OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

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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 fifteen volumes of opinions published covered the years 1977 through 1991; the present volume covers 1992. The opinions included in Volume 16 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1992 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of his 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 U.S.C. § 0.25.

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OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Proposed Federal Abortion Legislation

The proposed legislation would enact a federal statutory regime of abortion regulation that leaves the States with substantially less regulatory authority than they have under *Roe v. Wade* or *Planned Parenthood v. Casey*.

The proposed legislation would represent a doubtful exercise of Congress' power to enforce the Fourteenth Amendment and would rest on a questionable link to Congress' power to regulate interstate commerce.

July 1, 1992

LETTER FOR THE CHAIRMAN
COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE

This letter presents the views of the Department of Justice concerning the amended versions of the Freedom of Choice Act of 1991, introduced as companion bills H.R. 25 and S. 25 (collectively "the bill"). The Department strongly opposes enactment of this legislation. The recent amendment introduced by Senator Mitchell, making minor changes to the bill, fails to confront the bill's most serious flaws. For the reasons below, if the bill were presented to the President, I and the President's other senior advisors would recommend that he veto this legislation.

The review bill would still prohibit States from enacting reasonable regulatory restrictions on abortions clearly permitted under *Roe v. Wade* and its progeny. It would also represent a doubtful exercise of Congress' power under the Fourteenth Amendment and would rest on a questionable link to Congress' power to regulate interstate commerce.

I. The Revised Bill

The bill is described by its sponsors as a "codification" of much of the complex regime of abortion legislation erected by the Supreme Court since its 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973). The bill as revised expressly states its purpose to be "to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in *Roe v. Wade* and applied in subsequent cases from 1973 to 1988." Section 2(b). Because of its sweeping language, however, the bill

would enact a federal statutory regime of abortion regulation that leaves the states with substantially less regulatory authority than under *Roe* or the Supreme Court's decision earlier this week in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

The essence of the bill remains substantially unchanged: "[a] State . . . may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability," and after viability the State may not restrict abortion if the abortion "is necessary to preserve the life or health of the woman." Section 3(a)(1) and (2).

The revised bill would thus still allow abortions for any reason, even sex selection, before the fetus becomes "viable." With no definition or standards for viability, it appears that the bill could leave that determination to the person performing the abortion. Thus a single health care professional's judgment that a particular fetus was not "viable" would be conclusive and binding on the state, whether or not the fetus satisfied other objective criteria of "viability" such as a test for weight. It is not even clear that the professional judgment must be rendered by a medical doctor.

Even after fetal viability, with no standards for determining what constitutes the "health of the woman" justifying an abortion, the revised bill would still go well beyond merely "codifying" *Roe*. As we have explained in earlier statements and testimony, we believe that the term "health" in section 3(a)(2) would likely be construed broadly. *See Doe v. Bolton*, 410 U.S. 179 (1973). The Court there noted that the medical judgment must be made in light of all factors, including "emotional, psychological, [and] familial" factors. *Id.* at 192. It is likely, therefore, that even after viability an abortion performed for any reason that a medical professional (who, again, apparently need not be a licensed physician) deemed "relevant to the well-being" of the woman, *id.*, would probably be protected under the bill as "necessary to preserve the life or health of the woman." Section 3(a)(2).

The revised bill purports to address a few of the concerns the Department has raised previously. These changes, however, do not fully meet the Department's concerns on the issues they address, and leave many more serious flaws unaddressed.

For example, the revised bill allows some degree of parental participation in the decision of a minor to undergo an abortion. However, it provides only that the state could require the minor to "involve" the parent in the decision. Section 3(b)(3). The term "involve" is left undefined. It is troubling that the bill's authors chose an inherently vague term over more definite words such as "notify" and "consent." It is simply unclear whether the bill would exclude parental consent requirements. The bill could thus be read to invalidate laws in the twenty-one states that require some form of parental consent, including the Pennsylvania abortion statute upheld this week by the Supreme Court in *Casey*.

So read, the bill would go well beyond *Roe* and later cases. In *Bellotti v. Baird*, 443 U.S. 622, 647 (1979), for example, a plurality of the Court ruled

that a parental consent requirement for abortions by minors would be constitutional if it contained a judicial bypass provision. And in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 493-94 (1983), the Court upheld another parental consent provision with a judicial bypass. The bill could be read to overrule these cases to the extent they permitted such consent provisions. The bill would not, therefore, codify *Roe* as "applied in subsequent cases from 1973 to 1988," as it claims to do. Section 2(b).

Although the revised bill would permit States to protect the rights of unwilling individuals to refrain from performing abortions, the bill does not permit *institutions* to refuse to perform abortions. Thus, a hospital whose board or sponsoring organization was opposed to abortions could nevertheless be held liable for refusing to perform them. Indeed, the bill could now be read to require institutions to hire willing individuals in order to provide abortion services. Similarly, although the Senate bill has been amended to allow a state to refuse to pay for abortions, section 3(b)(2), nothing in that provision or any other part of the bill appears to permit a state to deny the use of a state facility to a woman who was willing to pay for the abortion. The bill might even be construed to *require* the states to provide state facilities for abortions where private facilities are unavailable.

Further, the revised bill contains no exception for informed consent and waiting periods. State laws requiring that factual information concerning the nature of the abortion procedure and available alternatives be made available to a woman twenty-four or forty-eight hours prior to an abortion would thus be invalidated. Thirty-two states currently have such laws. The purpose of such provisions is typically to ensure that the woman's decision to abort is free, reflective and informed. That state purpose would be illegitimate under the bill.

II. Congressional Authority

The bill has been significantly revised to address the Congress' power to adopt it. The bill asserts that Congress has the authority to enact the bill under both the Commerce Clause (Article I, Section 8) and Section 5 of the Fourteenth Amendment of the Constitution. *See* section 2(a)(4). We continue to doubt whether Congress has authority to enact this legislation on the proffered grounds.

In commenting on earlier versions of this legislation, we criticized the suggested reliance on Congress' power under Section 5 of the Fourteenth Amendment, arguing that the Section 5 authority does not extend to fixing the content of the amendment's substantive provisions. We are therefore pleased that the bill now acknowledges that "Congress may not by legislation create constitutional rights" and purports to create only "statutory rights." Section 2(a)(3).

Having recognized that Congress may not create constitutional rights or

alter their content, the bill's drafters have now sought to assert a connection between recognized constitutional rights and the statutory right to abortion that the bill would adopt. That assertion, however, is unpersuasive.

For example, the bill suggests that the statutory rights it creates would protect "liberty." Section 2(a)(4). The Fourteenth Amendment, however, prohibits only certain deprivations of liberty, for instance those that have no rational relationship with a legitimate state interest; were it to prohibit all deprivations of liberty, it would forbid an enormous range of laws including laws against homicide. Thus, to say that a proposed federal statute prevents the states from restricting liberty in general is to say almost nothing about whether the federal statute in any way implements the commands of the Fourteenth Amendment. The bill also asserts that state restrictions on abortion interfere with women's exercise of constitutional rights unrelated to abortion. Section 2(a)(2)(D). The bill does not say what these other rights are, so it is impossible to tell how it would keep the states from interfering with them.

As we have noted with respect to earlier versions of this legislation, Congress' power under the Commerce Clause has been held to be quite broad. It is likely that Congress could enact some legislation concerning abortion pursuant to that power. The arguments now put forward to support this legislation under the Commerce Clause, however, are still troublesome. For example, the bill finds that restrictions on abortion "burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations." Section 2(a)(2)(A)(ii). We fail to see how any increased interstate travel resulting from diverse state laws regulating abortion would constitute a burden on commerce. Moreover, the argument that travel from one jurisdiction to another justifies a single national abortion law on commerce grounds proves too much, for it could justify uniform federal laws on any subject, which is inconsistent with the notion of the federal government as a government of limited powers.

Finally, in our view Congress' intervention in this area would usurp a field of legislation traditionally reserved to the states. As must be obvious from the public reaction this week to the Supreme Court's *Casey* decision, the policy choices in this area are difficult and national consensus is elusive. The political outcomes of fifty distinct state processes would be far more likely to represent the genuine diversity of views that exists on this subject than would a uniform federal code entrenching a more restrictive regime than that of *Roe* and *Casey*. Observance of federalism is thus particularly desirable with respect to abortion regulation.

In keeping with the President's position that "[a]s a nation, we must protect the unborn," Message to the House of Representatives Returning Without Approval the District of Columbia Appropriations Act, 1990, 2 Pub. Papers of George Bush 1563 (Nov. 20, 1989), and for the reasons explained above, the Department of Justice opposes the enactment of the bill, and if

the bill were presented to the President in its current form, I and the President's other senior advisors would recommend a veto.

Sincerely,

WILLIAM P. BARR
Attorney General

Authority to Use United States Military Forces in Somalia

The President, in his constitutional role as Commander in Chief and Chief Executive, might reasonably and lawfully determine that it was justified to use United States Armed Forces personnel to protect those engaged in relief work in Somalia. His authority extended to using U.S. military personnel to protect Somalians and other foreign nationals in Somalia.

December 4, 1992

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have asked for my views as to your authority to commit United States troops to support and secure the humanitarian assistance effort currently underway in Somalia. I am informed that the mission of those troops will be to restore the flow of humanitarian relief to those areas of Somalia most affected by famine and disease, and to facilitate the safe and orderly deployment of United Nations peacekeeping forces in Somalia in the near future. I understand that private United States nationals and military personnel are currently involved in relief operations in Somalia. I am further informed that the efforts of the United States and other nations and of private organizations to deliver humanitarian relief to those areas of Somalia are being severely hampered by the breakdown of governmental authority in Somalia and, in particular, by armed bands who steal relief commodities for their own use.

I conclude that in your constitutional role as Commander in Chief and Chief Executive, you may reasonably and lawfully determine that the protection of those engaged in relief work in Somalia, including members of the United States Armed Forces who have been and will be dispatched to Somalia to assist in that work, justifies the use of United States military personnel in this operation. I further conclude that you have authority to use those military personnel to protect Somalians and other foreign nationals in Somalia. You have authority to commit troops overseas without specific prior Congressional approval "on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests." 40 Op. Att'y Gen. 58, 62 (1941) (Jackson, A.G.). *See also* 53 Dep't St. Bull. 20 (1965) (President Lyndon Johnson ordered the United States military to intervene in the Dominican Republic "to preserve the lives of American citizens and citizens of a good many other nations."). As explained more fully in the

enclosed opinion of the Office of Legal Counsel, your authority thus extends to the protection of the lives of United States citizens and others in Somalia.

Apart from your constitutional authority, I conclude that ample statutory authority exists for the use of the military to engage in the distribution of humanitarian relief in Somalia. *E.g.*, 10 U.S.C. § 2551.

While not required as a precondition for Presidential action here, I also note that United Nations Security Council Resolution 794 authorizes the United States and other member nations to use "all necessary means" to establish a secure environment for humanitarian relief operations in Somalia and to provide military forces to that end. You may reasonably and lawfully conclude that it is necessary to use United States military personnel to support the implementation of Resolution 794 and other Security Council resolutions concerning Somalia.

Finally, I note that the proposed mission accords with the requirements of international law. United States forces will be acting consistent with Resolution 794, which has been adopted in accordance with Chapter VII, Article 42 of the Charter of the United Nations. Implementation of Resolution 794 will accord fully with the principle of non-intervention in matters that are "essentially within the domestic jurisdiction" of member States, inasmuch as that principle does not "prejudice the application of enforcement measures under Chapter VII." U.N. Charter art. 2(7). Resolution 794 makes it unnecessary to evaluate the proposed mission separately under principles of customary international law. I note, however, that given the urgent need for humanitarian assistance to Somalians and the breakdown of governmental authority in Somalia, the operation appears fully consistent with those principles.

Respectfully,

WILLIAM P. BARR
Attorney General

December 4, 1992

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked for our opinion whether the President has the legal authority to commit United States Armed Forces to assist the United Nations in ensuring the safe delivery of food, medicine and other relief to the population in affected regions of Somalia. We understand that the mission of those troops will be to restore as quickly as possible the flow of humanitarian relief to those areas of Somalia most affected by famine and disease, and to facilitate the safe and orderly deployment of United Nations peacekeeping forces in Somalia in the near future. We also understand that private United States nationals are currently involved in relief operations in Somalia and United States military personnel are engaged in humanitarian supply flights into Somalia. We further understand that the efforts of the United States and other nations and of private organizations to deliver humanitarian relief to those areas of Somalia are being severely hampered by the breakdown of governmental authority in Somalia and, in particular, by armed bands who steal relief commodities for their own use.[1]

In our opinion, the President's role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas. Accordingly, where, as here, United States government personnel and private citizens are participating in a lawful relief effort in a foreign nation, we conclude that the President may commit United States troops to protect those involved in the relief effort. In addition, we believe that long-standing precedent supports the use of the Armed Forces to protect Somalians and other foreign nationals in Somalia. We also believe that the President, in determining to commit the Armed Forces to this operation, may lawfully look to the importance to the national interests of

[1] We note at the outset that the deployment of troops to Somalia appears primarily aimed at providing humanitarian assistance, and will only involve combat as an incident to that humanitarian mission. Thus, the current situation poses two questions: is there legal authority for United States Armed Forces to perform humanitarian tasks, and if so, may the President authorize those troops to engage in more purely military actions, such as self-defense and the creation of safe corridors for the provision of aid. We understand from the General Counsel of the Department of Defense that there is clear statutory authority for the use of the Armed Forces to support and to perform humanitarian tasks in Somalia. *See, e.g.*, 10 U.S.C. § 2551; *see also* 22 U.S.C. §§ 2292, 2292*l*. We conclude in this opinion that in these circumstances the President's constitutional authority to authorize the troops to engage in various related military actions is also clear. We do not address issues raised by the proposed operation under the War Powers Resolution.

the United States of upholding the recent United Nations resolutions regarding Somalia. Finally, we note that Congress has expressed its tacit approval for the President's exercise of his constitutional authority in this matter.

I.

From the instructions of President Jefferson's Administration to Commodore Richard Dale in 1801 to "chastise" Algiers and Tripoli if they continued to attack American shipping, to the present, Presidents have taken military initiatives abroad on the basis of their constitutional authority. *See* Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 209-16 (1976); J. Terry Emerson, *War Powers Legislation*, 74 W. Va. L. Rev. 53, 88-110 (1971); James Grafton Rogers, *World Policing and the Constitution* 93-123 (1945); Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928). Against the background of this repeated past practice under many Presidents, this Department and this Office have concluded that the President has the power to commit United States troops abroad for the purpose of protecting important national interests. *See, e.g., Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (Jackson, A.G.) ("the President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests"). As the Supreme Court noted in *United States v. Verduqo-Urquidez*, 494 U.S. 259, 273 (1990), "[t]he United States frequently employs Armed Forces outside this country — over 200 times in our history — for the protection of American citizens or national security."[2]

At the core of this power is the President's authority to take military action to protect American citizens, property, and interests from foreign threats. *See, e.g., Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115, 121 (1979) ("It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad."); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) ("Presidents have repeatedly employed troops abroad in defense of American lives and property."); *see also* Memorandum of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* at 8 (May 22, 1970) (President as Commander in Chief has authority "to commit military forces of the United States to armed conflict . . . to protect the lives of American troops in the field"). In *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186), an American naval officer, under orders from

[2] *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (historical practice provides important evidence of scope of constitutional powers).

the President and the Secretary of the Navy, bombarded Greytown, Nicaragua, in retaliation for the Nicaraguan government's refusal to make reparations for attacks against United States citizens and property. In a suit brought against the naval officer, Justice Nelson held that the officer properly took this action, observing that such an attack on American citizens and property required the sort of swift and effective response that only the Executive could make:

> Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action.

Id. at 112. Justice Nelson also stated that whether the President had a duty to act to protect the citizens involved "was a public political question . . . which belonged to the executive to determine." *Id. See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

Applying these principles to the present case, we conclude that the President can reasonably determine that the proposed mission is necessary to protect the American citizens already in Somalia. We understand that these include private United States citizens engaged in relief operations, and United States military personnel conducting humanitarian supply flights. The United Nations has determined that existing conditions in Somalia pose a threat to the lives and safety of these individuals and of non-Americans also engaged in efforts to deliver food, medicine and other relief to over two million Somalians. *See* Security Council Resolution No. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N.Doc. S\RES\794 (1992), *reprinted in* H.R. Rep. No. 89, 103d Cong., 1st Sess. 19 app. (1993) (determining that the Somali situation "constitutes a threat to international peace and security," and expressing alarm at "reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities"); *see also* John M. Goshko, *U.N. Chief Favors Use of Force in Somalia*, Wash. Post, Dec. 1, 1992, at A1.

It is also essential to consider the safety of the troops to be dispatched as requested by Security Counsel Resolution No. 794. The President may provide those troops with sufficient military protection to insure that they are able to carry out their humanitarian tasks safely and efficiently. He may also decide to send sufficient numbers of troops so that those who are primarily engaged in assisting the United Nations in noncombatant roles are defended by others who perform a protective function. *See, e.g.*, Memorandum of William

H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* at 8 (May 22, 1970).

Nor is the President's power strictly limited to the protection of American citizens in Somalia. Past military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens. For example, in 1965, President Lyndon Johnson explained that he had ordered United States military intervention in the Dominican Republic to protect both Americans and the citizens of other nations, *see An Assessment of the Situation in the Dominican Republic*, 53 Dep't St. Bull. 19, 20 (1965) ("to preserve the lives of American citizens and citizens of a good many other nations — 46 to be exact, 46 nations"). During the 1900-01 Boxer Rebellion in China, President McKinley, without prior congressional authorization, sent about 5,000 United States troops as part of a multi-national contingent to lift the siege of the foreign quarters in Peking after the Chinese government proved unable to control rebels. *Compilation of the Messages and Papers of the Presidents 1789-1902* at 113, 120 (James D. Richardson, ed. Supp. 1904).[3]

The United States has an additional important national interest arising from the involvement of the United Nations in the Somalian situation. In a 1950 opinion supporting President Truman's decision to support the United Nations in repelling the invasion of South Korea, the State Department concluded that "[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest." *Authority of the President to Repel the Attack in Korea*, 23 Dep't St. Bull. 173, 177 (1950). We adopt that conclusion. Here, too, maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest, and will promote the United States' conception of a "new world order." *See, e.g.*, President's Address to the 46th Session of the United Nations General Assembly, 27 Weekly Comp. Pres. Doc. 1324, 1327 (1991).

In Security Council Resolution No. 794, which was adopted pursuant to Chapter VII of the United Nations Charter, the Security Council has authorized the United States and other member States to use "all necessary means" to establish a secure environment for the delivery of essential humanitarian

[3] A case of intervention on behalf of a foreign national, one Martin Koszta, was cited approvingly by the Supreme Court in *In re Neagle*, 135 U.S. 1, 64 (1890), as an example of the legitimate exercise of Executive power "growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." *Id.* Although Koszta had expressed his intention of becoming naturalized, at the time of the events in question he was not an American citizen. He was seized by the Austrian government while in Smyrna and confined in an Austrian vessel. A United States naval officer demanded Koszta's surrender, and "was compelled to train his guns upon the Austrian vessel before his demands were complied with." *Id.* The Court noted that no Act of Congress sanctioned this armed intervention.

aid in Somalia.[4] The President is entitled to rely on this resolution, and on its finding that the situation in Somalia "constitutes a threat to international peace and security," in making his determination that the interests of the United States justify providing the military assistance that Security Council Resolution No. 794 calls for. Moreover, American assistance in giving effect to this and other Security Council resolutions pertaining to Somalia would in itself strengthen the prestige, credibility and effectiveness of the United Nations — which the President can legitimately find to be a substantial national foreign policy objective, and which will tend further to guarantee the lives and property of Americans abroad.

This conclusion accords with our prior opinions. During the Korean War, for example, we took the position that a Security Council resolution authorizing the use of force by member States to protect international peace and security could

> furnish a new ground for a decision by the President to use troops abroad.
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> . . . .
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> In the presence of such a resolution the President is bound to consider what the interests of the United States require. He will necessarily weigh the nature of the breach of the peace which has occurred, what its consequences will be for the United Nations if it goes unchallenged, and what it foreshadows in the way of an ultimate threat to the vital interests of the United States. In the light of these and other considerations he will then make the decisions which he, as President, must make.

Franklin S. Pollak, Power of the President to Send Troops Abroad, 34-35 (Apr. 27, 1951).[5]

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[4] *Id.* ("Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the Pakistani UNOSOM [U.N. Operation in Somalia Peacekeeping] [sic] contingent in Mogadishu"; "Noting the offer by Member States aimed at establishing a secure environment for humanitarian relief operations in Somalia as soon as possible"; "Calls on all Member States which are in a position to do so to provide military forces"; "Endorses the recommendation by the Secretary-General in his letter of 29 November 1992 (S\24868) that action under Chapter VII [authorizing use of force] of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible").

[5] We do not conclude that a Security Council resolution calling on member States to provide troops to assist the United Nations by itself imposes any legal *duty* on the President to act in accordance with the resolution. But, as we explained in our 1951 memorandum, such a resolution can be an important factor on which the President may rely in determining whether national interests require such military action.

II.

Finally, we note that the available evidence strongly suggests that Congress believes that the President's use of military force to assist United Nations relief and peacekeeping efforts in Somalia does not exceed his constitutional powers. In recent legislation, Congress appears to have recognized the President's authority to make use of military personnel, should he deem it necessary to carry out or protect humanitarian missions in Somalia. Section 3(b)(3) of the Horn of Africa Recovery and Food Security Act, Pub. L. No. 102-274, 106 Stat. 115, 116 (1992), states that "[i]t is the sense of the Congress that the President should . . . ensure, to the maximum extent possible and in conjunction with other donors, that emergency humanitarian assistance is being made available to those in need." Section 4(a)(1) of the Act states in part that U.S. policy should be "to assure noncombatants . . . equal and ready access to all food, emergency, and relief assistance," and section 4(b)(1) states that pursuant to the United States policy of "seeking to maximize relief efforts" the United States should "redouble its commendable efforts to secure safe corridors of passage for emergency food and relief supplies in affected areas." *Id.* at 117. Moreover, in section 2(3), Congress explicitly found that the actions of the government and armed opposition groups in Somalia "erode[d] food security" in that country. *Id.* at 115.

Thus, Congress appears to have contemplated that the President might find it necessary to make use of military forces to ensure the safe delivery of humanitarian relief in Somalia, and to have assumed in such circumstances that the President possessed constitutional authority to do so.[6] *See also Dames & Moore*, 453 U.S. at 678-79.

TIMOTHY E. FLANIGAN
Assistant Attorney General
Office of Legal Counsel

[6] As noted above, the quoted provisions of the Act are part of a "sense of Congress" resolution. A "sense of Congress" resolution does not, of course, give the President authority he does not otherwise possess. Nonetheless, we believe that the Congressional views expressed in the quoted portions of the Act are evidence that Congress recognized that the President has authority to use military force to accomplish the goals of the Act.

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Recess Appointments During an Intrasession Recess

The President may make interim recess appointments during an intrasession recess of eighteen days.

January 14, 1992

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This memorandum responds to your request that this Office determine whether the President may make appointments under the Recess Appointments Clause to the Federal Housing Finance Board ("FHFB"), the Legal Services Corporation ("LSC"), and the office of the Chief Executive Officer of the Resolution Trust Corporation ("RTC") during the current recess of the Senate, which began on January 3, 1992 and will end on January 21, 1992. We conclude that he may.

Common to all of these appointments is the issue whether the President may make recess appointments during an intrasession recess of eighteen days.[1] Article II, Section 2, Clause 3 of the Constitution provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The longstanding view of the Attorneys General has been that the term "recess" includes intrasession recesses if they are of substantial length. Attorney General Daugherty held in 1921 that the President had the power to make a recess appointment during a twenty-eight day intrasession recess. He explained that recess appointments could be made during any recess of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921) (quoting S. Rep. No. 4389, 58th Cong., 3d Sess. 1905; 39 Cong. Rec. 3823). According to Attorney General Daugherty, while "the line of demarcation cannot be accurately drawn," *id.* at 25,

[1] For practical purposes with respect to nominations, this recess closely resembles one of substantially greater length. House Concurrent Resolution 260, enacted on November 27, 1991, provides that the first session of the 102nd Congress stood adjourned until 11:55 a.m. on January 3, 1992, or until Members were otherwise notified to reassemble. H. Con. Res. 260, 102d Cong., 1st Sess. (1991). It also provides that "when the Congress convenes on January 3, 1992 . . . , the Senate shall not conduct any organizational or legislative business and when it recesses or adjourns on that day, it stand in recess or adjournment until 11:30 a.m. on Tuesday, January 21, 1992 [or until otherwise notified to reassemble]." *Id.* Except for its brief formal session on January 3, then, the Senate will have been absent from November 27, 1991 until January 21, 1992, a period of fifty-four days.

> the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor of the validity of whatever action he may take.

Id. Attorney General Daugherty's opinion has been cited with approval in subsequent opinions of the Attorneys General, and has been relied on by the Comptroller General as well. *See e.g.*, 41 Op. Att'y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948).

Past practice is consistent with exercise of the recess appointment power during an intrasession recess of eighteen days. President Coolidge made a recess appointment during a fifteen day recess. Memorandum for the Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 3 (Dec. 3, 1971). In 1985 President Reagan made recess appointments during an eighteen day intrasession recess. Memorandum to Files, from Herman Marcuse, Office of Legal Counsel (Jan. 28, 1985). Accordingly, we believe that the President may constitutionally make recess appointments during the current intrasession recess.[2]

We next address the specific offices you have identified. All of the members of the Boards of Directors of the LSC and the FHFB had been serving pursuant to recess appointments that expired when the First Session of the 102nd Congress ended on January 3, 1992. Those offices are thus now vacant and the President may make recess appointments to them during the current recess. *See Permissibility of Recess Appointments of Directors of the Federal Housing Finance Board*, 15 Op. O.L.C. 91 (1991); Memorandum for John P. Schmitz, Deputy Counsel to the President, from Timothy E. Flanigan, Special Assistant, Office of Legal Counsel (Oct. 17, 1990).

Finally, we believe that the President may recess appoint the Chief Executive Officer of the RTC. That office was created by section 201 of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, 105 Stat. 1761 ("Act"), which the President signed on December 12, 1991. Although certain of the substantive provisions of the Act do not take effect until February 1, 1992, *see* title III of the Act, the provision creating the position of Chief Executive Officer is not subject to any special effective date provision, and hence went into effect upon enactment. The Attorneys General have long believed that the President has the power to make an original recess appointment to a newly created position. *See* 12 Op. Att'y Gen. 455 (1868); 14 Op. Att'y Gen. 562 (1875); 18 Op. Att'y Gen. 28 (1880), a position upheld in *United States v. Allocco*, 305 F.2d 704, 713-14 (2d Cir. 1962), *cert. denied*, 371 U.S. 964

[2] Attorney General Daugherty, however, suggested in 1921 that "an adjournment for 5 or even 10 days" would not be sufficient "to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. at 25.

(1963). The Office therefore now exists and is vacant for purposes of the Recess Appointments Clause.

In conclusion, we believe that the current recess constitutes a sufficient period for the President to make the aforementioned recess appointments as a matter of law. As a matter of policy, we suggest that the President make the appointments as soon in the recess as possible.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports

Section 129(e) of Pub. L. No. 102-138 and section 503 of Pub. L. No. 102-140 are unconstitutional to the extent that they purport to limit the President's ability to issue more than one official or diplomatic passport to United States government personnel.

The single-passport requirements set forth in section 129(e) and section 503 are severable from the remainder of the statutes in which they appear.

The President is constitutionally authorized to decline to enforce the portions of section 129(e) and section 503 that purport to limit the issuance of official and diplomatic passports.

January 17, 1992

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our opinion on several issues raised by the nearly identical provisions of section 129(e) of the Foreign Relations Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-138, 105 Stat. 647, 662 (1991), and section 503 of Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 820 (1991), an act making appropriations for the State Department and other agencies. Specifically, you asked whether these provisions are unconstitutional to the extent that they purport to prohibit the issuance of more than one official or diplomatic passport to United States government officials, whether they are severable from the remainder of the two bills, and whether the President may decline to enforce them.[1] For the reasons explained below, we conclude that the relevant portions of section 129(e) and section 503 are unconstitutional to the extent that they limit the issuance of official and diplomatic passports and that those sections are severable from the remainder of the two statutes. Under the circumstances, we further conclude that the President is constitutionally authorized to decline to enforce these provisions.

[1] Memorandum for Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, from C. Boyden Gray, Counsel to the President (Oct. 23, 1991) ("Opinion Request").

I.

Section 129 of Pub. L. No. 102-138 provides in part:

> (e)(1) REQUIREMENT OF SINGLE PASSPORT. — The Secretary of State shall not issue more than one official or diplomatic passport to any official of the United States Government for the purpose of enabling that official to acquiesce in or comply with the policy of the majority of [the] Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passport or other documents reflects that the person has visited Israel.
>
> (2) IMPLEMENTATION OF POLICY OF NONCOMPLIANCE.— The Secretary of State shall promulgate such rules and regulations as are necessary to ensure that officials of the United States Government do not comply with, or acquiesce in, the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passport or other documents reflect that the person has visited Israel.[2]

The relevant portion of section 503 of Pub. L. No. 102-140 is nearly identical:

> [Ninety] days after the enactment of this Act, none of the funds provided in this Act shall be used by the Department of State to issue more than one official or diplomatic passport to any United States Government employee for the purpose of enabling that employee to acquiesce in or comply with the policy of the majority of Arab league nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that that person has visited Israel.[3]

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[2] 105 Stat. at 662. By virtue of section 129(e)(3)(A), section 129(e) is effective January 26, 1992.

Because you have requested our opinion only as to those provisions that "purport to forbid the issuance of more than one official or diplomatic passport to U.S. officials for the purpose of enabling those officials to acquiesce in" the Arab League policy described in section 129, we have so limited our review and will for ease of reference refer to the operative portion of section 129, section 129(e). *See* Opinion Request.

We note, however, that section 129 also prohibits issuance of "any passport that is designated for travel only to Israel." Pub. L. No. 102-138, § 129(d)(1), 105 Stat. at 661. To the extent that this prohibition applies to official and diplomatic passports, it suffers from the same constitutional defects as the prohibition on multiple passports.

[3] 105 Stat. at 820. Like section 129 of Pub. L. No. 102-138, section 503 also prohibits the issuance of Israel-only passports: "None of the funds provided in this Act shall be used by the Department of State to issue any passport that is designated for travel only to Israel . . . ." *Id.* Our discussion of section 503 is limited to the provision that forbids the issuance of more than one official or diplomatic passport to United States government officials. *See supra* note 2. References to section 503 in this memorandum should be understood to be so limited.

These provisions purport to effect a change in the State Department's current practice in issuing official and diplomatic passports to government personnel sent to the Middle East, which is described in the conference report on Pub. L. No. 102-138: "Officials of the U.S. Government traveling in the Middle East are, as a general practice, issued two passports so that they can travel to Israel and to Arab countries in compliance with the passport and visa policy of the majority of Arab League nations." H.R. Conf. Rep. No. 238, 102d Cong., 1st Sess. 107 (1991). You have asked our opinion whether legislation banning continuation of this practice is unconstitutional.

The State Department has concluded that section 129(e) and section 503 would unconstitutionally intrude on the President's authority to conduct diplomacy on behalf of the United States.[4] In the State Department's view, these provisions would "directly interfere with the President's ability to send his diplomats abroad to negotiate with foreign governments," *id.* at 7, and "interfere with the discretion and flexibility needed by the President to carry out the exclusively executive function of foreign diplomacy," *id.* at 12.[5] Accordingly, the State Department concludes that these provisions are unconstitutional. *Id.* at 14.

As part of its analysis, the State Department "examined a variety of possibilities for carrying out diplomatic functions without the issuance of more than one official or diplomatic passport," but it was "unable to identify a satisfactory alternative in a significant number of cases that would be affected by this legislation." *Id.* at 5. These alternatives included: (1) "travelling to either Israel or Arab League nations without presenting a passport;" (2) "ask[ing] Israel not to stamp the passports of U.S. officials;" (3) "seek[ing] advance permission from the receiving Arab country every time a U.S. official would be entering that country with a passport reflecting travel to Israel;" (4) "cancelling a diplomatic or official passport that reflected travel to Israel whenever the holder needed to travel to an Arab League nation, and reissuing a new passport;" and (5) "arranging negotiations so that travel to Israel followed travel to the Arab countries." *Id.* at 5-6. The State Department rejected all of these alternatives.[6] After reviewing these options, it concluded:

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[4] Memorandum for Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, from Jamison M. Selby, Deputy Legal Adviser, Department of State (Jan. 3, 1992) ("Selby Memorandum").

[5] The State Department also disputes Congress's view, expressed in the text of section 129(e) and section 503, that issuing multiple passports to accommodate travel to the Middle East constitutes a practice of "acquiesc[ing] in" or "comply[ing] with" the Arab League policy. Selby Memorandum at 2. In State's view, the issuance of multiple passports is "rather a challenge to [that policy], because the rules of the boycott forbid the use of second passports to evade the policy." *Id.* Nevertheless, the State Department recognizes that "Congress considers the issuance of second passports as compliance with the Arab League policy." *Id.*

[6] Option (1) was rejected because travel without a passport "would probably not be permitted by receiving states, would adversely impact U.S. bilateral relations in the region, and, if permitted, would expose U.S. officials to unacceptable personal risk." Selby Memorandum at 6. Option (2) was rejected because "even to propose it could adversely affect our relations with Israel, and, in any event, any such request would likely be rejected by Israel." *Id.* Option (3) was unacceptable because it "would put our diplomatic travel at

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> Thus, in order to carry out [the single-passport requirement] in all cases, the President would have to make the abolition of the Arab League passport policy the first item on his negotiating agenda and succeed in having that policy abolished before proceeding with substantive negotiations of great importance to all parties concerned. . . . [W]e believe that such an effort would not succeed at this time.

Id. We defer to the State Department's expertise with respect to the practical effects of section 129(e) and 503 and concur in its legal conclusions.

II.

The necessary background for our analysis of the particular issues presented here is the well-settled recognition of the President's broad authority over the Nation's foreign affairs. That authority flows from his position as head of the unitary Executive and as Commander-in-Chief. *See, e.g.*, U.S. Const. art. II, §§ 1-3; *Haig v. Agee*, 453 U.S. 280, 291-92 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). In addition, Section 2 of Article II of the Constitution specifically grants the President the "Power . . . to make Treaties" and to "appoint Ambassadors, other public Ministers and Consuls." These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations and to direct the negotiation of treaties and agreements with them. *See Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (1990) ("Barr Memorandum").

In exercising the "federal power over external affairs," the President is not subject to the interference of Congress:

> [T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

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[6](....continued)
the pleasure of Arab governments." *Id.* The State Department concluded that option (4) would cause "logistical problems" and might be viewed as inconsistent with the legislation. *Id.* Finally, option (5) was rejected because it would be "unacceptable to Israel" and because it would "only resolve the problem for a single trip." *Id.* More importantly, "it would be impossible in complex negotiations involving rapid, repeated travel between Israel and Arab countries." *Id.*

Curtiss-Wright, 299 U.S. at 319 (quoting 10 Annals of Cong. 613 (1800)) (emphasis in original). In other words, the President possesses "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." *Id.* at 320. *See also* Barr Memorandum, 14 Op. O.L.C. at 38-39.

The President himself emphasized these principles in his signing statement on Pub. L. No. 102-138:

> Article II of the Constitution confers the Executive power of the United States on the President alone. Executive power includes the authority to receive and appoint ambassadors and to conduct diplomacy. Thus, under our system of government, all decisions concerning the conduct of negotiations with foreign governments are within the exclusive control of the President. . . .
>
> The Constitution . . . vests exclusive authority in the President to control the timing and substance of negotiations with foreign governments and to choose the officials who will negotiate on behalf of the United States.

Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, II Pub. Papers 1344 (Oct. 28, 1991) ("Presidential Signing Statement").

From the Executive's plenary authority to conduct the Nation's foreign affairs flow a number of specific executive powers that are of particular relevance to the issue at hand. These include control over the issuance of passports, power to determine the content of communications with foreign governments, authority to conduct diplomacy, and authority to define the content of foreign policy. As we explain in more detail below, we conclude that the infringement on these powers worked by section 129(e) and section 503 would be unconstitutional.

First, these provisions conflict with the long-accepted principle that the President, through delegates of his choosing, has authority over issuance of passports for reasons of foreign policy or national security. Prior to the enactment of the first passport legislation, it was generally understood that the

> issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States. This derived from the generally accepted view that foreign policy was the province and responsibility of the Executive.

Haig, 453 U.S. at 293.

From the outset, "Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Id.* at 294. In the earliest passport statutes, Congress expressly recognized the Executive's authority in that regard. *See, e.g.*, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, 199 (prohibiting travel to enemy country without passport issued by officer "authorized by the President"). Passport legislation enacted in 1856, which authorized the Secretary of State to grant and issue passports "under such rules as the President shall designate and prescribe," reinforced the established power of the Executive in this area. *See Haig*, 453 U.S. at 294 (citing Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60). As noted by the 1960 Congress, the 1856 Act

> merely confirmed an authority already possessed and exercised by the Secretary of State. . . . This authority was ancillary to his broader authority to protect American citizens in foreign countries and was necessarily incident to his general authority to conduct the foreign affairs of the United States under the Chief Executive.

Staff of Senate Comm. on Government Operations, 86th Cong., 2d Sess., *Reorganization of the Passport Functions of the Department of State* 13 (Comm. Print 1960) ("*Passport Reorganization*"). The Passport Act of 1926, ch. 772, 44 Stat. 887, adopted the pertinent language of the 1856 Act. The legislative history of the 1926 Act indicates congressional recognition of Executive authority with respect to passports. *See Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. 5, 10-11 (1926). As the 1960 Senate staff report concluded: "[T]he authority to issue or withhold passports has, by precedent and law, been vested in the Secretary of State as a part of his responsibility to protect . . . what he considered to be the best interests of the Nation." *Passport Reorganization* at 13.

Executive action to control the issuance of passports in connection with foreign affairs has never been seriously questioned. For example, in 1861, the Secretary of State issued orders prohibiting persons from departing or entering the United States without passports, denying passports to individuals who were subject to the military service unless they were bonded, and denying passports to individuals who were engaged in activities that threatened the Union. *See* 3 John Bassett Moore, *A Digest of International Law* 920 (1906). In 1903, President Theodore Roosevelt promulgated a rule authorizing the Secretary of State to refuse to issue passports to persons who the Secretary believed desired a passport "to further an unlawful or improper

purpose." Exec. Order No. 235, § 16 (1903), *quoted in* Moore at 902.[7] On a number of occasions the President, acting through the Secretary of State, has exercised his foreign affairs power by refusing to issue a passport or by revoking one already issued. For example, in 1948, the Secretary of State, pursuant to his "discretionary authority . . . to conduct and be responsible for foreign policy," refused to issue a passport to a congressman who sought to go abroad to attend a Paris conference to aid Greek guerrilla forces. *Passports Again an Issue*, N.Y. Times, Apr. 11, 1948, at E9, *discussed in Haig*, 453 U.S. at 302.

More recently, the Supreme Court upheld the authority of the Secretary of State to revoke a passport on grounds of national security pursuant to a regulation, 22 C.F.R. § 51.70(b)(4) (1991), promulgated under section 1 of the Passport Act of 1926, codified as amended at 22 U.S.C. § 211a. *See Haig*, 453 U.S. at 289-310. Although *Haig* was decided on statutory grounds, *id.* at 289 n.17, the Supreme Court noted with approval the vesting of authority over passports in the Executive based on the Executive's constitutional authority in the area of foreign affairs, *id.* at 294.[8] By purporting to regulate the issuance of official and diplomatic passports, section 129(e) and section 503 infringe upon this constitutional authority.

Second, section 129(e) and section 503 would interfere with the President's communications to foreign governments in the conduct of the business of the United States Government abroad. In interfering with the issuance of official and diplomatic passports, Congress infringes on the President's plenary authority "to speak or listen as a representative of the nation." *Curtiss-Wright*, 299 U.S. at 319.

In general, passports are representations by the President to a foreign government on behalf of the United States. *See Haig*, 453 U.S. at 292 ("A passport is . . . a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer."); *id.* (quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835)) ("'[A passport] is a document, which, from its nature and object, is addressed to foreign powers . . . and is to be considered rather in the character of a political document . . . .'")

More particularly, official and diplomatic passports are documents addressed to foreign powers in which the President vouches for United States officials and diplomats.[9] They carry the Secretary of State's endorsement: "The bearer is abroad on an official [or diplomatic] assignment for the Government of the

[7] *See also* Exec. Order No. 654 (1907); Exec. Order No. 2119-A (1915); Exec. Order No. 2519-A (1917)

[8] *Haig v. Agee* provides two other examples of Executive authority over passports. In 1954, the Secretary revoked a passport held by an individual who was involved in supplying arms to foreign groups whose interests were contrary to United States policy. *Id.* at 302. Similarly, in 1970, the Secretary revoked passports held by two persons who sought to travel to the site of an international airplane highjacking. *Id.*

[9] State Department regulations describe the types of passports issued by the United States Government:

(a) *Regular passport.* A regular passport is issued to a national of the United States proceeding abroad for personal or business reasons.

(b) *Official passport.* An official passport is issued to an official or employee of the

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United States of America." According to the Passport Office of the State Department, such passports have at least two purposes:

> (1) to represent to the foreign government that the bearer is in fact an official or employee of the United States Government proceeding abroad on [United States Government] business; [and] (2) to facilitate the accomplishment of that business (clothing diplomats with diplomatic immunity, by issuing a separate diplomatic passport falls within this category.)

Memorandum for Harry L. Coburn, Deputy Assistant Secretary for Passport Services, from William B. Wharton, Director, Office of Citizenship Appeals and Legal Services at 4-5 (Sept. 21, 1984).

Because of the communicative nature of official and diplomatic passports, section 129(e) and section 503 may be read as an attempt to dictate to the President the scope of permissible communications with foreign governments by means of passports. They would prevent him from issuing, in the case of a United States official or diplomat who has visited Israel, "a letter of introduction," *Haig*, 453 U.S. at 292, to Arab League nations that does not also document the bearer's visit to Israel. Indeed, in certain cases, the single-passport requirement might positively compel the President to issue, on behalf of government officials and diplomats, letters of introduction that would offend the recipients and cause the bearers to be turned away or subjected to retaliation and harassment. For example, the State Department predicts that "U.S. officials travelling to the Middle East could be expected to face obstacles to their entry to many Arab League countries if their passports reflect travel to Israel." Selby Memorandum at 5 (footnote omitted). Just as Congress may not directly intrude upon the President's "power to speak . . . as a representative of the nation," *Curtiss-Wright*, 299 U.S. at 319, it cannot indirectly, by means of section 129(e) and section 503, effect the same intrusion.

Third, the single-passport requirement would impair the President's ability to conduct foreign affairs by denying his diplomats the documentation necessary for entry into certain Arab League nations. It has long been recognized that "[a]s 'sole organ' [of the federal government in the field of international relations], the President determines also how, when, where and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited as to time, place, form, or forum." Louis

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[9](....continued)

> United States Government proceeding abroad in the discharge of official duties. . . .
> (c) *Diplomatic passport.* A diplomatic passport is issued to a Foreign Service Officer, [to] a person in the diplomatic service or to a person having diplomatic status either because of the nature of his or her foreign mission or by reason of the office he or she holds. . . .

22 C.F.R. § 51.3 (1991).

Henkin, *Foreign Affairs and the Constitution* 47 (1972). Section 129(e) and section 503 impermissibly attempt to limit the President's authority to make such determinations.

Congress itself has given heed to these principles since the founding of the Republic. As the Supreme Court has noted, the Senate Committee on Foreign Relations declared in 1816:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The Committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the inference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.

Curtiss-Wright, 299 U.S. at 319 (quoting 8 Reports of the Sen. Committee on Foreign Relations 24 (1916)).

It is clear that the single-passport requirement would interfere with, and perhaps foreclose altogether, the President's ability to conduct diplomacy involving certain Arab League countries. The policy of these countries is to deny entrance to those persons whose passports reflect previous travel to Israel. *See* H.R. Conf. Rep. No. 238 at 107.[10] The State Department believes that "[b]ased on prior experience and recent efforts to have the [Arab League policy] repealed, . . . at least in some instances the [policy] will be enforced against U.S. officials." Selby Memorandum at 12. The State Department has avoided the application of this policy to United States official and diplomatic personnel by issuing dual official or diplomatic passports to United States government employees whose responsibilities require travel to both Israel and Arab League nations. *See id.* at 4; *The Anti-Boycott Passport Act of 1991: Hearings Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 102d Cong., 1st Sess. 48, 54, 67 (1991) (testimony of Elizabeth M. Tamposi, Assistant Secretary of State, Bureau of Consular Affairs). To date, "[t]his practice has been successful in keeping the Arab travel boycott from interfering with the conduct of U.S. diplomacy in the region and from raising bilateral tensions." Selby Memorandum at 4.

If official and diplomatic personnel were forced to carry only a single

[10] In addition, the State Department advises that certain non-Arab League countries with large Muslim populations, such as Senegal, have occasionally refused to honor travel documents that reflect travel to Israel. Selby Memorandum at 5 n.2.

passport, they would face barriers to entering these Arab countries if they had visited Israel anytime within the period of the passport's validity — a period as long as five years. *See* 22 C.F.R. § 51.4(c), (d) (1991).[11] State Department officials have predicted that — at the very least — the single-passport requirement is likely to result in "incidents of reciprocation, retaliation and harassment of both officials and Congressmen, . . . either as a matter of policy in certain countries or simply as a manifestation of anti-Israeli zealousness among airport officials." U.S. Dep't of State, *The Operational Impact of Anti-Boycott Passport Legislation* 3 (June 17, 1991). In addition, "[q]uite apart from the question of entry, difficulties might also arise when an individual bearing evidence of prior or future travel to Israel is stopped at one of the many internal checkpoints in Lebanon and other Arab countries, and asked to produce a passport. At this juncture, evidence of travel to Israel might spark other, more serious, problems than denial of any entry visa." Selby Memorandum at 5. Such difficulties would clearly "interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations" and "would place our officials at personal risk." *Id.* As the President similarly declared in his signing statement on Pub. L. No. 102-138:

> A purported blanket prohibition on the issuance of more than one official or diplomatic passport to U.S. Government officials could interfere with my ability to conduct diplomacy by denying U.S. diplomats the documentation necessary for them to travel to all countries in the Middle East and could upset delicate and complex negotiations.

