, of kinds which are commonly furnished in physicians' offices and are commonly either rendered without charge or included in the physicians' bills," "outpatient physical therapy services," "qualified psychologist services," "clinical social worker services," and certain services "performed by a nurse practitioner or clinical nurse specialist." *Id.* § 1395x(s). These health care providers only qualify as covered entities if they "transmit[] any health information in electronic form in connection with" certain transactions described in section 1320d-2. *Id.* § 1320d-1(a)(3). The regulations further define the covered entities. *See* 45 C.F.R. § 160.103.

These covered entities must comply with the regulations promulgated pursuant to Part C. Section 1320d-4 requires compliance with the regulations within a certain time period by "each person to whom the standard or implementation specification [adopted or established under sections 1320d-1 and 1320d-2] applies." 42 U.S.C. § 1320d-4(b). Failure to comply with the regulations may render the covered entity either civilly or criminally liable.

The statute grants to the Secretary of HHS the authority for civil enforcement of the standards. Section 1320d-5(a) states, "Except as provided in subsection (b) of this section, the Secretary shall impose on any person who violates a provision of this part a penalty of not more than $100 for each such violation . . . ." *Id.* § 1320d-5(a)(1). Subsection (b) provides for three exceptions. First, a civil "penalty may not be imposed . . . with respect to an act if the act constitutes an offense punishable under" the criminal enforcement provision. *Id.* § 1320d-5(b)(1). Second, a civil "penalty may not be imposed . . . with respect to a provision of this part if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision." *Id.* § 1320d-5(b)(2). Third, a civil "penalty may not be imposed . . . if the failure to comply was due to reasonable cause and not to willful neglect; and the failure to comply is corrected" within a specified period of time. *Id.* § 1320d-5(b)(3).

The statute prescribes criminal sanctions only for those violations of the standards that involve the disclosure of "unique health identifiers," *id.* § 1320d-6(a), or of "individually identifiable health information," *id.*, that is, that subset of health information that, *inter alia*, "identifies the individual" or "with respect to which there is a reasonable basis to believe that the information can be used to identify the individual," *id.* § 1320d(6). More specifically, section 1320d-6(a) provides:

> A person who knowingly and in violation of this part—
>
> (1) uses or causes to be used a unique health identifier;
>
> (2) obtains individually identifiable health information relating to an individual; or

> (3) discloses individually identifiable health information to another person,
>
> shall be punished as provided in subsection (b) of this section.

Subsection (b) sets forth a tiered penalty scheme. A violation of subsection (a) is punishable generally as a misdemeanor by a fine of not more than $50,000 and/or imprisonment for not more than one year. *Id.* § 1320d-6(b)(1). Certain aggravating circumstances may make the offense a felony. Subsection (b)(2) provides for a maximum penalty of a $100,000 fine and/or five-year imprisonment for violations committed under false pretenses. *Id.* § 1320d-6(b)(2). And subsection (b)(3) reserves the statute's highest penalties—a fine of not more than $250,000 and/or imprisonment of not more than ten years—for those offenses committed "with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm." *Id.* § 1320d-6(b)(3).

II.

A.

We address first which persons may be prosecuted under the criminal enforcement provision, section 1320d-6. Specifically, we address whether section 1320d-6 renders liable only covered entities or whether the provision applies to any person who does an act described in that provision, including, in particular, a person who obtains protected health information in a manner that causes a covered entity to violate the statute or regulations. We conclude that an analysis of liability under section 1320d-6 must begin with covered entities, the only persons to whom the standards apply. If the covered entity is not an individual, general principles of corporate criminal liability will determine the entity's liability and that of individuals within the entity, including directors, officers, and employees. Finally, certain conduct of these individuals and that of other persons outside the covered entity, including of recipients of protected information, may be prosecuted in accordance with principles of aiding and abetting liability and of conspiracy liability.

We begin with the language of the statute. *See Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute."). Section 1320d-6(a) states that:

> A person who knowingly and in violation of this part—
>
> (1) uses or causes to be used a unique health identifier;

> (2) obtains individually identifiable health information relating to an individual; or
>
> (3) discloses individually identifiable health information to another person,
>
> shall be punished as provided in subsection (b) of this section.

Because Congress enacted the Administrative Simplification provisions for the express purpose of facilitating the use of health identifiers and the acquisition and disclosure of health information, an act listed in subsections (a)(1) to (a)(3) must be done "in violation of this part" in order to constitute a criminal offense. The phrase "this part" refers to "Part C—Administrative Simplification," codified at sections 1320d to 1320d-8. Section 1320d-1(a) makes clear that the standards promulgated under Part C apply only to covered entities: "Applicability. Any standard adopted under this part shall apply, in whole or in part, to the following persons: (1) A health plan. (2) A health care clearinghouse. (3) [Certain] health care provider[s] . . . ." *Id.* § 1320d-1(a); *see also* 45 C.F.R. § 160.102(a); *id.* § 162.100; *id.* § 164.104; Exec. Order No. 13,181, 65 Fed. Reg. 81,321 (Dec. 20, 2000), *reprinted in* 42 U.S.C. § 1320d-2 note ("HIPAA applies only to 'covered entities,' such as health care plans, providers, and clearinghouses. HIPAA regulations therefore do not apply to other organizations and individuals that gain access to protected health information . . . ."). Congress expanded this list to include Medicare prescription drug card sponsors "for purposes of applying part C['s]" Administrative Simplification provisions. 42 U.S.C. § 1395w-141(h)(6)(A). And these provisions require only "each person to whom the standard or implementation specification applies"—i.e., the covered entities—to comply with it. *Id.* § 1320d-4(b). Because Part C makes the standards applicable only to covered entities and because it mandates compliance only by covered entities, only a covered entity may do one of the three listed acts "in violation of this part." Other persons cannot violate Part C directly because the part simply does not apply to them. When the covered entity is not an individual, principles of corporate criminal liability discussed *infra* will determine when a covered entity has violated Part C and when these violations can be attributed to individuals in the entity.[2]

That the statute criminalizes the "obtain[ing]" of individually identifiable health information in violation of Part C, *id.* § 1320d-6(a)(2), in addition to its disclosure, does not convince us that our reading of section 1320d-6 according to its plain terms is incorrect. It could be argued that, by including a distinct prohibition on obtaining health information, the law was intended to reach the acquisition of health information by a person who is not a covered entity but who "obtains" it

[2] We express no opinion in this memorandum as to whether any particular person or entity may qualify as a covered entity for purposes of liability under sections 1320d-5 or 1320d-6.

from such an entity in a manner that causes the entity to violate Part C. *Id.* Further examining the statute and the regulations, however, reveals that the inclusion of section 1320d-6(a)(2) merely reflects the fact that the statute and the regulations limit the acquisition, as well as the disclosure and use, of information by covered entities. Those sections of the statute authorizing the Secretary of HHS to promulgate regulations speak broadly of adopting standards, *inter alia*, "for transactions," "providing for a standard unique health identifier," and concerning "security." *Id.* § 1320d-2(a)(1)(A), (b)(1), (d). They do not speak only of regulations governing the "use" and "disclosure" of information; the language used in these provisions easily encompasses the acquisition of information.[3] Pursuant to this authority, the Secretary has promulgated regulations governing the acquisition of certain information by a covered entity. *See, e.g.*, 45 C.F.R. § 164.500(b)(1) ("When a health care clearinghouse creates *or receives* protected health information . . . .") (emphasis added); *id.* § 164.502(b)(1) ("When using or disclosing protected health information *or when requesting protected health information from another covered entity* . . . .") (emphasis added); *id.* § 164.514(d)(4)(i) ("A covered entity must limit *any request* for protected health information to that which is reasonably necessary . . . .") (emphasis added). Failure to comply with these regulations may render a covered entity liable for "obtain[ing] individually identifiable health information" "in violation of this part." 42 U.S.C. § 1320d-6(a)(2).[4]

The difference between the language used in the civil enforcement provision and that used in the criminal enforcement provision does not support a broader reading of section 1320d-6. The civil enforcement provision makes liable "any

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[3] The only statutory section cast in terms of "use" and "disclosure" is the requirement that the Secretary submit to Congress "recommendations on standards with respect to the privacy of individually identifiable health information . . . address[ing] at least . . . the uses and disclosures of such information." *Id.* § 1320d-2 note. But as discussed above, this quoted language is not found in the main provisions of HIPAA that grant the Secretary authority to promulgate regulations; those provisions use broader terminology that easily includes the authority to regulate the acquisition of information. *See id.* § 1320d-2. Instead, this section solicited recommendations for further legislation concerning health privacy, facilitated congressional oversight of the privacy rules the Secretary developed, and required the Secretary to issue such rules if Congress did not act on the recommendations within a certain time period; it is not a restriction of the authority given elsewhere in the statute. *See infra* note 12. And on its face this provision does not purport to describe the extent of the Secretary's authority, as it requires the privacy recommendations to address "*at least*" the "uses" and "disclosures" of covered information. *Id.* § 1320d-2 note (emphasis added); *see also id*. (same with respect to the privacy regulations). Finally, a rule "address[ing]" the "disclosure" of information may well regulate the acquisition of information by a covered entity because obtaining information generally involves the "disclosure" of it by another person. The provision's use of the noun "disclosure," therefore, does not help to answer the question before us.

[4] Nor does the inclusion of "causes to be used" as well as "use" in section 1320d-6(a)(1) compel us to conclude—contrary to the plain language of the statute—that the provision renders liable entities that are not covered by the regulations but that "cause" a covered entity to "use" unique health identifiers in violation of the part. This language is better read to cover those instances in which a covered entity causes, in violation of the part, another person to use a unique health identifier, but where the covered entity itself did not use the identifier in an unauthorized manner.

person who violates a provision of this part." *Id.* § 1320d-5(a)(1). The criminal enforcement provision makes it a crime to do certain acts "knowingly and in violation of this part." *Id.* § 1320d-6(a). To be sure, the statute must be read as a whole and variations in the language of closely related provisions should be given effect if possible. *See Bryan v. United States*, 524 U.S. 184, 191–93 (1998) (interpreting the requirement that an act be done "willfully" in one subsection of the statute by reference to the "knowingly" requirement contained in other subsections of the same statute). Here, however, the difference in phrasing used in the two provisions does not constitute a basis for concluding that section 1320d-6 reaches persons who are not, or are not part of, a covered entity. Section 1320d-6's use of "in violation of," as opposed to "who violates," reflects only the difference in the scope of the conduct proscribed by the two sections. Section 1320d-5 is phrased as it is—"any person who violates a provision of this part"—because a violation of any of the standards subjects the violator to civil penalties. 42 U.S.C. § 1320d-5(a)(1). In contrast, criminal punishment is restricted to those violations of the standards—specified in subsections (a)(1) to (a)(3) of section 1320d-6(a)—that involve the improper use, acquisition, or disclosure of individually identifiable health information or unique health identifiers. Section 1320d-6(a) makes liable a person who "uses or causes to be used," "obtains," or "discloses" such health information. Having described the prohibited acts using present tense verbs, the provision could not retain the "violates this part" formulation; instead, it uses "in violation of this part" to make clear that only those uses, acquisitions, and disclosures in a manner contrary to the regulations are illegal. The difference in language between section 1320d-5 and section 1320d-6 is thus best understood as nothing more than a grammatical accommodation resulting from the need to describe the acts for which section 1320d-6 prescribes criminal liability.[5]

Although we conclude that Part C applies only to covered entities, we do not read the term "person" at the beginning of section 1320d-6 to mean "covered entity." Such a reading would not only be contrary to the language of that provision but also create tension with other parts of the statute that appear to use the term broadly, *see, e.g.*, *id.* § 1320d-6(a)(3) (prohibiting "disclos[ures] to another person"), and with the Dictionary Act, codified at 1 U.S.C. § 1 (2000), which sets forth a presumptively broad definition of person wherever the term is

[5] At most, the difference in phrasing between section 1320d-5 and section 1320d-6 would render the statute ambiguous. If that were the case, it might be appropriate to apply the rule of lenity and conclude that the statute is best read not to subject to direct prosecution persons other than covered entities and those rendered liable by general principles of corporate criminal liability. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). But as the language of the statute unambiguously compels the same result, we do not apply the rule of lenity here. *See Chapman v. United States*, 500 U.S. 453, 463 (1991) ("The rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act . . . .") (citation and quotation omitted).

used in the United States Code,[6] a definition presumptively applicable here because the defined terms specific to Part C do not include the term "person." *See* 42 U.S.C. § 1320d. We conclude only that the phrase "in violation of this part" restricts the universe of persons who may be prosecuted directly. Section 1320d-6 provides criminal penalties for "person[s]" who perform the listed acts "knowingly" and "in violation of this part." *Id.* § 1320d-6. The "in violation of this part" limitation on the scope of liability—like the "knowingly" requirement—is distinct from the definition of "person." It describes that subset of persons who may be held liable, provided that the other elements of the offense are also satisfied. Under this reading of the statute, section 1320d-6(a)(3) continues to make "covered entities" liable for disclosure to *any* "person."

We have considered other laws using the phrase "in violation of." None of these laws supports the view that, as used in 42 U.S.C. § 1320d-6, the phrase should be read more expansively than we conclude. For instance, several of these laws apply to the public generally, and, accordingly, do not shed light on whether section 1320d-6 allows direct prosecutions of persons other than those to whom the substantive requirements of HIPAA's Part C apply. *See, e.g.*, 18 U.S.C. § 547 (2000) ("Whoever receives or deposits merchandise in any building upon the boundary line between the United States and any foreign country, or carries merchandise through the same, *in violation of law* . . . .") (emphasis added); 18 U.S.C. § 1590 (2000) ("Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services *in violation of this chapter* . . . .") (emphasis added). And the phrasing of other laws makes it clear that "in violation of" describes an item involved in the prohibited act, as opposed to the act itself. For instance, 18 U.S.C. § 2113(c) (2000) penalizes "[w]hoever receives . . . property . . . which has been taken . . . in violation of subsection (b) . . . ." *Id*. In this case, the placement of the phrase "in violation of" following the word "which" makes plain that the phrase describes only the property, a reading confirmed by the provision's use of the passive "has been taken." *Id.*; *see also* 18 U.S.C. § 1170(b) (2000) ("Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained *in violation of* the Native American Grave Protection and Repatriation Act . . . .") (emphasis added). In contrast, the phrase "in violation of" in section 1320d-6 does not modify the type of health care information involved in the offense; rather, it relates directly to the acts prohibited by the provision (i.e., "uses or causes to be used," "obtains," or "discloses"). Finally, we have reviewed the cases interpreting these and other potentially analogous provisions and have found none that would

[6] "In determining the meaning of any Act of Congress, unless the context indicates otherwise— the word[] person[] . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

cause us to read section 1320d-6 in any way other than in accordance with its plain meaning.[7]

We conclude, therefore, that an assessment of liability under section 1320d-6 must begin with covered entities. The statute and regulations determine which individuals and entities qualify as a "covered entity." *See* 42 U.S.C. § 1320d; *id*. § 1395w-141(h)(1); *id*. § 1395x; 45 C.F.R. § 160.103.[8] A health care provider is any "person furnishing health care services or supplies," and will be either an individual or an entity. 42 U.S.C. § 1320d(3); *see also id*. § 1395x. In contrast, a "health care clearinghouse," "health plan," and Medicare "prescription drug card sponsor" will virtually never be an individual. *See id.* § 1320d(2) & (5); *id.* § 1395w-141(h)(1)(A). When the covered entity is not an individual, principles of corporate criminal liability will determine the entity's liability and the potential liability of particular individuals who act for the entity. Although we do not elaborate these principles here, in general, the conduct of an entity's agents may be imputed to the entity when the agents act within the scope of their employment, and the criminal intent of agents may be imputed to the entity when the agents act on its behalf. *See* Kathleen F. Brickley, *Corporate Criminal Liability* §§ 3–4 (2d ed. 1992). In addition, we recognize that, at least in limited circumstances, the criminal liability of the entity has been attributed to individuals in managerial roles, including, at times, to individuals with no direct involvement in the offense. *See id.* § 5.[9] Consistent with these general principles, it may be that such individuals in particular cases may be prosecuted directly under section 1320d-6.

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[7] Consistent with our reading of 42 U.S.C. § 1320d-6, the Sixth Circuit has held that the Video Privacy Protection Act's ("VPPA") creation of a cause of action for "[a]ny person aggrieved by any act of a person in violation of this section," 18 U.S.C. § 2710(c)(1) (2000), allows suits against only video tape service providers and not against all persons. *See Daniel v. Cantrell*, 375 F.3d 377, 382–84 (6th Cir. 2004). In that case, the plaintiff had sued several persons who were not video tape service providers, alleging that they had violated the privacy right in his video rental records given him by the statute. Similar to section 1320d-6, the VPPA cause of action provision refers to acts of "a person in violation of this section." 18 U.S.C. § 2710(c)(1). The court reasoned that because the operative provision of the VPPA provides that "[a] video tape service provider who knowingly discloses . . . personally identifiable information . . . shall be liable," *id.* § 2710(b), only such providers could be "in violation of" the statute. *Daniel*, 375 F.3d at 383–84. Accordingly, despite the use of the broad term "person" in section 2710(c)(1), only video tape service providers may be sued under that section.

[8] The statute and regulations do not limit the actions for which a covered entity may be held liable to those activities that render the person a covered entity. Once a person is a covered entity, he must "comply with [an applicable] standard or specification," 42 U.S.C. § 1320d-4(b)(1)(A) and "may not use or disclose protected health information, except as permitted or required by" the regulations, 45 C.F.R. § 164.502. Thus, a physician who is a covered entity in part because he transmits certain health care information electronically must not disclose such protected information, either electronically *or otherwise*, except as authorized by the regulations. And a physician who is a covered entity must comply with the standards with respect to protected information concerning both his own patients and those patients he is not treating.

[9] "Many regulatory statutes . . . make corporate officials vulnerable to prosecution for criminal conduct in which they did not personally participate and about which they had no personal knowledge." *Id.* § 5.01; *see also United States v. Jorgensen*, 144 F.3d 550, 559–60 (8th Cir. 1998) (applying the

Other conduct that may not be prosecuted under section 1320d-6 directly may be prosecuted according to principles either of aiding and abetting liability or of conspiracy liability.[10] The aiding and abetting statute renders "punishable as a principal" anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission" and anyone who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. § 2 (2000). And the conspiracy statute prescribes punishment "if two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371 (2000).[11] Further discussion of corporate criminal liability, aiding and abetting liability, and conspiracy liability in the absence of a specific factual context would be unfruitful, particularly because the contours of these legal principles may vary by jurisdiction. Accordingly, we leave the scope of criminal liability under these principles for consideration in the ordinary course of prosecutions.[12]

B.

We address next whether the "knowingly" element of the offense set forth in 42 U.S.C. § 1320d-6 requires the government to prove only knowledge of the facts that constitute the offense or whether this element also requires proof that the defendant knew that the act violated the law. We conclude that the "knowingly"

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principle that "a corporate officer who is in a responsible relationship to an activity within a company that violates provisions of . . . federal . . . laws . . . can be held criminally responsible even though that officer did not personally engage in that activity" in the context of a statute that required proof of "intent to defraud" when the defendant possessed the requisite intent) (quotations and citations omitted).

[10] Depending on the specific facts and circumstances, such conduct may also be punishable under other federal laws. *See, e.g.*, 18 U.S.C. § 1028 (2000 & Supp. III 2004) (identity theft); *id*. § 1030 (2000 & Supp. III 2004) (fraudulent access of a computer).

[11] For instance, an individual who is not a covered entity who aids or conspires with a covered entity in the use of protected health information in a manner not authorized by the regulations (e.g., to establish a fraudulent billing scheme) could be charged under section 2 or section 371 of title 18.

[12] We note that conduct punishable under section 1320d-6 may also be punishable under state law and render a person liable in tort. *See generally* Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 Rutgers L.J. 617 (2002). When Congress enacted HIPAA, it was concerned that state statutory and common law provided inadequate and uneven protection for health information. Congress sought to create a nationwide floor for such protection. *See* Preamble, Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule Preamble"), 65 Fed. Reg. 82,462, 82,463–64 (Dec. 28, 2000). Thus, HIPAA's privacy rules preempt only those contrary state laws that are *less* stringent than the applicable federal privacy rules. *See* 42 U.S.C. § 1320d-7(a)(2)(B); 45 C.F.R. § 160.203(b) ("A standard, requirement, or implementation specification . . . that is contrary to a provision of State law preempts the provision of State law . . . except if . . . [t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than" the federal standard.). All other criminal and civil liability for breaches of a duty concerning the privacy of health information that existed prior to HIPAA remains after its passage.

element is best read, consistent with its ordinary meaning, to require only proof of knowledge of the facts that constitute the offense.

We begin again with the text of 42 U.S.C. § 1320d-6(a). *See Liparota*, 471 U.S. at 424.

> A person who knowingly and in violation of this part—
>
> (1) uses or causes to be used a unique health identifier;
>
> (2) obtains individually identifiable health information relating to an individual; or
>
> (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.

42 U.S.C. § 1320d-6(a). A plain reading of the text indicates that a person need not know that commission of an act described in subsections (a)(1) to (a)(3) violates the law in order to satisfy the "knowingly" element of the offense. Section 1320d-6 makes the requirements that the act be done "knowingly" and that it be done "in violation of this part" two distinct requirements. These two elements do not modify each other; rather, they independently modify "uses or causes to be used," "obtains," and "discloses." For example, defendants will be guilty of an offense if they both "knowingly" "disclose[] individually identifiable health information" and they "in violation of this part" "disclose[] individually identifiable health information." The view that the statute requires proof of knowledge of the law effectively reads "knowingly" to refer to the "violation of this part." But this reading is contrary to the plain language of the statute, which sets forth these terms as two separate elements each independently modifying the third element, i.e., one of the listed acts. Accordingly, to incur criminal liability, a defendant need have knowledge only of those facts that constitute the offense.

Our reading of the "knowingly" element of the offense comports with the usual understanding of the term. The Supreme Court has stated that "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan*, 524 U.S. at 193 (footnote omitted) ("[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law."). As set forth above, the text of section 1320d-6 does not "dictate[] a different result." *Bryan*, 524 U.S. at 193. In fact, its text dictates an interpretation consistent with the ordinary understanding of "knowingly" as referring only to "knowledge of the facts that constitute the offense." *Id.*

The plain meaning of the "knowingly" element of section 1320d-6 must control, "at least where the disposition required by the text is not absurd." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). We

consider whether our reading of the criminal provision is absurd in light of the possible exception to civil liability for reasonable ignorance of the law. Sections 1320d-5 and 1320d-6 operate in a complementary fashion, covering mutually exclusive conduct. *See* 42 U.S.C § 1320d-5(b)(1) (excepting from civil penalties an act that "constitutes an offense punishable under section 1320d-6 of this title.").[13] The civil enforcement section provides, "A penalty may not be imposed . . . if . . . the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision." *Id.* § 1320d-5(b)(2). Section 1320d-5 therefore may be read to premise civil liability on knowledge that the act in question violated the applicable standard, not just on knowledge that the particular act occurred.[14] If civil sanctions (of fines up to $100) may be avoided by establishing reasonable ignorance of the law, it might at first blush appear to be an absurd result to conclude that the significantly more serious criminal punishments (of fines up to $250,000 and imprisonment of up to ten years) may not be similarly excused.

The absurd results canon of construction is "rarely invoke[d] . . . to override unambiguous legislation." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring) (noting that the canon is limited "to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone."). Applying the usual definition of "knowingly" here does not yield an absurd result, and certainly not one so absurd that it would cause us to read the statute contrary to its plain meaning. The argument that the statute should not be read so as to impose criminal punishment on the basis of a lesser degree of intent than that required for civil sanction would be more compelling if sections 1320d-5 and 1320d-6 covered the same acts. But they do not. *See* 42 U.S.C. § 1320d-5(b)(1). Civil sanctions may be imposed for violations of a wide variety of regulations. For these violations, the statute provides a maximum $100 fine and sets forth certain exceptions to liability. *Id.* § 1320d-5 ("General penalty for failure to comply with requirements and standards").[15] In contrast, of all the possible violations of the regulations, section

[13] Thus, the Secretary may not impose civil sanctions for the commission of an act that subjects a person to the possibility of criminal prosecution, regardless of whether the person is in fact punished criminally.

[14] This is not the only possible reading of section 1320d-5(b)(2). This paragraph is headed "Non-compliance not discovered," and the language of the provision—"the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision"—could be read to refer to ignorance of the facts that constitute the violation, rather than ignorance of the law. But to answer the questions you have asked, we need not decide which reading is better.

[15] In addition to the exception noted above, section 1320d-5(b) contains another defense to liability where "(i) the failure to comply was due to reasonable cause and not to willful neglect; and (ii) the failure to comply is corrected during the 30-day period beginning on the first date the person liable for

1320d-6 carves out a limited set and subjects them to criminal punishment. Such punishment is reserved for violations involving "unique health identifiers" and "individually identifiable health information." *Id.* § 1320d-6 ("Wrongful disclosure of individually identifiable health information"). Thus, the statute reflects a heightened concern for violations that intrude upon the medical privacy of individuals. In light of this concern, there is nothing obviously absurd about the statute's allowing a defense of reasonable ignorance of the law for those regulatory violations subject to civil penalty, but withholding this defense with respect to those violations that threaten the privacy of individuals. Accordingly, even reading section 1320d-6 in light of section 1320d-5(b)'s exception to civil liability for reasonable ignorance of the law gives us no reason to doubt that the plain and ordinary meaning of the "knowingly" element of section 1320d-6 is the correct one.

Nor is it proper to apply here the exception to the usual meaning of "knowingly" exemplified by *Liparota*. *See id.*, 471 U.S. at 424–28. *Liparota* is the case cited by the Supreme Court in *Bryan* as an example of the exception to the rule—when "the text of the statute dictates a different result"—that "knowingly" refers to the facts that constitute the offense and not to the law. *Bryan*, 524 U.S. at 193 & n.15. In *Liparota*, the Supreme Court held that a statute forbidding fraudulent use of food stamps required proof of knowledge that the use was unauthorized. 471 U.S. at 433. The statute in that case read: "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter" shall be guilty of a criminal offense. *Id.* at 420–21 n.1 (quoting 7 U.S.C. § 2024(b)(1)). This language is at least ambiguous; "knowingly" may modify, for example, either only the verb "uses" or it may modify the entire verbal phrase "uses . . . in any manner not authorized." *Id.*; *see id.* at 424 (The "interpretations proffered by both parties accord with congressional intent . . . . [T]he words themselves provide little guidance. Either interpretation would accord with ordinary usage."); *id.* at 424 n.7 (referring to the statutory language and noting that "[o]ne treatise has aptly summed up the *ambiguity* in an analogous situation") (emphasis added). *But see Bryan*, 524 U.S. at 193 n.15 (citations omitted) (in *Liparota*, "we concluded that both the term 'knowing' . . . and the term 'knowingly' . . . literally referred to knowledge of the law as well as knowledge of the relevant facts"). The Supreme Court then considered the presumption that criminal statutes contain a mens rea element,[16] applied the rule of lenity, and rested its interpretation, in large part, on

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the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred." *Id.* § 1320d-5(b)(3).

[16] "[C]riminal offenses requiring no *mens rea* have a 'generally disfavored status.'" *Liparota*, 471 U.S. at 426 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978)); *Staples v. United States*, 511 U.S. 600, 606 (1994) ("[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.").

the concern that the contrary reading would "criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426–27.

Here, the "knowingly" element of section 1320d-6 is not ambiguous; thus, it would be inappropriate to resort to the rule of lenity. *See Chapman v. United States*, 500 U.S. 453, 463 (1991) ("The rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act . . . .") (citation and quotation omitted). Moreover, our interpretation of "knowingly" does not dispense with the mens rea requirement of section 1320d-6 and create a strict liability offense; satisfaction of the "knowingly" element will still require proof that the defendant knew the facts that constitute the offense. *See Staples v. United States*, 511 U.S. 600, 622 n.3 (1994) (Ginsburg, J., concurring) ("The mens rea presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, deeply rooted in the American legal system, that, ordinarily, ignorance of the law or a mistake of law is no defense to criminal prosecution.") (quotations and citations omitted). Finally, the concern expressed in *Liparota* about criminalizing a broad swath of seemingly innocent conduct is less present here. The statute in *Liparota* criminalized the unauthorized use of food stamps by any participant in the program, as well as by any person who might come in possession of these stamps. 471 U.S. at 426–27. In contrast, section 1320d-6, as we conclude above, applies directly to covered entities. These covered entities—health plans, health care clearinghouses, certain health care providers, and Medicare prescription drug card sponsors—are likely well aware that the health care business they conduct is heavily regulated by HIPAA and other laws. To the extent that some concern remains, it is insufficient to override the plain meaning of the statute. Accordingly, *Liparota* provides no support for giving "knowingly" in section 1320d-6 a meaning different from its usual understanding as referring only to knowledge of the facts that constitute the offense.

III.

For the foregoing reasons, we conclude that covered entities and those persons rendered accountable by general principles of corporate criminal liability may be prosecuted directly under 42 U.S.C. § 1320d-6 and that the "knowingly" element of the offense set forth in that provision requires only proof of knowledge of the facts that constitute the offense.

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Authority of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to Permit Importation of Frames, Receivers, and Barrels of Non-Importable Firearms

The Bureau of Alcohol, Tobacco, Firearms, and Explosives does not have authority under the Gun Control Act of 1968 to permit the importation of the frames, receivers, and barrels of non-importable firearms, where the importation of those parts is solely for purposes of repair or replacement rather than for the assembly of a new firearm.

The Bureau may, however, announce that, for a limited time (60 days), it will not take enforcement action against persons importing frames, receivers, or barrels pursuant to a previously issued permit.

