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OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS

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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 seventeen volumes of opinions published covered the years 1977 through 1993; the present volume covers 1994. The opinions included in Volume 18 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 1994 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.

Opinions of the Office of Legal Counsel in Volume 18

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Authority for Issuing Hatch Act Regulations

The Office of Personnel Management, rather than the Office of Special Counsel, has the authority to promulgate regulations delimiting the scope and nature of permissible activities under the Hatch Act Reform Amendments of 1993.

February 2, 1994

MEMORANDUM OPINION FOR THE DEPUTY SPECIAL COUNSEL
OFFICE OF SPECIAL COUNSEL

You have asked whether the Office of Personnel Management ("OPM") or the Office of Special Counsel ("OSC") has the authority to promulgate regulations delimiting the scope and nature of impermissible political activities under the Hatch Act Reform Amendments of 1993 ("Hatch Act Amendments"), Pub. L. No. 103-94, sec. 2(a), §§ 7321-7326, 107 Stat. 1001, 1001-1004.[1] OPM contends that OSC has plenary authority to issue Hatch Act regulations, whereas OPM is empowered to promulgate Hatch Act regulations only on two narrowly-defined subjects.[2] OSC, on the other hand, asserts that it lacks authority to promulgate Hatch Act regulations. It contends that OPM historically has been responsible for issuing general Hatch Act regulations and that no provision in the Hatch Act Amendments has reassigned or diminished OPM's responsibility in this regard. After examining existing precedent, the statutes outlining the responsibilities of OPM and OSC for implementing the Hatch Act, and the text and legislative history of the Hatch Act Amendments, we conclude that OPM possesses the authority to promulgate regulations explicating the Hatch Act as amended.

I. *The Need for Revised Hatch Act Regulations*

For more than fifty years, the Hatch Act prohibited federal workers from participating in a broad range of political activities. *See United Pub. Workers v. Mitchell*, 330 U.S. 75, 78-79 (1947); *see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973) (upholding Hatch Act provision forbidding federal employees to take an active part in political management or political campaigns). In 1993, however, Congress eliminated many of the restrictions that had previously cabined the political activities of federal employees. *See* Hatch Act Amendments, Pub. L. No. 103-94, 107 Stat. 1001

[1] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from James A Kahl, Deputy Special Counsel, U S Office of Special Counsel (Dec. 28, 1993)

[2] The position of OPM is set forth in a letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management (Jan 28, 1994).

(1993). Despite the steps taken by Congress to liberalize the rules governing the political conduct of federal workers, some political activities remain generally impermissible for all federal employees, *see, e.g., id.* sec. 2(a), § 7323(a)(2), 107 Stat. at 1002 (prohibiting federal employees from soliciting, accepting, or receiving political contributions), and some federal employees must continue to observe stringent limitations upon involvement in the political process. *See, e.g., id.* sec. 2(a), § 7323(b)(3), 107 Stat. at 1003 ("No employee of the Criminal Division of the Department of Justice . . . may take an active part in political management or political campaigns."). If a federal employee violates any of these provisions, which will take effect on February 3, 1994, the employee "shall be removed from his position." *Id.* sec. 2(a), § 7326, 107 Stat. at 1004. Accordingly, federal employees who wish to participate in political activities need immediate guidance in the form of regulations distinguishing permissible political conduct from impermissible activities.[3]

II. *The Division of Hatch Act Regulatory Responsibility*

Until 1978, the Civil Service Commission bore the entire burden of administering the Hatch Act. S. Rep. No. 103-57, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1802, 1805. But in passing the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.) ("Civil Service Reform Act"), Congress divided the responsibility for implementing the Hatch Act into three discrete tasks: the Merit Systems Protection Board ("MSPB") was "charged with adjudicating Hatch Act cases," OPM became "responsible for promulgating Hatch Act regulations," and OSC received the authority "to investigate allegations of Hatch Act violations and present them to the MSPB." *American Fed'n of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984) (footnotes omitted), *cert. denied*, 474 U.S. 909 (1985); *see also* S. Rep. No. 95-969, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2746. In 1989, Congress refined this division of authority by formally separating OSC from the MSPB and independently enumerating the powers and functions of OSC.[4] *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, §§ 3(a)(11)-(13), 103 Stat. 16, 19-21 (adding 5 U.S.C. §§ 1211-1212, which "established the Office of Special Counsel" as an independent body and set forth the powers and functions of the Office of Special Counsel).

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[3] In a January 13, 1994, letter concerning the dispute at hand, Representative William L. Clay and Senator John Glenn made precisely this point: "Given the dire consequences that can result to employees who violate the Hatch Act, in our view it is imperative that Federal employees be provided timely guidance as to what constitutes permissible and impermissible political activity." Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from William L. Clay, Chairman, Committee on Post Office and Civil Service, and John Glenn, Chairman, Committee on Governmental Affairs (Jan. 13, 1994).

[4] The Civil Service Reform Act of 1978 provided for a "Special Counsel of the Merit Systems Protection Board" whose powers were defined in conjunction with those of the MSPB. *See* Civil Service Reform Act, sec. 202(a), §§ 1204-1208, 92 Stat. at 1122-30.

The three-way division of Hatch Act authority now flows from clear statutory pronouncements. *See* 5 U.S.C. § 1204 (defining powers and functions of the MSPB); 5 U.S.C. § 1212 (setting forth powers and functions of OSC); 5 U.S.C. § 1103 (prescribing functions of director of OPM). Specifically, the MSPB has authority to hear and adjudicate "all matters within the jurisdiction of the Board," 5 U.S.C. § 1204(a)(1), take action to enforce its own orders, *id.* § 1204(a)(2), "prescribe such regulations as may be necessary for the performance of its functions," *id.* § 1204(h), and review "rules and regulations of the Office of Personnel Management." *Id.* § 1204(a)(4). This last responsibility, of course, presupposes that OPM will issue general regulations. *See American Fed'n of Gov't Employees*, 747 F.2d at 755 (MSPB's role includes "the review of Hatch Act regulations promulgated by the OPM").

OSC possesses the authority to investigate and prosecute alleged Hatch Act violations, 5 U.S.C. §§ 1212(a), 1215(a), 1504, and "prescribe such regulations as may be necessary to perform the functions of the Special Counsel."[5] *Id.* § 1212(e). The regulations issued by OSC are not subject to oversight by the MSPB. *See* 5 U.S.C. § 1204. OSC also has the power to issue advisory opinions on Hatch Act questions, *id.* § 1212(f), but these advisory opinions have no binding effect on the MSPB. *See American Fed'n of Gov't Employees*, 747 F.2d at 752-55 (explaining the nature and effect of "the advice the Special Counsel is permitted to give").

OPM derives its authority over personnel management from two sources. First, specific responsibilities are vested in the Director of OPM by 5 U.S.C. § 1103, including the obligation to "publish in the Federal Register general notice of any rule or regulation which is proposed by [OPM] and the application of which does not apply solely to [OPM] or its employees." *Id.* § 1103(b)(1). Second, the Director of OPM is empowered to assume "authority for personnel management functions" delegated by the President.[6] *Id.* § 1104(a)(1). The Director of OPM

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[5] OPM asserts that this provision empowers OSC to issue Hatch Act regulations. Both the MSPB and OSC have been granted the basic authority to prescribe all regulations necessary to perform their functions. Indeed, the language of the statutes vesting this fundamental operational authority in the MSPB and OSC is virtually identical. *Compare* 5 U.S.C. § 1204(h) ("The [Merit Systems Protection] Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions.") *with* 5 U.S.C. § 1212(e) ("The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel."). The similarity in the language of these two statutes undermines OPM's claim that 5 U.S.C. § 1212(e) confers upon OSC the power to issue Hatch Act regulations and bolsters OSC's interpretation of 5 U.S.C. § 1212(e) as a simple assignment of the authority to promulgate the regulations necessary to run OSC itself. Indeed, if OPM is correct in interpreting 5 U.S.C. § 1212(e) as sufficiently capacious to accommodate the function of issuing Hatch Act regulations, then the MSPB similarly possesses plenary authority to promulgate Hatch Act regulations under the virtually identical language of 5 U.S.C. § 1204(h). The more logical interpretation dictates that the MSPB and OSC have been granted nothing more than the authority to issue all regulations that they deem necessary for their own internal operations.

[6] The Director of OPM also derives residual authority from section 102 of the President's Reorganization Plan of 1978, which transferred to the Director of OPM "all functions vested by statute in the United States Civil Service Commission" that were not expressly assigned to any other entity. Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1979), *reprinted in* 5 U.S.C. § 1101 note, *and in* 92 Stat. 3783, *see also American Fed'n of Gov't Employees*, 747 F.2d at 753 n.13 (identifying President's Reorganization Plan as source of OPM authority).

may, in turn, delegate to the heads of executive branch agencies "any function vested in or delegated to the Director [of OPM]," *id.* § 1104(a)(2), but this broad authority to delegate cannot "be construed as affecting the responsibility of the Director [of OPM] to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations." *Id.* § 1104(b)(3).

The statutory provisions apportioning the power once held exclusively by the Civil Service Commission clearly authorize OPM to issue general regulations under the Hatch Act. Consistent with these statutes, OPM revised the existing Hatch Act regulations on April 24, 1984. *See* Political Activity of Federal Employees, 49 Fed. Reg. 17,431, 17,432-33 (1984) (amendments codified at 5 C.F.R. §§ 733.101(g)-(j), 733.122(b)(12)-(16)(1993)). OPM rejected an attack upon its authority to issue Hatch Act regulations by emphatically stating that "OPM believes that it does have the authority to regulate the partisan political activity of Federal employees."[7] *Id.* at 17,431. Although OPM now argues that it lacks authority to undertake such a task, the tripartite system of Hatch Act implementation — including the statutory language setting up the division of labor — cuts against OPM's position. The MSPB has been assigned the task of reviewing "rules and regulations of the Office of Personnel Management," 5 U.S.C. § 1204(a)(4), yet the statute outlining the powers and functions of the MSPB contains no corresponding assignment of responsibility for screening regulations promulgated by OSC. *See* 5 U.S.C. § 1204. Instead, OSC gives advice in the form of opinions that have no binding effect on the MSPB. *Id.* § 1212(f). As the D.C. Circuit has explained, these interrelated statutes provide the MSPB with oversight authority "in the review of Hatch Act regulations promulgated by the OPM," *American Fed'n of Gov't Employees*, 747 F.2d at 755, while insulating the MSPB from any concern about the myriad non-binding OSC advisory opinions that "offer essentially a forecast, albeit an educated one, of the way the MSPB would rule if an actual case materialized." *Id.* at 753-54.

III. *Congressional Ratification of OPM's Role*

The regime dividing the responsibility for Hatch Act implementation into three discrete tasks remained in place while Congress formulated the Hatch Act Amendments, and apparently informed congressional debate concerning the allocation of regulatory responsibility. *See, e.g.*, 139 Cong. Rec. S8610 (daily ed. July 13, 1993) (statement of Senator Roth indicating that, in lieu of congressional amendment of the Hatch Act, "the Office of Personnel Management, in consultation with the Office of Special Counsel as well as the Department of Justice, should promulgate new regulations to clarify the restrictions on political activity"). In

[7] OPM cited the following authorities to support its revision of 5 C.F.R. pt. 733: "5 U.S.C. 3301, 3302, 7301, 7321, 7322, 7323, 7324, 7325, and 7327; Reorganization Plan No. 2 of 1978, 3 CFR 1978 Comp. p.323, and E.O. 12107, 3 CFR 1978 Comp. p.264." *See* 49 Fed. Reg. at 17,432.

fact, while the Hatch Act Amendments wended their way through Congress, OPM expressly acknowledged its obligation to issue Hatch Act regulations: on April 26, 1993, OPM reported in its semiannual regulatory agenda that it intended to review the existing regulations regarding political activity of federal employees. *See* Office of Personnel Management Semiannual Regulatory Agenda, 58 Fed. Reg. 25,163, 25,169 (1993). In adopting the Hatch Act Amendments, which include no provision reassigning any regulatory functions among the MSPB, OSC, and OPM, Congress ratified the roles historically adopted by the three agencies.

The legislative history of the Hatch Act Amendments fortifies the conclusion that Congress approved of OPM's traditional obligation to issue Hatch Act regulations. At the inception of the process to amend the Hatch Act during the 103d Congress, the House of Representatives broke with settled practice by assigning to the Special Counsel the obligation to "prescribe any rules and regulations necessary to carry out" the Hatch Act amendments. H.R. 20, 103d Cong., § 2(a) (1993) (proposed version of 5 U.S.C. § 7327 published at 139 Cong. Rec. 3983 (1993)). The Senate, in contrast, passed a bill striking out the entire House bill — including the assignment of rule-making authority to the Special Counsel — and adding provisions that authorized OPM to prescribe regulations for certain conduct. 139 Cong. Rec. S9169, S9170-71 (daily ed. July 21, 1993). The House ultimately acceded to the Senate version of the Hatch Act reform bill, including the provisions assigning the responsibility for issuing various regulations to OPM. *Id.* at H6814, H6815-16 (daily ed. Sept. 21, 1993).

The tripartite system of Hatch Act implementation created in 1978 has not been altered by the Hatch Act Amendments, which assign to OPM the authority to prescribe regulations on two specific subjects in language that treats OPM as the agency with plenary authority to issue Hatch Act regulations. *See* Hatch Act Amendments, sec. 2(a), § 7325, 107 Stat. at 1004 ("The Office of Personnel Management may prescribe regulations permitting employees" in certain geographic areas "to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside."); *id.* sec. 8(a), § 3303(e), 107 Stat. at 1007 ("Under regulations prescribed by the Office of Personnel Management, the head of each agency shall ensure that employees and applicants are given notice of the provisions of this section" pertaining to political recommendations.). In contrast, the Hatch Act Amendments mention OSC only in the context of broadening the investigative authority of the Special Counsel. *See id.* sec. 3, § 1216(c), 107 Stat. at 1004. These provisions prompted the Congressional Budget Office to observe that "[t]he bill would require the Office of Personnel Management (OPM) to issue the necessary regulations and the Office of Special Counsel to enforce these regulations." S. Rep. No. 103-57 at 22, *reprinted in* 1993 U.S.C.C.A.N. at 1823. We agree with this assessment.