Presidential Signing Statement at 1344-45.[12]

Finally, Congress declared in section 129 that it was "the purpose of this section . . . to prohibit United States Government acquiescence in" the Arab

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[11] The authority of the President to grant exceptions for citizens to enter or depart the United States without a passport *see* 8 U.S.C. § 1185(b), would not overcome these barriers imposed by the operation of section 129(e) and section 503. By its terms, section 1185(b) applies only to travel to and from the United States. It would have no effect on the ability of the President's representatives to gain entry into a foreign country.

[12] As the State Department has noted, the single-passport requirement, had it been in effect, might have upset the recent negotiations leading up to the long-sought Middle East Peace Conference. Memorandum for Brent Scowcroft, from Robert W. Pearson, Executive Secretary, Department of State, *Re: Proposed Legislation Prohibiting Multiple Official or Diplomatic Passports* at 2 (Oct. 29, 1991). In addition to the Secretary of State himself, other State Department personnel were involved in shuttle diplomacy between Israel and the Arab League nations of Jordan, Syria, Egypt, and Saudi Arabia, among others. The single-passport requirement would have disrupted the intensified travel necessary to facilitate the peace conference process. *Id.* Similarly, the complex process of obtaining the release of the American hostages in Lebanon might have been imperiled if United States diplomats were unable to make responsive consultations with Israeli and Arab League diplomats because of a single-passport requirement. In general, "to carry out [the requirement] in all cases, the President would have to . . . [postpone] substantive negotiations of great importance to all parties concerned." Selby Memorandum at 6.

League passport and visa policy. Section 129(a)(2), 105 Stat. at 661. To the extent that the single-passport requirement is an attempt, by indirect means, to dictate the substance of United States policy toward Arab League governments, it suffers from an additional constitutional defect. As the "'sole organ of the nation in its external relations,'" *Curtiss-Wright*, 299 U.S. at 319 (quoting 10 Annals of Cong. 613 (statement of Rep. John Marshall)), it is for the President alone to articulate the content of the Nation's response to the Arab League passport policy. By interfering with the President's foreign policy determinations, section 129(e) and section 503 attempt to intrude into a sphere in which the Constitution gives Congress no role. *See* Barr Memorandum, 14 Op. O.L.C. at 41.

In sum, the single-passport requirement interferes with the "plenary and exclusive" power of the President to conduct foreign affairs. The current policy of issuing more than one passport to officials of the United States Government traveling to the Middle East is a proper exercise of that power. Into this field, "the Senate cannot intrude; and Congress itself is powerless to invade it." *Id.* Thus, to the extent that section 129(e) and section 503 would interfere with the President's ability to conduct diplomacy with certain nations and limit the content and nature of his speech to foreign governments as the representative of the United States by limiting issuance of official and diplomatic passports, they do not comport with the Constitution.[13]

That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity. As we have said on several prior occasions, Congress may not use its power over appropriation of public funds "to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs. . . . [T]he President cannot be compelled to give up

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[13]This analysis has proceeded from the President's broad authority over the Nation's foreign affairs and has relied on specific applications of that authority. The analysis applies self-evidently to the issuance of diplomatic passports, which are furnished to Foreign Service Officers, persons in the diplomatic service, and persons having diplomatic status due to their missions or offices. *See* 22 C.F.R. § 51.3(c) (1991), *quoted supra* note 9. The Department of State has also asked for our views on the constitutionality of the single passport requirement "as applied to non-Executive branch officials, such as members of Congress and the federal judiciary, who often carry diplomatic passports, and Congressional staff, who frequently travel on official passports." Selby Memorandum at 14. We have received the informal advice of the State Department that it believes the provisions are also unconstitutional as applied to these non-executive branch officials. Telephone Conversation between Jamison M. Selby, Deputy Legal Adviser, Department of State, and Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel (Jan. 17, 1992).

Without the benefit of the State Department's formal views on this question, we offer the following views. To the extent that members of the legislative and judicial branches travel on diplomatic passports our analysis, of course, applies to such passports. In general, we also believe that the President's authority over foreign affairs applies equally to the issuance of official passports. To receive an official passport, a person must be "an official or employee of the United States Government proceeding abroad in the discharge of official duties." 22 C.F.R. § 51.3(b) (1991), *quoted supra* note 9. Such persons are necessarily representing the United States in its dealings with foreign nations. Indeed, they travel with the Secretary of State's endorsement that they are "abroad on an official assignment for the Government of the United States of America." Accordingly, we believe that our analysis would apply with equal force to all officials passports, whether issued to members of the executive branch or to members of a coordinate branch.

the [constitutional] authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his Office.'" Barr Memorandum, 14 Op. O.L.C. at 42 n.3 (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261-62 (1989)).

The Supreme Court has recently endorsed this conclusion. In some spheres, it has said, "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *South Dakota v. Dole*, 483 U.S. 203, 209 (1987); *cf.* U.S. Const. art. I, § 8, cl. 1. But in *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991), the Supreme Court found *Dole* "inapplicable" to issues (such as those raised by section 129(e) and section 503) that "involve separation-of-powers principles." In accordance with this decision, therefore, our analysis is not affected by the fact that the single-passport requirement of section 503 is in the form of a condition on appropriation.[14]

For all these reasons, we conclude that section 129(e) and section 503 are unconstitutional to the extent that they purport to limit the President's ability to issue more than one official or diplomatic passport to United States government personnel.

III.

We now turn to the question whether section 129(e) and section 503 may be severed from the authorization act and the appropriations act.

The Supreme Court has explained the basic approach to severability questions on many occasions: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), *quoted in Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Thus, absent evidence that the statute without the unconstitutional provisions will not function "in a *manner* consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685, the unconstitutional provision will be found to be severable.

The single-passport requirement of section 129(e) operates independently of the remainder of Pub. L. No. 102-138, which contains 144 substantive sections related to one another only by the fact that they involve some aspect of foreign relations. *See, e.g.*, § 121 ("Childcare Facilities at Certain Posts Abroad"); § 225 ("Eastern Europe Student Exchange Endowment Fund"); § 301 ("Persian Gulf War Criminals"); § 359 ("Human Rights Abuses

[14] The State Department agrees that "if Congress cannot directly prohibit the issuance of multiple diplomatic passports, it cannot do so indirectly through its appropriations power." Selby Memorandum at 13 (emphasis and capitalization omitted).

in East Timor"); § 402 ("Multilateral Arms Transfer and Control Regime"); § 507 ("Sanctions Against Use of Chemical or Biological Weapons"). There is no textual evidence that Congress would not have enacted this wide-ranging bill if the isolated provision regarding issuance of multiple passports had not been included.[15] Nothing in the legislative history undermines this conclusion.[16] The absence of section 129(e), moreover, would in no way impair the execution of the remainder of the statute in a manner fully consistent with the intent of Congress. There is, in short, no reason to conclude that Congress would have declined to enact Pub. L. No. 102-218 had it known that section 129(e) would not pass constitutional muster. We therefore conclude that the single-passport requirement is severable from the remainder of Pub. L. No. 102-138.

The appropriations bill, Pub. L. No. 102-140, contains an express severability clause. Section 604 provides:

> If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the remainder of the Act and the application of each provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

105 Stat. at 823. The Supreme Court has held that the inclusion of a severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Alaska Airlines*, 480 U.S. at 686 (citations omitted). In the case of Pub. L. No. 102-140, there is no strong evidence — indeed, there is no evidence at all — that Congress intended the validity of the statute to depend on the validity of section 503. The single-passport

[15] The absence of a severability provision is not dispositive, for "[i]n the absence of a severability clause . . . , Congress' silence is just that — silence — and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686.

[16] The Senate Foreign Relations Committee gave this provision no special attention that would indicate its centrality to the legislation as a whole. The portion of the Committee's 134-page report devoted to what later became section 129 consumed only a single page, and was merely a synopsis of the provision's text. *See* S. Rep. No. 98, 102d Cong., 1st Sess. 55 (1991). The House bill did not even contain a single-passport requirement. *See* H.R. Rep. No. 53, 102d Cong., 1st Sess. 62 (1991).

On the Senate floor, the Chairman of the Foreign Relations Committee (Senator Pell) did not mention the single-passport requirement as he summarized the bill, *see* 137 Cong. Rec. S11,121 (daily ed. July 29, 1991) and only one speaker discussed the passport provision. *See id.* at S11,189-90 (statement of Sen. Lautenberg).

The conference committee adopted almost verbatim the language of the Senate bill. *See* H R. Conf. Rep. No. 238 at 107. The conferees devoted no more attention to section 129 than to many other provisions. Nor did the conferees give any indication that this provision of the bill was so central to its adoption that the bill would fail without it.

When the bill came back from conference, the passport provision merited only a single sentence of discussion on the Senate floor. *See* 137 Cong. Rec. S14,438 (daily ed. Oct. 4, 1991) (statement of Sen. Kerry). In the House, the Democratic floor manager spoke about the provision at greater length, but gave no indication that it was in any sense the keystone of the entire bill. *See* 137 Cong. Rec. H7638 (daily ed. Oct. 8, 1991) (statement of Rep. Berman).

requirement did not even appear in the House bill, but was added by the Senate. *See* S. Rep. No. 106, 102d Cong., 1st Sess. 114 (1991). The Conference Report did not discuss the provision at all. *See* H.R. Conf. Rep. No. 233, 102d Cong., 1st Sess. 87 (1991) (noting only that the Senate's amendment adding the single-passport requirement was "[r]eported in disagreement"). Finally, the respective committee reports gave no indication that the severability clause was to be given anything but its natural construction. *See* S. Rep. No. 106, at 123; H.R. Rep. No. 106, 102d Cong., 1st Sess. 97 (1991).[17]

Thus, we conclude that the single-passport requirements of Pub. L. No. 102-138 and Pub. L. No. 102-140 are severable from the remainder of those bills.

IV.

The final issue we address is whether the President may refuse to enforce the single-passport requirements.[18] The Department of Justice has consistently advised that the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions.[19] Both the President's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and the President's oath to "preserve, protect and defend the Constitution of the United States," *id.* § 1, vest the President with the responsibility to decline to enforce laws that conflict with the highest law, the Constitution. We recognize, however, that the judicial authority addressing this issue is sparse and that our position may be controversial.

Among the laws that the President must "take Care" to faithfully execute is the Constitution. This proposition seems obvious, since the Constitution is "the supreme *Law* of the Land." U.S. Const. art. VI, § 2 (emphasis added). As the Justice Department has stated previously,

> the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts

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[17] Although the severability clause of Pub. L. No. 102-140 is couched in terms of provisions of the act being "held to be invalid," and thus arguably might be read to contemplate a court decision on validity of portions of the act, it remains an accurate indicator of whether Congress would have enacted the bill, and desired its other provisions to stand, if any particular section were not enforced.

[18] The analysis of this question does not turn on the fact that the President has signed the two bills. As the Supreme Court has observed, "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983). That the President has signed a bill in no way estops him from later asserting the bill's unconstitutionality, in court or otherwise. *See* Letter for Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, from William French Smith, Attorney General at 3 (Feb. 22, 1985) ("Attorney General Smith Letter") ("[T]he President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects."); Memorandum for Robert J. Lipshutz, Counsel to the President, from John M Harmon, Assistant Attorney General, Office of Legal Counsel at 1 (Sept 27, 1977) ("Harmon Memorandum") ("[P]rior to a definitive judicial determination of the question of constitutionality a President may decline to enforce a portion of a statute if he believes it to be unconstitutional, even if he or one of his predecessors signed the statute into law.").

[19] Our most recent consideration of this issue is set forth in the Barr Memorandum. The following discussion is drawn in large part from that memorandum.

of Congress, and cases arise in which the duty to the one precludes the duty to the other.

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 29 (1980) (Opinion of Attorney General Benjamin R. Civiletti). *See also, e.g., Bid Protest Hearings* at 23 (statement of Professor Mark Tushnet) ("[T]he President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law."). Where an act of Congress conflicts with the Constitution, the President is faced with the duty to execute conflicting "laws" -- a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed and execute the Constitution, the supreme law of our Nation.

Thus, the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that *an act of the legislature, repugnant to the constitution, is void.*" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). As Alexander Hamilton had previously explained, "[t]here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid." *The Federalist No. 78*, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[20] Obviously, if a statute is "void" or "no law," it cannot be one of the "Laws" that the President must faithfully execute.

We are aware that the Constitution provides that a bill enacted pursuant to the procedure described in article I, section 7 "shall become a Law." Only laws "made in Pursuance" of the Constitution, however, "shall be the supreme Law of the Land." U.S. Const. art. VI, § 2; *see also Marbury*, 5 U.S. (1 Cranch) at 180. In order to be a *valid* "Law," therefore, a statute must comport with the substance of the Constitution, as well as with its procedures. When confronted with a suggestion to the contrary, the Supreme Court dismissed it in a footnote: "The suggestion is made that [a

[20] This proposition is hardly a novel one. *See e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 920 (1990) ("The Supreme Court has said more times than one can count that unconstitutional statutes are 'no law at all.'") (citing *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed.")); Letter for Gerrit Smith, from Salmon P. Chase, Chief Justice of the United States (Apr. 19, 1868) *quoted in* J.W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 577 (1874) ("Chief Justice Chase Letter") ("Nothing is clearer to my mind than that acts of Congress not warranted by the Constitution are not laws."); *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209, 214 (1865) ("If any law be repugnant to the Constitution, it is void; in other words, it is no law").

legislative veto provision] is somehow immunized from constitutional scrutiny because the Act containing [the provision] was passed by Congress and approved by the President. *Marbury v. Madison* resolved that question." *Chadha*, 462 U.S. at 942 n.13 (citation omitted).

The President's constitutional oath of office is further authority for the President to refuse to enforce an unconstitutional law. The Constitution requires the President to take an oath in which he promises to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1. As Chief Justice Chase asked, "How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress sincerely believed by him to have been passed in violation of it?" Chief Justice Chase Letter at 578. He had already answered the question: "[I]n the case where [an act of Congress] directly attacks and impairs the Executive power confided to him by the Constitution . . . it seems to me to be the clear duty of the President to disregard the law . . . ." *Id.* at 577. Just as the Take Care Clause requires the President to faithfully execute the laws, including the Constitution as the supreme law, the oath to defend the Constitution allows the President to refuse to execute a law he believes is contrary to that document.

Although the Supreme Court has not squarely addressed the issue, four Justices have recently endorsed the proposition that a President may decline to enforce unconstitutional laws. In *Freytag v. Commissioner*, 501 U.S. 868 (1991), Justice Scalia, in an opinion joined by Justices O'Connor, Kennedy, and Souter, observed that "the means [available to a President] to resist legislative encroachment" upon his power included "the power to veto encroaching laws, *or even to disregard them when they are unconstitutional.*" *Id.* at 906 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted and emphasis added). The Court's opinion did not take issue with this observation.[21]

Justice Scalia's opinion is the latest in a long line of authority dating back to the framing of the Constitution. For instance, James Wilson, a key drafter and advocate for the ratification of the Constitution, addressed the President's authority to refuse to enforce unconstitutional laws in the Pennsylvania ratifying convention. He equated Presidential review of statutes with judicial review:

> I had occasion, on a former day . . . to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the

[21] The Supreme Court has considered several controversies that arose because of a President's decision to ignore statutes that he believed were unconstitutional without suggesting that the President had acted illegitimately. For example, as Attorney General Benjamin R. Civiletti has observed, the Court in *Myers v. United States*, 272 U.S. 52 (1926), upheld the President's decision to fire a postmaster despite a statute preventing him from doing so and did not question the propriety of the President's action that gave rise to the case before it. *See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980)

> legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges — when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. . . . *In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.*

II *The Documentary History of the Ratification of the Constitution* 450-51 (Merrill Jensen ed., 1976) (statement of Dec. 1, 1787) (second emphasis added).

Wilson's understanding illustrates the Framers' profound structural concern about the threat of legislative encroachments on the Executive and the Judiciary. James Madison observed that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist No. 48*, at 309 (James Madison) (Clinton Rossiter ed., 1961). The Supreme Court has said that: "the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. Presidential decisions not to enforce statutes that violate the separation of powers have been justified by the need to resist legislative encroachment. In 1860, for example, Attorney General Black advised President Buchanan that he could refuse to enforce an unconstitutional condition in a law:

> Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution. . . . You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.

Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860).[22]

More recently, the Department of Justice, under both Democratic and Republican Administrations, has consistently advised that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional. Thus, Attorney General Smith explained that the Department's decision not to enforce or defend the Competition in Contracting Act was

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[22] *Cf.* Raoul Berger, *Executive Privilege: A Constitutional Myth* 309 (1974) ("Agreed that a veto exhausts presidential power when the issue is the *wisdom* of the legislation. But the object of the Framers was to prevent '*encroachment*' . . . . I would therefore hold that the presidential oath to 'protect and defend the Constitution' posits both a right and a duty to protect his own constitutional functions from congressional impairment.").

> based upon the fact that in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other branches. . . . An obligation to take action to resist encroachments on his institutional authority by the legislature may be implied from [his oath to "preserve, protect and defend" the Constitution] . . . .

Attorney General Smith Letter at 3; *see also* Letter for Thomas P. O'Neill, Jr., Speaker of the House, from Benjamin R. Civiletti, Attorney General at 3 (Jan. 13, 1981) ("[T]he Executive's independent [constitutional] obligation to 'take care that the laws be faithfully executed', permits the Attorney General not to initiate criminal prosecutions that will undoubtedly prove unsuccessful on constitutional grounds.") (citation omitted); Harmon Memorandum at 16 ("[T]he President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes.").

This Office has given the same advice, particularly when the statutes in question would blur the separation of powers between the Congress and the President, as do section 129(e) and section 503. *See, e.g.*, Harmon Memorandum at 13 ("We have said that *Myers [v. United States*, 272 U.S. 52 (1926)], by implication, stands for the proposition that the President may lawfully disregard a statute that trenches upon his constitutional powers. We would be disposed to accept that proposition even in the absence of *Myers*."); Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 17 (Aug. 27, 1984) ("[T]he President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility."). *See also* Barr Memorandum, 14 Op. O.L.C. at 49-50. The Department has consistently maintained that these principles apply whether or not the President signed the law that he intends not to enforce. *See supra* note 18.

We recognize that opponents of the specific Presidential authority to refuse to enforce unconstitutional statutes draw support for their views from the same constitutional texts we have cited, especially the Take Care Clause. *See, e.g.*, Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 396 (1987) ("To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution."); *Bid Protest Hearings* at 89 (letter of Professor Eugene Gressman) ("[I]t would be a novel and 'entirely inadmissible' construction of the Constitution to contend that the President's obligation to see the laws faithfully executed implies a power to forbid their execution."). These conclusions appear to rest on the argument that the executive branch is not the institution within the federal government that is authorized to determine whether a law is unconstitutional. Accordingly, Professor Gressman has stated that "despite a Presidential belief that a duly

enacted statute invades Executive powers, he must comply with and execute that statute *until it is definitively invalidated by the courts*." *Id.* at 88 (emphasis added). As the Justice Department has acknowledged, "until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers." *Id.* at 318-19 (statement of Acting Deputy Attorney General D. Lowell Jensen).

We reject, however, the argument that the President may not treat a statute as invalid prior to a judicial determination, but rather must presume it to be constitutional. This would subtly transform the proposition established in *Marbury v. Madison* -- in deciding a case or controversy, the Judiciary must decide whether a statute is constitutional -- to the fundamentally different proposition that a statute conflicts with the Constitution *only* when the courts declare so. Professor Sanford Levinson explained why this cannot be so:

> If one believes that the judiciary "finds" the [law] instead of "creating" it, then the law is indeed "unconstitutional from the start." Indeed, the judicial authority under this view is derived from its ability to recognize the constitutionality or unconstitutionality of laws, but, at least theoretically, the constitutional status [of statutes] is independent of judicial recognition. To argue otherwise is ultimately to adopt a theory that says that the basis of law — including a declaration of unconstitutionality — is the court's decision itself. Among other problems with this theory is the incoherence it leads to in trying to determine what it can mean for judges to be faithful to their constitutional oaths.

Bid Protest Hearings at 67.

Still others have argued that the veto power is the only tool available to the President to oppose an unconstitutional law. Although we recognize that the veto power is the primary tool available to the President; we disagree with the contention that the Framers intended it to be the only tool at the President's disposal. James Wilson's statement, quoted above, demonstrates that the idea that the President has the authority to refuse to enforce a law he believes is unconstitutional was familiar to the Framers. The Constitution limits the President's formal power in the legislative process to the exercise of a qualified veto, but it places no limit on his authority to take care that the laws are faithfully executed.[23]

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[23] We emphasize that this conclusion does not permit the President to determine as a matter of policy discretion which statutes to enforce. The only conclusion here is that he may refuse to enforce a law that

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Conclusion

For the reasons given above, we conclude that section 129(e) of Pub. L. No. 102-138 and section 503 of Pub. L. No. 102-140 are unconstitutional to the extent that they purport to prohibit the issuance of more than one official or diplomatic passport to United States government officials. We also conclude that these provisions are severable, and that the President is constitutionally authorized to decline to enforce them.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

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[23] (....continued)
he believes to be *unconstitutional*.

Given this distinction, the Supreme Court's decision in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), has no relevance to the question whether the President may refuse to enforce a law because he considers it unconstitutional. There, the Supreme Court states: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613. The Court, however, took pains to deny that the President had made such an argument, as the case involved the Postmaster General's refusal, with no support from the President, to comply with a statute that ordered him to pay two contractors for mail carrying services. Because the case did not involve a claim by the President that he would not enforce an unconstitutional law, the Court had no occasion to examine the unique considerations presented by such a claim.

Transfers of Forfeited Property to State and Local Law Enforcement Agencies

Section 981(e)(2) of title 18 does not prevent a state or local law enforcement agency from retransferring to other state or local government agencies property that has been transferred from the federal government pursuant to that section. However, the Attorney General has authority under section 981(e) to prevent such a further transfer by imposing a contrary term of condition on the initial transfer from the federal government.

Section 881(e) of title 21 does not prevent a state or local law enforcement agency from retransferring to other state or local government agencies property that has been transferred from the federal government pursuant to that section. However, the Attorney General has authority under section 881(e) to forbid a further transfer if he determines that to do so would "serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies."

January 23, 1992

MEMORANDUM OPINION FOR THE ACTING DEPUTY ATTORNEY GENERAL

This is in response to the request from your office for our advice whether federal law prevents a state or local law enforcement agency from transferring to other state or local agencies property that has been transferred from the federal government pursuant to 18 U.S.C. § 981(e)(2), where the other agency intends to use the property for purposes not directly related to law enforcement, and to the subsequent request for our advice whether such transfers are prohibited with respect to property that has been transferred pursuant to 21 U.S.C. § 881(e)(1)(A).[1] We conclude that section 981(e)(2) of title 18 does not prevent a state or local law enforcement agency from making such a further transfer, but that the Attorney General, pursuant to his authority under 18 U.S.C. § 981(e), is authorized to prevent such a further transfer by imposing a contrary term of condition on the initial transfer from the federal government. We also conclude that section 881(e) of title 21 does not prevent a state or local law enforcement agency from making such a further transfer, but that the Attorney General is authorized to forbid a further transfer if he determines that to do so would "serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies." 21 U.S.C. § 881(e)(3)(B).

Section 981 was enacted as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1366, 100 Stat. 3207, 3207-35. Though the statute has been amended several times since enactment, the relevant features governing the transfer of forfeited property to state and local law enforcement

[1] We do not address whether any particular state or local agency would have the authority, under local law, to transfer property to other state agencies. That would not, of course, be an issue of federal law and would likely vary from jurisdiction to jurisdiction.

agencies have remained unchanged. Section 981(e) authorizes the Attorney General "to transfer [property forfeited pursuant to this section] on such terms and conditions as he may determine . . . to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property." That section further requires the Attorney General to ensure that the amount transferred to the state or local law enforcement agency "reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property." Finally, the section provides that a decision of the Attorney General to transfer forfeited property to a state or local law enforcement agency "shall not be subject to review."

Nothing in the text of section 981 requires that a state or local agency use transferred property for law enforcement purposes or even that the agency retain the property rather than transferring it to another agency.[2] Section 981 does provide the Attorney General with the discretionary authority to impose terms and conditions on the transfer of forfeited property and, pursuant to this power, the Attorney General may impose either or both of the conditions that the state or local agency use the property for law enforcement purposes and that it not transfer the property. The Attorney General also may transfer the property with no conditions on its use, thereby allowing the state or local agency to retransfer the property or to make any other use of the property.

With respect to property forfeited under the control and enforcement provisions of the drug laws (21 U.S.C. §§ 801-904), 21 U.S.C. § 881(e)(1)(A) provides that the Attorney General may:

> retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property.

In exercising his transfer authority under section 881(e)(1), the Attorney General is required, pursuant to section 881(e)(3), to assure that the property transferred to the state or local agency:

> (A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, . . . ; and

[2]There is little legislative history concerning the Attorney General's power to transfer forfeited property to state or local law enforcement agencies. The relevant Senate and House reports mention the power but offer no explanation or elaboration. *See* S. Rep. No. 433, 99th Cong., 2d Sess. 23, 24, 29-31 (1986); H.R. Rep. No. 855, 99th Cong., 2d Sess., pt. 1, at 4, 18, 31-32 (1986). No conference report was prepared for the final legislation. Nothing in this brief legislative history contradicts our conclusions.

(B) will serve to encourage further cooperation between the recipient state or local agency and Federal law enforcement agencies.

21 U.S.C. § 881(e)(3).

As with section 981, nothing in the text of section 881(e)(1)(A) requires that the state or local agency use transferred property for law enforcement purposes or that the agency retain the property rather than transfer it to another agency. In fact, while section 881(e)(1)(E) requires that property retained by the Attorney General must be retained "for official use," no similar restriction appears with respect to the property transferred to state or local agencies.[3]

The text of section 881(e)(1)(A) does not expressly contain discretionary authority for the Attorney General to impose terms and conditions on the transferred property. Section 881(e)(3)(B) does, however, require the Attorney General to assure that the transferred property serve to encourage further state-federal cooperation. That requirement provides a basis for imposing conditions restricting the use of the forfeited property if the Attorney General determines that such conditions would be appropriate to further cooperation. For example, the Attorney General might determine that requiring the state or local agency to retain the property and to use it in future law enforcement activities is an appropriate means of furthering state-federal cooperation. Alternatively, the Attorney General might determine that transferring forfeited property with no restrictions or conditions simply as a reward for the state or local agency's efforts would be an appropriate means of assuring further cooperation. We emphasize that, while requiring the Attorney General to assure further cooperation, section 881(e)(3) does not require any particular means for doing so. The Attorney General may, therefore, choose any appropriate means to accomplish the statutory objective.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] The Attorney General's authority to transfer forfeited property to state and local law enforcement agencies was added to section 881 by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-743, tit. II, § 309, 98 Stat. 1837, 2051-52. The Senate report on that legislation explained the purpose behind the amendment as follows:

> [The amendment] provides that the Attorney General may transfer drug-related property forfeited under title 21, United States Code, to another Federal agency, or to an assisting State or local agency. . . . Often State and local law enforcement agencies give significant assistance in drug investigations that result in forfeitures to the United States. However, there is presently no mechanism whereby the forfeited property may be directly transferred to these agencies *for their official use*. This amendment . . . will permit such transfers and thereby should enhance important cooperation between Federal, State, and local law enforcement agencies in drug investigations.

S. Rep. No. 225, 98th Cong., 2d Sess. 216 (1983) (emphasis added). Our interpretation of section 881(e)(1)(A) is consistent with this passage from the legislative history. Section 881(e)(1)(A) does allow forfeited property to be transferred to state and local law enforcement agencies for their official use, but it does not prohibit those agencies from retransferring the property.

Fourth Amendment Implications of Military Use of Forward Looking Infrared Radars Technology for Civilian Law Enforcement

Forward Looking Infrared Radars (FLIR) reconnaissance of structures on private lands does not constitute a search within the meaning of the Fourth Amendment.

Department of Defense personnel engaged in such surveillance would not be subject to liability for damages in a constitutional tort action.

March 4, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This memorandum is in response to your request for further advice concerning the use of Forward Looking Infrared Radars ("FLIR") technology by the Department of Defense ("DoD") to assist civilian law enforcement agencies. In a memorandum dated February 19, 1991, this Office advised that, under existing statutory authority, DoD may assist civilian law enforcement agencies to identify or confirm suspected illegal drug production within structures located on private property by conducting aerial reconnaissance that uses FLIR technology.[1] You subsequently requested an opinion from this Office on the question whether FLIR surveillance of structures on private property constitutes a "search" within the meaning of the Fourth Amendment.[2] A memorandum that you have made available to us preliminarily concludes that FLIR reconnaissance of structures on private lands does constitute such a search.[3] For the reasons set forth herein, we conclude that it does not.

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[1] *Military Use of Infrared Radars Technology to Assist Civilan Law Enforcement Agencies*, 15 Op. O.L.C. 36 (1991).

[2] Letter for J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, from Terrence O'Donnell, General Counsel, Department of Defense (Apr. 11, 1991).

[3] Memorandum for Terrence O'Donnell, General Counsel, Department of Defense, from Robert M. Smith, Jr. (Sept. 19, 1990) ("Smith Memorandum"). Other parties to examine the issue have reached differing conclusions. *Compare* Memorandum for Office of the Deputy Chief of Staff for Operations and Plans, from Patrick J. Parrish, Assistant to the General Counsel, Department of the Army (Sept. 17, 1990) (FLIR surveillance is a search under Fourth Amendment) *with* Memorandum for Joint Chiefs of Staff, from Lt. Col. C.W. Hoffman, Jr., Deputy LLC (Aug. 14, 1990) (FLIR not a search) *and* Memorandum of Staff Judge Advocate for the Commander-in-Chief of the Pacific Command (attached to Letter for J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, from Terrence O'Donnell, General Counsel, Department of Defense (Nov. 21, 1990)) (same).

II.

Our February 19 memorandum sets forth the facts relevant to FLIR technology, and we briefly recount them here. FLIR is a passive technology that detects infrared radiation generated by heat-emitting objects. Infrared rays are received by the FLIR system, electronically processed, and projected on a screen as a visual image in the shape of the object that is emitting the heat. The warmer the object, the brighter the image of the object appears. *See United States v. Sanchez*, 829 F.2d 757, 759 (9th Cir. 1987); *United States v. Kilgus*, 571 F.2d 508, 509 (9th Cir. 1978); *United States v. Penny-Feeney*, 773 F. Supp. 220 (D. Haw. 1991), *aff'd sub nom. United States v. Feeney*, 984 F.2d (9th Cir. 1993).

FLIR does not have the characteristics of an X-ray technology. We have been informed that it cannot provide information concerning the interior of a container or structure. It detects only heat emanating from surfaces that are directly exposed to the FLIR system. Thus, for example, if there were heat-producing objects within a building, FLIR could detect that more infrared radiation was being emitted from the building's roof than if the building were empty, but the system could not identify the shapes of heat-emitting objects located within the structure. Nor could the system identify the source of the heat or the precise location of the heat source within the structure.

Law enforcement agencies believe that FLIR technology can be useful in identifying buildings that house marijuana crops, or methamphetamine or other drug processing laboratories. In particular, FLIR can aid law enforcement officials in establishing probable cause to believe that criminal activity is being conducted within a particular building by determining whether the building is radiating unusually large amounts of heat (due to the use of high intensity lighting or combustion generators) or unusually small amounts of heat (due to heavy insulation designed to mask the use of lighting or generators). Recently, therefore, federal and state law enforcement agencies have requested that military aircraft equipped with FLIR fly over suspect buildings on private lands and produce infrared images of those structures.[4]

We concluded in our February 19 memorandum that DoD has authority to provide the requested assistance under the provisions of 10 U.S.C. §§ 371-378, which are designed to promote cooperation between military personnel and civilian law enforcement officials. We now consider whether such assistance constitutes a "search" within the meaning of the Fourth Amendment to the Constitution.

[4] The Department of Defense has informed us of three requests for assistance that present the question whether such surveillance constitutes a Fourth Amendment search. The Drug Enforcement Administration ("DEA") has asked the Army to conduct infrared imaging of a barn on private land in which the DEA suspects that marijuana is being cultivated. Second, a law enforcement agency has requested that an Army flight crew conduct a training mission over certain private lands and buildings in the vicinity of Wichita, Kansas, using an Army helicopter equipped with FLIR, to identify suspected illegal marijuana cultivation. Third, the DEA has asked that the Army undertake flights in OH-58D helicopters equipped with FLIR, at a height of at least 500 feet above ground, to identify dwellings and other structures on private land in Arizona that the DEA suspects contain methamphetamine laboratories.

II.

The Fourth Amendment provides:

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

U.S. Const. amend. IV. Until the 1960's, the Supreme Court interpreted the amendment to apply only to searches or seizures of the tangible things referred to in the text: "persons, houses, papers, and effects." In *Olmstead v. United States*, 277 U.S. 438, 465 (1928), *overruled by Berger v. New York*, 388 U.S. 41 (1967), for example, the Court held that the interception of telephone conversations by government wiretaps did not implicate the Fourth Amendment, reasoning that "[t]he language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office."

The traditional interpretation of the Fourth Amendment was also limited to cases where the government committed a physical trespass to acquire information. In *Olmstead*, the Court noted that the wiretaps were conducted "without trespass upon any property of the defendants." 277 U.S. at 457. In two eavesdropping cases, *Goldman v. United States*, 316 U.S. 129, 134-35 (1942), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *On Lee v. United States*, 343 U.S. 747, 751-52 (1952), the absence of a physical trespass was important to the Court's conclusion that no Fourth Amendment search had been conducted. Only where "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners" did the Court hold that eavesdropping implicated the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505, 509 (1961).

These limitations on the scope of the Fourth Amendment were eliminated by the Court in a series of decisions during the 1960s. In *Berger*, 388 U.S. at 51, the Court held that "'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment." In *Katz*, 389 U.S. at 353, the Court overruled the "trespass" doctrine enunciated in *Olmstead*, and held that eavesdropping conducted through the placement of a listening device on the outside of a telephone booth constituted a "search and seizure" under the Fourth Amendment.

Subsequent decisions have constructed a two-part inquiry, derived from Justice Harlan's concurring opinion in *Katz*, to determine whether a government activity constitutes a Fourth Amendment search: "[F]irst, has the

individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986). *See also California v. Greenwood*, 486 U.S. 35, 39 (1988); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

A.

It will always be difficult to determine with certainty whether the owners or users of specific structures have subjective expectations of privacy that would be infringed by the proposed aerial reconnaissance. On the face of the matter, however, it seems unlikely that the owner of a structure would subjectively expect that the amount of heat emitted from the roof of the structure will remain private. Heat is inevitably discharged from structures that contain electrical equipment such as lights or generators, and we are informed by DoD that FLIR equipment has been used by law enforcement agencies for years to detect heat-emitting objects. Smith Memorandum at 6. The only court to address the Fourth Amendment implications of FLIR concluded that the owners of a private residence that was monitored by FLIR "did not manifest an actual expectation of privacy in the heat waste since they voluntarily vented it outside the garage where it could be exposed to the public and in no way attempted to impede its escape or exercise dominion over it." *Penny-Feeney*, 773 F. Supp. at 226. Moreover, it is likely that most people expect that law enforcement agencies will use information that is available to them for the detection of crime. Absent more detailed information about the expectations of the individuals involved, we will turn to the second prong of the Fourth Amendment inquiry described by the Supreme Court for determining whether government activity constitutes a Fourth Amendment search.[5]

B.

The second question posed by the Supreme Court's analysis is whether FLIR surveillance, by detecting the amount of heat emitted from the exterior of a structure on private property, intrudes upon an expectation of privacy that society is willing to recognize as reasonable. The Supreme Court has not developed a clear doctrine that would indicate what is an objectively

[5] The Supreme Court has never relied solely on the first prong of its two-part inquiry to hold that a government activity is not a search under the Fourth Amendment. The Court itself has suggested that the "subjective" element of the inquiry may be an "inadequate index of Fourth Amendment protection," *Smith v. Maryland*, 442 U.S. at 740 n.5, because, "[f]or example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects." *Id.*

reasonable expectation of privacy in a case where neither a physical trespass into a home or curtilage nor a physical search of tangible objects enumerated in the text of the Fourth Amendment is involved. In *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978), the Court did explain that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[6] Similarly, in *Robbins v. California*, 453 U.S. 420, 428 (1981), *disposition overruled on other grounds, United States v. Ross*, 456 U.S. 798 (1982), a plurality of the Court ventured that "[e]xpectations of privacy are established by general social norms." What remains unclear from these and other decisions, however, is the methodology that should be employed to determine what expectations of privacy "society" is prepared to recognize as reasonable.

The Fourth Amendment's protections are best discerned by reference to the Supreme Court's prior decisions in the area. *Cf. Allen v. Wright*, 468 U.S. 737, 751 (1984) (given the absence of precise definitions in standing doctrine, courts may answer standing questions through comparison with prior cases). Applying the oft-stated principle articulated by the Court in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *Katz*, 389 U.S. at 351 (citations omitted), we conclude that the use of FLIR to conduct aerial reconnaissance of structures is not a Fourth Amendment search.[7]

The Supreme Court has applied the "public exposure" rule to cases involving aerial surveillance of private property.[8] In *Ciraolo*, the Court held that police officers did not conduct a Fourth Amendment search when they traveled over respondent Ciraolo's home in a fixed-wing aircraft at an altitude of 1000 feet and observed, with the naked eye, marijuana plants growing in a garden within the curtilage of Ciraolo's home. Although the home and garden were surrounded by double fences of six and ten feet in height, the Court noted that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. at 213-14. Accordingly, the Court held that "respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Id.* at 214.

Similarly, in *Florida v. Riley*, 488 U.S. 445 (1989), the Court held that helicopter surveillance of the interior of a greenhouse, located within the

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[6]The Supreme Court has referred interchangeably to "legitimate" and "reasonable" expectations of privacy. *See Ciraolo*, 476 U.S. at 220 n.4 (Powell, J., dissenting).

[7]The District Court in *Penny-Feeney*, 773 F. Supp. at 226-28, relied to some extent on the "public exposure" doctrine to hold that FLIR surveillance of a private home did not violate a reasonable expectation of privacy of the residents. Although we concur with the result in that case, we do not agree with all of the court's reasoning.

[8]The Court has not equated the scope of the "public exposure" doctrine with subjective expectations of privacy. The Court has assumed that a person may have a subjective expectation of privacy even in that which he "knowingly exposes to the public." *E.g., Ciraolo*, 476 U.S. at 213.

curtilage of respondent Riley's home, did not constitute a search under the Fourth Amendment. Although the interior of Riley's greenhouse was not visible from the adjoining road, the investigating officer discovered that the sides and roof of the greenhouse were left partially open, and that the interior of the greenhouse — including marijuana plants — could be observed with the naked eye from a helicopter circling over Riley's property at an altitude of 400 feet. A plurality of the Court, noting that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse," concluded that the case was controlled by *Ciraolo*. *Id.* at 451.

Justice O'Connor, concurring in *Riley*, also concluded that there was no Fourth Amendment search, although she believed that "there is no reason to assume that compliance with FAA regulations alone" means that the government has not interfered with a reasonable expectation of privacy. *Id.* at 453 (O'Connor, J., concurring in judgment). In Justice O'Connor's view, the controlling question was whether "the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.'" *Id.* at 454 (quoting *Katz*, 389 U.S. at 361) (internal quotations omitted). Because Riley had not shown that air travel at an altitude of 400 feet was extraordinary, Justice O'Connor concluded that the helicopter surveillance was not a "search."

The Court has also applied the "public exposure" doctrine to hold that an individual has no reasonable expectation of privacy in garbage left at the curb outside his home for pickup by trash collectors, *California v. Greenwood*, in telephone numbers dialed and thus conveyed automatically to the telephone company, *Smith v. Maryland*, or in a route traveled by an automobile on a public highway or the movements of objects in "open fields," even when they are monitored surreptitiously by an electronic beeper. *United States v. Knotts*. In each of these cases, the Court reasoned that individuals had openly displayed their activities or objects to public view and therefore enjoyed no expectation of privacy that society is prepared to recognize as reasonable.

We believe that the use of FLIR to observe heat emissions from the exterior of structures on private property is analogous to the surveillance activities undertaken by the government in the "public exposure" cases. Assuming that the aerial surveillance is to take place from airspace sometimes used by the public -- and we have not been provided with precise information on that issue -- the question presented by FLIR surveillance is quite comparable to those decided by the Court in *Ciraolo* and *Riley*. "[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion." *Riley*, 488 U.S. at 449 (plurality opinion). The owner of a structure on private property knowingly, indeed almost inevitably, emits heat from the structure, and any member of the public flying over the structure could detect those heat emissions with FLIR.

We recognize, of course, that the investigating officers in *Ciraolo* and *Riley* conducted their visual observations with the naked eye, while FLIR surveillance employs technology to detect what an investigator could not observe on his own. Decisions of the Supreme Court and courts of appeals suggest, however, that the use of technological means to gather information will not amount to a Fourth Amendment search where the government does not thereby observe the interior of a structure or any other "intimate details" of the home or curtilage. In view of the limited information disclosed by FLIR, we do not believe that the use of such technology in the proposed reconnaissance missions would constitute a "search" under the Fourth Amendment.

As a threshold matter, it is clear that the use of technological devices to acquire information that would be unattainable through the use of natural senses does not necessarily implicate the Fourth Amendment. In *United States v. Lee*, 274 U.S. 559, 563 (1927), the Supreme Court held that the use of a searchlight by the Coast Guard to examine a boat on the high seas did not violate the Fourth Amendment. The Court explained that "[s]uch use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." In *On Lee*, 343 U.S. at 754, the Court said in dictum that "[t]he use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." And in *United States v. White*, 401 U.S. 745, 753 (1971), a plurality of the Court concluded that "[a]n electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent . . ., but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question." The courts of appeals have held that the interception of communications from radio frequencies that are accessible to the general public does not constitute a Fourth Amendment search, even though radio waves cannot be perceived by natural senses. *E.g.*, *United States v. Rose*, 669 F.2d 23, 26 (1st Cir.), *cert. denied*, 459 U.S. 828 (1982); *Edwards v. Bardwell*, 632 F. Supp. 584, 589 (M.D. La.), *aff'd*, 808 F.2d 54 (5th Cir. 1986).

The Supreme Court discussed the use of sophisticated surveillance equipment in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). There, the Court considered the Fourth Amendment implications of aerial surveillance by the Environmental Protection Agency, which made use of precise photographic equipment to observe the open areas of an industrial facility. In holding that the surveillance was not a "search," the Court noted that the photographic equipment could permit "identification of objects such as wires as small as 1/2-inch in diameter," *id.* at 238, and addressed the significance of the equipment for the Fourth Amendment:

> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. *But the photographs here are not so revealing of intimate details as to raise constitutional concerns.* Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

Id. (emphasis added). So too here, FLIR does not reveal intimate details concerning persons, objects, or events within structures.

The Court's concern over observation of "intimate details" has been repeated in cases involving private homes and their curtilage. In *Ciraolo*, for example, the Court went out of its way to note that "[t]he State acknowledges that '[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses *those intimate associations, objects or activities* otherwise imperceptible to police or fellow citizens.'" 476 U.S. at 215 n.3 (emphasis added). More significantly, the plurality in *Riley*, in concluding that helicopter surveillance of Riley's greenhouse did not constitute a search, found it important that "no intimate details connected with the use of the home or curtilage were observed." 488 U.S. at 452.[9]

The courts of appeals that have considered the Fourth Amendment implications of magnification technology used by the government to collect information have distinguished between surveillance of the interior of a home, which has been deemed a search, and observation of the curtilage, which has not. In *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980), the Second Circuit held that the use of a high-powered telescope to peer through the window of an apartment was a "search" under the Fourth Amendment. The court reasoned that "[t]he vice of telescopic viewing into the interior of a home is that it risks observation not only of what the householder should realize might be seen by unenhanced viewing, *but also of intimate details of a person's private life*, which he legitimately expects will not be observed either by naked eye or enhanced vision." *Id.* at 138-39 (emphasis added).

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[9] Justice Brennan, in his dissent in *Riley*, criticized the majority on this point, suggesting that the police just as easily could have observed intimate details of Riley's personal activities, although all they happened to observe was evidence of crime. 488 U.S. at 463 (Brennan, J., dissenting). FLIR, however, is incapable of revealing intimate details. It simply provides information about surface heat, from which general inferences sometimes can be drawn.

Accord United States v. Kim, 415 F. Supp. 1252, 1254-56 (D. Haw. 1976) (use of telescope to view inside of apartment was Fourth Amendment "search"); *State v. Ward*, 617 P.2d 568, 571-73 (Haw. 1980) (use of binoculars to view inside of apartment was "search"); *State v. Knight*, 621 P.2d 370, 373 (Haw. 1980) (aerial observation with binoculars of inside of closed greenhouse was "search").[10]

Subsequently, however, the Second Circuit distinguished *Taborda* in a case involving the use of binoculars and a high-powered spotting scope to observe an outdoor area adjacent to a house and garage. In *United States v. Lace*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982), the court explained that *Taborda* "proscribed the use of a telescope by a policeman only so far as it enhanced his view into the interior of a home." *Id.* at 51. The Fourth Amendment was not implicated by the use of binoculars and a spotting scope "in places where the defendant otherwise has exposed himself to public view." *Id.* Reflecting subsequently on *Taborda* and *Lace*, the Second Circuit declared that "it was not the enhancement of the senses *per se* that was held unlawful in *Taborda*, but the warrantless invasion of the right to privacy in the home. In contrast, the warrantless use of supplemental resources including mechanical devices, such as binoculars, to observe activities outside the home has been consistently approved by the courts." *United States v. Bonfiglio*, 713 F.2d 932, 937 (2d Cir. 1983).