July 6, 2005

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

You asked for our opinion whether the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or "Bureau") has the authority to permit the importation of the frames, receivers, and barrels of non-importable firearms, where the importation of those parts is solely for purposes of repair or replacement rather than for the assembly of a new firearm. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Carl J. Truscott, Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives (July 1, 2005). We conclude that ATF does not have such authority. Having been made aware of this conclusion, you also have asked whether it would be permissible for ATF to announce that, for a limited time (60 days), it will not take enforcement action against persons importing frames, receivers, or barrels pursuant to a previously issued permit. We conclude that, under these circumstances, a temporary policy of non-enforcement against those acting in good-faith reliance on ATF permits would represent a reasonable exercise of the Bureau's enforcement discretion.

I.

The Gun Control Act of 1968, as amended, broadly restricts the importation of firearms into the United States. *See* 18 U.S.C. § 922 (2000 & Supp. V 2005). However, the Act makes an exception for firearms that are "generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms." *Id*. § 925(d)(3) (Supp. V 2005). (In addition, to come within this exception, the weapon must fall outside the definition of "firearm" in 26 U.S.C. § 5845 (2000).) Because Congress did not define "sporting purposes," that authority passed to ATF, which, over the years, has classified an increasingly wide variety of firearms—including various kinds of semi-automatic rifles—as not suitable for sporting purposes and thus subject to section 925(d)(3)'s import prohibition. In 1986, as part of the Firearms Owners' Protection Act, Pub. L. No.

99-308, § 105(2)(C), 100 Stat. 449, 459 (1986), Congress amended section 925(d)(3) to provide that "in any case where the Attorney General[1] has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled." Since 2001, however, ATF has continued to allow the importation of frames, receivers, and barrels of non-importable firearms, albeit only for the repair or replacement of the corresponding parts of firearms that are already in the country. To that end, the Bureau has issued permits authorizing importers to bring such parts into the United States for that purpose. This exception has allowed owners of machine guns, surplus military firearms, and nonsporting firearms to acquire parts needed to repair firearms they lawfully acquired and lawfully possess.

We have now determined that ATF's practice is not authorized by the statute. Our conclusion is compelled by the unambiguous language of section 925(d)(3). *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."). The language added by the Firearm Owners' Protection Act is clear. It addresses "any" case in which a firearm is non-importable because it has been deemed to fall outside of the "sporting purposes" exception. Within that category of weapons, the statute mandates that "it shall be unlawful to import *any* frame, receiver, or barrel of such firearm which would be prohibited if assembled." 18 U.S.C. § 925(d)(3) (emphasis added). "Any" is a word that in ordinary usage is understood to have an "expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Read naturally, therefore, section 925(d)(3) bars the importation of every frame, receiver, or barrel of every firearm that comes within its scope and admits of no exceptions to that comprehensive ban. *Cf. Brogan v. United States*, 522 U.S. 398 (1998) (refusing to read into a statutory prohibition on "any false statement" an implied limitation for the mere denial of wrongdoing).

Although we recognize that the word "any" is not invariably as expansive as its ordinary meaning suggests, *see Small v. United States*, 544 U.S. 385 (2005) (holding that "any court" as used in 18 U.S.C. § 922(g)(1) did not include foreign courts), we find no textual or contextual indications that—as used in section 925(d)(3)—the term admits of any implicit exception. Indeed, the situation here is far different from the one that confronted the Supreme Court in *Small*, where the phrase "any court" had to be read against a general presumption that Congress legislates with domestic concerns in mind. 544 U.S. at 388–89. That presumption

[1] The Attorney General has delegated his statutory authority under chapter 44 of title 18 (which includes sections 922 and 925) to ATF. *See* 28 C.F.R. § 0.130(a)(1) (2004); *cf.* 28 U.S.C. § 510 (2000) (allowing the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General").

created at least some reason to doubt that the statute necessarily covered foreign convictions. In addition, the Court identified important differences between the two categories of convictions, which would have been indiscriminately conflated if "any" were interpreted broadly. *Id*. at 389–90. Finally, the Court noted that reading the statute to include foreign courts would introduce anomalies that Congress was unlikely to have expected or intended. *Id*. at 391–92.

Here, in contrast, there are no background principles of statutory construction that would ordinarily work to distinguish parts used for replacement from parts used for any other purpose. In this context, affording "any" its natural sweep would not implicate concerns about extraterritoriality, federalism,[2] constitutionality,[3] or any other concern that would support reading otherwise-broad statutory language narrowly. And, whereas in *Small*, it was plausible to think that the use of the phrase "any court" in a federal statute might be limited to courts within the purview of Congress (i.e. domestic courts), here there is simply no linguistic context, be it casual conversation or federal legislation, where "any frame, receiver, or barrel . . . which would be prohibited if assembled" can be read to leave out a subset of frames, receivers, or barrels of a prohibited firearm. Nor are we aware of any relevant context from the time of section 925(d)(3)'s amendment that would suggest giving special treatment to replacement parts so as to exempt them from the statute's seemingly general prohibition.

Finally, no absurd or even anomalous results would flow from interpreting the statute to mean what it says. It is perfectly reasonable for Congress to have wanted to bar the importation of all frames, receivers, and barrels of firearms that could not be imported if fully assembled, rather than merely those frames, receivers, and barrels that were to be used for purposes other than repair or replacement. Indeed, insofar as one purpose of the import ban was to reduce over time the number of non-sporting firearms in the United States that could be put to illicit ends, ATF's implied exception, which would allow such weapons to be continually reconstituted from imported parts, would seem to frustrate that purpose. Of course, if Congress had intended for section 925(d)(3) to include a repair or replacement exception, it could have enacted one. Because it did not, and because nothing inconsistent with the statutory purpose would occur in the absence of such an exception, we are not free to read into the statute a limitation that does not appear in its text.

Nor may ATF invoke its general regulatory authority to engraft a repair or replacement exception onto the statute's blanket importation ban. Although the

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[2] *E.g.*, *Nixon v. Mo. Municipal League*, 541 U.S. 125 (2004) (refusing to adopt a broad reading of "any entity" where doing so would have resulted in federal interference in the relationship between states and their political subdivisions).

[3] *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (discussing and applying the constitutional avoidance canon).

Bureau has rulemaking authority with respect to the federal firearms laws, *see* 18 U.S.C. § 926 (2000 & Supp. V 2005), that authority cannot be used to undermine an unambiguous statutory command. An agency may not rewrite a statute in the guise of interpreting it. *See, e.g.*, *Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996). More specifically, a general grant of rulemaking authority does not confer on an agency the power to create exceptions from the plain language of a statute. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977) (holding that where a statute required permits for pollution discharges from "any point source," EPA lacked the power to exempt certain categories of point sources from that requirement).[4] Indeed, it is a cardinal rule of administrative law that where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467. U.S. 837, 842-43 (1984).

Here, as discussed above, the text of section 925(d(3) speaks "to the precise question at issue," thus foreclosing the agency from making a different choice. *Chevron*, 467 U.S. at 842. Congress has banned the importation of all frames, receivers, and barrels of all firearms that ATF has classified as not suited for sport, as well as those parts of all surplus military firearms and all "firearms" as defined in 26 U.S.C. § 5845. The statute leaves no gap to be filled and therefore delegates no policy judgment to ATF about whether to allow such imports for particular purposes. *Accord Nat'l Cable & Telecomm. Ass'n v. Brand X Internet*, 545 U.S. 967, 980–81 (2005). ATF cannot "pry apart the clear words of the act in order to create a gap into which it can wedge its policy preference." *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791,797 (11th Cir. 2000). In sum, then, because a repair or replacement exception "goes beyond the meaning that the statute can bear," *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994), recognizing such an exception represents an impermissible use of ATF's regulatory power. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

II.

Our conclusion that ATF lacks the statutory authority to issue permits for the importation of frames, receivers, and barrels for repair or replacement means, of

[4] More recently, the Ninth Circuit followed *Costle* when it rejected the EPA's similar attempt to "exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word 'define' for the word 'exempt,' would turn *Costle* on its head." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002).

course, that ATF must stop granting applications for such permits. You have advised us that you have already done so. We are aware, however, that importers who already hold permits issued by ATF may well suffer considerable economic hardship if those permits were invalidated and their operations immediately shut down. Those importers acted in good-faith reliance on the Bureau's erroneous conclusion that it possessed the legal authority to recognize a repair or replacement exception. Possessing what they reasonably believed were valid permits, those importers entered into binding contracts with foreign suppliers and made investments that would likely be unrecoverable if all importations were stopped suddenly and without warning. Indeed, parts may be in transit to the United States now.

In an effort to alleviate this potential unfairness, you have asked whether, for a limited period of time, ATF may refrain from taking enforcement action against current permit-holders who continue to import frames, receivers, or barrels in accordance with the terms of their permits. We understand that ATF will achieve this result by notifying Customs and Border Protection that—as of 60 days from the date on which ATF notifies industry of its new policy—repair or replacement permits should no longer be accepted to release the frames, receivers, and barrels of non-importable firearms into the United States. Under these circumstances, we believe that this approach would be a permissible exercise of ATF's enforcement discretion.

The Supreme Court has recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *cf. United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (recognizing that the NLRB has "unreviewable discretion to refuse to institute an unfair labor practice complaint"). This is so because an agency's decision about whether to enforce the laws over which it has jurisdiction "involves a complicated balancing of a numbers of factors which are peculiarly within its expertise." *Heckler*, 470 U.S. at 831. These factors include how best to spend agency resources; the agency's likelihood of success if it decides to enforce; whether the particular enforcement action fits within the agency's overall policies; and, to some extent, concerns for individual liberty and property rights, which may be implicated when the agency acts, but usually not when the agency declines to act. *Id*. at 831–32; *see also Wayte v. United States*, 470 U.S. 598, 607–08 (1985).

ATF is entitled to balance these considerations to assure existing permit-holders that, for a short time, no enforcement action will be taken against them. It would be difficult to gainsay ATF's conclusion that its limited resources are best not spent enforcing the ban against importers for taking action that the Bureau had specifically authorized them to take. Moreover, it is entirely appropriate for an

agency to rely on equitable considerations in deciding when to bring an enforcement action and against whom. *Cf. Interim Designation of Acceptable Documents for Employment Verification*, 62 Fed. Reg. 51001, 51001–02 (Sept. 30, 1997) ("[I]n order to minimize confusion and disruption, [INS] will exercise its discretion to forego enforcement actions against employers who continue to act in reliance upon and in compliance with existing employment verification forms, guidance, and procedures."). Here, given that existing permit-holders acted reasonably in structuring their businesses and making contracts on the assumption that the permits were valid, those considerations are particularly compelling.

We emphasize that we are not suggesting that ATF (or any other federal agency) may use its enforcement discretion simply to allow or encourage private parties to flout statutory bans. Rather, we believe that the unusual circumstances now presented—where ATF's misapprehension of its authority induced reasonable reliance on the part of regulated parties—allow ATF to set aside a limited period during which it will decline to visit the consequences of its own legal error upon those who would otherwise endure significant financial hardship. By merely delaying enforcement, ATF is not suggesting that the statutory ban on importation does not merit enforcement. Once the 60-day window closes, no further importations will be allowed, and anyone who subsequently violates section 925(d)(3) will be subject to punishment, whether or not he previously had a permit. In the meantime, however, that window represents an appropriate compromise between ATF's important obligation to enforce the law in an evenhanded manner and its desire not to impose the costs of its mistakes on those who relied in good faith upon them.

III.

For these reasons, we conclude that although ATF lacks the statutory authority to grant permits for the importation of frames, receivers, and barrels of non-importable firearms, the Bureau may exercise its discretion not to bring enforcement proceedings against individuals who, for a limited time, continue to import such parts in good-faith reliance on previously issued importation permits.

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

Whether the President May Sign a Bill by Directing That His Signature Be Affixed to It

The President need not personally perform the physical act of affixing his signature to a bill he approves and decides to sign in order for the bill to become law. Rather, the President may sign a bill within the meaning of Article I, Section 7 by directing a subordinate to affix the President's signature to such a bill, for example by autopen.

July 7, 2005

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether, having decided to approve a bill, the President may sign it, within the meaning of Article I, Section 7 of the Constitution, by directing a subordinate to affix the President's signature to it, for example by autopen. This memorandum confirms and elaborates upon our earlier advice that the President may sign a bill in this manner. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Signing of H.J. Res. 124* (Nov. 22, 2002) ("Whelan Memorandum"). We emphasize that we are not suggesting that the President may delegate the decision to approve and sign a bill, only that, having made this decision, he may direct a subordinate to affix the President's signature to the bill.[1]

Our analysis proceeds as follows: In Part I, we examine the legal understanding of the word "sign" at the time the Constitution was drafted and ratified and during the early years of the Republic. We find that, pursuant to this understanding, a person may sign a document by directing that his signature be affixed to it by another. We then review opinions of the Attorney General and the Department of Justice and find the same understanding reflected in opinions addressing statutory signing requirements in a variety of contexts. Reading the constitutional text in light of this established legal understanding, we conclude that the President need not personally perform the physical act of affixing his signature to a bill to sign it within the meaning of Article I, Section 7. In Part II, we consider the settled interpretation of the related provisions of the same section of the Constitution that require that bills be presented to the President and that the President return to Congress bills he disapproves, and find that this interpretation confirms our view of Article I, Section 7's signing requirement. In Part III, we consider practice and precedent relating to the constitutional signing requirement and show that they do not foreclose our conclusion.

[1] Practical reasons why the President might wish to proceed in this manner are apparent. For example, the President may be away from Washington, D.C., when Congress presents an enrolled bill to the White House, and he may wish it to take effect immediately (for example to prevent a government shutdown, to avoid lapses in authority, or to approve new authorities without delay).

I.

Article I, Section 7 provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

U.S. Const. art. I, § 7, cl. 2. Neither the constitutional text nor the drafting and ratification debates provide further guidance regarding what it means for the President to "sign" a bill he approves. *See* Memorandum for Gerald D. Morgan, Special Counsel to the President, from Malcolm R. Wilkey, Assistant Attorney General, Office of Legal Counsel, *Re: Responsibility of the President to Sign Bills Passed by the House and the Senate* at 2 (Aug. 19, 1958) ("Wilkey Memorandum") ("Research has not disclosed any record of debate concerning the specific responsibility which the Founding Fathers sought to place upon the President by the word 'sign.' Nor does any evidence give reason to think that the word was used other than in its commonly-understood meaning."). However, the word "sign" had a generally understood legal meaning that was well established at common law when the Constitution was drafted and ratified and that continued throughout the Republic's early years (and beyond). Under this well-settled legal understanding, an individual could sign a document by directing that his signature be affixed to it by another. Opinions of the Attorney General and the Department of Justice have repeatedly applied this understanding in various contexts to conclude that Executive Branch officials, including the President, may satisfy statutory signing requirements in this manner. This settled understanding of the meaning of "sign" leads us to conclude that Article I, Section 7 permits the President to sign a bill by directing a subordinate to affix the President's signature to it.

A.

We begin with the common law meaning of the word "sign" at the time the Constitution was drafted and ratified and during the early years of the Republic. It is well settled that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952). A similar rule of construction applies in constitutional interpretation. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (holding that the constitutional right of the accused "'to be confronted with the witnesses against

him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding"); *Payton v. New York*, 445 U.S. 573, 591 (1980) (interpreting the Fourth Amendment prohibition of "unreasonable searches and seizures" by looking to "the common-law understanding of an officer's authority to arrest" as "obviously relevant, if not dispositive" evidence "of what the Framers of the Amendment might have thought to be reasonable"). As Justice Story explained, "[t]he existence, therefore, of the common law is not only supposed by the constitution, but is appealed to for the construction and interpretation of its powers." *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857) (Story, J.) (listing, as examples, various provisions of the Constitution that must be interpreted in light of the common law), *rev'd on other grounds*, 14 U.S. 415 (1816). Common law decisions from the early years of the Republic can also illuminate the original meaning of the constitutional text, absent evidence that they reflect a break with common law principles that prevailed at the time the Constitution was drafted and ratified. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 418–20 (1976) (looking at early common law decisions in interpreting the Fourth Amendment's reasonableness requirement); *In re Winship*, 397 U.S. 358, 361–62 (1970) (same for Due Process Clause of the Fifth Amendment).

At the time the Constitution was drafted and ratified, and continuing thereafter, courts in England and the United States applied the rule that "when a document is required by the common law or by statute to be 'signed' by a person, a signature of his name in his own proper or personal handwriting is not required." *Finnegan v. Lucy*, 157 Mass. 439, 440 (1892) (noting that this rule "was and still is very generally held"; collecting early English and American authorities); *see also id*. at 443 ("Signing does not necessarily mean a written signature, as distinguished from a signature by mark, by print, by stamp, or by the hand of another."). Rather, under the "principle of signatures," the common law recognized that one could sign a document not only with one's own hand, but also by the hand of another who was properly authorized to affix one's signature to the document on one's behalf or who did so in one's presence. Furthermore, a document signed in one's name by the hand of another in either of these manners was equally effective as a document signed with one's own hand.

Although the precise origins of the principle of signatures are not clear, they appear to trace back at least as far as *Lord Lovelace's Case*, 82 Eng. Rep. 140, Sir Wm. Jones Rep. 268 (J. Seate 1632), where it was said:

> [I]f one of the officers of the forest put one seal to the Rolls by assent of all the Verderers, Regarders, and other Officers, it is as good as if every one had put his several seal, as in case divers men enter into an Obligation, and they all consent, and let but one seal to it, it is a good Obligation of them all.

Id. at 141. This case thus appears to have recognized that a person required to seal a document need not affix his seal to it personally if he agrees to be bound by the seal of another and, more generally, that the identity of the person who affirms a legal document need not correspond to the identity of the person who affixes a mark upon that document to signify that affirmation.[2]

English courts subsequently extended the principle recognized in *Lord Lovelace's Case* to situations where one person actually affixes another's signature to a document. In *Nisi prius coram Holt*, 12 Mod. Rep. 564, 564 (1701), Chief Justice Holt held that "if a Man has a Bill of Exchange, he may authorize another to indorse his Name upon it by Parol; and when that is done, it is the same as if he had done it himself." Importantly, this case held that the law will not distinguish a document signed by one's own hand from a document signed in one's name by the hand of another acting on one's behalf. The signature is equally valid if it is affixed in either manner. Thus, by 1701, *Nisi prius coram Holt* and *Lord Lovelace's Case* had established the fundamental basis for the principle of signatures.

Some have traced the principle of signatures even earlier, to *Combe's Case*, decided in 1614. As reported by Chief Justice Coke, this case held that when one person has authority to act for another, he should do so in the name of the person on whose behalf he acts. The court explained:

> [W]hen any has authority as attorney, to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority. . . . [B]ut if attornies have power by writing to make leases by indenture for years, &c. they cannot make indentures in their own names, but in the name of him who gives the warrant.

Combe's Case, 77 Eng. Rep. 843, 847, 9 Co. Rep. 75, 76–77 (1614).[3] This decision firmly established that an agent could, and often must, affix his principal's signature to legal documents to conduct business on the principal's behalf. As one court later observed, "[i]t does not appear that the authority of

[2] The "Verderers, Regarders, and other Officers" referred to in *Lord Lovelace's Case* comprised the Court of Sweinmote, a forest court that, among other things, would certify convictions for violations of the forest laws to the Court of Justice Seate for entry of judgment. 3 William Blackstone, *Commentaries* *72. Although the language quoted in the text appears to reflect the argument of the Attorney General, nothing in the terse report of this decision suggests that the Court disagreed with this language, and litigants and judges in subsequent cases have treated it as reflecting the holding of the Court. *See, e.g.*, *Ball v. Dunsterville*, 100 Eng. Rep. 1038, 1039, 4 Term Rep. 313, 314 (K.B. 1791); *Simonds v. Ludlow*, 2 Cai. Cas. 1 (N.Y. Sup. Ct. 1805); *Cady v. Sheperd*, 28 Mass. 400, 404 (1831).

[3] Chief Justice Coke's reporter does not clearly indicate whether *Combe's Case* was decided by the Court of Common Pleas or the Court of King's Bench.

Combe's case is at all shaken by more modern decisions. All concur in laying it down as an indispensable requisite, to give validity to a deed executed by an attorney, that it should be made in the name of the principal." *Elwell v. Shaw*, 16 Mass. 42, 46 (1819); *see also Stone v. Wood*, 7 Cow. 453, 454 (N.Y. Sup. Ct. 1827) ("When an agent or attorney contracts on behalf of his principal, he must do so *in the name* of the principal, or the latter is not bound. When any one has authority to do an act, it should be done in the name of him who gives the authority; not in the name of the attorney. All the subsequent cases agree in the law as thus laid down by Coke. There is no contradiction on the subject."). Significantly for our purposes, it appears to have been generally understood, as a corollary to the rule set down in *Combe's Case*, that "[w]hen the name of the principal is subscribed by his agent, the former is liable in his own name on the contract, *because, in law, the signature is his*." *Patterson v. Henry*, 27 Ky. 126, 127 (1830) (emphasis added); *see also Locke v. Alexander*, 8 N.C. 412, 415 (1821) ("Attorneys are the mere instruments of their principals: the principals act by them, and the act, to be the act of the principal, must be done in his name.").

The principle of signatures was thus established by *Lord Lovelace's Case*, *Nisi prius coram Holt*, and *Combe's Case* long before the Constitution was drafted and ratified, and, with increasing frequency, courts in England and the United States continued to apply the principles set forth in these cases during the drafting and ratification period and the early years of the Republic. They did so most frequently in the context of agency law. Because the law of agency permitted a principal to conduct virtually any business through an agent, agents often would be called upon to sign documents in the course of exercising their delegated authority, and courts generally upheld agreements signed by an agent in his principal's name. *See, e.g.*, *Wilks v. Back*, 102 Eng. Rep. 323, 324, 2 East 142, 144 (K.B. 1802) (Grose, J.) ("I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal and not in his own name; but here it was so done"); *Campbell v. Baker*, 2 Watts 83, 84 (Pa. 1833) ("The general rule is, that a person signing a contract as an agent merely, must sign the name of his principal, as was done here.").[4]

[4] Conversely, most courts held that a document signed by an agent in his own name rather than his principal's was void. *See, e.g.*, *Frontin v. Small*, 92 Eng. Rep. 423, 424, 2 Ld. Ray. 1418, 1419 (Ex. 1726) ("lease was void, because it was not made in the name of James Frontin, whose house it appeared to be"); *Bogart v. De Bussy*, 6 Johns. 94, 96 (N.Y. Sup. Ct. 1810) (citing *Frontin v. Small*); *Fowler v. Shearer*, 7 Mass. 14, 19 (1810) ("it must be the act and deed of the principal, done and executed by the [agent] in his name"). The general rule, explained by Chancellor Kent, was that "[w]hen a man acts in contemplation of law, by the authority, and in the name of another, if he does an act in his own name, although alleged to be done by him as attorney, it is void." *Simonds v. Catlin*, 2 Cai. R. 61, 65 (N.Y. Sup. Ct. 1804). Courts even applied this rule in cases where it was clear that the principal intended to bind himself by a document signed by his agent, on the ground that "the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to

Thus, for example, consistent with *Nisi prius coram Holt*, an agent could endorse a commercial bill in his principal's name. *See, e.g.*, *Daniels v. Burnham*, 2 La. 243, 245 (1831) ("It is a general rule, to which there are few exceptions, that no person is responsible on a bill of exchange, but those who are parties to it, and whose names are on it. This rule extends, as well to bills drawn by agents as by others, and unless (with the exception of very particular cases) they sign in the name of the principal, he is not bound. So rigid is the commercial law."). As the New York Supreme Court of Judicature observed, "[t]here is no doubt that a person may draw, accept or endorse a bill by his agent or attorney, and that it will be as obligatory upon him as though it were done by his own hand." *Pentz v. Stanton*, 10 Wend. 271, 275 (N.Y. Sup. Ct. 1833). "But," the court also noted, "the agent in such case must either sign the name of the principal to the bill, or it must

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possess a legal validity." *Clarke's Lessee v. Courtney*, 30 U.S. 319, 349 (1831) (Story, J.); *see also Elwell v. Shaw*, 16 Mass. 42 (1819).

Other courts, however, required the principal's rather than the agent's signature only for deeds and other documents under seal. *See, e.g.*, *Copeland v. Mercantile Ins. Co.*, 23 Mass. 198, 203 n.2 (1828) ("The rule that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds and not to simple contracts."); *New England Marine Ins. Co. v. De Wolf*, 25 Mass. 56, 61–62 (1829) ("The authorities cited to maintain the position, that the name of the principal must be signed by the agent, are of deeds only; instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature, which are usually managed with more attention to the substance than to the form of contracts."); *cf. M'Donough v. Templeman*, 1 H. & J. 156, 161 (Md. 1801) ("If an agent contracts by parol for his principal he may do so in his own name; but a deed by an attorney to bind his principal, must be in the name of the principal, and signed in his name."). And some courts held that a document signed in the agent's name would (or at least in some circumstances could) bind the *agent*. *See Taft v. Brewster*, 9 Johns. 334, 334 n.a (N.Y. Sup. Ct. 1812) ("Where one enters into a covenant, though he describes himself as the agent of another, and covenant as such, but sign and seal in his own name, he is liable personally."); *Duvall v. Craig*, 15 U.S. 45, 56 n.a (1817) ("Where a person acts as agent for another, if he executes a deed for his principal, and does not mean to bind himself personally, he should take care to execute the deed in the name of his principal, and state the name of his principal only, in the body of the deed."); *Patterson v. Henry*, 27 Ky. 126, 127 (1830) ("[A]s a general rule, the agent makes himself individually liable, by substituting his own name as agent for that of his principal."); *Godley v. Taylor*, 14 N.C. 178, 179 (1831) ("Where an agent wishes to be excused from obligations or covenants into which he enters, he should affix the name of his principal to the deed. When he does not do so, but only signs his own name as agent, he is personally answerable. For in such case he undertakes for his principal. He undertakes as agent, or as surety for his principal, that if the latter will not perform the contract, he will answer for him, in the manner stipulated.") (internal citations omitted); *cf.* 2 James Kent, *Commentaries on American Law* *631 ("The attorney who executes a power as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal. But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible, though he should, in the contract or covenant, give himself the description or character of agent."). Although, as these authorities illustrate, the consequences of an agent affixing his own name to a document instead of his principal's were not always clear, none of the authorities questioned the rule that if a properly authorized agent affixed his principal's name to a document, the signature would be as valid as if the principal had affixed it himself.

appear on the face of the bill itself, in some way or another, that it was in fact drawn for him, or the principal will not be bound. The particular form of the execution is not material, if it be substantially done in the name of the principal." *Id.*

Similarly, an agent could execute and sign a deed in his principal's name.[5] *See, e.g.*, *White v. Cuyler*, 101 Eng. Rep. 497, 497, 6 Term. Rep. 176, 177 (K.B. 1795) (Kenyon, C.J.) ("in executing a deed for the principal under a power of attorney, the proper way is to sign in the name of the principal") (citing *Combe's Case*); *M'Donough v. Templeman*, 1 H. & J. 156, 161 (Md. 1801) ("a deed by an attorney to bind his principal, must be in the name of the principal, and signed in his name"); *Stinchfield v. Little*, 1 Me. 231, 234 (1821) ("It seems to have been settled or recognized as law in Courts of justice by judges, distinguished for their wisdom and learning, in successive generations, and under different governments, that in order to bind the principal or constituent, and make the instrument his deed, the agent or attorney must set to it the name and seal of the principal or constituent, and not merely his own."); *Mears v. Morrison*, 1 Ill. 223, 223 (1827) ("The usual and appropriate mode of signing a deed by an agent or attorney, is for him to sign his principal's name, and then to sign his own name, as agent."); *Patterson v. Henry*, 27 Ky. 126, 128 (1830) ("A deed signed and sealed by the attorney in fact, and in his own name for his constituent, is not the deed of the latter; and therefore will not pass his title. The authority in such case, is simply to sign the name and affix the seal of the principal.") (internal citation omitted); *cf. Fowler v. Shearer*, 7 Mass. 14, 19 (1810) ("At common law, the deed of a married woman is not merely voidable but is absolutely void; and she may plead generally *non est factum*. But the husband may make his wife his attorney; and as his attorney she may execute a deed in his name, and may put his seal to it; and may, before a magistrate, acknowledge it to be her husband's deed. And he shall be bound by it as effectually as by a deed executed personally by himself.").

Enacted in 1677, the original Statute of Frauds incorporated the principle of signatures by providing that certain contracts, such as contracts for the sale of land, had to be in writing and signed by the persons to be bound or by "their Agents thereunto lawfully authorized." An Act for Prevention of Frauds & Perjuryes, 29 Car. II c. 3 (Eng.).[6] Accordingly, courts routinely applied the princi-

[5] Although not strictly required by the common law, most deeds were signed. As Blackstone explained, "it is requisite that the party, whose deed it is, should *seal*, and in most cases I apprehend should *sign* it also." 2 William Blackstone, *Commentaries* *305; *see also* 3 William Holdsworth, *A History of English Law* 231 (1923) ("The other ceremonies attending the execution of a deed in modern times are sealing, the delivery, and the attestation of witnesses. Signature, though usual, is not necessary for validity, unless required by statute.").

[6] At the time of the Constitution's ratification, several states had adopted statutes of frauds that included this provision essentially verbatim. *See, e.g.*, An Act for Prevention of Frauds and Perjuries, 1771 Conn. Pub. Acts LXXV; An Act to Prevent Fraud and Perjury, Mass. Gen. Laws ch. 16, § 1 (1788); An Act to Prevent Frauds and Perjuries, Va., ch. 101 (1785).

ple of signatures in matters governed by the Statute. For instance, in *Merritt v. Clason*, 12 Johns. 102 (N.Y. Sup. Ct. 1815), the New York Supreme Court of Judicature held that a contract satisfied the Statute of Frauds where a broker, acting as agent for both plaintiff and defendant, wrote in the plaintiff's memorandum-book, "'*February* 18th, bought of *Daniel & Isaac Merritt*, (the plaintiffs), by *Isaac Wright & Son*, 10,000 bushels of good merchantable rye, at one dollar per bushel, deliverable in the last ten or twelve days of *April* next, along side any vessel or wharf the purchaser may direct, for *Isaac Clason* of *New-York*, payable on delivery.'" *Id.* at 102. The broker informed the defendant of what was written and the defendant repeatedly accepted delivery of the goods. The court held that the memorandum "was *signed* according to the statute." *Id.* at 106. The court continued:

> It is not disputed, that the authorization of the agent, for such purpose, need not be in writing. In the body of this memorandum the name of *Isaac Clason*, the defendant, is written by his agent, whom he had expressly authorized to make this contract. The memorandum, therefore, is equally binding on the defendant as if he had written it with his own hand and if he had used his own hand, instead of the hand of his agent, the law is well settled that it is immaterial, in such a case, whether the name is written at the top, or in the body, or at the bottom of the memorandum. It is equally a *signing* within the statute.