IV. *Conclusion*

Since 1978, OPM has assumed the responsibility for promulgating Hatch Act regulations. The Hatch Act Amendments ratified and supplemented OPM's authority to issue general Hatch Act regulations, while concomitantly reaffirming and augmenting OSC's traditional role in investigating and prosecuting Hatch Act violations. Accordingly, we conclude that OPM has the authority to promulgate revised Hatch Act regulations.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Denial of Public Access to Trial Exhibits in Child Pornography Prosecutions

Courts may deny public access to exhibits entered into evidence in child pornography prosecutions

February 10, 1994

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

You have asked whether courts may deny public access to exhibits entered into evidence in child pornography prosecutions.[1] Because the privacy interests of the children depicted in such trial exhibits overcome the general presumption in favor of public access to judicial records, we conclude that prosecutors may ask courts to prohibit access to child pornography exhibits, and that courts may enter orders providing this type of relief.

I. *The Theory Supporting Public Access to Trial Exhibits*

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted). Moreover, this common law right of access to judicial records does not depend "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Id.* But "the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598. In this respect, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599 (footnote omitted).

While the Supreme Court has acknowledged the common law right of access to court records, the Court has eschewed constitutional theories proffered in support of a more expansive right to inspect court documents.[2] *Nixon*, 435 U.S. at 608-10

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[1] The right of access afforded to the general public is coterminous with the right of access granted to the press *Pell v. Procunier*, 417 U S 817, 833-34 (1974); *cf. also Nixon v Warner Communications, Inc* , 435 U S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public "). Hence, the term "public access" should be regarded as synonymous with press access.

[2] In discussing access to actual court proceedings, the Supreme Court has consistently distinguished between the Sixth Amendment, which empowers defendants to demand open proceedings in criminal cases, *see, e.g* , *Waller v. Georgia*, 467 U S 39, 44-47 (1984), and the First Amendment, which grants the press and public the qualified right to attend criminal proceedings even when the defendant wishes to have the proceedings closed *See, e g* , *Press-Enterprise Co v Superior Court of California*, 478 U.S 1, 7-13 (1986); *Globe Newspaper Co v Superior Court of Norfolk County*, 457 U.S 596, 603-07 (1982) These

(rejecting arguments based on First and Sixth Amendments). With regard to the First Amendment guarantee of freedom of the press, the Court has held that, within the courthouse, "'a reporter's constitutional rights are no greater than those of any other member of the public.'" *Id.* at 609 (quoting *Ester v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring)). With respect to the Sixth Amendment right to a public trial, the Court has concluded that this requirement "is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.* at 610. Thus, the single rationale supporting public access to trial exhibits flows from the common law right to inspect and copy judicial records. *Id.* at 597; *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1292-93 (9th Cir. 1986).

II. *Presumptions, Privacy Concerns, and the Balancing Test*

Application of the common law right of access to judicial records and documents requires a balancing of the factors militating for and against public viewing of the records and documents at issue. *Nixon*, 435 U.S. at 602; *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981). The starting point for the balancing test "is the presumption — however gauged — in favor of public access to judicial records." *Nixon*, 435 U.S. at 602; *see also Valley Broad.*, 798 F.2d at 1293 (collecting cases). Because of this presumption, the press and public ordinarily must be allowed to inspect and copy trial exhibits. *Id.*; *Criden*, 648 F.2d at 823. But even when public disclosure has occurred through the admission of evidence at trial, "there are instances where the right to [inspect and] copy evidence already made public has been denied pursuant to the court's power to prevent use of evidence for improper purposes." *Id.* at 825. For example, courts retain the authority to deny public access to court records that might be "'used to gratify private spite or promote public scandal.'" *Nixon*, 435 U.S. at 598. Courts likewise may prohibit public access to trial exhibits that "would result in the great public embarrassment of a third party." *Valley Broad.*, 798 F.2d at 1294 n.7. For this reason, a district court could properly foreclose public access to videotapes made by a defendant prior to raping a kidnap victim, even though the "evidence had been shown in the courtroom," "because further broadcast would support sensationalism, would not serve the public interest, and 'would impinge upon the precious privacy rights of . . . the unfortunate victim of the crime.'" *Criden*, 648 F.2d at 825 (quoting *In re Application of KSTP Television*, 504 F. Supp. 360, 362 (D. Minn. 1980)).

The privacy concerns that can justify denial of public access to trial exhibits are most compelling in the context of child pornography prosecutions. *See Valley Broad.*, 798 F.2d at 1294 (factors weighing against public access to court records include "the likelihood of an improper use, 'including publication of . . . porno-

decisions, of course, do not speak to the question of public access to court records and exhibits introduced at trial. *See United States v Beckham*, 789 F 2d 401, 411, 413 (6th Cir. 1986) (contrasting First Amendment right to attend trial and Sixth Amendment right to open proceedings with common law right to inspect and copy public records).

graphic . . . materials'") (quoting *United States v. Criden*, 648 F.2d 814, 830 (3d Cir. 1981) (Weis, J., concurring in part and dissenting in part)). As the Supreme Court has explained, pornographic materials involving children "are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *New York v. Ferber*, 458 U.S. 747, 759 (1982). Moreover, distribution of child pornography "violates 'the individual interest in avoiding disclosure of personal matters.'" *Id.* at 759 n.10 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). Consequently, children who appear in pornographic pictures and films suffer a personal invasion with each viewing of the material.[3] Indeed, one district court employed precisely this reasoning in denying press access to videotapes depicting relations and conversations between a kidnap victim and the kidnapper who subsequently raped her. *In re Application of KSTP Television*, 504 F. Supp. at 362 ("Release of the tapes for public dissemination would impinge upon the precious privacy rights of Mary Stauffer, the unfortunate victim of the crime."). Because the tapes had previously been shown during the trial of the kidnapper, the district court concluded that "any additional information inherent in the video tape form can serve only to accent the morbid and lurid details of the crime and pander to lascivious curiosity." *Id.* at 363.

The decision in *KSTP Television* has given rise to the settled principle that concern for the privacy of third parties can override the presumption of access to judicial records. *Valley Broad.*, 798 F.2d at 1294 & n.7 (citing *KSTP Television* with approval); *In re Application of National Broad. Co.*, 653 F.2d 609, 619-20 (D.C. Cir. 1981) (same); *Criden*, 648 F.2d at 825 (same). In child pornography prosecutions, this principle rebuts the presumption of public access to trial exhibits. *See id.* (discussing *KSTP Television*); *cf. also Nixon*, 435 U.S. at 598 (noting that "the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful, and sometimes disgusting, details of a divorce case'") (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)). By interposing concern for the privacy of the children who appear in the pornographic exhibits admitted at trial, the government can defeat common law claims asserted in support of public access to such exhibits, and courts can take action to prevent the public availability of the exhibits.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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[3] This problem is compounded when the press and public receive permission to copy exhibits in child pornography prosecutions.

> [A] press representative in reporting a trial may adequately inform the general public about a challenged motion picture film by describing it as pornographic. It is not necessary that the film or excerpts be released for use in the evening TV news Indeed, to permit such a showing under the guise of news would only thwart the laws prohibiting exhibition.

Criden, 648 F.2d at 831 (Weis, J , concurring in part and dissenting in part)

Whether the Office of the Vice President is an "Agency" for Purposes of the Freedom of Information Act

The Office of the Vice President is not an "agency" for purposes of the Freedom of Information Act

February 14, 1994

MEMORANDUM OPINION FOR THE
COUNSEL AND DIRECTOR OF ADMINISTRATION
OFFICE OF THE VICE PRESIDENT

This memorandum responds to your request for the opinion of the Office of Legal Counsel as to whether the Office of the Vice President ("OVP") is an "agency" for purposes of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). For the reasons set forth below, we conclude that it is not.

The FOIA definition of "agency" includes an "establishment in the executive branch of the Government (including the Executive Office of the President)." *Id.* § 552(f)(1). Relying on the conference committee report explaining the 1974 amendment to the definition, the Supreme Court has held that the term "agency" does not cover "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)).

As a threshold matter, we note that a court might decide that the OVP, which is only a small personal staff for the Vice President, does not even qualify as an "establishment." We believe that is a reasonable position, although the law is unsettled as to the definition of "establishment." There is no need to rely on that position, however, because in our opinion the following analysis, based on case law, definitively establishes that the OVP is not an "agency."

The OVP clearly satisfies the Supreme Court's "sole function" test, because the Vice President and his staff do not have "substantial independent authority in the exercise of specific functions," *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), but rather have the sole function of advising and assisting the President. *See generally Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993). The Vice President has no constitutional or statutory responsibilities as an executive branch officer,[1] and the common understanding that his executive role is limited to advising and assisting the President (as determined by each President) is confirmed by the statute authorizing appropriations and other assistance and services for the Vice

[1] There is no need, of course, to consider the Vice President's responsibilities as the President of the Senate, *see* U S Const art I, § 3, cl. 4, because the FOIA does not apply to Congress.

President: "In order to enable the Vice President to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." 3 U.S.C. § 106(a).[2]

Indeed, because of the constitutional status of the Vice President, a court might decide that it is not even necessary to consider whether the OVP satisfies the "sole function" test. In holding that the President is not an agency for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), the Supreme Court adopted an "express statement" rule:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992). Because the Vice President is also a constitutional officer, *see* U.S. Const. art. II, § 1, cl. 1, the same "express statement" rule should apply in the present context, which would necessitate an express reference to the Vice President rather than the general "establishment in . . . the Executive Office of the President" formulation. Thus, the absence of such an express statement in the FOIA definition of "agency" requires the conclusion that Congress did not intend to subject the Vice President and his Office to the FOIA.

The understanding that the Vice President and his staff, like the President and his staff, are outside the coverage of the FOIA is confirmed by the treatment of the OVP under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 ("PRA"). These two statutes are "in pari materia" and should be construed together. The PRA covers all EOP records that are not covered by the FOIA. *See* H.R. Rep. 95-

[2] The OVP thus appears to present almost as straightforward and simple a case as the Office of the President (i.e., the White House Office) with respect to satisfying the "sole function" test. "The legislative history [of FOIA's 'agency' definition] is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President." *Kissinger*, 445 U.S. at 156 (holding that Henry Kissinger's notes in capacity of Assistant to the President were not "agency records") More difficult questions are presented by the larger Executive Office of the President ("EOP") units with more diverse responsibilities, such as the Council on Environmental Quality, which has been held to be a FOIA agency, *see Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980), or the National Security Council ("NSC"), the FOIA status of which is being litigated, *see Armstrong v. Executive Office of President*, 1 F.3d 1274, 1296 (D.C. Cir. 1993), and which this Office has recently opined is not a FOIA agency, *see* Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser, NSC, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Status of NSC as an "Agency" under FOIA* (Sept. 20, 1993).

1487, at 3 (1978) ("The definition of Presidential records was designed to encompass those records which currently fall outside the scope of the [FOIA].") *reprinted in* 1978 U.S.C.C.A.N. 5732, 5734; 44 U.S.C. § 2201(2)(B)(i) ("Presidential records" do not include "official records of an agency (as defined in [the FOIA]).").
The PRA contains an express statement that OVP records are presidential records rather than agency records. 44 U.S.C. § 2207 ("Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records."). *See generally Armstrong v. Bush*, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (explaining that components of the EOP fall into two categories — those that create presidential records subject to the PRA and those that create federal (i.e., agency) records subject to the Federal Records Act and the FOIA; OVP is in former category).

For the foregoing reasons, we conclude that the Office of the Vice President is not an "agency" for purposes of the Freedom of Information Act.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities

The Emoluments Clause of the Constitution does not apply in the cases of government employees offered faculty employment by a foreign public university where it can be shown that the university acts independently of the foreign state when making faculty employment decisions.

March 1, 1994

MEMORANDUM OPINION FOR THE CHIEF COUNSEL
GODDARD SPACE FLIGHT CENTER
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

This memorandum responds to your request of September 9, 1993, for our opinion concerning the applicability of the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8 ("Emoluments Clause"), to the employment by the University of Victoria in British Columbia, Canada, of two scientists on leave without pay from the Goddard Space Flight Center ("Goddard"), a component of the National Aeronautics and Space Administration ("NASA").[1] We conclude that the Emoluments Clause does not apply in these cases.

I.

As Goddard has explained, Drs. Inez Fung and James K. B. Bishop have sought your administrative approval for employment as Professors in the School of Earth and Ocean Sciences at the University of Victoria until August 31, 1994. During that period, the two scientists would be in Leave Without Pay status from their positions at the Goddard Institute for Space Studies, a component of Goddard. (Goddard is itself a NASA field installation.) Both scientists hold the position of Aerospace Technology (AST)/Global Ecology Studies at the GS-15 level. For their services in teaching and research while on leave, Drs. Fung and Bishop would be paid $85,000 and $70,000 respectively by the University of Victoria.

The University of Victoria operates under the University Act, a statute enacted by the legislature of British Columbia. *See* University Act, R.S.B.C., ch. 419 (1979) (Can.) ("University Act"). The Act provides that the university is to consist of a chancellor, convocation, board, senate, and faculties. University Act, § 3(2). The chancellor is to be elected by the members of the convocation, *id.* § 11(1), and is to serve on the board of governors, *id.* § 19(a). The convocation is composed of

[1] *See* Letter for Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, from Lawrence F. Watson, Chief Counsel, Goddard Space Flight Center, National Aeronautics and Space Administration (Sept. 9, 1993) (the "Goddard Mem.")

the chancellor, the president, the members of the senate, all faculty members, all graduates, all persons added to the roll of the convocation by the senate, and all other persons carried on the roll before July 4, 1974. *Id.* § 5(1).