The Ninth Circuit, when considering surveillance conducted with magnification devices, has similarly focused on the privacy interest associated with the area or activity observed, rather than on the nature of the technology used. In *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980) (Kennedy, J.), *cert. denied*, 454 U.S. 833 (1981), the court held that surveillance of private ranch property from a Coast Guard helicopter, by a Customs official using binoculars and a telephoto lens, did not infringe upon a reasonable expectation of privacy. The court emphasized that "[w]e are not presented with an attempt to reduce, by the use of vision-enhancing devices or the incidence of aerial observation, *the privacy expectation associated with the interiors of residences or other structures*." *Id.* at 1380 (emphasis added). Other courts have approved the distinction for Fourth Amendment purposes between enhanced viewing of the interior of private structures and the enhanced viewing of activities or objects outside such buildings. *Dow Chemical Co. v. United States*, 749 F.2d 307, 314-15 & n.2 (6th Cir. 1984), *aff'd*, 476 U.S. 227 (1986); *United States v. Michael*, 645 F.2d 252, 258 n.16 (5th Cir.), *cert. denied*, 454 U.S. 950 (1981); *United States v. Devorce*, 526 F. Supp. 191, 201

[10] Prior to *Taborda*, some courts held that enhanced viewing of the interior of certain structures on private property did not constitute a search. *Fullbright v. United States*, 392 F.2d 432, 434 (10th Cir.) (use of binoculars to view inside of open shed near house), *cert. denied*, 393 U.S. 830 (1968); *People v. Hicks*, 364 N.E.2d 440, 444 (Ill. App. 1st Dist. 1977) (use of binoculars to view interior of residence); *State v. Thompson*, 241 N.W.2d 511, 513 (Neb. 1976) (use of binoculars to view interior of residence through curtains); *State v. Manly*, 530 P.2d 306 (Wash.) (use of binoculars to view interior of apartment), *cert. denied*, 423 U.S. 855 (1975); *Commonwealth v. Hernley*, 263 A.2d 904 (Pa. Super. 1970) (use of binoculars to look through window of print shop), *cert denied*, 401 U.S. 914 (1971).

(D. Conn. 1981). *Cf. New York v. Class*, 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'"); *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion) (taking of paint scrapings from the exterior of a vehicle left in a public parking lot did not infringe legitimate expectation of privacy where "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched").

State and federal courts have followed a similar line of reasoning when considering the use of light-intensifying "nightscopes" to conduct surveillance in the dark. In *United States v. Ward*, 546 F. Supp. 300, 310 (W.D. Ark. 1982), *aff'd in relevant part*, 703 F.2d 1058, 1062 (8th Cir. 1983), the court held that the use of a nightscope to observe the movements of individuals outside a barn did not constitute a search, where "[t]he officers did not 'peep' or peer into or through any windows or skylights," or "obtain a view of objects or persons normally physically obscured." *Id.* at 310. In *United States v. Hensel*, 509 F. Supp. 1376 (D. Me. 1981), *aff'd*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983), the court stated that the use of nightscopes "transgresses no Fourth Amendment rights" where drug enforcement agents used the scopes to observe activities on a private dock "but could not see into the buildings." *Id.* at 1384 n.9. The First Circuit, although not resolving the issue, subsequently characterized this conclusion as "a reasonable position to take, given the case law on the subject." 699 F.2d at 41. The Tennessee Court of Criminal Appeals reached the same conclusion in *State v. Cannon*, 634 S.W.2d 648 (Tenn. Crim. App. 1982), noting that the nightscope was used "to observe the traffic and activity on the outside of the dwelling," but that it was "of no value in surveying activity in the interior of the house." *Id.* at 651. *See also Newberry v. State*, 421 So.2d 546, 549 (Fla. App. 1982), *appeal dismissed*, 426 So.2d 27 (Fla. 1983); *State v. Denton*, 387 So.2d 578, 584 (La. 1980). Like the Second Circuit in *Taborda* with respect to telescopes, the Supreme Court of Pennsylvania has placed limits on the use of night vision equipment when it is used to discover "intimate details" within a dwelling. In *Commonwealth v. Williams*, 431 A.2d 964, 966 (Pa. 1981), the Court held that when such equipment was used for nine days to observe activity within private apartment, including two acts of sexual intercourse, then the surveillance constituted a "search" under the Fourth Amendment.

Following the reasoning of these decisions, we do not believe that the use of FLIR to detect the amount of heat emanating from structures on private lands constitutes a Fourth Amendment search. FLIR does not permit observation of the interior of homes or other structures. It cannot be used to peer through windows or skylights. It does not reveal even the shape or precise location of heat-emitting objects within a building, but shows only the amount of heat emitted from the exterior of a structure. When compared with the observations made by investigating officers in *Ciraolo* and *Riley* (which included the interior of Riley's greenhouse and the specific plants growing in

Ciraolo's garden) and in *Lace*, *Allen*, and other lower court decisions (which included the movement of persons and vehicles within the curtilage of a residence), external heat emissions are not the sort of "intimate detail" likely to raise concerns under the public exposure cases.[11]

III.

A.

The Smith Memorandum predicts, however, that the public exposure rationale "is unlikely to be adopted by the courts" with respect to FLIR. Smith Memorandum at 27. In its view, the public exposure doctrine should not be extended to cases where the technology adds a "sixth sense" to those naturally possessed by investigating officers. The memorandum contends that nightscopes and binoculars reveal activities that would have been visible to the human eye absent darkness or distance, and that the electronic beeper employed to monitor a vehicle on public roads in *United States v. Knotts* revealed only activities that would have been visible to passersby. By contrast, the memorandum argues, FLIR "permits observation of something that passersby cannot perceive with their natural senses," and its use is thus not likely to be sanctioned under the public exposure doctrine. Smith Memorandum at 27.

Assuming that there is a viable distinction between technologies that enhance existing senses and those that permit "extra-sensory" perception, and assuming that FLIR permits government agents to observe what they could not detect with their natural senses, those facts alone do not mean that the use of FLIR is a "search" under the Fourth Amendment. Federal and state courts have held that the interception of radio waves — which themselves cannot be perceived by the natural senses — does not constitute a "search." The United States Court of Appeals for the First Circuit, for example, concluded that there is no reasonable expectation of privacy in a communications broadcast on a ham radio frequency, which is "commonly known to be a means of communication to which large numbers of people have access as receivers." *Rose*, 669 F.2d at 26. Similarly, the Fifth Circuit summarily affirmed the decision of a district court which concluded that "[t]here is no reasonable expectation of privacy in a communication which is broadcast by radio in all directions to be overheard by countless people who have purchased and daily use receiving devices such as a 'bearcat' scanner or who

[11] The relatively minimal information disclosed by FLIR clearly distinguishes it from X-ray-like technologies, which could permit the viewing of persons or objects through opaque structures or containers. As the United States said in its brief in *Dow Chemical*, if "the government possessed a sophisticated X-ray device that enabled it to see through the walls of a house, there seems little doubt that the use of such a device to discover objects or activities located inside a dwelling would be subject to Fourth Amendment regulation." Brief for the United States at 24 n.12, 476 U.S. 227 (1986) (No. 84-1259). *See United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980) (use of X-ray machine to reveal shapes of objects is a Fourth Amendment search), *cert. denied*, 451 U.S. 972 (1981); *United States v. Henry*, 615 F.2d 1223 (9th cir. 1980) (same).

happen to have another mobile radio telephone tuned to the same frequency." *Edwards v. Bardwell*, 632 F. Supp. at 589. *Accord Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 538-39 (5th Cir. 1987). Three other circuits have likewise held that there is no reasonable expectation of privacy in radio telephone or cordless telephone conversations. *Tyler v. Berodt*, 877 F.2d 705, 706-07 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990); *United States v. Hall*, 488 F.2d 193, 198 (9th Cir. 1973); *United States v. Hoffa*, 436 F.2d 1243, 1247 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).[12] These decisions demonstrate that the question whether the acquisition of information is a "search" must depend on more than whether the information may be perceived by the natural senses.

In any event, we believe it is virtually impossible to divide surveillance techniques neatly between those that allow "extra-sensory" perception and those that merely employ the natural senses. It is hardly clear, for example, that night vision equipment, the use of which has been held not to constitute a search, permits merely "enhancement of the natural sense of sight." Smith Memorandum at 27. One jurist to consider the question thought not, and observed that a nightscope "not only magnifies what the viewer could see with the naked eye, but also makes possible the observation of activities which the viewer could not see because of darkness." *State v. Denton*, 387 So.2d at 584. On the other hand, the First Circuit has opined that "[u]se of a beeper to monitor a vehicle involves something more" than "magnification of the observer's senses," *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978), even though the Smith Memorandum maintains that beeper surveillance reveals only activities that would be visible to passersby, and thus is not "extra-sensory." Smith Memorandum at 27. In short, virtually all of the devices used by investigating officers in some sense permit the collection of information that could not "naturally" be observed. The distinction between natural and "extra-sensory" observations thus seems to have little analytical or constitutional significance.

Even if that distinction were important, it is not at all clear that FLIR would be categorized properly as a device that permits observations that humans could not make with their natural senses. At some level, heat emanations can be observed through the natural sense of sight. The naked eye can perceive heat waves rising from a warm object. The relative speeds at which snow melts from the roofs of various structures can give indications about the relative heat emissions from those structures. The natural senses can also feel heat emanations when they are in close proximity to the human body. Thus, it could be argued that FLIR merely enhances the capacity of the natural senses to perceive heat.

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[12] *See also State v. Delaurier*, 488 A.2d 688, 694 (R.I. 1985) (owners of cordless telephone had no reasonable expectation of privacy in their conversations, which could be intercepted with standard AM/FM radio); *State v. Howard*, 679 P.2d 197, 206 (Kan. 1984) (same); *People v. Medina*, 234 Cal. Rptr. 256, 262 (Cal. Ct. App.) (no reasonable expectation of privacy in message sent through pager system, where conversation "could be intercepted by anyone with a radio scanner or another pager"), *cert. denied*, 484 U.S. 929 (1987).

Courts generally have held that the relevant question for determining whether surveillance infringes upon a *legitimate* expectation of privacy is not merely *how* information is collected but *what* information is collected. If an object of government surveillance is recognized by society as enjoying a privacy interest of sufficient magnitude, the government's activity will constitute a "search." Technology that allows the government to view the interior of a home almost certainly implicates the Fourth Amendment. But we are not prepared to say, as the Smith Memorandum suggests, that any "extra-sensory" technological development that assists authorities in ferreting out crime is automatically one that society would deem unreasonably intrusive, no matter how minimal the intrusion on the privacy interests of the citizenry. The Supreme Court has "never equated police efficiency with unconstitutionality," *Knotts*, 460 U.S. at 284, and we fear that acceptance of the Smith Memorandum's analysis would come perilously close to doing so.

B.

More fundamentally, the Smith Memorandum suggests that extension of the public exposure doctrine to endorse the use of FLIR would threaten to "repudiate" *Katz*, because "any member of the public who could obtain a sophisticated listening device could have heard everything the police heard" in *Katz*. Smith Memorandum at 28. This contention does illustrate that the public exposure doctrine must have limits, and it points to an internal tension in the reasoning of *Katz* itself. It could reasonably be argued that *Katz*, given the availability of listening devices, knowingly exposed his conversations to the public by using a public telephone booth to place his calls. It may well be that the Supreme Court will eventually be forced to revisit its Fourth Amendment jurisprudence and explain the relationship between *Katz* and the "public exposure" doctrine.

In the light of decisions subsequent to *Katz*, however, it appears that the Court concluded that the eavesdropping in *Katz* was a search not simply because the FBI employed technology, but because the technology permitted the interception of "private communication." 389 U.S. at 352. Private communications, like private papers and the interior of a home, implicate a privacy interest of the highest degree. As Justice Brandeis explained in his prescient dissent in *Olmstead*, the Supreme Court has long held that private letters are protected by the Fourth Amendment, *see Ex parte Jackson*, 96 U.S. 727 (1877), and "[t]here is, in essence, no difference between the sealed letter and the private telephone message." *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting). "Society" is plainly prepared to recognize as reasonable the expectation that private telephone calls will remain free from monitoring by the government. Heat emissions from the exterior of a structure — providing, as they do, no precise details about a structure's interior — do not, in our view, enjoy a similar status.

C.

The principal case relied on by the Smith Memorandum for the conclusion that FLIR surveillance is a Fourth Amendment search is *United States v. Karo*, 468 U.S. 705 (1984). In *Karo*, drug enforcement agents installed an electronic beeper in a can of ether, which they believed was to be delivered to buyers for use in extracting cocaine from clothing that had been imported into the United States. After the ether was delivered to the buyers, who had no knowledge of the presence of the beeper, the agents monitored the movement of the can of ether within a private residence where it was stored and used.

The Court held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." *Id.* at 714. After reciting the basic rule that "[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances," *id.* at 714-15, the Court explained that monitoring of the beeper inside the private residence was the functional equivalent of a physical search of the premises:

> In this case, had a DEA agent thought it useful to enter the . . . residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched.

Id. at 715. The Court distinguished its earlier decision in *United States v. Knotts*, which held that the monitoring of a beeper on public roads was not a Fourth Amendment search. The *Karo* Court concluded that although the use of a beeper inside a home is "less intrusive than a full-scale search," it "reveal[s] a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id.*

The Smith Memorandum states that it "appears likely" that the Supreme Court would hold, primarily on the authority of *Karo*, that FLIR surveillance is a Fourth Amendment search. Smith Memorandum at 25. The Memorandum

reasons that FLIR would enable investigators to deduce whether an object, such as a generator, is within a private structure in which there is a reasonable expectation of privacy. Accordingly, like a beeper, FLIR could permit the government to learn "a critical fact about the interior of the premises" without obtaining a warrant.

We do not believe that *Karo* should be read so broadly. First, it is clear that not every acquisition of information by the government from which it can *deduce* facts about the interior of a residence or other private structure constitutes a search. In *California v. Greenwood*, 486 U.S. 35 (1988), for example, the Court held that a search of trash placed outside a home for removal by the trash collector did not infringe upon a legitimate expectation of privacy of the homeowner. The Court reached this conclusion despite the fact that, as the dissent pointed out, "a sealed trash bag harbors telling evidence of the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" *Id.* at 50 (Brennan, J., dissenting) (internal quotations omitted). Likewise, in *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that the installation and use of a pen register to record telephone numbers dialed by Smith was not a search, although the pen register revealed to police telephone numbers that Smith dialed within the privacy of his own home. *See id.* at 743.

Many other observations permit police to discern what might in some cases be "critical facts" about the interior of a residence, although they almost certainly do not constitute searches under the Fourth Amendment. The sighting through a nightscope of smoke emanating from a chimney on top of a house, for example, allows an inference that a fire is burning inside the house. Observation through binoculars of light beams coming from a window permits the conclusion that someone (or some device) has activated a light inside the house. Yet in light of the decisions of the Supreme Court in *Ciraolo* and *Riley* and of the various state and lower federal courts involving binoculars and nightscopes, we believe it quite unlikely that the Supreme Court would hold, by analogy to *Karo*, that such observations of activity exposed to public view infringe upon Fourth Amendment rights.

Second, the Court in *Karo* rested its holding on the fact that the government had "*surreptitiously employ[ed]* an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at 715 (emphasis added). By contrast, the owner of a structure on private property has full knowledge that heat is emitted from the structure and, presumably, that it can be monitored by infrared radars.[13] The result in *Karo* would likely have been different had the owner of the residence knowingly placed his own beeper in the ether

[13] We are informed by DoD that "infrared technology has been in use by local, state, and federal law enforcement officials for years." Smith Memorandum at 6. FLIR is mentioned in a reported court decision as early as 1977, *see United States v. Potter*, 552 F.2d 901, 906 n.7 (9th Cir. 1977), and it has been discussed by several courts in the last fourteen years. The existence and usefulness of FLIR may be

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container and voluntarily conveyed the signal to anyone in the public who might desire to monitor it. *Cf. United States v. Rose*, 699 F.2d at 26 (no reasonable expectation of privacy in communications broadcast on a ham radio frequency); *Edwards v. Bardwell*, 632 F.2d at 589.

The Smith Memorandum contends that "the only constitutional significance of the fact in Karo that the beeper monitoring was done 'surreptitiously' appears to be that it was done without the knowledge and consent of Karo" and that "[t]o this extent, the proposed use of FLIR is as surreptitious as was the use of the beeper in Karo." Smith Memorandum at 25. As noted, we believe this analysis fails to recognize the distinction between knowing and unknowing conveyance of information for receipt by the public. *Karo* did not know that the beeper was emitting its signal from the interior of his residence, because DEA agents surreptitiously planted the beeper in his home. By contrast, the owner of a structure on private property knows that he is emitting heat through the roof of the structure.[14]

D.

Finally, the Smith Memorandum predicts that a court considering the use of FLIR over private property would invoke the Supreme Court's cautionary note in *Dow Chemical* that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. at 238. *See* Smith Memorandum at 27. Whatever the significance of this dictum, we do not believe it applicable to aerial reconnaissance that makes use of FLIR. While FLIR equipment may be expensive, we are informed that it is available to any member of the public who might wish to purchase it for use. FLIR does not, therefore, constitute "surveillance equipment not generally available to the public."

To be sure, the proposed uses of FLIR raise difficult Fourth Amendment issues. FLIR enables the government to acquire information concerning heat emissions from private structures that has not been readily available in the past. We do not believe, however, that every technological advance in the service of law enforcement will inevitably infringe upon expectations of privacy that society is willing to honor. FLIR collects information about heat that is emanating from the exterior of structures and conveyed openly into the atmosphere. It does not reveal any precise or intimate details about

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[13] (....continued)
known among the citizenry as well, for law enforcement officials have informed DoD that individuals attempting to cultivate illegal drugs "will often insulate their growing houses in an effort to preclude discovery of the intense heat generated by [the cultivation] process." Smith Memorandum at 1.

[14] The Memorandum also relies on a number of lower court decisions holding that the use of a magnetometer to detect metal on a person is a search under the Fourth Amendment. *See, e.g., United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974); *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

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the interior of a structure. Any member of the public flying over a building with FLIR could acquire the information proposed to be collected by DoD personnel.

In view of these factors and the relevant court precedents, we believe that the proposed use of FLIR to conduct aerial reconnaissance over structures located on private lands would not constitute a "search" under the Fourth Amendment, unless travel at the altitude to be flown by the aircraft carrying FLIR equipment is extraordinary. We believe this caveat is necessary, because Justice O'Connor's concurring opinion in *Florida v. Riley* seemed to indicate that aerial surveillance from airspace that is rarely, if ever, traveled by the public would interfere with a reasonable expectation of privacy. 488 U.S. at 455 (O'Connor, J., concurring); *see also United States v. Hendrickson*, 940 F.2d 320, 323 (8th Cir.), *cert. denied*, 502 U.S. 992 (1991). It is uncertain whether the Supreme Court will ultimately adopt the reasoning of the *Riley* plurality or Justice O'Connor concurrence, but for the time being, the law is unsettled with respect to aerial surveillance conducted from airspace that an individual could prove is rarely, if ever, used by the general public. If DoD encounters a situation in which FLIR surveillance would be carried out from airspace that is rarely used by the public, we would be pleased to examine that issue in more depth.

IV.

You have also expressed concern that DoD personnel who conduct FLIR surveillance might be subject to tort liability in an action brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). We do not believe that DoD personnel engaged in such activity will be liable for damages. If, as we believe, FLIR surveillance does not constitute a Fourth Amendment search, there would of course be no constitutional violation and no potential liability.

Even if a court were to disagree with our conclusion and hold that FLIR surveillance is a search, we do not believe that DoD personnel would be subject to liability for monetary damages. Federal officers are entitled to "qualified immunity" from tort suits for actions taken in the course of their official duties. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court explained that an officer is entitled to such immunity unless he violates a constitutional right that is "clearly established" at the time

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[14] (....continued)
See Smith Memorandum at 14 & n.33. These decisions contain little or no analysis of the question whether use of such a device is a Fourth Amendment search, and we agree with DoD that "we cannot be certain that the [Supreme] Court would agree their use is a search or that it would apply the same analysis to use of FLIR." *Id.* In any event, the use of a magnetometer is distinguishable from FLIR in at least one crucial respect. The magnetometer cases do not fall within the public exposure doctrine, because it is not true that "any member of the public" could learn what the government discovers through a magnetometer. The government is able to make use of a magnetometer only because it can require individuals to pass through the mechanism in order to travel on airplanes. *See Albarado*, 495 F.2d at 806-07.

of the officer's action. The right must be "clearly established" in this particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Given the uncertainty surrounding what expectations of privacy "society is prepared to recognize as reasonable," we do not believe that the use of FLIR from airspace that is used by the general public — even if ultimately held to be a Fourth Amendment search — would violate a "clearly established" constitutional right of the owners of structures on private lands. As our legal analysis (and the difference of opinion among those to have examined the issue) shows, a reasonable officer certainly could believe that the use of FLIR to conduct aerial reconnaissance of private structures is lawful. Accordingly, we do not think that DoD personnel providing that type of assistance to civilian law enforcement agencies would be subject to liability for damages in a constitutional tort action.

TIMOTHY E. FLANIGAN
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Office of Legal Counsel

Application of 18 U.S.C. § 205 to Proposed "Master Amici"

18 U.S.C. § 205 precludes attorneys in the executive branch from serving as "master amici" in the Court of Veterans Appeals.

March 12, 1992

MEMORANDUM OPINION FOR THE CHIEF JUDGE
UNITED STATES COURT OF VETERANS APPEALS

You have requested the Department of Justice's opinion whether 18 U.S.C. § 205 would bar an attorney employed in the government from serving as a "master amicus" in the United States Court of Veterans Appeals. The Attorney General has forwarded your request to our Office. We conclude that an executive branch attorney's service as a master amicus would be prohibited by the statute.

I.

You are exploring methods for enlisting pro bono representation for veterans having cases before the Court of Veterans Appeals and believe that attorneys in the executive branch might provide that representation. Letter for William P. Barr, Acting Attorney General, from Chief Judge Frank Q. Nebeker, United States Court of Veterans Appeals, at 2 (Nov. 6, 1991) ("Nebeker Letter"). As you observe, however, 18 U.S.C. § 205 by its terms forbids an officer or employee of the executive branch, except "in the proper discharge of his official duties," from "act[ing] as agent or attorney for prosecuting any claim against the United States" or "act[ing] as agent or attorney for anyone before any department, agency, [or] court . . . in connection with any covered matter in which the United States is a party or has a direct and substantial interest." 18 U.S.C. § 205(a)(1) & (2).[1]

[1] A "covered matter" is defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter." 18 U.S.C. § 205(h).

There are several exceptions to the prohibition in section 205, only one of which is even arguably applicable here. That exception allows an employee, "if not inconsistent with the faithful performance of his duties," to represent a "person who is the subject of disciplinary, loyalty, or other personnel

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In an effort to avoid section 205's prohibition, you propose that government attorneys act as "master amici" to the Court of Veterans Appeals pursuant to a rule to be adopted by the Court. A master amicus would "advise the Court of any nonfrivolous issue capable of being raised by the [veteran] appellant and assist the Court in understanding the Record and such issue(s)." *See* Proposed Amendment to Rule 46, Rules of Practice and Procedure, U.S. Court of Veterans Appeals (Proposed Rule 46), attached to Nebeker Letter. You contemplate that the master amicus and the veteran would not have an attorney-client relationship. To attempt to avoid even the appearance of such a relationship, the Court would require service of all papers on the veteran as well as on the master amicus. Nebeker Letter at 2. You believe that the activities of a master amicus would not be "of the kind contemplated by the proscriptions of section 205," especially in view of "the strong government policy in favor of just compensation for our nation's veterans and the non-adversarial nature of the [Veterans' Administration] claims adjudication process." Nebeker Letter at 2.

II.

We believe that a government employee serving as a master amicus would "act[] as agent or attorney for prosecuting [a] claim against the United States" and would "act[] as agent or attorney . . . before [a] department, agency, [or] court . . . in connection with [a] covered matter in which the United States is a party or has a direct and substantial interest." 18 U.S.C. § 205(a)(1) & (2). We therefore conclude that section 205 bars government attorneys from serving as master amici.

A.

Section 205 forbids a government employee from acting as an agent or attorney "in connection with any covered matter in which the United States is a party or has a direct and substantial interest." 18 U.S.C. § 205(a)(2). Cases before the Court of Veterans Appeals clearly are matters in which the United States has a direct and substantial interest, because it will have to pay any claims upheld by the Court. You concur in this conclusion. Nebeker Letter at 2 ("the United States has 'a direct and substantial interest' in the matter of a veteran's claim"). Moreover, the Secretary of Veterans Affairs, in his official capacity, is a party. 38 U.S.C. §§ 7261, 7263. The United States thus is a party in the cases. Therefore, section 205 clearly applies to proceedings in the Court of Veterans Appeals.

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[1](....continued)
administration proceedings." 18 U.S.C. § 205(d). Even that exception, however, does not appear applicable to cases in the Court of Veterans Appeals. *See, e.g.*, Office of Government Ethics Informal Advisory Opinion 85x1 (1985) (veterans' claims before the Board of Veterans' Appeals, with limited exceptions, could not come within the provision for "personnel administration proceedings," and section 205 thus applies).

A separate basis for applying section 205 is that the claims pressed by appellants in the Court of Veterans Appeals are "against the United States." 18 U.S.C. § 205(a)(1). The United States provides veterans, their dependents, or their survivors with benefits such as compensation for service-connected disability or death. 38 U.S.C. §§ 1101-1163; *see id.* § 1110 ("the United States will pay to any veteran . . . compensation as provided in this subchapter"). Veterans' claims are first presented to the Secretary of Veterans Affairs. He rules on "all questions of law and fact necessary to a decision . . . under a law that affects the provision of benefits . . . to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). Those rulings are reviewable by the Board of Veterans' Appeals, *id.* § 7104(a), and, in turn, the Court of Veterans Appeals has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." *Id.* § 7252(a). The claims of veterans appealing the denial of benefits through this process are "against the United States" in the evident sense that if the United States loses, it will have to pay. *See also* Office of Government Ethics Informal Advisory Opinion 85x1 (1985) (claims of veterans in Board of Veterans' Appeals are covered by section 205).[2]

You suggest that the veterans' claims process is "beneficial and paternalistic rather than adversarial" in the stages before review by the Court of Veterans Appeals. Nebeker Letter at 1; *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-11, 323-24, 333-34 (1985) (proceedings before the Board of Veterans' Appeals are ex parte, and no government official appears in opposition to the veterans' claims). Whatever the nature of the prior proceedings, however, the Court of Veterans Appeals uses an adversary process. Its rules use much of the framework of the Federal Rules of Appellate Procedure. The Secretary of Veterans Affairs is represented by the General Counsel of the Department. 38 U.S.C. § 7263(a). Appellants may be represented by their counsel. *Id.* § 7263(b). In cases that proceed to a decision in the Court of Veterans Appeals, the Secretary seeks, through this adversary process, to defend the denial of veterans' claims. Thus, section 205 would apply to proceedings in the Court of Veterans Appeals, even if it did not apply to the earlier stages of the claims process.[3]

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[2] Veterans' claims are "against the United States" even though, as you state, the United States has a "strong government policy in favor of just compensation for our nation's veterans." Nebeker Letter at 2. Although the United States has an interest in the just compensation of veterans, it also has an interest in ensuring that benefits go only to veterans who have valid claims. Moreover, we do not believe that any policy interest is sufficient in itself to limit the terms of the prohibition in section 205, although the existence of the policy interest might argue for a legislative initiative to change the statute.

[3] A letter from the Court of Veterans' Appeals Advisory Committee on Representation asserts that "many aspects of the traditional adversarial relationships between appellants and appellees do not exist in matters concerning veterans seeking review of their claims." Letter to Frank Q. Nebeker, Chief Judge, United States Court of Veterans Appeals, from Barry P. Steinberg, *et al.*, at 1 (July 9, 1991). In particular, the letter states that "the Department of Veterans Affairs (VA) and its executive, the Secretary of Veterans Affairs, the respondent in all of the Court's cases, see themselves as advocates of veterans' rights." *Id.* Nevertheless, according to your letter, "Congress created the Court of Veterans Appeals in the model and tradition of the federal courts of appeals." Nebeker Letter at 1. Moreover, as noted above, the Court of Veterans Appeals uses adversary procedures. Thus, although the Secretary's attitude and approach may differ from that of most litigants, the proceedings in the Court of Veterans Appeals are plainly adversarial.

B.

The master amicus would act as "agent or attorney" for prosecuting a veteran's claim. He would fill the gap created by the veteran's lack of formal legal representation. The Court would appoint a master amicus only "where the appellant is without representation." Proposed Rule 46. The master amicus would be obligated to "advise the Court of any nonfrivolous issue capable of being raised by the appellant." *Id.* Only attorneys qualified for admission to the bar of the Court could serve as master amici. In effect, the master amicus would be responsible for presenting the arguments that would have been made by the veteran's lawyer if the veteran were represented by retained counsel: the master amicus would offer the arguments that could be made for the veteran, but not those that could support the government's position. Thus, the master amicus would carry out virtually all of the functions of appellate counsel for the veteran.[4]

To be sure, Proposed Rule 46 is obviously crafted to avoid the appearance of a typical attorney-client relationship between the master amicus and the veteran. Proposed Rule 46, for example, would require that papers be served on the veteran, as well as on the master amicus, in order to suggest that no attorney-client relationship exists. Nebeker Letter at 2.[5] The master amicus, moreover, arguably would not be the agent of the veteran in a formal sense, because the veteran would have no right to exercise immediate control over the master amicus.

Nevertheless, as an initial matter, we believe that the proposal would achieve indirectly what plainly may not be done directly. The master amicus, an attorney to be appointed only when an appellant is without representation, would present all of the arguments that could be made for the appellant. Unlike a usual amicus, the master amicus would neither represent an interest of his own[6] nor inform the court about discrete issues on which the court needs expert guidance. He would instead be brought into a case under circumstances in which a court would ordinarily appoint not an amicus, but counsel for the unrepresented party. He would thus perform a role almost identical to that of appointed counsel and would not function as amicus to the court in any ordinary or traditional sense. These circumstances suggest that such a mechanism, as a practical matter, would be used to supply an attorney for an otherwise unrepresented veteran. If section 205 could be evaded in this way, the path would be clear for numerous programs

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[4] That a master amicus would receive no pay for his services is irrelevant. Unlike 18 U.S.C. § 203(a), section 205 is not confined to receipt or acceptance of "any compensation for representational services." *See* 18 U.S.C. § 205(a)(1).

[5] Ordinarily, briefs are served on counsel representing a party, rather than on the party himself. *See, e.g.*, U.S. Vet. App. R. 25(b) (service of papers to be made on representative of party); Fed. R. App. P. 25(b) (service of briefs to be made on counsel for a represented party); Fed. R. Civ. P. 5(b) (service to be made on counsel unless otherwise ordered by court).

[6] The Rules of Practice and Procedure for the Court of Veterans Appeals require the brief of an amicus to state "the interest of the amicus." U.S. Vet. App. R. 29(b).

in other contexts in which government attorneys, in effect, prosecute claims against the government.

This danger cannot be avoided by arguing that proceedings in the Court of Veterans Appeals might be distinguished from other, more adversarial claims adjudications in the government. As shown above, the master amicus, in fact, will occupy an adversary role in proceedings before the Court of Veterans Appeals. Indeed, if the master amicus did not occupy such an adversary role and the appeals process followed the "beneficial and paternalistic" model that you describe for those hearings that precede litigation before the Court of Veterans Appeals, the work of the master amicus would frustrate the statutory arrangements under which cases before the Court of Veterans Appeals are plainly intended to be adversary proceedings. *See* 38 U.S.C. § 7263.

As a textual matter, section 205 reaches any person who "*acts as* agent or attorney" for a claimant. Thus, section 205 focuses on the function performed by the government employee, and its prohibition may cover persons who are not formally designated as agents or attorneys for claimants. *See also United States v. Sweig*, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1970) (stating that "the strict common-law notion of 'agency' does not necessarily exhaust the meaning of the prohibition" and that the statute should be given "a different and wider meaning"). Functionally, the master amicus would perform a role nearly identical to that of retained counsel. He therefore would "act as" the attorney for the veteran -- as, from your description, he is clearly intended to do.

Like its statutory predecessor, section 205 "expresses a public policy that it is improper for a Government employee to prosecute claims against the Government in a representative capacity," and it protects "the integrity of Government actions by preventing its employees from using actual or supposed influence in support of private causes." H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961) ("House Report"). Section 205 was intended to prevent the conflict of interest thought to arise from the "opportunity for the use of offical influence." *Id.* A master amicus would have such an opportunity to the same extent as retained counsel. *See also* S. Rep. No. 2213, 87th Cong., 2d Sess. 11 (1962) (statute aimed at "representational activities").[7]

Whatever the precise scope of the term "attorney" in section 205, we believe that the term covers such traditional "representational activities" as presenting the legal arguments of a party otherwise lacking representation.[8]

[7]Although section 205 is narrower than its predecessor statute, which extended to "aid[ing] or assist[ing]" in the prosecution of a claim, the change was intended to direct the statute more precisely to the perceived problem of official influence: "[T]he inclusion of the term 'aids or assists' would permit a broad construction embracing conduct not involving a real conflict of interest. However, acting as attorney or agent, which would afford the opportunity for the use of official influence, would continue to be prohibited." House Report at 21. The functions to be performed by the master amicus would raise the exact problem at which section 205 was aimed.

[8] *See also* Office of Government Ethics Informal Advisory Opinion 88x6 (1988) ("Generally, public officials are not permitted to step outside of their official roles to assist private entities or persons in their dealings with the Government."); Office of Government Ethics Informal Advisory Opinion 84x14

Continued

Because section 205 is a criminal statute, its construction could be governed by the rule of lenity, under which a statute is to be read narrowly in order to favor a potential defendant. That rule comes into play, however, only if "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted). The rule of lenity applies only if "there is a 'grievous ambiguity or uncertainty in the language and structure of the Act.'" *Chapman v. United States*, 500 U.S. 453, 463 (1991) (citation omitted). After resort to the language, structure, history, and motivating policies of section 205, we believe, for the reasons stated above, that there is no "grievous ambiguity or uncertainty in the language and structure" of the statute and that section 205 would cover the proposed master amicus.

We therefore conclude that 18 U.S.C. § 205 precludes attorneys in the executive branch from serving as "master amici" in the Court of Veterans Appeals.

DOUGLAS R. COX
Deputy Assistant Attorney General
Office of Legal Counsel

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[8](....continued)
(1984) (section 205 "was designed to prevent Federal employees from engaging in representational-type activities on behalf of others in their dealings with the United States"); Bayless Manning, *Federal Conflict of Interest Law* 85 (1964) ("The emphasis of Section 205 is upon action in a representative capacity, particularly in a situation involving direct confrontation between the government employee and other government employees."); *cf. Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments*, 4B Op. O.L.C. 498, 499 (1980) (section 205 does not forbid "purely ministerial contacts").

In construing 18 U.S.C. § 207, we have observed that "[a]n agency or representational relationship entails at least some degree of control by the principal over the agent who acts on his or her behalf." 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) (citation omitted). *See also United States v. Schaltenbrand*, 930 F.2d 1554, 1560-61 (11th Cir.) (defendant who had minimal role at a meeting was not an "agent" under 18 U.S.C. § 207(a) because he could not "make binding commitments on [the supposed principal's] behalf"), *cert. denied*, 502 U.S. 1005 (1991). Although Proposed Rule 46 does not provide for the veteran to direct the master amicus, we do not believe that the possible lack of control would shield the proposed arrangement from section 205. Our opinion discussing the relevance of control under section 207 dealt with a former federal employee who performed no traditional representational function but rather limited his participation to offering a "character affidavit" for a pardon applicant. In the present proposal, the master amicus would perform all the functions of appellate counsel, and the differences between the master amicus and a court-appointed counsel would be so marginal that the arrangement might be seen as a subterfuge to avoid section 205.

Statutory Authority to Contract With the Private Sector for Secure Facilities

The Federal Bureau of Prisons has statutory authority to contract with the private sector for secure facilities.

March 25, 1992

MEMORANDUM OPINION FOR THE DIRECTOR
FEDERAL BUREAU OF PRISONS

This memorandum responds to your request for our opinion whether the Federal Bureau of Prisons ("BOP") has statutory authority to contract with the private sector for secure facilities.[1] The General Accounting Office ("GAO") has concluded that BOP lacks such authority;[2] BOP has taken the opposite view.[3] For the reasons explained below, we conclude that BOP has statutory authority to contract with the private sector for secure facilities.

I.

BOP was established in the Department of Justice in 1930 to provide a central federal organization responsible for the care and treatment of federal prisoners. H.R. Rep. No. 106, 71st Cong., 2d Sess. 1 (1930). BOP has the authority and responsibility under 18 U.S.C. § 3621(b) to "designate the place of . . . imprisonment" for prisoners who have been sentenced to a term of imprisonment under relevant federal statutes. BOP "may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau [of Prisons], whether maintained by the Federal Government or otherwise." 18 U.S.C. § 3621(b).[4]

[1] *See* Memorandum for J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, from J. Michael Quinlan, Director, Federal Bureau of Prisons (Apr. 26, 1991) ("Opinion Request").

[2] GAO, *Private Prisons, Cost Savings and BOP's Statutory Authority Need to be Resolved: Report to the Chairman, Subcomm. on Regulation, Business Opportunities and Energy, House Comm. on Small Business* (Feb. 1991) ("GAO Report").

[3] *See* Opinion Request at 1; Memorandum for J. Michael Quinlan, Director, from Clair A. Cripe, General Counsel, Federal Bureau of Prisons at 4 (Oct. 14, 1988) ("1988 Memorandum"); Memorandum for Norman A. Carlson, Director, from Clair A. Cripe, General Counsel, Federal Bureau of Prisons (June 10, 1983), *reprinted in Privatization of Corrections: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 150 (1985-86) ("Privatization Hearing").

[4] Section 3621(b) is applicable to those convicted of offenses committed on or after November 1, 1987.

Continued

BOP has consistently taken the position that the language of section 3621(b) — especially as it refers to facilities "whether maintained by the Federal Government or otherwise" — allows it to place federal prisoners in facilities operated by the private sector as well as those run by federal, state, or local authorities. *See* Opinion Request at 1; 1988 Memorandum at 4; Privatization Hearing at 150. It has relied for this conclusion on the plain language of the statute and on general principles of federal procurement law under which executive agencies may enter into contracts with the private sector. *See* Opinion Request at 1; 1988 Memorandum at 2-3; Privatization Hearing at 149-50; *Bureau of Prisons and the U.S. Parole Commission: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 16-17 (1985) ("1985 Hearing"); *see also Privatization Toward More Effective Government: Report of the President's Commission on Privatization* 147 (Mar. 1988) ("President's Commission").[5]

GAO, however, has concluded that, at least as to secure facilities, the statute's reference to facilities "maintained by the Federal Government or otherwise" includes only federal, state, and local facilities, but not facilities operated by the private sector. *See* GAO Report at 45-50. GAO argues that there is no evidence that Congress contemplated private incarceration of federal prisoners except in limited circumstances involving residential community treatment centers such as halfway houses. *Id.* at 48-49.[6] GAO contends that the authority in section 3621(b) to place prisoners in any facility "whether maintained by the Federal Government or otherwise" is

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[4](....continued)

See 18 U.S.C. § 3621 note. It is based on former 18 U.S.C. § 4082(b), *reprinted in* 18 U.S.C. § 4082 note, which governs as to offenses committed before November 1, 1987. Former section 4082(b) provided in part that "[t]he Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise." References to section 4082 in this memorandum should be understood to refer to former section 4082. Our analysis in this memorandum applies to the authority to designate the place of incarceration under both section 3621(b) and former section 4082(b). References in this memorandum to the history of section 3621(b) should be understood to include its predecessor statutes.

[5]One writer has claimed that BOP's former director, Norman A. Carlson, testified to the contrary in a 1985 Hearing. *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration* 399 n.940 (1988) ("Robbins"). However, Robbins quotes only a portion of Carlson's remarks. In context, it is plain that Carlson stated that he was unsure, without the benefit of advice of counsel, whether BOP could privatize "one of the *existing* 45 institutions." 1985 Hearing at 17 (emphasis added). He stated unequivocally his view that BOP has "statutory authority in [its] enabling legislation in title 18 to contract with State, local or private agencies for the care and custody of offenders. I think the enabling legislation gives us that authority." *Id.* at 16. Carlson further clarified his position in a 1986 hearing:

> Although I raised some question [regarding the legal authority to contract for an entire facility] when I testified before this subcommittee in March of 1985, our General Counsel advises me that we currently have the necessary authority to contract for the management of an entire facility under 18 U.S.C. § 4082. This law allows the Attorney General to designate as a place of confinement "any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise."

Privatization Hearing at 141.

[6]A residential community treatment center is a pre-release facility to which a prisoner may be transferred in order to be assisted in becoming re-established in the community. S. Rep. No. 613, 89th Cong., 1st Sess. 7 (1965) ("S. Rep. No. 613"). Such facilities are contrasted with secure facilities used to house prisoners who "remain a distinct threat to the community." *Id.* at 7-8.

circumscribed by 18 U.S.C. § 4002 (authorizing the Attorney General to contract for the incarceration of federal prisoners with states and localities) and 18 U.S.C. § 4003 (permitting the Attorney General to cause new federal facilities to be erected), which in GAO's view outline the only two options available to BOP for obtaining incarceration facilities. GAO Report at 46-48.[7]

II.

We begin our analysis with the language of the statute. As the Supreme Court has recently said, in construing a statute the one "cardinal canon before all others," is that we must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: '[the] inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The plain language of section 3621(b) gives BOP open-ended authority to place federal prisoners in "any available penal or correctional facility" that meets minimum standards of health and habitability without regard to what entity operates the prison. As if to emphasize the breadth of BOP's authority to use "any available facility," Congress expressly noted that such facilities could be those "maintained by the Federal Government or otherwise." The words "or otherwise" are not qualified or defined. They are most obviously read to include (as the statute has already described) any penal or correctional facility — without regard to whether it is maintained by a state, local, or private entity — as long as it meets "minimum standards of health and habitability established by the Bureau." In short, there is nothing in the language of section 3621(b) that limits BOP's placement authority to those facilities operated by the federal government, states, or localities. Based on the well-recognized canon of statutory construction referred to above, we believe that the plain language of section 3621(b) is dispositive as to BOP's authority to place prisoners in facilities operated by the private sector.

Although GAO concedes that the plain language of section 3621(b) does not limit BOP's choice of prison operators, GAO Report at 48, GAO asserts that section 3621(b)'s legislative history establishes that Congress did not authorize placing federal prisoners in private secure facilities such as are at issue here. It contends that

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[7] Section 4002 of title 18 provides in part:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Section 4003 provides that if the authorities of a state, territory, or political subdivision thereof are unable or unwilling to enter into such contracts or "if there are no suitable or sufficient facilities available at reasonable cost, the Attorney General may select a site . . . and cause [an appropriate facility] to be erected."

> [n]othing in the legislative history of this provision suggests that Congress ever contemplated having private parties operate adult secure facilities. Rather, it appears that Congress' intention in enacting the provision concerning places of confinement was simply to clarify that the Attorney General would have the power to choose the places prisoners would be confined, which at that time were limited to federal or state and local institutions.

GAO Report at 48.

In light of the plain language of section 3621(b), we think GAO's conclusion that BOP lacks the authority to designate private secure facilities -- based on the *absence* of comment on that issue in the legislative record -- is an incorrect reading of the statute.[8] Moreover, even if we were to rely on the legislative history of section 3621(b) to determine BOP's authority to place prisoners in privately operated facilities, we find nothing in the legislative history of section 3621(b) to indicate that Congress intended to preclude the use of such facilities to incarcerate federal prisoners. The language now contained in section 3621(b) originated in the Act of May 14, 1930, Pub. L. No. 71-218, 46 Stat. 325 ("1930 Act"), and was adopted to resolve an ambiguity as to who had the power to designate the place of confinement of federal prisoners. S. Rep. No. 533, 71st Cong., 2d Sess. 2 (1930) ("S. Rep. No. 533") (statement of the Attorney General). It authorized the Attorney General to "designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise."[9] The language enacted in 1930 has remained substantially unchanged through its present codification in 18 U.S.C. § 3621(b).[10] During the various reenactments of the provision, there was never any indication that the power to designate the place of confinement was limited to designation of federal, state, or local facilities. *See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 141

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[8] We note that while GAO reports are often persuasive in resolving legal issues, they, like opinions of the Comptroller General, are not binding on the executive branch. *See* Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel at 8 (Dec. 18, 1989) ("This Office has never regarded the legal opinions of the Comptroller General as binding upon the Executive."); *Reimbursement for Detail of Judge Advocate General Corps Personnel to a United States Attorney's Office*, 13 Op. O.L.C. 188, 189 n.2 (1989) ("The Comptroller General is an officer of the legislative branch, *see Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986), and historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the legal opinions of the Attorney General and the Office of Legal Counsel.").

[9] This language, contained in section 7 of the 1930 Act, was originally codified at 18 U.S.C. § 753f, *see* 18 U.S.C. § 4082 note, and was later reenacted in modified form and codified at former 18 U.S.C. § 4082(b). *See supra* note 4.

[10] Former section 4082(b) authorized the Attorney General to designate the place of incarceration for federal prisoners. Section 3621(b) gives that authority to BOP, a component of the Justice Department. The change was not intended to affect the authority with regard to place of confinement, but rather only to simplify the administration of the prison system. S. Rep. No. 225, 98th Cong., 1st Sess. 141 (1983).

(1983) ("The designated penal or correctional facility need not be . . . maintained by the Federal Government.").

On the contrary, there is evidence in the legislative history of section 3621(b) that at least after a 1965 amendment Congress specifically anticipated that BOP would designate privately operated facilities as places of incarceration. In 1965 Congress amended the designation provision to allow designation of a "facility" as well as an "institution." Act of Sept. 10, 1965, Pub. L. No. 89-176, 79 Stat. 674 (former § 4082(b), *reprinted in* 18 U.S.C. § 4082 note). The word "facility" was defined to "include a residential community treatment center." *Id.* at 675 (former § 4082(g), *reprinted in* 18 U.S.C. § 4082 note).[11] The legislative history of former section 4082(g) indicates that by enacting that definition Congress intended that "facility" would include community treatment centers such as those already being used to place juvenile offenders. *See* S. Rep. No. 613 at 3-4. As GAO concedes, GAO Report at 23, at least one of those juvenile facilities was being operated by contract with a nongovernmental entity:

> The residential community treatment centers, to which the bill authorizes the Attorney General to commit and transfer prisoners, are similar to the so-called halfway houses now operated by the Department of Justice for juvenile and youthful offenders. . . .
>
> . . . The halfway houses are operated under different plans. . . . *The New York City center is operated under contract by Springfield University.*

S. Rep. No. 613 at 3-4 (emphasis added). According to the Senate Report, Congress envisioned that "under the bill's authority to use community centers for older types of prisoners *a similar variety of organizational plans will be adopted.*" *Id.* at 4 (emphasis added).