Id. at 106–07. Other cases reached similar results. *See, e.g.*, *Irvin v. Thompson*, 7 Ky. 295, 296 (1816) (holding that an agent validly signed a contract for the sale of real estate in his principal's name pursuant to an oral grant of authority and that the mode of appointing agents was "left . . . as it was at common law," which did not require such authority to be in writing, or it would "prevent every person who is unable to write from making a binding contract"); *cf. Shaw v. Nudd*, 25 Mass. 9, 12 (1829) (similar).

As these cases illustrate, "[t]he common law . . . [did] not require that an authority to an agent to sign an unsealed paper, or a written contract, should also be by a writing. Thus, for example, an agent may, by a verbal authority, or by a mere implied authority, sign or indorse promissory notes for another." Joseph Story, *Commentaries on the Law of Agency* § 50 (1839) ("*Story on Agency*"); *see also Miller v. Moore*, 17 F. Cas. 341, 341 (C.C.D.C. 1807) (No. 9,584) ("But THE COURT permitted parol (viva voce) testimony to be offered, to show that Wellford was an agent for Alexander, and that he had been accustomed to indorse the name of Alexander on notes, and that Alexander had sanctioned such indorsements."); *Weightman v. Caldwell*, 17 U.S. 85, 96 n. (1819) ("The agent who is authorized to sign, need not be constituted by writing."); *Bank of Washington v. Peirson*, 2 F. Cas. 749, 749 (C.C.D.C. 1826) (No. 953) (holding that it is "not necessary that the power to indorse should be under seal"). "[E]ven where a

statute, such as the statute of frauds, require[d] an instrument to be in writing, in order to bind the party," this rule allowed a party "without writing, [to] authorize an agent to sign it in his behalf, unless the statute positively require[d] that the authority also should be in writing." *Story on Agency* § 50; *see also* 2 James Kent, *Commentaries on American Law* *511 n.a ("The agent under the statute must be a third person, and not one of the principals, and his authority may be by parol.").

Courts applied a different rule, however, with respect to deeds and other documents under seal. As Justice Story explained, "whenever any act of agency is required to be done in the name of the principal under seal, the authority to do the act must generally be conferred by an instrument under seal. Thus, for example, if the principal should authorize an agent to make a deed in his name, he must confer the authority on the agent by a deed." *Story on Agency* § 49; *see also Delius v. Cawthorn*, 13 N.C. 90, 97 (1829) ("But *Johnson*, the principal, was not bound by the specialty, because the authority of the agent was not created by deed, and power to bind the principal by an instrument under deed, can only be delegated by deed."); *Blood v. Goodrich*, 9 Wend. 68, 75 (N.Y. Sup. Ct. 1832) ("The first question is whether the agreement of December 11, 1828, is binding upon all the defendants? This contract is the basis of any liability which may rest upon any or all of the defendants. It was signed by Kingsbury, 'for self, Goodrich and Champion.' The proof of the execution by Kingsbury proves nothing against the other defendants. It shows the instrument to be the deed of Kingsbury; but to make it the deed of Goodrich and Champion, something else must be proved; it must be shown that Kingsbury had authority to act for them; and as he professes to act by deed, an authority from them under their seals is indispensable."); *M'Murtry v. Frank*, 20 Ky. 39 (1826) (explaining that authority under seal is required to authorize an agent to sign a sealed document). This rule was apparently based on the principle that "the power to execute an instrument under seal should be evidenced by an instrument of equal solemnity." *Story on Agency* § 49. Although these cases required additional formality in this context, they recognized that so long as he did so pursuant to a sealed instrument, a principal could sign and execute a document under seal by authorizing or directing an agent to affix the principal's signature and seal to it, and that the principal would be bound by a document signed and executed in this manner.

Even where the law required authorization under seal, however, the principle of signatures permitted one validly to sign or seal a document, in the absence of such formal authorization, by directing another to affix one's name or seal to the document in one's presence. *See Ball v. Dunsterville*, 100 Eng. Rep. 1038, 1039, 4 Term Rep. 313, 314 (K.B. 1791) ("*The Court* were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party, executing a deed, treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other *in the presence of that other*."); *Simonds v. Ludlow*, 2 Cai. Cas. 1 (N.Y. Sup. Ct. 1805) (similar, citing *Lord Lovelace's Case* and *Ball*);

Hanford v. McNair, 9 Wend. 54, 56 (N.Y. Sup. Ct. 1832) ("An agent cannot bind his principal by deed, unless he has authority by deed so to do. The only exception to the rule that the authority to execute a deed must be by deed, is where the agent or attorney affixes the seal of the principal in his presence and by his direction."); *Rex v. Longnor*, 110 Eng. Rep. 599, 600, 4 B. & A. 647, 649 (K.B. 1833) (Littledale, J.) (upholding the validity of a deed where two principals "met for the purpose of executing it, [and] their names, by their authority, were written opposite to two of the seals"); *cf. Mackay v. Bloodgood*, 9 Johns. 285 (N.Y. Sup. Ct. 1812) ("In the present case, one of the defendants sealed the bond, with one seal, for himself and his partner, with the consent of his partner, and after the partner had seen and approved of the bond, and while he was about the store, at the time of the execution. This evidence was sufficient to carry the cause to the jury, and to justify them in finding it the deed of both.").

Courts based this rule on the general principle that "what a person does in the presence of another, in his name and by his direction, is the act of the latter, as if done exclusively in his own person." *Kime v. Brooks*, 31 N.C. 218, 220 (1848); *see also Kidder v. Prescott*, 24 N.H. 263 (1851) ("an act done by one in the presence and under the control of another, for that other, is regarded not as the exercise of a delegated authority, but as the personal act of the party in whose behalf it was performed"); *Gardner v. Gardner*, 59 Mass. 483, 484 (1850) ("The execution of the deed is objected to, on the ground, that when a deed is executed by an agent or attorney, the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act."). As Justice Story explained,

> [A]lthough a person cannot ordinarily sign a deed for and as the agent of another, without an authority given to him under seal; yet this is true only in the absence of the principal; for if the principal is present, and verbally or impliedly authorizes the agent to fix his name to the deed, it becomes the deed of the principal; and it is deemed, to all intents and purposes, as binding upon him, as if he had personally sealed and executed it. The distinction may seem nice and refined; but it proceeds upon the ground, that where the principal is present, the act of signing and sealing is to be deemed his personal act, as much as if he held the pen, and another person guided his hand and pressed it on the seal.

Story on Agency § 51.

A similar principle was expressly incorporated in the provision of the Statute of Frauds governing wills, which required that "all Devises and Bequests of any Lands . . . shall be in Writeing and signed by the partie soe deviseing the same or by some other person in his presence and by his expresse directions and shall be

attested and subscribed in the presence of the said Devisor by three or fower [4] credible Witnesses." 29 Car. II c. 3; *see also Starr v. Starr*, 2 Root 303 (Conn. Super. 1795) (discussing the statutory requirements); *Ford v. Ford*, 26 Tenn. 92 (1846) (same). Consistent with the statutory language and the principle of signatures, courts upheld wills signed in the testator's name and presence by another. *See, e.g.*, *Cochran's Will*, 6 Ky. 491, 499 (1814) ("The will was written by David Cochran, in the absence of all other persons except the testator. The name of the testator was signed by D. Cochran—he proves that it was done under the direction of the testator. The subscribing witnesses all prove the acknowledgment of the testator that this instrument was his will, and in his presence attested the same. This is a substantial compliance with the law."); *Pate's Adm'r v. Joe*, 26 Ky. 113, 113 (1829) ("That testator's name was signed by his directions, and that witnesses subscribed their names in his presence, may be established by circumstantial evidence."). In addition, courts held that attesting witnesses could satisfy the statutory requirement that they "subscribe their names" to the will by directing that their signature be affixed to the will by another in their presence on the ground that, consistent with the principle of signatures, such a signing "should . . . , for every purpose contemplated by the law, be regarded as their own act, as much so as if it had been a deed to which they were subscribed, or as if their hands had been held and guided by another." *Upchurch v. Upchurch*, 55 Ky. 102, 113 (1855).

Consistent with its apparent origins in *Lord Lovelace's Case*, the common law principle of signatures also applied in the context of public law. Thus, for example, in reliance on the well-established rule that "the name of a party affixed to an instrument by his direction, and in his presence, is affixed by himself; whether he in fact puts his hand upon the pen or not," it was held in *Hanson v. Rowe*, 26 N.H. 327 (1853), that where "[t]he sign of the magistrate was placed upon the writ, by a mechanical act performed in his presence and under his immediate direction and inspection," it was "to every legal intent as much his sign manual as if his own hand had guided the pen which traced it." *Id.* at 329; *see also Andover v. Grafton*, 7 N.H. 298, 305 (1834) ("Had the selectman who signed the note, placed with his own name that of the other selectman who authorized him to settle the account and give a note, perhaps the evidence respecting the authority might have been sufficient to have rendered it valid, as it would then have purported to carry on its face evidence that it was the act of the town, by a majority of the selectmen; but even in that case it would deserve consideration, whether authority to do this could be delegated, and whether it could be legally done unless the other selectman was present, and assenting at the time of the execution of the paper."). And in a somewhat later case, in a context very similar to that which we consider here, the Supreme Court of the State of Missouri held that the mayor of Kansas City could approve an ordinance passed by the city counsel by directing his secretary to affix the mayor's signature to the ordinance in his presence. *Porter v. Boyd Paving & Constr. Co.*, 214 Mo. 1 (1908). The city's charter paralleled Article I, Section 7, providing that ordinances passed by the city counsel "shall be 'presented to the

mayor. If the mayor approve any ordinance he shall sign it; if not he shall return it to the city clerk with his objection, and the city clerk shall at the next session of the house in which it originated return it to such house.'" *Id.* at 10. The court relied on the principle of signatures, explaining that "[u]nquestionably it has been generally held by the courts of England and of this country that when a document is required by the common law or by statute to be 'signed' by any person, a signature of his name, in his own proper or personal handwriting, is not required." *Id.* at 11. On this basis, it concluded that the mayor could satisfy the requirements of the city's charter by directing that his signature be affixed to an ordinance by another.

Indeed, similar principles may have governed the manner in which the King of England approved bills passed by Parliament. As Blackstone explains, the King could assent to a bill either by signing it with his own hand or by directing the clerk of Parliament to manifest the King's assent in the presence of the King and Parliament. *See* 1 William Blackstone, *Commentaries* *184–85.[7]

Thus, it was well settled at common law that one could sign a legally binding document without personally affixing his signature to it. Rather, under the principle of signatures, one could sign a document by authorizing or directing another to place one's signature on it.

B.

Opinions of the Attorney General and of this Office and its predecessors at the Department of Justice, have also recognized and applied the principle of signatures in a variety of contexts. For example, in 1824 Attorney General Wirt addressed the question "[w]hether, in cases in which the law requires that public documents shall be *signed* by the Secretary of the Treasury, that officer having been rendered by sickness unable to write his name in the usual manner, may impress his name by the use of a stamp or copperplate, instead of pen and ink; and whether instruments so signed are valid in law." *Signature of the Secretary of the Treasury*, 1 Op. Att'y Gen. 670, 670 (1824). "[P]roceed[ing] upon the postulate that the Secretary has not been so far disabled by disease but that he is capable of seeing what is done, so

[7] Blackstone describes in detail the two ways in which the King could assent to a bill passed by Parliament:

> 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French. . . . 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

1 William Blackstone, *Commentaries* *184–85.

that one paper cannot be passed upon him for another," *id.* at 674, Attorney General Wirt concluded:

> [I]f [the Secretary] keep the stamp or copperplate in his own possession, and either apply it himself, or cause it to be applied by another in his presence, and by his authority, I am of opinion that the instrument is as valid, in strict law, as if he had written his name with a pen. It might otherwise happen that the public might lose the services of an able officer, from a mere temporary disability in his right hand.

Id. at 673–74. Attorney General Wirt observed, "[w]ith regard to the signing being done *propriâ manu* of the person to be affected by it, it has been always decided that this is unnecessary—not only in wills, where the law expressly tolerates the agency of another, but in all other instruments where the law is silent—except as it speaks in the maxim that *qui facit, &c*." *Id.* at 672. He further explained, "[t]he adoption and acknowledgment of the *signature*, though written by another, makes it a man's own. As to usage, and even official usage, I believe that by far the greater part of our judicial records are not signed by the clerk of the court himself, but are signed by deputies, who use the name of the clerk on a mere general verbal authority." *Id.* The Attorney General underscored the flexibility accorded to the Secretary of the Treasury to determine the manner in which he signs documents:

> The law requires . . . that the warrants shall be *signed* by him; but as to the method of *signing*, that is left entirely to [the Secretary]. He may write his name in full, or he may write his initials; or he may print his initials with a pen: that pen may be made of a goose quill, or of metal; and I see no *legal* objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. It is merely directory to the officers who are to act after him—to the Comptroller, who is to countersign; the Register, who is to record; and the Treasurer, who is to pay. . . . It is true, that the stamp may be forged; but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define *the manner* in which the *signing* shall be done. They have not yet defined it; and the word *signing* does not, as we have seen, necessarily imply, *ex vi termini*, the use of pen and ink, held and guided by the hand of the Secretary himself: it does not imply it *in legal acceptation, at least*.

Id. at 673.

Subsequent opinions reaffirmed Attorney General Wirt's conclusion. These opinions further recognized that an officer need not be present to satisfy a statutory

signing requirement by directing that his signature be affixed by another so long as the officer ensures—by specific authorization, instruction, or otherwise—that the signature reflects his own conscious and deliberate act. Thus, in 1917, Acting Attorney General Davis relied largely on Attorney General Wirt's analysis in concluding that the Farm Loan Commissioner could satisfy a statutory requirement that every farm loan bond contain a certificate signed by the Farm Loan Commissioner by directing another to affix "an engraved facsimile signature of the Farm Loan Commissioner" to the certificate. *Signing Certificate Attached to Farm Loan Bonds*, 31 Op. Att'y Gen. 146, 146 (1917). Davis described the reasoning in Wirt's opinion as "entirely sound" and explained that this reasoning "renders it unnecessary to construe the present act as requiring the certificate to be signed by the Farm Loan Commissioner with his own hand." *Id.* at 147. Instead, Davis observed, "[t]he requirement of the act is met if the signature of the Farm Loan Commissioner be written, stamped or engraved on the bond under circumstances which make it his own conscious and deliberate act." *Id.* He concluded:

> If he were accustomed to sign his name by a stamp rather than with pen and ink there can be no question that he might authorize this stamp to be affixed in his presence by another person in his behalf. Upon the same principle of physical agency he may authorize the Director of the Bureau of Engraving and Printing from time to time to affix his signature by engraving to certificates upon bonds identified by number or other description, so that the act of the director would be in effect the act of the commissioner himself. It is enough that the signature shall be affixed by direction of the Farm Loan Commissioner; that he shall have adopted it as his own; and that he shall have satisfied himself before the bonds have finally issued that the certificate so signed is true in point of fact.

Id. at 147–48.

Attorney General Gregory reached a similar conclusion with respect to statutory and regulatory requirements that certain orders and vouchers be "approved by the Department [of the Navy] or by the Chief of the Bureau of Navigation." *Affixing Facsimile Signature to Orders, Vouchers, Etc.*, 31 Op. Att'y Gen. 349, 350 (1918).[8] Relying again on Attorney General Wirt's opinion, Gregory concluded that "the affixing of this facsimile signature properly initialed by officers duly authorized thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval by the Chief of the Bureau of Navigation of

[8] The statute in question did not specifically require the signing of orders and vouchers. *Affixing Facsimile Signature to Orders*, 31 Op. Att'y Gen. at 350 ("The provisions of the law and the regulations respecting this matter require only that the orders and vouchers be approved by the Department or by the Chief of the Bureau of Navigation.").

the orders, vouchers, etc., which are the subject of this opinion." *Id.* at 351. Gregory concluded:

> I do not mean by this, of course, that the Chief of the Bureau of Navigation can transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc. What I do mean is, that the Chief of the Bureau having in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of that fact may be done by others thereunto duly authorized by him.

Id.

Consistent with the views of these Attorneys General, the courts have held that these sorts of facsimile signatures of public officers are in law "the true and genuine signatures of those officers." *Hill v. United States*, 288 F. 192, 193 (7th Cir. 1923) (holding in criminal prosecution for circulating false bank notes that facsimile signatures of governor and cashier of the Federal Reserve Bank of St. Louis were valid signatures).

More relevant still, for nearly 100 years the Department of Justice has applied the principle of signatures to the President's signing of various commissions. Although commissions, unlike bills, are not subject to a constitutional signing requirement, the Constitution does provide that the President "shall Commission all the Officers of the United States," U.S. Const. art. II, § 3, and various statutes dating back to as early as 1789 require that commissions for certain officers be signed by the President. For example, an act of September 15, 1789, directed the Secretary of State to

> affix the said seal to all civil commissions, to officers of the United States, to be appointed by the President by and with the advice and consent of the Senate, or by the President alone. *Provided*, That the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States.

Act of Sept. 15, 1789, ch. 14, § 4, 1 Stat. 68, 68–69. This and similar statutes have been in force since that time. Since at least the early twentieth century, the Department of Justice has interpreted such provisions not to require the President personally to affix his signature to the covered commissions.

The Department appears first to have addressed the proper construction of such statutes when President Woodrow Wilson became ill and unable "to sign the commissions of a large number of diplomatic and consular officers of the United States, who had been appointed by him and to whose appointments the Senate had given consent." Memorandum for the Attorney General, from Alfred A. Wheat, Office of the Solicitor General, *Re: Signature of the President Upon Commissions of Presidential Postmasters* at 5 (Dec. 9, 1926) ("Wheat Memorandum") (describ-

ing this incident). The Secretary of State asked the Attorney General "whether 'you consider that I would be justified in signing in the name of the President, commissions for the officers in question and in affixing the seal of the United States to such commissions.'" *Id.* Although "hesitant about expressing the official opinion of the Department," Assistant Attorney General Brown responded, in informal advice to the Secretary of State, that "[i]t would seem to be sufficient that a commission should bear a declaration that it is an act of the President and that it is signed by the Secretary of State in his name and at his direction." *Id.*[9]

The Department reached a more definitive conclusion in 1926 with respect to a statutory requirement that the President sign postal commissions. That statute required that

> the commissions of all officers under the direction and control of the Postmaster General and the Secretary of Commerce and Labor shall be made out and recorded in the Post-Office Department and the Department of Commerce and Labor, respectively, and the Department seal affixed thereto, any laws to the contrary notwithstanding: *Provided*, that the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States.

Pub. L. No. 58-155, ch. 1422, 33 Stat. 990, 990–91 (1905). The Postmaster General asked "whether this proviso requires the autographed signature of the President or whether the printing of his facsimile signature is sufficient to satisfy the law." Wheat Memorandum at 1. Looking to earlier opinions of the Department, especially that of Attorney General Wirt, as well as case law applying the principle of signatures, Alfred Wheat, of the Office of the Solicitor General, reasoned that "when the President's name is affixed to a commission in such manner as he shall adopt and sanction it has been signed by him." *Id.* at 3. He concluded, therefore, "[u]pon principle and authority," that "the facsimile signature of the President affixed to a commission by direction of the President and adopted by him as his signature is a compliance with the statute." *Id.* at 8. Wheat recognized, however, "that the President may not delegate the actual appointment to another official" and that "even after the Senate has advised and consented to an appointment the President may decide not to make it." *Id.* at 9. Accordingly, he indicated that his conclusion was subject to the understanding "that before any commission is recorded, sealed or issued the Postmaster General will receive the direction of the President that the commission issue to a named

[9] Although some historians have raised questions regarding the actual source of decisions in the White House during President Wilson's illness, it appears that the appointees who were the subject of Assistant Attorney General Brown's advice had been properly appointed by President Wilson and confirmed by the Senate before he fell ill. *See* Wheat Memorandum at 5.

person whom he has appointed to a named office." *Id*. "Whatever may be the mechanics of it," Wheat continued, "the record should show that the person appointed is the choice of the President and the 'commissioning' is the President's Act." *Id.* Wheat's memorandum and conclusions were adopted by the Attorney General and acted upon by the Postmaster.

As Acting Solicitor General, Wheat reached the same conclusion in a 1929 memorandum to the Attorney General addressing a statute that required the President to sign the commissions of certain notaries public. Memorandum for the Attorney General, from Alfred A. Wheat, Acting Solicitor General, *Re: Signature of the President on Pardon Warrants and Signatures of the President and the Attorney General on Commissions of Notaries Public in the District of Columbia* (Mar. 27, 1929) ("Wheat Notaries Memorandum"). The statute in question stated:

> That hereafter the commissions of all judicial officers . . . shall be made out and recorded in the Department of Justice, and shall be under the seal of said Department and countersigned by the Attorney General . . . : *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States.

Act of Aug. 8, 1888, ch. 786, 25 Stat. 387, 387. Noting his previous conclusion "that upon principle and authority the facsimile signature of the President affixed to a commission by direction of the President and adopted by him as his signature was a compliance with the [postal] statute," Wheat explained that "[t]he same principle applies to the question now presented." Wheat Notaries Memorandum at 1–2. Indicating that he had "no doubt whatever that . . . notarial commissions may be issued without autograph signature of the President," *id.* at 6, Wheat concluded that the President "may adopt a facsimile and direct that commissions bearing it shall issue to those whom he has appointed," *id.* at 3. *See also id.* at 4 (noting that "the President may direct that his facsimile signature be affixed to documents issued by his direction").

In 1954 this Office applied the same reasoning when asked "whether there is any way to obviate the necessity for Presidential signature of each and every commission evidencing the appointment of a United States Marshall." Memorandum for the Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Signature of Commissions of United States Marshals* at 1 (Mar. 17, 1954) ("Rankin Memorandum"). Such commissions were subject to the same statutory requirement that Acting Solicitor General Wheat had construed in 1929. *Id.* at 2. Stating that "[i]t is clear, of course, that the President cannot delegate his appointive duty," Assistant Attorney General Rankin observed that "[t]here is involved in the issuance of a commission a form of discretion which is inextricably interwoven with the act of making the appointment." *Id.* Furthermore, "[b]ecause it is apparently the intention of the statutes that the issuance of such commissions shall be the act of the President," Rankin

questioned "whether this duty is one which can properly be delegated by the President." *Id.* Relying on Wheat's "well-reasoned" previous opinions, Rankin concluded that he could "see no reason, however, why the signature of the President could not be placed on such commissions by mechanical means." *Id.* Rankin recommended as a precaution, however, "that the President sign a memorandum for the files of the White House directing that the facsimile signature be placed on commissions prepared for persons identified by name in the memorandum[, which] would enable the President to dispose of such commissions in blocks or groups merely by signing his name once for each group." *Id.* at 3.

This Office has invoked the principle of signatures in other contexts involving the President, as well. For example, in 1969 we advised that the Secretary of State could sign extradition warrants for the President pursuant to "a letter from the President to the Secretary requesting him to affix a facsimile of the President's signature, or to sign in his behalf, or both." Letter for K.E. Malmborg, Assistant Legal Adviser for Administration and Consular Affairs, Department of State, from Thomas E. Kauper, Acting Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 12, 1969) ("Kauper Letter"). Noting that "some method of Presidential exercise of the decision making function is retained, such as provision for notification of and approval by the President prior to the signing," we observed that "[t]his form of delegation has been used in the past with respect to delegations of authority to sign commissions of military officers, postmasters and United States marshals." *Id.*[10] More generally, we have concluded that "[w]here the President's signature is to appear on a document, the signature generally may be affixed by any means, such as by someone else authorized to sign the President's name or by the use of a mechanical signature device." Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Delegation of the President's Authority to Physically Sign Documents* at 7 (1969) ("Rehnquist Memorandum") (accompanying Letter for John D. Ehrlichman, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (Mar. 20, 1969) ("Rehnquist Letter")). Accordingly, we have explained that, at least as a general matter,

> The question of whether the President should manually sign his name to a document is primarily one of propriety rather than of law, and it is within the President's discretion to determine which documents he wishes to personally sign and those with respect to which

[10] There was apparently no statutory requirement that the President sign the warrants. Accordingly, we could see "no legal impediment to the President's delegating to the Secretary [of State] either (1) only the authority to physically sign the warrants, or (2) the authority to issue the warrant as well as to sign it." Kauper Letter at 1. We indicated that if "the decision to issue the warrant as well as the signing function is to be delegated to the Secretary," a formal delegation pursuant to 3 U.S.C. § 301 (rather than the procedure discussed in the text) would be proper and that "the form of the warrant would have to be revised so as to show that it is issued by the Secretary rather than by the President." *Id.* at 2–3.

> he wishes to delegate the signing to someone else in his behalf or have his own signature written or affixed by means other than his own hand.

Rehnquist Memorandum at 9. Thus, the Department of Justice has long recognized that under the principle of signatures, an executive officer, including the President, may sign a document, within the meaning of various statutory signing requirements, by directing that his signature be affixed to it by another.

C.

Our understanding of the common law meaning of "sign" at the time the Constitution was drafted and ratified and during the early years of the Republic, as well as the opinions of Attorneys General and the Department of Justice applying the principle of signatures, lead us to conclude that the President may sign a bill within the meaning of Article I, Section 7 without personally affixing his signature to it with his own hand. Rather, consistent with the principle of signatures, the President may sign by directing a subordinate to affix the President's signature to a bill that the President has approved and decided to sign.

We do not suggest that the President may delegate the decision *whether* to "approve[]" and "sign" a bill. U.S. Const. art. I, § 7, cl. 2. It has long been the view of the Executive Branch that the President may not delegate this decision. As Attorney General Cushing explained 150 years ago, "[The President] approves or disapproves of bills which have passed both Houses of Congress: that is a personal act of the President, like the vote of a Senator or Representative in Congress, not capable of performance by a Head of Department or any other person." *Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 465 (1855); *see also Presidential Succession and Delegation in Case of Disability*, 5 Op. O.L.C. 91, 94 (1981) (listing "[t]he power to approve or return legislation" among the "nondelegable functions of the President"); Memorandum for the Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Delegation of Presidential Powers to the Vice President* at 2 (June 22, 1961) (same); *cf. Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 628 (Ct. Cl.) ("[The President] alone can approve or veto legislation; that authority cannot be delegated. Whatever the help a President may have, the ultimate decision must be his."), *cert. denied*, 380 U.S. 950 (1964). And with respect to signing bills, this Office has likewise stated that "[t]here is no doubt that the responsibility is meant to be that of the President alone. He alone for the executive branch participates in the legislative process." Wilkey Memorandum at 2. Thus, although the President generally has considerable discretion to delegate power conferred on him by the Constitution, *see Myers v. United States*, 272 U.S. 52, 117 (1926), or statute, *see* 3 U.S.C. §§ 301–303 (2000), we do not question the substantial authority supporting the view that the President must personally decide whether to approve and sign bills.

Yet it does not follow from such a requirement that when the President *has* approved and decided to sign a bill, he cannot do so by directing a subordinate to carry out the ministerial act of affixing the President's signature to it. As our review of the common law and Department of Justice opinions shows, the principle of signatures supports this type of signing. It is true that cases applying the principle of signatures in the context of agency law ordinarily did not distinguish a delegation of authority to make the decision *whether* to sign from an instruction to perform the ministerial act of affixing the principal's signature to a document once the *principal* has made that decision. Indeed, because it was generally so easy for a principal to delegate broad authority, there was little reason for courts to address this distinction. Given that the law of signatures permitted a principal to authorize a person both to decide whether to sign a document and to perform the ministerial act of affixing the principal's signature to the document on the principal's behalf, however, we believe it follows *a fortiori* that the same legal principle would also permit a principal to exercise the lesser power of instructing a person to carry out the ministerial act of affixing the principal's signature to a document the principal has decided to sign. As Justice Story explained:

> By the general theory of our municipal jurisprudence . . . every person is invested with a general authority to dispose of his own property, to enter into contracts and engagements, and to perform acts, which respect his personal rights, interests, duties, and obligations, except in cases where some positive or known disability is imposed upon him by the laws of the country, in which he resides, and to which he owes allegiance. Every person not under such a disability, is treated as being *sui juris*, and capable, not only of acting personally in all such matters by his own proper act, but of accomplishing the same object through the instrumentality of others, to whom he may choose to delegate, either generally, or specially, his own authority for such a purpose. In the expanded intercourse of modern society it is easy to perceive, that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and assistance and labors of many persons, in addition to the immediate superintendence of him, whose rights and interests are to be directly affected by the results. Hence the general maxim of our laws, subject only to a few exceptions above hinted at, is, that whatever a man *sui juris* may do of himself, he may do by another; and as a correlative of the maxim, that what is done by another is to be deemed done by the party himself.

Story on Agency § 2.