The Supreme Court of Canada has outlined the powers of the boards of governors and senates subject to the University Act:

> Under the *University Act*, R.S.B.C. 1979, c. 419, the management, administration and control of the property, revenue, business and affairs of the university are vested in a board of governors consisting of 15 members. Eight of the members are appointed by the Lieutenant Governor in Council, but two of these must be nominated by the alumni association. The provincial government, therefore, has the power to appoint a majority of the members of the board of governors, but it does not have the power to select a majority. The academic government of the university is vested in the senate, only a minority of the members of which are appointed by the Lieutenant Governor.

Harrison v. University of British Columbia, [1990] 3 S.C.R. 451, 459 (Can.) (plurality op.). Further, "under s. 22(1) of the Act, the Lieutenant Governor 'may, at any time, remove from office an appointed member of the board.'" *Id.* at 467 (Wilson, J., dissenting).

In general, the "management, administration and control of the property, revenue, business and affairs of the university are vested in the board." University Act, § 27. In addition, the university "enjoys special government-like powers in a number of respects and the exercise of these would presumably fall under the jurisdiction of the board. It has the power to expropriate property under s. 48 and its property is protected against expropriation under s. 50. It is exempt from taxation under s. 51. The board may also borrow money to meet University expenditures (s. 30) and appoint advisory boards for purposes it considers advisable (s. 33). The University may not dispose of its property without the approval of the Lieutenant Governor (s. 47(2))." *Harrison*, [1990] 3 S.C.R. at 467 (Wilson, J., dissenting).

As pointed out above, the academic governance of the university is vested in the senate. University Act, § 36. The senate is composed of a number of persons, including the chancellor, the president, deans, administrators, faculty, students, four members of convocation, representatives of affiliated colleges, and four persons appointed by the Lieutenant Governor. *Id.* § 34(2). Thus, only a relatively small minority of the senate will consist of governmental appointees.[2]

[2] "With respect to some important matters, however, the decisions of the senate are effectively controlled by the board of governors." *Harrison*, [1990] 3 S.C.R. at 469 (Wilson, J., dissenting). For example, "every resolution passed by the senate respecting the establishment or discontinuance of any faculty, department, course of instruction, chair fellowship, scholarship, exhibition, bursary or prize (s. 36(1)) as well as internal

Finally, the faculty is "constituted by the board, on the recommendation of the senate." University Act, § 38. The faculty has various powers, including the power to determine, subject to the approval of the senate, courses of instruction. *Id.* § 39(d).

II.

The Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, provides:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Goddard advances two basic arguments for concluding that the Emoluments Clause is inapplicable in these cases. First, it maintains that the University of Victoria is not a "foreign State" within the meaning of the Clause. Second, it suggests that when a Federal employee is on Leave of Absence Without Pay status, he or she does not occupy an "Office of Profit or Trust" under the United States.

For reasons somewhat different from Goddard's, we agree that the Clause is inapplicable here. Although we believe that foreign public universities, such as the University of Victoria, are presumptively foreign states under the Emoluments Clause, we also find that, in this case, the university can be shown to be acting independently of the foreign state with respect to its faculty employment decisions. Because such a showing can be made, we conclude that in that context the University of Victoria should not be considered a foreign state.

A.

The Emoluments Clause was adopted unanimously at the Constitutional Convention, and was intended to protect foreign ministers and other officers of the United States from undue influence and corruption by foreign governments — a danger of which the Framers were acutely aware.[3] James Madison's notes on the Convention for August 23, 1787, report:

> Mr[.] Pinkney urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence and

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faculty matters and terms of affiliation with other universities is of no force or effect unless approved by the board (s 37)." *Id.*

[3] *See, e.g., The Federalist* No 22, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.")

> moved to insert — after Art[.] VII sect[.] 7. the clause following — "No person holding any office of profit or trust under the U.S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State["] which passed nem: contrad.

2 *The Records of the Federal Convention of 1787*, at 389 (M. Farrand ed., 1966) ("Records"); *see also* 3 *id.* at 327 (remarks of Governor Randolph).[4] "Consistent with its expansive language and underlying purpose, the provision has been interpreted as being 'particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based upon our historic policies as a nation.'" *Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 (1987) (quoting 24 Op. Att'y Gen. 116, 117 (1902)).

Our Office has been asked from time to time whether foreign entities that are public institutions but not diplomatic, military, or political arms of their government should be considered to be "foreign State[s]" for purposes of the Emoluments Clause. In particular, we have been asked whether foreign public universities constitute "foreign State[s]" under the Clause. Our prior opinions on this subject have not been a seamless web. Thus, in an opinion that Goddard cites and relies upon, we concluded that while the University of New South Wales was clearly a public institution, it was not so clear that it was a "foreign State" under the Emoluments Clause, given its functional and operational independence from the federal and state governments in Australia.[5] Accordingly, we opined that the question posed there — whether a NASA employee could accept a fee of $150 for reviewing a Ph.D. thesis — had to be answered by considering the particular circumstances of the case, in order to determine whether the proposed arrangement had the potential

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[4] The Emoluments Clause builds upon practices that had developed during the period of the Confederation:

> It was the practice of Louis XVI of France to give presents to departing ministers who signed treaties with France Before he left France in mid-1780, Arthur Lee received a portrait of Louis set in diamonds atop a gold snuff box In October 1780 Lee turned the gift over to Congress, and on 1 December Congress resolved that he could keep the gift In September 1785 Benjamin Franklin informed Secretary for Foreign Affairs John Jay that, when he left France, Louis XVI presented him with a miniature portrait of himself, set with 408 diamonds In October Jay recommended to Congress that Franklin be permitted to keep the miniature in accordance with its December 1780 ruling about a similar miniature given to Lee In March 1786 Congress ordered that Franklin be permitted to keep the gift At the same time, Congress also allowed Jay himself to accept the gift of a horse from the King of Spain even though Jay was then engaged in negotiations with Spain's representative, Don Diego de Gardoqui

10 *The Documentary History of the Ratification of the Constitution* 1369 n 7 (John P Kaminski et al. eds , 1993), *see also President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L C. 187, 188 (1981) (discussing background of the ratification of the Clause).

[5] *See* Memorandum for H Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr , Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Emoluments Clause Questions raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* (May 23, 1986)

for corruption or improper foreign influence of the kind that the Emoluments Clause was designed to address. On other occasions, however, we have construed the Emoluments Clause to apply to public institutions of higher education in foreign countries without engaging in such an inquiry.[6]

In re-examining these precedents, we have considered the claim that foreign universities, even if "public" in character, should generally not be considered to be instrumentalities of foreign states for purposes of the Emoluments Clause. On behalf of this view, it can be argued that the Clause was designed to guard against the exercise of improper influence on United States officers or employees by the political, military, or diplomatic agencies of foreign states, because payments by those agencies are most likely to create a conflict between the recipient's Federal employment and his or her outside activity. Because public universities do not generally perform such functions, they ought not, on this analysis, to be brought within the Clause.[7]

After considering the question carefully, we have concluded that such an interpretation of the Emoluments Clause is mistaken. Foreign public universities are, presumptively, foreign states within the meaning of the Clause.[8]

The language of the Emoluments Clause is both sweeping and unqualified.[9] The Clause in terms prohibits those holding offices of profit or trust under the United States from accepting "*any* present, Emolument, Office, or Title, *of any kind whatever*" from "*any* . . . foreign State" unless Congress consents. U.S. Const. art. I, § 9, cl. 8. (emphases added). There is no express or implied exception for emoluments received from foreign states when the latter act in some capacity other than the performance of their political, military, or diplomatic functions. The decision whether to permit exceptions that qualify for the Clause's absolute prohibition or that temper any harshness it may cause is textually com-

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[6] *See, e g* , Memorandum to File from Robert J. Delahunty, Acting Special Counsel, *Re. Applicability of Emoluments Clause to Employment of CFTC Attorney by East China Institute of Politics and Law* (Aug. 27, 1992), Memorandum to Files from Barbara E Armacost, *Re Emoluments Clause and Appointment to the President's Committee on the Arts and Humanities* (Nov 15, 1990) The General Accounting Office has reached a similar result in a related context *See* 44 Comp. Gen 130 (1964) (retired Coast Guard officer subject to recall to active duty held not entitled to retirement pay for period in which he was teaching for Department of Education of State of Tasmania, Australia)

[7] *See* Gerald S Schatz, *Federal Advisory Committees, Foreign Conflicts of Interest, The Constitution, and Dr Franklin's Snuff Box*, 2 D C. L Rev 141, 163, 166 (1993) ("The Emoluments Clause's reference to foreign states was a reference to foreign governments' acts in their sovereign capacity, as distinguished from the acts . . of foreign governmental entities without the legal capacity to represent the national sovereign . The Clause addresses the problem of conflict of interest on the part of a U S Government functionary vis-à-vis a foreign sovereign in a sovereign capacity The Clause thus may not be assumed to disqualify from U S Government service . an academic paid by a foreign government with which the officer does not deal.").

[8] *See also Applicability of the Emoluments Clause To Non-Government Members of ACUS*, 17 Op O L C 114, 121-23 (1993) (opining that Emoluments Clause applies to foreign public universities)

[9] *Accord* 49 Comp Gen 819, 821 (1970) (the "drafters [of the Clause] intended the prohibition to have the broadest possible scope and applicability")

mitted to *Congress*, which may give consent to the acceptance of offices or emoluments otherwise barred by the Clause.[10]

Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign states even when they act through instrumentalities, such as universities, which do not perform political, military, or diplomatic functions. Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty.[11] That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research.[12] Moreover, institutions of higher learning are often substantially funded, whether directly or indirectly, by their governments, and university research programs or other academic activities may be linked to the missions of their governmental sponsors, including national scientific and defense agencies.[13] Thus, United States Government officers or employees might well find themselves exposed to conflicting claims on their interests and loyalties if they were permitted to accept employment at foreign public universities.[14]

Finally, Congress has exercised its power under the Emoluments Clause to create a limited exception for academic research at foreign public institutions of learning. The Foreign Gifts and Decorations Act provides in part that Federal employees may accept from foreign governmental sources "a gift of more than minimal value when such gift is in the nature of an educational scholarship." 5 U.S.C. § 7342(c)(1)(B).[15] Thus, Congress has recognized that foreign governmental bodies may wish to reward or encourage scholarly or scientific work by employees of our Government, but has carefully delimited the circumstances in which Federal employees may accept such honors or emoluments That suggests that Congress

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[10] Accordingly, Congress has acted in appropriate cases to relieve certain classes of government personnel, e g , retired military officers, from applications of the Clause. *See Ward v United States*, 1 Cl Ct. 46 (1982).

[11] *See Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 100 (1986)

[12] Consistent with this view, we have opined that an employee of the National Archives could not serve on an international commission of historians created and funded by the Austrian Government to review the wartime record of Dr. Kurt Waldheim, the President of Austria. *See generally*, 11 Op O L C. 89 (1987)

[13] Goddard's own link with Columbia University in New York City, *see* Goddard Mem. at 3, 7, is illustrative.

[14] Of course, the same predicament could arise if Government employees worked at *private* universities abroad (or even in the United States). But the fact that the Emoluments Clause does not address every situation in which Government employees might be subjected to improper influence from foreign states is no reason to refuse to apply it to the cases which it *does* reach.

[15] We have opined that this exception applied to an award of approximately $24,000 by a foundation acting on behalf of the West German Government to a scientist employed by the Naval Research Laboratory We reasoned that a "program designed to honor United States scientists and enable them to stay for an extended period at research institutes in the Federal Republic of Germany to carry out research of the Awardee's own choice seems to be in the nature of an educational scholarship, acceptance of which Congress has permitted." Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel at 4 (Mar 17, 1983) (internal quotation omitted).

believes both that the Emoluments Clause extends to paid academic work by Federal employees at foreign public universities and that the Clause's prohibition on such activity should generally remain in force.

Accordingly, we conclude that foreign governmental entities, including public universities, are presumptively instrumentalities of foreign states under the Emoluments Clause, even if they do not engage specifically in political, military, or diplomatic functions.[16]

B.

Having found that foreign public universities may and presumptively do fall under the Emoluments Clause, we turn next to the question whether the University of Victoria in particular is an instrumentality of a foreign state (the province of British Columbia), and hence within the Clause. We conclude that it is not, at least with respect to the faculty employment decisionmaking that is in issue here. Goddard contends:

> The ability of [Canadian] federal or provincial government officials to influence and control the actions of [the University of Victoria's board, senate, and faculty] is most possible concerning the Board, but in all three cases is minimized by the other members of the organizations, the sources from which those members are obtained, the method of their ominations and appointments, and the procedures concerning replacement . . . .
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> Thus, it appears [that] the University of Victoria is established as a largely self-governing institution, with minimal influence exercisable over the daily affairs and even general policies of the University.

Goddard Mem. at 6.

[16] We would also reject any argument that foreign public universities should be excluded from the purview of the Emoluments Clause on the theory that the Clause must be taken to prohibit only the acceptance of office or emoluments bestowed by a foreign state while engaged in performing "traditional" governmental functions, i e , functions that governments would normally have performed at the time of the framing The theory assumes that governmental support for higher education would not have been among such functions. The argument has several flaws. First, there is no such exception provided by or implicit in the language of the Clause Second, the purposes of the Clause are better served if it is understood to cover all the functions of modern government, not some narrow class of them. Third, the Framers appear to have thought that support for higher education was indeed a legitimate function of government The Constitutional Convention considered a proposal to empower Congress to establish a national university, but rejected it on the ground that the power was already embraced within the District of Columbia Clause *See* 2 *Records* at 616 President George Washington, in his first and eighth annual addresses, called on Congress to consider establishing a national university. *See* 30 *The Writings of George Washington* 494 (John Fitzpatrick ed , 1939), 35 *id.* at 316-17

Without attempting to decide whether, as Goddard claims, the University of Victoria is generally free from the control of the provincial government of British Columbia, we think that the evidence shows that the university is independent of that government when making faculty employment decisions. We rely here chiefly on the Supreme Court of Canada's decisions in the *Harrison* case, cited above, and in the companion case, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (Can.).