Accordingly, for many years BOP has, "with the knowledge of Congress," contracted "for the placement of lower security inmates in private facilities, particularly contract Community Treatment Centers." 1985 Hearing at 22-23 (Testimony of Norman A. Carlson, Director, BOP). *See also id.* at 16-17 ("Today we have . . . nearly 2,500 [federal] inmates who are in halfway houses. . . . We contract with State, local and private agencies for this

[11] The definition of "facility" in former section 4082(g) did not *limit* application of the term to residential community treatment centers. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.07, at 152 (3d ed. 1992 rev.) ("Sutherland") ("[T]he word 'includes' . . . conveys the conclusion that there are other items includable, though not specifically enumerated."). In any event, Congress deleted the definition of "facility" when it substantially reenacted section 4082(b) in section 3621(b). Thus, particularly as it appears in section 3621(b), "facility" is not limited to residential community treatment centers. We reject the suggestion to the contrary in Robbins at 412-13.

service."). As Director Carlson testified in 1986, "[s]ince 1981, the Bureau of Prisons has relied solely on the private sector to provide prerelease housing through its community treatment center programs." Privatization Hearing at 132. In 1986, BOP "contract[ed] with 330 Community Treatment Centers ["CTCs"], 234 of which [were] privately run. Over 3,000 Federal inmates [were] in these CTCs. . . . In 1984, approximately 80 percent of offenders who were serving sentences of over six months and who were released to the community were released through contract CTCs." *Id.* at 168 (BOP staff position paper).

GAO apparently does not dispute BOP's authority to enter into private contracts for residential community facilities. *See generally* GAO Report at 48-49; *see also* Robbins at 412. GAO does not believe, however, that the text and legislative history of the 1965 amendment support the conclusion that Congress anticipated use of private *secure* facilities. It reasons that the Attorney General had specific statutory authority to contract for juvenile residential community treatment centers. *See* 18 U.S.C. § 5040.[12] Thus, in GAO's view, the 1965 amendment does not demonstrate Congress's view that the Attorney General already had authority to contract for private incarceration facilities, and, at most, it provided that authority for adult residential community facilities. *See also* Robbins at 400 ("[T]he meaning of the phrase 'or otherwise' has changed, but only to the rather limited extent of permitting [BOP] to contract with private corporations for the confinement of federal prisoners in certain special facilities, such as residential community-treatment centers.").[13]

GAO's response misses the point and ignores the statute's plain language. Former section 4082(b), as amended in 1965, gave the Attorney General the

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[12] Section 5040 provides in part that "[t]he Attorney General may contract with any public or private agency or individual and such community-based facilities as halfway houses and foster homes for the . . . custody and care of juveniles in his custody." Provisions authorizing such private contracts have been in effect since 1938. *See* Juvenile Justice and Delinquency Act of 1974, Pub. L. No. 93-415, § 510, 88 Stat. 1109, 1138 (1974); Act of June 16, 1938, ch. 486, § 6, 52 Stat. 764, 766.

[13] Robbins contends that because the precursors of section 3621(b) and sections 4002 and 4003 were enacted together, *see* 1930 Act §§ 3, 4, & 7, the "or otherwise" language of section 3621(b) can only be interpreted as referring to institutions that were authorized by the precursors of sections 4002 and 4003, *i.e.*, federal, state, local, or other public institutions. Robbins at 405-06. He then reasons that the 1965 amendment only broadened the authority now contained in section 3621(b) to include the power to contract for residential community treatment centers:

> Thus, although section 4082(b) was expanded to allow the Attorney General to confine adult federal prisoners in privately run facilities, Congress contemplated such action only with respect to qualified pre-release prisoners in residential community-treatment centers. Congress did not intend the amendment to be a broad grant of authority to place adult federal prisoners in all types of privately run facilities.

Id. at 412-13 (footnote omitted).

Robbins places great weight on the fact that the precursors of section 3621(b) and sections 4002 and 4003 were initially enacted in the same public law. *See id.* at 405. However, these sections subsequently have been reenacted, amended, and recodified in separate locations in the United States Code. Section 3621(b) is codified in subchapter C (Imprisonment) of chapter 229 of title 18, entitled "Postsentence Administration." Sections 4002 and 4003 are codified in chapter 301 of title 18, entitled "General Provisions," which includes a number of loosely-related provisions. *See, e.g.*, § 4001 (Limitation on detention; control of prisons); § 4004 (Oaths and acknowledgments); § 4005 (Medical relief; expenses). The mere fact that these sections were initially enacted together, without more, does not require that they should be construed in a like manner.

authority to place a federal prisoner in a "facility" including, but not limited to, a residential community treatment center. The Senate Report indicates that Congress expected the Attorney General to use the same kinds of arrangements for the adult residential facilities contemplated by the 1965 amendment as already existed in connection with similar facilities for juvenile offenders, at least one of which involved a contract with a nongovernmental entity. S. Rep. No. 613 at 3-4 (under the "authority to use community centers for older types of prisoners a similar variety of organizational plans will be adopted"). Yet Congress apparently saw no need to provide additional authority beyond that inherent in the designation provision itself to allow the Attorney General to enter into contracts with the private sector for adult facilities. This indicates that Congress believed the Attorney General had the authority under former section 4082(b) to enter into such contracts.

There is, moreover, no statutory basis in section 3621(b) for distinguishing between residential community facilities and secure facilities. Because the plain language of section 3621(b) allows BOP to designate "any available penal or correctional facility," we are unwilling to find a limitation on that designation authority based on legislative history. Moreover, the subsequent deletion of the definition of "facility" further undermines the argument that Congress intended to distinguish between residential community facilities and other kinds of facilities. *See supra* note 11.[14]

III.

GAO also contends that the language of section 3621(b) can only be understood in conjunction with 18 U.S.C. § 4002, which explicitly authorizes the Attorney General to contract with states and localities for the "imprisonment, subsistence, care, and proper employment" of federal prisoners, and 18 U.S.C. § 4003, which permits the Attorney General to cause appropriate facilities to be erected. *See supra* note 7. These statutes do not mention contracts with the private sector. GAO argues that sections 4002 and 4003 detail the only two courses of action the Attorney General and, by inference, BOP may take to provide incarceration facilities, and thus provide a statutory limit on the otherwise broad language of section 3621(b). GAO Report at 47-48 & n.8. GAO invokes the maxim of *expressio unius est exclusio alterius*[15] to conclude that because Congress addressed "two courses of action the federal government may use in order to obtain incarceration facilities" in

[14] We also note that GAO's construction of the 1965 amendment would mean that the phrase "maintained by the federal government or otherwise" would have two different meanings at the same time: it would mean federal, state, or local government "institutions," but federal, state, local, *or private* "facilities."

[15] *Expressio unius est exclusio alterius* means "the expression of one thing is the exclusion of another." *Black's Law Dictionary* 581 (6th ed. 1990). Under the maxim of *expressio unius*, where a "form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." Sutherland § 47.23, at 216 (footnotes omitted).

some detail, the "clear inference is that Congress intended to preclude any arrangement not expressly authorized" by those sections. *Id.* at 47.

As an initial matter, we question whether application of the *expressio unius* maxim is appropriate in these circumstances. The statutes at issue here are both affirmative grants of authority. The premise of the maxim — that the expression of one thing is the exclusion of another — simply does not apply where the expressions of limitation are set up against an additional affirmative grant of authority. The maxim, it seems to us, is more properly reserved for those circumstances in which the issue is whether the enumeration of items is exhaustive of the authority provided in the absence of other grants of authority. It is quite something else to apply the maxim, as GAO would have us do, to conclude that limitations on a particular grant of authority should also limit a separate grant of authority.

We also note that the maxim of *expressio unius* is not a rule of substantive law, but a rule of statutory construction based on "'logic and common sense.'" Sutherland § 47.24, at 228 (quoting Herbert Broom, *A Selection of Legal Maxims* 453 (10th ed. 1939)). It embodies a "presumption that . . . Congress intended to deny all powers not expressly enumerated" and it "should be invoked only when other aids to interpretation suggest that the language at issue was meant to be exclusive." *Bailey v. Federal Intermediate Credit Bank*, 788 F.2d 498, 500 (8th Cir.) *cert. denied*, 479 U.S. 915 (1986). Application of the presumption generally occurs where "'there [is] some evidence the legislature intended [the presumption's] . . . application lest it [should] prevail as a rule of construction despite the reason for and the spirit of the enactment.'" Sutherland § 47.25, at 234 (alteration in original) (quoting *Columbia Hospital Ass'n. v. City of Milwaukee*, 151 N.W.2d 750, 754 (1967)). *See also National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (*expressio unius* maxim "must yield to clear contrary evidence of legislative intent.").[16]

Here, the presumption suggested by the *expressio unius* maxim is undermined by the fact that nothing in the text or legislative history of sections 4002 and 4003 confirms the negative inference that Congress intended by the grants of contracting authority to limit BOP's unqualified section 3621(b) power to designate the place of incarceration of federal prisoners. Sections 4002 and 4003, by their terms, are permissive rather than exclusive. Section 4002 provides that the Attorney General "*may* contract . . . with the proper authorities of any State, Territory, or political subdivision thereof" in order to "provid[e] suitable quarters for the safekeeping, care, and subsistence" of

[16] This Office has noted on numerous occasions that "[i]n attempting to assess congressional intent, the *expressio unius* maxim may serve as a guide to that intent, but it is inconclusive. Other factors, including . . . the nature of the legislation, and the legislative history, must also be considered in the effort to discern congressional intent." *Applicability of Certain Cross-Cutting Statutes to Block Grants Under the Omnibus Budget Reconciliation Act of 1981*, 6 Op. O.L.C. 83, 105 (1982)(footnote omitted). *See also Paperwork Reduction Act of 1980*, 6 Op. O.L.C. 388, 407 (1982) ("The application of the [*expressio unius*] maxim is more persuasive when the language of the statute, its legislative history, and other factors point to the same result.").

federal prisoners. *Id.* (emphasis added). Alternatively, under section 4003 the Attorney General "*may* . . . cause to be erected" a suitable federal facility. *Id.* (emphasis added). Nothing in these sections or anywhere else in BOP's enabling legislation could be said to prohibit contracting with the private sector or to establish statutory requirements that would be at variance with such private contracts.

The legislative history of sections 4002 and 4003 indicates that these provisions were enacted specifically to address particular problems in connection with the incarceration of federal prisoners in state and local facilities. Sections 4002 and 4003 were enacted in response to a shortage of prison space for federal prisoners and the lack of a central administrative organization to oversee the disposition of such prisoners. *See* S. Rep. No. 533 at 2 (statement of the Attorney General). Although the federal government was already relying heavily on state and local facilities for the incarceration of federal prisoners, it was "powerless to remedy the deplorable conditions of filth, contamination, and idleness which [were] present in most of the antiquated jails of the country" and was "obliged to pay the States the rates they charge[d] for boarding Federal prisoners, even though they may be exorbitant." *Id.*

In response, section 3 of the 1930 Act, the precursor to section 4002, placed specific limitations and requirements on contracts with states and local governments. Section 4 of the 1930 Act, now substantially contained in section 4003, was enacted because emergency conditions and the large number of federal prisoners in certain districts made it desirable for the Department of Justice to have the authority to provide prisons of its own. *See* S. Rep. No. 533 at 3. Because these provisions were enacted to address specific circumstances involving the incarceration of federal prisoners in federal, state, and local facilities, Congress's failure to address contracts with the private sector is not surprising, and does not reflect an intention to prohibit such contracts.[17]

The *expressio unius* argument is further undermined because BOP does not, as a general matter of federal contracting law, need specific statutory authorization to contract with the private sector. The general rule is that an agency may use contracts with the private sector to carry out its statutory mission as long as the contract is not "specifically prohibited by statute" or "at variance with required statutory provisions or procedures." 1 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* 5, 10 (1977) ("Nash & Cibinic"). As these commentators have explained:

[17] The argument that the Bureau's 3621(b) designation power is limited by the options spelled out in sections 4002 and 4003 is also undermined by several provisions in BOP's enabling legislation that authorize other permissible places of prisoner incarceration. Section 4125(b) of title 18 authorizes the Attorney General to "establish, equip, and maintain [work] camps upon sites selected by him . . . and designate such camps as places for confinement of persons convicted of" federal offenses. In addition, the Attorney General may use inactive Department of Defense facilities as prisons. Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-624, § 9, 92 Stat. 3459, 3463 (1978), *reprinted in* 18 U.S C. § 4001 note. Thus, sections 4002 and 4003 do not in fact contain all the options available to the Attorney General in designating places of incarceration.

> The authority of the executive to use contracts in carrying out authorized programs is . . . generally assumed in the absence of express statutory prohibitions or limitations. Some statutes contain specific authorization to use contracts, others are silent on the matter and, in some very rare cases, statutes require the use of contracts. However, the executive agencies normally have the discretion to decide whether to accomplish their objectives by contract or through the use of Government employees.

Id. at 5. The courts have recognized that government agencies have broad discretionary powers in carrying out their functions, including the authority to contract for services when it is determined to be in the agency's interest. *See, e.g., Local 2017, AFGE v. Brown*, 680 F.2d 722 (11th Cir. 1982) *cert. denied*, 459 U.S. 1104 (1983); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). Thus, the power of an agency to contract for services is not dependent on specific authority to enter into such contracts. *See* Memorandum for Clair A. Cripe, General Counsel, Federal Bureau of Prisons, from Ralph Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 30, 1982).[18]

It is well established that BOP has authority to contract with the private sector for various services in connection with incarceration facilities. *See* Opinion Request (citing 40 U.S.C. § 471; 41 U.S.C. § 252(a); 48 C.F.R. §§ 1.101, 2.101); Privatization Hearing at 132-33, 170-72. For example, BOP has entered into private contracts for food service and medical, educational, and psychological services, and for consulting and other services in connection with Federal Prison Industries. Privatization Hearing at 132-33, 170-72. *See also* President's Commission at 147 ("Contracting for services and nonsecure facilities is a common practice in the field of corrections. Virtually all the individual components of corrections (such as food services, medical services and counseling, educational and vocational training, recreation, maintenance, transportation, security and industrial programs) have been provided by private contractors.").

GAO claims that it does not dispute BOP's authority generally to contract with the private sector for goods and services. *See* GAO Report at 50 ("As a general proposition, an agency may use contracts to carry out any activity

[18] We do not suggest that there are no limitations on the authority of a governmental entity to contract for goods or services. For example, a governmental entity may not enter into a contract that is specifically prohibited by statute or that is at variance with statutory provisions or procedures. *See* 1 Nash & Cibinic at 10. In addition, some functions are considered to be inherently governmental in nature and may not be delegated to nongovernmental entities. *See* OMB Circular A-76 (Aug. 4, 1983). This memorandum also does not address possible constitutional limitations on contracting. *See generally Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76*, 14 Op. O.L.C. 94 (1990). We are, of course, available to consult with you or your staff as to constitutional issues that might arise in connection with contracts with the private sector for prison facilities.

that the agency is authorized to perform under its enabling legislation or other statutory provision without a specific grant of contracting authority."). Rather, GAO contends that contracting with the private sector for incarceration facilities would be "inconsistent with the statutory scheme," which "describes with specificity the courses of action the government may use to obtain incarceration facilities." *Id.* *See generally* 1 Nash & Cibinic at 10 (governmental entity may not enter into a "contract which is specifically prohibited by statute, or at variance with required statutory provisions or procedures"). GAO's argument proves too much. Section 4002 states that "the Attorney General may contract . . . with the proper authorities of any State, Territory, or political subdivision thereof, for *imprisonment, subsistence, care, and proper employment of such persons*." *Id.* (emphasis added). To the extent GAO believes that contracting for private incarceration facilities would be inconsistent with section 4002, private contracting for other items involving the subsistence and care of prisoners would call into question BOP's well-established authority, apparently not questioned by Congress, to enter into contracts with the private sector for food service, clothing, and other goods and services.

More fundamentally, we disagree with GAO's assertion that private contracts for incarceration of federal prisoners would be "inconsistent with the statutory scheme." GAO Report at 50. As we have previously explained, *see supra* pp. 67-70, 72-73, nothing in the text or legislative history of section 3621(b) or sections 4002 and 4003 indicates that Congress intended to prohibit such contracts. Given the broad and unlimited designation authority contained in section 3621(b), we cannot conclude that private contracts would "conflict with the statutory scheme" based on the grants of authority contained in sections 4002 and 4003 and Congress' purported silence concerning private contracts.[19]

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[19] We also reject GAO's contention that our interpretation of section 3621(b) is undercut by certain other statutes that explicitly authorize the use of private facilities for confinement. GAO Report at 49-50 (citing 18 U.S.C. §§ 4013(a)(3) and 5040). The weakness of the argument can be seen by applying it consistently to 18 U.S.C. § 4013.

Section 4013(a) authorizes the Attorney General to make payments from appropriated funds:

> [in] support of United States prisoners [in non-Federal institutions] for —
>
> (1) necessary clothing;
>
> (2) medical care and necessary guard hire;
>
> (3) the housing, care, and security of persons held in custody of a United States marshal . . . under agreements with State or local units of government or *contracts with private entities*;

(emphasis added). GAO argues that section 4013(a)(3)'s reference to private contracts for prisoner incarceration indicates that when Congress intended to allow private contracting it did so explicitly. Again, GAO's argument proves too much. It would preclude private contracting for clothing, medical care, and security because subsections (a)(1) and (a)(2) do not explicitly permit private contracts as compared to subsection (a)(3). That would again call into question the Bureau's well-established authority to contract with the private sector for such items. *See supra* p. 74.

Conclusion

For the foregoing reasons, we conclude that the Bureau of Prisons has the statutory authority to contract with the private sector for secure facilities.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

Funding for the Critical Technologies Institute

The Department of Defense may make funds available to the National Science Foundation out of monies appropriated in the Department of Defense Appropriations Act, 1991, to support the activities of the Critical Technologies Institute during the 1992 fiscal year.

May 12, 1992

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This responds to your request for our opinion whether the Department of Defense ("DoD") may make $5 million available to the Director of the National Science Foundation ("NSF") out of monies appropriated in the Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, tit. IV, 104 Stat. 1856, 1870 (1990) ("FY 91 Appropriations Act"). The funds would be used to support the activities of the Critical Technologies Institute ("the Institute") during the current fiscal year. Although you have concluded that DoD may make those monies available for this purpose,[1] DoD disagrees.[2] We conclude that DoD may take those monies available for funding the activities of the Institute.

I.

Congress established the Institute in the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 822, 104 Stat. 1485, 1598 (1990) ("FY 91 Authorization Act") (codified as amended at 42 U.S.C. § 6686). The Institute is "a federally funded research and development center," 42 U.S.C. § 6686(a), with a variety of duties, including the assembly and analysis of information "regarding significant developments and trends in technology research and development in the United States and abroad," and the provision of technical support and assistance to presidential science and

[1] *See* Memorandum for Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, from Robert G. Damus, Acting General Counsel, Office of Management and Budget ("OMB") (Apr. 23, 1992) ("OMB Memorandum").

[2] *See* Memorandum for Douglas R. Cox, Deputy Assistant Attorney General, Office of Legal Counsel, from Manuel Briskin, Deputy General Counsel (Fiscal & Inspector General), DoD (Apr. 21, 1992) ("DoD Memorandum").

technology advisers. *Id.* § 6686(d)(1) and (4)(A). Although Congress initially provided that the Office of Science and Technology Policy ("OSTP") would serve as the Institute's sponsoring agency, *see* FY 91 Authorization Act, § 822(e)(1), 104 Stat. at 1599, a 1991 amendment provided that the Institute would operate under a sponsorship agreement with NSF. *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 822(c), 105 Stat. 1290, 1435 (1991) ("FY 92 Authorization Act") (codified at 42 U.S.C. § 6686(g)). NSF is an independent entity in the executive branch whose responsibilities include supporting scientific and engineering research, maintaining a "clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources," and providing a source of information for policy formulation by the Federal Government. 42 U.S.C. §§ 1861, 1862(a).

In the FY 91 Authorization Act, Congress authorized $5 million, out of DoD funds, for the Institute's activities during its first fiscal year of operation. FY 91 Authorization Act, § 822(g)(1), 104 Stat. at 1600.[3] In the FY 91 Appropriations Act, Congress appropriated a lump-sum of more than $9.1 billion for DoD research and development activities; those monies were made available through fiscal year 1992. FY 91 Appropriations Act, tit. IV, 104 Stat. at 1870.[4] The FY 91 Appropriations Act did not specifically refer to the Institute as one of the activities or projects covered by the lump-sum appropriation.

The Institute did not begin operations in fiscal year 1991 and, as a result, no funds were obligated for its activities during that fiscal year. OMB Memorandum at 5. Nonetheless, in the DoD appropriations act for fiscal year 1992, Congress assigned new responsibilities to the Institute. *See* Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8112, 105 Stat. 1150, 1201 (1991) ("FY 92 Appropriations Act"). Shortly thereafter, Congress amended the Institute's authorizing legislation. *See* FY 92 Authorization Act, § 822, 105 Stat. at 1433. The FY 92 Authorization Act altered the Institute's structure and revised its duties somewhat, and also amended its funding authorization. The amended funding provision, at the center of OMB's dispute with DoD, reads as follows:

> To the extent provided in appropriations Acts, the Secretary of Defense shall make available to the Director of the National

[3] Section 822(g)(1) provided: "Subject to such limitations as may be provided in appropriation Acts, the Secretary of Defense shall make available to the Director of the Office of Science and Technology Policy, out of funds available for the Department of Defense, $5,000,000 for funding the activities of the Institute in the first fiscal year in which the Institute begins operations."

[4] Congress appropriated "[f]or expenses of activities and agencies of the Department of Defense (other than the military departments), necessary for basic and applied scientific research, development, test and evaluation; advanced research projects as may be designated and determined by the Secretary of Defense, pursuant to law; maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law; $9,115,699,000, to remain available for obligation until September 30, 1992." 104 Stat. at 1870.

Science Foundation, out of funds appropriated for fiscal year 1991, $5,000,000 for funding the activities of the Institute.

Id. § 822(d)(1), 105 Stat. at 1435. The FY 92 Authorization Act also authorized the transfer of funds previously "appropriated to any department or agency for" the Institute to NSF for purposes of carrying out the Institute's activities. *Id.* § 822(d)(3), 105 Stat. at 1435.[5]

II.

You ask whether DoD may make available to NSF, out of monies appropriated by the FY 91 Appropriations Act, $5 million for funding the operations of the Institute during the current fiscal year. OMB and DoD agree that the Institute, a "research and development center" with wide-ranging responsibility for collecting and analyzing science and technology data, 42 U.S.C. § 6686(a), (d), qualifies as a proper research and development activity for purposes of the FY 91 Appropriations Act. OMB and DoD further agree that $5 million of DoD's FY 91 appropriations was available to fund the Institute prior to enactment of the FY 92 Authorization Act. OMB Memorandum at 11-13; DoD Memorandum at 2. The sole issue for our resolution, therefore, is whether the FY 92 Authorization Act created a new requirement for a more specific appropriation for the Institute than had been made in the FY 91 Appropriation Act. We believe it did not. Accordingly, we conclude that DoD may make the funds available to NSF.

It is axiomatic that an agency must have legal authority to perform its functions and, if it is to spend public monies, appropriated funds. An agency's legal power typically derives from its "organic" or "enabling" statute. I U.S. General Accounting Office, *Principles of Federal Appropriations Law* 2-33 (2d ed. 1991) ("*Principles 2d*"). Its appropriated funds of course must have been drawn from the Treasury pursuant to a duly enacted statute in accordance with Article I, Section 9 of the Constitution, which provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

In addition to legislation appropriating monies, Congress frequently enacts budget "authorization" legislation, which, as the name implies, authorizes Congress to appropriate monies for described purposes. *Principles 2d* at 2-33. "An authorization act is basically a directive to the Congress itself which Congress is free to follow or alter (up or down) in the subsequent appropriation act." *Id.* at 2-35. Congress usually passes authorization legislation before enacting appropriations legislation, but sometimes the order is reversed. *Id.* at 2-48.

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[5] In the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Congress had appropriated roughly $6,000,000 for necessary expenses of OSTP. Pub. L. No. 102-139, tit. III, 105 Stat. 736, 766 (1991). The legislative history of this act suggests that Congress intended roughly $1.6 million in additional funds for the Institute. H.R. Conf. Rep. No. 226, 102d Cong., 1st Sess. 48-49 (1991).

It is also axiomatic that Congress may make a lump-sum appropriation covering a wide range of activities without specifying precisely the objects to which the appropriation may be applied. *See TVA v. Hill*, 437 U.S. 153, 164 n.14 (1978) (noting that TVA projects are funded from lump-sum appropriations "without the need for specific congressional authorization"); *International Union, United Auto., Aerospace & Agric. Implement Workers of America v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.) ("[a] lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit") (footnote omitted), *cert. denied*, 474 U.S. 825 (1985). As we advised OMB more than a decade ago, "[i]f the activity or function is one which Congress has elsewhere given the agency authority to perform, its funding does not depend upon its being singled out for specific mention each year in the appropriation progress." Letter for Michael J. Horowitz, Counsel to the Director, OMB, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 3-4 (Sept. 18, 1981). A rule requiring greater specificity in appropriations would create extreme obstacles for the functioning of the Federal Government. *See id.* at 4; U.S. General Accounting Office, *Principles of Federal Appropriations Law* 5-94 (1st ed. 1982) ("*Principles 1st*"). As the General Accounting Office has recognized, "as the Federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity. . . . [A]n appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk." *Id.*

Applying these principles here, we conclude that DoD may make the monies in question available to NSF for purposes of funding the Institute during the current fiscal year. In the FY 91 Appropriations Act, Congress appropriated a lump-sum of more than $9.1 billion, available for obligation through fiscal year 1992, for research and development activities by DoD. FY 91 Appropriations Act, tit. IV, 104 Stat. at 1870. *See supra* p. 78. The FY 91 Authorization Act clearly contemplated that DoD could make $5 million of its $9.1 billion research and development appropriation available for the Institute. The act states that the Secretary of Defense "shall make available" the funds in the first fiscal year that the Institute begins its operations. FY 91 Authorization Act, § 822(g)(1), 104 Stat. at 1600. This direction is qualified only with the phrase "[s]ubject to such limitations as may be provided in appropriation Acts." *Id.* The FY 91 Appropriations Act did not mention the Institute and contained no applicable limitations. Therefore, in light of the general principles of appropriation law discussed above, the $5 million was available for the Institute.

The legislative history, although not controlling, supports this understanding of the FY 91 statutes. *See* Statement on Signing the Department of Defense Appropriations Act, 1991, II Pub. Papers of George Bush 1558 (1990) (distinguishing between an unenacted annex to the conference report and the law itself). A table in the conference report accompanying the FY 91

Appropriations Act demonstrates that the conferees envisioned that DoD would expend $5 million of the $9.1 billion lump-sum appropriation for research and development on the Institute. *See* H.R. Conf. Rep. No. 938, 101st Cong., 2d Sess. 116 (1990). The report prepared by the Senate Committee on Appropriations demonstrates the same understanding. *See* S. Rep. No. 521, 101st Cong., 2d Sess. 235 (1990) ("[a]s approved by the full Senate, the Committee adds $5,000,000 to the budget for" the Institute).[6]

Although OMB and DoD do not dispute that the FY 91 Authorization Act, which authorized appropriation of funds for the Institute "[s]ubject to such limitations as may be provided in appropriation Acts," FY 91 Authorization Act, § 822(g)(1), 104 Stat. at 1600, authorized appropriation of the funds for the Institute despite the lack of a specific line-item appropriation, DoD contends that amendments made by the FY 92 Authorization Act now prohibit it from making those monies available to NSF. DoD Memorandum at 1-2. Among other changes, the FY 92 Authorization Act changed the introductory phrase of the funding provision to read: "[t]o the extent provided in appropriations Acts." FY 92 Authorization Act, § 822(d)(1), 105 Stat. at 1150, 1435, *quoted supra* pp. 78-79. DoD argues that phrase requires a specific appropriation for the Institute. As a consequence, DoD concludes that neither the lump-sum appropriation for research and development activities in the FY 91 Appropriations Act, nor the earmarking table in the 1991 conference committee report, is sufficient to provide DoD with the authority to make the $5 million available to NSF. DoD Memorandum at 2. The FY 92 Appropriations Act makes no specific reference to the Institute.

We disagree with DoD that the text of the FY 92 Authorization Act requires a specific line-item appropriation. The FY 92 Authorization Act authorized $5 million for the Institute "[t]o the extent provided in appropriations Acts." Although to "provide" may mean, as DoD apparently interprets it, "to make a proviso or stipulation," *Webster's Ninth New Collegiate Dictionary* 948 (1986), it may also mean, more generally, "to make preparation to meet a need." *Id.* The FY 92 Authorization Act authorized the funds "[t]o the extent provided in appropriations Acts," and the FY 91 Appropriations Act, we believe, so "provided" — albeit in general, not specific, terms. As we have explained, it is a fundamental principle of appropriations law,

[6] Two events following enactment of the FY 91 statutes are suggestive. In considering the FY 92 Appropriations Act, the Senate adopted language, later deleted without explanation by the conference committee, expressly stating "[t]hat of the funds appropriated for fiscal year 1991 under the heading 'Research, Development, Test and Evaluation, Defense Agencies,' $5,000,000 shall be obligated for the Critical Technologies Institute within 90 days after enactment of [the] Act." 132 Cong. Rec. 13,442 (daily ed. Sept. 23, 1991). *See also* S. Rep. No. 154, 102d Cong., 1st Sess. 337 (1992). In addition, the House Committee on Appropriations is currently considering a proposal to rescind, from monies made available under the FY 91 Appropriations Act $4.9 million from the Institute's funding. House Comm. on Appropriations, 102d Cong., 2d Sess. (Comm. Print 1992). Both suggest a clear understanding on the part of Congress that the $5 million had been appropriated for the Institute, although we accord this "subsequent legislative history" minimal weight. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part).

repeatedly enunciated by the Comptroller General, that Congress is not required to enact a specific appropriation for a program. *See Principles 1st* at 5-94 to 5-103 (citing opinions). A lump-sum appropriation covering the general category is sufficient. *See supra* p. 80. There is nothing in the text of section 822(d)(1) that alters this principle.[7]

Such an interpretation does not, as DoD claims, render the introductory clause of section 822(d)(1) a nullity. First, the statute would not have "exactly the same meaning" with or without the introductory clause. *Cf.* DOD Memorandum at 3. The introductory clause makes clear that the act merely authorizes funds, and that a further appropriation is required. This reading is thus consistent with the distinction between authorization and appropriation legislation. *See supra* p. 79. Second, such an interpretation does not render "meaningless" the change in the introductory clause from the FY 91 Authorization Act to the FY 92 Authorization Act. *Cf.* DoD Memorandum at 3. DoD is correct that section 822(d)(1), referring as it did to the 1991 appropriation, did not contemplate a future or concurrent appropriation. It is for just this reason, however, that the change in locution makes sense. The FY 91 Authorization Act was considered in Congress at the same time as the FY 91 Appropriations Act, and both passed Congress on the same day. Therefore, when Congress made the authorization "[s]ubject to such limitations as may be provided in appropriation Acts," it was unclear whether any such limitations would be imposed. By contrast, section 822(d)(1) in the FY 92 Authorization Act specifically referred back to the previous year's appropriations. Hence in passing the FY 92 Authorization Act, Congress knew that the relevant appropriations act, *i.e.*, the FY 91 Appropriations Act, contained no "such limitations." Therefore, although it made sense to condition the authorization in the fall of 1990 on "such limitations," not knowing whether there would be any, it would have been illogical to repeat the phrase in the amended authorization in the fall of 1991. The substituted language reflects this fact.

By contrast, DoD's interpretation of the introductory clause would render *all* of section 822(d)(1) a nullity. The appropriation for fiscal year 1991, the only appropriation to which section 822(d)(1) refers, had been enacted nearly a year before the FY 92 Authorization Act, and without a specific reference to the Institute. As a consequence, DoD's insistence on a specific appropriation would eliminate the availability of the funds altogether: section 822(d)(1) would command the Secretary of Defense to make available funds that the section, by its terms, simultaneously would render unavailable. Under DoD's interpretation, Congress would have enacted an internally inconsistent provision with no operative effect. Of course, it is fundamental that a statute

[7] DoD suggests that had Congress meant "within the amounts provided in an appropriation Act," it could have said so. DoD Memorandum at 2. However, Congress could have just as easily stated "to the extent *specified* in appropriations Acts" or even more simply achieved the result that DoD argues it intended -- prohibiting the use of the 1991 appropriation for the Institute — by doing so expressly. *See* OMB Memorandum at 16.

must be construed, if possible, so that no part of it is made inoperative or superfluous. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46.06 (5th ed. 1992).

Further, DoD suggests that the "[t]o the extent provided" clause eliminated the funds that DoD concedes were available under the FY 91 Acts, relying on Comptroller General and Office of Legal Counsel opinions that concern a similar phrase in section 207 of the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 note.[8] DoD suggests that those opinions support the contention that the phrase "[t]o the extent provided in appropriations Acts" requires a specific appropriation for the Institute. DoD Memorandum at 3.

That supposition is rebutted by the opinions themselves. First, the text of section 207 of EAJA presents a significantly different question of interpretation than the provision at issue here. Section 207 states that payment of certain judgments is authorized "only to the extent and in such amounts as are provided in advance in appropriation Acts." The limiting clause in section 207 does not read, as the present statute does, "to the extent provided in" appropriations acts, but rather "to the extent *and in such amounts* as are provided . . . in appropriations Acts." (Emphasis supplied). That additional phrase certainly requires a greater degree of precision than "to the extent provided" would alone, so that even if section 207 requires a specific line-item appropriation, the provision at issue here would not necessarily require the same.

Second, the "to the extent . . . provided" clause in section 207 of EAJA does not, as interpreted in the cited opinions and others, require a specific line-item appropriation. As those opinions explain, the concern motivating section 207's clause was not whether a line-item appropriation rather than a lump-sum appropriation was required, but instead whether an appropriation was necessary at all. Section 207 was prompted by an effort on the House floor to have the EAJA bill ruled out of order because it contained appropriations, in violation of House rules. Section 207, and especially its "to the extent . . . provided" language, was added to make clear that the bill merely authorized funds, but did not appropriate them. Therefore, funds previously appropriated to pay certain judgments could not be utilized to pay other fees and judgments for which appropriations were authorized by the bill without "additional congressional action in the form of legislation." Olson Memorandum, 6 Op. O.L.C. at 209.[9] The Comptroller General reached essentially the same conclusion.[10] *See* 62 Comp. Gen. at 698; 63 Comp. Gen. at 263.

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[8] *See* DoD Memorandum at 3 (citing 63 Comp. Gen. 260 (1984); 62 Comp. Gen. 692 (1983); and *Payment of Attorney Fee Awards Against the United States Under 28 U.S.C. § 2412(b)*, 7 Op. O.L.C. 180 (1983). *See also Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op. O.L.C. 204 (1982) ("Olson Memorandum").

[9] Although the Olson Memorandum did suggest that a specific appropriation or an amendment of section 207 would be sufficient, 6 Op. O.L.C. at 209 n.10, it did not state that such actions were the

Continued

DoD also cites an unpublished decision of the Comptroller General suggesting that statutory language authorizing payments "'to the extent provided in appropriations acts'" in another statute requires a "specific reference to the payments in an appropriation act." Memorandum from the Comptroller General to the Honorable Edolphus Towns, U.S. House of Representatives, No. B-230775, 1988 WL 227669 at 1 (C.G. 1988).[11] This decision seems inconsistent with the principles discussed in other GAO publications, *see supra* p. 79, the Comptroller General opinions concerning EAJA, discussed above, and other Comptroller General decisions. *See, e.g.*, Matter of Department of Transportation — Allocation of Lump-Sum Appropriation for Pipeline Safety Programs, No. B-222853, 1987 WL 102908 (C.G. 1987). The decision cited by DoD may be explained by a rather strong indication in the legislative history of the act at issue in that decision that Congress had intended to exclude the funds in question from the applicable lump-sum appropriation. In any event, as noted above, *see supra* note 10, we are not bound by decisions of the Comptroller General.

CONCLUSION

We conclude that pursuant to the statutory authorities DoD may make $5 million of monies appropriated to DoD by the FY 91 Appropriations Act available for funding the activities of the Institute during the current fiscal year.

DOUGLAS R. COX
Deputy Assistant Attorney General
Office of Legal Counsel

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[9](....continued)
exclusive means to accomplish that purpose, nor was it addressed to that issue.

[10]Decisions of the Comptroller General, an agent of Congress, are of course not binding on the executive branch. *See* Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation* at 8 (Dec. 18, 1989). Such opinions are often instructive, however, on issues of appropriations law.

[11]DoD cites this unpublished decision in support of what DoD asserts is its consistent practice of interpreting the phrase "to the extent provided in an appropriation act" to require a specific appropriation. We do not here address whether such an interpretation would be correct in other circumstances, for example in the absence of authorization and a previous appropriation made for the same purpose. Obviously, the phrase must be read in context. *See, e.g., McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context. 'In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)."). In any event, we address today only the specific questions posed by the Institute legislation.

Congressional Pay Amendment

The Congressional Pay Amendment, which was originally proposed by Congress to the States for ratification in 1789, and having been ratified by three-fourths of the States, has been ratified pursuant to Article V and is accordingly now part of the Constitution.

Under 1 U.S.C. § 106b, the Archivist was, upon receipt of formal instruments of ratification from the requisite number of States, required to publish the Congressional Pay Amendment along with his certificate specifying that the Amendment has become valid, to all intents and purposes, as part of the Constitution.

May 13, 1992

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for a summary of our views, on an expedited basis, on whether the Congressional Pay Amendment has been duly adopted in accordance with the formal requirements of Article V of the Constitution. The General Counsel of the National Archives and Records Administration has informed us that the Archivist of the United States has received word that a total of thirty-nine States have adopted the Amendment, one more than the three-fourths required under Article V. The Archivist expects to have received formal instruments of ratification from all the necessary States shortly and informs us that no state has purported to rescind its ratification.

Article V of the Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

Congress proposed the Pay Amendment to the States in 1789, by a resolution concurred in by two-thirds of both Houses. 1 Stat. 97 (1789). That resolution further provided that the Amendment would be valid as part of

the Constitution "when ratified by three fourths of the [State] legislatures." *Id.* As the Amendment was proposed by the requisite majorities of both Houses of Congress, and has been ratified by the legislatures of three-fourths of the States, it has met all of the requirements for adoption set forth in Article V.

Section 106b of title 1, United States Code, provides:

> Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Accordingly, upon the receipt of formal instruments of ratification of the Pay Amendment from three-fourths of the States, the Archivist must forthwith cause the Amendment to be published with his certificate specifying the States by which it has been adopted, and that the Amendment has become valid, to all intents and purposes, as a part of the Constitution of the United States. The effective date of the Amendment is the date on which it was ratified by the thirty-eighth State to do so.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

November 2, 1992

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked us to memorialize the detailed analysis underlying the advice rendered to you earlier this year in connection with the ratification of the Congressional Pay Amendment, originally proposed by Congress to the States for ratification in 1789. You also asked us to address the question whether the Archivist of the United States, upon receipt of formal instruments of ratification from the requisite number of states, was required to certify that the Congressional Pay Amendment has become part of the Constitution.[1]

For the reasons set forth below, we conclude that the Congressional Pay Amendment has been ratified pursuant to Article V and is accordingly now part of the Constitution, and that the Archivist was required to issue his certification to that effect in accordance with 1 U.S.C. § 106b.

I.

A.

The procedures for amending the Constitution are set forth in Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

[1] We have relied upon the Archivist of the United States for his official tally of the ratifying States. In addition to the forty states listed in the Archivist's certification, *see* 57 Fed. Reg. 21,187, 21,188 (1992), we understand that California ratified the amendment on June 26, 1992, *see* 138 Cong. Rec. E2237 (daily ed. July 24, 1992). We set forth in detail the history of the Congressional Pay Amendment's ratification by the States in the accompanying Appendix.

The Constitution of the United States: Analysis and Interpretation, S. Doc. No. 16, 99th Cong., 1st Sess. 18 (Johnny H. Killion ed., 1987) ("*Constitution Annotated*"). Thus, Congress or a convention proposes an amendment, Congress proposes a mode of ratification, and the amendment becomes part of the Constitution when ratified by three fourths of the States. The ratification of the Congressional Pay Amendment followed this process. Congress proposed the amendment and directed it to state legislatures for ratification. Act of Sept. 23, 1789, ch. 27, 1 Stat. 97 (1789) (Amendments to the U.S. Constitution). Three fourths of the several States have now ratified it. 57 Fed. Reg. 21,187, 21,188 (1992); *see also* Appendix.[2] By a straightforward reading of Article V, the amendment is now "valid to all Intents and Purposes, as Part of th[e] Constitution."

That the ratification of the Congressional Pay Amendment has stretched across more than 200 years is not relevant under the straightforward language of Article V. Article V contains no time limits for ratification. It provides simply that amendments "shall be valid to all Intents and Purposes . . . *when ratified*." Thus the plain language of Article V contains no time limit on the ratification process.

Nor are we aware of any other basis in law for adding such time limits to the Constitutional amendment process, other than pursuant to the process itself. Indeed, an examination of the text and structure of Article V suggests that the absence of a time limit is not an accident. The procedure prescribed in Article V necessarily implies that some period of time must pass between the proposal of an amendment and its final ratification by the requisite number of States.[3] This suggests that if a time limit on the process were intended, the time limit would be stated in terms. Moreover, Article V does deal with a question concerning time limits, and does so quite precisely: no amendment affecting "the first and fourth Clauses in the Ninth Section of the first Article" was permitted to be made "prior to the Year One thousand eight hundred and eight." If the Framers had contemplated some terminus of the period for ratification of amendments generally, they would have so stated.

The rest of the Constitution strengthens the presumption that when time periods are part of a constitutional rule, they are specified. For example, representatives are elected every second year, U.S. Const. art. I, § 2, and a census must be taken within every ten year period following the first census,

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[2] The Archivist also informs us that no State has transmitted to the federal government a document purporting to rescind a prior ratification. In the early 1800's, the Vermont legislature, which had previously ratified the amendment, passed a resolution opposing a later, nearly identical proposal by the Kentucky legislature. *See* 1817 Vt. Laws 100-01. There is no evidence, however, that Vermont attempted to rescind its previous ratification. Several states did expressly reject the Congressional Pay Amendment when it was first proposed, though only New Hampshire appears to have formally notified the federal government of that fact. *See* 1 *Documentary History of the First Federal Congress of the United States of America* 348 (Linda Grand DePauw, et. al., eds. 1972) ("1 *First Congress*"); Appendix at pp. A-3 to A-4.

[3] *See* Joseph Story, *Commentaries on the Constitution of the United States* § 959, at 681 (1833) (reprinted 1987) (formal requirements of Article V indicate that "[t]ime is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments") ("*Commentaries*").

which was required to be taken within three years of the first meeting of Congress. *Id.* Neither House of Congress may adjourn for more than three days without the consent of the other, U.S. Const. art. I, § 5, and the President has ten days (Sundays excepted) within which to sign or veto a bill that has been presented to him. U.S. Const. art. I, § 7. The Twentieth Amendment refers to certain specific dates, January 3rd and 20th. Again, if the Framers had intended there to be a time limit for the ratification process, we would expect that they would have so provided in Article V.[4]

The records of the drafting and ratification of the Constitution contain no hint that Article V was intended to contain any implicit time limit. *See, e.g., Dillon v. Gloss*, 256 U.S. 368, 371 (1921). The issue appears not to have arisen at the time of the framing, but has since been debated in Congress from time to time. Throughout most of those debates, the dominant view has been that the Constitution permits the ratification process to proceed for an unlimited period of time. The first discussion we have found of the question whether a proposed constitutional amendment remains viable indefinitely came in 1869, when Senator Buckalew introduced a measure to regulate the time and manner in which state legislatures would consider the Fifteenth Amendment. In support of his proposal, he stated that because of the confusion created by States that either ratify after rejecting, or reject after ratifying, "we are in this condition that you cannot have a constitutional amendment rejected finally at all in the United States; rejections amount to nothing, because ratifications at some future time, ten, twenty, fifty, or one hundred years hence, may give it validity." Cong. Globe, 40th Cong., 3d Sess. 913 (1869). Senator Bayard, opposing a related proposal, stated his belief that "as long as the proposed amendment has neither been adopted by three fourths of the States nor rejected by more than one fourth, it stands open for . . . action." *Id.* at 1312.

The Senate and House debates regarding proposal of the Eighteenth Amendment in 1917 also indicate a common belief that Article V contains no time limits. For example, in his remarks on the need for limiting time for state ratification, Senator Ashurst explained that two of the first twelve amendments proposed by Congress "are still pending . . . and have been for 128 years." 55 Cong. Rec. 5556 (1917). Senator Borah expressed the view that "[t]he fundamental law of the land does say very plainly, that it places no limitation upon the time when or within which [an amendment] must be ratified. It says 'when ratified', and fixes no limit." *Id.* at 5649. Senator

[4]The Constitution also contains provisions that refer to time but not to a specific period or date. The Twelfth Amendment provides that when the House of Representatives must choose the President, it is to ballot "immediately" (presumably to prevent intrigue and cabal); the Vice President shall "immediately" assume the office of President under certain circumstances, U.S. Const. amend. XXV, § 4; the first Senate was "immediately" to divide itself into three classes for purposes of determining when terms of office expired, U.S. Const. art. I, § 3, cl. 2; the Sixth Amendment requires that accused persons receive a "speedy" trial. The Constitution also requires that certain duties be performed "from time to time." *See* U.S. Const. art. I, § 5, cl. 3 (publication of journal of Congress); art. I, § 9, cl. 7 (publication of statement of accounts); art. II, § 3 (President's state of the union message). The common theme of all these provisions is that when time is part of a constitutional rule, the document so provides.