As Justice Story's explanation makes clear, the overriding purpose of the law of agency was to facilitate executing the intent of individuals. For this reason, there is no doubt that if the law ordinarily allows a principal to delegate broad authority to decide which documents to sign, it would also allow him to take the lesser step of instructing another person to execute the ministerial task of placing the principal's signature on a document the principal has determined to sign. Indeed, as is evident from the opinions discussed above, the Department of Justice has repeatedly "distinguishe[d] between the physical signing of a document and the decision-making function involved with respect to the document," Memorandum for William E. Casselman II, Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Types of Documents Which Must Be Personally Signed by the President* at 1 (Mar. 5, 1975) ("Scalia Memorandum"), and has concluded that an executive officer may direct a subordinate to perform the former while retaining the latter, *see, e.g.*, *Affixing Facsimile Signatures to Orders*, 31 Op. Att'y Gen. at 351; Wheat Memorandum at 9; Rankin Memorandum at 2–3. And even if the broader decision-making authority cannot be delegated, we believe the lesser power to direct another to perform a ministerial act remains.[11] Moreover, as the authorities discussed above make clear, when the President directs a subordinate to affix the President's signature to a bill the

[11] While the principle of signatures generally required the principal's presence for his signature validly to be affixed to a document by another person otherwise lacking authority to act on the principal's behalf, we do not believe that inability of the President to delegate the decision whether to approve and sign a bill means that his presence is required when his signature is affixed to a bill he has approved and decided to sign, so long as the person affixing the President's signature to the bill has been properly and specifically authorized to perform that ministerial act. The purpose of the presence requirement appears to have been to provide a principal with control over acts done in his name in the absence of some other valid grant of authority that would otherwise constrain his agent. *See, e.g.*, *Kime v. Brooks*, 31 N.C. 218, 220 (1848) ("what a person does in the presence of another, in his name and by his direction, is the act of the latter, as if done exclusively in his own person; but that what is done out of his presence, though by his direction and in his name, cannot in law be considered an act in *propria persona*, but one done by authority"); *id.* at 221 (agent's act of signing, sealing, and delivering of deed was not in principal's physical presence and could not be said to be the principal's act "in that he saw or knew or could know of his own knowledge, that [the agent] was in fact doing what he directed her; but it rested on his confidence, that she would pursue his directions, and in her testimony that she did pursue them"). That requirement should not apply, however, when a principal properly and specifically authorizes a subordinate to affix the principal's signature to a document. Accordingly, as noted above, the Department has properly substituted specific authorization for presence in situations where an executive officer retains the decision-making function associated with a signature requirement but directs another to perform the manual act of affixing the officer's signature. *See, e.g.*, *Signing Certificate Attached to Farm Loan Bonds*, 31 Op. Att'y Gen. at 147–48; *Affixing Facsimile Signatures to Orders*, 31 Op. Att'y Gen. at 351; Wheat Memorandum at 9; Rankin Memorandum at 2–3. It follows that the President need not be present when his signature is affixed, pursuant to the President's specific authorization, to a bill the President has approved and decided to sign. And so long as the authorization is limited to this ministerial act, no improper delegation of the President's constitutional responsibilities has occurred.

President has approved and decided to sign, it is in legal contemplation the President who signs the bill, not the subordinate, who merely performs a ministerial act pursuant to the President's specific instructions.

II.

Precedent and practice under the related provisions of Article I, Section 7 provide additional support for our conclusion that the President may sign a bill by directing that his signature be affixed to it by a subordinate. In addition to directing the President to "sign" a bill he approves, Article I, Section 7 also directs that bills that pass both Houses of Congress "shall . . . be presented to the President," and that if the President does not approve a bill "he shall return it, with his Objections to that House in which it shall have originated." In other words, the Constitution requires that the President be presented with bills, and, as a general matter, that he sign bills he approves and return bills he disapproves.[12]

The presentment and return provisions have not been interpreted to require the President to receive or return a bill with his own hands. Rather, since at least the early twentieth century,

> enrolled Bills have not been presented to the President in person, except in the case of the Bank Holiday Bill of 1933 and Bills passed on the eve of *sine die* adjournment of the Congress. The usage has been for the Committee on Administration of either the House or the Senate, after the Bill has been signed by the Speaker of the House and the Presiding Officer of the Senate, to send a clerk to the White House with the enrolled Bill and deliver it to a legislative clerk in the records office of the White House, who signs a receipt for it. The Committee on Administration then reports to the House or Senate "that this day they presented to the President of the United States, for his approval, the following Bills."
>
> For many years this has been understood to constitute presentation to the President.

Eber Bros., 337 F.2d at 635 (Whitaker, J., concurring); *accord id.* at 629 (majority); *cf. id.* at 631 n.15 ("Delivery to an authorized aide in the President's immediate entourage would undoubtedly be equivalent to personal delivery to the President."). Thus, as we have previously explained, "[w]hen the President is in

[12] In the event that the President neither signs nor returns a bill within ten days of its presentation to him, Article I, Section 7 further provides that the bill "shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." U.S. Const. art. I, § 7, cl. 2. *See generally Wright v. United States*, 302 U.S. 583, 590 (1938) (analyzing this provision); *The Pocket Veto Case*, 279 U.S. 655 (1929) (same).

the United States, presentation does not require delivery to him personally; rather it is done by delivery of the bill to one of the legislative clerks on the White House staff." *Presentation of Enrolled Bills—Absence of the President*, 2 Op. O.L.C. 383, 383 (1977). This is not to say that the bill is not *presented* to the President within the meaning of the Constitution, but only that the ministerial process of physically accepting delivery of the bill from Congress may, if the President so directs, be carried out by a subordinate.

Similarly, when the President disapproves a bill and decides to return it to the house of Congress in which it originated, the accepted practice has been for the President to return the bill by way of a messenger. *See Wright v. United States*, 302 U.S. 583, 590 (1938). Again, it is *the President* who returns the bill even though, pursuant to the President's instructions, someone other than the President physically delivers it to Congress. The Supreme Court has implicitly approved this practice. In addressing whether the President could return a bill to a house of Congress that had gone into a recess for three days but had appointed an agent to accept bills, the Court explained:

> [A] rule of construction or of official action which would require in every instance the persons who constitute the Houses of Congress to be in formal session in order to receive bills from the President would also require the person who is President personally to return such bills.

Id. at 591–92 (quoting approvingly from Brief for Amicus Curiae Committee on the Judiciary of the House of Representatives, *The Pocket Veto Case*, 279 U.S. 655 (1929)). Explaining that "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return," *id.* at 589, the Court held that a bill could in these circumstances be returned by delivery to an agent authorized to accept it on behalf of the originating house.

The Court's apparent rejection of a construction of Article I, Section 7's return provision that would require the President physically to carry a bill he disapproves to Congress, like the settled understanding that bills need not be presented to the President by physical delivery into the President's hands, suggests that this section's related provision directing that the President sign a bill he approves should not be interpreted to require the President personally to perform the ministerial act of affixing his name to a bill he has decided to sign. As we previously indicated, "[w]e do not believe that the requirement that a President 'sign' a bill in order to manifest his approval of it requires that he personally put pen to paper any more than the requirement that he manifest his disapproval by 'return[ing] it, with his Objections to that House in which it shall have originated,' U.S. Const. art I, § 7, cl. 2, requires that he personally deliver the rejected bill to Congress. We believe, instead, that the word 'sign' is expansive enough to include the meaning of 'cause the bill to bear the President's signature.'" Whelan Memorandum at 1.

Indeed, it would create serious anomalies to interpret the signing provision, but not the return and presentment provisions, to require personal ministerial action by the President. Under such an interpretation, when the President is unavailable due to travel or some other reason, Congress could present a bill to him by delivering it to the White House and the President could disapprove that bill simply by directing a messenger or aide to return it to Congress. The President could not, however, approve and sign the bill—simply because he would be unable personally to perform the ministerial act of affixing his signature to it. This anomalous interpretation would prevent the President from exercising his constitutional "duty . . . to examine and act upon every bill passed by Congress." *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453 (1899). Yet if the word "sign" is read, consistent with its traditional common law meaning and Attorney General and Department of Justice opinions interpreting analogous statutory signing requirements, to permit the President to direct a subordinate to affix the President's signature to a bill the President has approved and decided to sign, the President's power to approve bills can be preserved in all situations.

Our conclusion also finds support in the latitude traditionally exercised by Congress and the President in determining how to execute the ministerial duties associated with the presentment and return requirements. For example, the Constitution's Presentment Clause does not specify the manner in which a bill should be presented to the President. Since 1789, however, Congress has implemented this requirement by directing the engrossing of a bill after it passes one house, and the enrollment of a bill after it passes both houses. This enrolled bill is then signed by the presiding officers of both houses and presented to the President. *See* 1 Annals of Cong. 57–58 (Aug. 6, 1789); *see also* J.A.C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. Pol. Q. 364, 365–69 (1950) (explaining development of enrollment requirement).[13] As the Supreme Court has explained, "the signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses . . . to the president" that the bill "has received, in due form, the sanction of the legislative branch of the government, and that it is

[13] The precise procedures required for enrollment have varied slightly over the years. Current law provides:

> Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States.

1 U.S.C. § 106 (2000).

delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

Nevertheless, Congress has reserved for itself the authority to waive or relax the enrollment requirement. According to 1 U.S.C. § 106, "[d]uring the last six days of a session such engrossing and enrolling of bills and joint resolutions may be done otherwise than as above prescribed, upon the order of Congress by concurrent resolution." Congress has frequently exercised this authority. For example, Congress relaxed the requirements of section 106 "with respect to the printing (on parchment or otherwise) of the enrollment of any bill or joint resolution making general appropriations or continuing appropriations for the fiscal year ending September 30, 2000." Pub. L. No. 106-93, 113 Stat. 1310 (1999). Instead, Congress determined that "[t]he enrollment of any such bill or joint resolution shall be in such form as the Committee on House Administration of the House of Representatives certifies to be a true enrollment." *Id.* Similarly, to avoid "the great labor of enrolling by hand," Congress in 1874 considered suspending outright "the joint rule [then] requiring bills to be enrolled in parchment [to] allow certain House bills . . . to be presented to the President as engrossed in the House and amended in the Senate," before ultimately relaxing the enrollment rule to require only that "the bills in question should be 'printed upon paper, and duly examined and certified by the Joint Committee on Enrolled Bills provided by the joint rules.'" 4 *Hinds' Precedents* § 3442; *see also* 1 U.S.C. § 106 notes (collecting congressional departures from the ordinary enrollment requirements); *Preparation of Slip Laws from Hand-Enrolled Legislation*, 13 Op. O.L.C. 353, 355 (1989) (noting Congress's "occasional departure from the normal process of preparing printed enrollments of bills before presenting them to the President").

Similarly, the President and Congress have exercised flexibility in determining how best to present bills to the President when he is traveling abroad. Thus, despite the "familiar practice" of "presenting a bill to the President by sending it to the White House in his temporary absence," *Wright*, 302 U.S. at 590, several presidents have entered agreements with "the congressional leadership pursuant to which no enrolled bills will be presented during [the President's] absence." *Presentation of Enrolled Bills*, 2 Op. O.L.C. at 383. For example, when President Franklin Roosevelt traveled abroad at the end of a congressional session, he sent a letter to the Vice President and the Speaker of the House stating, "[a]s I expect to be away from Washington for some time in the near future, I hope that insofar as possible the transmission of completed legislation be delayed until my return." *Id.* at 385 (reproducing letter). Furthermore, President Roosevelt wrote, "in other cases of emergency" the White House is "authorized to forward . . . any and all enrolled bills or joint resolutions . . . by the quickest means," although "[t]he White House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them." *Id.* As President Roosevelt's letter indicates, when Congress delivers a bill to the White House while the President is

traveling abroad, the practice has been to accept the bill, but only for transmission to the President, not presentment. Thus, we have previously explained:

> In the unlikely event that the President is unable to obtain such a commitment from Congress, including the contingency of urgent legislation that cannot await the President's return, the President normally withdraws the legislative clerks' authority to accept enrolled bills on his behalf when he travels abroad and so advises the Congress. The bills are received by the White House staff not for 'presentation' to the President but for forwarding or transmission to the President. Presentation is then effected either when the bills actually are received by him abroad or upon his return to Washington.

Id. at 384; *see also Eber Bros.*, 337 F.2d at 625 (noting that bills received at the White House during the President's absence were stamped with the legend "Held for presentation to the President upon his return to the United States."). In short, as the Court of Claims has explained, "presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces." *Eber Bros.*, 337 F.2d at 629.

The same flexibility is evident in the manner in which the Supreme Court has permitted Congress to receive bills returned by the President. As noted above, in *Wright*, the Court concluded that one house of Congress could appoint an agent to receive bills returned by the President when that house went into recess for three days. The Court explained:

> To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.

Id. at 590.

Just as the presentment and return requirements have been understood and applied to give the President and Congress flexibility with respect to ministerial detail so long as the essential aspects of these requirements are performed by the appropriate constitutional actors, so also the signature requirement should be understood to give the President similar latitude to determine how his signature will be affixed to a bill once he has personally made the constitutionally essential decision to approve and sign it. The longstanding precedent and practice regarding the presentment and return provisions thus support our conclusion that the President may direct a subordinate to affix the President's signature to a bill the President has approved and decided to sign.

III.

In reaching our conclusion, we recognize that from the Founding to the present day, the President has always signed bills by personally affixing his signature to them. Moreover, in recent years some unpublished opinions of this Office (though not our most recent opinion, *see* Whelan Memorandum) have suggested a constitutional basis for this practice. *See* Rehnquist Letter at 2 (concluding that "*with the exception of signing bills passed by Congress*, there is no legal impediment to the delegation of the act of signing and that the question of which documents the President should personally sign is largely one of propriety rather than of law") (emphasis added); Scalia Memorandum at 1 (citing Rehnquist Memorandum and stating that "[t]he signing of bills passed by the Congress is one exception which *may* require the President's personal signature") (emphasis added); Memorandum for the Files, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Signing of Bankruptcy Extension Act* at 9–10 (June 13, 1984) ("Tarr Memorandum") ("We therefore concluded that it was necessary for the President physically to sign the bill in order for it to become a law."); *cf.* Wilkey Memorandum at 10 ("a bill would seem to present an *a fortiori* case in which under the Constitutional provision the signification of the President's approval requires an exercise of personal discretion and therefore cannot be delegated"); Rehnquist Memorandum at 2 ("the requirement for the President's signature as well as his decision approving a bill would appear to be non-delegable"). Indeed, on at least two occasions, a bill was flown halfway around the world, on the advice of this Office, so that the President could personally affix his signature to it. *See* Tarr Memorandum at 9 (China); *see also* Memorandum for the Files, from Jeffrey P. Singdahlsen, Attorney-Adviser, Office of Legal Counsel, *Re: Preliminary Advice and Consideration Regarding Proposal to Fax Continuing Resolution to the President While He Was Abroad* at 1 (Dec. 22, 1999) (Turkey).

Nevertheless, we do not think that the question presented in this memorandum would have had practical significance at the time the Constitution was drafted and ratified or at the time the practice regarding the President's signature of bills was established. Current technology enables the President, without being physically presented with the enrolled bill, to be informed of a bill's precise contents for consideration and approval (for example by receiving a copy of the bill by e-mail or fax) more rapidly than he could receive the enrolled bill itself for approval and signature. This was not the case at the time the Constitution was drafted and ratified or during the early years of the Republic, however. For this reason, we believe that the historical practice should be viewed not as rejecting the position we adopt today, but rather as simply reflecting the practical reality that for much of our Nation's history the President was precluded by circumstance and technological limitations from approving and signing a bill that had not been physically delivered to him.

Furthermore, as discussed above, opinions of the Attorney General and the Department of Justice have recognized and applied the principle of signatures in many other contexts and are in that respect consistent with our conclusion. And, despite our Office's reluctance to extend the principle fully to the constitutional requirement that the President sign bills, even in this context our opinions have suggested some degree of flexibility consistent with the principle of signatures. For example, this Office has relied on the principle of signatures in concluding that the President may "sign" a bill by affixing his initials, rather than his full name. *See* Wilkey Memorandum at 3; *see also id.* at 9 n.5 (quoting *Finnegan*, 157 Mass. at 440) ("'It was and still is very generally held that when a document is required by the common law or by statute 'to be signed' by a person, a signature of his name in his own proper or personal handwriting is not required.'")). Similarly, we have suggested that "[i]f the President's hands only were to become disabled so that he could not personally sign his name, obviously some other means for affixing his signature would have to be used. Otherwise, no legislation could be approved because of the signing requirement of Article I, section 7 of the Constitution." Rehnquist Memorandum at 8.

More fundamentally, our opinions suggesting that the President himself must physically affix his signature to bills appear to be based on the generally accepted understanding—which we in no way call into question—that the President cannot delegate the *decision* to approve and sign a bill.[14] The method of signing a bill that we approve here, however, does not entail any delegation of this decision—rather it simply involves a ministerial act performed by a subordinate at the President's specific direction. As discussed above, the Department of Justice has repeatedly

[14] To the extent earlier opinions of this Office proceed beyond the principle that the President may not delegate the decision to approve and sign a bill and conclude that he must personally perform the ministerial act of physically affixing his signature to the bill, they rely only on cursory recitations of the constitutional text and inferences from statements in Supreme Court cases addressing other matters. But as explained above, we do not think the text of Article I, Section 7 bars the President from signing a bill, consistent with the principle of signatures, by directing a subordinate to affix the President's signature to a bill the President has approved and decided to sign. Nor is such a conclusion compelled by Supreme Court precedent. In *Gardner v. Collector*, 73 U.S. (6 Wall.) 499 (1867), the Court stated, in the course of holding that the President need not date a bill he signs, that "[t]he only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more. The simple signing his name at the appropriate place is the one act which the Constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law." *Id.* at 506. Although we have previously stated that "[t]he Court's language emphasizes the personal nature of the duty required of the President, thus precluding considerations of delegation," Wilkey Memorandum at 3, we think the Court's language is better understood simply as restating the text of Article I, Section 7, and not as addressing the question we consider here. Another Supreme Court case (which did not involve the President or Article I, Section 7) states that "[i]t may be assumed that a requirement of the officer's signature, without more, means that he shall write his name or his distinctive appellation." *Ohl & Co. v. Smith Iron Works*, 288 U.S. 170, 176 (1932). That case, which held that an official could sign by initialing a document, did not address the question whether an officer could sign a document by directing that his signature be affixed to it by another.

"distinguishe[d] between the physical signing of a document and the decision-making function involved with respect to the document." Scalia Memorandum at 1; *see also, e.g.*, *Affixing Facsimile Signature to Orders*, 31 Op. Att'y Gen. at 351; Wheat Memorandum at 9; Rankin Memorandum at 2–3. Indeed, despite sometimes imprecise usage of the word "delegation," the Department's opinions appear to recognize correctly that so long as the President retains this decision-making function, his instruction to a subordinate to affix the President's signature to a document does *not* amount to a delegation of presidential authority in any meaningful or legally significant sense. Thus, 3 U.S.C. § 301, which generally authorizes the President to delegate "any function which is vested in [him] by law" to the head of any department or agency, or any other officer required to be appointed by the President by and with the advice and consent of the Senate, also requires that such delegations be "in writing" and "published in the Federal Register." Nevertheless, we have concluded that "[w]here the only act delegated is the act of signing, it is not necessary to formally delegate the signing function by issuance of an Executive order and publication in the Federal Register pursuant to 3 U.S.C. § 301." Kauper Letter at 2; *see also* Rehnquist Memorandum at 6 ("Even where there is a specific statutory reference to the President's signing a document, the practice has apparently been not to formally delegate the authority to sign documents on behalf of the President by publication in the Federal Register."). Similarly, we have approved the "delegation of authority to members of the White House staff to *physically* sign documents" even though, under section 301, "it would not be proper for the President to delegate decision-making authority to members of the White House staff" who are not appointed by and with the advice and consent of the Senate as this statute requires. Rehnquist Letter at 1 (emphasis added).

The Department's opinions provide no basis for concluding that an instruction that does not amount to a delegation of presidential authority for purposes of section 301 should nonetheless be regarded as such a delegation for constitutional purposes, and, for the reasons explained above, *see supra* Part I.C, we believe it should not be so regarded. Rather, as we previously explained, so long as the President personally makes the decision to approve and sign a bill, "the principle that the President may not *delegate* to another person his authority to sign a bill . . . means, for example, that if a White House aide were to sign his own name to a bill, that bill would not thereby become law. By contrast, the President's directive to an aide to affix the President's signature to a bill does not involve a delegation of authority." Whelan Memorandum at 2. And, if a presidential instruction to affix the President's signature to a document the President has decided to sign does not amount to a delegation of presidential authority, we are aware of no basis for distinguishing a statutory requirement that the President sign a document (which the Department has repeatedly held can be satisfied through such an instruction) from the constitutional requirement that the President sign bills he approves. *Cf.* U.S. Const. art. VI (establishing that the "Supreme Law of

the Land" includes both the "Constitution" and "Laws of the United States which shall be made in Pursuance thereof").

Accordingly, we conclude that neither past practice nor previous opinions relating to the signing requirement of Article I, Section 7 foreclose reading that requirement in a manner that is consistent with the traditional common law understanding of "sign," with Attorney General and Department of Justice opinions applying that understanding to statutory signing requirements, and with the settled interpretation of the related presentment and return provisions.

IV.

For the foregoing reasons, we conclude that the President need not personally perform the physical act of affixing his signature to a bill he approves and decides to sign in order for the bill to become law. Rather, the President may sign a bill within the meaning of Article I, Section 7 by directing a subordinate to affix the President's signature to such a bill, for example by autopen.[*]

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

[*] Editor's Note: A footnote providing advice concerning implementation of the authority discussed in this opinion has been redacted.

Whether Conflict of Interest Laws Apply to a Person Assisting a Supreme Court Nominee

On the facts described, former Senator Fred Thompson would not be an "officer" or "employee" of the federal government if he assisted a Supreme Court nominee during the process of confirmation by the Senate, and as a consequence the federal conflict of interest laws would not apply to him.

July 22, 2005

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether, for purposes of the federal conflict of interest laws, former Senator Fred Thompson would be an "officer" or "employee" of the federal government if he assisted a Supreme Court nominee during the process of confirmation by the Senate. On the facts as you have described them, we believe that Mr. Thompson would not be an "officer" or "employee" and that, as a consequence, the conflict of interest restrictions would not apply to him.

As you have explained the facts to us, Mr. Thompson informed the President that he was available to assist the nominee, to advocate the nominee's confirmation, and to advise the nominee about how to deal with members of the Senate. The President encouraged such an arrangement, but the nominee will decide whether to take up Mr. Thompson's offer. The nominee, rather than anyone at the White House, will have the authority to end the arrangement at any time. Mr. Thompson will report to the nominee, not to the White House. He will not hold himself out as speaking for the government. Mr. Thompson will represent the nominee only for purposes of his nomination to the Supreme Court and only in his capacity as a nominee, not in his capacity as a sitting federal judge. Although Mr. Thompson will consult and work with government personnel, he will not be under their direction or control, and he, in turn, will not direct or control government personnel, for example by calling or chairing meetings of government personnel. He will not have an office in a federal building or otherwise have the right of an employee to use government facilities. The government will not pay for his services or cover his expenses.

As we have previously explained, the application of the principal conflict of interest restrictions governing the Executive Branch depends on the meaning of the terms "officer" and "employee." *See Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service*, 26 Op. O.L.C. 32 (2002) ("*Conflict of Interest Rules*"). The major conflict of interest provisions—the criminal conflict of interest laws, 18 U.S.C. §§ 202–209 (2000); the directives 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 (2005) ("Standards of Ethical Conduct")—all apply only to "officers" and "employees" of the federal government.

Title 18 does not define "officer" or "employee," but we have found the definitions in title 5 to be "'the most obvious source of a definition' for title 18 purposes." *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 *Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee,"* 1 Op. O.L.C. 20 (1977) ("*Informal Presidential Advisor*")). The title 5 definitions set up a three-part test. Under 5 U.S.C. § 2104 (2000), an "officer" is someone who is (1) "required by law to be appointed in the civil service by [the President, a court of the United States, the head of an Executive agency, or the Secretary of a military department] acting in an official capacity," (2) "engaged in the performance of a Federal function under authority of law or an Executive act," *and* (3) "subject to the supervision" of the President or the head of an executive agency or military department. Under 5 U.S.C. § 2105 (2000), the term "employee" covers an "officer" and any person who is engaged in federal functions, but is appointed and supervised by specified federal officials other than those able to appoint and supervise "officers." *See Conflict of Interest Rules*, 26 Op. O.L.C. at 33. For both "officers" and "employees," therefore, the test is essentially the same.[1]

The executive order reaches "employees," a term that covers "any officer[s] or employee[s] of an agency." Exec. Order No. 12674, § 503(b). We have concluded that these terms in the executive order "are identical in scope and meaning with the terms 'officer' and 'employee' as used in 5 U.S.C. §§ 2104 and 2105." *Fishery Management Councils*, 17 Op. O.L.C. at 153. Furthermore, because the Standards of Ethical Conduct implement the executive order, we have found the same definitions applicable to the implementing regulations as well as the executive order. *Id*. at 150 n.2, 158.

In each instance, therefore, the application of the conflict of interest rules depends on the meaning of "officer" or "employee," and those terms take their meaning from the three-part test derived from title 5: (1) "required by law to be appointed in the civil service by [a federal official] 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 federal officials. A person is an "officer" or "employee" only if he meets *all* three requirements. *See Conflict of*

[1] For purposes of the conflict of interest laws, title 18 does define a subclass of "employees." The term "special Government employee" includes "an officer or employee of the executive . . . branch of the United States Government . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties, either on a full-time or intermittent basis." 18 U.S.C. § 202(a) (2000). This definition itself depends on the meaning of the terms "officer" and "employee," which are not defined in section 202(a).

Interest Rules, 26 Op. O.L.C. at 35 (citing *McCarley v. MSPB*, 757 F.2d 278, 280 (Fed. Cir. 1985)).

On the facts you have described, none of the three requirements would be satisfied. For purposes of the conflict of interest restrictions, therefore, Mr. Thompson would not be an "officer" or "employee."

First, Mr. Thompson would not be appointed in the civil service by a federal official. In *Informal Presidential Advisor*, we observed that this requirement suggests "a formal relationship between the individual and the Government," 1 Op. O.L.C. at 21, and that "[i]n the usual case, this formal relationship is based on an identifiable act of appointment," *id.* Here, there will be no formal act of appointment by a federal official. Indeed, although the President has responded positively to Mr. Thompson's offer to be available to assist the nominee, the choice to use Mr. Thompson's services will be left to the nominee, acting in his personal capacity.

To be sure, "an identifiable act of appointment may not be absolutely essential for an individual to be regarded as an officer or employee in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict of interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed." *Id.*; *see also Ass'n of Am. Physicians & Surgeons v. Clinton*, 187 F.3d 655, 662 (D.C. Cir. 1999). On the present facts, however, the absence of a formal appointment does not arise from an attempt to circumvent the conflict of interest laws. Because none of the three requirements is met, the absence of a formal appointment does not avoid a conclusion that would otherwise be reached about application of conflict of interest rules. Instead, the absence of an appointment reflects that the federal government has only an informal relationship with Mr. Thompson.

Second, Mr. Thompson will not be "engaged in the performance of a Federal function under authority of law or an Executive act." He will advocate the nominee's confirmation and will advise the nominee about dealing with the Senate. In this role, he will not purport to speak for the government. He therefore will be performing the function of a private advocate taking part in the debates and proceedings on confirmation, rather than the function of a government official. *See* Office of Government Ethics ("OGE"), *Letter to a Designated Agency Ethics Official*, Informal Advisory Ltr. 95x8, 1995 WL 855434, at *7 (July 10) (a person would not be an employee where, "pursuant to the proposed arrangement, [he] would be working . . . as a representative of [an outside person or group], not the United States, and . . . would not be authorized to speak, or purport to speak, on behalf of the agency"); *cf., e.g.*, 5 C.F.R. § 2635.807(b) (2005) (restricting an employee's references to his official position when he is speaking or writing in a private capacity). Furthermore, he will not be directing the actions of federal officials, for example by "coordinating the Administration's activities in [this] particular area," *Informal Presidential Advisor*, 1 Op. O.L.C. at 23, or by calling

or chairing meetings of government personnel, *id.* He will consult and work with government officials, but in this respect he will be in the same position as many representatives of outside persons or groups who share interests with the government. Such cooperation does not mean that the representative of the outside person or group is performing a federal function.

Third, Mr. Thompson will not be subject to the direction of federal officials. To the extent that Mr. Thompson is not determining his own activities, the nominee in his private capacity will direct what Mr. Thompson does. *See* OGE, *Memorandum to Designated Agency Ethics Officials, General Counsels and Inspectors General Regarding Summary of Ethical Requirements Applicable to Special Government Employees*, Informal Advisory Mem. 00x1, 2000 WL 33407342, at *2 (Feb. 15) ("*Summary of Ethical Requirements*") (although the degree of control over short-term employees need not be as great as over permanent employees, "supervision or operational control remains an important attribute of employee status"). The nominee, moreover, will decide whether his assistance will be used at all and, if so, for how long. The power to end Mr. Thompson's service, which the nominee rather than the government will have, is "a key indicator of supervision." OGE, *Letter to an Individual*, Informal Advisory Ltr. 01x11, 2001 WL 34091920, at *2 (Nov. 29); *see Fishery Management Councils*, 17 Op. O.L.C. at 155–56.