The principal question presented in *Harrison* was whether the University of British Columbia's mandatory retirement policy respecting its faculty and administrative staff was consistent with the requirements of the Canadian Charter of Rights and Freedoms ("the Charter").[17] Whether the Charter applied turned on whether the challenged policy constituted governmental action — an inquiry raising issues at least somewhat akin to those posed by the "State action" doctrine in United States jurisprudence. *See Harrison*, [1990] 3 S.C.R. at 463 (plurality op.).[18] Over dissent, the Court held that the university's policy was not governmental action under the Charter. In reaching that conclusion, three of the seven judges drew a distinction between "ultimate or extraordinary control and routine or regular control," and held that while the government of British Columbia may be able to exercise the former, it lacked "the quality of control that would justify the application of the *Charter*." *Id.*; *see also id.* at 478 (L'Heureux-Dubé, J., dissenting on the appeal only) (university not "government" for purpose of section 32 of Charter).

Similarly, in *McKinney*, a majority of the Court, again over dissent, held that the mandatory retirement policies of the defendant universities (there, located in the Province of Ontario) did not implicate the Charter. Moreover, the lead opinion emphasized the autonomy of the provincial universities when making faculty employment decisions:

> The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a *Charter* attack cannot be sustained on that ground. There is

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[17] The Canadian Charter is, in essence, a bill of rights. The Federal Government of Canada "enacted first the *Canadian Bill of Rights*, R.S.C., 1985, App. III, in 1960 and then the *Canadian Charter of Rights and Freedoms* in 1982, the latter having constitutional status. The values reflected in the *Charter* were to be the foundation of all laws, part of the 'supreme law of Canada' against which the constitutionality of all other laws was to be measured." *McKinney v. University of Guelph*, [1990] 3 S.C.R. at 355 (Wilson, J., dissenting).

[18] *But see McKinney*, [1990] 3 S.C.R. at 274-75 (plurality op.) (noting certain differences between Canadian and American doctrines), *id.* at 343-44 (Wilson, J., dissenting) ("This Court has already recognized that while the American jurisprudential record may provide assistance in the adjudication of *Charter* claims, its utility is limited . . . The *Charter* has to be understood and respected as a uniquely Canadian constitutional document.").

> nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative . . . .
>
> . . . . .
>
> The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions.

McKinney, [1990] 3 S.C.R. at 269, 273 (plurality op.); *see also id.* at 418-19 (L'Heureux-Dubé, J., dissenting) (while universities may perform certain public functions attracting Charter review, hiring and firing of employees at universities in both British Columbia and Ontario are not among such actions: "Canadian universities have always fiercely defended their independence").

While the Ontario statute at issue in *McKinney* differed from the British Columbia statute considered in *Harrison* (in particular, Ontario's statutes, unlike British Columbia's, did not permit the provincial government to appoint a majority of a university board's membership), the *Harrison* plurality held that these differences did not establish that the core functions of the British Columbian universities were under the province's control. *Harrison*, [1990] 3 S.C.R. at 463-64 (plurality op.) Thus, the Court's statements in *McKinney* concerning the autonomy of Ontario's universities in matters of faculty employment would apparently hold true for the universities in British Columbia as well.[19] Furthermore, even the dissent in *Harrison* acknowledged "the lack of government control over the mandatory retirement policy specifically in issue here and over matters specifically directed to the principle of academic freedom." *Id.* at 471-72 (Wilson, J., dissenting).[20] The remaining member of the Court accepted the trial court's finding that the university's em-

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[19] Judge Sopinka concurred in the conclusions and reasoning of the *Harrison* plurality except on the question whether the mandatory retirement policy was "law" within the meaning of section 15(1) of the Canadian Charter He would have preferred not to decide that question on the basis of the assumption that the university was part of the government *Harrison*, [1990] 3 S.C R at 481 (Opinion of Sopinka, J). In *McKinney*, Judge Sopinka agreed that "a university is not a government entity for the purpose of attracting the provisions of the *Canadian Charter of Rights and Freedoms*" [1990] 3 S C R at 444. While not being willing to say that "none of the activities of a university are governmental in nature," he was of the opinion that "the core functions of a university are non-governmental and therefore not directly subject to the *Charter* This applies *a fortiori* to the university's relations with its staff" *Id.* (Opinion of Sopinka, J) As in his opinion in *Harrison*, he preferred not to reach the question whether, if a university were part of the government, its mandatory retirement policies would be "law" for purposes of the Canadian Charter *Id.*

[20] Judge Cory agreed with Judge Wilson that the University of British Columbia formed part of the government for purposes of section 32 of the Canadian Charter, but disagreed with her on other grounds. *Harrison*, [1990] 3 S C.R. at 481 (Opinion of Cory, J) .

ployment agreements were essentially private contracts. *Id.* at 479-80 (L'Heureux-Dubé, J., dissenting on appeal only).

These Canadian cases cannot of course determine our interpretation of the Emoluments Clause. But they do provide compelling evidence that the University of Victoria is independent of the government of British Columbia with respect to decisions regarding the terms and conditions of faculty employment. Because that showing can be made, we believe the university should not be considered to be a foreign state under the Emoluments Clause when it is acting in that context.[21]

CONCLUSION

The Emoluments Clause does not prohibit the two NASA scientists from accepting paid teaching positions at the University of Victoria during their unpaid leave of absence from their agency.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[21] Since it is not necessary to our decision, we do not address Goddard's alternative argument that Federal employees in Leave Without Pay status do not occupy an Office of Profit or Trust within the meaning of the Emoluments Clause

OCC Mortgage Lending Testing Program

Individuals who serve as "testers" in a proposed Office of the Comptroller of the Currency program designed to identify discriminatory lending practices by national banks would not violate any federal criminal laws if, as part of the program, they provide false information to targeted banks

March 8, 1994

MEMORANDUM OPINION FOR THE COMPTROLLER OF THE CURRENCY

Our office has been asked to respond to your request to the Attorney General for the Justice Department's view on whether individuals who serve as "testers" in a proposed Office of the Comptroller of the Currency ("OCC") program designed to identify discriminatory lending practices by national banks would be subject to criminal liability if, as part of the testing program, they provide false information to targeted banks. Based on our understanding of the manner in which the testing program will be conducted,[1] we do not believe that the testers would violate any federal criminal laws. The Criminal Division of the Justice Department has advised us that it agrees with our conclusion.[2]

I. BACKGROUND

OCC is the primary regulator of national banks. In that role, OCC is responsible for ensuring that national banks comply with federal laws that prohibit racially discriminatory lending practices. Last year, OCC announced that it would undertake a serious effort to ferret out such practices. The proposed testing program is part of those efforts.[3]

Posing as prospective borrowers, the testers will communicate with a targeted bank and inquire about available home mortgage programs. In the course of their discussions with bank personnel, testers may provide false information about their identities, employment, income, and credit history. Testers representing different racial groups will be given similar false background information to provide to the bank. Accordingly, when OCC evaluates the manner in which a targeted bank responds to the testers' inquiries, the false information will serve as the constant factor, while the race of the tester providing the information will be the variable

[1] Our knowledge of the program is based on information that we have received from OCC personnel who are working on its design and implementation

[2] Our opinion is limited to federal law We have not considered whether false statements made by the testers would violate any state laws

[3] Testing is a well-established mechanism for identifying discrimination in the sale and rental of housing *See Havens Realty Corp. v Coleman*, 455 U.S. 363 (1982) We have been told the use of testers to identify lending discrimination is less developed at this point.

factor. In this way, OCC will seek to determine whether the race of the testers influenced the bank's conduct, and thus whether the bank may be in violation of the federal fair lending laws.

The testing program will be restricted to what is known as the "pre-application" phase, which means that the testers will only engage in preliminary discussions with bank personnel about available loan programs. The testers will be instructed not to fill out any loan applications or any other document, even if the bank requests that the testers do so.

The testers will not be OCC employees, but rather, persons hired by organizations with which OCC will contract to administer the testing program. Those organizations will help OCC to design the testing program and to train the testers. OCC will, however, oversee and retain ultimate control of the program.

Notice of the testing program will be provided to other federal agencies that have some regulatory authority over national banks.[4] In addition, we believe that OCC should give notice about the testing program to the United States Attorney in the particular districts in which targeted banks are located; it is our understanding that OCC has no objection to providing such notice.

II. DISCUSSION

In considering whether the OCC testers would be subject to criminal liability, we have analyzed four federal statutes that, in certain circumstances, reach false statements made to financial institutions. In order of their relevance to the OCC testing program, those statutes are 18 U.S.C. § 1014, which proscribes false statements made with an intent to influence the actions of a financial institution with respect to loans and certain other transactions; 18 U.S.C. § 1344, which proscribes efforts to defraud a financial institution or obtain money from the institution; 18 U.S.C. § 1005, which proscribes the making of false entries in the records of a financial institution with the intent to deceive officers of the institution; and 18 U.S.C. § 1001, the general federal false statements statute, which proscribes false statements made "in any matter within the jurisdiction of any department or agency."

We do not believe that false statements made by OCC testers in the context of pre-application testing would violate any of the four statutes. The critical features of the OCC testing program are that (i) it will be confined to the pre-application stage; (ii) the testers only will be seeking information from targeted banks; (iii) the testers will not fill out application forms or submit any other documents to the banks; and (iv) the testers will have no intention of applying for a loan or obtaining any funds from the banks. In light of these limitations, the testers will lack the req-

[4] Those agencies include the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and, at least with respect to lending activities, the Department of Housing and Urban Development and the Department of Justice

uisite intent to violate §§ 1014, 1344, and 1005. As for § 1001, we do not believe that the testers' false statements would come within the scope of that statute, because the statements would not be made in connection with a "matter within the jurisdiction of any department or agency." Furthermore, we do not think that the testers false statements would satisfy the "materiality" requirement that most courts have read into § 1001.

Our opinion is limited to false statements that may be made as part of the OCC pre-application testing program. In our view, persons acting outside the particular context of the OCC testing program who make false statements in connection with pre-application inquiries could violate the statutes in question here, particularly §§ 1014, 1344, and 1005. Simply put, such persons might well have the requisite intent to violate those statutes, whereas the OCC testers will lack that intent.[5]

A. *Section 1014*

18 U.S.C. § 1014 prohibits persons from making false statements, either written or oral, "for the purpose of influencing in any way the action of [financial institutions] upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." One of the elements of a § 1014 violation is "intent to influence action by the financial institution *concerning a loan or one of the other transactions listed in the statute.*" *United States v. Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (Kennedy, Cir. J.) (emphasis added). *See United States v. Krown*, 675 F.2d 46, 51 (2d Cir. 1982); *United States v. Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980), *aff'd*, 688 F.2d 826 (3d Cir. 1982). Because the OCC testing program will be limited to the pre-application setting in which testers only will be seeking information from targeted banks, and because

[5] Because OCC will be directing the testers' conduct, and because notice of the testing program will be provided to other affected agencies, we also believe that the program should be regarded as a valid law enforcement tool designed to uncover violations of the federal fair lending rules. In that sense, the testing program would be analogous to other federal "sting" operations that have been held to be legal, even where the participants in the operations engage in conduct that would be illegal outside the law enforcement context *See Hampton v. United States*, 425 U S 484, 490 (1976); *id* at 490-91 (Powell, J., concurring); *United States v Russell*, 411 U.S 423, 432 (1973), *Lewis v United States*, 385 U S. 206, 208 (1966), *see also United States v. Mosley*, 965 F.2d 906, 912 (10th Cir. 1992) ("the government can act as both supplier and buyer in sales of illegal goods"); *United States v Milam*, 817 F.2d 1113, 1116 (4th Cir. 1987) (government agents may sell counterfeit currency to uncover scheme to distribute such currency), *Shaw v Winters*, 796 F 2d 1124, 1125-26 (9th Cir 1986) (police department may sell stolen food stamps to uncover fencing operation), *cert. denied*, 481 U.S. 1015 (1987), *United States v. Murphy*, 768 F 2d 1518, 1528-29 (7th Cir. 1985) (government agents may offer bribes to public officials to uncover corruption), *cert. denied*, 475 U.S. 1012 (1986)

We do not express any opinion as to whether, under the principles of *In re Neagle*, 135 U S 1 (1890), the testers' participation in a valid federal law enforcement operation would shield them from state prosecution if their conduct violated state laws *See Baucom v Martin*, 677 F.2d 1346 (11th Cir. 1982) (applying principles of *In re Neagle* and holding that FBI agent was not subject to state prosecution for attempting to bribe state official as part of a federal law enforcement operation designed to uncover corruption in state government) As it relates to the OCC testing program, the issue would be whether the principles of *In re Neagle* apply to persons who are not themselves federal government employees, but who are working at the direction of federal officials.

they will have no intention of actually applying for a loan or entering into any of the other types of transactions specified in the statute, their false statements will not come within the scope of § 1014.

Construing § 1014 broadly, some courts have held that the statute covers any transaction that might subject a financial institution to risk of financial loss.[6] But even under that reading of § 1014, the testers' false statements would not violate the statute: again, because the testing program will be restricted to the pre-application phase, and because the testers will have no intention of either applying for a loan or entering into any of the specified transactions, there is no risk of financial loss to the targeted bank.[7]

B. *Section 1344*

18 U.S.C. § 1344, the federal bank fraud statute, makes it a crime to "knowingly execute[], or attempt[] to execute, a scheme or artifice to (1) defraud a financial institution or (2) to obtain any of the moneys, funds, credits, assets, securities or other property . . . of a financial institution, by means of false or fraudulent pretenses, representations, or promises." Under either prong of the statute, it is not necessary to show that the "scheme or artifice" actually caused the institution a loss or that the defendant personally benefitted — it is enough that the institution is

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[6] *See United States v Stoddart*, 574 F 2d 1050, 1053 (10th Cir. 1978); *see also United States v Payne*, 602 F.2d 1215, 1219 (5th Cir 1979), *cert denied*, 445 U S. 903 (1980) Court decisions that look to risk of loss in determining whether a transaction falls within § 1014 do not hold that intent to cause a risk of loss is a necessary element of a § 1014 violation

[7] At OCC s request, we have looked at the definition of application under the Federal Reserve Board's regulation implementing the Equal Credit Opportunity Act, 15 U.S C § 1691 ("ECOA"). Together, ECOA and the Fed's Regulation, known as Regulation B, prohibit banks from discriminating on the basis of race against "applicants" for credit, and require banks to send a notice to persons whose applications are rejected, the notice must set forth the reasons for the bank's decision to deny the applicant's request for credit Regulation B defines "application" as "an oral or written request for an extension of credit that is made in accordance with procedures established by a creditor . . " 12 C F.R. § 202 2(f) (1993). The Fed's Official Staff Interpretation of Regulation B provides that, in the normal course, inquiries of the sort that the OCC testers will make do not constitute an "application." For example, the Official Staff Interpretation states that no application has been made when a consumer asks about the bank's terms for mortgage loans and provides information about her income, and in response, bank personnel explain the institution's lending policies 12 C.F R pt 202, Supp. I, App. D, at 48-49 (1993).