Cummins offered a separate amendment to Article V, stating that "I am in favor of supplying what is manifestly a defect in our Constitution and providing some limit of time . . . ." *Id.* at 5652. Senator Overman later stated that "as the Constitution is now, . . . an amendment . . . can be submitted for a thousand years and be in force whenever ratified." 56 Cong. Rec. 10,098 (1918). In the House, Representative Reavis objected to any time limit in the Constitution. "The amendment is submitted until enough legislatures have passed upon it to indicate whether or not it will be approved by three-fourths of them." 56 Cong. Rec. 444 (1917). Representative Steel replied that without a time limit, "when a proposed constitutional amendment goes out to the States it rests there for agitation for all time without any limitation whatever." *Id.* at 445.

Thus, although there was much disagreement on the issue — later addressed in *Dillon v. Gloss* — whether *Congress* could impose time limits for state ratification of a proposed constitutional amendment in the absence of a separate amendment to Article V, there was little doubt as to the rule established by the Constitution itself: the proposed amendment remained viable, at least until rejected by more than one-fourth of the States.[5]

Thus, the text and history of Article V make plain that any argument that there is a time limit on the ratification process must be based on some ground other than text and history.

B.

1.

Two decisions of the Supreme Court, *Dillon*, and *Coleman v. Miller*, 307 U.S. 433 (1939), have been cited for the proposition that Article V requires that the ratification of constitutional amendments takes place within a "reasonable" time after proposal.[6] That doctrine is not within the holding of those cases, however, and we believe that any dicta supporting the doctrine are unsound.

In upholding Congress's power to limit to seven years the time for ratification of the Eighteenth Amendment, the Supreme Court in *Dillon* stated "that the fair inference or implication from Article V is that the ratification [of an amendment] must be within some reasonable time after the proposal." 256 U.S. at 375. If this reasoning is controlling and Article V does contain

[5] It is especially telling that so many of those who thought that the Constitution imposed no time limit on the amendment process thought this feature to be a defect in the document; had they thought the question a close one, or if any textual argument had been available, they might have resolved it in favor of what they took to be the preferable outcome.

[6] *See, e.g., Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 117 (1978) ("Senate Hearings") (testimony of Prof. Thomas I. Emerson, Yale University); *id.* at 144 (testimony of Prof. Jules B. Gerald, Washington University); *id.* at 266 (statement of Prof. Ruth B. Ginsburg, Columbia University).

an implicit requirement that proposal and ratification be reasonably contemporaneous, the Congressional Pay Amendment almost certainly would be invalid.[7]

Although recognizing that Article V "says nothing about the time within which ratification may be had," *id.* at 371, the Court in *Dillon* identified three grounds for concluding that Article V "strongly suggests" that a proposed amendment may not remain "open to ratification for all time" and that ratification in some States may not be "separated from that in others by many years and yet be effective." *Id.* at 374. The Court stated:

> *First*, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. *Secondly*, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. *Thirdly*, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.

Id. at 374-75 (emphases added).[8]

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[7] Indeed, the Court in *Dillon* suggested that the period for ratification of the Congressional Pay Amendment, along with that of three other long-dormant proposed amendments, had lapsed:

> That [construing Article V to require contemporaneous ratification] is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago — two in 1789, one in 1810 and one in 1861 — are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and *in our opinion it is quite untenable.*

Id. (emphasis added). *See also* Memorandum from David C. Huckabee, Analyst, and Thomas M. Durbin, Legislative Attorney, Congressional Research Service, Library of Congress, *Re: The Proposed Congressional Pay Constitutional Amendment: Issues Pertaining to Ratification*, at 2-3 (Aug. 12, 1991) ("CRS Memorandum").

[8] In support of the notion of contemporaneous consensus, the Court quoted with approval a passage from John A. Jameson, *A Treatise on Constitutional Conventions* (Da Capo Press 1972) (4th ed. 1887), in which Jameson wrote:

> The better opinion would seem to be that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.

Id. § 585, at 634, *quoted in part in* 256 U.S. at 375.

Contrary to the conclusion in *Dillon*, however, Jameson in his treatise had not suggested that his "opinion" on the need for contemporaneous ratification was based on any requirement detectable in the text of Article V. Rather, he believed that securing this policy goal would require the adoption of a "constitutional statute of limitation" for proposed amendments. Jameson specifically referred to the

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In *Coleman v. Miller*, the Court was presented with a claim by members of the Kansas Legislature that the Child Labor Amendment, proposed by Congress thirteen years before, "had lost its vitality through lapse of time." 307 U.S. at 451. The Court refused to consider the claim. *Id.* at 452-56 (opinion of Hughes, C.J., joined by Stone and Reed, JJ.); *id.* at 456-60 (Black, J., joined by Roberts, Frankfurter and Douglas, JJ., concurring). In his "opinion for the Court" in *Coleman*, Chief Justice Hughes observed that although the three considerations outlined in *Dillon* represented "cogent reasons" for concluding in the earlier case that Congress had the power to fix a reasonable time limit for ratification, *Dillon*'s discussion of these considerations was merely a dictum. *Id.* at 452-53. Nevertheless, in determining that the issue was "political," Chief Justice Hughes in dicta adhered to the premise of *Dillon* that Article V may be read as implicitly limiting the time for ratification. *See id.* at 453-54. *See also* CRS Memorandum at 3; Staff of House Comm. on the Judiciary, 85th Cong., 1st Sess., *Problems Relating to a Federal Constitutional Convention* 44-45 (Comm. Print 1957) (by Cyril F. Brickfield).[9]

2.

Dillon is not authoritative on the issue whether Article V requires contemporaneous ratification. As Chief Justice Hughes pointed out in *Coleman*, 307 U.S. at 452-53, the "reasonable time" discussion in *Dillon* was dictum because the issue before the Court was Congress's authority to limit the period for ratification, not a State's authority to ratify a long-dormant proposed amendment. *See* 1 Westel W. Willoughby, *The Constitutional Law of the United States* 596 n.18 (2d ed. 1929) ("Willoughby") ("[T]he declaration of the court [in *Dillon*] as to the lapsing of proposed amendments which do

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[8](....continued)
various proposed amendments "floating about" in 1887, including the Congressional Pay Amendment, which had shortly before been ratified by Ohio, and he acknowledged that "there is in force in regard to them no recognized statute of limitation." Jameson, *supra*, § 586, at 635-36. After discussing the hypothetical "confusion or conflict" that would result from such open-ended proposals, Jameson concluded with a plea for amending the amendment process:

> We discuss this question here merely to emphasize the dangers involved in the Constitution *as it stands*, and to show the necessity of legislation to make certain those points upon which doubts may arise in the employment of the constitutional process for amending the fundamental law of the nation. A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, *ought by all means to be passed.*

Id. at 635-36 (emphases added). *See also* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, H.R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, at 291-92 & n.1 (1897).

[9]Chief Justice Hughes wrote that "the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic." 307 U.S. at 453. The four concurring Justices would have dismissed the case for lack of standing, *see id.* at 460-70 (opinion of Frankfurter, J.), but concurred in the Chief Justice's conclusion on the broader ground that "Congress has sole and complete control over the amending process, subject to no judicial review." *Id.* at 459 (Black, J., concurring). Justices Butler and McReynolds in dissent found the issue justiciable and concluded that under *Dillon* "more than a reasonable time had elapsed" for ratification of the Child Labor Amendment. *Id.* at 473 (Butler, J. dissenting). We discuss *Coleman*'s political question holding in Part II, *infra*.

not receive ratification by the States within a reasonable period of time was *obiter*, inasmuch as this question was not before the court in the instant case."); *see also* Brief for the United States Amicus Curiae at 25, *Coleman v. Miller*, 307 U.S. 433 (1939) (No. 38-7) ("It was unnecessary in [*Dillon*] to consider whether a proposed amendment would expire with the passage of time in the absence of [a limitation] provision . . . .").[10]

Nor is *Coleman* authoritative as to contemporaneity. The *Coleman* Court's discussion of *Dillon*'s "reasonable time" inference was simply not part of its holding. Although Chief Justice Hughes's opinion for three members of the Court did approve of the "cogent reasons" for requiring contemporaneity outlined in *Dillon*, *see* 307 U.S. at 452-53, the four remaining Justices comprising the seven-vote majority on the dispositive "political question" issue specifically repudiated *Dillon*. The four concurring Justices called for "disapproval of the conclusion arrived at in *Dillon v. Gloss*, that the Constitution impliedly require[d] that a properly submitted amendment must die unless ratified within a 'reasonable time.'" *Id.* at 458 (Black, J., concurring) (footnote omitted).[11] Moreover, Chief Justice Hughes's conclusion does not logically imply that *Dillon* was correct. Having declined to address the content of an implicit time limit, it leaves open for Congress the conclusion that there is no time limit at all.

3.

On its merits, the reasoning of *Dillon* is unpersuasive in both its specific arguments and in its broader methodology. The *Dillon* Court's first

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[10] Indeed, some have argued that the entire opinion of the Court in *Dillon* was a dictum and must be considered "dubious" authority at best. *See* Note, *The Process of Constitutional Amendment*, 79 Colum. L. Rev. 106, 126 n.75 (1979); Ernst Freund, *Legislative Problems and Solutions*, 7 A.B.A. J. 656, 656-57 (1921). The challenge to the Eighteenth Amendment in *Dillon* was baseless because the seven-year limitation at issue was part of the text of the amendment and was therefore itself ratified by the States; the petitioner did not claim that Congress lacked authority to include such a limitation in the amendment itself. Note, 79 Colum. L. Rev. at 126 n.75. *See* Brief for Appellee at 5, *Dillon v. Gloss*, 256 U.S. 368 (1921) (No. 20-251) ("The amendment having been ratified by the requisite number of States within the time limitation provided in section three, it is unimportant whether that section is valid or invalid."). "[T]he Supreme Court, apparently mistaking the actual facts of the case submitted to it, stated and decided the case as though the time limit for ratification had been contained . . . in the Joint Resolution of Congress . . . ." Willoughby, at 596-97.

[11] We do not believe that Chief Justice Hughes's opinion must be treated as a holding of the Court because it rested on a "narrower ground" than Justice Black's. Ordinarily, where an opinion for the Court is fragmented, as in *Coleman*, the opinion of the Justices concurring in the judgment on the narrowest grounds is regarded as the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *King v. Palmer*, 950 F.2d 771, 778 (D.C. Cir. 1991) (Silberman, J., concurring), *cert. denied*, 550 U.S. 1229 (1992). However, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. The "reasonable time" rule thus cannot be considered a holding of *Coleman* because it was specifically rejected by four concurring Justices. *Coleman* "is not a case in which the concurrence [here the three-justice Hughes faction] posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *Id.* at 782. "In other words, it is not a case in which there is an implicit majority of the court" on the issue whether Article V requires reasonably contemporaneous ratification. *Id.*

consideration was that proposal and ratification are steps in a single process and hence should not be widely separate in time. This argument simply assumes its conclusion — that the process is to be short rather than lengthy.

Second, *Dillon* argued that because amendments are to be proposed only when needed, the implication is that they should be dealt with promptly. But necessity is not the same as emergency. Thus, Story has written:

> The guards [in Article V] against the too hasty exercise of the [amendment] power, under temporary discontents or excitements, are apparently sufficient. Two thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring amendments to be proposed; and three fourths of the states must ratify them. Time is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action. . . .
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> . . . The mode, both of originating and ratifying amendments . . . must necessarily be attended with such obstacles and delays, as must prove a sufficient bar against light or frequent innovations.

Commentaries, §§ 959-960, at 681-82. The States that have ratified the Congressional Pay Amendment only recently evidently consider it to be just as necessary today as the first Congress presumably thought it was in 1789.

Finally, *Dillon* suggests that Article V is designed to seek consensus, and that consensus must be contemporaneous. Again, even assuming that it is proper to interpolate terms into a constitutional provision in order to serve its purported end — a question we address below — this reasoning is faulty. Consensus does not demand contemporaneity. The sort of lasting consensus that is particularly suitable for constitutional amendments may just as well be served by a process that allows for extended deliberation in the various states. There have been occasions when it has taken decades to build the consensus within Congress needed for a two-thirds vote on a proposed amendment.[12] In the absence of a time limit in the original amendment proposal, it

[12] *See, e.g.*, Senate Hearings, at 134-35 (statement of Professor Thomas I. Emerson) ("History has demonstrated that a long period of time is necessary for the nation to make up its mind with respect to fundamental changes . . . . Thus the Women's Suffrage Amendment was under consideration for nearly three quarters of a century.").

would appear to be equally true that it may legitimately take many decades to build the three-fourths consensus required for the states' approbation.[13]

More fundamentally, *Dillon* rests on a faulty approach to the interpretation of the Constitution, and in particular those provisions that determine the structure of government. The amendment procedure, in order to function effectively, must provide a clear rule that is capable of mechanical application, without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored. As the Supreme Court has explained, the Constitution is designed to provide "[e]xplicit and unambiguous provisions" to govern the structure of government. *INS v. Chadha*, 462 U.S. 919, 945 (1983) (construing the presentment and bicameralism provisions of Article I). The very functioning of the government would be clouded if Article V, which governs the fundamental process of constitutional change, consisted of "open-ended" principles without fixed applications. The alternative to procedural formalism is uncertainty and litigation.[14]

As explained above, the terms of Article V provide a clear rule: any amendment once proposed "shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States." The reading according to which Article V contains an implicit time limit, by contrast, introduces so much uncertainty as to make the ratification process unworkable. The two stages of the amendment process are proposal and ratification. The latter is done by states acting through legislatures or conventions. In order to be able to carry out its function in the ratification process, any state that is contemplating ratification must know whether an amendment is in fact pending before it. That is not a matter of degree; the proposed amendment is either pending or not.

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[13] It is conceivable that the goal of consensus, if there is one, could be defeated where the last State to ratify harbors an entirely different intent or purpose in approving the amendment than did the first ratifying States or the proposing Congress. Thus, for example, the meaning of the words of an amendment chosen by the proposing Congress could conceivably change dramatically with the passage of time. If there is a substantive consensus requirement beyond the procedural formalities of Article V, this hypothetical case might be taken to violate that substantive meaning. That, however, is plainly not the case with the Congressional Pay Amendment. The intent and purpose behind this amendment have been consistent from its proposal by Madison to its recent ratification. We, therefore, express no opinion on any hypothetical scenario that may present a more fundamental challenge to the notion of consensus. We conclude only that consensus itself does not necessarily require contemporaneity. Moreover, of course, if the absence of a time limit introduces a danger into the Article V amendment process, the solution is to specify a time limit, either in the text of the amendment or the proposing resolution.

[14] *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 418 (1983) ("Dellinger"): "Attention to th[e] formalities [specified in Article V] is more likely to provide clear answers than is a search for the result that best advances an imputed 'policy' of 'contemporaneous consensus.'" Professor Dellinger nevertheless maintains that a proposed amendment, like the Congressional Pay Amendment, that languishes for years without action by state legislatures could be considered dead. *Id.* at 425. Dellinger's "doctrine of desuetude," however, has itself been criticized as "an anomolous position" in light of his reliance on the formalities of Article V. John R. Vile, *Judicial Review of the Amending Process: The Dellinger-Tribe Debate*, 3 J.L. & Pol. 21, 33 (1986). *See also* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 434 n.6 (1983). In our view, the notion of desuetude is fraught with all of the shortcomings that characterize the "reasonable time" rule of *Dillon* and must be rejected for the same reasons.

According to the theory that Article V contains an implicit time limit, the State must deduce that it can ratify only if the time since proposal is still a reasonable one. The implicit reasonable time rule can take one of two forms. First, the Constitution might be said to impose the same time period with respect to all proposed amendments. Putting aside the implausibility of the suggestion that a legal rule includes a time certain without stating it, this reading would require each state somehow to decide for itself what limitation the Constitution implicitly imposes. This question is extremely difficult, and there is no reason to believe that the different States would answer it in the same way.[15] In fact, the long history of congressional treatment of time limits demonstrates that there is no agreement as to what period of time would be reasonable.[16]

The other possible form of the implicit time limit rule is that the "reasonable" time differs from amendment to amendment, depending on any number of unstated factors. This theory requires that the States undertake an inquiry even more difficult than the search for an implicit but specific time limit. To take an example, this approach may suggest that the merits of a proposal may affect the question whether it is still pending, because one approach to judging the reasonableness of the period of ratification is to ask if the problem the amendment was designed to address is still pressing — a question that is inseparable from the substance of the amendment. However the question of reasonableness is to be answered, it is plain that answering it can be extremely difficult, and that expecting all the States to answer it in the same way is unreasonable.

The implicit time limit theory thus imposes an impossibly burdensome requirement on ratifying States — that they discern the implicit limitation and, if the system is to work smoothly, that they all discern the same one. Most discussions of the implicit time limit obscure this difficulty by shifting attention away from the situation of the States. For instance, Chief Justice Hughes's opinion in *Coleman* indicates that the reasonableness of the period that has passed since proposal is for Congress to decide at the time of promulgation. *See* 307 U.S. at 454. Congress's decision at the end of the

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[15] The compelling need for regularity and certainty in the amendment procedure is exactly what prompted Congress to include a time limit in the Eighteenth Amendment, which led the Court in *Dillon* to consider the question"[w]hether a *definite* period for ratification shall be fixed so that all may know what it is *and speculation on what is a reasonable time may be avoided.*" 256 U.S. at 376 (emphases added).

[16] What seems to have been the first attempt to impose a time limit on the States occurred during congressional consideration of the Fourteenth Amendment, when Senator Buckalew proposed an amendment to the joint resolution that would have required ratification within *three years*. Cong. Globe, 39th Cong., 1st Sess. 2771 (1866). In 1917, during debates on the Eighteenth Amendment, Senator Ashurst stated that he could support a time limit of "10, 12, 14, 16, 18, or even 20 years." 55 Cong. Rec. 5557 (1917). Senator Harding proposed an amendment to the joint resolution that would have limited states' consideration to a period of *six years*. Senator Cummins offered a substitute amendment that would have amended Article V to require state ratification of all amendments proposed after January 1, 1917, to *eight years*, expressing the view that what is a "reasonable" period for ratification might differ in each case. 55 Cong. Rec. 5652 (1917). During debate on the Child Labor Amendment in 1924, Representative Linthicum and Senator Fletcher offered amendments that would have required ratification within *five years* of proposal. 65 Cong. Rec. 7288, 10,141 (1924).

process, however, can be of no use to States while that process is going on. According to Chief Justice Hughes's approach, the States must make decisions concerning constitutional amendments without knowing whether those decisions matter until they learn from Congress at some later date, if ever.[17] The implicit time limit thesis is thus deeply implausible, because it introduces hopeless uncertainty into that part of the Constitution that must function with a maximum of formal clarity if it is to function.

In sum, the dictum of *Dillon* and the view of Chief Justice Hughes's plurality in *Coleman* are not authoritative nor are they persuasive. Article V contains no time limit not stated in its text. The Congressional Pay Amendment — rather, the Twenty-Seventh Amendment — although well aged, is not stale.[18]

II.

You have also asked whether, under 1 U.S.C. § 106b, the Archivist was required to publish the Congressional Pay Amendment along with his certificate specifying that the Amendment has become valid, to all intents and purposes, as part of the Constitution. We believe that he was required to do so.

A.

Section 106b provides:

> Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

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[17] *See* Note, *Critical Details: Amending the United States Constitution*, 16 Harv. J. on Legis. 763, 767 (1979) ("Although *Coleman* did spell out some guidelines, the state legislatures would still only speculate about what amount of time Congress would conclude was reasonable. Only some direct signal from Congress before or during ratification would definitely prescribe the time for action in the states."). *See also* 2 David K. Watson, *The Constitution of the United States* 1311-12 (1910) ("Who but the state can judge of what would be a reasonable time? It is for the state to ratify and cannot the state take its own time to do it?"), *quoted in Case Note*, 24 Minn. L. Rev. 393, 394 n.9 (1940).

[18] Several other amendments to the Constitution have been proposed to the States without time limits and have never received the approval of three-fourths of the States. *See Constitution Annotated*, at 51-53. A resolution was introduced in the Senate purporting to declare that those proposals have "expired," but it was not passed. *See* S. Con. Res. 121, 102d Cong., 2d Sess. (1992); 138 Cong. Rec. S6839, S6908 (daily ed. May 19, 1992). *But see* 138 Cong Rec. S6949 (daily ed. May 2, 1992) (Senator Sanford asserting that "today the Senate also decided to declare that four other proposed and pending amendments . . . were to be considered to have lapsed"). This opinion does not address the current vitality of any of those amendments. We note, however, that the status of the amendment proposed in 1861 providing that "[n]o amendment shall be made to the Constitution which will authorize or give Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State," *Constitution Annotated* at 52, may be determined by the subsequent adoption of the Thirteenth Amendment.

1 U.S.C. § 106b. The statutory directive is clear. First, the Archivist must determine whether, as a matter of law, he has received "official notice" of an amendment's adoption "according to the provisions of the Constitution." *Id.* If he determines that he has received such notice, he must publish the amendment with a certificate specifying, inter alia, that the amendment "has become valid, to all intents and purposes, as a part of the Constitution." *Id.* The statute allows the Archivist no discretion in this regard.

Congress has required the executive branch to certify the validity of constitutional amendments since 1818. In that year, Congress established a statutory mechanism for the publication of constitutional amendments as part of a general provision "for the publication of the laws":

> [W]henever official notice shall have been received, at the Department of State, that any amendment which heretofore has been, or hereafter may be, proposed to the constitution of the United States, has been adopted, according to the provisions of the constitution, it shall be the duty of the said Secretary of State forthwith to cause the said amendment to be published in the . . . newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the constitution of the United States.

Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439. Over time, Congress deleted the reference to newspapers and transferred the duty of publication from the Secretary of State, first to the Administrator of General Services, *see* Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710 (1951); Reorg. Plan No. 20 of 1950, § 1(c), 64 Stat. 1272, and then to the Archivist, *see* National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107, 98 Stat. 2280, 2291 (1984). The substance of the statutory directive, however, has remained the same.

Section 106b and its antecedents have long been understood as imposing a ministerial, "record-keeping" duty upon the executive branch. *See* 96 Cong. Rec. 3250 (Message from President Truman accompanying Reorg. Plan No. 20 of 1950); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 Okla. L. Rev. 63, 75-76 (1978). The Archivist may not refuse to certify a valid amendment. *See United States ex rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920) (no discretion to refuse publication once official notice received, as publication is merely "ministerial act"), *aff'd mem. sub. nom. U.S. ex rel. Widenmann v. Hughes*, 257 U.S. 619 (1921); *United States v. Sitka*, 666 F. Supp. 19, 22 (D. Conn. 1987), *aff'd*, 845 F.2d

43 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988).[19] Nonetheless, section 106b clearly requires that, before performing this ministerial function, the Archivist must determine whether he has received "official notice" that an amendment has been adopted "according to the provisions of the Constitution." This is a question of law that the Archivist may properly submit to the Attorney General for resolution. *See* 28 U.S.C. § 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President.").[20]

B.

As we concluded above, the Congressional Pay Amendment has been adopted in accordance with the Constitution. The only obstacle to the Archivist's promulgation of the amendment would be the thesis, advanced by some commentators, that under *Coleman v. Miller*, 307 U.S. 433 (1939), Congress alone among the branches may determine whether an amendment has been constitutionally adopted. Under this theory, the Archivist must wait for a determination of the matter by Congress or, at most, issue a "conditional certification" of an amendment in deference to possible congressional action. We believe that *Coleman* is not authority for this theory, and that congressional promulgation is neither required by Article V nor consistent with constitutional practice. As a consequence, we believe that the Archivist was not required to wait for a congressional promulgation to certify the Congressional Pay Amendment as valid.

1.

In *Coleman*, the Court considered the validity of the ratification by Kansas of the Child Labor Amendment, proposed by Congress in 1924. 307 U.S. at 435-36. Members of the Kansas Legislature had brought a state-court action alleging that the Kansas ratification had been invalid because, inter alia, the State Legislature had ratified the amendment some thirteen years after Congress had proposed it. Congress had not imposed a time-limit on ratification

[19] Indeed, there is authority for the proposition that the Archivist's Certificate is not necessary to an amendment's validity. The text of Article V contains no such requirement. *See also Dillon v. Gloss*, 256 U.S. 368, 376 (1921) (Eighteenth Amendment became valid on the date it received its final ratification; the date of publication was "not material, for the date of [an amendment's] consummation, and not that on which it is proclaimed, controls.").

[20] Others have recognized the Attorney General's role in resolving such legal questions. Concerning the validity of ratifications of the Equal Rights Amendment, Professor Dellinger questioned why the Administrator of General Services, at that time the official responsible for certifying new amendments, would submit the question to Congress: "An administrator uncertain about the lawful exercise of one of her responsibilities is normally expected to refer the question to the Attorney General for an opinion and then act in accordance with that opinion." 97 Harv. L. Rev. at 402. That was exactly what the administrator at the time intended to do. Asked what would be done if the requisite number of states had ratified but some States had purported to rescind their ratifications, the Deputy Archivist stated that "we would call upon the Attorney General to determine the answer to the legal question on rescission." Senate Hearings, at 109 (testimony of James E. O'Neill).

when it had proposed the amendment to the States. The Supreme Court of Kansas held that the amendment remained susceptible to adoption despite the thirteen-year delay, and dismissed the suit. *Id.* at 437.

The Supreme Court of the United States reversed. There was no majority opinion on the validity of the Kansas ratification. Three Justices — Chief Justice Hughes, Justice Stone, and Justice Reed — determined that the question whether Kansas had ratified within a "reasonable time" was a nonjusticiable political question. Chief Justice Hughes asserted that the resolution of such a question would depend on social, political, and economic conditions that courts were incompetent to address. *Id.* at 453-54. "On the other hand," he reasoned, "these conditions [were] appropriate for the consideration of the political departments of the Government." *Id.* at 454. The Hughes opinion concluded that the question whether an amendment had lapsed should "be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment." *Id.*

Four Justices — Justice Black, joined by Justices Roberts, Frankfurter, and Douglas — went even further. They disclaimed *any* judicial review of a congressional determination as to the adoption of an amendment. "[U]ndivided control of [the amendment] process had been given by [Article V] exclusively and completely to Congress," Justice Black wrote. *Id.* at 459 (Black, J., concurring). "Therefore, any judicial expression amounting to more than mere acknowledgement of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority." *Id.* at 459-60. Two Justices — Justices Butler and McReynolds — dissented on the ground that the amendment was invalid because of the thirteen-year delay. *Id.* at 473-74 (Butler, J., dissenting).

Neither Chief Justice Hughes nor Justice Black explained the constitutional basis for the assertion that Congress had authority to "promulgate" an amendment. Rather, Chief Justice Hughes relied on the "special circumstances" surrounding the adoption of the Fourteenth Amendment in 1868. *Id.* at 449-50.[21] At that time, as we have seen, the duty of publication of constitutional amendments rested with the Secretary of State. Because of irregularities in the ratifications of Ohio and New Jersey — the legislatures of both States had attempted to rescind their earlier votes to approve the amendment — Secretary Seward issued a "conditional certification" of the Fourteenth Amendment on July 20, 1868. Proclamation No. 11, 15 Stat. 706 (1868). Secretary Seward certified that *if* the resolutions of Ohio and New Jersey were still effectual, notwithstanding the subsequent attempts to rescind, "then the . . . amendment . . . ha[d] become valid, to all intents and

[21] Justice Black provided no support for his assertion.

purposes, as a part of the Constitution." *Id.* at 707. Secretary Seward disclaimed any authority to resolve the matter himself. *Id.*

The next day, Congress passed a concurrent resolution declaring the Fourteenth Amendment to be a part of the Constitution and directing Secretary Seward to promulgate it as such. Cong. Globe, 40th Cong., 2d Sess. 4266, 4295-96 (1868). The Senate passed the resolution without any debate, *id.* at 4266, and in the House the only question was whether Georgia, of whose ratification the Speaker had received notice by telegraph, should be included on the list of ratifying States. *Id.* at 4295-96. One week later, on July 28, 1868, Secretary Seward issued a second proclamation, "in execution of" the concurrent resolution and "in conformance thereto," certifying the Fourteenth Amendment as valid. Proclamation No. 13, 15 Stat. 710 (1868).

"Thus," observed Chief Justice Hughes, in the case of the Fourteenth Amendment "the political departments of the Government dealt" with questions concerning the ratification of the amendment. *Coleman*, 307 U.S. at 449. He apparently used the events surrounding the adoption of the Fourteenth Amendment as a model and simply assumed that, if and when the issue arose with respect to the Child Labor Amendment, the same procedures would obtain. *See id.* at 454 ("The [eventual] decision by the Congress, in its control of the action of the Secretary of State, of the question whether the [Child Labor Amendment] had been adopted within a reasonable time would not be subject to review by the courts."). The plurality opinion did not address the question whether, in the event the Secretary of State decided to certify the amendment on his own, congressional promulgation would still be necessary. Indeed, given the posture of the case, the Justices could not have addressed that question: the Child Labor Amendment was nowhere near ratification, and circumstances had not required the Secretary to make any decision regarding the validity of the amendment.[22]

Chief Justice Hughes's opinion is thus best understood as resting on a political question rationale: courts will not attempt to resolve certain questions concerning the validity of states' ratifications of constitutional amendments. Rather, the decision of the political branches will control. To read the Hughes opinion as addressing the relationship between the political branches and *requiring* the Executive to defer to Congress on the adoption of an amendment would be to resolve an issue that was not before the *Coleman* Court. As it was, the *Coleman* dissenters took their brethren to task for even addressing the role of Congress in the amendment process. The Court had not heard argument on that point, they protested; Congress's role had not been "raised by the parties or by the United States appearing as *amicus curiae*." 307 U.S. at 474 (Butler, J., dissenting). At most, *Coleman* stands for the proposition that the validity of a constitutional amendment is

[22] The Hughes opinion endorsed the Court's earlier holding in *Leser v. Garnett*, 258 U.S. 130, 137 (1922), that the Secretary would be bound by official notice from a state respecting its ratification. *See Coleman*, 307 U.S. at 451.

a political question. That proposition has no bearing on the actions of the Archivist, an officer of one of the political branches.[23]

2.

On its merits, the notion of congressional promulgation is inconsistent with both the text of Article V of the Constitution and with the bulk of past practice.[24] Article V clearly delimits Congress's role in the amendment process. It authorizes Congress to propose amendments and specify their mode of ratification, and requires Congress, on the application of the legislatures of two-thirds of the States, to call a convention for the proposing of amendments. Nothing in Article V suggests that Congress has any further role. Indeed, the language of Article V strongly suggests the opposite: it provides that, once proposed, amendments "*shall be valid* to all Intents and Purposes, as Part of this Constitution, when ratified by" three-fourths of the States. (Emphasis added.) As Professor Dellinger has written, the Constitution "requires no additional action by Congress or by anyone else after ratification by the final state." 97 Harv. L. Rev. at 398. To interpret Article V "as requiring or permitting" a further step of congressional promulgation is, in the words of another scholar, "no more defensible than to find a third house of Congress hidden cleverly in the interstices of the constitutional language vesting all legislative power in a House and a Senate." Rees *supra*, at 899.

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[23] We have discussed Chief Justice Hughes's opinion because it is the only part of *Coleman* other than the judgment that might be considered authoritative. If the views of the majority Justices had any common ground, Chief Justice Hughes's occupied the narrowest portion of that ground: Justice Black's disclaimer of any judicial inquiry is broader than the Chief Justice's approach. Scholars doubt whether *Coleman* has authority even as a political question decision. Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 887-88 (1980) ("Rees"); Dellinger, at 388 n.8. *See also AFL-CIO v. March Fong Eu*, 686 P.2d 609, 616 (Cal. 1984) Indeed, Chief Justice Rehnquist has questioned whether *Coleman's* analysis still obtains in the context of Article V. *See Uhler v. AFL-CIO*, 468 U.S. 1310 (1984) (Rehnquist, Circuit Justice); *but cf. Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (relying on *Coleman* to conclude that President's power to denounce a treaty was a nonjusticiable political question).

[24] In 1977, this Office stated that Congress could by concurrent resolution extend the time-limit for ratification of the Equal Rights Amendment. *See* Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Oct. 31, 1977) ("October Memorandum"). *See also Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 5-7 (1977) (statement of John M. Harmon, Assistant Attorney General, Office of Legal Counsel); Senate Hearings, *supra*, note 6. Relying on *Coleman*, this Office further concluded that Congress has the exclusive power to determine whether an amendment has been timely adopted. *See* October Memorandum at 17, 20-21, 43. *See also Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13 (1977). In an aside, we specifically referred to the Congressional Pay Amendment and noted our view that if and when the thirty-eighth ratification was received, Congress would have the duty to decide whether too much time had passed for the Amendment to be viable. *See* October Memorandum at 21 & n.26; *see also id.* at 35 n.43 (Congress may determine whether an amendment has been adopted by concurrent resolution). Those opinions arose in a factual setting quite different from the instant case. The "reproposal" of a constitutional amendment may be an exclusively congressional function in a way that the certification of a ratified amendment is not. *See Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (thought to stand for the proposition that the President's signature is not needed for proposal of an amendment). To the extent that our earlier opinions suggest that Congress alone must make the determination of the adoption of a constitutional amendment, we reject them today.

In light of the overall structure of the Constitution, it would be surprising if Article V did confer such exclusive power on Congress. The fundamental features of the American constitutional system -- federalism and separation of powers — produce a division of power designed to ensure that the people, rather than any organ of the government, are sovereign. As Attorney General Edward Bates explained in 1861, the Framers of the Constitution rejected the notion that "Parliament is omnipotent." *See* 10 Op. Att'y Gen. 74, 75 (1861). Instead, the federal government "is not vested with the sovereignty, and does not possess all the powers of the nation. It has no powers but such as are granted by the Constitution." *Id.* at 77. The same principle undergirds the separation of powers: the three branches of the federal government "are co-ordinate and coequal — that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others." *Id.* at 76. To give one branch of government ultimate control over the Constitution's very content would be to repudiate the American approach in favor of a return to parliamentary supremacy. Article V, however, shows that the Constitution is consistent in its rejection of governmental sovereignty.

The drafting history of Article V reaffirms this conclusion. The Federal Convention designed the amendment system so that both Congress and the states played important roles. At the convention, the Framers manifested a marked distrust of Congress in the amendment process. An early outline of the Constitution specified that the Constitution could be amended "without requiring the assent of the Natl. Legislature." 1 *Records Federal Convention of 1787* 121 (Max Farrand, ed., revised ed. 1966). In supporting that provision, George Mason argued: "It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account." *Id.* at 203.[25] Mason reaffirmed his concern in the final days of the convention and argued that Article V gave Congress too much power and ability to abuse the process. 2 *Records of the Federal Convention of 1787* 629 (Max Farrand, ed., revised ed. 1966). Article V was specifically altered by the convention to accommodate Mason's concern. *Id.*

Commentary during the ratification debates bears out the Framers' intention to check the power of Congress in the amendment process. Madison explained in Federalist No. 39 that the amendment system balanced the States and the federal government, so that the system is "neither wholly federal, nor wholly national." *The Federalist* No. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961). In discussing the provisions for calling a convention upon the petition of two-thirds of the States, Alexander Hamilton states:

> [The amendments so proposed] "*shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in

[25] The Congressional Pay Amendment, dealing as it does with the power of members of Congress to increase their salaries, is just the sort of amendment to which Mason's comment would apply most readily.

> three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body [Congress].

The Federalist No. 85, at 593 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). These words are equally applicable to ratification of an amendment by three-fourths of the States. Discussing Article V more generally, Hamilton concluded by observing that "[w]e may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority." *Id.* These statements are inconsistent with the notion that Congress has a general power of superintendence over the amendment process.

Congressional promulgation is also at odds with the bulk of past practice in this area. As we have seen, Chief Justice Hughes in *Coleman* used the "special circumstances" surrounding the adoption of the Fourteenth Amendment as a model for the only instance of congressional involvement in the promulgation of an amendment following ratification in more than two hundred years. *See, e.g.*, Dellinger, at 400. There has never been another "conditional certification" of an amendment by the executive branch.[26] The concurrent resolution "promulgating" the Fourteenth Amendment, adopted with no substantive debate, was unnecessary and an aberration.

The events surrounding the adoption of the Fifteenth Amendment two years later demonstrate that fact.[27] Irregularities in State ratifications also plagued this Amendment — New York had attempted to rescind its ratification, *see* Cong. Globe, 41st Cong., 2d Sess. 1444 (1870), and two other States, Ohio and Georgia, ratified the amendment only after having rejected it once, *see* Memorandum to Don W. Wilson, Archivist of the United States, from Martha L. Girard, Director of the Federal Register 6 (May 22, 1991).

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[26] *See* Letter to Governors of the Several States from Thomas Jefferson, Secretary of State (March 1, 1792), *reprinted in* 2 *The Bill of Rights: A Documentary History* 1203 (Bernard Schwartz, ed., 1971) (First through Tenth Amendments); President John Adams, Message to Congress, 7 Annals of Cong. 809 (1798) (Eleventh Amendment); Letter to Governors of the Several States from James Madison, Secretary of State (Sept. 25, 1804) (Twelfth Amendment), *cited in Constitution Annotated*, at 28 n.4; Certification by William H. Seward, Secretary of State, 13 Stat. 774 (1865) (Thirteenth Amendment); Certification of Hamilton Fish, Secretary of State, 16 Stat. 1131-32 (1870) (Fifteenth Amendment); Certification by Philander C. Knox, Secretary of State, Act of Feb. 25, 1913, 37 Stat. 1785 (1913) (Sixteenth Amendment); Certification by William Jennings Bryan, Secretary of State, Act of May 31, 1913, 38 Stat. 2049 (1913) (Seventeenth Amendment); Certification by Frank L. Polk, Acting Secretary of State, Act of Jan. 28, 1919, 40 Stat., "Eighteenth Amendment to the Constitution" 1 (1919); Certification by Bainbridge Colby, Secretary of State, Act of Aug. 26, 1920, 41 Stat. 1823 (1920) (Nineteenth Amendment); Certification by Henry L. Stimson, Secretary of State, Act of Feb. 6, 1933, 47 Stat. 2569 (1933) (Twentieth Amendment); Certification by William Phillips, Acting Secretary of State, Act of Dec. 5, 1933, 48 Stat. 1749 (1933) (Twenty-First Amendment); Certification by Jess Larson, Administrator of General Services, 16 Fed. Reg. 2019 (1951) (Twenty-Second Amendment); Certification by John L. Moore, Administrator of General Services, 26 Fed. Reg. 2808 (1961) (Twenty-Third Amendment); Certification by Bernard L. Boutin, Administrator of General Services, 29 Fed. Reg. 1715 (1964) (Twenty-Fourth Amendment); Certification by Lawson B. Knott, Administrator of General Services, 32 Fed. Reg. 3287 (1967) Twenty-Fifth Amendment), Certification by Robert L. Kunzig, Administrator of General Services, 36 Fed Reg. 12,725 (1971) (Twenty-Sixth Amendment).

[27] Chief Justice Hughes in *Coleman* briefly noted the events surrounding the ratification of the Fifteenth Amendment, but did not assign them any weight in this analysis. *See* 307 U.S. at 450 n.25.

On February 21, 1870, Senator Williams introduced a joint resolution declaring that the Amendment had become valid as part of the Constitution. Cong. Globe, 41st Cong., 2d Sess. 1444 (1870). Shortly thereafter, the Senate passed a different resolution requesting that the Secretary of State inform the Senate which States had ratified the Amendment. *Id.* at 1653.

On March 30, 1870, Secretary of State Hamilton Fish issued a proclamation certifying that the Fifteenth Amendment had become valid. The proclamation noted the attempted rescission by New York, but did not mention the questions regarding the Ohio and Georgia ratifications. 16 Stat. 1131 (1870). The Senate took no action in response to the proclamation, and Senator Williams allowed his earlier resolution to die. Cong. Globe, 41st Cong., 2d Sess. 3142 (1870). There was some debate in the House concerning the validity of the New York and Indiana ratifications, *id.* at 2298, but ultimately the House passed a resolution declaring that the Amendment had become a binding part of the Constitution. *Id.* at 5441.[28] At no time during the consideration of the Fifteenth Amendment did anyone in Congress suggest that congressional promulgation was essential to its validity. As the Fifteenth Amendment was adopted only two years after the Fourteenth, the absence of such a suggestion demonstrates that the congressional promulgation of the Fourteenth Amendment was merely an aberration.

If congressional promulgation is required, Secretary Fish illegally certified that the Fifteenth Amendment was part of the Constitution.[29] Indeed, the executive branch would have illegally certified every amendment except the Fourteenth.[30] If only to avoid this absurd conclusion, we must reject the assertion that only Congress may promulgate an amendment.

III.

We conclude that the Congressional Pay Amendment has been validly ratified pursuant to the procedures set forth in Article V, and that the Archivist of the United States was required to promulgate the Twenty-Seventh Amendment pursuant to 1 U.S.C. § 106b.

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Office of Legal Counsel

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[28] The House Resolution also confirmed the validity of the Fourteenth Amendment. Cong. Globe, 41st Cong., 2d Sess. 5441 (1870).

[29] The experience of the Fifteenth Amendment also refutes a modified version of Justice Black's thesis, under which congressional certification would be required in doubtful cases. The status of the Fifteenth Amendment was as doubtful as that of the Fourteenth, and for the same reasons.

[30] Of course, the certifications would nevertheless be binding on the courts. *See Leser v. Garnett*, 258 U.S. 130 (1922); *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir.) (Easterbrook, J.), *cert. denied*, 479 U.S. 853 (1986), *cf. Field v. Clark*, 143 U.S. 649, 669 (1892).

APPENDIX

The Congressional Pay Amendment had its beginnings in the ratification conventions of States considering the original Constitution. Several States proposed amendments when they ratified the Constitution. Two of these, Virginia and New York, included a precedent to the Congressional Pay Amendment. 2 *The Bill of Rights: A Documentary History* 844, 916 (Bernard Schwartz, ed., 1971) ("Schwartz").[1] North Carolina proposed amendments on August 2, 1788, without at first ratifying the Constitution. *Id.* at 966, 977. Among the amendments it proposed was a congressional pay provision taken almost verbatim from Virginia's. *See id.* at 970-71. Representative James Madison included Virginia's proposal in the resolution of amendments he proposed to the House on June 8, 1789. 4 *Documentary History of the First Federal Congress of the United States of America* 9, 10 (Charlene Bangs Bickford and Helen E. Veit, eds., 1986) ("4 *First Congress*"). On the motion of Elbridge Gerry, the proposed amendments of several States, including New York's congressional pay proposal, were also put before the House. *Id.* at 4, 19, 24.

There was relatively little debate on the proposed Congressional Pay Amendment in Congress. Madison forecast that Congress's power over the compensation of its members was unlikely to be abused, but nevertheless pointed out the impropriety of giving members the power "to put their hand into the public coffers, to take out money to put in their pockets." 1 Annals of Cong. 457 (Gales & Seaton eds., 1789). Congressman John Vining later echoed this sentiment: "There was, to say the least of it, a disagreeable sensation, occasioned by leaving it in the breast of any man to set a value on his own work." *Id.* at 756-57. Another Congressman, however, thought that "much inconvenience and but very little good would result" from the amendment. *Id.* at 756 (statement of Theodore Sedgwick).

Congress approved the proposal of twelve amendments to the Constitution on September 25, 1789. The Congressional Pay Amendment was approved with only a minor change in wording made in the Senate. *See* 4 *First Congress*, at 44-46. As sent to the states for ratification, it read:

> No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

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[1] Virginia ratified the Constitution on June 25, 1788, after narrowly defeating a motion to propose amendments prior to ratification. *See* Schwartz, at 834-39. Two days later, the convention proposed amendments, including: "That the laws ascertaining the compensation of senators and representatives for their services, be postponed, in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted which shall first be passed on the subject." *Id.* at 844. New York ratified the Constitution and proposed amendments on July 26, 1788. Among its proposed amendments was "That the Compensation for the Senators and Representatives be ascertained by standing Laws; and that no alteration of the existing rate of Compensation shall operate for the Benefit of the Representatives, until after a subsequent Election shall have been had." *Id.* at 916.

1 *Documentary History of the First Federal Congress of the United States of America* 208 (Linda Grant De Pauw, et al., eds., 1972) ("1 *First Congress*") (reproducing entry from Appendix to Senate Legislative Journal, 1st Cong., 1st Sess.). *Cf.* Act of Sept. 23, 1789, ch. 27, 1 Stat. 97 (1789). The proposed amendments were transmitted to the eleven States that had ratified the Constitution, as well as to North Carolina and Rhode Island. *See* 4 *First Congress*, at 9, 48.

When the amendments were proposed, nine States constituted the three-fourths necessary for ratification of the amendments. Before any States had acted on the amendments, North Carolina ratified the Constitution; nine States still constituted three-fourths. *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* xxi (Patrick T. Conley and John P Kaminski, eds., 1992) ("*Bill of Rights and the States*"). The Congressional Pay Amendment had been ratified by only four States before Rhode Island ratified the Constitution on May 29, 1790, bringing the number of States in the Union to 13, three-fourths of which was ten. Before any more States ratified the amendment, Vermont joined the Union, bringing the total to 14, three-fourths of which was eleven. Regardless of the time at which the "three-fourths" requirement was determined, however, the Congressional Pay Amendment was never close to that total in its initial period. It received only two more ratifications in 1791, for a total of six.[2]

Thomas Jefferson, as Secretary of State under George Washington, was responsible for monitoring the States' actions on the proposed amendments. *Id.* at xxii. His tally shows that of the thirteen original States and Vermont, six ratified the amendment. *Id.* at xxiii (photographic reproduction of Jefferson's tally). Five States rejected the amendment, three of them "silently," meaning that the ratification documents made no reference to the Congressional Pay Amendment. *Id.* at xxii-xxiii. The other three States did not respond: Massachusetts, Connecticut, and Georgia. *Id.*

The six States that ratified the Congressional Pay Amendment along with what is now the Bill of Rights are:

- Maryland, December 19, 1789. 1 *First Congress*, at 349-50 (reproducing entry in Senate Journal of June 14, 1790).
- North Carolina, December 22, 1789. 1 *First Congress*, at 346-47 (reproducing entry in Senate Journal of June 11, 1790).
- South Carolina, January 28, 1790, 1 *First Congress*, at 275-76 (reproducing entry in Senate Journal of April 3, 1790).
- Delaware, January 28, 1790, 1 *First Congress*, at 253-54 (reproducing entry in Senate Journal of March 8, 1790).
- Vermont, November 3, 1791, Schwartz, at 1202-03; *Bill of Rights and the States*, at xxii.
- Virginia, December 15, 1791, Schwartz, at 1202.