Informal Presidential Advisor observed that this third part of the test "has been of importance in the conflict-of-interest area primarily in determining whether an individual is an independent contractor rather than an employee and therefore not subject to the conflict-of-interest laws." 1 Op. O.L.C. at 21. Mr. Thompson will not be working for the government and will not even be the government's independent contractor; it is therefore unnecessary to use the test to draw that distinction here. Nevertheless, we note that the factors by which independent contractors are distinguished from employees point, overwhelmingly, to the conclusion that Mr. Thompson is not an employee of the government. He does not take instructions from the government or receive government training; his work is not integrated into the government's business; he does not have a continuing relationship with the government; the government does not set his hours of work; he is not required to report to the government on his activities; he is not paid by the government; the government is not responsible for his expenses; the government cannot discharge him; he furnishes his own materials (such as they are); he may do other work at the same time; and he may quit without liability. *See Hosp. Res. Pers., Inc. v. United States*, 68 F.3d 421, 427 (11th Cir. 1995) (cited in OGE, *Summary of Ethical Requirements*, 2000 WL 33407342, at *15 n.4). Furthermore, although Mr. Thompson may consult with officials on government premises, he would not have an office in a government building or otherwise have the right to use government facilities that employees enjoy. *Cf. Informal Presidential Advisor*, 1 Op. O.L.C. at 21 (a person is probably an employee if he "works on Government premises under the direction of Government personnel and performs work of a kind normally handled by Government employees"). Mr. Thompson does render

his services personally, *see Hosp. Res. Pers.*, 68 F.3d at 427, and it may be that a lower level of control is necessary to find that professional services, as opposed to nonprofessional ones, involve the level of supervision that could make someone an employee, *see* OGE, *Summary of Ethical Requirements*, 2000 WL 33407342, at *15 n.3. But an examination of the usual factors dictates the conclusion here that the government would not control Mr. Thompson's activities.

We therefore conclude that Mr. Thompson, on the facts as stated, would not be an "officer" or "employee" subject to the federal conflict of interest rules.

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

Assignment of Certain Functions Related to Military Appointments

Section 531(a)(1) of title 10 does not affirmatively prohibit delegation to the Secretary of Defense of the President's appointment authority.

The Appointments Clause of the Constitution does not prohibit Congress from allowing the President to choose between making such an appointment himself and delegating it to the Secretary of Defense.

So long as each nomination is submitted to the Secretary of Defense for approval (whether individually or in groups) and each appointment is made in the name of the Secretary of Defense (whether the document evidencing the appointment be signed by the Secretary or an authorized subordinate officer), the Constitution would permit much of the legwork of the appointment process to be delegated to a subordinate officer below the Secretary of Defense.

July 28, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This memorandum records advice that this Office recently provided in response to three questions that you posed concerning a proposed executive order to delegate to the Secretary of Defense the President's power to make certain military appointments under 10 U.S.C. § 531(a)(1) (Supp. IV 2005). *See* Exec. Order No. 13384, 70 Fed. Reg. 43,379 (July 27, 2005). Section 531(a)(1) provides that "[o]riginal appointments in the grades of second lieutenant, first lieutenant, and captain in the Regular Army, Regular Air Force, and Regular Marine Corps and in the grades of ensign, lieutenant (junior grade), and lieutenant in the Regular Navy shall be made *by the President alone*." *Id.* (emphasis added). Section 301 of title 3, in turn, authorizes the President "to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law." Section 301 applies only if the law establishing the function "does not affirmatively prohibit delegation." 3 U.S.C. § 302 (2000).

First, you have asked whether 10 U.S.C. § 531(a)(1) affirmatively prohibits delegation of the President's appointment authority. In our view, section 531(a)(1) does not affirmatively prohibit delegation. While section 531(a)(1) authorizes appointments "by the President alone," the word "alone" in section 531 is most naturally read to mean "without the need for Senate consent." Subsection (a)(1) uses "alone" to distinguish subsection (a)(2), which provides that certain appointments "shall be made by the President, by and with the advice and consent of the Senate." The same usage is reflected in the Appointments Clause of the Constitution, which requires the President to make appointments "by and with the advice

and consent of the Senate," while permitting Congress to vest the appointment of inferior officers "in the President alone." There, too, the word "alone" means "without Senate consent," and Congress presumably incorporated that meaning in section 531. *Compare* 5 U.S.C. § 3345(a)(2) & (3) (2000) ("the President (*and only the President*) may direct" certain persons "to perform the functions and duties of the vacant office") (emphasis added).

This conclusion also comports with the meaning of the word "alone" in analogous statutes. For example, 10 U.S.C. § 12203(a) vests in the "President alone" the authority to make appointments of reserve officers in commissioned grades of lieutenant colonel and commander or below. Until title 10 was recodified in 1956, this law provided that "the President shall make all" such appointments. The word "alone" was added in the recodification, which was intended merely "to restate, without substantive change" the existing laws. Pub. L. No. 84-1028, 70A Stat. 1, 25, 640 (1956). The notes of revision indicate that the word "alone" was inserted as a clarification. And the Court of Claims concluded that "the word 'alone' was inserted in that section to make it clear that the President no longer needed Senate 'advice and consent' for appointments below general officer rank." *Jamerson v. United States*, 401 F.2d 808, 810 (1968).

In 1957, this Office offered the same interpretation of various statutes vesting in the "President alone" the authority to make temporary military promotions below flag grade. *See* Opinion for the President, from the Attorney General (May 31, 1957). The services' practice at that time was for the Secretaries of the Army, Navy, and Air Force to make these promotions. We determined that "this is a delegable function" under 3 U.S.C. § 301, and that "[n]one of the [pertinent] statutes affirmatively prohibits delegation." *Id.* at 4. "In view of the universal acceptance of this rule and the long standing practice in the several Services" and "in the absence of any expression of Presidential intent to the contrary," we concluded that "the present practice of the Service Secretaries of conferring promotions without prior reference to the President . . . is valid as a matter of law." *Id.* at 6–7. This view also accorded with the Office's more general statements about the ability of the President to delegate, at least to the head of a department, the power to appoint inferior officers. *See* Memorandum, *Re: Delegation of Presidential Functions* at 31 (Sept. 1, 1955); Memorandum for the Attorney General, *Re: The Power of the President to Delegate Certain Functions* at 110 (n.d. ca. 1955).

Longstanding Executive Branch practice also compels this conclusion. On several occasions over the last half century, the President has invoked section 301 or its predecessor to delegate to the head of a department appointment authority vested by statute in the President, whether that authority was vested in the "President alone," *see* Exec. Order No. 10637, §§ 1(s), 2(d), 20 Fed. Reg. 7,205 (Sept. 19, 1955) (certain military appointments); Exec. Order No. 11023, § 1(b)–(d), (h)–(j), 27 Fed. Reg. 5,133 (May 29, 1962) (certain appointments of commis-

sioned officers in the NOAA); Exec. Order No. 12396, §§ 1(c), (d), 2(a)(2), 47 Fed. Reg. 55,897 (Dec. 9, 1982) (certain military promotions); Exec. Order No. 13358, §§ 1(b), 2(b), 69 Fed. Reg. 58,797 (Sept. 28, 2004) (certain military reserve appointments), or simply in the "President," *see* Exec. Order No. 10250, § 1(a), (g), 16 Fed. Reg. 5,385 (June 5, 1951) (appointment of certain inferior officers in the Interior Department); Exec. Order No. 11140, § 1(a), (d), 29 Fed. Reg. 1,637 (Jan. 30, 1964) (certain commissioned officers of the Public Health Service). These orders not only reflect the Executive Branch's presumed view of the legality of these delegations, they also establish a practice of which Congress has been aware and in which Congress can be said to have acquiesced. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 702 (1979).

Second, you have asked whether the Constitution permits Congress to allow this practice. In particular, you have asked whether the Appointments Clause of the Constitution prohibits Congress from allowing the President to choose between making an appointment himself and delegating it to the head of a department. We believe that the Appointments Clause permits Congress to do so.

This conclusion follows first from the text of the Appointments Clause—in particular, its so-called Excepting Clause, which provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Clause plainly gives Congress some discretion to allocate the appointment power. Nothing in the text precludes Congress from vesting the power by law in the President while permitting him to delegate it to the head of a department subject to his supervision.

Nor is this conclusion inconsistent with the history of the Excepting Clause. The Appointments Clause as a whole reflects a compromise that was intended to foster a sense of responsibility, ensure accountability, curb any natural inclinations towards favoritism, and prevent logrolling and factions. *See generally The Federalist* Nos. 66, 76, and 77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). While the Excepting Clause received little attention at the Convention, it likely was intended to operate consistent with these values. Thus, it bears significance that a statute giving the President the option of making an appointment himself or instead delegating that authority to the head of a department would not diminish these values—at least no more so than a statute vesting appointment authority in the head of a department, which the Excepting Clause plainly permits.

This result also accords with the longstanding practice of the Executive Branch. The Executive Branch traditionally has distinguished between appointments that require Senate confirmation and appointments that the President may make alone. The Attorney General and this Office have long held the view that the President's power to appoint officers requiring Senate confirmation must be exercised by the President and may not be delegated. *See Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 465 (1855); *Presidential Succession and*

Delegation in the Case of Disability, 5 Op. O.L.C. 91, 94 (1981). Nor, for example, may the President delegate his authority to demote a military officer appointed with the advice and consent of the Senate. However, a different result has obtained when Congress by law vests appointment power in the President alone and, also by law, provides that the President may delegate that authority. As noted, presidents have long delegated to the heads of departments authority to appoint inferior officers when Congress has vested that discretion in the President, and this Office has affirmed the legality of the practice. Accordingly, the Excepting Clause does not preclude Congress from providing the President a choice between appointing an inferior officer himself or delegating the responsibility to the head of a department subject to his supervision.

Third, you have asked whether the prohibition in the draft order that prevents the Secretary of Defense from reassigning appointment authority to a subordinate is constitutionally compelled. The question whether Congress may permit the President or the head of a department to delegate appointment authority to an officer below the head of a department is a difficult one, and we cannot provide a definitive answer at this time. As noted, delegation clearly is not to be permitted for officers requiring Senate confirmation. However, neither the Attorney General nor this Office has definitively answered the question with respect to inferior officers who do not require Senate consent. While we do not attempt to resolve the question here, we can offer this advice: so long as each nomination is submitted to the Secretary of Defense for approval (whether individually or in groups) and each appointment is made in the name of the Secretary of Defense (whether the document evidencing the appointment be signed by the Secretary or an authorized subordinate officer), the Constitution would permit much of the legwork of the appointment process to be delegated to a subordinate.

This practice would be consistent with the text of the Clause. It is true that, by naming three permissible repositories of appointment authority—the President, the Heads of the Departments, and the Courts of Law—the Excepting Clause implicitly indicates that the power may not be vested in some other person. The Excepting Clause "prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint" and thereby "reflects our Framers' conclusion that widely distributed appointment power subverts democratic government." *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991). The Clause was designed to "limit[] the universe of eligible recipients of the power to appoint" in order to ensure that such actors were readily identifiable and politically accountable. *See id.* at 880. At the same time, however, the Clause does not prohibit substantial involvement of subordinates in the appointment process.

The history of the Clause reflects this understanding. The Excepting Clause was proposed by Gouverneur Morris on the last working day of the Convention. James Madison objected that "[i]t does not go far enough if it be necessary at all—Superior officers below Heads of Departments ought in some cases to have the

appointment of the lesser offices." *See* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 647 (1893, reprint 1987). Morris responded that there "is no necessity," since "Blank commissions can be sent." *Id.* Although these statements might support a broader view, at a minimum they support the view that a head of a department may use subordinates to carry out appointments so long as the appointment is submitted to the head of the department for approval and made in the name of the head of the department, upon whom ultimate political accountability must rest.

The early history of the implementation of the Clause strongly supports this view. In 1799, Congress passed a law providing that collectors of customs "shall, with the approbation of the principal officer of the treasury department, employ proper persons as . . . inspectors, at the several ports within his district." Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642. In 1821, Attorney General Wirt concluded that inspectors of customs were "officers," upon whom were devolved "important duties," and that appointment with approbation of the Secretary of the Treasury required that "the names of the individuals proposed to be appointed shall be submitted to him, and that no one shall be appointed who shall not be approved by him." *Tenure of Office of Inspectors of Customs*, 1 Op. Att'y Gen. 459, 459 (1821). In 1843, Attorney General Legare concluded that this was not only the better construction of the statute, but "the only possible construction, under the constitution." *Confirmation of Spanish Grants of Land in Mobile*, 4 Op. Att'y Gen. 156, 164 (1843). Thus, while the appointment must remain that of the head of the department, a process whereby subordinates submit names for approval appeared to satisfy the requirement. *See also United States v. Sears*, 27 F. Cas. 1006, 1009 (C.C.D. Mass. 1812) (No. 16,247) (Story, J.) (concluding that an inspector of customs was a validly appointed officer of the United States where "the commission of the inspector reciting such approbation [of the Secretary of the Treasury] was proved at the trial"); *United States v. Morse*, 27 F. Cas. 1 (C.C.D. Maine 1844) (No. 15,820) (Story, J.) (assuming that the appointment of an inspector of customs was valid with approbation of the Secretary of the Treasury); Leonard D. White, *The Jeffersonians: A Study in Administrative History 1801–1829*, at 129 (1956) ("Lesser officers and employees did not require senatorial approval and were posted on nomination of chief clerks, auditors, collectors of customs, and other intermediate officials, and approved by the head of the appropriate department."); Leonard D. White, *The Jacksonians: A Study in Administrative History 1829–1861*, at 73 (1954) ("[A]ppointment [of inspectors of customs and other minor customs officers] was made by the collector, subject to approval by the Secretary of the Treasury. Formally the latter took no initiative, but in the larger customs houses there is evidence of prior consultation.").

The Supreme Court similarly approved of the practice in *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393–94 (1868), concluding that an inferior officer appointed by the Assistant Treasurer with the approbation of the Secretary of the

Treasury was "appointed by the head of a department" within the meaning of the Appointments Clause. *See* General Appropriations Act of July 23, 1866, ch. 208, 14 Stat. 191, 202; *see also United States v. Mouat*, 124 U.S. 303, 307–08 (1888) (stating in a dictum that the appointment of a paymaster's clerk by another inferior officer "might still be considered sufficient to call [it] an appointment by the head of that Department" if "only approved by . . . [the] [a]cting Secretary in a formal way"). Other statutes and cases reflecting the practice are numerous. *See, e.g.*, Act of Mar. 3, 1817, ch. 110, § 7, 3 Stat. 397 (granting collectors of customs the power to appoint permanent deputies with the approbation of the Secretary of the Treasury); *United States v. Barton*, 24 F. Cas. 1025 (E.D. Pa. 1833) (No. 14,534) (appointment of deputy collector of customs by collector of customs was valid with the approbation of the Secretary of the Treasury); *Stanton v. Wilkeson*, 22 F. Cas. 1074, 1075 (S.D.N.Y. 1876) (No. 13,299) (appointment of a receiver, an officer of the United States, by the Comptroller of the Currency was valid because it was presumed to have been made with the approval of the Secretary of the Treasury); *Frelinghuysen v. Baldwin*, 12 F. 395 (D.N.J. 1882) (same); *Platt v. Beach*, 19 F. Cas. 836 (E.D.N.Y. 1868) (No. 11,215) (same).

More recently, at least three executive orders have either vested appointment authority in inferior officers or expressly permitted a head of a department to do so. Executive Order 10637 of Sept. 16, 1955, vested appointment authority in the Secretary of the Navy when the Coast Guard operated as a service of the Navy, and the Secretary of the Navy was not at that time the head of a department. *Id.* § 5. Executive Order 11140 of Jan. 30, 1964, allowed redelegation of appointment authority by the Secretary of Health, Education, and Welfare to any Senate-confirmed officer. *Id.* § 4. And Executive Order 12396 of Dec. 9, 1982, allowed redelegation of appointment authority by the Secretary of Defense to subordinates. Furthermore, as noted above, this Office's 1957 opinion discussed and approved of the practice of service secretaries, making promotions without prior reference to the President, at a time when the service secretaries were not heads of departments. We assume, however, in the absence of contrary evidence, that, even under these orders and under the practice described in the 1957 opinion, all appointments were made with the ultimate approval of the head of the department, consistent with the earlier authority.

In view of this history and practice, we think it clear that the head of a department at a minimum may receive substantial assistance from subordinates in the appointment process. Even assuming that the ultimate decision whether to make an appointment must remain the responsibility of the head of the department, approval of a list of appointments by the head of the department would satisfy this requirement. Furthermore, it is well established that the documents evidencing an appointment by the President or the head of a department need not be signed by that person. *See, e.g.*, *Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 472–73 (1855); *Navy Appointments*, 22 Op. Att'y Gen. 82, 84

(1898); *see also Dysart v. United States*, 369 F.3d 1303, 1312 (Fed. Cir. 2004) ("In the case of a promotion to the grade of rear admiral, the final public act of appointment is the signing and issuance of the letter of appointment by the Special Assistant for Flag Officer Management and Distribution on behalf of the President.").

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

Authority Under the Defense Base Closure and Realignment Act to Close or Realign National Guard Installations Without the Consent of State Governors

The federal government has authority under the Defense Base Closure and Realignment Act of 1990, as amended, to close or realign a National Guard installation without the consent of the governor of the state in which the installation is located.

August 10, 2005

MEMORANDUM OPINION FOR THE CHAIRMAN
DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "DBCRA") establishes a process by which the federal government is authorized to close and realign federal military installations in the United States. Pub. L. No. 101-510, § 2901, 104 Stat. 1485, 1808, *reprinted as amended in* 10 U.S.C. § 2687 note (2000 & Supp. IV 2004). You have asked the Attorney General whether the federal government has authority under the Act to close or realign a National Guard installation without the consent of the governor of the state in which the installation is located, particularly given two earlier-enacted statutes that require gubernatorial consent before a National Guard "unit" may be "relocated or withdrawn," 10 U.S.C. § 18238 (2000), or "change[d]" as to its "branch, organization, or allotment," 32 U.S.C. § 104(c) (2000). *See* Letter for Alberto R. Gonzales, Attorney General, from Anthony J. Principi, Chairman, Defense Base Closure and Realignment Commission (May 23, 2005). The Attorney General has delegated to this Office responsibility for rendering legal opinions to the various federal agencies. *See* Foreword, 29 Op. O.L.C. v (2005). We conclude that the federal government has the requisite authority.

I.

A.

Congress adopted the Base Closure Act in order "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." DBCRA § 2901(b).[1] Congress acted against the backdrop of "repeated, unsuccessful, efforts to close military bases in a rational and timely manner." *Dalton v. Specter*, 511 U.S. 462, 479 (1994) (Souter, J., concurring in part and concurring in judgment). The initial Act authorized rounds of closure and realignment for 1991, 1993, and 1995; amendments in 2001 (and again in 2004)

[1] Citations of the Act are of the sections as they appear in the note to 10 U.S.C. § 2687 (2000 & Supp. IV 2004).

provided for another round in 2005. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, §§ 3001–3008, 115 Stat. 1012, 1342–53 (2001); Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, div. A, § 1084, div. B, §§ 2831–2834, 118 Stat. 1811, 2064, 2132–34 (2004). While in force, the Base Closure Act (which under current law expires on April 15, 2006) serves as "the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States." DBCRA § 2909(a).[2] The Act's scope is broad: It defines "installation" as "a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility." *Id.* § 2910(4). And "[t]he term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." *Id.* § 2910(5).

In addition to reaching broadly, the Act also establishes an "elaborate selection process" for accomplishing its purpose, by assigning specific roles to several federal actors who are subjected to rigid statutory deadlines. *Dalton*, 511 U.S. at 464 (opinion of Court). The process for the 2005 round begins when the Secretary of Defense certifies to Congress that a need exists to close and realign military installations and that such closures and realignments would "result in annual net savings for each of the military departments." DBCRA § 2912(b)(1)(B). The process may proceed thereafter only if, no later than March 15, 2005, the President nominates for Senate consideration persons to constitute the Defense Base Closure and Realignment Commission. *Id.* § 2912(d). Although the Commission's actions are expressly subject to the approval or disapproval of the President (as explained below) and the Act does not restrict the removal of commissioners, the Commission is "independent" of other federal departments, agencies, or commissions. *Id.* § 2902(a); *see generally Removal of Holdover Officials Serving on the Federal Housing Finance Board and the Railroad Retirement Board*, 21 Op. O.L.C. 135, 135, 138 n.5 (1997); *see also Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166–68 (2003).

The next step after the nomination of commissioners is for the Secretary of Defense to develop a list of the military installations in the United States that he recommends for closure or realignment; he must submit that list to the Commission by May 16, 2005. DBCRA § 2914(a). In preparing his list, the Secretary must

[2] The Act makes an exception for closures and realignments not covered by 10 U.S.C. § 2687. *See* DBCRA § 2909(c)(2). Section 2687 applies to closures of military installations at which 300 or more civilians are employed and to realignments of such installations that involve a reduction by more than 1,000 (or fifty percent) of the civilian personnel. In other words, small closures and realignments are not subject to the Act's exclusivity provision. This does not mean, however, that such closures and realignments *cannot* be carried out under the Act.

"consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department." *Id.* § 2903(c)(3)(A). The Secretary's recommendations must be based on his previously established and issued "force-structure plan" and a "comprehensive inventory of military installations." *Id.* § 2912(a)(1). Congress also has enumerated four "military value criteria," *id.* § 2913(b), and four "other criteria," *id.* § 2913(c), on which the Secretary must rely, and has provided that these, along with the plan and inventory, shall be the "only criteria" on which he relies, *id.* § 2913(f). (In prior rounds, Congress left with the Secretary discretion to establish the selection criteria. *Id.* § 2903(b).)

The Commission must hold public hearings and prepare a report reviewing the Secretary's recommendations and setting out the Commission's own recommendations. *Id.* § 2903(d). Just as it has restricted the Secretary in preparing the original list, so also has Congress constrained the Commission's authority to alter the Secretary's list. The Commission may do so only if it "determines that the Secretary deviated substantially from the force-structure plan and final criteria." *Id.* § 2903(d)(2)(B). And the Commission must make additional findings and follow additional procedures if it proposes to close or realign an installation that the Secretary has not recommended for closure or realignment or to increase the extent of a realignment. *Id.* §§ 2903(d)(2)(C)–(D), 2914(d)(3), (d)(5). The Commission must transmit its report and recommendations to the President no later than September 8, 2005. *Id.* § 2914(d).

Within two weeks of receiving the Commission's report, the President must issue his own report "containing [his] approval or disapproval of the Commission's recommendations." *Id.* § 2914(e)(1). The Act "does not at all limit the President's discretion in approving or disapproving the Commission's recommendations." *Dalton*, 511 U.S. at 476; *see also id*. at 470. But it does require his review to be "all-or-nothing," *see* DBCRA § 2903(e); he "must accept or reject the entire package offered by the Commission," 511 U.S. at 470. If he disapproves, the Commission may prepare a revised list, which it must send to the President by October 20, 2005. DBCRA § 2914(e)(2). Presidential rejection of that list ends the process; no bases may be closed or realigned. *Id.* § 2914(e)(3). If, however, the President approves either the original or revised recommendations, he sends the approved list, along with a certification of approval, to Congress. *Id.* § 2903(e)(2), (e)(4).

Each of the above steps is necessary for any closures or realignments to occur under the Act. If Congress does not enact a joint resolution disapproving the Commission's recommendations within forty-five days after the transmittal from the President, the Secretary of Defense must implement the entire list. *Id.* § 2904. The Act goes on to specify in great detail the procedures for implementing these closures and realignments. *Id.* § 2905.

B.

The modern National Guard descends from efforts that Congress began in the early twentieth century both to revive the long-dormant "Militia" described in the Constitution and, spurred by World War I, to make it an effective complement to the regular Armed Forces. *See generally Perpich v. Dep't of Defense*, 496 U.S. 334, 340–46 (1990). Among its several provisions relating to the militia, the Constitution grants to Congress power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," while "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16. Acting pursuant to this power, Congress in 1903 passed the Dick Act, ch. 196, 32 Stat. 775, which provided among other things for an organized militia, known as the National Guard of the several states, that would be organized in the same way as the regular Army, trained by regular Army instructors, and equipped through federal funds. *Perpich*, 496 U.S. at 342. For historical and constitutional reasons, it was thought that this force could not be used outside of the United States. *See Whether the Second Amendment Secures an Individual Right*, 28 Op. O.L.C. 126, 152–53 (2004) ("*Second Amendment*").

Partly to overcome this restriction, Congress in the National Defense Act of 1916, ch. 134, 39 Stat. 166, further federalized the National Guard pursuant to its power, among others, to "raise and support Armies." U.S. Const. art. I, § 8, cl. 12; *see Selective Draft Law Cases*, 245 U.S. 366, 377 (1918). The National Defense Act "provide[d] for greater federal control and federal funding of the Guard," "authorized the President to draft members of the Guard into federal service," and provided that the Army should include both the regular Army and the National Guard while in federal service. *Perpich*, 496 U.S. at 343–44. The Court in the *Selective Draft Law Cases* and *Cox v. Wood*, 247 U.S. 3 (1918), upheld the draft provisions of the National Defense Act, concluding, among other things, that Congress's power to raise and support armies was "not qualified or restricted by the provisions of the militia clause," *Cox*, 247 U.S. at 6. The Court reaffirmed this interpretation in *Perpich*, 496 U.S. at 349–50.

In 1933, Congress gave the National Guard much of its current shape by creating two overlapping organizations whose members have dual enlistment: the National Guard of the various states and the National Guard of the United States, the latter forming a permanent reserve corps of the federal Armed Forces. *See* Act of June 15, 1933, ch. 87, 48 Stat. 153; *Perpich*, 496 U.S. at 345; *see also* 10 U.S.C. § 101(c) (2000) (distinguishing between these two entities); *id.* § 10101 (defining the "reserve components of the armed forces" to include the Army and Air National Guard of the United States); *see also id.* §§ 10105, 10111 (2000) (similar). Today, the federal government "provides virtually all of the funding, the materiel, and the leadership for the State Guard units," although Congress

continues, arguably for constitutional reasons, to allow a state to provide and maintain at its own expense a defense force outside of this system. *Perpich*, 496 U.S. at 351–52; 32 U.S.C. § 109(c) (2000). The National Guard of the United States is thus at all times part of the Armed Forces of the United States. The requirement of dual enlistment set up in 1933 means that a member of the National Guard simultaneously performs two distinct roles: Armed Forces reservist and state militiaman. Under ordinary circumstances, National Guard units retain their status as state militia units, under the ultimate command of the governor of the state in which the unit is located. *See* 10 U.S.C. § § 10107, 10113 (2000). Under certain conditions, however, the President can order those units into active federal service, just as he can order any other component of the Armed Forces into active duty. *See* 10 U.S.C. § 12301 (2000 & Supp. IV 2004). For as long as they remain in federal service, members of the National Guard are relieved of their status in the State Guard, *see* 32 U.S.C. § 325(a) (2000 & Supp. IV 2004); *Perpich*, 496 U.S. at 345–46, and their units become exclusively components of the United States Armed Forces, *see* 10 U.S.C. §§ 10106, 10112 (2000).

II.

A.

Your letter to the Attorney General requests an answer to the question whether the federal government, when following the procedures described in the Base Closure Act, has authority to recommend and carry out the closure or realignment of a National Guard installation without obtaining the consent of the governor of the state in which the installation is located.

As an initial matter, the authority and procedures of the Base Closure Act undoubtedly do extend to National Guard installations, just as they do to any other type of military installation under the jurisdiction of the Department of Defense. The Act is comprehensive in its coverage. In broadly defining "military installation," DBCRA § 2910(4) (quoted above), the Act makes no distinction between installations associated with the National Guard and those associated with any other component of the Armed Forces. Indeed, the Secretary's required inventory of military installations must include facilities in both the "active and reserve forces," *id.* § 2912(a)(1)(B), which plainly includes the National Guard, *see* 10 U.S.C. § 10101. We understand that all of the National Guard installations recommended by the Secretary for closure or realignment in the current round are located on land either owned or leased by the Department of Defense. Such installations are included within the definition of "military installation" and are thus presumptively subject to closure or realignment under the Act. Similarly, the Act's definition of "realignment," which "includes any action which both reduces and relocates functions and civilian personnel positions," DBCRA § 2910(5), provides no basis for distinguishing the National Guard. Nothing in that definition

suggests that such actions are not equally covered whether they involve active or reserve forces, the regular military or the National Guard. It is therefore not surprising that in previous rounds both the Secretary and the Commission made recommendations to close or realign National Guard installations, or that the Secretary has made such recommendations in the current round.

As your letter recognizes, however, two statutes might be read to restrict the federal government's ability to carry out such closures and realignments. These are 10 U.S.C. § 18238 and 32 U.S.C. § 104(c). Considering each provision in turn, we conclude that neither affects the exercise of authority under the Base Closure Act.

B.

Section 18238 provides in full as follows:

> A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn *under this chapter* without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia.

(Emphasis added.) Section 18238 by its terms applies only to relocations or withdrawals "under this chapter." The applicable chapter of title 10 is chapter 1803, which comprises sections 18231 to 18239. The Base Closure Act, however, is not included in chapter 1803. Public Law 107-107, which authorizes the current round of closings and realignments, is a distinct legal authority, and the Act has been included as a note to 10 U.S.C. § 2687, which is part of chapter 159. By its terms, therefore, section 18238 does not apply to the Base Closure Act because the Act is not part of "this chapter" (i.e., chapter 1803) and action under the Act therefore is not, and cannot be, action under chapter 1803. Thus, as the plain text of the provision makes clear, section 18238 has no bearing on the scope of authority exercised under the Act.

This reading of the current text is confirmed by the statutory history of section 18238. The provision was originally enacted as section 4(b) of the National Defense Facilities Act of 1950, ch. 945, 64 Stat. 829, 830. Section 4(b) applied only to situations in which the location of a National Guard unit was changed "pursuant to any authority *conferred by this Act*." *Id*. (emphasis added).[3] This limiting clause was modified to "under this chapter" in 1956 when the Facilities

[3] Section 4(b) required merely that the relevant governor be "consulted." 64 Stat. at 830. A subsequent amendment added the phrase "and shall have consented." Pub. L. No. 84-302, § 1(c), 69 Stat. 593, 593 (1955). In 1958, the wording was changed to the current "without the consent" version, and the phrase "shall have been consulted" was omitted as surplusage. Pub. L. No. 85-861, § 1(43), 72 Stat. 1437, 1457 (1958); S. Rep. No. 85-2095, at 33 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4615, 4634.