The Official Staff Interpretation does state that an inquiry becomes an application when bank personnel determine that the individual making the inquiry would not qualify for a loan, and that determination is conveyed to the individual on the spot. It is our understanding that this is unlikely to occur in the OCC testing program, given the limited nature of the inquiries that the testers will make. However, it is conceivable that a bank could tell a tester that he does not qualify for a loan, and thereby treat the tester's request for information as an application for purposes of Regulation B. This would not mean, however, that the request would also be an application for purposes of § 1014 The focus of Regulation B is different from that of § 1014 Regulation B is concerned with the conduct of the lender, while § 1014 is concerned with the conduct of the borrower. Accordingly, under Regulation B, whether an inquiry rises to the level of an application depends on how the bank responds to the prospective borrower, not on what the borrower says. Indeed, that is what the Fed's Official Staff Interpretation states. *Id.* at 48. By contrast, under § 1014, it is the statements and intention of the prospective borrower that determine whether an inquiry amounts to an application or other transaction specified in the statute.

exposed to a potential loss.[8] However, there must be an intention on the part of the defendant to cause an actual or potential loss to the institution.[9] The testers will have no such intention, since the purpose of the testing program is merely to obtain information from a targeted bank, rather than obtaining any funds from the bank. As a result, the testers' false statements will not violate § 1344.

C. *Section 1005*

In pertinent part, 18 U.S.C. § 1005 imposes criminal penalties on "[w]hoever makes any false entry in any book, report, or statement of [a bank] with intent to injure or defraud [the bank] . . . or to deceive any officer [of the bank]." In light of the fact that the testers will only seek pre-application information, and will not fill out any applications or other documents, they will not make any entries in bank records. To be sure, if it is the policy of a targeted bank to record information obtained in pre-application meetings with prospective borrowers, then it is conceivable that the testers' false statements could cause bank personnel to make false entries. In turn, it could be argued that this would lead the testers to violate § 1005, through the "aider and abetter" statute, 18 U.S.C. § 2. In our view, however, even if the testers' statements do prompt the bank to make false entries, the testers would not have any intention of causing that result, and thus they would lack any intention to violate § 1005. *See United States v. Barel*, 939 F.2d 26, 42 (3rd Cir. 1991) (defendant's action in causing bank employees to make false entries did not violate § 1005 because defendant had no intent to cause the bank to violate the statute); *United States v. Rapp*, 871 F.2d 957, 963-64 (11th Cir.) (defendant did not violate § 1005 because there was no evidence that he "knowingly or willfully directed or authorized" the making of false entries by bank personnel), *cert. denied*, 493 U.S. 890 (1989).[10]

D. *Section 1001*

In pertinent part, 18 U.S.C. § 1001 bars the making of false statements "in any matter within the jurisdiction of any department or agency of the United States." A false statement need not be made directly to a federal department or agency in or-

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[8] *See, e g., United States v Briggs*, 965 F 2d 10, 12 (5th Cir 1992), *cert. denied*, 506 U.S 1067 (1993); *United States v Solomonson*, 908 F.2d 358, 364 (8th Cir 1990), *United States v Goldblatt*, 813 F.2d 619, 624 (3rd Cir 1987)

[9] *See, e g , United States v Jones*, 10 F 3d 901, 908 (1st Cir. 1993), *United States v Saks*, 964 F 2d 1514, 1518 (5th Cir. 1992); *United States v. Stavroulakis*, 952 F 2d 686, 694 (2d Cir), *cert denied*, 504 U.S. 926 (1992).

[10] In any event, we have not found any reported decision in which a court has applied § 1005 to persons who were not employees or officers of a bank, agents of a bank, or bank customers acting in conjunction with bank personnel *See Barel*, 939 F 2d at 39 (Section 1005 only applies to bank insiders or their accomplices), *United States v Austin*, 585 F 2d 1271 (5th Cir 1978) (upholding § 1005 conviction of customer who was acting in tandem with bank executives to defraud the institution)

der to come within the purview of § 1001; there are cases upholding convictions under the statute for false statements made to state or local governmental agencies and private companies.[11] In each of those cases, however, there was a clear "nexus" between the entity to which the false statements were made and the function of a federal department or agency.[12] As a general proposition, we do not believe that the necessary link will be present here so as to bring the testers' false statements within the jurisdiction of a federal department or agency for purposes of § 1001.

In a number of the § 1001 cases involving false statements to a nonfederal entity, the required nexus took the form of a funding relationship between that entity and the federal government. In particular, the false statement to the nonfederal entity triggered some statutory obligation of the federal entity to disburse funds.[13] No such obligation is implicated by the testers' false statements to targeted banks. In other cases, false statements to a nonfederal entity were made in connection with a specific statutory or regulatory arrangement between that entity and a federal agency. For example, in *United States v. Wright*, 988 F.2d 1036 (10th Cir. 1993), false statements in a report submitted to a state environmental protection agency were reached by § 1001 where the reports were required to be filed with the state agency pursuant to regulations of the federal Environmental Protection Agency. Similarly, in *United States v. Davis*, 8 F.3d 923 (2d Cir. 1993), false statements made by a federal prisoner to state prison officials were found to be within the ambit of § 1001 where the state officials were acting pursuant to a federal statute authorizing federal prison officials to delegate to state officials the responsibility for housing federal prisoners.[14] Here, however, the testers' false statements will not be tied to a particular program involving the targeted bank and federal agencies. Nor do we believe that the testers false statements will normally end up being submitted to federal agencies pursuant to some statutory or regulatory requirement.[15] That the OCC and other federal agencies exercise general supervisory

[11] *See, e.g., United States v. Davis*, 8 F.3d 923 (2d Cir. 1993) (false statement to state agency); *United States v. Petullo*, 709 F.2d 1178 (7th Cir. 1983) (false statement to municipal agency); *United States v. Brack*, 747 F.2d 1142 (7th Cir. 1984) (false statement to private company), *cert. denied*, 469 U.S. 1216 (1985).

[12] *See, e.g., United States v. St. Michael's Credit Union*, 880 F.2d 579, 591 (1st Cir. 1989) (in order for § 1001 to apply to false statements made to a nonfederal agency, there must be a "nexus . . . between the deception of the nonfederal agency and the function of a federal agency").

[13] *See, e.g., United States v. Suggs*, 755 F.2d 1538 (11th Cir. 1985); *United States v. Richmond*, 700 F.2d 1183 (8th Cir. 1983); *United States v. Petullo*, 709 F.2d 1178 (7th Cir. 1983). In *United States v. Wolf*, 645 F.2d 23 (10th Cir. 1981), the defendant made a false statement to a private corporation, which induced the corporation to disburse money to the defendant. Because the disbursement was made pursuant to a federal regulatory scheme, the false statements were held to be a matter within the jurisdiction of a federal department or agency for purposes of § 1001.

[14] *See also United States v. Milton*, 8 F.3d 39, 46 (D.C. Cir. 1993) (false statements to private company made pursuant to EEOC directive were within the jurisdiction of a federal agency because there was a "statutory basis" for the EEOC directive), *cert. denied*, 513 U.S. 919 (1994).

[15] The Home Mortgage Disclosure Act ("HMDA") and the relevant implementing regulations require a financial institution to submit to the federal banking agencies certain information regarding "completed applications" to the institution for home mortgage loans. *See* 12 U.S.C. § 2803, 12 C.F.R. pt. 203 (1993).

authority over the banks does not convert the testers' false statements into a "matter within the jurisdiction" of those agencies.

In addition to our view that the testers' false statements probably will not meet the "jurisdictional" requirement of § 1001, we also believe that the statements will not satisfy the materiality requirement that nearly all courts have held to be a necessary element of the pertinent part of the statute.[16] The most common formulation of the materiality test of § 1001 and other criminal statutes that proscribe misrepresentations is as follows: the false statement must have a natural tendency to influence, or be capable of influencing, a federal department or agency to take action that it otherwise would not take.[17] If OCC notifies other relevant federal agencies about the testing program, then it would be difficult to see how the testers' false statements could influence those agencies in such a fashion, and thus difficult to see how the statements would be material.[18]

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HMDA defines "completed application" as "an application in which the creditor has received the information that is regularly obtained in evaluating applications for the amount and type of credit requested." 12 U.S.C. § 2802(3). It is conceivable that a targeted bank could treat a pre-application inquiry as a "completed application" for purposes of HMDA, and submit information gleaned in the inquiry to the OCC. In such cases, the requisite § 1001 nexus between the bank and a federal agency might exist. In the normal course, however, it is very unlikely that a tester's pre-application inquiry will rise to the level of an application that triggers the HMDA reporting requirements. *Cf. supra* note 7 (discussing meaning of "application" for purposes of Regulation B notification requirements and stating that pre-application inquiries will generally not constitute a Regulation B application). Indeed, it is our understanding that OCC has decided to use pre-application testing precisely because information about pre-application contacts between prospective borrowers and financial institutions is not a reportable event under HMDA. If on the remote chance a tester is told outright at the pre-application stage that he will not qualify for any loan, OCC could notify the bank immediately and instruct the institution not to treat the tester's inquiry as an application for HMDA purposes.

[16] The Second Circuit is the only court to hold otherwise. *See United States v. Bilzerian*, 926 F.2d 1285, 1299 (2d Cir.) (citing previous Second Circuit cases rejecting materiality requirement), *cert. denied*, 502 U.S. 813 (1991).

[17] *See, e.g., Kungys v. United States*, 485 U.S. 759, 770 (1988); *United States v. Meuli*, 8 F.3d 1481, 1485 (10th Cir. 1993), *cert. denied*, 511 U.S. 1020 (1994); *United States v. Notarantonio*, 758 F.2d 777, 785 (1st Cir. 1985).

[18] Notification of United States Attorneys would make it highly unlikely that testers ever would be subjected to a federal prosecution. We believe that federal prosecutors would treat the OCC testing program as a valid law enforcement operation (*see supra* note 5) and decline to prosecute testers participating in the operation, even if the testers' false statements were technically to violate any federal criminal statutes (which, in our view, they will not).

Application of the Brady Act's Criminal Penalties to State or Local Law Enforcement Officers

The criminal penalties contained in the Brady Handgun Violence Protection Act do not apply to state or local law enforcement officers in the performance of their duties under the Brady Act Accordingly, the United States lacks the authority to prosecute state or local officials for violations of the Brady Act.

March 16, 1994

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum presents our analysis of the application of the criminal penalties contained in the recently enacted Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) ("the Act"). Specifically, we address the question whether the Act's criminal penalties apply to state or local law enforcement officers. We conclude that the Act's criminal penalties do not apply to such officials in performance of their duties under the Act.

Section 102(c) of the Act amends 18 U.S.C. § 924(a) in relevant part by adding the following new paragraph:

> (5) Whoever knowingly violates subsection (s) or (t) of section 922 [the Act's interim and permanent systems for background checks] shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.

107 Stat. at 1541.

Three provisions of the Act could be interpreted as placing obligations on a "chief law enforcement officer" ("CLEO"):[1] 18 U.S.C. § 922(s)(2),* which provides that CLEOs "shall make a reasonable effort to ascertain within 5 business days" whether a handgun transfer would be illegal; 18 U.S.C. § 922(s)(6)(B), which provides that CLEOs shall destroy information received pursuant to the Act; and 18 U.S.C. § 922(s)(6)(C), which provides that if a CLEO determines that a transfer would be illegal, he or she shall provide reasons for such determination within 20 days.

The Act specifically exempts CLEOs from liability for damages in 18 U.S.C. § 922(s)(7), which provides that

[1] 18 U.S.C. § 922(s)(8) provides that, "[f]or purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."

* Editor's Note: In *Printz v United States*, 521 U.S. 898, 933-34 (1997), the Supreme Court struck down 18 U.S.C. § 922(s)(2), together with 18 U.S.C. § 922(s)(1)(A)(i)(III) & (IV), as unconstitutional

> A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—
>
> (A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or
>
> (B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

The Act does not, however, specifically exempt CLEOs from the criminal penalties of 18 U.S.C. § 924(a)(5). Consequently, the question arises whether a CLEO's failure to comply with the Act would subject him or her to the criminal penalties of 18 U.S.C. § 924(a)(5).

The history of the Act indicates that Congress did not envision its criminal sanctions applying to CLEOs. The 1991 version of the Brady Bill, which was passed by the House but never enacted into law, contained the criminal penalty provision from the public law quoted above but did not include the principal obligation now imposed on CLEOs — that CLEOs shall make a reasonable effort to ascertain within five days whether a transfer would be illegal. When the bill's proponents added the "reasonable effort" language of 18 U.S.C. § 922(s)(2) in 1992, no member of Congress even intimated that the modification to § 922(s)(2) would enlarge, or in any way affect, the application of the bill's criminal sanctions. In fact, there was never any suggestion that the criminal sanction applied to CLEOs. Such congressional silence strongly supports the conclusion that Congress did not intend to apply 18 U.S.C. § 924(a)(5) to CLEOs.