[2] By contrast, the third through twelfth proposed amendments, now known as the Bill of Rights, were ratified by the requisite eleven States by December 15, 1791, when Virginia ratified them. *See Bill of Rights and the States*, at xxii; Schwartz, at 1201-02.

The Bill of Rights was ratified without the Congressional Pay Amendment by five States, two of which have since ratified the Congressional Pay Amendment:

- New Hampshire ratified the first and third through twelfth proposed amendments on January 25, 1790. 1 *First Congress*, at 348-49 (reproducing entry in Senate Journal of June 14, 1790). The document transmitted to the Congress indicates that it "rejected" the second article of the proposed amendments. *Id.* at 348.

  New Hampshire subsequently ratified the Congressional Pay Amendment on March 7, 1985. *See* 131 Cong. Rec. 6689 (1985); 138 Cong. Rec. S6831 (daily ed. May 19, 1992).

- New Jersey ratified all but the second amendment on November 20, 1789. 1 *First Congress*, at 475-76 (reproducing entry in Senate Journal of August 6, 1790). The notification transmitted to Congress did not mention the second proposed amendment. *Id.*

  New Jersey subsequently ratified the Congressional Pay Amendment on May 7, 1992. 138 Cong. Rec. S6831, S6846 (daily ed. May 19, 1992).

- The New York legislature ratified the first and third through twelfth proposed amendments on February 24, 1790. 1 *First Congress*, at 279-80 (reproducing entry in Senate Journal of April 5, 1790).[3] The document transmitted to the Congress indicates that it ratified all of the proposed amendments "except the second." *Id.* Although that document does not mention a formal rejection of the proposed amendment, a contemporary newspaper account reported that it was rejected by a vote of 52 to 5. Schwartz, at 1178.

- Rhode Island ratified all but the second amendment on June 11, 1790. *See* 1 *First Congress*, at 389 (reproducing entry in Senate Journal of June 30, 1790); *Bill of Rights and the States*, at xxii. The notification transmitted to Congress does not mention the second proposed amendment. 1 *First Congress*, at 389.

- Pennsylvania ratified all but the first and second proposed amendments on March 10, 1790. 1 *First Congress*, at 260-61 (reproducing entry in Senate Journal of March 16, 1790). The notification transmitted to Congress does not mention the amendments that were not ratified. *Id.* Newspaper accounts indicate that the first two amendments were postponed for further consideration, but there is no indication of whether they were formally rejected. Schwartz, at 1176.

Massachusetts, Connecticut, and Georgia did not notify the federal government of any action on the proposed amendments.[4]

Further action to impose a constitutional limitation on congressional pay did not come until 1816. During its first session, the Fourteenth Congress passed a law replacing its per diem pay, which had remained unchanged since the first Congress, with a salary of $1500 per year. Act of Mar. 19,

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[3] The resolution was approved by New York's Council of Revision on February 27, 1790. 1 *First Congress*, at 280.

[4] Massachusetts presented a unique case. Its legislative records indicate that it considered the amendments, and agreed to ratify most. The Congressional Pay Amendment was "rejected" by the Massachusetts Senate, Schwartz, at 1174, and was "not accepted" by the Massachusetts House. *Id.* at 1175. However, Massachusetts did not notify the federal government of these actions. *Id.* at 1172. When Secretary of State Thomas Jefferson sought such notification, he was told that the Massachusetts legislature had never passed the official bill ratifying the amendments. *Id.* at 1175. Massachusetts ultimately ratified the Bill of Rights in 1939, as did Georgia and Connecticut. *Bill of Rights and the States*, at xxii.

1816, ch. 30, 3 Stat. 257. *See also* 29 Annals of Cong. 199-204 (1816). The Compensation Act was extraordinarily unpopular. *See* Henry Adams, *History of the United States of America During the Administrations of James Madison* 1274-76 (Library of America 1986). Immediately upon convening the second session of the Congress, a bill repealing the Act was introduced. *See* 30 Annals of Cong. 10 (1816). Beyond merely a repeal of the offensive statute, Senator James Barbour introduced a joint resolution proposing a constitutional amendment identical to the Congressional Pay Amendment in all but punctuation:

> No law varying the compensation for services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

Id. at 30. *See also* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, H.R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, at 34 (1897) ("Ames"). Congress repealed the Compensation Act, *see* Act of Feb. 6, 1817, ch. 9, 3 Stat. 345, but did not act on the proposed amendment.

Nevertheless, several states joined the call for such an amendment. On January 17, 1817, the General Assembly of Kentucky proposed a constitutional amendment nearly identical to the Congressional Pay Amendment:

> That no law varying the compensation of the members of the congress of the United States, shall take effect until the time for which the members of the house of representatives of that congress by which the law was passed, shall have expired.

1816-17 Ky. Laws 279. *See also* Ames, at 333. The legislatures of Massachusetts and Tennessee passed resolutions proposing similar amendments. Ames, at 34-35, 333. Tennessee's resolution, identical to that of Kentucky except for punctuation and capitalization, was received by the Senate and printed in the *Annals of Congress* although only by a narrow vote after "considerable debate." 31 Annals of Cong. 170 (1818). Congress took no action on any of these proposals. The legislature of Illinois, however, passed a resolution criticizing Kentucky's proposed amendment as "unnecessary and inexpedient" and directing Illinois's representatives in Congress to oppose the proposal. 1821 Ill. Laws 187. Illinois's resolution was transmitted to Congress. 38 Annals of Cong. 35 (1821). Vermont, Ohio and New Hampshire also passed resolutions opposing Kentucky's proposal. 1817 Vt. Laws 100-01; 1818 Ohio Laws 202-03; 1818 N.H. Laws 165. *See also* Ames, at 333. It does not appear that any of those States took action at that time to ratify or reject the Congressional Pay Amendment proposed by the first

Congress, nor is there any indication whether anyone at the time considered that amendment to be pending before the States.[5]

In 1822, three new amendments related to congressional salaries were proposed, though Congress did not act on any of them. Ames, at 35. One was essentially the same as the Congressional Pay Amendment, except that it did not apply to Senators:

> That no increase or diminution of the compensation to Representatives, for their services as such, shall be made by Congress, to have effect or operation during the period for which the members of the House of Representatives, acting upon the subject, shall have been elected.

39 Annals of Cong. 1752 (1822). Another fixed the compensation of members of Congress at the amount paid to members of the first Congress. *See id.* at 1768. The third provided that compensation for members of Congress, as well as the President and Vice President, would be fixed every ten years, after the census, and that alterations would take effect only after the particular official's current term had expired. *Id.* at 1777-78. Again, there is no indication whether those members proposing the amendments believed that the amendment proposed by the first Congress was still pending. The brief remarks in the *Annals of Congress* do not address the issue. *See id.* at 1753, 1768.

The only state to take formal action on the Congressional Pay Amendment in the 19th century was Ohio. Its General Assembly ratified the proposed amendment on May 6, 1873. As expressed in the ratifying resolution, the legal theory was straightforward: under Article V, proposed amendments become valid when ratified by three-fourths of the States, and the Congressional Pay Amendment "not having received the assent of the Legislatures of three-fourths of the several States is still pending for ratification." 1873 Ohio Laws 409 (joint resolution ratifying the second article of the twelve amendments to the Constitution submitted by the first Congress).[6] It is unclear what became of Ohio's ratification. Although the resolution called upon the governor to transmit the ratification to the President and Congress, more than one hundred years later, in 1985, the National Archives and Records Service reported that Ohio, as well as several other States, had not sent official notice of ratification to the federal government. Robert S. Miller and Donald O. Dewey, *The Congressional Salary Amendment: 200 Years Later*, 10 Glendale

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[5] Vermont had already ratified the Congressional Pay Amendment and New Hampshire had previously rejected it. *See supra*, pp. 107-08.

[6] Ohio's action received considerable attention early in this century, when several proposals were made to amend the Constitution to impose a time limit on ratification for all amendments. Members of Congress supporting the proposal pointed to Ohio's ratification of the Congressional Pay Amendment as a prime example of the consequences of having no time limits on amendments. *See e.g.*, 55 Cong. Rec. 5556-57 (1917); 58 Cong. Rec. 5697, 5699 (1919).

L. Rev. 92, 102 (1991).[7] Those States have since transmitted official notices. *See id.*; 57 Fed. Reg. 21,187, 21,188 (May 19, 1992) (Archivist's certification of the 27th Amendment, listing the forty states that had ratified the amendment and transmitting notification to the Archivist before May 18, 1992); 138 Cong. Rec. S6835 (daily ed. May 19, 1992).

The controversial pay increase that provoked Ohio's ratification led to activity in Congress as well. Just as in the early 1800's, several new amendments, similar to that proposed by the first Congress, were introduced. Ames at 35. Congress took no action on them, however, instead repealing the pay increase. *Id.*

The next action on the Congressional Pay Amendment did not come until March 3, 1978, when the Wyoming legislature ratified it. *See* 124 Cong. Rec. 7910 (1978).[8] Five years later, on April 27, 1983, Maine ratified the amendment, 130 Cong. Rec. 25,007-08 (1984), bringing the total number of ratifications to nine. Since then, thirty-two additonal States have ratified the amendment, most recently Missouri and Alabama on May 5, 1992, Michigan and New Jersey on May 7, 1992, Illinois on May 12, 1992, and California on June 26, 1992. *See* 57 Fed. Reg. 21,187, 21,188 (May 19, 1992) (Archivist's certification); 138 Cong. Rec. E2237 (daily ed. July 24, 1992) (California). Thus, forty-one States have now ratified the amendment, three more than three-fourths of the fifty States.

Some States that have ratified recently have elaborated the legal basis for their actions in their ratifying resolutions. Fourteen States mentioned the Supreme Court's decision in *Coleman v. Miller*, 307 U.S. 433 (1939), in their ratifying resolutions. Many used language to this effect:

> Whereas, the legislature of the state of New Mexico acknowledges that the article of amendment to the constitution of the United States proposed by resolution of the First Congress on September 25, 1789, may still be ratified by states' legislatures as a result of the ruling by the United States supreme court in the landmark case of *Coleman v. Miller*, 307 U.S. 433 (1939) . . . .

132 Cong. Rec. 3956 (1986) (New Mexico). *Accord* 134 Cong. Rec. 14,023 (1988) (Arkansas); 133 Cong. Rec. 11,618-19 (1987) (Montana); 135 Cong. Rec. 15,623 (1989) (Nevada); 135 Cong. Rec. 20,519-520 (1989) (Oregon); 135 Cong. Rec. 11,900-01 (1989) (Texas); 136 Cong. Rec. S9170 (daily ed. June 28, 1990) (Kansas); 137 Cong. Rec. S10,949 (daily ed. July 25, 1991) (North Dakota); 138 Cong. Rec. S6845 (daily ed. May 19, 1992) (Alabama).[9]

Other States referred to *Coleman* without expressly tying it to their power

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[7] It should be noted that notice of ratification by at least some of those States had been previously received by Congress and published in the Congressional Record. *See* 124 Cong Rec. 7910 (1978) (Wyoming); 130 Cong. Rec. 25,007-08 (1984) (Maine).

[8] The Governor of Wyoming signed the ratification on March 6, 1978. Miller and Dewey, 10 Glendale L. Rev., *supra*, at 100.

[9] For ease of reference, we have cited to the resolutions as reprinted in the Congressional Record,

Continued

to ratify the Congressional Pay Amendment, and also noted the lack of any time limit either generally in Article V or specifically in the Congressional Pay Amendment as proposed to the States. For example, Colorado, which on April 22, 1984, became the tenth State to ratify the amendment, states:

> Whereas, Article V of the United States Constitution does not state a time limit on ratification of an amendment submitted by Congress, and the First Congress specifically did not provide a time limit for ratification of the proposed amendment; and
>
> Whereas, The United States Supreme Court has ruled in *Coleman v. Miller*, 307 U.S. 433 (1939), that an Amendment to the United States Constitution may be ratified by states at any time, and Congress must then finally decide whether a reasonable time had elapsed since its submission when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment, ...

138 Cong. Rec. S6837 (daily ed. May 19, 1992) (Colorado). *Accord* 135 Cong. Rec. 5821 (1989) (Iowa); 135 Cong. Rec. 14,147 (1989) (Minnesota); 138 Cong. Rec. S14,974 (daily ed. Sept. 24, 1992) (Missouri); 138 Cong. Rec. S8387 (daily ed. June 17, 1992) (Illinois).

Other States have not cited *Coleman*, and instead have emphasized, as Ohio did, the absence of a time limit in the Congressional Pay Amendment proposal. For example, Wyoming, the first State to ratify the amendment in this century, stated in its ratifying resolution:

> Whereas the Congress of the United States, upon proposing that amendment, did not place any time limitation on its final adoption . . . .

1978 Wyo. Sess. Laws. 427. *Accord* 134 Cong. Rec. 9525 (1988) (Georgia); 134 Cong. Rec. 8752 (1988) (West Virginia); 135 Cong. Rec. 14,816 (1989) (Alaska); 136 Cong. Rec. S10,091 (daily ed. July 19, 1990) (Florida). *See also* 133 Cong. Rec. 24,779 (1987) (Wisconsin) (noting additionally that "the congress of the United States has the power to impose reasonable time

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[9](....continued)

although such publication has no independent legal consequence. The States generally transmit certified copies of the resolutions directly to the Archivist of the United States. The resolutions, except for California's, are also reprinted together in the Congressional Record. *See* 138 Cong. Rec. S6831-46 (daily ed. May 19, 1992). A tabulation by the Archivist of the dates of ratification can be found in the Congressional Record. *Id.* at S6831.

limits for the ratification of proposed amendments"). Wisconsin's ratification is noteworthy also because it is the only one that provides a rationale for the authority to ratify an amendment that was proposed before the State entered the Union:

> Whereas, the congressional pay changes amendment was validly ratified by the state of Vermont on November 3, 1791, even though Vermont had not been one of the original 13 states to which the proposed amendment had been submitted, and had not yet achieved statehood when the amendment was submitted . . . .

Id.

Finally, many States mention neither *Coleman* nor time limits, nor allude to the fact that the amendment is approximately 200 years old. *See* 130 Cong. Rec. 25,007-08 (1984) (Maine); 1985 S.D. Laws 27 (South Dakota); 131 Cong. Rec. 6689 (1985) (New Hampshire); 131 Cong. Rec. 9443 (1985) (Arizona); 131 Cong. Rec. 27,963 (1985) (Tennessee); 131 Cong. Rec. 27,963-64 (1985) (Oklahoma); 132 Cong. Rec. 8284 (1986) (Indiana); 132 Cong. Rec. 12,480 (1986) (Utah); 133 Cong. Rec. 23,571 (1987) (Connecticut); 134 Cong. Rec. 18,760 (1988) (Louisiana); 135 Cong. Rec. 14,572-73 (1989) (Idaho); 138 Cong. Rec. S7026 (daily ed. May 20, 1992) (Michigan); 138 Cong. Rec. S6846 (daily ed. May 19, 1992) (New Jersey); 138 Cong. Rec. E2237 (daily ed. July 24, 1992) (California). The Idaho legislature's resolution was based, pursuant to state law, on a state referendum on the amendment. 135 Cong. Rec. 14,572-73 (1989).

The Archives has indicated that it has received no rescissions of previous ratifications of the Congressional Pay Amendment, nor have we found any public record of rescissions.[10]

[10] Several of the States that have ratified the amendment, however, had previously rejected it. To the extent reflected in documents transmitted to the federal government, New Hampshire had expressly rejected the amendment, while New Jersey had simply failed to ratify it when ratifying the other proposed amendments. In 1817, Vermont, which had ratified the amendment in 1791, passed a resolution opposing a similar amendment proposed by Kentucky, but the resolution specifically refers to the Kentucky, proposal and does not purport to rescind Vermont's earlier ratification of the Congressional Pay Amendment. *See supra*, p. 109. Oklahoma's ratification purports to have an expiration date — December 31, 1995 — pursuant to state law. 131 Cong. Rec. 27,964 (1985).

MARKETING LOANS FOR GRAINS AND WHEAT

The formulas in the Food, Agriculture, Conservation, and Trade Act of 1990, under which farmers repay loans from the Department of Agriculture, contain a scrivener's error in the organization of the subsections, and the provisions should be read as if the error, which arose in the process of enrollment, had not been made.

Under section 1302 of the Omnibus Budget Reconciliation Act of 1990, marketing loan provisions that previously had been discretionary would be mandatory for the 1993 through 1995 crop years, if an agricultural trade agreement under the Uruguay Round Negotiations pursuant to the General Agreement on Tariffs and Trade were not entered into by June 30, 1992, or if this agreement had not entered into force for the United States by June 30, 1993.

June 3, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

You have requested our views concerning the proper reading of two provisions of the Food, Agriculture, Conservation, and Trade Act of 1990. These provisions prescribe formulas governing repayment of marketing loans for feed grains and wheat for the 1991 through 1995 crop years. As explained in more detail below, we concur in your opinion that the provisions should be given the reading that ignores a likely typographical error in the process of enrollment. We also agree with your reading of a provision of the Omnibus Budget Reconciliation Act of 1990.

I.

The Food, Agriculture, Conservation, and Trade Act of 1990 ("1990 Act"), Pub. L. No. 101-624, 104 Stat. 3359, established the most recent five-year plan of federal price support and acreage reduction programs for numerous agricultural commodities. The 1990 Act added new sections 105B and 107B to the Agricultural Act of 1949 ("1949 Act"), governing the 1991 through 1995 crops of feed grains and wheat, respectively. *See* 1990 Act, §§ 301(3), 401(3), 104 Stat. at 3382-3419.[1] Both sections contain "marketing loan provisions," which include formulas for repayment of loans made to farmers by the Department of Agriculture ("USDA"). Section 105B(a)(4)(A) provides:

[1] Sections 105B and 107B are codified at 7 U.S.C. §§ 1444f, 1445b-3a (Supp. II 1990), respectively.

> The Secretary [of Agriculture] may permit a producer to repay a loan made under this subsection for a crop at a level (except as provided in subparagraph (C)) that is the lesser of —
>
> (i) the loan level determined for the crop;
>
> (ii) the higher of —
>
> (I) 70 percent of such level;
>
> (II) if the loan level for a crop was reduced under paragraph (3), 70 percent of the loan level that would have been in effect but for the reduction under paragraph (3); or
>
> (iii) the prevailing world market price for feed grains (adjusted to United States quality and location), as determined by the Secretary.[2]

The marketing loan provisions that governed the 1986 through 1990 crops of feed grains provided as follows:

> The Secretary may permit a producer to repay a loan made under paragraph (1) or (6) for a crop at a level that is the lesser of —
>
> (i) the loan level determined for such crop; or
>
> (ii) the higher of —
>
> (I) 70 percent of such level;
>
> (II) if the loan level for a crop was reduced under paragraph (3), 70 percent of the loan level that would have been in effect but for the reduction under paragraph (3); or
>
> (III) the prevailing world market price for feed grains, as determined by the Secretary.

1949 Act, § 105C(a)(4)(A), *as added by* Food Security Act of 1985 ("1985 Act"), § 401, Pub. L. No. 99-198, 99 Stat. 1354, 1396 (codified at 7 U.S.C. § 1444e(a)(4)(A) (1988)).[3]

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[2] Section 107B(a)(4)(A) is identical except that it refers in (iii) to the prevailing world market price for *wheat*. For the sake of brevity, we will discuss section 105B as a proxy for both provisions.

[3] Again, the provision governing wheat was substantially identical. *See* 1949 Act, § 107D(a)(5)(A), *as added by* 1985 Act, § 308, 99 Stat. at 1384 (codified at 7 U.S.C. § 1445b-3(a)(5)(A) (1988)).

The relevant textual differences between the loan repayment formulas of the 1985 Act and the 1990 Act are slight. In the 1985 Act, the "world market price" factor is headed by "(III)" and is indented so as to be part of clause (ii). In the 1990 Act, the same factor is headed by "(iii)" and is not indented, appearing to make it a clause parallel with clauses (i) and (ii), rather than part of (ii). The 1985 Act thus has two clauses with the second clause containing three subclauses, while the 1990 Act has three clauses, the second of which contains two subclauses. Moreover, the two clauses of the 1985 Act, as well as the three subclauses of clause (ii), are arranged with the connective "or" preceding the ultimate clause and subclause. In the 1990 Act, no "or" appears before clause (ii) or before subclause (II) of clause (ii).

Although the textual difference is small, you have informed us that the effect is to make a striking change in the marketing loan repayment formula. USDA estimates that if what appears to be denominated clause (iii) in the 1990 Act is indeed a separate clause, instead of being a third subclause of clause (ii), the federal treasury would lose some $3 billion per year in the form of reduced loan repayments by producers of feed grains and wheat.

III.

Based upon your detailed understanding of USDA's marketing loan programs as implemented by the 1985 and 1990 Acts and your knowledge of the legislative process preceding enactment of the 1990 Act, you have opined that the change in the denomination of the prevailing world market price factor from "(III)" to "(iii)" resulted from an error in the enrollment of the 1990 Act. On this basis, you conclude that USDA should disregard the error and should treat the feed grains and wheat loan repayment formulas of the 1990 Act as having a structure identical to those of the 1985 Act. On the basis of the materials that you have provided us, we concur in your conclusions.

We examine first the text of section 105B(a)(4)(A). It is apparent that this provision contains a grammatical error: if provision (iii) is a separate clause, the word "or" is missing from the end of subclause (ii)(I). This is consistent with the supposed scrivener's error in transforming what should have been subclause (ii)(III) into clause (iii). Clause (ii)(I) would not have needed a final "or" if it had been only the first of three, rather than two, subclauses in clause (ii). It is also true that if provision (iii) is read to be a subclause of clause (ii), the word "or" is missing from the end of clause (i). The fact that section 105B(a)(4)(A) contains a grammatical error, however read, suggests that we approach the text with more caution than usual.

An examination of the sense of section 105B(a)(4)(A) demonstrates that such additional caution is warranted. As enrolled, the loan repayment formula is seriously flawed as a matter of logic. The output of clause (ii) — the number that results from taking the "higher of" subclauses (ii)(I) and

(ii)(II) — will always be less than the output of clause (i).[4] The result is that clause (i) will *never* be the "lesser of" the three clauses and thus will never be the output of the loan repayment formula. Section 105B(a)(4)(A) is essentially saying: choose the lesser of A, B, and C — but B is analytically always less than A, so never choose A. In this scheme, clause (i) — that is, choice A — is superfluous.

By contrast, if clause (iii) had been enrolled as subclause (ii)(III), as in the 1985 Act, there would be no such absurdity in the loan repayment formula of section 105B. Depending on the world market price, sometimes the output of clause (ii) would be less than the output of clause (i), sometimes not. If the market price were high, the output of clause (ii) would be high, and the output of clause (i) could be the lesser of the two. Clause (i) would not be superfluous.

There is at least one other textual indication that section 105B(a)(4)(A) has suffered a scrivener's error. The provisions governing upland cotton and rice — the only other commodities in the 1990 Act with similar marketing loan provisions — have loan repayment formulas akin to the 1985 Act, rather than to section 105B(a)(4)(A) as enrolled. The loan repayment formula for rice, for example, provides:

> In order to ensure that a competitive market position is maintained for rice, the Secretary shall permit a producer to repay a loan made under paragraph (1) for a crop at a level that is the lesser of —
>
> (i) the loan level determined for the crop; or
>
> (ii) the higher of —
>
> (I) the loan level determined for the crop multiplied by 70 percent; or
>
> (II) the prevailing world market price for rice as determined by the Secretary.

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[4] As to subclause (ii)(I), this statement is true because seventy percent of a positive quantity will always be less than that quantity (here, "the loan level determined for the crop").

As to subclause (ii)(II), this statement is true because of the other provisions of section 105B(a). Paragraphs (1) and (2) direct the Secretary to make feed grain marketing loans available at a level ("Original Level") to be determined by him according to specified criteria. Paragraph (3)(A) allows the Secretary to reduce the Original Level by an amount not to exceed ten percent under certain conditions. Paragraph (3)(B) allows the Secretary, upon making certain determinations, to reduce the Original Level further by an amount not to exceed ten percent. Thus, paragraph (3) as a whole allows the Secretary to reduce the Original Level by as much as twenty percent, but not more. This "Reduced Level" — if the Secretary actually makes the reductions — becomes "the loan level determined for the crop" specified in clause (i) of the repayment formula.

If we assume an Original Level of 100, the Reduced Level may be as low as 80, but not lower. Any number between 80 and 100 is always higher than 70, which is seventy percent of the Original Level, that is, the quantity specified in subclause (ii)(II). Subclause (ii)(II), then, also will always have a lower output than clause (i). Clause (ii) as a whole, therefore, will always have a lower output than clause (i), because its output will be the higher of two quantities, each of which is lower than clause (i).

1949 Act, § 101B(a)(5)(A), *as added by* 1990 Act, § 601, 104 Stat. at 3443 (codified at 7 U.S.C. § 1441-2(a)(5)(A) (Supp. II 1990)). The loan repayment formula for cotton is nearly identical. *See* 1949 Act, § 103B(a)(5)(A)(i), *as added by* 1990 Act, § 501, 104 Stat. at 3423 (codified at 7 U.S.C. § 1444-2(a)(5)(A)(i) (Supp. II 1990)).[5]

In sum, from our textual analysis, we have determined that the feed grains and wheat loan repayment formulas of the 1990 Act are different from their predecessors in the 1985 Act — and from their upland cotton and rice counterparts — only in matters of capitalization of three letters, indentation of one subclause, and the use of "or;" and that the 1990 Act formulas as enrolled are grammatically and logically flawed. These determinations enable us to concur with your opinion that sections 105B(a)(4)(A) and 107B(a)(4)(A) ought to be given the reading closest to their text that makes logical sense: provision (iii) should be treated as a third subclause of clause (ii).

III.

The legislative history of the passage and enrollment of the 1990 Act is consistent with this conclusion. The House and the Senate passed different versions of the 1990 Act and proceeded to conference to work out their disagreements. The feed grains and wheat marketing loan repayment formulas were among the issues to be worked out. As to feed grains, the report of the Conference Committee stated:

> (2) Loan Repayment
>
> *(a) In General*
>
> The Senate bill states that the Secretary shall permit a producer to repay a feed grains price support loan for a crop at the lesser of —
>
> (1) the loan level determined for the crop; or
>
> (2) the prevailing world market price for the crop. (New Section 105A(a)(3))
>
> The House amendment states that the Secretary may allow a producer to repay a loan at a level that is the lesser of —

[5] In the formulas for both rice and cotton, the "prevailing world market price" factor is one of only two, rather than three, factors in the second clause, because the formulas do not have a factor referring to an unreduced loan level.

The title of the 1990 Act governing oilseeds has a marketing loan provision, but its repayment formula has only two factors —loan level and world market price. The formula is therefore not susceptible to the same kind of scrivener's error. *See* 1949 Act, § 205(d)(1)(A), *as added by* 1990 Act, § 701(2), 104 Stat. at 3457 (codified at 7 U.S.C. § 1446f(d)(1)(A) (Supp. II 1990)).

(1) the loan level determined for the crop; or

(2) the higher of 70 percent of the loan level for the crop, or 70 percent of the loan level that would have been in effect but for the reduction provided for above (if the loan level for the crop was reduced), or the prevailing world market price for feed grains, as determined by the Secretary. (New Section 105A(a)(4))

The Conference substitute adopts the House provision.

H.R. Conf. Rep. No. 916, 101st Cong., 2d Sess. 785 (1990) (final emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 5286, 5310.[6]

The House provision subsumed the prevailing world market price factor under what became clause (ii) in the enrolled bill, rather than making it a clause in its own right. The enrolled version of section 105B(a)(4)(A) does not in fact implement the decision of the conference committee to adopt the House version of the repayment formula.

It is always possible, however, that the printed report of the conference committee is itself in error. It may be that the conference actually adopted the *Senate's* version. We find this possibility less plausible than the likelihood of an enrollment error. In the first place, as enrolled, section 105B(a)(4)(A) is certainly not the Senate's version. Second, the enrolled repayment formula bears the paragraph number of the House's version — "New Section 105A(a)(4)" — rather than the paragraph number of the Senate's version — "New Section 105A(a)(3)."[7]

IV.

You also have requested that we confirm your opinion that the effect of section 1302 of the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), Pub. L. No. 101-508, 104 Stat. 1388, 1388-12 to -13, is to make the discretionary marketing loan provisions of sections 105B(a)(4)(A) and 107B(a)(4)(A) mandatory for the 1993 through 1995 crop years if an agricultural trade agreement under the Uruguay Round Negotiations conducted

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[6] Again, the passage discussing loan repayments for wheat is identical in all relevant respects. *See id.* at 773-74, *reprinted in* 1990 U.S.C.C.A.N. at 5298-99.

[7] Some judicial decisions may support overlooking a scrivener's error in the enrollment of a bill. In 1974, the Supreme Court stated that "'we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.'" *Cass v. United States*, 417 U.S. 72, 83 (1974) (quoting *Schmid v. United States*, 436 F.2d 987, 992 (Ct. Cl. 1971) (Nichols, J., dissenting)). The D.C. Circuit stated in 1981 that when "a mistake in draftsmanship is obvious, courts may remedy the mistake." *Symons v. Chrysler Corp. Loan Guar. Bd.*, 670 F.2d 238, 242 (D.C. Cir. 1981). *See also Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 737 (D.C. Cir. 1992).

under the General Agreement on Tariffs and Trade ("GATT") is not entered into by June 30, 1992. Section 1302(b)(3) of OBRA provides that if the condition set out in section 1302(a) — entering into a GATT agreement — is not met, the Secretary "shall permit producers to repay price support loans for any of the 1993 through 1995 crops of wheat and feed grains at the levels provided under sections 107B(a)(4) and 105B(a)(4)." The word "shall" transforms the permissive language of the 1990 Act into a duty of the Secretary.

On this issue, we note that even if the United States does "enter into" an agreement under GATT by June 30, 1992, section 1302(d)(3) would make the marketing loan provisions mandatory if this GATT agreement "has not entered into force for the United States" by June 30, 1993.

V.

In sum, we agree with your interpretations of both the Food, Agriculture, Conservation, and Trade Act of 1990 and the Omnibus Budget Reconciliation Act of 1990.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices

Federal agencies are not included in the phrase "person or other entity" in the antidiscrimination provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel for Immigration Related Unfair Employment Practices is without authority to bring discrimination charges against federal agencies.

August 17, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE NAVY

This memorandum responds to your request that we reconsider our opinion of May 2, 1990, in which we concluded that the Antidiscrimination Provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1), authorizes the Special Counsel for Immigration Related Unfair Employment Practices to investigate and prosecute charges of employment discrimination by federal agencies. After evaluating your request for reconsideration and the response of the Special Counsel, we conclude that the federal government is not a "person or other entity" covered by the Antidiscrimination Provision. We withdraw our earlier opinion.[1]

I.

The Antidiscrimination Provision of the Immigration Reform and Control Act ("IRCA") provides that:

> [i]t is an unfair immigration-related employment practice for a *person or other entity* to discriminate against

[1] *See* Memorandum for Andrew M. Strojny, Acting Special Counsel, from Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Defense Cooperation with Investigation of Immigration Related Unfair Employment Practice*, (May 2, 1990) ("OLC Memorandum"); Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Craig S. King, General Counsel, Department of the Navy (May 17, 1990) ("Navy Memorandum"); Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel (June 1, 1990) ("Special Counsel Memorandum").

> any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of [an] individual for employment or the discharging of [an] individual from employment —
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual . . . , because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1) (emphasis added). Under IRCA's enforcement provisions, the Special Counsel for Immigration Related Unfair Employment Practices ("Special Counsel") may file charges against any "person or other entity" for violation of the Antidiscrimination Provision. Such charges initially come before an administrative law judge ("ALJ") within the Department of Justice. *Id.* § 1324b(d)(1). In the event that the Special Counsel does not file charges with the ALJ within a specified time, the private claimant may do so directly. *Id.* § 1324b(d)(2).

If the ALJ finds that the defendant "person or other entity" has violated the Antidiscrimination Provision, the ALJ may order injunctive relief, back pay, and civil penalties. *Id.* § 1324b(g)(2)(B)(iii)-(iv). Any "person aggrieved" by the ALJ's order may seek review in the appropriate court of appeals, *id.* § 1324b(i)(1), and the district court may enforce the ALJ's order on petition by the Special Counsel or by the private claimant. *Id.* § 1324b(j)(1).

The events that gave rise to our consideration of this matter began when Dr. Jacob Roginsky, a naturalized United States citizen who emigrated to this country from the Soviet Union, filed allegations with the Special Counsel that the Navy had engaged in immigration-related unfair employment practices prohibited by the Antidiscrimination Provision. The Special Counsel commenced an investigation into Dr. Roginsky's charges. The Navy declined to cooperate with this investigation, arguing that the Antidiscrimination Provision does not apply to federal agencies and, hence, that the Special Counsel lacked authority to investigate. Acting on a request from the Special Counsel, we issued our opinion of May 2, 1990, in which we concluded that the Special Counsel had authority to pursue the investigation. The Navy then requested that we reconsider our opinion. *See* Navy Memorandum at 13; *see also* Special Counsel Memorandum at 1.

Thereafter, Dr. Roginsky filed an administrative claim directly against the Navy. As a result, the Special Counsel no longer had authority to file an administrative claim on behalf of Dr. Roginsky. *See* 28 C.F.R. § 44.303(d). We also understand that the dispute involving Dr. Roginsky has been settled. The precise question addressed by our opinion of May 2, 1990 — whether the Special Counsel may investigate the charges of immigration-related unfair

employment practices brought by Dr. Roginsky against the Navy — thus is no longer at issue.

The Special Counsel informs us that the complaint by Dr. Roginsky was the first in which the Special Counsel has been required to address the applicability of IRCA to a federal government department or agency. Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 3 (May 7, 1990). The Special Counsel also notes that "[b]ecause the overwhelming majority of federal jobs are restricted [to United States citizens] by statute, regulation or executive order . . . there cannot be a very large number of meritorious charges." Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 7 (Apr. 27, 1990).[2] We nonetheless reconsider the interpretation of IRCA set forth in our earlier opinion because the applicability of that act to federal agencies is an issue of importance.

II.

The applicability of IRCA to federal agencies turns on whether federal agencies are "person[s] or other entit[ies]" within the meaning of the Anti-discrimination Provision. The phrase "person or other entity" is not defined in IRCA. This broad language might ordinarily be understood to include not only natural persons but virtually all organizations, including public agencies. Our earlier opinion, in fact, rested primarily on the view that "the plain meaning of the phrase 'person or other entity' encompasses . . . 'entit[ies]' such as the United States Government." OLC Memorandum at 3.

On further review, however, we believe that our earlier analysis did not adequately address the sovereign immunity implications of a "plain meaning" interpretation of the phrase and, in particular, on the settled rules of statutory construction that have evolved to preserve sovereign immunity. It is well established that:

> [s]tatutory provisions which are written in such general language that they are reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances.

3 Norman J. Singer, *Sutherland on Statutory Construction*, § 62.01 (5th ed.

[2] The Special Counsel has informed us that one other "former Soviet citizen has filed a charge against the [Department of Defense]" and that this investigation is "on hold" pending reconsideration of our May 2, 1990 opinion. *See* Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 2 (Aug. 15, 1990).

1992 rev.); *accord United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). Therefore, the phrase "person or other entity" should not be read to include federal agencies in the absence of affirmative evidence that Congress intended that they be included. As discussed below, not only is there no evidence that Congress intended to include federal agencies within the phrase "person or other entity," there is considerable evidence that Congress did not intend federal agencies to be included in this term.

III.

Enforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States. Sovereign immunity bars an action against the United States if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)).[3] The Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States Government from acting or compel it to act. 8 U.S.C. § 1324b(g)(2)(B)(iii). It also provides for judicial enforcement of such orders by the district courts. *Id.* § 1324b(j). Therefore, the Antidiscrimination Provision may be applied to federal agencies only if Congress has waived the government's sovereign immunity against enforcement actions under section 1324b(j).[4]

In determining whether Congress has waived sovereign immunity, "[i]t is an error to suppose that the ordinary canons of statutory construction are to be applied." *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). In particular, the Supreme Court has held that waivers of sovereign immunity "cannot be implied but must be

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[3] We assume for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive. *See* Special Counsel Memorandum at 8-9, 19. We do not believe, however, that this assumption bears on the specific question presented here, because disputes under IRCA are subject to judicial enforcement procedures and thus are not resolved entirely within the executive branch. *See supra* p. 122.

[4] The Antidiscrimination Provision also contemplates judicial enforcement of civil penalties, 8 U.S.C. § 1324b(g)(B)(iv), (j), payable into the Treasury. The assessment of a civil penalty against a federal agency in a sense would *not* expend itself upon the fisc, because it would not have any net effect on the Treasury balance. Nor would the assessment of a civil penalty against an agency serve the goal of deterrence. Because there are no appropriations in agency budgets for payment of IRCA penalties, the funds to pay such penalties presumably would be drawn from the general fund of the Treasury, 31 U.S.C. § 1304(a), and then returned to that same fund as miscellaneous receipts, 8 U.S.C. § 1356(c), with no effect whatsoever on the defendant agency. The fact that application of the Antidiscrimination Provision to federal agencies would render one aspect of the enforcement scheme ineffectual provides independent reason to question the application of the provision to these agencies.

unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980). This requirement of an unequivocal expression of a waiver of sovereign immunity has recently been reaffirmed in a number of decisions. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); and *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990).[5] As a general matter, waivers of sovereign immunity take the form of explicit statements that the federal government is subject to a statutory rule or will be subject to suit.[6] Statutes explicitly providing a right of action against a federal entity or conferring jurisdiction on a court to resolve claims against the federal government also have been held to constitute waivers of sovereign immunity.[7]

IRCA does not contain any waiver of sovereign immunity in the form of a substantive rule that explicitly applies to the United States. Nor is there any specific grant of jurisdiction to resolve claims against the federal government. In these respects, the contrast between IRCA and Title VII of the Civil Rights Act of 1964 is especially instructive on Congress's intent in enacting IRCA. Unlike in IRCA, Congress expressly brought within the ambit of Title VII federal "executive agencies as defined in section 105 of title 5," 42 U.S.C. § 2000e-16(a), and it did so because otherwise a claimant would have to "overcome a U.S. Government defense of sovereign immunity." S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971). The absence of any reference to the federal government in IRCA is particularly significant in light of the settled law prior to IRCA's enactment that Title VII provides the

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[5] The Special Counsel cites two Supreme Court cases on the standard for waivers of sovereign immunity, but neither is relevant in the present context. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939), involved a claim against a government corporation. It has long been recognized that government corporations may be sued in the same manner as private corporations. *Id.* at 390. The application of IRCA contemplated here, however, would involve neither a government corporation nor any other specialized organizational form the use of which would subject the United States to suit. In *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984), the scope rather than the existence of a waiver of sovereign immunity was at issue. The Court cited *Keifer* for the proposition that "intent to waive immunity . . . can only be ascertained by reference to underlying congressional policy." *Id.* at 521.

[6] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e16(a); Clean Air Act, 42 U.S.C. §§ 7418(a), 7604(a)(1); Clean Water Act, 33 U.S.C. §§ 1323, 1365; Resource Conservation and Recovery Act, 42 U.S.C §§ 6961, 6972(a)(1)(a); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9620(a).

The Secretary of Labor's decision in *Pogue v. Department of the Navy*, Secretary of Labor Case No. 87-ERA-21 (May 10, 1990), on which the Special Counsel relies, is not to the contrary. The determination that sovereign immunity does not shield the federal government from the "whistleblower" provision of CERCLA rested on the applicable statutory definition of "person," which expressly includes the "United States Government." 42 U.S.C. § 9601(21). Congress, moreover, expressly provided that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter [including the whistleblower provision] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." *Id.* § 9620(a)(1).

[7] *See Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974) (finding waiver of sovereign immunity in right of action to contest discriminatory suspension of federal financial assistance in 42 U.S.C. § 2000d-2); *McKenzie v. United States*, 536 F.2d 726, 728 (7th Cir. 1976) (finding waiver of sovereign immunity in express grant of jurisdiction to bankruptcy courts to resolve federal tax liability of bankrupt entities under 11 U.S.C. § 11(a)(2A)).

exclusive remedy against federal agencies for complaints of national origin discrimination. *See Brown v. General Services Admin.*, 425 U.S. 820, 829 (1976). Despite extensive discussion of the relationship between IRCA and Title VII with respect to private employers, there is no evidence in the committee reports on IRCA that Congress intended IRCA to supplement the exclusive Title VII remedy against federal agencies. *See* H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 69-70 (1986); *id.*, pt. II, at 12; *see also* Navy Memorandum at 11; *infra* pp. 127-28. Accordingly, we conclude that Congress has not waived the sovereign immunity of the United States for claims under IRCA.

In our prior opinion, we relied upon the exception to the Antidiscrimination Provision of IRCA for discriminatory actions required by executive order, section 1324b(a)(2)(C), to support our conclusion that federal agencies were covered by IRCA. We reasoned there that "the creation of an exception for discrimination required by [executive] orders strongly suggests that Congress understood federal agencies otherwise to be within the scope of the antidiscrimination provision" because "executive orders govern the employment decisions of the federal government rather than those of private entities." OLC Memorandum at 4. It is clear that we were proceeding at that point in the opinion on an assumption that executive orders never govern actions of private employers. In fact, however, some executive orders do affect private parties. For example, Executive Order No. 10865, 3 C.F.R. § 62 (1960), *reprinted in* 50 U.S.C. § 435 note, effectively forbids certain private employers conducting business with the government from hiring individuals who, due to their citizenship status, could not obtain the requisite security clearance.[8]

Having focused on the fact that some executive orders do extend to private employers, we believe that the exception for "executive orders" must be understood as directed at "discrimination" by government contractors pursuant to executive orders such as No. 10865, not at the actions of federal government agencies. This is the more natural understanding of the exception, given that it appears among other exceptions that apply to discrimination by government contractors. It is merely one of several exceptions for decisions made on the basis of citizenship status that are "required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government." 8 U.S.C. §

[8] Section 1(a) of Executive Order No. 10865, requires the issuance of regulations to govern "releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, [government] contracts." These regulations require security clearances for private employees to whom classified information may be released. *See, e.g.*, 10 C.F.R. pt. 710 (security clearance program for contractors handling nuclear material); 32 C.F.R. pt. 155 (security clearance program for defense contractors).

The Special Counsel asserts that Congress enacted the exception for executive orders specifically to address Executive Order No. 11935, 3 C.F.R. 146 (1977), *reprinted in* 5 U.S.C. § 3301 note, which provides that "[n]o person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States." *See* Special Counsel Memorandum at 4. The Special Counsel cites no authority in support of this assertion, and we have discovered none.

1324b(a)(2)(C). Of course, when it is understood that the exception was included so as to exempt private employer activities required by law, the existence of the exception does not support the inference that federal agencies would otherwise be covered by the Antidiscrimination Provision.[9] The exception plainly does not constitute an "unequivocal" expression of congressional intent to waive the sovereign immunity of the United States.

To the extent that there is any evidence in the legislative history on the specific question presented here, it too suggests that Congress did not contemplate that federal agencies would be included under the Antidiscrimination Provision. First, there is no express discussion of the application of IRCA to federal agencies, which one would certainly expect to find if Congress intended to cover these agencies. Second, although the committee reports on the bills that became IRCA and on similar proposals from earlier Congresses include detailed estimates of the enforcement costs of the legislation to the federal government, they make no mention of compliance costs. *See* S. Rep. No. 485, 97th Cong., 2d Sess. 52-56 (1982); S. Rep. No. 62, 98th Cong., 1st Sess. 57-64 (1983); H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 99-107 (1983); S. Rep. No. 132, 99th Cong., 1st Sess. 57-66 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 128-29 (1986). Had Congress understood that the federal government would come within IRCA, these reports almost certainly would have included cost estimates for federal agency compliance.[10]

The Special Counsel relies primarily on a passage from the Senate Report on IRCA in support of his position that federal agencies are included within the act. The passage states that the phrase "person or other entity," as used in the Employer Sanction Provision, covers "individuals, partnerships, cor-

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[9] The Special Counsel argues that, even if IRCA itself does not waive sovereign immunity, a private claimant nonetheless may obtain judicial enforcement of the Antidiscrimination Provision by invoking the waivers contained in the Administrative Procedure Act, the Federal Tort Claims Act, and the Tucker Act. *See* Special Counsel Memorandum at 10 n.7. The assertion that other avenues may be available for judicial enforcement of the substantive provisions of the Antidiscrimination Provision is not responsive to the conclusion that we reach above. Our point is not that the courts may never enforce a substantive rule of conduct against the federal government; rather, it is that the substantive rules of the Antidiscrimination Provision, read in light of longstanding principles of statutory construction, do not encompass governmental conduct.

Moreover, we are unaware of any evidence that Congress wished to include federal agencies within the Antidiscrimination Provision but to relegate claims against these agencies — unlike claims against private entities — to an enforcement scheme different from that set forth in the provision. The more plausible inference is that Congress did not intend the Antidiscrimination Provision to cover federal agencies in the first place. In fact, the provisions relied on by the Special Counsel would provide relief against federal agencies less complete than, or inconsistent with, the provisions in IRCA. The Administrative Procedure Act waives sovereign immunity for suits brought by persons "aggrieved by agency action" but permits only those suits that "seek[] relief *other than money damages*." 5 U.S.C. § 702 (emphasis added). The waivers in the Federal Tort Claims Act (28 U.S.C. § 1346(b)) and the Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491) would permit damage actions but would provide for a sequence of judicial review -- involving either the district court or the Claims Court -- that is inconsistent with that provided in the Antidiscrimination Provision.

[10] The Supreme Court has recently stated that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text If clarity does not exist there, it cannot be supplied by a committee report." *United States v. Nordic Village, Inc*, 503 U.S. 30, 37 (1992) (citations omitted). Our analysis of the legislative history is thus purely confirmatory.

porations and other organizations, nonprofit and profit, private and *public*, who employ, recruit, or refer persons for employment in the United States." S. Rep. No. 132, at 32 (emphasis added). Even if we were to discount the Supreme Court's statement in *Nordic Village* and accept the assertion that Congress could waive sovereign immunity through legislative history, we could not conclude that the mention of "public" employers in this passage compels the inclusion of federal agencies within the coverage of IRCA. States and municipalities may act as employers and many states operate employment agencies. All of these entities would be "public" employers and thus could well be the organizations referenced in the Senate Report.[11]

IV.