Act was first codified in title 10 as part of the codification of military law into titles 10 and 32. Pub. L. No. 84-1028, sec. 1, § 2238, 70A Stat. 1, 120, 123 (1956).[4] As was generally the case in the 1956 codification, no change in meaning was intended. *Id*. sec. 49(a), 70A Stat. at 640 ("In sections 1–48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections"); *see also Schacht v. United States*, 398 U.S. 58, 62 n.3 (1970) ("Although the 1956 revision and codification were not in general intended to make substantive changes, changes were made for the purpose of clarifying and updating language."); S. Rep. No. 84-2484, at 19 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4632, 4640 ("The object of the new titles has been to restate existing law, not to make new law. Consistently with the general plan of the United States Code, the pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties, or functions."); *Fairbank v. Schlesinger*, 533 F.2d 586, 600 (D.C. Cir. 1975) (observing that "the codification of the Armed Forces statutes in 1956, according to the provisions of the codification and the committee reports, did not intend to make any changes in the law") (footnote omitted); *id*. at 595 & n.20 (discussing the codification).

Both text and history thus make clear that the gubernatorial consent requirement contained in section 18238 applies *only* where the federal government is acting under the authority conferred by the Facilities Act, as now codified in chapter 1803 of title 10. The Commission is certainly not doing so here. It is instead acting under the authority of the Base Closure Act—its only source of authority or even existence—without any reliance on chapter 1803, just as the President and later the Secretary of Defense will act solely under the Act as the process continues. Moreover, the Commission is performing actions distinct from those for which chapter 1803 provides authority. The primary purpose of that chapter is to provide for "the acquisition" in various ways "of facilities necessary for the proper development, training, operation, and maintenance of the reserve components of the armed forces, including troop housing and messing facilities." 10 U.S.C. § 18231 (2000); *see also* H.R. Rep. No. 81-2174, at 1 (1950) (stating similar purpose of original Facilities Act). To that end, chapter 1803 authorizes the Secretary of Defense to acquire or build facilities with federal money, as well as to make contributions to the states. *See* 10 U.S.C. § 18233 (2000 & Supp. IV 2004). Those contributions are to be used either to convert existing facilities for joint use by more than one reserve unit, *id.* § 18233(a)(2), or to acquire or convert new facilities "made necessary by the conversion, redesignation, or reorganization of units" of the National Guard of the United States by the Secretary of the relevant military department, *id.* § 18233(a)(3).

[4] Section 4(b) then became 10 U.S.C. § 2238, part of chapter 133. In 1994, Congress redesignated chapter 133 as chapter 1803, and sections 2231–2239 as sections 18231–18239, with section 2238 becoming section 18238. Pub. L. No. 103-337, § 1664(b), 108 Stat. 2663, 3010 (1994).

All of this federally funded construction for the benefit of the National Guard naturally could lead to the relocation of certain Guard units to new facilities. In these circumstances, section 18238 requires gubernatorial consent before a unit is "withdrawn" from its existing facility or "relocated" to a new one. The provision thus limits the ability of the Secretary of Defense to relocate National Guard units unilaterally *as an incident* of his powers under chapter 1803 to provide new facilities for the reserve components of the Armed Forces. In contrast, when the federal government uses the Base Closure Act to close or realign military installations—and thereby to relocate National Guard units—its power in no way derives from chapter 1803.

The same analysis applies even if the closure or realignment of a National Guard facility pursuant to the Base Closure Act should ultimately require the federal government to acquire land or construct facilities. That Act provides independent statutory authority for such development activity, by authorizing the Secretary of Defense to "take such actions as may be necessary to close or realign any military installation, including *the acquisition of such land, [or] the construction of such replacement facilities* . . . as may be required to transfer functions from a military installation being closed or realigned to another military installation." DBCRA § 2905(a)(1)(A) (emphasis added). Here again, because the exercise of such authority would not depend on anything in chapter 1803, it would be unconstrained by section 18238.[5]

C.

Section 104(c) of title 32 provides in full as follows:

> To secure a force the units of which when combined will form complete higher tactical units, the President may designate the units of the National Guard, by branch of the Army or organization of the Air Force, to be maintained in each State and Territory, Puerto Rico, and the District of Columbia. However, no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.

32 U.S.C. § 104(c). Related to this provision, section 104(a) authorizes each state to "fix the location of the units and headquarters of its National Guard," and

[5] There is an additional reason for not reading section 18238 to apply to the Base Closure Act. The Facilities Act grants authority to "the Secretary of Defense." *See, e.g.*, 10 U.S.C. § 18233(a). It follows that section 18238's limitation on that authority applies only to actions taken by the Secretary. Thus, the Facilities Act at least should not be read to apply to actions by the Commission or the President. And given that the final power to require closure or realignment under the Base Closure Act belongs to the President alone, *see Dalton*, 511 U.S. at 469–70, it would be anomalous to read section 18238 to apply to—and conflict with—the Secretary's subsequent duty (discussed above) to implement *all* of the closures and realignments on the list approved by the President.

section 104(b) provides that, except as otherwise specifically provided in title 32, "the organization of" the Army National Guard and Air Force National Guard "and the composition of [their] units" shall be the same as those of their respective branches of the federal Armed Forces.

For two reasons, we conclude that section 104(c) does not constrain actions taken pursuant to the Base Closure Act. First, the text of that section strongly suggests that the second sentence simply qualifies any exercise of authority under the first, and thus that its gubernatorial consent requirement does not apply to the exercise of any separate authority—such as the Base Closure Act—even if that authority may allow similar or overlapping actions. Second, reading the "However" sentence more broadly would so fundamentally undermine the Base Closure Act's detailed and comprehensive scheme that Congress could not have intended such a result. Indeed, the inconsistency between the integrated and exclusive procedures of the Base Closure Act and the requirement imposed by the second sentence of section 104(c) is sufficiently serious that, if the Act and section 104(c) did overlap, we would be compelled to read the former as impliedly suspending operation of the latter to the extent of the overlap.[6] Interpreting section 104(c) not to apply to the Act avoids that result and harmonizes the two statutes in a way fully consistent with the underlying purposes of each, as required by well-established rules of statutory construction.

We begin with the text. The second sentence of section 104(c) refers back to the first sentence in two significant ways; these references suggest that the second sentence's admonition that "no change" may be made without gubernatorial

[6] At least some closures or realignments of National Guard installations under the Base Closure Act may be said to involve a "change in the branch, organization, or allotment of a unit located entirely within a State," in which case, if section 104(c) did apply, gubernatorial consent would be required. We understand that phrase to reach only actions that would either alter the affiliation of a particular National Guard "unit" with a particular segment of the regular Armed Forces or move a Guard "unit" out of a state where it had been entirely maintained. This interpretation follows from reading the two sentences of section 104(c) together. In the first sentence, "branch" refers to the part of the Army with which the Guard unit is associated, and "organization" refers to the part of the Air Force. When used in the very next sentence, those terms should be given the same meaning. *Cf. Brown v. Gardner*, 513 U.S. 115, 118 (1994) (observing that the "presumption that a given term is used to mean the same thing throughout a statute [is] . . . surely at its most vigorous when a term is repeated within a given sentence") (citation omitted). Similarly, "allotment" is best understood, in light of the first sentence, to refer to the President's "designat[ion] of units . . . to be maintained in each State." Regulations issued by the National Guard Bureau adopt this interpretation: "Allotment to a state comprises all units allocated to and accepted by the Governor of that state for organization under appropriate authorization documents." National Guard Bureau, Departments of the Army and the Air Force, *Organization and Federal Recognition of Army National Guard Units*, NGR 10-1, § 2-2(a), at 5 (Nov. 22, 2002) (available at http://www.ngbpdc.ngb.army.mil/pubs/10/ngr10_1.pdf , last visited Aug. 12, 2014). Under this reading, section 104(c) would not restrict the transfer of a National Guard unit's federally owned equipment or armaments, so long as the "unit" itself remained in place and its branch or organization were not changed. Although the provision so construed is limited, we understand that certain closures or realignments proposed by the Secretary in the current round may involve relocating an entire National Guard unit out of a given state, which could amount to a change in "allotment."

approval is best read simply to constrain actions conducted under the first sentence's authorization of certain presidential "designat[ions]." For one, the beginning word, "However," is one that necessarily refers to and limits what comes before. For another, the words "branch" and "organization" appear in both sentences of section 104(c). In the first sentence they describe the scope of the President's power; in the second, they describe the scope of the limitation on that power. This parallel construction indicates that the second sentence was intended to apply when the President takes action under the first sentence, not when he acts pursuant to authority conferred on him by entirely separate and distinct authorizations.

This reading finds additional support in the statutory history. What is now section 104(c) is the combined product of the National Defense Act of 1916 and the amendments enacted in 1933. Section 60 of the National Defense Act allowed the President to associate National Guard units with particular branches of the regular Army and to arrange those units geographically so that, when combined, they would form complete tactical units. 39 Stat. at 197. As originally enacted, this section granted no veto authority to the states. In 1933, however, Congress qualified this presidential power, such that section 60 read as follows:

> [T]he President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: *Provided*, That no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.

Act of June 15, 1933, § 6, 48 Stat. at 156. The language of this amendment demonstrates even more clearly that Congress did not intend the gubernatorial consent provision to be a free-standing requirement for all actions taken by the federal government with respect to the National Guard. Instead, the use of a proviso form—linking the second clause to the preceding one both grammatically (by the colon followed by the word "*Provided*") and syntactically (by the repetition of the words "branch" and "arm")—indicates that Congress intended merely to qualify the authority it had previously conferred on the President in the 1916 Act.

This provision reached its current form in the 1956 codification, discussed above in connection with section 18238. *See* Pub. L. No. 84-1028, sec. 2, § 104(c), 70A Stat. at 598. As with the changes made to section 18238, those made to section 104(c) at that time were stylistic, and were not intended to alter the scope or meaning of the provision. *See supra* Part II.B.

Thus, given both the language of the current text and the history of that text, the second sentence of section 104(c) is best read simply as a proviso of the first, i.e.,

as a statement "restricting the operative effect of statutory language to less than what its scope of operation would be otherwise." 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47:08, at 235 (6th ed. 2000) ("Sutherland"); *see Ga. R.R. & Banking Co. v. Smith*, 128 U.S. 174, 181 (1888) ("The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular."). This textual reading is consistent with the general rule that a proviso should be construed narrowly, *see Comm'r v. Clark*, 489 U.S. 726, 739 (1989), and "to refer only to the things covered by a preceding clause," *Alaska v. United States*, 545 U.S. 75, 106 (2005).

It is true that courts do not always apply the general rule that a proviso is limited to the provision it qualifies. *See* 2A Sutherland § 47:09, at 238–39; *Alaska*, 545 U.S. at 106–07. But our analysis here rests only on the particular text at issue—focusing on the obvious connections between the two sentences of section 104(c), which the statutory history makes even more obvious, as well as on the absence of any language indicating that the proviso was intended to reach beyond the scope of the provision that it qualifies. In addition, the existence of a separate gubernatorial consent provision in section 18238 further suggests that section 104(c)'s proviso was not intended to be comprehensive. Our interpretation thus does not depend on invoking a presumption to clarify a text more naturally read in a different way, but instead relies on what Congress intended when it enacted section 104(c), as evidenced by the words that it used and the context in which it used them. *See* 2A Sutherland § 47:09, at 239–40. All of these indicators point toward giving the proviso a narrow cast.

This textual reading of the scope of section 104(c)'s proviso finds additional support in the rule that seemingly inconsistent statutes should be construed, where their text permits, to avoid a conflict. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000) ("[I]t is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict."). This rule of statutory construction reinforces the need to construe the proviso narrowly, as a more expansive interpretation would create serious conflicts between section 104(c) and the Base Closure Act. The Act establishes comprehensive procedural and substantive criteria to be used for making base closure and realignment decisions. It imposes strict deadlines on various Executive Branch actors and on Congress; establishes and limits the criteria on which the Secretary may rely in preparing his list of recommendations; establishes and limits the criteria on which the Commission may rely in reviewing and revising the Secretary's list; and constrains the President and Congress to all-or-nothing decisions about the entire package of recommendations. These finely wrought procedures are designed to

be—and can work correctly only if they are—wholly integrated as a single package, exclusive of and unimpeded by external procedural requirements like a gubernatorial veto. Accordingly, we must read section 104(c)'s proviso—consistent with its text and statutory history—as not applying to the exercise of authority under the Base Closure Act.[7] *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

The potential conflicts between a gubernatorial consent requirement and the Base Closure Act take several forms. First, where it applies and while it is in force, the Act is expressly designated as the "*exclusive* authority" for the closure or realignment of federal military installations in the United States. DBCRA § 2909(a) (emphasis added). This exclusivity would be eviscerated if an entity not given any authority by the Act were nevertheless allowed to *deselect* particular installations from the list of proposed closures and realignments. The Act, in contrast to the roles carefully selected for the Secretary, Commission, President, and Congress, designates no role whatsoever for state governors in the selection process. It would be a serious incursion on the Act's comprehensive procedural scheme to allow a different set of actors, unmentioned in the Act with regard to selection, and operating at an entirely different level of government, to play such a crucial and potentially disruptive role in determining which installations could be closed or realigned. Indeed, such a conclusion would allow state governors to exercise a power that the Act withholds from *all* of the federal actors on which it confers responsibility: the ability to block the closure or realignment of an *individual* installation for *any reason*. In addition, Congress knew how to confer a

[7] If we were to read the second sentence of section 104(c) as reaching beyond the section in which it appears, we would be compelled to read the Base Closure Act as impliedly repealing (or, more accurately given the time-limited nature of the Act, temporarily suspending) the proviso to the extent that the proviso would interfere with and constrain the exercise of authority under the Act. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (describing the "well-settled" rule that "where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"); 1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 23:9, at 458 (6th ed. 2002) ("[I]t is only natural that subsequent enactments could declare an intent to repeal preexisting laws without mention or reference to such laws. A repeal may arise by necessary implication from the enactment of a subsequent act."). The general presumption against implied repeals is overcome where there is a clear conflict between provisions enacted at different times or a clear indication that, in enacting the later statute, Congress intended to supplant the earlier one. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 766–67 (2004); *Branch v. Smith*, 538 U.S. 254, 273 (2003); *see also In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991) (holding that the Trans-Alaska Pipeline Authorization Act impliedly repealed the earlier Limitation Act, because the former was "comprehensive" and its "scheme simply cannot work if the Limitation Act is allowed to operate concurrently"). For the reasons given in the text below, such would plainly be the case here. Congress intended the Base Closure Act to be an integrated, comprehensive, and exclusive statutory scheme, and a limited suspension of the previously enacted proviso in section 104(c) (which was last amended before the Base Closure Act was first enacted in 1990) would be "necessary to make [the Act] work." *Cf. Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

role on governors (and other non-federal entities) when it wanted them to have one: The Act expressly gives to state and local officials (including governors in some cases) the right to be consulted regarding and even veto certain federal actions, but these are actions implementing the list, *after* it has been approved. *See* DBCRA § 2905(b)(2)(D) & (E), (3)(B) & (D), (5)(B) & (C)(i). In this context, the Act's contrasting silence about the role of state governors in the process of selecting bases for closure and realignment must be considered conclusive. *See, e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

Similarly, applying section 104(c) to the Act would unravel the exclusivity of the selection criteria that Congress has woven into the rules for both the Secretary and the Commission. Under section 2913(f), the "final selection criteria specified in [section 2913] shall be the *only criteria* to be used, along with the [Secretary's] force-structure plan and infrastructure inventory" in determining the Secretary's recommendations (emphasis added). Furthermore, the Secretary in applying these criteria must "consider *all* military installations inside the United States *equally* without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department." DBCRA § 2903(c)(3)(A) (emphases added). Although this provision is not free from ambiguity (the concluding "without regard" clause might be read as limiting the sense of "equally" rather than merely emphasizing one aspect of equal consideration), there is nevertheless tension between this mandate and the application of a unique immunity for National Guard installations. The Commission faces analogous restrictions, as it may depart from the Secretary's recommendations only if, among other things, it determines that he "deviated substantially from the force-structure plan and final criteria." *Id.* § 2903(d)(2)(B); *see also id.* § 2914(d) (imposing other constraints). Thus, the base closure framework is unambiguously designed not to allow either the Secretary or the Commission to make decisions about which installations to close or realign on any additional criteria not described in the Act itself—such as the wishes of state governors. A requirement that gubernatorial consent be obtained before particular installations may be recommended for closure or realignment cannot be squared with this crucial feature of the Act.

Section 2914(b), which Congress added for the 2005 round, confirms this interpretation by expressly allowing one narrow exception from the exclusivity of selection criteria, and giving even that exception a minimal scope. This section requires the Secretary, in developing his recommendations, to "consider any notice received from a local government in the vicinity of a military installation that the government would approve of the closure or realignment of the installation." *Id.* § 2914(b)(2)(A). Yet at the end of the day, "[n]otwithstanding" this requirement, the Secretary must base his recommendations only on "the force-structure plan,

infrastructure inventory, and final selection criteria." *Id.* § 2914(b)(2)(B). The Act makes no comparable provision for state officials—or, indeed, for any officials who *disapprove* a possible closure or realignment. In light of this narrow accommodation of the view of local governments, the exclusion of any accommodation of the views of non-consenting governors is powerful evidence that Congress did not expect—and would not have wanted—a gubernatorial veto provision to impede any action proposed or carried out under the Base Closure Act. *Cf. United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned.").

The conflict between an expansively interpreted version of section 104(c) and the comprehensive scheme of the Base Closure Act becomes particularly acute in the context of the President's role under the Act. As previously noted, the Act imposes no constraints on the President's discretion to approve or disapprove the Commission's recommendations. If state governors had a veto power over actions under the Act, however, one of two absurd consequences would follow. On the one hand, the President could take into account a gubernatorial veto. The President's power under the Act, however, is all-or-nothing; he is barred from editing out a particular installation to whose closure or realignment a governor objects. Accordingly, his only option for giving effect to the gubernatorial veto would be to reject the entire list.[8] In such case, the governor would receive a veto power not simply over a particular National Guard installation—which, as explained above, is extraordinary enough in the context of the Act—but rather over the *entire set* of recommended closures and realignments. Such a power not only would exceed the scope of section 104(c) itself, but also would be clearly irreconcilable with a nationwide, federal base closure process that, as described above, provides no role for governors in selecting installations for closure or realignment. On the other hand, the President might disregard a gubernatorial objection (notwithstanding section 104(c)) and approve the entire list. This action, however, would set up yet another conflict: Section 2904(a) of the Act requires the Secretary, in implementing the final list, to "close *all* military installations recommended for closure" and "realign *all* military installations recommended for realignment." DBCRA § 2904(a)(1), (2) (emphases added). In that scenario, the Secretary could not comply with section 104(c) without violating section 2904(a).

Although these specific conflicts are extremely significant, we also cannot overlook that reading section 104(c) to apply to actions under the Base Closure Act would thwart the broader goal of the Act: to replace an essentially ad hoc and politically unworkable process, *see Dalton*, 511 U.S. at 479, 481–82 (opinion of

[8] Although the President could return the list to the Commission with objections based on the veto, that would not solve the problem. If the Commission simply deleted the vetoed recommendations, it would violate the exclusivity of selection criteria. If it did not, the President would face the original problem again when the Commission returned the list.

Souter, J.), with a comprehensive, unified, and rational one, "a fair process that will result in the timely closure and realignment of military installations inside the United States," DBCRA § 2901(b). With respect to National Guard installations at least, applying section 104(c) would revive the ills of the pre-Act process. Justice Souter's observations in *Dalton* (on behalf of four Justices) about the incompatibility of the Base Closure Act with judicial review would thus apply with equal force to a gubernatorial veto:

> If judicial review could *eliminate one base* from a package, the political resolution embodied in that package would be destroyed; if such review could eliminate *an entire package*, or leave its validity in doubt when a succeeding one had to be devised, the political resolution necessary to agree on the succeeding package would be rendered the more difficult, if not impossible. The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled, go far to persuade me that Congress did not mean the courts to have any such power through judicial review.

511 U.S. at 481–82 (emphases added).

For these reasons, a gubernatorial consent requirement would do serious damage to—and thus be incompatible with—the carefully calibrated scheme set up by the Base Closure Act. Under applicable rules of statutory construction, this incompatibility confirms our interpretation that section 104(c)'s proviso qualifies only the power that section 104(c) itself grants.[9] Here, because the power exercised in the base closure process by the Secretary, the Commission, and ultimately the President, including the power to relocate National Guard units, is in no way derived from or dependent on section 104(c), it follows that the proviso does not apply.[10]

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[9] This interpretation does not render the proviso a nullity. The provision applies whenever the President acts pursuant to the authority granted him by the first sentence of section 104(c). Although the President's decision to rearrange National Guard units under that authority (which he can do at any time) is not constrained by the Base Closure Act's elaborate requirements, he is required in such circumstance to secure gubernatorial permission before altering the branch, organization, or allotment of a unit. Nor does our interpretation produce a result at odds with the proviso's apparent purpose. When Congress in 1933 was in the process of adding to the predecessor of section 104(c) the requirement of gubernatorial consent, the House Committee on Military Affairs stated the reasons for the addition as follows: "[W]here a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service," the "State should not arbitrarily be compelled to accept a change." H.R. Rep. No. 73-141, at 6 (1933). The stated goal was to protect states against *arbitrary* changes. Although one might find the closures and realignment wrought by the elaborate process of the Base Closure Act imperfect, one could hardly consider them arbitrary. Indeed, the entire point of the Act is to *reduce* arbitrariness.

[10] Necessarily included within your request is the question whether the authority to close or realign National Guard installations under the Base Closure Act, unrestricted by a requirement of state consent, would violate the Constitution, or, at least, whether we should read sections 18238 and 104(c) broadly

III.

For the foregoing reasons, we conclude that the federal government, acting pursuant to the Base Closure Act, need not obtain permission from state governors before closing or realigning National Guard installations.

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

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so as to avoid a possible constitutional violation. We see no basis for an affirmative answer. First, the most plausible source of any constitutional infirmity would be the second Militia Clause. But that clause authorizes *Congress* to provide for "organizing, arming, and disciplining, the Militia," U.S. Const. art. I, § 8, cl. 16, which includes forming the militia into organized units, *Perpich*, 496 U.S. at 350. Indeed, "the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress," *id.* at 349; and concurrent state power in this area is clearly subordinate to that federal power. *See Second Amendment*, 28 Op. O.L.C. at 162–64. Second, the modern National Guard, intimately connected with the federal Armed Forces, rests to a large extent on Congress's distinct power to raise and support armies, which is not qualified by the Militia Clauses. *See supra* Part I.B. Third, the Act applies only to federal installations, and thus finds further support in Congress's power "to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. That power is not held at the mercy of the states. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539, 543 (1976). Finally, as already noted, the original version of what is now section 104(c), in force from 1916 to 1933, contained no requirement of gubernatorial consent; we have located no constitutional objections raised during that time. Rather, the proviso apparently was added in 1933 solely for policy reasons. *See* H.R. Rep. No. 73-141, at 6 (quoted above in note 9).

Proposed Amendments to Military Commission Order No. 1

The Secretary of Defense could, consistent with the President's Military Order of November 13, 2001, revise Military Commission Order No. 1 so that the presiding officer would rule upon all questions of law (subject to the requirements of section 4(c)(3) of the Military Order regarding questions of admissibility), and the other members of the commission would make findings and pronounce sentence.

August 12, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

You have requested our view on whether certain proposed amendments to the Secretary of Defense's Military Commission Order No. 1 ("Military Commission Order") are consistent with the President's Military Order of November 13, 2001, 3 C.F.R. 918 (2001 Comp.) ("President's Military Order"). We have reviewed the proposed amendments and conclude that all of them are consistent with the President's Military Order.

One proposed change merits special discussion: It has been proposed, through several of the revisions, to amend the Military Commission Order so that (i) the presiding officer of a military commission would make all legal rulings but not vote on findings or sentence and (ii) the other members of the commission would vote on findings and sentence but not make any legal rulings (except on some questions of admissibility). As explained below, such amendment would be consistent with the President's Military Order.

The President's Military Order, entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," provides, among other things, that the Executive Branch administer trials by military commission of al Qaeda members and other foreign individuals who have committed or supported acts of international terrorism. *See* President's Military Order §§ 2(a), 4(a); *see also id*. § 7(c) (order "is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party"); *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 8–9 (D.C. Cir. 1999) (holding that there was no "judicial review" of an executive order that expressly disclaimed creating any rights, and rejecting the use of such order in seeking judicial review of agency action as "an indirect—and impermissible—attempt to enforce private rights under the order"). The Secretary of Defense, in turn, is expressly authorized by that order to promulgate such "orders and regulations" as "may be necessary" to provide for trial by military commission. President's Military Order § 4(b). His orders and regulations shall "include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys." *Id.* § 4(c). In addition, the procedures adopted by the Secretary must "at a minimum" meet eight specific requirements set forth in section 4(c). Among these

eight requirements, and particularly relevant here, is section 4(c)(2), which requires "a full and fair trial, with the military commission sitting as the triers of both fact and law." In addition, section 4(c)(3) provides for the "admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person"; that is, section 4(c)(3) requires that the presiding officer make rulings on admissibility, subject to the override of a majority of the commission.

Pursuant to these authorities and requirements, the Secretary of Defense promulgated the Military Commission Order on March 21, 2002. That order allows for both the presiding officer and all other members of the military commission together to decide questions of law or fact (subject to the special rule for questions of admissibility). *See, e.g.*, Military Commission Order §§ 5(L), 6(F).

To determine whether the above-described proposal, dividing authority between the presiding officer and the other members of a commission, is consistent with the President's Military Order, the primary question is whether such division would contravene the requirement of section 4(c)(2)—that "the military commission sit[] as the triers of both fact and law." Although it is possible to read this section to require each member of a military commission to decide on all questions of law and fact, in which case the proposed change would violate section 4(c)(2), it is also permissible to read it as merely requiring that the military commission—as opposed to some other entity—decide all questions of law and fact at trial. The latter is a reasonable reading of section 4(c)(2) given its text and the context.

The text of section 4(c)(2) might be considered awkward in referring to "the military commission" (singular) as the "triers" (plural). This construction, however, likely just reflects that the term "military commission" is a collective noun. It therefore "can take either singular or plural verbs and subsequent pronouns." *Columbia Guide to Standard American English* 100 (1993). Here, given the plural "triers," section 4(c)(2) appears to use the term "military commission" to mean the "military commission members," as individuals, rather than the military commission as an entity. *See Oxford Dictionary of English Grammar* 69 (1994) ("The choice of singular or plural verb—and corresponding pronouns and determiners—depends on whether the group is considered as a single unit or a collection of individuals."); Morton S. Freeman, *The Grammatical Lawyer* 305 (1979) ("Nouns known as collective nouns may be either singular or plural, depending upon whether the group is considered as a whole—in which case singulars are used—or as individual members—in which case plurals are used[.]"). Under this reading of "military commission," it is true that one might conclude that the word "both" in section 4(c)(2) indicates that *each* member of the military commission must decide all questions of fact and law. But the language is not unequivocal on this point, and one also could conclude that section 4(c)(2), in requiring that the military commission members be "triers of both fact and law," merely indicates that *some* from among the military commission members must

resolve all legal or factual questions. The quoted phrase, in other words, may be read as ensuring that the military commission, in conducting "a full and fair trial," is complete in and of itself with regard to both fact and law—not delegating any of its powers as trier to any other court or tribunal. If, for example, a small firm composed of two policy experts and a lawyer were hired to brief members of Congress on "both the facts and law" underlying a particular bill, it would at the very least be reasonable to understand the terms of the retention as not requiring each of the members of the firm to master all issues, but rather as leaving the members free to divide up the responsibilities as appropriate, by, for example, having the policy experts handle the factual issues and the lawyer handle the legal issues. The firm would still be providing the briefing as to both types of issues. Thus, under the most natural reading of the term "military commission" as used in section (4)(c)(2), together with this latter reading of the phrase "triers of both fact and law," that section may reasonably be interpreted as not barring the proposed change in the Military Commission Order.

Alternatively, and notwithstanding the plural "triers," section 4(c)(2) might be read to use "military commission" to mean the military commission as an entity. That sense does seem to be the more frequent usage in section 4. *See* President's Military Order § 4(a) (providing that a covered individual shall "be tried by military commission for any and all offenses triable by military commission"), § 4(c)(1) (providing for "military commissions to sit at any time and any place"), § 4(c)(3) (referring to the "presiding officer of the military commission" and "any other member of the commission"). Under this reading, section 4(c)(2) would simply require that the military commission as an entity decide in some authorized fashion all questions of fact or law, without specifying how the entity did so and thus without imposing any requirement regarding the duties of individual commission members. Thus, whatever the better reading of section 4(c)(2), it would not prohibit the Secretary of Defense from specifying the details for how the commission made such decisions.

In addition, other provisions of the President's Military Order further support the view that not every member (or even a majority of the members) of a military commission need participate in or approve every decision. Section 4(c)(3), for example, distinguishes between the roles of the "presiding officer" and "other member[s]," thus expressly contemplating the separate allocation of authority among military commission members. And sections 4(c)(6) and (c)(7) provide for conviction and sentencing "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present." Nothing in these two provisions requires that each member vote on findings and sentence. To the contrary, by making clear that the military commission need not act by unanimity or with all members present, they contemplate otherwise and, together with section 4(c)(3), reinforce our view of the permissible readings of section 4(c)(2).