This reasoning is reinforced by the great solicitude paid to law enforcement officials in other provisions of the Act. It would be incongruous to insulate the CLEO against liability for damages and even for attorneys' fees for providing erroneous information that prevents a sale and then turn around and subject him or her to criminal fine or imprisonment for failure to perform ministerial acts. Our conclusion is further supported by the impracticality, if not impossibility, of prosecuting a chief law enforcement officer for failing to make "a reasonable effort." The use of the term "reasonable effort" reflects Congress' apparent intent to vest discretion in CLEOs by providing a flexible statutory requirement. This elasticity, though common in civil statutes, is unusual in criminal laws because it does not clearly define a punishable act. It would be difficult to prosecute a CLEO for failing to make "a reasonable effort," and such prosecution could be subject to a Fifth Amendment due process challenge. In light of the fact that applying criminal penalties to the "reasonable effort" requirement would be both unusual and arguably unconstitutional, we find it difficult to believe that Congress intended the "reasonable effort" standard to be criminally enforceable.

Established principles of statutory construction further support our conclusion that the criminal penalty provision does not extend to law enforcement officials, but only to gun dealers and other nongovernmental persons. The Supreme Court has repeatedly cautioned that courts should not lightly construe federal statutes as intended to intrude into state governmental processes or to change the traditional relationship between federal and state institutions. Where a statute arguably

> would upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance. We explained recently: [I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.

Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citations and internal quotation marks omitted). A federal statute imposing criminal penalties on a state law enforcement official because, for example, he or she destroyed a weapons purchaser's statement a few days late or failed to "make a reasonable effort" to research the information available on a potential purchaser certainly alters "the usual constitutional balance between" the states and the federal government. We are unaware of any other instance where Congress has assigned specific tasks to state or local officials and then deemed a failure to perform those tasks to be a crime. Moreover it would have the effect of placing the operational and record-keeping activities of state and local law enforcement agencies under the supervision and control of federal prosecutors and the federal criminal law. Because there is no explicit reference to chief law enforcement officers in the penalty provision, it does not contain the "unmistakably clear" language that would be necessary for a court properly to construe the provision to have such a purpose.

To include chief law enforcement officers within the ambit of the criminal penalty provision would be contrary to Congress' intent as determined according to rules of statutory construction and the relevant legislative history. Furthermore, the absence of a definitive standard inherent in the term "a reasonable effort" would very likely pose an insurmountable hurdle to successful prosecution or raise a substantial due process question. Accordingly, we conclude that 18 U.S.C. § 924(a)(5) does not apply to state officials and that the United States therefore lacks the authority to prosecute such officials for violations of the Act.

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Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute

Statutory provisions that allow members of the United States Sentencing Commission to hold over in office after their terms have expired apply to incumbent members who were appointed prior to the enactment of the holdover statute

Commissioners who were appointed prior to the enactment of the holdover statute may constitutionally exercise such holdover rights without violating the Appointments Clause.

April 5, 1994

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

BACKGROUND AND SUMMARY

On August 26, 1992, President Bush signed "An Act to amend [28 U.S.C. § 992] to provide [that] a member of the United States Sentencing Commission whose term has expired may continue to serve until a successor is appointed or until the expiration of the next session of Congress." Act of Aug. 26, 1992, Pub. L. No. 102-349, 106 Stat. 933 (1992) (codified at 28 U.S.C. § 992(b)) ("the holdover statute"). This memorandum addresses whether members of the Sentencing Commission ("Commission") who were in office at the time the holdover statute was enacted may exercise holdover rights pursuant to the statute.

We first address whether Congress intended the holdover statute to apply to commissioners who were appointed prior to its enactment. The plain meaning of the holdover provision belies any claim that it does not apply equally to incumbent commissioners and to newly appointed commissioners. By its own terms, it applies to any "voting member of the Commission whose term has expired" regardless of when the member was appointed. *Id.* Only by consulting the legislative history does any ambiguity arise regarding its application to incumbent commissioners. Even then, the legislative history of the holdover provision and the presidential signing statement provide inconclusive evidence of intent. Assuming that an examination of the legislative history is appropriate, there simply is insufficient evidence to disregard the plain meaning of the holdover provision.

We next address whether the holdover provision is constitutional as it applies to commissioners who were appointed before its enactment. As applied to such commissioners, the holdover provision raises questions under the Appointments Clause of the Constitution. It may be argued that the holdover provision interferes

with the President's appointment power because it extends the terms of office of appointees beyond that contemplated by the appointing authority and amounts to a legislative reappointment. Although this issue is not entirely free from doubt, we conclude that the particular holdover provision at issue would survive an Appointments Clause challenge. In sum, we conclude that the commissioners serving at the time the provision became law on August 26, 1992 may (like those appointed after the provision was adopted) constitutionally exercise holdover rights pursuant to the statute.

I.

The threshold issue requires us to construe the holdover provision to determine whether it applies to commissioners who were serving at the time of its enactment. The holdover provision provides that:

> Section 992(b) of title 28, United States Code, is amended to read as follows:
>
> * * *
>
> "(2) A voting member of the Commission whose term has expired may continue to serve until the earlier of—
>
> "(A) the date on which a successor has taken office; or
>
> "(B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired."

106 Stat. at 933. The text of the holdover provision does not distinguish between commissioners appointed before or after its enactment. By its own terms, it applies to any "voting member of the Commission whose term has expired" without reference to when the member was appointed. Although the text of the holdover provision contains no language either raising or addressing the question of whether it applies to a commissioner who was serving at the time of its passage, such a commissioner is a "voting member of the Commission" and one "whose term has expired," and thus is unquestionably within the plain meaning of the terms of the holdover statute.

The Supreme Court has instructed that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (second set of brackets in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432

and n.12 (1987) (where "the plain language of [the] statute appears to settle the question. . . . [W]e look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses"). In his signing statement, President Bush cited a portion of the legislative history of the holdover provision and rejected the plain reading of the statute. *See infra.* After examining the legislative history of the holdover provision, we conclude that President Bush was mistaken in his statement about its legislative history and that a careful reading of the legislative history as a whole provides no support for rejecting the plain meaning of the statute.

The legislative history of the holdover statute contains, at most, some ambiguous evidence of congressional intent. The text of the holdover provision is contained in the only section of the statute. When the bill was introduced in the Senate, it also contained a second section that provided:

> Sec. 2. EXTENSION OF TERMS OF PRESENT MEMBERS OF THE COMMISSION
>
> The amendment to [28 U.S.C. § 992(b)] contained in section 1 of this Act shall apply to the term of any voting member of the Commission whose term expires on October 31, 1991.

S. 1963, 102d Cong., § 2 (1991). The same provision was contained in the bill when it was reported out of committee. On January 31, 1992, Senate Majority Leader Mitchell sought and received unanimous consent to consider passage of the bill immediately. 138 Cong. Rec. 1166 (1992). At that date, the event specified in section two (the expiration of two commissioners' terms on October 31, 1991) had already occurred. Rather than alter section two, an amendment was offered on behalf of the bill's sponsors, the Chairman and Ranking Minority Member of the Judiciary Committee, to strike section two of the bill entirely. *Id.* Without any discussion, the amendment striking section two was approved (by unanimous consent) and then the bill as amended was passed by unanimous consent. *Id.*

The Senate's decision to strike all of section two rather than to amend it to cover other sitting commissioners is subject to different interpretations. Based on the future verb tense "expires" rather than the past tense "expired" in draft section two, it can be inferred that the sponsors of S. 1963 originally hoped to introduce and pass the bill prior to October 31, 1991. It could be argued that the sponsors thought that it was important to provide in the text that the holdover provisions in section one applied to these commissioners whose terms would soon expire because they believed that section one, in and of itself, might not apply to commissioners who were then serving on the Commission. If that were the case, however, it seems curious that they would want to grant holdover rights only to the commis-

sioners whose terms expired in October of 1991 and not to any of the other incumbent commissioners. It is also possible that at the time the Senate deleted section two, it simply realized that it could do nothing for the commissioners whose terms had *already* expired but that it assumed section 1 would apply to all of the then incumbent commissioners whose terms of office had not yet expired. These conflicting arguments based on the Senate's deletion of section two are difficult to reconcile, which suggests that placing much reliance on them is not warranted.

The signing statement issued by President Bush reflects a misinterpretation of the Senate's action in deleting section two. The signing statement states that:

> Today I am signing into law S. 1963, which permits Members of the United States Sentencing Commission whose terms have expired to continue to serve until either a successor takes office or the next session of the Congress ends.
>
> The legislation does not specify whether it would apply to the current Members of the Commission. Were the Act read to apply to the current Members, it would appear to violate the Appointments Clause of the Constitution by, in effect, permitting the Members to extend the terms of the office to which they were appointed by the President and confirmed by the Senate. Accordingly, I sign this legislation based on my understanding that it applies only to appointments made after the date of enactment of the Act, so as not to infringe on my constitutional appointment authority. This is in keeping with the well-settled obligation to construe ambiguous statutory provisions to avoid constitutional questions.
>
> *I note that this interpretation of the Act is supported by the fact that the Senate deleted from the Act a provision that would have expressly applied it to current Members of the Commission.*

Statement of President George Bush Upon Signing S. 1963, II Pub. Papers 1432 (Aug. 31, 1992) (emphasis added).

There are two problems with giving much weight to President Bush's signing statement. In general, the use of presidential signing statements by the courts and others as evidence of legislative history and the weight to be given such evidence — if it is to be given any weight at all — is controversial. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131 (1993) (discussing arguments for and against such use of presidential signing statements). Moreover, we believe President Bush's signing statement quoted above is subject to even less weight than is normally appropriate because it is based on a misreading of the legislative history. It simply is not true "that the Senate deleted from the Act a provi-

sion that would have expressly applied it to [then] current Members of the Commission." II Pub. Papers at 1432. The deleted section *only* applied to commissioners whose terms had *already* expired when the section was deleted; it did *not* apply to those then serving as commissioners whose terms would expire after enactment of the law. That fact makes questionable the inference drawn in the signing statement.

Two other statements of congressional intent are contained in the House report on S. 1963. H.R. Rep. No. 102-827, at 3 (1992). The section-by-section analysis describes the effect of the holdover statute:

> Section 1 of S. 1963 (the bill's only section) amends 28 U.S.C. 992(b) to provide for a voting member of the United States Sentencing Commission whose term has expired to continue to serve beyond the expiration date until a successor has taken office or until the end of [Congress's next] session . . . . No distinctions between types of voting members is intended; this provision is intended to apply to all voting members of the Sentencing Commission, including those appointed to fill a vacancy that occurs before the expiration of the term. *In addition, the section is intended to have prospective application only.*

Id. (emphasis added). The underlined language of the House report is also ambiguous. One possible meaning of "prospective application only" is that the holdover statute would apply to commissioners who were appointed to serve on the Commission in the future but not to commissioners who were already serving on the Commission. Another possible meaning of "prospective application only" is that the holdover statute could not be invoked by a commissioner whose term had already expired, i.e., the commissioners whose terms had expired in October of 1991. This second proposition is obviously true. If a commissioner's presidential commission had expired, nothing short of a renomination, reconfirmation, and reappointment consistent with the Appointments Clause would allow the former commissioner to serve again on the Commission. Thus, this statement in the House Report, which is subject to two reasonable but different interpretations, is to no avail in resolving the interpretive question.

There is some unambiguous evidence in the legislative history to support the plain meaning of the holdover provision. The congressional purpose in passing the holdover statute, as expressed in floor statements and the House Report, would apply equally to sitting commissioners and future members of the Commission.[1] The House Report explained that the problem of vacancies on the Commission was exacerbated by "the requirement that sentencing guidelines be promulgated or

[1] *See* H. R Rep. No 102-827, at 2-3, 138 Cong Rec 23,098-99 (1992) (statements of Reps. Schumer and Sensenbrenner)

amended with the support of at least four of the seven authorized voting members of the Commission. Consequently, whenever there is less than a full complement of sentencing commissioners, the work of the Commission may be impaired." H.R. Rep. No. 102-827, at 2. The House Report also related that:

> On October 31, 1991, the terms of three voting members of the Commission expired with no successors having been nominated. Two of these terms remain unfilled at the time of the writing of this report — more than eight months later. * * * In 1989-90, the Commission was forced to operate approximately seven months with only four voting members. * * * *This legislation is necessary to ensure that this situation is not repeated whenever commissioners' terms expire in the future.*

Id. (emphasis added).

The situation that Congress was attempting to prevent would exist now if the holdover statute did not apply to commissioners who were appointed prior to the statute's enactment. For this reason, we believe the legislative history of the holdover provision, on balance, reinforces the plain meaning of the statute. At worst, the legislative history is ambiguous regarding whether Congress intended the holdover statute to apply to commissioners who were appointed before it was passed. It is simply not conclusive enough to reject the plain meaning of the statute.

We do not believe that "the well-settled obligation to construe ambiguous statutory provisions to avoid constitutional questions," to which President Bush referred in his signing statement, is to the contrary. II Pub. Papers at 1432. We may not avoid all constitutional questions whenever a statutory ambiguity exists. The Supreme Court has instructed instead that statutes should be read, when fairly possible, to avoid grave and doubtful constitutional questions. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score") (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). To begin with, we are not convinced that the interpretation of the statute in President Bush's signing statement is "fairly possible." This is because such an interpretation would violate another canon of construction, the plain meaning rule, and was based on an erroneous reading of the legislative history.

Moreover, to satisfy the canon of construction articulated in *Rust*, one interpretation of the statute must be necessary to avoid a "grave and doubtful constitutional question[]." *Id.* at 191 (quoting *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909)). The Supreme Court has explained that although this canon is followed "out of respect for Congress, which [is presumed to] legislate[] in the light of [its] constitutional limitations, . . . avoidance of a difficulty will not be

pressed to the point of disingenuous evasion." *Id.* (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)). In *Rust*, for example, the Court concluded that the constitutional questions were not so doubtful that it should read the statute as precluding the questions. *Id.* As we explain in part II, we do not believe that the constitutional question is so grave and doubtful that we should evade answering it.