Our conclusion that the phrase "person or other entity" as used in the Antidiscrimination Provision does not include federal agencies is reinforced by the fact that a contrary construction would raise serious separation of powers issues. Were we to conclude that federal agencies are subject to the Antidiscrimination Provision, an officer within the Department of Justice, 8 U.S.C. § 1324b(c)(1), would have authority to sue other federal agencies in federal court. *Id.* § 1324b(j)(1) (authorizing Special Counsel to seek enforcement by the district court of ALJ orders). Such intra-executive branch litigation likely would contravene Articles II and III of the Constitution.

By its terms, Article II vests the entire executive power in the President. U.S. Const. art. II, § 1, cl. 1. As a necessary concomitant to this exclusive grant of power, the President has the authority to resolve intra-executive branch disputes in order to secure "that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926). Suits by one executive branch agency against another, however, would, in likely contravention of Article II, transfer the power to resolve such disputes from the President to the federal courts. *See generally Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 135-38 (1989).

Intra-executive branch lawsuits would also raise serious questions under Article III of the Constitution. Article III courts may resolve only those

[11] The Special Counsel also cites the House Report on IRCA, which states that the Employer Sanction Provision applies to "all employers regardless of the number of employees, as well as to those persons who recruit or for a fee refer undocumented aliens for employment." H.R. Rep. No. 682, at 56. This statement adds nothing to the statement in the Senate Report; in fact, unlike the Senate Report, the House Report does not even state that "public" entities are included within the Employer Sanction Provision.

Apart from legislative history, the Special Counsel observes that regulations promulgated by the Immigration and Naturalization Service for enforcement of the Employer Sanction Provision define the term "entity" to include "governmental bod[ies]." 8 C.F.R. § 274a.1(b). The regulation does not refer explicitly to the *federal* government, however, and in any event, administrative regulations "can neither enlarge nor diminish the scope of the waiver of immunity" set forth by Congress in the underlying statute. *Millard v. United States*, 16 Cl. Ct. 485, 490 (1989), *aff'd*, 916 F.2d 1 (Fed. Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

disputes in which there is a genuine "Case[]" or "Controvers[y]" involving a concrete adversity of interests between the parties. U.S. Const. art. III, § 2. Given that there is ultimately but a single interest of the executive branch — that determined by the President — litigation between two executive agencies would not appear to involve the requisite adversity of interests to constitute a "Case[]" or "Controvers[y]" within the meaning of Article III. *See, e.g., Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945) (dismissing suit against United States by a corporation whose stock was wholly owned by the United States on ground that "this [is] . . . nothing more than an action by the United States against the United States . . . . [T]here is no real case or controversy."); *United States ex. rel. TVA v. Easement and Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) ("[I]nter-agency disputes . . . are not subject to settlement by adjudication . . . . The settlement of interagency problems within the United States Government is not a judicial function but rather an administrative function."); 13 Op. O.L.C. at 138-141; *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79, 81-82 (1977).[12]

Interpreting the phrase "other entit[ies]" to include federal agencies would also raise the troublesome specter of litigation by the executive branch against coequal branches of the federal government, for there would be no principled basis on which to exclude the Congress and the judiciary from the reach of the Antidiscrimination Provision. Given the extraordinary nature of litigation by the executive branch — here, the Special Counsel — against coequal branches of the government, we hesitate to infer that such was authorized by Congress in the absence of affirmative evidence. This reticence is particularly appropriate given that Congress has taken great care to condition the applicability of other federal employment laws to itself and the judiciary.[13]

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[12] The courts sometimes decide cases nominally between two executive branch bodies, where one of the parties in interest is a private entity not within the President's control. *See, e.g., United States v. ICC*, 337 U.S. 426 (1949) (United States in its proprietary status as a shipper sought from railroads monetary relief that had been denied by the Interstate Commerce Commission); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954) (Secretary of Agriculture intervened in action by private agricultural interests before the ICC to recover for railroad overcharges); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (Secretary of Interior intervened on behalf of private power company and municipality seeking Federal Power Commission approval of dam); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) (Department of Justice challenged ocean carriers' agreement that earlier had been approved by Federal Maritime Commission).

In an enforcement action brought by the Special Counsel against a federal agency, however, the United States would be the real party in interest on both sides of the litigation. The defendant would be an agency of the United States, and the real party in interest on the prosecution side would also be the United States, acting in its sovereign capacity. Only where the Special Counsel has declined to sue and a claimant brings suit directly against a "person or other entity" alleged to have engaged in discrimination, *see* 8 U.S.C. § 1324b(d)(2), could there exist the requisite concrete adversity of interests, because only in this circumstance would one of the litigants be beyond presidential control.

[13] For example, in enacting the Civil Rights Act of 1991, Congress substantially limited the procedural protections and enforcement provisions available to plaintiff-employees seeking various types of relief against Congress. *See* §§ 117, 301-314 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1080, 1088-95 (1991) (providing for procedures and remedies available to House and Senate employees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16), and also providing for

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The problems with interpreting the phrase "person or other entity" in IRCA to include federal agencies would not be confined to the Antidiscrimination Provision alone. For example, many of the difficulties identified above would also exist with respect to the parallel Employer Sanction Provision of IRCA, which prohibits the hiring by any "person or other entity" of "unauthorized alien[s]." 8 U.S.C. § 1324a(a)(1).[14] Were we to conclude that federal agencies are "person[s] or other entit[ies]," the Employer Sanction provision would contemplate the imposition of mandatory civil penalties on the government, *id.* § 1324a(e)(4), requiring a waiver of sovereign immunity. It would permit the imposition of criminal penalties on a federal agency, *id.* § 1324a(f)(1), without any specific evidence that such an extraordinary measure was intended. Moreover, because the exclusive enforcement mechanism for such penalties would be a suit by the Attorney General against another federal agency, *id.* § 1324a(e)(9), the Attorney General could bring an enforcement action against another executive agency and indeed against the Congress or the judiciary.[15]

The Supreme Court has admonished that constructions of a statute that would render it constitutionally suspect should be avoided where a reasonable alternative reading of the statute is available. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Here, such a reading — under which the phrase "person or other entity" would not include the federal government — not only is reasonable but is consistent with established principles of statutory construction and sovereign immunity.

[13](....continued)
procedures and remedies for Senate employees under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a), and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12112-12114)).

Prior to enactment of the Civil Rights Act of 1991, Title VII barred executive branch agencies from discriminating on the basis of "race, color, religion, sex, or national origin," but that prohibition applied only to those few "units of the legislative and judicial branches . . . having positions in the competitive service." 42 U.S.C. § 2000e-16(a). The Fair Labor Standards Act was, and still is, similarly limited. 29 U.S.C. § 203(e)(2)(A)(iii).

[14] Congress enacted the Antidiscrimination Provision in response to the concern that employers might discriminate as a result of the Employer Sanction Provision against persons legitimately in this country. *See* H.R. Rep. No. 682, at 68. Thus, "[t]he antidiscrimination provisions of th[e] [statute] are a complement to the sanctions provisions, and must be considered in this context." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 87 (1986). The same "person[s] or other entit[ies]" are subject to both the Antidiscrimination Provision and the Employer Sanction Provision.

[15] Application of the Employer Sanction Provision of IRCA to federal agencies would bar those agencies from hiring only two narrow classes of aliens not already barred by Exec. Order No. 11935, *see supra* note 9, and similar restrictions found in annual appropriations since 1943. *See, e.g.*, Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 607, 105 Stat. 834, 868-69 (1991) ("Appropriations Act for 1992") (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations). Specifically, such an application of IRCA would prohibit federal agencies from hiring for a position outside of the competitive service (*i.e.*, a position not covered by Exec. Order No. 11935), those few unauthorized aliens to whom compensation otherwise may be paid under an exception to appropriations legislation. Such individuals would have to be "person[s] in the service of the United States . . . who, being eligible for citizenship, ha[ve] filed . . . declaration[s] of intention to become . . . citizen[s] of the United States . . . and [are] actually residing in the United States," or "person[s] who owe[] allegiance to the United States," or foreign nationals of certain specified countries. Appropriations Act for 1992, § 607, 105 Stat. at 868-69. There is no evidence that Congress wished to subject federal agencies to the Employer Sanction Provision of IRCA to obtain this incremental additional coverage.

CONCLUSION

We conclude on careful reconsideration of the statutory text of IRCA, its structure, purpose, and legislative history that federal agencies are not included within the phrase "person or other entity" in 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel is without authority to investigate or to bring charges of immigration-related employment discrimination against federal agencies. Discrimination by federal agencies based upon national origin is fully redressable under Title VII of the Civil Rights Act of 1964, which by its terms applies to federal executive agencies.[16]

Our contrary opinion of May 2, 1990, is withdrawn.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

[16] Title VII does not provide a remedy for employment discrimination based upon citizenship status. However, since 1943, annual appropriations acts passed by Congress have, with narrow exceptions, prohibited the use of appropriated funds to pay salaries to federal employees who are not "citizen[s] of the United States." *See, e.g.*, Appropriations Act for 1992, § 607, 105 Stat. at 868-69 (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations); *see also supra* note 15. As the Special Counsel observes, "the vast majority of federal civil service positions are open only to United States citizens." Special Counsel Memorandum at 4. Thus, there are only a limited number of circumstances in which there is even the potential for a cognizable claim of citizenship status discrimination.

Of course, our opinion does not preclude federal agencies, as a matter of policy, from continuing to adhere to the immigration status verification procedures prescribed by the Office of Personnel Management. *See* Federal Personnel Manual Supplement 296-33, Subch. 5-2.6a (1988) (requiring use of Standard Form I-9).

Whether a State May Elect Its United States Senators From Single-Member Districts Rather Than At-Large

Under the Seventeenth Amendment to the Constitution, a State may not constitutionally elect its United States Senators from two single-member districts rather than at large.

August 20, 1992

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

The National Association for the Advancement of Colored People, Inc., ("NAACP") has filed suit challenging the method by which Mississippi selects its Senators. The NAACP claims that Mississippi has violated the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971-1974e, and the 14th and 15th Amendments to the Constitution, by electing its Senators at-large, rather than from two single-member districts. You have asked for our views on the issue of whether a State constitutionally may elect its Senators from single-member districts, rather than at-large. We conclude that it may not.

The analysis begins with the text of the Seventeenth Amendment, which provides that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof." U.S. Const. amend. 17. Because States of the Union are distinct, unitary political entities, in order for a Senator to be from a State he or she must be from the entire State, not some part of it. Similarly, because of the nature of the States, election by "the people" of the State implies election by the whole people of the State, not some smaller set of citizens. The election of Senators from smaller districts instead of the entire State would result in Senators elected by only a *part* of the people of a State. Such a plan would be inconsistent with the Constitution's text.[1]

[1] This conclusion is fully consistent with the Constitution's provision concerning the election of Representatives, which also refers to election by the people, stating that the "House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*." U.S. Const. art. I, § 2, cl. 1 (emphasis added). This formulation was adopted by the Constitution's original framers to make clear that the lower house of Congress was to be elected proportionally by popular vote. *See* The Federalist No. 39, at 254-55 (James Madison) (Jacob E. Cooke ed. 1961). Representatives, therefore, represent people. Although it requires popular election, Article I, Section 2 for this reason need

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The history of the Seventeenth Amendment confirms that Senators are to be selected by the people of the whole State. The report accompanying S.J. Res. 134, which eventually became the Seventeenth Amendment, explained that the character of the Senate as representative of the States would be enhanced by popular election because, henceforth, a Senator would be selected by all of the people of a State, instead of just the members of the State's legislature: "It might change his relations to certain interests and certain forces within the State, but if we are to suppose that a State consists of all the people and of all the interests, will he not still be its representative in every sense *when his election comes from all the people of his State*?" *Election of Senators by Popular Vote*, S. Rep. No. 961, 61st Cong., 3d Sess. 4-5 (1911) (emphasis added) ("Senate Report").

The Constitution elsewhere confirms that the role of Senators is to represent States considered as integral political units. As Madison explained, the bicameral structure of Congress reflects a decision to have one body in which the people are directly represented and one in which they are represented in their capacity as state citizens — *i.e.*, one in which the States are represented. "The Senate . . . will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing [Confederation] Congress." Federalist No. 39, *supra* note 1, at 255. His remarks were later echoed by Justice Joseph Story, who contrasted the Senate with the House of Representatives and wrote that: "[E]ach state in its political capacity is represented [in the Senate] upon a footing of perfect equality, like a congress of sovereigns, or ambassadors, or like an assembly of peers." Joseph Story, *Commentaries on the Constitution of the United States* § 352, at 252 (Carolina Academic Pr. ed. 1987).[2] Accordingly, Article I, Section 3 provided that: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ." U.S. Const. art. I, § 3, cl. 1.

Article V of the Constitution also recognizes the role of Senators as representatives of their respective States. In creating a process of constitutional amendment, Article V both confirms that the Senate is a body representing States, and assures that it will continue as such. The provision describes the structure of the Senate as one of suffrage for the States, providing "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. art. V.

The Seventeenth Amendment did not change the fundamental character

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[1](....continued)
not and does not address the question of how the people are to choose Representatives, whether by districts, at-large, or otherwise. Senators, by contrast, represent States, and are elected, not by the people of the several States — that is, the people at large — but by the people of the States — that is, the people of each State in their separate capacities. It is therefore not surprising that the requirements of the Seventeenth Amendment for apportionment are different from those of Article I.

[2] *See also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-53 (1985) (citations omitted) (States as such are represented in the Senate both to reflect and to protect their remaining sovereignty).

of the Senate. Indeed, as noted above, the framers of the Seventeenth Amendment maintained that the change they were proposing would make the Senate more representative of the States:

> It was undoubtedly in the minds of the fathers that the Senators should in a peculiar sense represent the State something as an ambassador. That idea naturally arose out of the fact that the States had been separate and independent sovereignties, and regarded each other to a great extent as wholly independent States. . . . This amendment does not propose in any way to interfere with the fundamental law save and except the method or mode of choosing the Senators. It will still be the duty of the Senator to see that the States respectively are not denied any of the rights to which they are justly entitled under our system of government. It will still be the duty and the pride of the Senator to see that the Commonwealth which he represents *in its entirety* has that full representation to which it is entitled under the fundamental law. The change will consist in bringing him more thoroughly in touch with all the interests and all that makes up a great State, and that is certainly desired.

Senate Report, at 4-5 (emphasis added).

If Senators were elected from districts smaller than States, and not by the whole people of each State, they would represent and be accountable only to parts of States, not to the States as the Constitution requires. Indeed, the Senate would cease to be a body representing the States, and would become an assembly, like the House of Representatives, representing individuals living in certain areas of a State. The Constitution would no longer be the one described in Article V, in which the States themselves enjoy suffrage in the Senate.

Finally, the election of Senators from districts would deprive the people of the States of their constitutional right to elect both of their State's Senators. The Supreme Court has recognized that the Constitution's popular election provisions vest constitutionally protected rights in the people. *United States v. Classic*, 313 U.S. 299, 314 (1941) (Article I, Section 2 creates a right in the people to choose their representatives).[3]

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[3] *Classic* involved a federal prosecution under sections 19 and 20 of the federal criminal code (now codified at 18 U.S.C. §§ 241, 242), forbidding conspiracies to interfere with the enjoyment of rights secured by the Constitution, and the deprivation of such rights under color of state law. The defendants were indicted for willfully altering and falsifying ballots voters had cast in a Louisiana Democratic Party primary. In resolving the case, the Court was faced with the issue of "whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured by the Constitution.'" *Id.* at 307. The Court concluded that it was.

The Seventeenth Amendment, then, grants to each State's qualified voters a constitutional right to participate in senatorial elections. At-large election of Senators is mandatory if that individual right is understood as either the right to participate in all senatorial elections or the right to vote for both Senators. It is difficult to see how it could be understood otherwise. The Seventeenth Amendment, which provides that each State shall have two Senators and that the people shall elect them, nowhere suggests that there is any difference between the two Senators, nor that the right of the people it creates attaches to anything other than the two Senators given to each State. In the absence of any indication to the contrary, the only conclusion is that there is no disjunction between the individual right established by the amendment and the two senatorial offices the amendment refers to. It follows that if Senators were elected from districts smaller than States, the people of the State would be deprived of their constitutionally protected right to vote for each of their State's Senators. This can be accomplished, if it is to be accomplished, only by an amendment to the Constitution.

TIMOTHY E. FLANIGAN
Assistant Attorney General
Office of Legal Counsel

Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation

The Department of the Treasury does not have legal authority to index capital gains for inflation by means of regulation.

September 1, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

You have asked for our opinion whether the Department of the Treasury ("Treasury") has legal authority to amend its regulations to index capital gains for inflation. In connection with that request, you have provided us with your legal opinion concluding that Treasury does not have such authority. Opinion of the General Counsel (Aug. 28, 1992) ("Treasury Memorandum") In reaching that conclusion, you consider in detail, and specifically reject, arguments presented by the National Chamber Foundation in the form of a legal memorandum prepared by its private counsel, which concludes that Treasury has such legal authority. *See* Memorandum for Dr. Lawrence A. Hunter, Executive Vice President, National Chamber Foundation, by Charles J. Cooper, *et al.* (Aug. 17, 1992) ("NCF Memorandum").

We have carefully reviewed the arguments set forth in the Treasury Memorandum and the NCF Memorandum. As a result of that review, and of our own research and analysis, we are compelled to agree with Treasury's legal conclusion that Treasury does not have legal authority to index capital gains for inflation by means of regulation.[1]

I.

Section 1001(a) of the Internal Revenue Code ("Code") provides that "[t]he gain from the sale or other disposition of property shall be the excess

[1] Were we to disagree with your conclusion, and were Treasury to adopt a regulation of the sort proposed by the NCF Memorandum, we expect that the regulation would be challenged in court. Accordingly, we have consulted with the Department of Justice's Tax Division, the litigating division that would be responsible for defending any such indexing regulation. That division concurs fully in the conclusions set forth herein.

of the amount realized therefrom over the adjusted basis provided in section 1011." The general rule of section 1011(a) is that a property's adjusted basis is its "basis (determined under section 1012 . . .), adjusted as provided in section 1016." Section 1012 defines the basis of property as generally "the cost of such property." Although the term "cost" is not further defined in the Code, since the inception of the federal income tax system following ratification of the Sixteenth Amendment in 1913, Treasury has consistently interpreted the statutory term "cost" to mean price paid. *Compare, e.g.*, T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 273 (1914) ("The cost of property acquired . . . will be the actual price paid for it . . . ."), *with* 26 C.F.R. § 1.1012-1(a) (1992) ("The cost [of property] is the amount paid for such property in cash or other property."). The current regulation dates from 1957. *See* T.D. 6265, 1957-2, 12 C.B. 463, 470.

The sole issue presented by your request is whether Treasury may, by amending its regulations, reinterpret the statutory term "cost" to mean the price paid as adjusted for inflation. The NCF Memorandum argues that Treasury may do so. In making that argument, the Memorandum relies heavily on analysis of the Supreme Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[2] *Chevron* announced a two-step rule for courts to follow when reviewing an agency's construction of a statute that it administers. The court must always first examine "whether Congress has directly spoken to the precise question at issue. If 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." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As the Court noted in *Chevron*, "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). But any such "gap" must be created by Congress: "assertions of ambiguity do not transform a clear statute into an ambiguous provision." *United States v. James*, 478 U.S. 597, 605 (1986).[3]

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[2] *See* NCF Memorandum at 1 ("We must stress at the outset that our analysis of this question depends heavily on the standard of judicial review that would apply to such a regulation [under *Chevron*]."); *id.* at 12 ("The framework for analyzing the issue under study is provided by the Supreme Court's landmark *Chevron* decision."); *id.* at 21 ("In the terms of the *Chevron* doctrine, the question is whether Congress has . . . delegated authority to the Treasury to interpret the statute."); *id.* at 23 ("Accordingly, the basic question under *Chevron* is whether the term 'cost' is amenable to a construction that takes account of inflation.").

[3] Two members of the Supreme Court have suggested that an agency construction should prevail if the statute is merely "arguably ambiguous." *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n.4 (1988) (opinion of Kennedy, J., joined by White, J.). The NCF Memorandum's characterization of the "arguably ambiguous" standard as the view of "the Court" in that case, *id.* at 22 n 11, however, is plainly mistaken. Only two Justices embraced that view, and they expressly took issue with the refusal of four other members of the Court to recognize the alleged ambiguity. *See K. Mart Corp.*, 486 U.S. at 293 n.4.

The NCF Memorandum's central argument rests on the proposition that "cost" is an ambiguous term. In essence, the Memorandum argues that Congress, in using that word, left a "gap" in the statutory scheme to be filled by Treasury in the exercise of its rulemaking power under the Code. Specifically, the NCF Memorandum asserts that the "meaning of 'cost' is sufficiently ambiguous to permit the exercise of administrative discretion" to interpret cost in a manner that takes account of inflation, *id.* at 23, and consequently that in light of *Chevron*, "a regulation indexing capital gains for inflation should and would be upheld judicially as a valid exercise of the Treasury's interpretative discretion under the [Code]," *id.* at 1.[4]

Chevron is a profound expression of principles that flow from the doctrine of separation of powers. The decision recognizes the appropriate roles of each of the three branches of government. Congress writes laws; the executive branch interprets and enforces them. Congress may, however, leave greater or lesser scope for Executive action. Thus, Congress often leaves to the executive branch the task of filling in the gaps in the statutory scheme through interpretation, and courts must then defer to the Executive's reasonable interpretations. As the *Chevron* Court explained:

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[4] Although we agree with the conclusion of the NCF Memorandum that *Chevron* provides the framework for analyzing this issue, we note that there remains some confusion in the case law on this point. In *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991), the Supreme Court considered a challenge to a Treasury regulation interpreting a provision of the Code. The Court noted that Congress had given Treasury the broad power "to promulgate 'all needful rules and regulations for the enforcement of [the Internal Revenue Code].'" *Id.* at 560 (quoting I.R.C. § 7805(a)). Based on that grant of authority, the Court held that it "must defer to [Treasury's] regulatory interpretations of the Code so long as they are reasonable." *Id.* at 560-61 (citing *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476-77 (1979)). The Court made no reference to *Chevron* or its progeny.

Whatever the significance of the Court's failure in *Cottage Savings* to cite *Chevron*, we have found no case that has expressly rejected application of *Chevron* to regulations interpreting the Internal Revenue Code. Some lower court cases apply the *National Muffler* standard without considering *Chevron*, *see, e.g.*, *Davis v. United States*, 972 F.2d 869 (1992), while others cite both cases without resolving any supposed inconsistency between them, *see, e.g.*, *American Medical Ass'n v. United States*, 887 F.2d 760, 770 (7th Cir. 1989). Two courts of appeals, however, expressly applied *Chevron* to interpretative regulations under the Internal Revenue Code. *See RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1464 (11th Cir. 1992); *Peoples Federal Sav. & Loan Ass'n v. Commissioner*, 948 F.2d 289, 299 (6th Cir. 1991). A third court of appeals noted the two different standards but declined to choose between them, because on the facts of the case, either standard would have compelled the same result. *Pacific First Fed. Sav. Bank v. Commissioner*, 961 F.2d 800, 803 (9th Cir.) (noting, however, that much of the reasoning in *Peoples Federal* was persuasive), *cert. denied*, 506 U.S. 873 (1992). *Cf. Georgia Fed. Bank v. Commissioner*, 98 T.C. 105, 107-08, 118 (1992) (rejecting Sixth Circuit's conclusions in *Peoples Federal*, but applying *Chevron* principles).

Even if we assume that application of the *National Muffler* test rather than the *Chevron* test can produce different results in some cases, as applied here *National Muffler* would not alter our conclusion. The *National Muffler* standard requires that a regulation "harmoniz[e] with the plain language of the statute, its origin, and its purpose." 440 U.S. at 477. This permits not a plenary review by the court, but rather a determination whether the regulation is a "reasonable" interpretation of the statute. *Id.* at 476. Because the interpretation advanced in the NCF Memorandum is contrary to the plain language of the statute, it would fail the *National Muffler* test as well as the *Chevron* test.

In addition, we note that the Treasury Memorandum cites several decisions in which the courts of appeals have continued to apply — in the wake of *Chevron* — the traditional distinction between "legislative" and "interpretive" regulations in determining how much deference is due Treasury's interpretation of the Code. Treasury Memorandum at 41-42. Under this regime, "legislative" regulations generally are accorded greater deference than are "interpretive" regulations. We need not address the issue of *Chevron*'s impact upon this traditional distinction here, because in either case the plain meaning of the statute will control. We note, however, that the Supreme Court has not conclusively resolved this issue.

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66.

Chevron is thus a powerful analytical tool for the smooth administration of complex statutes and for the defense of agency actions under such statutes. It is not, however, unlimited. *Chevron* also teaches that when Congress writes legislation in specific terms, if it does not leave policy choices to be resolved by an administrative agency, then Congress's decision binds both the executive branch and the judiciary. To repeat: "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842. In particular, *Chevron* does not furnish blanket authority for the regulatory rewriting of statutes whenever a dictionary gives more than a single definition for a statutory term or whenever some arguably relevant discipline assigns a specialized, technical meaning to such a term. Such a reading of *Chevron* would eviscerate the well-established rule of construction that statutes must be accorded their plain and commonly understood meaning.[5] Indeed, it would lead to a legal regime in which many statutory terms with widely understood meanings would be deemed "ambiguous." In this regard, we fully concur in your conclusion that "[i]f the plain meaning doctrine could be applied only to words that have only one conceivable meaning, it would have precious little utility as a principle to resolve conflicting interpretations of statutes." Treasury Memorandum at 7-8.[6]

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[5] This rule of construction, like *Chevron* itself, sounds in the separation of powers under the Constitution and thus is an important limitation on judicial power. *See In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.).

[6] Accordingly, courts have generally been reluctant to treat the meaning of a single word or a short phrase as other than a "pure question of statutory construction" on which courts will not defer to agencies. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Courts have rejected agency interpretations of such words or terms in favor of the courts' own reading of the statutory language. *See, e.g., Conecuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581, 588-89 (D.C. Cir. 1988) (meaning of "terminate"); *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1357-58 (D.C. Cir. 1988) (meaning of "system of random selection"); *Santa Fe Pac. R.R. v. Secretary of Interior*, 830 F.2d 1168, 1174-80 & n.91 (D.C. Cir. 1987) (meaning of "lieu selection . . . right").

Surprisingly, the NCF Memorandum nowhere discusses the plain meaning rule, despite its obvious importance to the legal analysis. The omission is significant, because the methodology adopted by the NCF Memorandum would undermine the rule. Of course, the availability of two clearly inconsistent and equally plausible alternative dictionary definitions can in some circumstances "indicate[] that the statute is open to interpretation," *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992), particularly if the overall statutory context of the provision at issue provides evidence that the agency's proffered interpretation is a reasonable one, *id.* Clearly, however, the mere existence of

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Chevron teaches that the inquiry into the meaning of a statutory term — including whether that meaning is ambiguous — is to be conducted by "employing traditional tools of statutory construction." 467 U.S. at 843 n.9. *See also INS v. Cardoza-Fonseca*, 480 U.S. at 449 (using "ordinary canons of statutory construction" to ascertain the meaning of statutory terms). These tools and canons include examination of "the plain language of the Act, its symmetry with [other relevant legal materials], and its legislative history." *Id.* Additionally, "[i]n ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole." *K Mart Corp.*, 486 U.S. at 291.

In reaching its ultimate conclusion that Treasury lacks the legal authority to index capital gains for inflation, your opinion considers and rejects the NCF Memorandum's arguments that the term "cost" is ambiguous. It concludes that "[t]he statute itself has a plain meaning which is clear and unambiguous: cost means the 'actual price paid' or 'purchase price.' " Treasury Memorandum at 1. *See also, e.g., id.* at 4-8. As set forth below, we also conclude that "cost" is not ambiguous in the context of determining gain or loss from the disposition of property.

III.

A.

We must begin with what the Supreme Court has called a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The fundamental canon, of course, applies with full force to the tax laws. *See, e.g., Crane v. Commissioner*, 331 U.S. 1, 6 (1947) ("[T]he words of statutes — including revenue acts — should be interpreted where possible in their ordinary, everyday senses."); *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 383 (1937) ("The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary.");

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[6](....continued)
alternative dictionary definitions will not establish "ambiguity." Were that so, the dictionary would become an irresistible engine for destroying the plain meaning rule. In practice, of course, the courts rely on dictionary definitions to *establish*, rather than obscure, plain meaning. *E.g., United States v. Rodgers*, 466 U.S. 475, 479-80 (1984) (rejecting "alternative definition" of term "jurisdiction" provided by dictionary in favor of "[t]he most natural, nontechnical reading" provided by same source). *See also Mallard v. United States District Court*, 490 U S. 296 (1989), *discussed infra*. As we shall demonstrate, there is no ambiguity in the term "cost" in its statutory context.

The courts recognize that an "ambiguity" can properly be found only if there is a genuinely *reasonable* and *relevant* alternative reading of a term, not a merely *possible* or *arguable* alternative reading. Only this past Term, for instance, the Supreme Court found the meaning of the statutory phrase "person entitled to compensation" to be "plain," *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992), despite the dissenting Justices' argument that it could bear two distinct interpretations, *id.* at 500-02 (Blackmun, J., dissenting). *See also United States v. James*, 478 U.S. 597 (1986) (holding that the provision of the Flood Control Act creating immunity for "damage" was not ambiguous even though that term might arguably refer only to damage to property rather than, as ordinarily understood, to damage to both persons and property).

Helvering v. San Joaquin Fruit & Inv. Co., 297 U.S. 496, 499 (1936) ("Language used in tax statutes should be read in the ordinary and natural sense.").[7] Therefore, in order to determine whether "cost" is an ambiguous statutory term, we must first attempt to ascertain the "ordinary, contemporary, common meaning" of that term.

"Cost" first appears in the federal tax laws in the capital gains context in the Revenue Act of 1918.[8] The Supreme Court has explained that statutory terms are best understood by reference to meanings common at the time of their adoption. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).[9] Dictionaries that are roughly contemporaneous with the enactment of that Act define "cost" as the price paid for a thing or service. *See, e.g., Webster's New International Dictionary of the English Language* 509 (1917) ("*The amount or equivalent paid*, or given, or charged, or engaged to be paid or given for anything bought or taken in barter or service rendered . . . .") (emphasis added); 1 *Bouvier Law Dictionary* 689 (8th ed. 1914) ("The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation. Cost price is that actually paid for goods.") (citations omitted); 2 *A New English Dictionary on Historical Principles* 1034 (James A.H. Murray ed., New York, MacMillan & Co. 1893) ("That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; *the price paid for a thing*.") (emphasis added). More recent dictionaries give the same definition. *See, e.g., American Heritage Dictionary* 301 (1976) ("An amount paid or required in payment for a purchase."); *Black's Law Dictionary* 345 (6th ed. 1990) ("Expense;

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[7] In *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956), the Supreme Court unanimously rejected Treasury's "more recent ad hoc contention" as to how the statutory term "debenture" should be construed, in favor of Treasury's "prior longstanding and consistent administrative interpretation." *Id.* at 396. Treasury's traditional interpretation, the Court held, was more "in accord with *the generally understood meaning* of the term 'debentures.' 'The words of the statute [a stamp tax statute] are to be taken in the sense in which they will be understood *by that public in which they are to take effect.*'" *Id.* at 397 (citations omitted; emphases added; brackets in original).

[8] The Revenue Act of 1918 was actually enacted into law early in 1919. It provided in part: "That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, . . . the basis shall be . . . the cost thereof." Act of Feb. 24, 1919, ch. 18, § 202(a)(2), 40 Stat. 1057, 1060.

Subsequent revenue acts, *see infra* note 16, adopted the formulation in effect today: in general, the basis of property is "the cost of such property." In 1939, Congress began the practice of codifying the tax laws. The definition of property's basis as generally "the cost of such property" appears unchanged in all three codifications. *See* Internal Revenue Code of 1939, ch. 2, § 113(a), 53 Stat. 1, 40; Internal Revenue Code of 1954, ch. 736, § 1012, 68A Stat. 1, 296 (codified at I.R.C. § 1012); Internal Revenue Code of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085, 2095 (reenacting in relevant part the Internal Revenue Code of 1954).

[9] *See also Molzof v. United States*, 502 U.S. 301, 307 (1992) (relying upon "[l]egal dictionaries in existence when the [Federal Tort Claims Act] was drafted and enacted" to ascertain the meaning of a term used in that statute). Thus, although the meaning of the term "cost" has not changed in the 74 years since the enactment of the Revenue Act of 1918, we refer to authority contemporaneous with the first appearance of "cost" in this context.

Indeed, the definition of "cost" has remained essentially unchanged since the publication of the first modern English dictionary in 1755. In that year, Dr. Johnson defined "cost" principally as "[t]he price of any thing." 1 Samuel Johnson, *A Dictionary of the English Language (1755)* (Georg Olms Verlagsbuchhandlung ed. 1968).

price. The sum or equivalent expended, paid or charged for something."). Indeed, the only dictionary cited in the NCF Memorandum also gives as the primary meaning of cost "the price paid to acquire, produce, accomplish, or maintain anything." NCF Memorandum at 24 (quoting *Random House Dictionary of the English Language* 457 (2d ed. 1987)).

The NCF Memorandum's analysis of this dictionary meaning is revealing. The Memorandum first quotes the full definition: "1) the price paid to acquire, produce, accomplish, or maintain anything . . . , 2) an outlay or expenditure of money, time, labor, trouble, etc.: What will the cost be to me?, 3) a sacrifice, loss or penalty: to work at the cost of one's health." NFC Memorandum at 24. It then ignores the primary definition of cost — "price paid" — in favor of the third, obviously figurative, definition of cost as "loss" or "sacrifice."[10] *Id.* To this, the Memorandum adds "expenditure" generally, rather than "expenditure of money," which is the relevant concept when one is discussing the acquisition of property. The NCF Memorandum thus takes a perfectly clear definition of cost as applied to financial matters — price paid, or outlay or expenditure of money — and, without any discussion or further mention of that clear definition, seeks to obfuscate it.[11]

The NCF Memorandum attempts to mix the figurative and literal meanings of "cost" by asserting that "[a]ny such 'loss,' 'sacrifice,' or 'expenditure' needs to be ascribed a monetary value in order to determine the [taxable] gain realized" on the sale of an asset. *Id.* The Memorandum further asserts that the monetary value of a loss, sacrifice, or expenditure could be measured at other than the time it is incurred — at either the time of purchase or the time of sale. The Memorandum concludes: "We can discern nothing in the standard definition of 'cost' . . . suggesting that the historical 'purchase price' measurement of monetary value must be used in preference to a measurement that coincides with the sale of the asset." *Id.* Finally, the Memorandum asserts that when cost to the taxpayer is measured at the time of sale, it is legally appropriate to state cost in inflation-adjusted dollars to reflect the real impact of the purchase and sale on the taxpayer's buying power. *Id.* at 25.

We disagree with this line of reasoning on several levels. First, as reflected in each of the dictionary definitions of "cost" set forth above, the

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[10] Moreover, after describing the third alternative dictionary definition of "cost" as "*a* standard definition," the NCF Memorandum suggests later on the same page that it is "*the*" standard definition, implying that the third definition is the *only* meaning of the term. NCF Memorandum at 24 (emphases added). Thus, the *primary* dictionary definition of "cost" is spirited away.

[11] The analysis set forth in the NCF Memorandum stands in marked contrast to the analysis employed by the Supreme Court in similar circumstances. In *Mallard v. United States District Court*, the Court was called on to interpret the word "request." The Court first looked to "closest synonyms" in "everyday speech," namely, "ask," "petition," and "entreat." 490 U.S. at 301 (citing *Webster's New International Dictionary* 1929 (3d ed. 1981) and *Black's Law Dictionary* 1172 (5th ed. 1979)). Although the Court acknowledged that the dictionary gave other entries — "require" and "demand" — it found "little reason to think that Congress did not intend 'request' to bear its *most* common meaning when it used the word in [the statute]." *Id.* (emphasis added). Indeed, despite the potential alternate meanings of request, the Court chose to give it "its ordinary and natural signification." *Id.; accord Perrin*, 444 U.S. at 42.

first and most common meaning of the term is the price paid. "Price paid" obviously *does* suggest an "historical 'purchase price' measurement of monetary value." The primacy of this meaning is easily illustrated. If one were asked "How much did your car cost?" a response simply that "the car cost $10,000" would be considered truthful only if that amount were at least a close approximation of the actual price paid at the time of purchase. In contrast, a response based on some specialized meaning of the term "cost" (such as cost expressed in inflation-adjusted dollars or net of trade-in value) would be perceived as not responsive to the question. Indeed, such a response would be viewed as truthful only if the respondent were careful to point out that he was using the term in other than its normal and plain meaning. Clearly, then, a specialized use of "cost" is appropriate only with the addition of some qualifying words signaling that the speaker is using the term in a manner not contemplated by normal usage.[12]

Second, even assuming that it is appropriate to look to an alternative, figurative definition to establish the ambiguity of a statutory term, the NCF Memorandum's argument on this point cuts sharply against its conclusion. When monetary values are ascribed to terms such as "sacrifice" and "loss," such values are normally measured when *made* or *expended*. For example, statements such as "I lost $5,000 on the stock market" and "I sacrificed $10,000 to help my neighbor" require the listener to assume that the speaker is talking about historical dollar "loss" or "sacrifice," unless the speaker makes clear that those terms are being used in some way other than their ordinary meaning.[13]

Finally, even if the definitions of the term "cost" could be read to create some ambiguity with respect to that term, the NCF Memorandum fails to demonstrate the existence of any *relevant* ambiguity. That a particular term has two plausible definitions does not support an agency determination that rests on a third implausible definition. As shown above, none of the dictionary definitions of "cost" refers to "purchase price adjusted for inflation."[14]

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[12] An additional analytical flaw in the NCF Memorandum's treatment of the definition of the term "cost" is its focus on the "cost to the taxpayer" rather than on the statutory phrase "cost of such property" in section 1012 of the Code. The former phrase may be read to include a broader range of costs incurred by the owner in the course of ownership. For example, a statement of the "cost *to X* of owning a car" might include, in addition to the purchase price, costs associated with maintenance of the car, insurance, taxes, etc. The statute however, refers to "cost *of . . . property*." This phrase refers more naturally to the original price paid for the property: "What *did* the car cost?"

[13] Other relevant statutory terms also provide support for our rejection of the NCF Memorandum's conclusion that "cost" as used in section 1012 may be read to refer to something other than "historical cost." In ordinary usage, the term "gain" would be thought to describe an increase measured from one point in time to another. Moreover, the term "basis" suggests that gain is measured from some fixed baseline, rather than from a floating indicator of relative value.

[14] A possible alternative argument not advanced in the NCF Memorandum would be that, although the unambiguous meaning of "cost" is the original price paid, that definition is itself ambiguous in that it is not specified whether the price is to be stated in nominal or inflation-adjusted dollars. This argument suffers from several of the same defects noted above with respect to the Memorandum's attempt to discover ambiguity in the word "cost." The common meaning of the term "price" requires that it be stated in nominal dollars unless it is clear that the word is being used in some specialized sense. For example, in everyday speech the question "What was the price of your home when you bought it?" calls for an answer expressed in nominal dollars.

In addition to its argument based on the *Random House Dictionary*, the NCF Memorandum argues that "standard economic analysis" should be taken into account in determining the meaning of the term "cost." *Id.* at 25. To this end, the Memorandum looks to uses of "cost" in economics treatises to establish the term's ambiguity. *Id.* For purposes of construing section 1012 of the Code, however, the meaning to be given "cost" must be the "common and ordinary" meaning of that word — not its purported meaning in the jargon of economists. For example, the Tax Court has rejected arguments that taxpayers should not be taxed on their nominal capital gain, but on their "economic gain," quoting Learned Hand's statement that "'[the] meaning [of income] is to be gathered from the implicit assumptions of its use in common speech.' Thus, the meaning of income is not to be construed as an economist might, but as a layperson might." *Hellermann v. Commissioner*, 77 T.C. 1361, 1366 (1981) (quoting *United States v. Oregon-Wash. R.R. & Nav. Co.*, 251 F. 211, 212 (2d Cir. 1918)). In other words, "[t]he income tax laws do not profess to embody perfect economic theory." *Weiss v. Wiener*, 279 U.S. 333, 335 (1929). We must therefore reject the NCF Memorandum's attempt to ascertain the meaning of cost under "standard economic analysis," as well as its repeated invocations of "economic reality" or "principles" of sophisticated economic analysis more generally, *see, e.g., id.* at 2, 8, 23-27, 68, 87, 88 n.47, in favor of the common and ordinary meaning of that term.[15]

B.

The drafters of the Revenue Act of 1918 had available, in addition to the common and ordinary dictionary meanings of cost, Treasury's contemporaneous regulatory definition of cost. This definition, embodied in published Treasury Decisions, was "actual price paid." *See* T.D. 2005, 16 Treas. Dec. Int. Rev. 111, 112 (1914), *restated*, T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 272-73 (1914). This definition, adopted by Congress in the 1918 Act, certainly also evidences the "ordinary, contemporary, common meaning" of cost.[16]

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[15] The NCF Memorandum's contention that income from the sale of a capital asset can be determined for purpose of the Code only by taking inflation into account is similar to the legion of "tax protestor" claims that has so often been rejected by the courts. For example, in *Stelly v. Commissioner*, 804 F.2d 868, 869 (5th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987), the taxpayers asserted that they were entitled to a 13 percent downward adjustment in their interest income on the ground that their interest income had been devalued by inflation The Fifth Circuit ruled that there was "no basis in law or fact" for the inflation adjustment and concluded that Treasury "properly characterized the [taxpayers'] argument as frivolous." *Id.* at 870.

[16] The assertion in the NCF Memorandum that "there is nothing in the legislative history of the 1918 Act indicating that these Treasury Decisions were being adopted," *id.* at 36, is incorrect. As discussed more fully below, the available legislative history from 1918 concerning this issue indicates that Congress did adopt Treasury's interpretation when it wrote "cost" into the Revenue Act of 1918. During the floor debate concerning a proposal to amend the 1918 legislation so as to virtually eliminate the effect of inflation on capital gains, it was explained that the capital gains provision of the Act was "merely enacting into law the *rules and regulations* now in force under the present statute." 56 Cong. Rec. 10,349 (1918) (statement of Rep. Garner) (emphasis added). *See also* Treasury Memorandum at 8-13. Treasury's interpretation of "cost" has not substantially changed since 1914. *See* 26 C.F.R. §

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That "cost" in the Code has this plain meaning has been recognized in several court cases. For example, the Tax Court has stated that "there is no statutory provision which allows for an upward adjustment to basis to reflect inflation or loss of the purchasing power of the dollar." *Ruben v. Commissioner*, 53 T.C.M. (CCH) 992, 994-95 (1987). The court also observed that "[s]ections 1011 and 1012 of the Internal Revenue Code provide the general rule that a taxpayer's basis in property shall be its cost. While it is true that such [government] reports do provide evidence of inflation, basis in property is not affected by inflation." *Id.* at 994 n.2.[17]

Similarly, in *Crossland v. Commissioner*, 35 T.C.M. (CCH) 262 (1976), the taxpayers claimed an "inflation loss deduction" of ten percent of their gross income. The court acknowledged that "[i]nflation is a fact" and that it "affects every taxpayer to some extent," but it nonetheless disallowed the deduction: "Our tax structure is not set up to take into account the effects of inflation. Tax liability depends on income figures computed in terms of nominal dollars, without regard for inflation." *Id.* at 262. In a passage that is especially relevant, the court noted: "The problem of inflation has caused several writers to explore the practicality of indexing; *i.e.*, changing the tax structure to adjust for price level changes in computing taxable income. Although the suggestion might have merit, Congress has not seen fit to consider it . . . ." *Id.* at 263 (footnote omitted).[18]

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[16] (....continued)
1.1012-1(a) ("The cost [of property] is the amount paid for such property in cash or other property."). This definition was adopted in T.D. 6265, § 1.1012-1(a), 1957-2, 12 C.B. 463, 470, and has not been amended. Congress has repeatedly amended and reenacted the tax laws and has never disturbed Treasury's consistent interpretation of cost. *See* Revenue Act of 1921, ch. 136, § 202(a), 42 Stat. 227, 229; Revenue Act of 1924, ch. 234, § 204(a), 43 Stat. 253, 258; Revenue Act of 1926, ch. 27, § 204(a), 44 Stat. 9, 14; Revenue Act of 1928, ch. 852, § 113(a), 45 Stat. 791, 818; Revenue Act of 1932, ch. 209, § 113(a), 47 Stat. 169, 198; Revenue Act of 1934, ch. 277, § 113(a) 48 Stat. 680, 706; Revenue Act of 1936, ch. 690, § 113(a), 49 Stat. 1648, 1682; Revenue Act of 1938, ch. 289, § 113(a), 52 Stat. 447, 490; Internal Revenue Code of 1939, ch. 2, § 113(a), 53 Stat. 1, 40; Internal Revenue Code of 1954, ch. 736, § 1012, 68A Stat. 1, 296 (codified at I.R.C. § 1012); Internal Revenue Code of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085, 2095 (reenacting in relevant part the Internal Revenue Code of 1954).

A court would likely deem significant Congress's repeated reenactment of the tax laws without disturbing Treasury's interpretation of "cost." *Cottage Savings*, 499 U.S. at 560-62. *Accord United States v. Correll*, 389 U.S. 299, 305-06 (1967); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938). A court would also likely attach significance to Congress's repeated consideration of and refusal to enact proposals explicitly to index capital gains for inflation. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 & n.25 (1983) (finding in Congress's failure to enact any one of thirteen bills introduced to overturn the Treasury's interpretation of section 501(c)(3) of the Code additional support for the conclusion that Congress acquiesced in that interpretation). For a recounting of these refusals, see *infra* note 27.