As noted above, the President's Military Order also expressly grants to the Secretary of Defense the broad authority to promulgate such "orders and regula-

tions" as "may be necessary" to "carry out" the President's order to provide for trial by military commission, *id*. § 4(b), which orders and regulations shall include, but are not limited to, "rules for the conduct of the proceedings of military commissions," *id.* § 4(c). *See also id*. § 6(a) ("[T]he Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order."). Two related points follow from this grant. First, because the President has committed to the Secretary the authority to carry out the presidential order requiring military commissions, the Secretary has discretion to follow any reasonable interpretation of ambiguous provisions in the President's order. *See Udall v. Tallman*, 380 U.S. 1, 18 (1965) (agency interpretation of presidential orders is lawful "if . . . the [agency]'s interpretation is not unreasonable, if the language of the orders bears [its] construction"); *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981) ("In light of an agency's presumed expertise in interpreting executive orders charged to its administration," the agency's interpretations should receive "great deference."). Section 4(c)(2) is such a provision and, as shown, the Secretary may reasonably interpret it such that it would permit the proposed change in the Military Commission Order. Second, the President has granted to the Secretary broad authority to specify details for the workings of the military commission. *See* Letter for Raymond J. Kelly, Chairman, Railroad Retirement Board, from Robert W. Minor, Acting Deputy Attorney General, Department of Justice at 1 (Sept. 13, 1954) (where an executive order gave agencies authority to establish personnel regulations respecting national security, and where that order did not address a particular matter, that matter was "left to the discretion of each agency"); *cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (agency's power to administer a statute "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress") (internal quotation marks and citation omitted). Therefore, and under a reasonable reading of section 4(c)(2), the Secretary has authority under section 4(b) to specify particular duties for commission members to the extent that the President has not expressly done so in his order (as he has through the eight specific requirements in section 4(c)).

We therefore conclude that the Secretary of Defense could, in a manner consistent with the President's Military Order, revise the Military Commission Order as proposed so that the presiding officer would rule upon all questions of law (subject to the requirements of section 4(c)(3) regarding questions of admissibility) and the other members would make findings and pronounce sentence.

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

Application of 18 U.S.C. § 207(c) to Proposed Communications Between Retired Navy Flag Officer and Marine Corps Commanders in Iraq Regarding Security Issues

Although more detailed information is needed to make a complete determination in this fact-sensitive area, it appears that 18 U.S.C. § 207(c) would forbid at least some of the proposed communications between a retired Navy flag officer and Marine Corps commanders regarding the security situation in Iraq.

September 13, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE NAVY

Through the General Counsel of the Department of Defense, you have asked for our opinion whether 18 U.S.C. § 207(c) (2000) prohibits certain proposed communications between a retired Navy flag officer, now employed by a defense contractor under contract to provide services to the United States Air Force and Army Corps of Engineers in Iraq, and United States Marine Corps commanders. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from William J. Haynes II, General Counsel, Department of Defense (Aug. 17, 2005). These communications "would seek to effect changes . . . in the current state of security" in parts of Iraq and to "make recommendations" about procedures for pursuing the insurgents responsible for attacks on United States military personnel and private contractors. Memorandum for the Assistant Attorney General, Office of Legal Counsel, from Alberto J. Mora, General Counsel of the Navy, *Re: Request for Legal Opinion* at 1 (Aug. 10, 2005) ("Mora Memorandum"). Although more detailed information is needed to make a complete determination in this fact-sensitive area, it appears that at least some of the proposed communications would be forbidden by section 207(c).

I.

A rear admiral retired from the Navy and became employed as the President of a company ("Company") whose parent entity ("Parent") is currently under contract with the United States Air Force and United States Army Corps of Engineers to provide construction and other services in Iraq.[*] As President of the Company, the retired officer oversees construction of two bases that the firm is building for the new Iraqi army in an area of the country under the responsibility of the United States Multi-National Force-West ("MNF-W"). The MNF-W command, com-

[*] Editor's Note: For privacy reasons, the name and affiliation of the officer in question have been redacted from the published version of this opinion.

posed primarily of Marine Corps personnel, reports directly to CENTCOM, which in turns reports to the Secretary of Defense.

In recent months, attacks by Iraqi insurgents have killed or injured a number of the Company's employees and subcontractors. Given the security situation, the Company seeks to coordinate more effectively with the MNF-W commanders responsible for securing the area in which the Company is working to fulfill its contractual obligations. Given the retired officer's military experience, the Parent would like him to communicate directly with MNF-W personnel on these matters. More specifically,

> the Parent wants the retired officer to provide information related to his observations about security and defense, areas within the retired officer's expertise. The Parent desires for the retired officer to ask questions and seek information related to how the Parent's employees can better protect themselves, including communications regarding the Parent's scope of work and its coordination of on-site activity.

Letter for Marilyn L. Glynn, Acting Director, Office of Government Ethics, from Michael R. Rizzo, McKenna, Long & Aldridge LLP, *Re: Request for Formal Advisory Opinion Pursuant to 5 CFR 2638.301 et seq.* at 3 (May 31, 2005) ("Rizzo Letter"). The Parent believes that effective communications on these issues between the retired officer and Marine Corps personnel is necessary to ensure the security of the Company's employees and will potentially save lives. *Id.*

II.

Section 207(c) of title 18 provides criminal penalties for a "senior [officer] of the executive branch" who

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

18 U.S.C. § 207(c)(1). Thus, as a recently retired senior naval officer,[1] the retired officer is barred from making certain types of communications with "any officer

[1] There is no dispute that flag officers such as the retired officer qualify as "senior personnel" within the meaning of section 207(c). *See* 18 U.S.C. § 207(c)(2)(iv).

or employee" of the Department of the Navy during the statute's one year "cooling off" period. *Cf.* 5 C.F.R. § 2641, app. B (2005) (designating the Department of the Navy as "distinct and separate" from other components of the Department of Defense for purposes of section 207). And because the Marine Corps is part of the Department of the Navy, *see* 32 C.F.R. § 700.204(a) (2004), the prohibition extends to communications between the retired officer and Marine Corps personnel in Iraq.

At the same time, however, "[s]ection 207 does not by its terms forbid a former Executive Branch official from communication with his former agency in all circumstances." Memorandum for Stuart M. Gerson, Assistant Attorney General, Civil Division, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel at 2 (Mar. 15, 1993) ("Gerson Memorandum"). Instead, a communication is prohibited *only* if it is made (1) "with the intent to influence"; (2) "on behalf of any other person (except the United States)"; and (3) "in connection with any matter on which such person seeks official action." In addition, the statute offers a safe harbor to former senior officials who make or provide a statement "which is based on the individual's own special knowledge in the particular area that is the subject of the statement, *if no compensation is thereby received*." 18 U.S.C. § 207(j)(4) (emphasis added). Based on the limited factual information available to us, we believe that most of the communications proposed by the retired officer fall within section 207(c)'s prohibition and are not protected by the "special knowledge" exception. That conclusion, however, does not apply to situations in which the retired officer would do nothing more than request generally available factual information from MNF-W relating to security or other matters relevant to the Company's work.

In the first place, the role contemplated for Mr. Kubic is not that of a behind-the-scenes operative, but rather is a direct and personal one in which Mr. Kubic would be speaking to the Marine Corps officers with the intention that the information or views conveyed be attributed to him. Accordingly, Mr. Kubic would undoubtedly be making "communications" within the meaning of section 207(c). *See "Communications" Under 18 U.S.C. § 207*, 25 Op. O.L.C. 59, 62 (2001) (construing section 207(c) to include an attribution requirement).

Moreover, as we understand the retired officer's proposal, the purpose of at least some of those communications would be to persuade the commanders in MNF-W to use their forces in ways that the retired officer believes will provide better protection for both civilian contractors (including the Company's employees) and military personnel. (We take it that this understanding is what the Rizzo Letter means when it refers to "discussions regarding scope of work and coordination of on-site activity issues." Rizzo Letter at 2.[2]) Insofar as he seeks to engage in

[2] In your memorandum requesting a legal opinion, you describe the retired officer's proposal this way: "Through personal communication with local Marine commanders, if authorized, he would seek to effect changes in Marine Corps policy or practice regarding the current state of security around

such communications, the retired officer would clearly be "trying to influence the activities of the agency involved," and thus would satisfy the scienter and "official action" requirements of section 207(c). *Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party*, 17 Op. O.L.C. 37, 43 (1993); *see also* 5 C.F.R. § 2637.204(e) (2005) (section 207(c)'s prohibition on attempting to influence "applies to situations in which there is an appreciable element of actual or potential dispute or an application or submission to obtain Government rulings, benefits or approvals").[3] After all, decisions about how to deploy troops, and about how best to provide protection to military and civilian personnel in a war zone, are "official actions" of a branch of the Armed Forces. Direct communications with members of that branch by a former senior officer made with the goal of influencing those decisions come within the scope of section 207(c).

A different result follows, however, where the retired officer would merely be requesting generally available factual information from MNF-W commanders. OGE has long taken the position, and we have agreed, that a communication aimed solely at eliciting generally available information from a government agency is not made with the requisite "intent to influence" official agency action, and thus is not prohibited by section 207(c). *See* 5 C.F.R. § 2637.204(e); Memorandum for Component Heads, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel at 8 (Nov. 18, 1992) (noting that section 207(c) "does not apply to requests for factual information"); Memorandum for Tony Schall, Assistant to the Attorney General, from Timothy Flanigan, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Post Employment Restrictions* at 1 (Aug. 15, 1991) ("Schall Memorandum") (same). The retired officer thus remains free under section 207(c) to seek information or advice from the Marines regarding such matters as the security situation or the steps being taken by the military (or that the Company should take) to protect civilian contractors in Iraq. Although the sparse factual record before us makes it impossible to determine the extent to which the retired officer's proposed communications would actually fall into this category, it seems that at least some may do so. *See, e.g.*, Rizzo Letter at 3 ("the Parent desires for the retired officer to ask questions and seek information related to how the Parent's employees can better protect themselves."). We caution the retired officer, however, that especially where he contemplates communicating with Marine Corps officers himself, the line between

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Camp India and make recommendations about procedures for pursuing the AIF [Anti-Iraqi Forces] responsible for the mortar attacks." Mora Memorandum at 1.

[3] The Office of Government Ethics ("OGE") regulations contained in 5 C.F.R. pt. 2637 were written with respect to section 207 as it existed prior to its amendment in 1989, but both OGE and this Office have continued to rely on them when interpreting those portions of the statute that were unchanged by the amendments. *See "Communications" Under 18 U.S.C. § 207*, 25 Op. O.L.C. at 60 n.3.

seeking information and providing advice or otherwise attempting to influence decisions or actions may not always be clear, and that it is impermissible to use factual inquiries in an effort to influence the agency to take particular official acts. *See* Schall Memorandum at 2.

Next, we must consider whether the proposed communications—at least the ones that are intended to influence—will be made "on behalf of" someone other than the retired officer (or the United States). "By the express terms of the statute, a former officer or employee is free to communicate information or advice . . . as long as he does not do so 'on behalf of any other person.'" Gerson Memorandum at 2. We have previously opined that this language limits the reach of section 207 to those "communications that are made by one who is acting as an agent or attorney, or in some other representational capacity for another." Memorandum for Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 207(a) to Pardon Recommendation Made by Former Prosecutor* at 6 (Oct. 17, 1990) ("Boudin Opinion").[4] The "representational relationship" required by the statute "entails at least some degree of control by the principal over the agent who acts on his or her behalf." *Id.*

Here, because it seems that the retired officer would be speaking not on his own behalf, but rather at the behest and for the benefit of the Company, the statements he proposes to make would clearly satisfy this test. As we understand the situation, the retired officer's communications with MNF-W would be made in his capacity as President of ECCI and would be designed to help improve security in the parts of Iraq where the Company's personnel are working. In that context, it is difficult to deny that the retired officer would be acting "subject to the control or direction" of the firm, and thereby as the firm's agent or representative. Boudin Opinion at 6. Simply put, in this situation the retired officer would not "speak[] for himself alone." Gerson Memorandum at 3. Instead, he would speak for the Company and his efforts to use direct communications with his former department to influence agency action would fall squarely within the prohibitory terms of section 207(c).

Finally, we address the "special knowledge" safe harbor contained in section 207(j)(4). That exception allows a former official to make statements based on the individual's "own special knowledge," but only if "no compensation is thereby received." Even assuming that the security issues that would be the subject of the retired officer's statements would come within his own special knowledge, we agree with OGE that "the receipt of a salary, or other compensation for doing one's job generally, is sufficient, if the statement at issue is made as part of the

[4] Although the Boudin Opinion addressed only 18 U.S.C. § 207(a), the language it construed—"on behalf of any other person"—also appears in section 207(c), where it is used in the same way. Relying on the interpretive canon that a phrase that appears in multiple places in the same statute should be given the same meaning in each, we have previously applied the Boudin Opinion's analysis to section 207(c). *See* Gerson Memorandum at 3 & n.3.

individual's duties for his non-federal employer." Letter for Michael R. Rizzo, McKenna, Long & Aldridge LLP, from Marilyn L. Glynn, Acting Director, Office of Government Ethics at 5 (June 8, 2005). We think the best reading of the phrase "no compensation is thereby received" is that it excludes statements made in the ordinary course of an agency relationship for which the speaker receives compensation. In other words, if a former official is paid to represent the interests of a particular person or company, and makes statements aimed at advancing that end, he receives compensation "thereby," even if he is not paid on a statement-by-statement basis. Thus, as a salaried employee of the Company who would be communicating with the Marine commanders in the course of his employment, the retired officer may not take shelter in section 207(j)(4). A contrary conclusion—that a statement may be protected by section 207(j)(4) so long as the speaker is not paid specifically for making it—would impermissibly convert the exception into a mere accounting rule. It would suggest, for instance, that a lawyer could represent a client before the same agency where the lawyer was previously a senior official so long as he received a flat fee rather than an hourly rate. We do not think Congress intended to allow the statutory ban on such communications to be capable of evasion merely by clever bookkeeping.

We certainly understand, and are sympathetic to, the retired officer's pleas that he and his firm face a conflict between the federal ethics laws and the need to take steps to protect his employees from further danger. As described above, however, at least some of the communications proposed by Mr. Kubic would be covered by the language of section 207(c). And, although it contains a number of express exceptions for particular types of communications, *see, e.g.*, 18 U.S.C. § 207(j), the statute makes no exception for emergency situations. Nor is there an exception for communications made in war zones involving issues of safety and security. Given that Congress has not seen fit to legislate such exceptions, we are not at liberty to interpret such provisions into existence merely to bring about a desirable result.

This conclusion about the scope of section 207 does not leave the Company unable to communicate with military personnel in Iraq in order to help protect its personnel. Any Company employee not covered by section 207(c) remains free to discuss security matters (or any other issue) with MNF-W, and certainly may seek to persuade the military commanders to take whatever protective actions are thought necessary. Indeed, so long as he does not act with the intention that the views or information conveyed to Marine officers be attributed to him, the retired officer may play a "behind the scenes" role in such communications. *"Communications" Under 18 U.S.C. § 207*, 25 Op. O.L.C. at 63 (observing that under section 207(c), "former officials can sell their expertise to interested clients, and their clients can present all substantive information or views they wish to federal agencies"). In addition, as described above, the retired officer himself may seek generally available factual information from any military officer or department. And, because the Navy is separate from the Department of Defense for purpose of

the federal ethics laws, *see* 5 C.F.R. § 2641, app. B, the retired officer may always contact and attempt to influence officers and employees of military departments *other* than the Department of the Navy.

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

Appointments to the Board of the Legal Services Corporation

The President has authority to appoint a member of the Board of the Legal Services Corporation who has been confirmed after his or her statutory term of office has expired, where the holdover provision of the statute allows a member to serve until a successor is appointed.

September 20, 2005

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On July 28, 2005, the Senate confirmed the President's nominations of Thomas A. Fuentes and Bernice Phillips as members of the Legal Services Corporation's Board of Directors, for terms expiring July 13, 2005. 151 Cong. Rec. 19,014 (July 28, 2005). You have asked whether the President may now make these appointments and, if so, how long the appointees may serve. We believe that the President may make the appointments and that each appointee would serve at the pleasure of the President in a holdover capacity until his or her successor is appointed and qualifies.

The Legal Services Corporation ("LSC"), which "provid[es] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance," 42 U.S.C. § 2996b(a) (2000), has a board of directors "consisting of eleven voting members appointed by the President, by and with the advice and consent of the Senate . . . ." *Id.* § 2996c(a). The directors serve staggered terms of three years, with the terms of five directors expiring one year before the terms of the other six. *Id.* § 2996c(b). To preserve this staggering, "[t]he term of each member . . . shall be computed from the date of termination of the preceding term." *Id.* § 2996c(b). At the same time, to ensure the continuity of the LSC, the statute allows members in some cases to "hold over" after their terms expire and new terms begin: "Each member of the Board shall continue to serve [beyond the expiration of his or her term] until the successor to such member has been appointed and qualified." *Id.*

On January 24, 2005, the President nominated Mr. Fuentes and Ms. Phillips for vacancies on the Board and specified in the nominations that the nominees would serve terms expiring July 13, 2005. 151 Cong. Rec. 592 (Jan. 24, 2005). The nominations were for these foreshortened periods because the term for each nomination, in accordance with the statute, was "computed from the date of termination of the preceding term" and because the term of each nominee's predecessor had expired three years before that date. *Id.*

If the nominees had been confirmed and appointed before July 13, no matter how close to that date, there would be no doubt that they could "continue to serve" beyond that date. Thus, there would be no gap in the filling of the positions. The

question is whether the statute nevertheless bars a holdover from filling a gap simply because he was confirmed after July 13. We do not think that it does.

Although we have found no precedent for appointments to terms that have expired, we believe that the appointments of Mr. Fuentes and Ms. Phillips would be consistent with the statute. The statute provides for "members" of the Board to be "appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 2996c(a). Here, that would be done. The Senate has given its advice and consent to an appointment by the President. There is no doubt about which of the positions on the Board each of the prospective appointees would take. Even though the particular terms to which they were nominated have expired, the positions on the Board that they would occupy of course continue to exist. They therefore would be made "members" of the Board. Furthermore, because of the statutory provision under which "[e]ach member of the Board shall continue to serve until the successor to such member has been appointed and qualified," *id.* § 2996c(b), they may carry out their duties as members notwithstanding the expiration of the terms for which their appointments would be made. A member appointed to an expired term would serve pursuant to that provision, pending replacement by a successor.

It would, moreover, make little practical sense to conclude that the President lacks authority to make the appointments. The President in his nomination and the Senate in its confirmation have passed upon each prospective appointee's fitness for office, and the President is now about to make the final decision to effect the appointment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803). A conclusion that the President may not make the appointment would mean that the Senate's solemn act of advice and consent was a nullity, that the considerable effort of bringing the prospective appointment to this point was wasted, and that the Board would be denied the services that the President and Senate believe it should have.

Arguably, the "holdover" provision does not fit the present facts; it allows members to "continue to serve," and it might be argued that appointees who become members after the expiration of their terms do not "continue" to serve as holdovers because they did not serve earlier. However, an appointment under section 2996c(a) makes the appointee a "member" of the Board, and section 2996c(b) simply provides that, from that moment, the member may serve in a constant manner, without interruption, notwithstanding the expiration of his or her term, whenever that may occur. This reading is consistent with the sense of the verb "continue" as meaning "to be steadfast or constant in a course or activity: keep up or maintain esp. without interruption a particular condition, course, or series of actions." *Webster's Third New International Dictionary* 493 (1986). Furthermore, to the extent that the word "continue" is ambiguous, we construe it so as to promote a complete, fully functioning Board. The clear purpose of the holdover provision here, "like the holdover clauses that appear in the statutes of

many independent agencies, is to ensure continuity and avoid the leadership vacancies that otherwise would exist until successor officials could be appointed," and "to prevent gaps in agency leadership" and "ensure agency continuity," *Swan v. Clinton*, 100 F.3d 973, 985 (D.C. Cir. 1996) (citations omitted) (interpreting a provision that precluded reappointment and thus could raise an issue about continuity, but relying on authorities about various holdover clauses to reach the general conclusion about their purpose); and this gap-filling purpose supports the conclusion that the appointees here can serve as holdovers.[1]

The appointees' status, to be sure, would be unusual. A position held by a holdover official at the LSC is vacant for the purposes of the Recess Appointments Clause. *Effect of Statutory Holdover Provisions*, 2 Op. O.L.C. 398 (1978); Memorandum for C. Boyden Gray, Counsel to the President, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments to the Board of Directors of the Legal Services Corporation* (Nov. 28, 1989); *McCalpin v. Dana*, No. 82-542 (D.D.C. Oct. 5, 1982) (the President could displace holdover directors by making recess appointment), *appeal dismissed as moot*, *McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985); *but see Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891 (D.D.C. 1994) (when an LSC director is serving under a holdover provision, the director's office is not vacant and thus cannot be filled through a recess appointment), *rev'd on other grounds*, *Wilkinson v. Legal Servs. Corp.*, 80 F.3d 535 (D.C. Cir. 1996). Thus, the appointments here would not "fill" the positions for those purposes. But this consequence does not present a good reason for concluding that the appointment cannot be made at all. These appointees would be removable at will by the President and would not have the tenure protection that other appointees may enjoy, *see, e.g.*, *Swan*, 100 F.3d at 984 (even assuming that appointees would have tenure protection during their terms, they are removable without cause while they are holding over), but they would be able fully to discharge the duties of their offices until they are replaced by successors.[2]

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[1] A similar gap-filling purpose has informed the interpretation of the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, where the phrase "Vacancies that may happen during the Recess of the Senate" has been construed to reach vacancies that first occur before a recess but still exist when the recess begins. In accordance with this construction, the court in *Evans v. Stephens*, 387 F.3d 1220, 1226–27 (11th Cir. 2004) (en banc), explained that "interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning."

[2] Although the President's power to displace a holdover director through a recess appointment is sanctioned by the longstanding view of the Executive Branch and by some practice, the exercise of a power simply to remove a holdover director at the LSC would be, as far as we are aware, unprecedented. We nevertheless believe that the President has the power to remove a holdover director at will.

By statute, a director "may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for

Finally, we do not believe that Mr. Fuentes and Ms. Phillips could be considered to be appointed to three-year terms beginning July 13, 2005. Presidents sometimes make two nominations of a person at the same time—one nomination for the unexpired portion of a term and another for the succeeding full term. *See* Memorandum for John D. Calhoun, Assistant Deputy Attorney General, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel, *Re: Prospective Appointments by the President* (Apr. 7, 1960). Here, however, the President nominated Mr. Fuentes and Ms. Phillips only for the unexpired portions of the terms ending July 13, 2005. The practice of making simultaneous nominations for successive terms, along with the absence of such nominations here, negates any argument that the Senate's confirmations for terms ending July 13, 2005, should be regarded as confirmations for terms ending in 2008, and that the later appointments would also be for such terms. *Cf. Case of Chief Constructor Easby*, 16 Op. Att'y Gen. 656, 657 (1880) ("The law of the term of the office, of

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no other cause." 42 U.S.C. § 2996c(e). The statute is silent on removal by the President. We would not construe this legislative silence as precluding the President from removing a holdover director, because such a construction would raise serious constitutional concerns. *See The President's Authority to Remove the Chairman of the Consumer Product Safety Commission*, 25 Op. O.L.C. 171, 172 (2001) ("CPSC Memorandum"). Therefore, in our view, "unless Congress signals a clear intention otherwise, a statute should be read to preserve the President's removal power, so as to avoid any constitutional problems." *Id.* at 173 (citations omitted). There may still be a question whether the President's removal authority should be limited by an implied "for cause" restriction. Whatever arguments for such a restriction might be offered as to removal of a director during his term, we believe that removal of a holdover director would not require cause. A "for cause" restriction on removal during a holdover period cannot be justified as necessary for the LSC's independence. As the District of Columbia Circuit held in rejecting the argument that holdover officials at the National Credit Union Administration were removable only for cause,

> [h]oldover members can be replaced, whether they have removal protection or not, by the President nominating and the Senate confirming their successors. As a result, a removal restriction will not protect holdover members from the aftermath of a Presidentially unpopular decision, and holdover members know that even if they cannot be removed directly, an unpopular decision may lead the President to nominate a successor immediately or encourage the Senate to speed up confirmation hearings. . . . [A]ll that removal protection achieves is to make holdover members more dependent on Senate inaction than on the President.

Swan, 100 F.3d at 984. A concurring opinion was, if anything, more emphatic:

> [A]fter the term expires, the reason for the assumption [that tenure protection could ever be inferred] expires as well. Unless, then, Congress indicates in the legislation itself that it intends some measure of job protection during the holdover period, which in this sort of situation—where Congress did not explicitly provide a good cause limitation on removal during the actual term—is virtually inconceivable, there is no reason at all to infer a congressional purpose to limit the President's removal power during the holdover period.

Id. at 990 (Silberman, J., concurring). Thus, in addition to the reasons that counsel against inferring tenure protection even during an official's term, *see* CPSC Memorandum, 25 Op. O.L.C. at 172–74, there are compelling reasons that the statutory silence about the President's removal authority should not be interpreted to impose a removal restriction during a holdover period.

course, controls special language in the nomination and confirmation."); *Quackenbush v. United States*, 177 U.S. 20, 27 (1900) ("the terms of the commission cannot change the effect of the appointment as defined by the statute").

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

Waiver of Sovereign Immunity With Respect to Whistleblower Provisions of Environmental Statutes

The federal government's sovereign immunity has been waived with respect to the whistleblower provisions of the Solid Waste Disposal Act and the Clean Air Act, but not with respect to the whistleblower provision of the Clean Water Act.

September 23, 2005

LETTER OPINION FOR THE SOLICITOR
DEPARTMENT OF LABOR

This letter will confirm the conclusions of our Office that the federal government's sovereign immunity has been waived with respect to the whistleblower provisions of the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971 (2000), and the Clean Air Act ("CAA"), 42 U.S.C. § 7622 (2000), but not with respect to the whistleblower provision of the Water Pollution Prevention and Control Act (commonly known as the Clean Water Act ("CWA")), 33 U.S.C. § 1367 (2000). These questions arose in May 2004 in the context of an interagency dispute within the Executive Branch concerning the application of these statutes. *See* Exec. Order No. 12146, § 1-401, 3 C.F.R. 409, 411 (1979 Comp.), *reprinted in* 28 U.S.C. § 509 note (2000); 28 C.F.R. § 0.25(a) (2004).

I.

The SWDA and the CWA prohibit, *inter alia*, discrimination against an employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter." SWDA, 42 U.S.C. § 6971(a); CWA, 33 U.S.C. § 1367(a). The CAA similarly prohibits, *inter alia*, discrimination against an employee who has "commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter" or who has "assisted or participated in or is about to assist or participate in any manner in such a proceeding or in any other action." 42 U.S.C. § 7622(a). The Secretary of Labor is authorized to resolve these whistleblower claims, with limited review available in federal court. *See* SWDA, 42 U.S.C. § 6971(b); CWA, 33 U.S.C. § 1367(b); CAA, 42 U.S.C. § 7622(c).

The relevant provision in the SWDA provides:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any

> proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971(a). An aggrieved employee may file a complaint against "any person," *id.* § 6971(b), which the SWDA defines as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States," *id.* § 6903(15) (2000).

The relevant provision in the CAA provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
> >
> > (2) testified or is about to testify in any such proceeding, or
> >
> > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. § 7622(a). The CAA does not define the term "employer" but permits aggrieved employees to file a complaint against "any person," *id.* § 7622(b)(1), which the CAA defines as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof," *id.* § 7602(e) (2000).

The relevant provision in the CWA provides:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a). An aggrieved employee may file a complaint against "any person," *id.* § 1367(b), which the CWA defines as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," *id.* § 1362(5) (2000).

II.

It is axiomatic that the government may not be sued without its consent. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Where Congress chooses to waive that immunity, its intent "must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waivers of immunity, furthermore, "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (internal quotation marks, citations, and alterations omitted); *see also Lane*, 518 U.S. at 192 (noting that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign"). These principles governing waivers of sovereign immunity apply not just in cases pending before Article III courts, but also in adjudications before agencies and non-Article III courts, because it is Congress, not the Executive Branch, that determines the scope of such waivers. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (holding that sovereign immunity barred fee award to prevailing party in INS proceeding); *United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (holding sovereign immunity presumptions apply in bankruptcy court proceedings); *Foreman v. Dep't of Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001) (applying sovereign immunity principles in holding that the Merit System Protection Board lacks authority to impose monetary damages).

A.

The SWDA permits whistleblower claims against any "person," 42 U.S.C. § 6971(b), which is elsewhere defined to include "each department, agency, and instrumentality of the United States," *id*. § 6903(15). This express language satisfies the stringent test for waiver of immunity. In *Department of Energy*, for example, the Supreme Court held that statutory language in the CWA (not at issue here) authorizing citizen suits against "'any person (including . . . the United States)'" sufficed to waive the government's immunity from such suits. 503 U.S. at 615 (quoting 33 U.S.C. § 1365(a)). Although the definition of "person" here is found not in the whistleblower provision itself, but rather in a separate provision defining various terms used in the SWDA, this cross-reference does not dull the clarity of the waiver of immunity. *Cf. Kimel v. Florida*, 528 U.S. 62, 76 (2000) (noting, in the similar context of congressional abrogation of state sovereign immunity, that Supreme Court "cases have never required that Congress make its

clear statement in a single section or in statutory provisions enacted at the same time").

B.

The CAA prohibits whistleblower retaliation by any "employer," 42 U.S.C. § 7622(a), which is not defined, and permits aggrieved employees to file a complaint against any "person," *id.* § 7622(b)(1), which is elsewhere defined to include "any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof," *id.* § 7602(e). Although the term "employer" is not defined, the relevant provision in section 7622 authorizes whistleblower suits against any "person," and the federal government is expressly included in the definition of "person." In reviewing an assertion of tribal sovereign immunity from a claim brought under the whistleblower provision of the Safe Drinking Water Act, 42 U.S.C. § 300j-9 (2000)—which, like the CAA, separately prohibits retaliation by "employer[s]" and permits suits against "person[s]"—the Tenth Circuit similarly focused its analysis on the term "person": "where Congress grants an agency jurisdiction over all 'persons,' defines 'persons' to include 'municipality,' and in turn defines 'municipality,' to include 'Indian Tribe[s],' . . . it has unequivocally waived tribal immunity." *Osage Tribal Council ex rel. Osage Tribe of Indians v. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999). The definitional connection here is more direct, and by expressly including the "United States" in the definition of "person," Congress has waived the government's immunity from suit under the CAA's whistleblower provision.

C.