We conclude that the holdover provision does apply to commissioners who were appointed prior to its enactment. By its own terms, the text of the holdover provision applies to any "voting member of the Commission whose term has expired," regardless of when the member of the Commission was appointed. We also find support for this interpretation in the legislative history of the holdover provision. Although the legislative history contains some ambiguous evidence of legislative intent, we simply cannot say that it is sufficient to reject the plain meaning of the statute.

II.

We next address whether the application of the holdover provision to commissioners who were appointed before its enactment violates the Appointments Clause. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . [principal] Officers of the United States." U.S. Const. art. II, § 2, cl. 2. It further provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* The Commission is "an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). *See also Mistretta v. United States*, 488 U.S. 361, 368, 384-94 (1989). The Commission's seven voting members are appointed by the President "by and with the advice and consent of the Senate." 28 U.S.C. § 991(a).

The Appointments Clause by its terms and its structure prohibits Congress from itself exercising the power to appoint "Officers of the United States." *See Buckley v. Valeo*, 424 U.S. 1, 126-28, 139 (1976) (per curiam). The text and structure of the Constitution reflect a deliberate constitutional choice to deny to the legislature the power to select the individuals who exercise significant governing authority as (non-legislative) officers of the federal government. *See id.* at 128-31 (reviewing the debates in the Philadelphia convention). That choice can be set at naught either by legislation overtly vesting in Congress the power of appointment or by statutes that functionally enable Congressional exercise of a power to appoint. This latter concern arises most pointedly in connection with statutes that attempt to extend the fixed tenure of an officer with a set term, thus denying the President the power he would otherwise have to reappoint the officer or select someone else.

In 1951, for example, the President requested the Justice Department's views on the validity of a statute extending the terms of the members of a commission: ac-

cording to the original legislation creating the commission, the terms were to expire in June 1951, but prior to that date Congress amended the legislation to extend the commissioners' tenure to August 1952. Acting Attorney General Perlman advised the President that while he did not think "there can be any question as to the power of the Congress to extend the terms of offices which it has created," that legislative power was subject "to the President's constitutional power of appointment and removal." *Displaced Persons Commission — Terms of Members*, 41 Op. Att'y Gen. 88, 90 (1951). However, because the legislation did not attempt to restrict the President's authority to remove the commissioners at will, it was constitutionally harmless: the President remained free to exercise his appointment power simply by removing the incumbents from office. *Id.* ("As so construed, the [extension legislation] presents no constitutional difficulties").[2] *See also Pension Agents and Agencies*, 14 Op. Att'y Gen. 147 (1872) (discussing the President's power to remove officer serving a term extended by statute).

We think that the Department's 1951 opinion adopted the correct approach to this issue: while the power to lengthen the tenure of an incumbent officer is incident to Congress's general power to create, determine the duties of, and abolish offices,[3] that power cannot legitimately be employed to produce a result that is, practically speaking, a congressional reappointment to office or a removal from office. This problem is not presented where a statutory change in the term of office is applied to subsequent appointees, for the appointing authority in the latter case appoints to an office that includes the potential for holdover as one of its attributes. Where a statutory change in the term of office is applied to incumbent officers, however, we must analyze the statute to determine whether it amounts to a legislative exercise of the executive's appointment powers.

The situation presented by the holdover statute at issue is on a continuum between legislation that we would view as non-objectionable and legislation we would view as constitutionally questionable. On one end of the continuum is a statute that extends the terms of officers whose appointment is vested in the President alone and who serve at the will and pleasure of the President. The extension of these officers' terms does not interfere with the appointing authority's (here, the President's) power to terminate or reappoint a given officer. Such legislation adjusts the interval at which the President must either make another appointment or face a vacancy, but does not infringe the appointment power. The President can terminate and replace the person who is serving in the office at any time, notwith-

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[2] *Cf In re Benny*, 812 F 2d 1133, 1142-43 (9th Cir. 1987) (Norris, J., concurring in the judgment): "[T]he Appointments Clause precludes Congress from extending the terms of incumbent officeholders I am simply unable to see any principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments Both implicate the identical constitutional evil—congressional selection of the individuals filling nonlegislative offices."

[3] *See Crenshaw v. United States*, 134 U S. 99 (1890), *Civil Service Retirement Act — Postmasters — Automatic Separation From the Service*, 35 Op. Att'y Gen 309, 314 (1927): "If, as stated in [*Embry v United States*, 100 U S 680 (1879)], Congress may at any time add to or take from compensation fixed, it may also, it would seem, by analogy, at any time shorten or lengthen a term of office "

standing the term extension. Approaching the other end of the continuum is a statute that lengthens the fixed terms of officials who can be removed only for cause, thus depriving the appointing authority of the opportunity to reappoint the incumbent or to chose someone else. In sum, the extension of tenure of officers serving at will raises no Appointments Clause problem, but lengthening the term of an officer who may be removed only for cause is constitutionally questionable.[4]

However, this conclusion, which we think sound in principle, has been partly rejected, at least in one context, by the courts. Congress's extension of the tenure of bankruptcy judges (who can be removed only for cause) in the Bankruptcy Amendments and Federal Judgeship Act of 1954 has been sustained repeatedly against constitutional challenge. The leading case, *In re Benny*, held that a statutory extension of tenure "becomes similar to an appointment" *only* "when it extends the office for a very long time." 812 F.2d at 1141. *See also In re Investment Bankers*, 4 F.3d 1556, 1562, 1563 (10th Cir. 1993) ("Although plausible arguments can be raised in response to the reasoning adopted by the *Benny* court, we are ultimately persuaded that this reasoning is correct;" noting that the Appointments Clause challenge "has been rejected by every court that has considered it"); *Matter of Koerner*, 800 F.2d 1358, 1366-67 (5th Cir. 1986) ("Congress has the constitutional power to make reasonable changes in the duties of any office it creates, including shortening or lengthening the term of service. . . . Under the limited circumstances of this case, . . . the action of Congress was a constitutionally reasonable change in the term of an existing office") (citations omitted). Although we are not persuaded by *Benny*'s reasoning, we must acknowledge that the courts may follow *Benny*'s conclusion in analogous situations.[5] In light of the fact that *Benny*

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[4] In 1987, this Office opined that legislation extending the terms of the certain members of the United States Parole Commission was an unconstitutional interference with the President's appointments power. *See Reappointment of United States Parole Commissioners*, 11 Op. O L C 135 (1987) If, as we think likely under the rule of *Wiener v United States*, 357 U.S 349 (1958), the Commissioners were removable only for cause, that conclusion was consistent with the earlier views of the Attorneys General, which we believe are sound. However, the analysis in the opinion suggests that the extension legislation was invalid *because* the Commissioners were "purely executive officers," *id.* at 352, removable (presumably) by the President at will, a line of reasoning with which we disagree The opinion might be read to suggest that extension legislation concerning officers removable only for cause is *not* unconstitutional That conclusion may be dictated by judicial precedent, *see infra*, but the reasoning would be contrary to our view of the better interpretation of the Appointments Clause.

[5] *Benny* stated that *Wiener* implicitly rejected any Appointments Clause problem with term-extension legislation, but that overreads the decision The date on which the President removed the plaintiff in *Wiener* from office was in fact *within* the term of office for which the plaintiff was originally appointed, although part of the back pay the plaintiff ultimately recovered was for a period after his original term would have expired. *See* 357 U S. at 350-51 (the term should have expired on March 1, 1954 as the law stood at the time plaintiff was appointed, the President removed plaintiff on December 10, 1953; plaintiff recovered back pay for four months after March 1, 1954 under a post-appointment extension of term) The additional Supreme Court cases that *Benny* and other courts have cited are distinguishable. *See, e g , Benny*, 812 F.2d at 1141 (citing *Shoemaker v United States*, 147 U S 282 (1893), which upheld legislation imposing additional duties on an officer), *In re Tom Carter Enters* , 44 B.R. 605, 607 (Bankr. C.D. Cal 1984) (citing *Shoemaker* and cases dealing with issues under the Contracts Clause and the Philippine Organic Act) *Benny* also pointed out that the First Congress twice extended the tenure of the first Postmaster General. 812 F.2d at 1142. While we agree that this fact supports the argument that Congress generally possesses the power to

does not rule out an Appointments Clause objection to legislation giving tenure for extraordinary long terms to incumbent officers removable only for cause, we believe that a short term holdover provision is likely to be upheld by the courts.

As we explained above, the holdover statute at issue is, constitutionally, somewhere in between the situations we believe represent the two extremes. Although the voting members of the Commission do have tenure protection and new members of the Commission must receive the advice and consent of the Senate before they are appointed, the secured or "guaranteed" terms of office of hold-over members are not being lengthened. The holdover provision simply allows them to continue to serve in office after their terms have expired until the earlier of two events: "(A) the date on which a successor has taken office; or (B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired." 106 Stat. at 933.

We must determine whether this change in the incumbent commissioners' service effectively frustrates the President's appointment power or confers on the Legislature a reappointment power (albeit for a short period of time). As to the first issue, the President's formal appointment power is not affected in the least. He may nominate whomever he wants at precisely the same time as he could before, presumably in advance of the expiration of the term he is seeking to fill. Moreover, it is not even clear that the effect of the holdover provision is to limit the discretion of the Executive, since it gives the President the option of retaining the holdover officer until he chooses to nominate a successor. In short, it is not clear whether the appointing authority's power is augmented or diminished by a holdover statute that applies to incumbent office holders. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (holding that the NRA's challenge to the alleged restriction on the President's appointment power to select more than three commissioners from one party is not justiciable because "it is impossible to determine in this case whether the *statute* actually limited the President's appointment power[;] . . . we [cannot] assume [] that the President wished to appoint more than three members of one party").

The only problematic effect we see that the holdover statute could have on the President's power of appointment is that the Senate might be less inclined to act on a nomination for bureaucratic or institutional reasons, such as a less pressing need to act on a nomination where there is a holdover, or for political or inter-branch advantage. But all of these reasons for Senatorial inaction are present for commissioners who are appointed *after* the holdover statute is enacted, and there can be no reasonable argument that the holdover statute as applied to subsequent appointees is unconstitutional. It is simply not persuasive to argue that the President's appointment power is effectively frustrated when incumbent commissioners hold over but not when subsequent commissioners hold over.

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extend terms, the original Postmaster General served at the pleasure of the President, and thus the First Congress's actions placed no practical limitation on the appointments power

With regard to Congress, we must still consider whether the application of a holdover provision to incumbent officer holders with tenure protection amounts to a legislative designation or legislative reappointment. Once again, there is no legislative reappointment in granting future appointees holdover rights because when the President makes a future appointment the holdover provision simply defines one of the attributes of the office to which the appointment is made. However, in his concurrence in *Benny*, Judge Norris argued that the problem with extending the terms of incumbents lies in the fact that Congress can review the track record of the incumbents and manipulate the tenure of officials it likes and dislikes. 812 F.2d at 1143-44. As Judge Norris argued in the context of extending the fixed term of bankruptcy judges:

> Congress can dictate with certainty who occupies an office by extending the terms of known incumbents. . . . By extending the terms of known incumbents, Congress can guarantee that its choices will continue to serve for as long as Congress wishes, unless the officers can be removed. Thus, congressional extension can effectively block the exercise of appointing power by the only officials constitutionally authorized to exercise it—officials of the *other* branches of government. Selective exercise of this extension power could prove to be a potent political weapon. For example, if Congress wished to prevent the executive or judicial branch from filling an office about to become vacant with an appointee unfavorable to the prevailing congressional majority party, it could simply extend the incumbent's term until a more favorable group of officials took control of either the executive or judicial branch. * * * In effect, extension statutes allow Congress to arrogate to itself one of the powers of appointment—the power of reappointment. Indeed, it is hard to see any distinction between the congressional extension at issue here and a statute expressly authorizing congressional reappointment of incumbents.

Id. (emphasis in original).

Judge Norris was in the minority in *Benny*, and furthermore, there are several important differences between the extension statute he was considering and the holdover statute we are considering. For Congress to extend the tenure of a known incumbent by means of a holdover statute beyond that desired by the President, Congress not only would have to pass a holdover statute, over the President's veto if necessary, but the Senate would also have to cooperate in refusing to confirm the President's subsequent nominee. Such bad faith concerted action is too speculative and hypothetical a basis to support a claim of unconstitutionality. *Cf. NRA Political Victory Fund*, 6 F.3d at 824-25 (holding not justiciable the NRA's separation

of powers claim that the President would have appointed other commissioners but for the political party restriction in the statute).

There are two other important limitations on the Congress's power to frustrate the President's appointment power by means of this holdover statute. One limitation is that the office probably is vacant for Recess Appointments Clause purposes, and the President probably would be able to make a recess appointment to fill the position whenever the Senate is in recess for the requisite length of time.[6] *See* U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."). The Department of Justice has long interpreted the term "Recess of the Senate" to include intrasession recesses if they are of substantial length.[7] There usually is a recess of the Senate of sufficient length to satisfy the constitutional standard in August and December of each year.

The Sentencing Commission holdover statute, moreover, contains its own time limit. In *Benny*, the Ninth Circuit held that an extension of a term of short duration did not constitute a congressional appointment:

> Congress'[s] power to extend prospectively terms of office can be implied from its power to add to the duties of an office other duties that are germane to its original duties. *Shoemaker v. United States*, 147 U.S. 282, 300-01 (1893). Logically, the only point at which a prospective extension of term of office becomes similar to an appointment is when it extends the office for a very long time. . . . [A] short extension, like the one at issue here [as much as a six year extension, does not] prevent[] those who have the appointment power from exercising that power.