[17] This key case is discussed by the NCF Memorandum only in a footnote, at the end of a string cite, and the Tax Court's quoted conclusion is mischaracterized as the court's "refus[al], in the absence of clear statutory provisions to the contrary, to accept the taxpayer's construction of the [Internal Revenue Code] over the Treasury's contrary construction." NCF Memorandum at 70 n.39. As noted in the text, however, the *Ruben* court's conclusion rested expressly on its observation that there is no applicable "*statutory* provision" permitting an upward adjustment to basis to reflect inflation. The *Ruben* court viewed the taxpayers' argument to the contrary as so "frivolous" that it upheld the assessment of penalties against the taxpayers in the form of additional tax. 53 T.C.M. (CCH) at 996.

[18] The same footnote in the NCF Memorandum that mischaracterizes *Ruben* mischaracterizes *Crossland* in the same way. The footnote also cites two other Tax Court cases. Neither of these cases turns upon

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Other courts have also interpreted the term "cost" as meaning nominal purchase price. In *Vandenberge v. Commissioner*, 147 F.2d 167, 168 (5th Cir.), *cert. denied*, 325 U.S. 875 (1945), the court stated: "Section 113(a) of the Revenue Act of 1938 provides that the unadjusted basis of property shall be the cost of such property. The solution to the question raised is as simple and clear as the language of the pivotal statute. The cost of the property was the price paid to acquire it." *See also Hawke v. Commissioner*, 35 B.T.A. 784, 789 (1937) ("We must assume that Congress used the term 'cost' in its commonly understood meaning as the amount of money which a man pays out in the acquisition of property."), *rev'd on other grounds*, 109 F.2d 946 (9th Cir.), *cert. denied*, 311 U.S. 657 (1940).

C.

Another of the traditional tools of statutory construction is an examination of "the language and design of the statute as a whole." *K Mart Corp.*, 486 U.S. at 291. The NCF Memorandum appears to recognize this rule of construction, but asserts flatly that there is nothing "in any other language of the [Code] suggesting that the historical 'purchase price' measurement of monetary value must be used in preference to a measurement that coincides with the sale of the asset." *Id.* at 24. That assertion is mistaken. Many provisions of the Code that grant itemized deductions to individuals and corporations are intelligible only if "cost" under section 1012 is measured at the time an asset is purchased or at other times beside the time of sale.

To cite an important example, the deduction for depreciation is calculated based on "the adjusted basis provided in section 1011, for the purpose of determining the gain on the sale or other disposition of such property." I.R.C. § 167(c). Under section 1011, of course, the adjusted basis of an asset is determined by section 1012, which uses the term "cost." Accordingly, the cost of an asset must be known in every year in which the taxpayer would take a depreciation deduction. If Treasury reinterpreted cost to require that cost be measured at the time of the asset's sale, as the NCF Memorandum suggests it could, the taxpayer (and Treasury) would have no basis on which to calculate the proper deduction. *See* Treasury Memorandum at 52-53.[19]

[18](....continued)
"Treasury's . . . construction" of the Code, as the Memorandum asserts. *Gajewski v. Commissioner*, 67 T.C. 181 (1976), *aff'd*, 578 F.2d 1383 (8th Cir. 1978), held that the "the statutory gold content of the dollar is irrelevant for purposes of computing petitioner's taxable income *under the Code*." *Id.* at 195 (footnote omitted; emphasis added) *Sibla v. Commissioner*, 68 T.C. 422 (1977), *aff'd*, 611 F.2d 1260 (9th Cir. 1980), held that the taxpayer was "not entitled to any adjustment in the gross income he received because of any decline in value of the dollar with respect to gold or silver." *Id.* at 431. Nothing in *Sibla* suggests that the holding was based on Treasury's interpretation of the Code, rather than on the court's own interpretation.

[19]Many other deductions and credits are also defined in terms of "adjusted basis" and would suffer from the same problem. *See* I.R.C. §§ 42(d) (low income housing), 165(b) (losses), 166(b) (bad debts), 169(f)(1) (pollution control facilities), 171(b)(2) (bond premiums), and 612 (depletion). If cost for some purposes must be determined at the time of acquisition, or at least at the time the deduction or credit is taken each year, while cost for purposes of calculating capital gains is to be determined at the time that an asset is sold (as proposed by the NCF Memorandum), the Internal Revenue Code would contradict itself. Such a forced contradiction would certainly undercut the reasonableness of any Treasury regulation indexing capital gains for inflation.

Other structural characteristics of the Code strongly support the conclusion that cost unambiguously means historical price paid, in nominal dollars *not* adjusted for inflation. As indicated above, "adjusted basis" is important in interpreting many provisions of the Code. The term appears in more than a hundred sections. By reference to section 1012, section 1011 provides that adjusted basis is generally the cost of property, "adjusted as provided in section 1016." I.R.C. § 1011(a). Section 1016 is entitled "Adjustments to basis," and it contains twenty-five separate items of adjustment.[20] This list of congressionally determined adjustments to cost does not include an inflation adjustment. Yet one would rationally expect that if Congress intended to provide such an adjustment in the Code, the adjustment would appear in section 1016 or in some other section of Part II of Subchapter O, entitled "Basis Rules of General Application." It is, at best, unlikely that Congress would so carefully and precisely lay out the many mandatory and allowable adjustments to cost and at the same time load (or authorize Treasury to load) a very significant adjustment — for inflation — into the word "cost" itself.

Moreover, under the doctrine of expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another"), omissions in such instances are to be deemed to reflect the intent of the legislature. Thus, in *TVA v. Hill*, 437 U.S. 153 (1978), the Court ruled that TVA's Tellico Dam project was subject to Endangered Species Act requirements, reasoning that, while Congress had included several "hardship" exemptions in the Act, none was provided for federal agencies. The Court concluded that "under the maxim expressio unius est exclusio alterius, we must presume that these were the only 'hardship cases' Congress intended to exempt." *Id.* at 188. *See also, e.g., United States v. Monsanto*, 491 U.S. 600, 611 (1989) (inclusion of forfeiture exemption in another chapter of the same legislation "indicates . . . that Congress understood what it was doing in omitting such an exemption" from the chapter at issue); Letter for George U. Carneal, General Counsel, Federal Aviation Administration, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, at 2 (Oct. 6, 1971); 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.23, at 216-17 (5th ed. 1992). Because Congress has specified other adjustments to basis but has not included an adjustment for inflation in the computation of capital gains, it follows that Congress did not intend to permit indexing in the capital gains context.

The force of this argument is even greater because Congress has, elsewhere in the Code, carefully and precisely set forth a number of adjustments for inflation. Section 1(f), entitled "Adjustments in tax tables so that inflation will not result in tax increases," requires Treasury every calendar year to "increas[e] the minimum and maximum dollar amounts for each rate bracket . . . by the cost-of-living adjustment for such calendar year," which

[20] Twenty-three of these are found in subsection (a)(1)-(9), (11)-(24), and one each in subsections (c) and (d).

adjustment is defined by reference to the Labor Department's published Consumer Price Index for all-urban consumers. I.R.C. § 1(f)(2)(A), (3)-(5). At least eight other dollar amounts specified in the Code are indexed for inflation by reference to section 1(f)(3). *Id.* §§ 32(i) (earned income credit), 41(e)(5)(C) (research activity credit), 42(h)(6)(G) (low income housing credit), 63(c)(4) (standard deduction), 68(b)(2) (overall limitation on itemized deductions), 135(b)(2)(B) (income from U.S. savings bonds used to pay higher education tuition and fees), 151(d)(4) (personal exemptions), and 513(h)(2)(C) (distributions of low cost articles by tax-exempt organizations). Section 1012, of course, contains no comparable provision. Again, we would expect that if Congress intended that asset costs be indexed for the calculation of capital gains, it would have done so explicitly and in the same manner as these many other indexing provisions.[21]

D.

In an attempt to find some basis in the statute to support its proposed interpretation, the NCF Memorandum relies on the writings of certain tax theorists for the proposition that a general purpose of the tax code is to treat similarly situated taxpayers alike (the principle of "horizontal equity"). *Id.* at 8, 26. From this general purpose, the Memorandum argues that the term "cost" should be read to mean inflation-adjusted cost in order to avoid the inequity inherent in taxing real and inflationary gains at the same rate.

Although the principle of horizontal equity may be embodied as a general purpose of the Code, that general purpose cannot be taken to provide a statutory basis for indexing of capital gains. The Supreme Court has noted the dangers of attempting to argue from a general statutory purpose to a context-specific interpretation of a particular statutory provision:

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[21] We note that the NCF Memorandum nowhere discusses the significance of section 1(f) of the Code and the provisions that refer to it, even though it is clearly of legal significance that Congress has provided for inflation-related indexation in some instances, but not in the case of capital gains. The NCF Memorandum attempts to explain away congressional failure to index asset costs in the same manner as tax brackets and other concepts in part because "the adverse effect of inflation was ameliorated by the general capital gains tax preference" (a lower effective tax rate on capital gains), which "obviated the need and impetus, from 1921 until 1986, to establish a more accurate counter for inflation, such as indexation." *Id.* at 53.

The argument, in fact, cuts against the NCF Memorandum's conclusions. Accepting the argument on its face, it is obvious that to the extent Congress established a preference for capital gains in order to reduce taxation of gains that resulted merely from inflation, Congress assumed that its tax laws otherwise treated cost as nominal purchase price with no adjustment for inflation. Moreover, as your opinion points out, Congress has consistently recognized that inflation introduces distortions into the calculation of capital gains. Treasury Memorandum at 13-15. It appears, then, that Congress has consistently made a deliberate policy choice not to index asset basis for inflation. As for the decision to repeal the capital gains preference in 1986, it was not taken in ignorance of the special character of investment in capital assets, but with a conscious belief that the reduction in individual income tax rates would eliminate any need to accord preferential treatment to capital gains. *Id.* at 15. In any event, long-term capital gains now enjoy a slightly preferential rate. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11101(c), 104 Stat. 1388, 1388-404 to 1388-405 (amending I.R.C. § 1(j)).

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). *See also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (rejecting agency's use of the "plain purpose" of legislation to support regulatory definitions not supported by the plain language of the statute).

Even more generally, the NCF Memorandum suggests that the Court has deferred to agency interpretations of other terms that are "no more ambiguous than the terms at issue here." *Id.* at 22 n.11. This approach to statutory interpretation suffers from a glaring flaw: as the Supreme Court has recognized in determining whether deference is owed, the court "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.*, 486 U.S. at 291. Accordingly, even an identical term may be ambiguous in one context and not in another. For example, in *Helvering v. Reynolds*, 313 U.S. 428 (1941) — relied upon in the NCF Memorandum for the proposition that "acquisition" was found to be ambiguous, *see id.* at 22 n.11 — the Court found the term ambiguous only in the context presented. The Court noted that although the same term might be "unambiguous . . . as respects other transactions," 313 U.S. at 433 (citing *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496 (1936)), it was in fact ambiguous in the context of remainder interests passing by bequest, devise, or inheritance, *id.* In *San Joaquin*, on the other hand, the Court, addressing real property acquired by lease with an option to buy, relied on the "plain import" of the word "acquired," because "acquired" was not a term of art and "[l]anguage used in tax statutes should be read in the ordinary and natural sense." 297 U.S. at 499.

Moreover, the cases relied upon by the NCF Memorandum for this suggestion themselves rely on factors that, when applied to the present case, undercut the Memorandum's ultimate conclusions. The Memorandum's reliance in *Cottage Savings*, for example, appears to ignore the fact that the Court, addressing the reasonableness of the agency's interpretation, discussed at length the fact that the long-standing agency interpretation had been left undisturbed by Congress for many years, and stated that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Savings*, 499 U.S. at 561. Here, as the NCF Memorandum recognizes, "Treasury's consistent and long-standing interpretation of cost" has been "original cost."

Id. at 77. *See also INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).[22]

Finally, the NCF Memorandum cites two cases as support for the proposition that "'cost' or similar terms in *other* statutes have been construed to permit, or even require, taking account of inflationary effects." *Id.* at 27 (emphasis added). That proposition is, of course, largely irrelevant to understanding the intent of Congress in enacting the Internal Revenue Code. *See, e.g., Prussner v. United States*, 896 F.2d 218, 228 (7th Cir. 1990) (en banc) (pointing out that "[d]ifferent statutes passed by different Congresses often do use the same words to mean different things"). In any event, at least one of the two cited cases simply offers no support for the Memorandum's proposition. *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144 (7th Cir.), *cert. denied*, 459 U.S. 907 (1982), concerned a statute that required the Copyright Royalty Tribunal to determine "reasonable copyright royalty rates." 17 U.S.C. § 801(b)(1). The court noted that the Tribunal had rejected an "individualized cost-based approach" and instead relied on factors "not related to cost." 676 F.2d at 1148.[23]

Accordingly, we agree with your conclusion that the Internal Revenue Code's plain language and structure demonstrate that "cost" cannot be interpreted to allow an adjustment for inflation.

III.

Under the Supreme Court's jurisprudence, the plain meaning of the word "cost" ends the inquiry:

> The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." The language before us expresses Congress' intent . . . with sufficient precision so that reference to legislative history . . . is hardly necessary.

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[22] The Court's recent decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), which noted that an agency interpretation is entitled to some deference even if it represents a break with prior interpretations, *id.* at 186-88, did not alter this rule. Subsequent to *Rust*, the Court again stated the general rule that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991).

[23] Indeed, the statute specifically *authorized* the Tribunal "to make determinations concerning the *adjustment* of reasonable copyright royalty rates." 17 U.S.C. § 801(b)(1) (emphasis added). Pursuant to that authority the Tribunal allowed an inflation adjustment in 1987. In *Chevron* terms, the adjustment was "affirmatively supported by the language of the Act." 676 F.2d at 1155. By contrast, in the case of section 1012 of the Internal Revenue Code, Congress has provided only the definition of "basis" in terms of "cost," while *omitting* any general grant of authority to make inflation-linked adjustments to cost basis.

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (citations omitted). Once it is determined as a textual matter that cost means "actual price paid" in nominal dollars, resort to the legislative history is unnecessary.

As noted above, however, *Chevron* requires that the search for the meaning of a statutory provision be conducted by "employing traditional tools of statutory construction." 467 U.S. at 843 n.9. These tools include the legislative history of the provision. *See also Cardoza-Fonseca*, 480 U.S. at 449. Thus, even if we were to conclude that the plain language and the structure of the Code did not provide a clear meaning for the term "cost" in section 1012, we would be compelled to search the legislative record of the Revenue Act of 1918 to determine if that record could provide such meaning.[24] Based on our review of that record, we agree with your conclusion that "the contemporaneous legislative history of the [Act] indicates that Congress intended the word 'cost' to mean the price paid in nominal dollars not adjusted for inflation." Treasury Memorandum at 8 (capitalization omitted).

As we have noted above, Treasury's pre-1918 regulatory definition of cost was "actual price paid." T.D. 2005, 16 Treas. Dec. Int. Rev. 111, 112 (1914), *restated*, T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 272-73 (1914). Contrary to the assertion in the NCF Memorandum that "there is nothing in the legislative history of the 1918 Act indicating that these Treasury Decisions were being adopted," *id.* at 36, the legislative history concerning this issue clearly indicates that Congress adopted Treasury's interpretation when it wrote "cost" into the Revenue Act of 1918. Indeed, it was explained during floor debate concerning an amendment proposed by Representative Hardy, intended in part to eliminate the effects of inflation on capital gains, that the capital gains provision of the Act was "merely *enacting into law the rules and regulations* now in force under the present statute." 56 Cong. Rec. 10,349 (1918) (statement of Rep. Garner) (emphasis added).

The NCF Memorandum, after extensively quoting from the debate surrounding Representative Hardy's proposed amendment to the capital gains provision of the Act, concedes that the legislative history "demonstrates that at least certain members of Congress were aware of the effects of inflation on capital gains. It also can be argued to reflect *an understanding of Congress that a property's basis referred to the acquisition cost of the property*." *Id.* at 44 (emphasis added).

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[24] The NCF Memorandum suggests that the proper scope and significance of legislative history is unclear under *Chevron*. *Id.* at 31 n.15. To the contrary, we believe its relevance is quite clear. A court undertakes a *Chevron* inquiry employing traditional tools of statutory construction, of which legislative history is generally one *See, e.g., Chevron*, 467 U.S. at 851-53, 862-64 (analyzing the legislative history of the Clean Air Act); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-25 (1987) (analyzing the history of the Labor Management Relations Act). *See also Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991) (*Chevron* requires deference "when the statute, viewed in light of its legislative history and the traditional tools of statutory construction, is ambiguous."), *cert. denied*, 503 U.S. 970 (1992).

Indeed, Congress must have been extremely well aware of the problems of inflation when it adopted the Act. In 1918, the year prior to the first statutory use of "cost" to define basis in the capital gains context, consumer prices for all urban consumers increased by 18.0%. *Economic Indicators Handbook* 224 (Darney ed. 1992).[25] In the previous year, inflation was nearly as high, at 17.4%, a dramatic rise from the 1% inflation rates in 1914 and 1915. *Id.*

In view of this World War I-related inflation, it is not surprising that a proposal intended to eliminate most of the effects of inflation on capital gains was debated at the time. In moving to strike the basis provision out of the Revenue Act entirely, Representative Hardy argued that the tax on gains would be unfair because "a piece of property bought in 1913, if its exchange value today is to be equal to its exchange value when it was bought, must bring in dollars and cents something like two times what it cost." 56 Cong. Rec. at 10,349.[26] *See also id.* ("[If a] man today makes a sale of a tract of land which he bought in 1913 at the prices then prevailing, and if he sold it today at 100% apparent profit and reinvested the money he could not obtain any more property now than he could have obtained in 1913 with the money then paid for the same land.").

While noting that "the reasoning of [Representative Hardy] would apply to every conceivable source of income," not simply capital gains, *id.* at 10,350 (statement of Rep. Kitchin), opponents of the proposed amendment emphasized that the section dealing with capital gains did not change current law. *See id.* ("This provision makes absolutely no change in existing law.") (statement of Rep. Kitchin). The opponents also explained how current law operated. Representative Fordney thus stated that if a taxpayer purchased property ten years ago and then sold it, the appropriate measure of the gain would be "[t]he difference between the *price paid for it 10 years ago* and the price you sell it for today." *Id.* at 10,351 (emphasis added). Representative Kitchin, the Chairman of the House Ways and Means Committee, further explained that "[i]f you bought a ship in 1916 for $100,000 and sell it in 1918 at $200,000, or if you bought Bethlehem stock or United States Steel Corporation stock in 1915, your income is the difference between the purchase and selling price, and that is the only rule under which you can administer the law." *Id.* at 10,350-51. The hypotheticals posed by Representatives Fordney and Kitchin are particularly revealing since the gains described would, to a large degree, have been attributable to the dramatic wartime inflation described above. No one at the time disputed these characterizations of current law, and the statements were consistent with the earlier Treasury Decisions quoted above. Ultimately, Representative Hardy withdrew his proposal to strike the basis provision and proposed an amendment

[25] The 1918 Act was adopted in 1919. *See supra* note 8.

[26] Representative Hardy was half right. Consumer prices had increased slightly more than 50% from 1913 to 1918, from an index of 9.9 to an index of 15.1. *Economic Indicators Handbook* at 224.

that would measure capital gain only from the beginning of the year in which the capital asset was sold. *Id.* at 10,351, 10,354. Congress was apparently not persuaded to remedy the effects of inflation on income derived from capital gains in this way, and the proposal was rejected. *Id.*

The NCF Memorandum attempts to deny the force of its own reading of the legislative history by asserting that the 1918 Act's legislative history "simply does not speak directly and clearly to the 'precise question at issue.'" *Id.* at 46-47 (quoting *Chevron*, 467 U.S. at 843 n.9). For the reasons set forth above and in the Treasury Memorandum, we disagree. In any event, as the NCF Memorandum recognizes, the legislative history is consistent with the ordinary meaning of the term "cost" as meaning historical price paid, *id.* at 44, and clearly demonstrates that Congress legislated with full knowledge of the effect of current law and of the impact of inflation on capital gains.

For these reasons, we concur in your conclusion that the legislative record evidences a clear congressional intent that "cost" be given its common and ordinary meaning, that is, price paid in nominal dollars not adjusted for inflation. Treasury Memorandum at 8-13.

IV.

The NCF Memorandum argues that Treasury's adoption of a capital gains indexing regulation is not foreclosed by Congress's repeated reenactments of the Internal Revenue Code with knowledge of Treasury's interpretation of "cost" to mean the actual price paid (the "reenactment" doctrine), or by Congress's rejection of statutory indexing proposals (the "acquiescence" doctrine). *See* NCF Memorandum at 75-87. We have discussed these doctrines only briefly, *see supra* note 16, because they have application only if Treasury has discretion under the statute to reinterpret "cost" — that is, only if "cost" is ambiguous. In Parts II and III, we have demonstrated that it is not.

In places, however, the NCF Memorandum appears to make an affirmative argument in support of regulatory indexing of capital gains based on recent votes of either the Senate or the House on legislative proposals to index capital gains:

> [W]hile Congress has not actually enacted a capital gains indexing proposal, the legislative history of Congress' consideration of such proposals reveals, if anything, that Congress *favors* the concept of indexing capital gains. Indeed, . . . indexation measures have *passed* in recent sessions of both the Senate and the House . . . .
>
> Congress' deliberations on the issue to date suggest that a majority of both Houses would welcome a Treasury reinterpretation of "cost" to take account of inflation.

NCF Memorandum at 84. *See also id.* at 3 ("[T]he legislative history of Congress' consideration of such proposals reveals, if anything, that Congress *favors* the concept of indexing capital gains."). This reasoning is substantially flawed for several reasons.

First, as the Treasury Memorandum points out, although Congress has repeatedly considered proposals explicitly to index capital gains for inflation, it has *never* enacted them. *Id.* at 15-18.[27] It is a strange twist of logic to conclude that because Congress has *rejected* a proposal many times, Congress therefore *favors* that proposal. Second, even assuming that a majority of both Houses would in fact be willing to enact such legislation, it by no means follows that they would welcome *an administrative agency's* decision to bring about a similar outcome by regulatory action alone.

More fundamentally, the attitude of a majority of the members of the current Congress is completely irrelevant to the question whether an agency's interpretation of existing law is or is not correct. Like the courts, the executive branch must interpret the law as it finds it, not base its interpretations on conjecture as to how Congress *might* act. Thus, although agencies must follow the "will of Congress" in interpreting statutes, "[t]he 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 n.7 (1991). Furthermore, it is an elementary principle of constitutional law that the policy preferences of individual members of Congress, even if they happen to comprise majorities of both Houses, are legally meaningless until they crystallize into "bicameral passage followed by presentment to the President." *INS v. Chadha*, 462 U.S. 919, 954-55 (1983). *See also* NCF Memorandum at 80 n.43.

The history of capital gains taxation also shows that Congress was aware of the effects of inflation but chose to deal with them in a manner other than indexation. The Revenue Act of 1918 did not distinguish between capital and ordinary income for purposes of tax rates. In 1921, however, Congress enacted the first preference for capital gains income. *Compare* Revenue Act of 1921, ch. 136, § 206(b), 42 Stat. 227, 233 (taxing capital gains at a maximum of 12.5%) *with id.*, § 211(a)(1), 42 Stat. at 233-35 (taxing ordinary income at rates as high as 65%). Your opinion concludes that "[o]ne of the policy reasons most often cited for this preferential treatment was the

[27] On at least four occasions since 1978, indexation legislation has been approved by either the Senate or the House, only to be rejected in conference. *See* Revenue Act of 1978, H.R. 13511, 95th Cong., 2d Sess. § 404 (1978) (approved by House), *rejected by* H.R. Conf. Rep. No. 1800, 95th Cong., 2d Sess. 258 (1978); Tax Equity and Fiscal Responsibility Act of 1982, H.R. 4961, 97th Cong., 2d Sess. § 310A (1982) (approved by Senate), *rejected by* H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 478 (1982); Omnibus Budget Reconciliation Act of 1989, H.R. 3299, 101st Cong., 1st Sess. § 11961 (1989) (approved by House), *rejected by* H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 664 (1989); Tax Fairness and Economic Growth Act of 1992, H.R. 4210, 102d Cong., 2d Sess. § 2101 (1992) (approved by House), *rejected by* H R. Conf. Rep. No. 461, 102d Cong., 2d Sess. 356, 364 (1992).

desire to mitigate the impact of inflation on the taxation of capital gains." Treasury Memorandum at 13. *See also id.* n.16 (citing committee hearings on the 1921 Act); NCF Memorandum at 48-49 & n.25 (same).

It is apparent that the draftsmen of the 1921 Act did not intend that "cost" reflect an adjustment for inflation. In reenacting the tax laws, they chose to mitigate the effects of inflation on capital assets by granting preferential treatment to capital gains — *not* by indexing cost. This choice reflects their understanding that without some special treatment, capital gains would be peculiarly subject to the effects of inflation under the tax laws. Congress's decision to provide preferential treatment for capital gains assumed that the Treasury's regulatory interpretation of "cost" as "actual price paid" was valid and would remain in effect.[28]

As recently as 1978, Congress was again faced with a choice in dealing with the impact of inflation on the values of capital assets. In the course of enacting the Revenue Act of 1978, the House adopted a provision expressly indexing the basis of such assets. The Senate, on the other hand, rejected this approach, choosing instead to increase the capital gains exclusion from 50% to 60%. The Finance Committee's explanation for this choice is instructive:

> [A]n increased capital gains deduction will tend to offset the effect of inflation by reducing the amount of gain which is subject to tax. Thus, by increasing the deduction, taxable gain should be reconciled more closely with real, rather than merely inflationary gain. However, since the deduction is constant, unlike the automatic adjustments generally provided for in various indexation proposals, it should not tend to exacerbate inflationary increases.

S. Rep. No. 1263, 95th Cong., 2d Sess. 192 (1978). The bill as finally enacted into law adopted the Senate's version. Pub. L. No. 95-600, § 402(a), 92 Stat. 2763, 2867 (1978).

Whenever Congress has been faced with a choice of different methods for dealing with the impact of inflation on capital gains, it has chosen some means other than indexation. Indeed, it has specifically rejected indexation in favor of the capital gains preference. This fact reflects both the understanding that indexation was not allowed under the Code in the first place and the intent of Congress to keep it that way. We believe that Congress's

[28] The capital gains preference continued to be a major feature of the tax laws until 1986. Since the enactment of the 1954 Code, this preference was accomplished in part by allowing individual taxpayers to exclude from gross income a substantial percentage of their capital gain income. *See, e.g.*, 26 U.S.C. § 1202 (1982) (allowing individuals to deduct 60% of their net capital gain from gross income). Section 1202 was repealed in 1986. Pub. L. No. 99-514, § 301(a), 100 Stat. 2085, 2216 (1986).

continued affirmation of an inflation-mitigating mechanism other than indexation — specifically, preferential treatment — together with Treasury's consistent interpretation of "cost" as not allowing indexation, makes this a particularly compelling case for concluding that Congress has ratified Treasury's interpretation of the Code.[29]

V.

The NCF Memorandum advances two other arguments, both of which are unavailing. First, the Memorandum attempts to show that "the Treasury has historically taken a flexible view toward its own interpretation of basis and cost." *Id.* at 29. Yet the supposed instances of this "flexible" view are mischaracterized.

The NCF Memorandum claims that because the 1918 Treasury regulations addressing the capital gains treatment of property acquired by gift equated "cost" with fair market value of the property at the time of the gift, cost "was completely divorced from concepts of historical or original cost." *Id.* at 38. This is mistaken; cost was clearly tied to the fair market value *at the time the asset was acquired by gift or bequest.* Rather than altering the time at which cost is calculated, as the Memorandum argues, the regulations merely substituted an appropriate measure of value where the taxpayer in question had not paid anything for the asset. *See Hartley v. Commissioner*, 295 U.S. 216, 219 (1935) ("The use of the word cost does not preclude the computation and assessment of the taxable gains on the basis of the value of property [at the time of acquisition] rather than its cost, where there is no purchase by the taxpayer, and thus no cost at the controlling date.").[30] Similarly, although Congress subsequently rejected fair market value at the time of the gift in favor of the donor's original cost, *see* Revenue Act of 1921, ch. 136, § 202(a)(2), 42 Stat. 227, 229, Congress never deviated from tying the basis to original cost — the only question was *whose* original cost was appropriate.

The NCF Memorandum also cites the treatment of depreciation and depletion in the 1918 regulations as an example of Treasury's flexibility in defining cost. *Id.* at 40. Those regulations, however, reflected flexibility not in defining "cost" but in determining what "property" the taxpayer owned. When those regulations were challenged in *United States v. Ludey*, 274 U.S. 295

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[29] There is evidence that when Congress eliminated the capital gains preference in 1986, its decision not to replace the preference with indexation was deliberate. As the NCF Memorandum points out, both the Treasury's public tax proposals in 1984 and the President's proposals to the Congress in 1985 recommended some form of indexation *Id.* at 57-58. Moreover, the problem of inflation and the need to index capital gains in the absence of preferential treatment were the subject of congressional hearings. *See, e.g., Tax Reform Act of 1986, Part IV: Hearings Before the Senate Comm. on Finance*, 99th Cong., 2d Sess. 61 (1986).

[30] In any event, to reason from the treatment of gifts in 1918 that the indexation of capital gains is appropriate, the NCF Memorandum would have to demonstrate the legal propriety of indexing the value of a gift from the date its cost is determined. There is no suggestion that such an adjustment would have been permissible.

(1927), the Supreme Court observed that the depreciation allowance was based on the theory that "by using up the [property], a gradual sale is made of it," and thus "[t]he depreciation charged is the measure of the cost of the part which has been sold." *Id.* at 301. *See also id.* at 302 (depletion charge "represents the reduction in the mineral contents of the reserves from which the product is taken"). The Court never deviated from its treatment of cost as a bearing on the price paid: "[t]he amount of the depreciation must be deducted from the *original cost* of the whole [property] in order to determine the cost of that disposed of in the final sale of properties." *Id.* at 301 (emphasis added). *See also* Treasury Memorandum at 30 n.30. The NCF Memorandum concedes as much: "the regulations provided that the *original cost* of property had to be adjusted downward for any depreciation or depletion taken on the property by the taxpayer prior to its sale." *Id.* at 40 (emphasis added). Nothing in the regulations suggested that the starting point for this calculation was not original cost in nominal dollars.

Second, the NCF Memorandum reads *Ludey* as upholding "the Treasury's discretion to fill in gaps left by Congress in the [Code's] capital gains provisions, specifically in the concept of 'cost.'" NCF Memorandum at 66. That reading is flawed in several respects. First, the *Ludey* Court did not rely on the Commissioner's regulatory interpretation; it instead held that "the *revenue acts* should be construed as *requiring* deductions for both depreciation and depletion when determining the original cost of oil properties sold." 274 U.S. at 300 (emphasis added). By its own terms, therefore, *Ludey* is not a decision that upholds agency discretion, but a decision in which the Court construed the statute for itself. *See also id.* at 303-04 (rejecting the Commissioner's method for determining the appropriate deduction).

The Treasury regulations in question in *Ludey* did not fill in "gaps" in the statutory term "cost;" rather, they reconciled two potentially contradictory statutory provisions. Treasury's interpretation of "cost" as requiring adjustments for depreciation was necessary to harmonize the statutory provision taxing capital gains with the statutory provision granting annual deductions for depreciation — that is, to prevent taxpayers from receiving tax benefits twice. *See id.* at 301 ("Any other construction would permit a double deduction for the loss of the same capital assets."). The Court avoided this double deduction based on indications in the statute that no such deduction was intended.[31] For example, the Court noted that Congress intended the allowance for depreciation to reflect a "gradual sale" of the property. Thus, the "depreciation charged is the measure of *the cost of the part which has been sold.*" *Id.* at 301 (emphasis added). Similarly, the Court determined that because depletion allowances were limited by statute to the amount of the

[31] *Cf. United States v. Skelly Oil Co.*, 394 U.S. 678, 695 (1969) (Stewart, J., dissenting) ("In prior decisions [including *Ludey*] disallowing what truly were 'double deductions,' the Court has relied on evident statutory indications, not just its own view of the equities, that Congress intended to preclude the second deduction.").

capital invested, the deduction was meant "to be regarded as a return of capital, not as a special bonus for enterprise and willingness to assume risks." *Id.* at 303.

In the case of indexing for purposes of determining capital gain, there is no conflict in statutory provisions that indexing would resolve. Indeed, as explained above, any interpretation that measures cost at the time of sale rather than purchase would create a positive conflict with provisions allowing deductions for depreciation and other items.

VI.

For all the reasons set forth above, we conclude, as did the Treasury Department, that the term "cost" as used in section 1012 is not ambiguous.[32]

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[32] Because we conclude that in using the term "cost," Congress has left no "gap" for Treasury to fill, no further inquiry is appropriate. We need not address under step two of *Chevron* whether a proposed Treasury regulation indexing capital gains for inflation would be a "reasonable" interpretation of section 1012 of the Code. 467 U.S. at 844.

Immigration and Naturalization Service Participation in Computer Matching Program with Department of Education

The Immigration and Naturalization Service has legal authority to participate in a computer matching program with the Department of Education in order to verify the immigration status of alien applicants for federal student aid under Title IV of the Higher Education Act of 1965.

September 21, 1992

MEMORANDUM OPINION FOR THE SECRETARY
DATA INTEGRITY BOARD

You requested our opinion whether the Immigration and Naturalization Service ("INS") has legal authority to participate in a computer matching program with the Department of Education ("Education") involving alien applicants for federal student aid under Title IV of the Higher Education Act of 1965. As explained in more detail below, we conclude that INS does have legal authority to participate in the matching program at issue.

I.

Pursuant to section 4 of the Computer Matching and Privacy Protection Act of 1988 ("Act"), 5 U.S.C. § 552a(u)(1), the Attorney General established the Data Integrity Board ("Board") to oversee the Justice Department's implementation of the Act. *See* Att'y Gen. Order No. 1351-89 (June 7, 1989). The Act requires the Board to review and approve all written agreements that provide for the disclosure of Department records, including INS records, through computer matching programs. 5 U.S.C. § 552a(u)(3)(A).[1] The review

[1] As defined in the Act, the term "matching program" means

> any computerized comparison of . . . two or more automated systems of records or a system of records with non-Federal records for the purpose of . . . establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, [or] participants in . . . assistance or payments under Federal benefit programs.

5 U.S C. § 552a(a)(8).

and approval process is intended to ensure compliance with relevant statutory and regulatory requirements. *Id.* One of those requirements is that the agreement "specify[] . . . the purpose and legal authority for conducting the [matching] program." *Id.* § 552a(*o*)(1)(A).

In February 1990, the Board approved a matching agreement between INS and Education that gave Education access to the INS-created Alien Status Verification Index ("ASVI") for the purpose of verifying that each alien applying for or receiving federal student aid is eligible for such assistance under 20 U.S.C. § 1091(a)(5).[2] Before granting its approval, the Board requested that INS and Education provide the Board with the "legal authority" for their participation in the program. INS relied upon section 103 of the Immigration and Nationality Act ("INA"), which charges the Attorney General "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a). With minor exceptions not relevant here, the Attorney General has delegated the authority conferred upon him by section 103 to INS. 28 C.F.R. § 0.105(a).

In its initial approval of the INS-Education matching agreement and in a subsequent annual review of the agreement, the Board expressed reservations about the sufficiency of section 103 as authority for INS participation in the program. The Board stated its view that section 121 of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, 3384-94, may have "superseded" section 103 of the INA, at least with respect to matching programs such as the one between INS and Education. If INS lacks statutory authority to participate in the matching program, the Board cannot continue to approve the INS-Education matching agreement.

II.

The Board's reservations about INS's authority to participate in the matching program with Education are based on the Board's concern that the Act prohibits all computer matching programs that are not supported by *specific* legal authority, that is, a statute that specifically refers to, and affirmatively authorizes, the matching program at issue. We conclude that this concern is unfounded. As explained below, the Act requires only that there be legal authority for a source agency to disclose information to a recipient agency

[2] Section 1091(a)(5) provides that in order to receive any federally funded grant, loan, or work assistance, a student must

> be a citizen or national of the United States, a permanent resident of the United States, in the United States for other than a temporary purpose and able to provide evidence from [INS] of his or her intent to become a permanent resident, or a permanent resident of the Trust Territory of the Pacific Islands, Guam, or the Northern Mariana Islands.

without violating the Privacy Act's general prohibition against disclosures of records absent written consent of the persons to whom the records pertain.[3]

Neither the Act itself nor any other legislation of which we are aware can reasonably be read to require that there be specific statutory authority for a matching program in order for an agency to conduct such a program in accordance with the Act. Although the Act mandates that a matching agreement "specify[]" the legal authority for conducting the matching program, 5 U.S.C. § 552a(*o*)(1), that requirement is procedural, not substantive. If the statute required agencies to identify "specific" legal authority for conducting a matching program, an argument might be made that explicit statutory authority was required for the particular program in question. *See Black's Law Dictionary* 1398 (6th ed. 1990) (defining "specific" as "[p]recisely formulated or restricted; definite; explicit; of an exact or particular nature"). The term "specify[]," however, does not modify "legal authority." Instead, it merely indicates that the agency must identify *some* legal authority that supports the program. *See id.* at 1399 (defining "specify" as "[t]o mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another"). Put another way, the term "specify[]" focuses on the nature of the identification, rather than the nature of the thing to be identified.

This reading of the statutory text is supported by the legislative history of the Act, which demonstrates that Congress did not intend to create any additional substantive legal obstacles to the implementation of computer matching programs: "Provided that the new procedures in [the bill] have been complied with, any computer match that was lawful before passage of the bill will continue to be lawful after passage." H.R. Rep. No. 802, 100th Cong., 2d Sess. 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3107, 3128.[4] The House Report on the Act further indicates that the "legal authority" that must be specified in a matching agreement is not legal authority for the matching program per se, but authority that confirms the "legality of [the] disclosures that are necessary to support computer matching." *Id.* at 21, *reprinted in* 1988 U.S.C.C.A.N. at 3127. Thus, the House Report observes that "[w]here records are disclosed by one agency to another for use in matching, the

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[3] The Privacy Act provides in part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be [consistent with one of twelve enumerated exceptions].

5 U.S.C. § 552a(b).

[4] When Congress intends to require agencies to obtain specific authorization in order to engage in a particular activity that is otherwise within their authority, it does so explicitly. For example, in drafting the provisions that govern the temporary or intermittent employment of experts and consultants, Congress specifically provided that an agency may procure the services of experts and consultants only when "authorized by an appropriation or other statute." 5 U.S.C. § 3109(b). Similarly, although an agency might possess general authority to pay publicity experts in furtherance of its statutory mission, Congress has explicitly barred such payment unless funds are "specifically appropriated for that purpose." *Id.* § 3107.

normal *legal authority* for the disclosure comes from a routine use [as provided in 5 U.S.C. § 552a(b)(3)]."[5] *Id.* (emphasis added).

Because the legality of disclosures of agency records is generally determined by reference to the exceptions set forth in 5 U.S.C. § 552a(b), the "legal authority" required by 5 U.S.C. § 552a(*o*)(1) is the particular exception under which disclosure is authorized. *See* Office of Management and Budget, Privacy Act of 1974; Final Guidance Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988, 54 Fed. Reg. 25,818, 25,825 (1989) ("[B]ecause the Matching Act does not itself authorize disclosures from systems of records for the purposes of conducting matching programs, agencies must justify any disclosures under [the Privacy Act, 5 U.S.C. § 552a(b)].").[6] In the case of the INS-Education matching program, the relevant exception is the routine use exception set forth in paragraph (3) of 5 U.S.C. § 552a(b). *See supra* note 5. The program requires INS to disclose records from the ASVI to Education. Consistent with 5 U.S.C. § 552a(a)(7), using the ASVI to verify the immigration status of applicants for or recipients of federal benefits is "compatible" with the purpose for which the ASVI was created. Indeed, it is *the* central purpose of the ASVI. As enacted by section 121(a)(1)(C) of IRCA, 42 U.S.C. § 1320b-7(d)(3) requires the states, in determining eligibility for federally funded benefit programs, to demand proof of satisfactory immigration status and to "utilize the individual's alien file or alien admission number to verify with [INS] the individual's immigration status through an automated or other system." In section 121(c)(1) of IRCA, 100 Stat. at 3391, Congress directed INS to "implement a system for the verification of immigration status under [section 1320b-7(d)(3)]." That automated system is the ASVI.

Consistent with 5 U.S.C. § 552a(e)(4)(D), INS published a notice in the Federal Register to inform the public that states and federal agencies would make use of the ASVI to verify the immigration status of applicants for federal benefit programs. *See* Verification of Immigration Status of Aliens Applying for Benefits Under Certain Programs, 54 Fed. Reg. 5556 (1989). INS also published specific notice of the INS-Education computer matching program. *See* 55 Fed. Reg. 5904 (1990). Because the INS-Education matching program meets the requirements of the routine use exception set forth in

[5] The routine use exception to the general rule against the nonconsensual disclosure of agency records applies when the disclosure would be "for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section." 5 U.S.C. § 552a(b)(3). Under subsection (a)(7), "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." Subsection (e)(4)(D) requires that when an agency establishes or revises any system of records, it must publish a notice in the Federal Register that includes "each routine use of the records contained in the system, including the categories of users and the purpose of such use."

[6] The OMB guidelines further state that "[s]ince the Computer Matching Act provides no independent authority for the operation of matching programs, agencies should cite a specific Federal or State statutory or regulatory basis for undertaking such programs." *Id.* at 25,826. That the "basis" for a matching program may include a *state* statute or a federal or state *regulation* provides additional support for the view that the Act should not be interpreted to require agencies to identify specific federal statutory authority for matching programs.

5 U.S.C. § 552a(b)(3), there is "legal authority" for the matching program within the meaning of 5 U.S.C. § 552a(*o*)(1)(A).[7]

Section 121 of IRCA does not alter these conclusions. Section 121(a)(3) would have required educational institutions participating in federal student assistance programs under Title IV of the Higher Education Act of 1965 to utilize an applicant's "alien file or alien admission number to verify with [INS] the individual's immigration status through an automated or other system." 20 U.S.C. § 1091(h)(3). Institutions using the verification system would have been required to abide by certain procedures designed to protect applicants from erroneous verifications. *See id.* § 1091(h)(4)-(6). Section 121(c)(4)(B) of IRCA, however, gave Education authority to waive the application of IRCA to Title IV programs not later than April 1, 1988, if Education determined that the costs of administering the verification system otherwise required by IRCA would exceed the estimated savings generated by the system.[8] By letter dated March 28, 1988, Education informed Congress of its decision to exercise this waiver authority.

You have asked whether, consistent with the statutory framework, Education can waive the procedural requirements of section 121(a)(3) of IRCA but still use the ASVI, which was implemented pursuant to section 121(c)(1) of IRCA. You suggest that despite the waiver by Education, INS may be constrained to permit access to the ASVI only in accordance with the specific procedures prescribed by section 121. A contrary conclusion, you argue, would be inconsistent with Congress's decision to include student aid programs in section 121 of IRCA and thereby to subject them to that statute's procedural requirements.

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[7] The INS-Education matching program is also consistent with the general statutory authority of the two agencies. The object of the program is to see that federal student assistance is not granted to persons who are not eligible under 20 U.S.C. § 1091(a)(5). *See supra* note 2. It is appropriate for INS to pursue this object because section 1091(a)(5) is a law "relating to the immigration and naturalization of aliens" such that it may be enforced by INS pursuant to section 103 of the INA, 8 U.S.C. § 1103(a). It is appropriate for Education to pursue this object because section 1091(a)(5) is part of Title IV of the Higher Education Act of 1965, and because Education funds and, in conjunction with institutions of higher education, administers programs authorized by Title IV. *See* 20 U.S.C. §§ 1070(b), 1072(a)(1), 1087b(a), 1087aa(a).

[8] Section 121(c)(4)(B), 100 Stat. at 3392, provides:

> If, with respect to [the system of grants, loans, and work assistance under Title IV of the Higher Education Act of 1965], the [Secretary of Education] determines, on the Secretary's own initiative or upon an application by an administering entity and based on such information as the Secretary deems persuasive . . . , that --
>
> (i) [the Secretary] or the administering entity has in effect an alternative system of immigration status verification which —
>
> (I) is as effective and timely as the system otherwise required under the amendments made [to 20 U.S.C. § 1091] with respect to the program, and
>
> (II) provides for at least the hearing and appeals rights for beneficiaries that would be provided under [such amendments], or
>
> (ii) the costs of administration of the system otherwise required under such amendments exceed the estimated savings,
>
> [the] Secretary may waive the application of such amendments to the covered program to the extent (by State or other geographic area or otherwise) that such determinations apply.

We conclude that Education's waiver unequivocally relieves it of the obligation to comply with the procedural requirements of section 121 and that, in the present circumstances, INS may share ASVI-generated data on federal student aid applicants with Education without requiring Education to comply with section 121. Congress's decision to include federal student assistance programs among the programs covered by section 121 was conditional. Although section 121(a)(3) requires each "institution of higher education" to obtain data on immigration status directly from INS, Congress gave Education express authority to waive this requirement if it found, "based on such information as [Education] deem[ed] persuasive," that the cost of institution-by-institution access to the ASVI would exceed the benefits of such access. *See supra* note 8. That is, Congress granted Education the authority to determine whether federal student aid programs should be included in section 121.

Once Education decided to waive the requirements of section 121(a)(3), however, it still faced the problem of enforcing, in a cost-effective manner, the mandate of 20 U.S.C. § 1091(a)(5) that federal student assistance be granted only to aliens in a satisfactory immigration status. *See supra* note 2. A computer matching program granting ASVI access to Education alone, rather than to every one of the thousands of educational institutions around the country, was Education's preferred solution. Nothing in section 121 of IRCA prohibits INS from granting access to the ASVI in these circumstances. Moreover, the institution-by-institution access to the ASVI contemplated by section 121 and the Education-only access established by the INS-Education matching agreement are quite different, precluding the inference that if Congress intended to regulate the former, it must have intended to regulate the latter. That Education need not comply with section 121(a)(3) of IRCA does not mean that federal student aid applicants lack procedural protections against erroneous determinations of their immigration status by the ASVI, because the Computer Matching and Privacy Protection Act sets forth procedures similar to those set forth in section 121(a)(3) that agencies must follow with respect to persons who are subject to matching programs. *See* 5 U.S.C. § 552a(p).

III.

We conclude that INS does have legal authority to participate in a computer matching program with Education in order to verify the immigration status of alien applicants for federal student aid under Title IV of the Higher Education Act of 1965.

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