The CWA permits whistleblower claims against any "person," 33 U.S.C. § 1367(a), which is elsewhere defined to include "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," *id.* § 1362(5). The definition thus does not include the United States, *see Dep't of Energy*, 503 U.S. at 617–18 (noting that the CWA does not "define[] 'person' to include the United States" and stating that an "omission has to be seen as a pointed one when so many other governmental entities are specified"),[1] and we therefore believe that section 1367 does not abrogate the federal government's sovereign immunity.

[1] We do not read the term "interstate body" to refer unequivocally to the United States. The CWA elsewhere defines "interstate agency" to mean "an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution[.]" 33 U.S.C. § 1362(2). We think it likely that "interstate body" has a similar meaning, but for present purposes it is sufficient to state that the term does not unequivocally include the federal government, which is the test for waiver of sovereign immunity.

We note, however, that a limited waiver of sovereign immunity is found in a separate provision of the CWA addressing the discharge or runoff of pollutants at certain federal facilities. *See* 33 U.S.C. § 1323(a). That section provides:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

Id. It might be argued that the whistleblower provision in section 1367 is a means to enforce pollution control and is, therefore, a "requirement[] . . . respecting the control and abatement of water pollution" for which sovereign immunity is waived. Even accepting *arguendo* that that is a possible construction of the CWA, it is certainly not the only one, and we believe that section 1323 does not unequivocally indicate a waiver of sovereign immunity with respect to section 1367 as required by Supreme Court precedents.

The phrase "requirements . . . respecting the control and abatement of water pollution" is not defined in the CWA. Interpreting an earlier version of section 1323, the Supreme Court indicated a narrow reading of "requirement" to refer "simply and solely to substantive standards, to effluent limitations and standards and schedules of compliance." *EPA v. California*, 426 U.S. 200, 215 (1976) (internal quotation marks and citations omitted). Applying the canon that waivers of sovereign immunity are to be narrowly construed, the Court in *EPA* held that "requirement" did not include state permits or other procedural mechanisms designed to ensure compliance with substantive pollution control standards. *Id.* at 213–27. As previous Labor Department decisions have pointed out, however, Congress overruled the holding in *EPA* in 1977 by amending section 1323 to waive sovereign immunity from, *inter alia*, "any requirement whether substantive or procedural." *See Jenkins v. EPA*, No. 92-CAA-6, 1994 WL 897221, at *3 (May 18) ("Congress amended the Federal facilities provision of the CWA . . . to overrule *EPA* . . . and to clarify that the Federal Government was required to

comply with State permit, reporting and other procedural requirements."); *Conley v. McClellan Air Force Base*, No. 84-WPC-1, 1993 WL 831968, at *4 (Sept. 7) (same). Although there was no congressional discussion of the CWA's whistleblower provision during the enactment of these amendments, the Labor Department has read the history of section 1323 to "suggest[] that [Congress] also intended all requirements of the [CWA] to apply" to federal facilities. *Jenkins*, 1994 WL 897221, at *3; *see also Conley*, 1993 WL 831968, at *4 (same).

Numerous courts, however, have concluded that the 1977 amendments "did not change the extent to which section [1323] waived immunity from state or local control; it merely made it clear that where federal agencies are subject to state or local regulation they must comply with state or local procedural as well as substantive requirements." *United States v. Tenn. Water Quality Control Bd.*, 717 F.2d 992, 997 (6th Cir. 1983); *cf. Parola v. Weinberger*, 848 F.2d 956, 961 (9th Cir. 1988) (finding that legislative reaction to *EPA* indicates that "requirement" also includes "the procedural *means* by which [substantive environmental] standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspections"). That is, Congress intended to overrule the specific holding in *EPA* by authorizing state procedural enforcement mechanisms, but it did not necessarily intend to expand the phrase "requirements . . . respecting the control and abatement of water pollution" beyond "substantive standards" or "effluent limitations." According to these courts, "the 'requirements' referred to in the CWA . . . relate only to pollution standards that a State might impose as part and parcel of its environmental programs." *N.Y. State Dep't of Envtl. Conservation v. Dep't of Energy*, 772 F. Supp. 91, 97 (N.D.N.Y. 1991); *see also New York v. United States*, 620 F. Supp. 374, 382 (E.D.N.Y. 1985) ("[T]o the degree the Supreme Court's ruling in [*EPA*] construed the substantive 'requirements' of [section 1323] to mean effluent limitations, such ruling was unaffected by the 1977 amendments enacted by Congress."); *Kelley v. United States*, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (noting that "'requirements' language has generally been held to mean 'relatively precise standards capable of uniform application'" and that section 1323 only waives sovereign immunity with respect to "objective, quantifiable standards subject to uniform application") (citations omitted). Indeed, the language that the Supreme Court interpreted in *EPA*—"'requirements respecting control and abatement of pollution,'" 426 U.S. at 209 (quoting 33 U.S.C. § 1323 (Supp. IV 1970))—is virtually identical to the current language in section 1323.

Under this interpretation, it is difficult to see how section 1367—which establishes remedies for employer whistleblower retaliation—is a "requirement," let alone a "requirement[] . . . respecting the control and abatement of water pollution." The CWA whistleblower provision is not a quantifiable restriction on pollutants and there is substantial doubt whether it could even be viewed as a means for ensuring compliance with such requirements. This doubt is fatal to a finding of a waiver of sovereign immunity, for the Supreme Court has held that where there are two plausible interpretations of a provision, with only one waiving

sovereign immunity, such provision does not unequivocally indicate a waiver of sovereign immunity. *See Nordic Village*, 503 U.S. at 36–37 (that there are "plausible" alternative readings of a provision that would not waive sovereign immunity "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted").[2] Considering that section 1367—the whistleblower provision itself—does not identify the federal government as an entity subject to suit, and considering that the term "requirement" has been narrowly construed by several courts notwithstanding the 1977 amendments, we do not believe that section 1323's reference to "requirements . . . respecting the control and abatement of water pollution" waives the federal government's sovereign immunity from whistleblower claims under section 1367.

Nor do we believe that other undefined language in section 1323—subjecting federal facilities to "administrative authority" and "process and sanctions"—waives the government's sovereign immunity from whistleblower claims under section 1367. First, "administrative authority" would seem to refer to governmental entities charged with regulating water pollution, and perhaps to any fines or penalties that they might be authorized to impose. *Cf. United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 532 (6th Cir. 1999) (holding that civil penalty assessed by a state administrative agency was an "administrative remedy or sanction" within the meaning of the CAA's citizen suit provision). Section 1367—which creates a cause of action, not a regulatory regime—does not naturally, and certainly not unequivocally, fall within the meaning of "administrative authority." Second, the Supreme Court, in narrowly reading "sanction" to mean only "coercive" fines, reasoned that Congress's conjunction of the terms "process" and "sanctions" was likely meant to refer to "the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides" or "forward-looking orders . . . characteristically given teeth by equity's traditional coercive sanctions for contempt." *Dep't of Energy*, 503 U.S. at 623. A whistleblower claim is not an order or remedy designed to abate water pollution; it is a freestanding claim designed to provide employment rights and remedies independent of the substantive requirements of the CWA. But even if there were a broader gloss of "process and sanctions" than that indicated by the Supreme Court, it cannot be maintained that the phrase unequivocally includes whistleblower claims under section 1367. For these

[2] In *Department of Energy*, for example, the Supreme Court narrowly read the term "sanction" in section 1323 to include "coercive" but not "punitive" fines. 503 U.S. at 627. Although the Court conceded that the "meaning of 'sanction' is spacious enough to cover not only what we have called punitive fines, but coercive ones as well," it determined that the use of the term in section 1323 "carries no necessary implication that a reference to punitive fines is intended." *Id.* at 621. Because Congress did not make express any intent to subject federal facilities to punitive fines, the Supreme Court determined that the "rule of narrow construction therefore takes the waiver no further than the coercive variety." *Id.* at 627.

reasons, we do not read section 1323 to waive the government's sovereign immunity from suit under the CWA's whistleblower provision.

III.

In sum, it is our conclusion that the government's sovereign immunity has been waived by the whistleblower provisions of the SWDA, 42 U.S.C. § 6971, and the CAA, *id.* § 7622, but not with respect to the whistleblower provision of the CWA, 33 U.S.C. § 1367.

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives

Under 18 U.S.C. § 1913, federal employees who are union representatives may not use official time to engage in "grass roots" lobbying in which, on behalf of their unions, they ask members of the public to communicate with government officials in support of, or opposition to, legislation or other measures.

November 23, 2005

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

Your office has asked whether federal employees who are union representatives may use their official time to engage in "grass roots" lobbying in which, on behalf of their unions, they ask members of the public to communicate with government officials in support of, or opposition to, legislation or other measures.[1] We conclude that federal employees are barred from doing so by 18 U.S.C. § 1913. As discussed below, whether any particular activity would violate section 1913 will depend on the specific facts.

Central to our analysis is the distinction between direct and "grass roots" lobbying. This distinction has been extensively applied in decisions of our Office and the Government Accountability Office ("GAO") dealing with lobbying by government officials. For example, we have stated that 18 U.S.C. § 1913 "does not apply to direct communications between Department of Justice officials and Members of Congress and their staffs . . . in support of Administration or Department positions," but that the statute "may prohibit substantial 'grass roots' lobbying campaigns . . . designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals." *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 301 (1989) ("1989 Opinion"). The essence of a "grass roots" campaign is the use of "telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress." Office of Legal Counsel, *Guidelines on 18 U.S.C. § 1913* at 2 (Apr. 14, 1995) ("1995 Guidelines") (attachment to Memorandum for the Heads of All Executive Departments and Agencies, from the Attorney General, *Re: Anti-Lobbying Act Guidelines* (Apr. 18, 1995)). Similarly, GAO has noted that appropriations riders imposing restrictions similar to those in section 1913 "apply primarily to indirect or grass-roots lobbying, and not to direct contact with or appeals to Members of Congress," *Lobbying Activity in Support of China Permanent Normal Trade*

[1] *See* Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Jane Dana, Acting General Counsel, Department of Commerce (June 20, 2005) ("Commerce Letter").

Relations, B-285,298, 2000 WL 675585, at *3 (Comp. Gen.) (citations omitted), and that "grass roots" lobbying involves "a clear appeal by the agency to the public to contact congressional members in support of the agency's position," *Social Security Administration—Grassroots Lobbying Allegation*, B-304,715, 2005 WL 991729, at *1 (Comp. Gen.).[2] As explained below, this same distinction is critical to identifying the limits of permissible lobbying by union representatives while they are on official time.

I.

Section 1913 of title 18 currently provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

18 U.S.C. § 1913 (Supp. IV 2005). Funds "appropriated by . . . enactment[s] of Congress" within the meaning of section 1913 include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote official time to their representational activities. *See* 5 U.S.C. § 7131(d) (2000). This expenditure of appropriated funds raises a question under 18 U.S.C. § 1913,

[2] We note that "the Comptroller General, as the agent of Congress, cannot issue interpretations of the law that are binding on the executive branch," *Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 82 (1991), and here we do not endorse the holding of any particular opinion of the Comptroller General or the Government Accountability Office.

to the extent that such funds are thus "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation."

By its terms, section 1913 applies only "in the absence of express authorization by Congress," and Congress has elsewhere given express authorization for union representatives to use official time for *direct* lobbying on representational issues. Under 5 U.S.C. § 7102(1) (2000), each federal employee has the right

> to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.

Section 7131(d) of title 5 states that

> [e]xcept as provided in the preceding subsections of this section [prohibiting the use of official time for activities relating to the internal business of a labor organization] . . . in connection with any other matter covered by this chapter [which includes section 7102], any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We previously concluded that sections 7102 and 7131(d) together give "express authorization" under 18 U.S.C. § 1913 for union representatives "to lobby members of Congress on representational issues." Memorandum for Charlotte Hardnett, Acting General Counsel, Social Security Administration, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. § 1913 to the Provision of Official Time to Employee Union Representatives to Lobby Congress on Representational Issues* at 1, 3 (Mar. 23, 2001) ("2001 Opinion"). The Federal Labor Relations Authority ("FLRA") has reached the same conclusion about the application of section 1913. *United States Department of the Army Corps of Engineers, Memphis District, Memphis, Tennessee and National Federation of Federal Employees Local 259*, 52 F.L.R.A. 920 (1997) ("*Army Corps of Engineers*").[3] The First Circuit, moreover, has

[3] *See also Soc. Sec. Admin., Balt., Md. & Am. Fed'n of Gov't Emps.*, 54 F.L.R.A. 600 (1998); *Ass'n of Civilian Technicians, Old Hickory Chapter, & U.S. Dep't of Defense, N.C. Nat'l Guard Bureau, Raleigh, N.C.*, 55 F.L.R.A. 811 (1999); *Ass'n of Civilian Technicians, Razorback Chapter 117, & U.S. Dep't of Defense, Nat'l Guard Bureau, Ark. Nat'l Guard, Camp Robinson, N. Little Rock, Ark.*, 56 F.L.R.A. 427 (2000) ("*Ark. Nat'l Guard*"); *cf. Dep't of Health & Human Servs., Soc. Sec. Admin., &*

strongly suggested the same view about application of the statute. In *Granite State Chapter, Association of Civilian Technicians v. FLRA*, 173 F.3d 25 (1st Cir. 1999), although the court held that an appropriations rider applicable to the Department of Defense barred any use of funds for lobbying, the court assumed that, absent the rider, union representatives could have lobbied Congress on official time. The court noted that the FLRA had found the use of funds for lobbying was consistent with section 1913 but was contrary to the rider. In affirming the FLRA's decision, the court wrote that the rider "repealed the Union's right to lobby Congress on official time as otherwise guaranteed by 5 U.S.C. § 7102." *Id.* at 28. *See also Ass'n of Civilian Technicians, Silver Barons Chapter v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000) (the rider "repeal[s] sections 7131 and 7102 . . . as they are read to allow [Department of Defense] employees to use official time to lobby Congress"); *Ass'n of Civilian Technicians, Tony Kempenich Mem'l Chapter 21 v. FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001) (agreeing with the First Circuit's decision but not referring to sections 7102 and 7131, except in reciting what the FLRA had decided).

These decisions—whether of this Office, the FLRA, or the courts—concern only direct lobbying. You have requested that we clarify the application of 18 U.S.C. § 1913 in the context of "grass roots" lobbying by union representatives. *See* Commerce Letter at 1.[4]

II.

In our 2001 Opinion finding that the federal labor laws create an "express authorization" under 18 U.S.C. § 1913 for direct lobbying, we did not decide whether the prohibition in section 1913 is necessarily limited to lobbying by agency officials acting on behalf of their agencies' positions. There, because we concluded that there was "express authorization" for the lobbying at issue, we did not "need [to] decide whether the lobbying activities engaged in by such representatives are exempt from the prohibition of 18 U.S.C. § 1913 on any other ground." *Id.* at 4 n.3. Here, we must first resolve the question whether the

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Am. Fed'n of Gov't Emps., Local 3231, 11 F.L.R.A. 7, 8 (1983) (in a case of direct lobbying, the FLRA finds that no violation of 18 U.S.C. § 1913 has been shown). In some other cases, without considering 18 U.S.C. § 1913, the FLRA has upheld union rights to engage in direct lobbying under some circumstances. *See, e.g.*, *Overseas Fed'n of Teachers, & Dep't of Def. Dependent Schs., Mediterranean Region*, 21 F.L.R.A. 757 (1986); *Nat'l Fed'n of Fed. Emps. Local 122 & U.S. Dep't of Veterans Affairs, Reg'l Office, Atlanta, Ga.*, 47 F.L.R.A. 1118 (1993).

[4] The FLRA declined our invitation to present its views on the question here. The Office of Personnel Management expressed the view that "section 7102 as written does not presently contemplate the use of official time for lobbying that does not meet the direct lobbying standard as stated in Section 7102" and that "any request by a union representative for official time to engage in grass roots lobbying would not be authorized under section 7131 and therefore would be in contravention of the Anti-Lobbying Act, section 1913." Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Mark A. Robbins, General Counsel, Office of Personnel Management, *Re: Anti-Lobbying Act* at 2 (Aug. 22, 2005).

prohibition in section 1913 extends beyond agency officials' lobbying on behalf of their agencies. We conclude that section 1913 reaches the use of appropriations for "grass roots" lobbying even if not on behalf of an agency's position. We further conclude that Congress has not expressly authorized an exception for such lobbying by union representatives.

A.

A statement in an FLRA opinion suggests an argument for why the prohibition in section 1913 might not apply to "grass roots" lobbying by union representatives. In *Army Corps of Engineers*, the FLRA wrote that

> when Congress enacted 18 U.S.C. § 1913, it intended to protect its members from indirect lobbying by agency officials. There is no evidence or assertion that the Union representatives in this case were lobbying indirectly on behalf of agency officials.

52 F.L.R.A. at 930 (citation omitted). Although the FLRA did not so hold, its statement that section 1913 was aimed at "agency officials" suggests a possible argument that 18 U.S.C. § 1913 would not apply at all to lobbying by union representatives on behalf of their unions, but only to lobbying on behalf of a federal agency.

We do not believe that section 1913 is limited to lobbying by agency officials as such. The prohibitory portion of section 1913—"[n]o part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly" for prohibited purposes—is not limited to the communication of agency positions. Rather, its language on its face applies to the use of appropriated funds for any communications designed to influence members of Congress or other officials with respect to any legislation, law, ratification, policy, or appropriation. As noted, relevant appropriations include funds used to pay the salaries of federal employees who are representatives of federal employees' unions, insofar as those employees devote official time to their representational activities. Moreover, amendments to section 1913 enacted in 2002 removed language that had limited the penalties under that section to "an officer or employee of the United States or of any department or agency thereof," Pub. L. No. 107-273, div. A, § 205(b), 116 Stat. 1778 (2002), and thus undermined any argument that only lobbying by persons acting for an agency in an official capacity would be covered.

The only portion of section 1913 that refers to "officers or employees of the United States or of its departments or agencies" who are communicating an agency position is not the prohibition but the exception to the prohibition. There is no reason to read that clause as implying that the prohibition itself is limited to such communications; rather, it is naturally read to do just what it says it does: to create an exception for communications whose prohibition this Office has long

believed would raise constitutional concerns. *See, e.g.*, 1989 Opinion, 13 Op. O.L.C. at 305–06.

Furthermore, although the language of section 1913 has been read narrowly to avoid constitutional concerns that would arise from its application to government officials, no such concerns would justify a narrowing construction of the language so as not to apply it to "grass roots" lobbying by federal employees who are union representatives. A broad interpretation of the law, as applied to those speaking for the Executive Branch, could "interfere with the President's constitutionally mandated role in the legislative process," "infringe upon his constitutional obligation to 'take Care that the Laws be faithfully executed,'" and "weaken the constitutional framework established in Article II, which in general imposes on the President the duty to communicate with the American people." 1989 Opinion, 13 Op. O.L.C. at 305. These separation of powers concerns do not apply to lobbying on behalf of unions. *See Office of the Adjutant Gen., N.H. Nat'l Guard, Concord, N.H. & Granite State Chapter, Ass'n of Civilian Technicians*, 54 F.L.R.A. 301, 312 (1998), *aff'd*, *Granite State Chapter*, 173 F.3d 25. Nor does such lobbying raise First Amendment issues that might call for a narrowing construction, because nothing in 18 U.S.C. § 1913 affects what private persons may say while on their own time. *See Tony Kempenich Mem'l Chapter 21*, 269 F.3d at 1122 (addressing First Amendment argument under an appropriations rider). Accordingly, we find no reason to give 18 U.S.C. § 1913, in this context, an interpretation that is narrower than its words would otherwise indicate.[5]

B.

We therefore turn to the question whether the federal laws, which give "express authorization" for direct lobbying of Congress by federal employees who are union representatives, also offer "express authorization" for "grass roots" lobbying by such employees. We believe that they do not provide such authorization. Section 7102 of title 5 guarantees that union representatives may "present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." By its terms, this guarantee is confined to direct lobbying and does not mention the presentation of views to members of the public, let alone a request

[5] In an analogous situation, an appropriations rider that deals with lobbying and is couched in general language not referring specifically to agencies or their officials—"[n]one of the funds made available by this Act shall be used in any way, directly or indirectly to influence congressional action on any legislation or appropriations matters pending before the Congress"—has been construed to reach expenditures for the salaries of union representatives engaged in lobbying. *See Granite State Chapter*, 173 F.3d at 27–28 (quoting Pub. L. No. 104-61, § 8015, 109 Stat. 636, 654 (1996)). *See also Headquarters, Nat'l Guard Bureau, Washington, D.C., Nev. Air Nat'l Guard, Reno, Nev., & Ass'n of Civilian Technicians*, *Silver Barons Chapter, Reno, Nev.*, 54 F.L.R.A. 316 (1998), *reaff'd*, 54 F.L.R.A. 595 (1998); *Office of the Adjutant Gen., N.H. Nat'l Guard, Concord, N.H. & Granite State Chapter, Ass'n of Civilian Technicians*, 54 F.L.R.A. 301, *aff'd*, *Granite State Chapter*, 173 F.3d 25.

that the public contact government officials. It therefore does not amount to the "express authorization" that would create an exception to 18 U.S.C. § 1913 for "grass roots" lobbying. And, as noted, section 7131(d) of title 5 is derivative of section 7102.

There is some precedent in this area for finding an "express" authorization even in the absence of clear words, but it does not apply here. *See* 1989 Opinion, 13 Op. O.L.C. at 303 ("We believe that Congress' continued appropriation of funds for positions held by executive branch officials whose duties historically have included seeking support for the Administration's legislative program constitutes 'express authorization by Congress' for the lobbying activities of these officials . . . .").[6] "Grass roots" lobbying is the core of the statutory prohibition. *See* 1995 Guidelines at 2. The conduct now in question is within that core, and there are no constitutional considerations that would demand a flexible understanding of "express authorization" here. *Cf. id.* at 1 (in the context of communications by the Executive Branch, 18 U.S.C. § 1913, "[i]f applied according to its literal terms," would raise concerns about separation of powers and "if so applied, might be unconstitutional").

There would seem to be two additional potential arguments against our reading of section 7102. We do not believe that either argument would be persuasive.

First, the FLRA has stated that "[c]ommunicating *with the public* to encourage others to make common cause with the employees' collective bargaining representative . . . is merely a logical extension of a Union's Section 7102 rights and accordingly . . . such conduct is protected by the Statute." *Dep't of the Air Force, 3d Combat Support Group, Clark Air Base, Republic of the Philippines & Overseas Educ. Ass'n, Pacific Region*, 29 F.L.R.A. 1044, 1062–63 (1987) ("*Clark Air Base*") (conclusion of Administrative Law Judge, which the FLRA adopted) (emphasis added).[7] The FLRA has also indicated that in certain circumstances, section 7102 may protect "the right to publicize matters affecting unit employees' terms and conditions of employment." *Dep't of the Air Force, Scott Air Force Base, Ill. & Nat'l Ass'n of Gov't Emps. Local R7-23, SEIU, AFL-CIO*, 34 F.L.R.A. 1129, 1135 (1990). But, to the extent that these statements might be read to find an express authorization for "grass roots" lobbying, they would go astray from the statutory text. We do not see how the federal labor laws, in guaranteeing a right

[6] Even while finding express authorization in congressional appropriations for certain positions whose official duties included well-established lobbying activities, we "caution[ed] . . . against these officials engaging in 'grass-roots' campaigns of the type mentioned in the legislative history to section 1913." 1989 Opinion, 13 Op. O.L.C. at 303 n.5 (citation omitted).

[7] *Accord U.S. Marine Corps Base Camp Smedley D. Butler, Okinawa, Japan, & Overseas Educ. Ass'n, Pacific Region*, 29 F.L.R.A. 1068, 1080 (1987) ("*Camp Smedley T. Butler*") (same); *Dep't of the Air Force, 18th Combat Support Wing, Kadena Air Base, Okinawa, Japan, & Overseas Educ. Ass'n, Pacific Region*, 29 F.L.R.A. 1085, 1097 (1987) ("*Kadena Air Base*") (same). *See generally Bureau of Prisons, Fed. Corr. Inst. (Danbury, Ct.) & Am. Fed'n of Gov't Emps., Council of Prison Locals C-33, Local 1661, AFL-CIO*, 17 F.L.R.A. 696, 696–97 (1985) ("*Bureau of Prisons*").

"to present the views of [a] labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities" can reasonably be said to give an "express authorization" for urging the public to communicate with government officials.

In its decision in *Army Corps of Engineers*, which concerned *direct* lobbying, the FLRA stated that, in enacting 18 U.S.C. § 1913, Congress "intended to protect its Members from *indirect* lobbying by agency officials" and that "there are significant questions whether the Union's lobbying activities are within the definition of items that Congress prohibited in 18 U.S.C. § 1913." 52 F.L.R.A. at 930–31 (emphasis added). It went on to find that it was unnecessary to determine whether section 1913 would otherwise reach the lobbying by the union because 5 U.S.C. §§ 7102 and 7131 gave "express authorization" to the direct lobbying activities at issue there. 52 F.L.R.A. at 930–31. This decision could be read to suggest that, whether union lobbying involves direct communications or indirect "grass roots" efforts, it is within the express authorization of the federal labor laws.[8] But the decision can as easily be read only to preserve the argument, similar to the one that we rejected above, that an appropriations rider applies only to agency officials acting in an official capacity on behalf of their agencies. *See Ark. Nat'l Guard*, 56 F.L.R.A. at 430 (relying on *Army Corps of Engineers* and apparently preserving the argument about application solely to agency officials). Moreover, the FLRA's holding in the case was limited to direct lobbying: "[T]he Statute [enacting the federal labor laws] constitutes 'an express authorization by Congress' for using Federal funds to grant official time to employees *to lobby Congress* on representational matters." *Army Corps of Engineers*, 52 F.L.R.A. at 933 (emphasis added).

Second, it might be argued that section 7102 authorizes "grass roots" lobbying on the ground that such lobbying may enable the public to serve as the conduit by which union representatives present their views to government officials. But any such argument would require a strained and unnatural reading of the phrase "to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." In the communications that are intended to result from "grass roots" lobbying, members of the public, not the union representatives, would be making the presentation, and the views that government officials receive would be presented as the public's views, rather than "the views of the labor organization." The purpose of a "grass roots" campaign is to bring public pressure to bear on government officials, not to provide an indirect route for views that are attributed

[8] *But see Office of the Adjutant Gen., Ga. Dep't of Def., Atlanta, Ga., & Ga. State Chapter Ass'n of Civilian Technicians*, 54 F.L.R.A. 654, 666 n.9 (1988) (with regard to an appropriations rider, the FLRA found it "unnecessary to address the Respondent's assertion that the activities for which official time was sought in this case are a form of 'grass roots' lobbying, as defined by the GAO, for which the use of appropriated funds is prohibited"); *see also Ark. Nat'l Guard*, 56 F.L.R.A. at 430 (reporting view of Chairman Wasserman).

to the union. Thus, when a union representative engages in "grass roots" lobbying of the sort that 18 U.S.C. § 1913 may bar—an appeal to the public to communicate with government officials—the federal labor laws offer no protection.[9]

C.

Whether any specific activity amounts to "grass roots" lobbying within the prohibition of section 1913 depends, of course, on the facts of the case, and we cannot determine such issues in the abstract. There may be uncertainty, for example, whether a particular communication urges recipients to communicate with government officials. We address here only your question whether the federal labor laws categorically exclude union representatives' "grass roots" lobbying from the reach of 18 U.S.C. § 1913. We conclude that they do not.

STEVEN G. BRADBURY
Acting Assistant Attorney General
Office of Legal Counsel

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[9] In *Clark Air Base*, *Kadena Air Base*, and *Camp Smedley T. Butler*, the FLRA held, outside the context of section 1913, that section 7102 protected union requests for members of the public to write to their Senators and Representatives. *Camp Smedley T. Butler*, 29 F.L.R.A. at 1076. The FLRA, however, did not consider the application of 18 U.S.C. § 1913 to this "grass roots" lobbying. Indeed, at least the version of 18 U.S.C. § 1913 in effect in 1986, when the events at issue in those cases took place, apparently would not have applied in any event to the lobbying there. At the time, 18 U.S.C. § 1913 reached only activities "intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress," 18 U.S.C. § 1913 (1982), but the communications to Congress at issue sought action with regard to how the Department of Defense was allocating cuts in spending, including those already mandated by the Gramm-Rudman-Hollings Act, Pub. L. No. 99-177, 99 Stat. 1037 (1985), rather than action on any "legislation or appropriation by Congress." *See Camp Smedley T. Butler*, 29 F.L.R.A. at 1073–74, 1078. In our view, these decisions do not even implicitly suggest that section 7102 gives an "express authorization" for "grass roots" lobbying that 18 U.S.C. § 1913 would otherwise forbid. *Cf. Dep't of the Air Force, Scott Air Force Base, Ill., and Nat'l Ass'n of Gov't Emps., Local R7-23, SIEU, AFL-CIO*, 34 F.L.R.A. 1129 (1990) (agency lawfully refused, on grounds other than restrictions on lobbying, to allow union to place advertisement in base newspaper, urging readers to communicate with Congress on a non-legislative matter). In addition, in these decisions, the FLRA did not mention an earlier case in which it had stated that section 7102 did not apply where a letter drafted by a union "was intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union." *U.S. Air Force, Lowry Air Force Base, Denver, Colo., & Am. Fed'n of Gov't Emps., AFL-CIO, Local 974*, 16 F.L.R.A. 952, 964 (1984). The FLRA declared that "[s]ection 7102 protects representatives of labor organizations in their presentation of the views of the labor organization to Congress," *id.*, and therefore did not cover the presentation of individual views that the union was trying to generate. The FLRA did find that communications by employees could be covered by 5 U.S.C. § 7211 (1982), which forbids interference with the "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress." A grant of official time under 5 U.S.C. § 7131(d), however, appears limited to matters "covered by . . . chapter [71 of title 5]," and section 7211 is in chapter 72. The guarantee of non-interference, therefore, does not convey a right to use official time.