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[6] There may be some question, however, whether the position being filled by the holdover officer is vacant for recess appointment purposes *Compare Staebler v. Carter*, 464 F. Supp. 585, 588-601 (D.D.C. 1979) (holding that the FEC office was vacant for Recess Appointments Clause purposes when the incumbent continued to exercise authority pursuant to a holdover provision that provided that "[a] member of the Commission [FEC] may serve on the Commission after the expiration of his term until his successor has taken office") *with Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993) (whether a vacancy exists for Recess Appointments Clause purposes depends on the wording and structure of the particular holdover provision, deciding that the Postal Service holdover provision did not create a vacancy) The Sentencing Commission holdover statute has features in common with the holdover statutes in both *Staebler* and *Mackie*. Although the Sentencing Commission holdover statute is similar to the wording of the statute in *Staebler* in two respects, there is a limitation on the length of time that the incumbent can hold over, which the court in *Mackie* said was important in deciding that a vacancy did not exist in the office. Thus, in the present case, it is unclear whether courts would hold that the President could exercise his recess appointment power to oust a holdover commissioner and fill the vacancy. We believe that the better view is that this holdover statute creates a vacancy for purposes of the Recess Appointments Clause

[7] *See generally Executive Power — Recess Appointments*, 33 Op Att'y Gen. 20 (1921) (opining that the President had the power to make recess appointments during an intrasession recess of the Senate lasting from August 24 to September 21, 1921); *Recess Appointments During an Intrasession Recess*, 16 Op O.L.C. 15 (1992), *Intrasession Recess Appointments*, 13 Op O.L.C. 271 (1989); *Recess Appointments Issues*, 6 Op O.L.C 585 (1982).

812 F.2d at 1141 (parallel citation omitted). Judge Norris disputed the short/long distinction and the majority's reliance on *Shoemaker*. He argued that:

> The congressional power to expand the duties of an existing office is subject to a reasonable and relatively clear limitation: Congress may not devolve upon an officeholder responsibilities which are not germane to his existing duties [citing *Shoemaker*]. When Congress merely adds duties to an office that are germane to the officeholder's existing duties, Congress has simply expanded the power of an official in the field and for a period of time in which a *valid* appointing authority has already entrusted him to act. The interference with the appointing authority's choice of personnel is marginal. By contrast, it is apparent from reading the majority opinion that there is no principled or coherent limitation on the power to extend an incumbent's term of office. * * * I fail to see how a line can be drawn between "short" and "long" extensions on any principled basis. The same constitutional evil the majority finds inherent in "long" extensions . . . is also present with short extensions. It is merely present for a shorter period of time.

Id. at 1145.

Although we are not prepared to articulate the precise line at which an extension would effect a congressional appointment, we do not share Judge Norris's skepticism either. In contrast to the hypothetical cases Judge Norris writes about where there is no "principled or coherent limitation" on extending the term of office, there is a "reasonable and relatively clear limitation" in the Sentencing Commission holdover statute. In fact, we think that the time limit in the Sentencing Commission holdover statute serves the same function, and is a close proxy for, "germaneness" as that concept is used when Congress expands the duties of an existing office. If the "interference with the appointing authority's choice of personnel is marginal" where additional but germane duties are added, we do not see any reason why the interference is greater, at least in a constitutional sense, for holdover provisions of short duration. We do not need to address the precise point at which an extension becomes impermissibly long, because we are satisfied that the time limit chosen by Congress in the Sentencing Commission holdover statute is shorter than the time limit in *Benny* and comes with a venerable pedigree. The time limit in the holdover provision at issue is almost identical to the one in the Recess Appointments Clause. The Framers provided that the President alone could fill vacancies in principal offices for this length of time without receiving the advice of the Senate. In other words, they decided that keeping the government running for this length of time was more important than adhering to the formalities of the Appointments Clause. We conclude that this time limit is also a reasonable

length within which Congress may by law keep independent agencies running until the appointing authority fills the position at issue.[8]

III.

In summary, we conclude that the holdover statute applies to the members of the Commission who were appointed prior to its enactment. We also conclude that such commissioners may hold over without violating the Appointments Clause, because the President remains free to appoint a successor who, upon confirmation, would displace the holdover and because there is a reasonable limit to the period during which they can serve as holdover commissioners.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[8] We do not address other hypothetical statutes that are not neutral in their application For example, we do not address a statute that would create or repeal holdover provisions for selective members of the same commission or for classes of members on the same commission, e.g., those appointed on a certain date or those from a particular political party Such statutes might amount to a prohibited congressional designation, even if the holdover period is for a short period of time

Sixth Amendment Implications of Law Enforcement Contact with Corporate Executives

Law enforcement contacts with high-ranking executives of a corporation without the presence of counsel after criminal charges have been filed against the corporation violate the corporation's Sixth Amendment right to counsel

No Sixth Amendment violation occurs when such law enforcement contacts with high-ranking executives occur while civil penalty proceedings are in progress against the corporation

April 15, 1994

MEMORANDUM OPINION FOR THE
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL

You have asked us to consider the Sixth Amendment implications of law enforcement contacts with high-ranking corporate executives while criminal or civil penalty proceedings are pending against the corporation that employs the executives.[1] We conclude that such contacts outside the presence of counsel violate the Sixth Amendment when criminal charges have been filed, but that law enforcement contacts of this nature do not contravene the Sixth Amendment when civil penalty proceedings are in progress.

I. *The Sixth Amendment as a Restriction on Interrogation*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. This constitutional safeguard comes into play concomitantly with the "first formal charging proceeding,"[2] *Moran v. Burbine*, 475 U.S. 412, 428 (1986), and encompasses the right to the assistance of counsel during all forms of interrogation. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 400-01 (1977)

[1] Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Irvin B. Nathan, Principal Associate Deputy Attorney General (Feb 24, 1994) We also received and considered comments contained in a Memorandum for Mary Jo White, United States Attorney, Southern District of New York, from David B Fein, Deputy Chief, Criminal Division, Southern District of New York (Mar. 11, 1994).

[2] In 1980, we explained that, "[g]enerally, no infringement of the Sixth Amendment can occur prior to the initiation of formal judicial proceedings." *Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations*, 4B Op. O.L.C. 576, 581 (1980) Although the Supreme Court had previously held that the Sixth Amendment right to counsel could attach prior to indictment, we noted that the Court's decision in that case — *Escobedo v. Illinois*, 378 U.S. 478 (1964) — "has been limited to its facts." 4B Op. O.L.C. at 581 n.10 (citing *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966), and *Kirby v. Illinois*, 406 U.S. 682, 690 (1972)).

(confession elicited by so-called Christian burial speech); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (surreptitious interrogation).

Most judicial decisions interpreting the right to counsel involve individual defendants, but the Sixth Amendment also affords corporations the right to counsel. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979); *see also United States v. Unimex, Inc.*, 991 F.2d 546, 549 (9th Cir. 1993) (holding that "a corporation has a Sixth Amendment right to be represented by counsel" at trial); *United States v. Thevis*, 665 F.2d 616, 645 n.35 (5th Cir. 1982) (accused corporation can avail itself of guarantees provided to "an 'accused'" by Sixth Amendment), *cert. denied*, 459 U.S. 825 (1982). Because a corporation "'is an artificial entity that can only act through agents,'" *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (quoting *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983)), the proscription of interrogation in the absence of counsel after the commencement of adversary judicial proceedings engenders some confusion when a corporation is named as a defendant. Nevertheless, the contours of the Sixth Amendment right to counsel available to corporations can be defined in both the criminal and civil contexts.

II. *Criminal Proceedings Involving Corporations*

Once the government files criminal charges against a corporation, the Sixth Amendment forecloses interrogation of the corporation outside the presence of corporate counsel. *United States v. Kilpatrick*, 594 F. Supp. 1324, 1350 (D. Colo. 1984), *rev'd on other grounds*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Although the district court opinion in *Kilpatrick* provides the only direct affirmation of this proposition, Sixth Amendment precedent bolsters the conclusion reached in *Kilpatrick*. The Supreme Court has emphasized that the Sixth Amendment "provides the right to counsel at postarraignment interrogations." *Michigan v. Jackson*, 475 U.S. 625, 629 (1986). Because the Sixth Amendment right to counsel applies to corporations as well as individuals, *Unimex*, 991 F.2d at 549; *Rad-O-Lite*, 612 F.2d at 743, corporations — like individuals — cannot be subjected to interrogation outside the presence of counsel after the initiation of criminal proceedings. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985); 4B Op. O.L.C. at 580 ("Once the right to counsel has attached, the government may not elicit incriminating statements from the [defendant] unless it has obtained a waiver of his Sixth Amendment right.").

The question, then, is whether interrogation of high-level corporate executives amounts to contact with the corporation itself. The relationship between corporations and their high-level executives provides the answer to this question. Corporate executives possess the power to invoke a corporation's right to counsel.

Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1119 & n.12 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). Moreover, statements made by high-level corporate executives can be imputed to the corporation itself as admissions. *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 76-77 (S.D.N.Y.) (Katz, Magistrate J.), *adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993). In sum, a corporation can invoke constitutional rights and make binding inculpatory statements through its high-ranking executives. Thus, interrogation of corporate executives constitutes interrogation of the corporation itself.[3] *Id.* (collecting cases holding that contact with high-level executives amounts to contact with corporation itself). Accordingly, when law enforcement officials question high-ranking corporate executives outside the presence of counsel after the initiation of formal criminal proceedings, the Sixth Amendment dictates that — absent a valid waiver of the right to counsel — all statements made by corporate executives are inadmissible against the corporation at a criminal trial.[4] *See Moulton*, 474 U.S. at 180.

III. *Civil Penalty Actions Against Corporations*

Courts traditionally have rejected assertions of the Sixth Amendment right to counsel in civil penalty proceedings on the assumption that the Sixth Amendment applies only after the filing of criminal charges. *See, e.g., Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.6 (11th Cir. 1986); *Collins v. Commodity Futures Trading Comm'n*, 737 F. Supp. 1467, 1482-83 (N.D. Ill. 1990). One commentator has suggested, however, that the Supreme Court's ruling in *United States v. Halper*, 490 U.S. 435 (1989), may have rendered this assumption obsolete. Linda S. Eads, *Separating Crime From Punishment: The Constitutional Implications of United States v. Halper*, 68 Wash U.L.Q. 929, 971-72 (1990). Consequently, you have asked us to address the effect — if any — of the *Halper* decision upon the notion that the Sixth Amendment right to counsel does not apply in civil penalty proceedings.

The *Halper* case involved a Double Jeopardy Clause challenge to a $130,000 civil penalty imposed upon an individual who had previously been convicted on felony charges for the same conduct that led to the civil penalty. *Halper*, 490 U.S. at 437-38. The Supreme Court found that the $130,000 civil penalty served retributive or deterrent purposes, rather than merely remedial purposes, because the penalty bore "no rational relation to the goal of compensating the Government" for

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[3] The New Jersey Supreme Court has even suggested that a "corporation's Sixth Amendment right to counsel may be implicated if government prosecutors might, after indictment, unqualifiedly interview [a lower-level employee] whose conduct establishes the guilt of the corporation." *Matter of Opinion 668 of the Advisory Comm. on Professional Ethics*, 633 A.2d 959, 963 (N.J. 1993).

[4] If the executives themselves have not been formally charged, however, the statements they make can be introduced in a subsequent criminal proceeding against the executives. *See Moulton*, 474 U.S. at 180 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.")

the $585 loss caused by Halper's conduct. *Id.* at 449. Therefore, the civil penalty amounted to "punishment" as contemplated by the Double Jeopardy Clause. *Id.* at 452.

The *Halper* Court unmistakably extended the reach of the Fifth Amendment, but the Court carefully distinguished the Double Jeopardy Clause from "the procedural protections of the Sixth Amendment" and other constitutional safeguards traditionally confined to criminal proceedings. *Halper*, 490 U.S. at 447. Specifically, the Court reaffirmed that the application of such constitutional guarantees turns upon the "abstract approach" prescribed in *United States v. Ward*, 448 U.S. 242, 248-51 (1980), rather than the "intrinsically personal" approach devised by the *Halper* Court to assess the availability of Double Jeopardy Clause protection. *Halper*, 490 U.S. at 447. In the wake of *Halper*, the lower courts have agreed that the availability of Sixth Amendment protections in civil penalty actions depends upon the *Ward* test, rather than the *Halper* standard. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir.), *cert. denied*, 506 U.S. 815 (1992); *United States v. Nevada Power Co.*, 31 Env't Rep. Cas. (BNA) 1878, 1882 (D. Nev. 1990).

According to *Ward*, a civil penalty action ordinarily should not be viewed as a criminal case with all the attendant Fifth and Sixth Amendment guarantees. *Ward*, 448 U.S. at 248-51. When a litigant in a civil penalty proceeding invokes Sixth Amendment rights by characterizing the action as a criminal prosecution, the court must engage in a two-part inquiry. *Id.* at 248. First, the court must "set out to determine whether Congress, in establishing the penalizing mechanism, indicated expressly or impliedly a preference for one label or the other." *Id.* Second, "where Congress has indicated an intention to establish a civil penalty," the court must "inquire[] further whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49. "'Only the clearest proof' that the purpose and effect of the [civil penalty] are punitive will suffice to override Congress' manifest preference for a civil sanction." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). Because the "protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions,'" *Austin v. United States*, 509 U.S. 602, 608 (1993), and civil penalty actions generally cannot be characterized as "criminal prosecutions," *see Ward*, 448 U.S. at 248-51, the Sixth Amendment does not foreclose interrogation of a corporation's executives while a civil penalty action is pending against the corporation.

IV. *Conclusion*

Law enforcement contact with high-ranking corporate executives must be judged by the same Sixth Amendment standards that govern individual defendants' right to counsel. Thus, contact with corporate executives outside the presence of

counsel is impermissible after the initiation of criminal proceedings against a corporation, but such contact passes muster under the Sixth Amendment when civil penalty proceedings are in progress.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Authority of USDA to Award Monetary Relief for Discrimination

The Department of Agriculture has authority to award monetary relief, attorneys' fees, and costs to a person who has been discriminated against in a program conducted by USDA if a court could award such relief in an action by the aggrieved person That question is controlled by whether the anti-discrimination provisions of the applicable civil rights statute apply to federal agencies, and if so, whether the statute waives the sovereign immunity of the United States against imposition of such relief.

The anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 do not apply to federal agencies. Some anti-discrimination provisions in each of the other civil rights statutes addressed in the opinion do apply to federal agencies, but only one of the statutes, the Equal Credit Opportunity Act, waives sovereign immunity with respect to monetary relief, authorizing imposition of compensatory damages. The Fair Housing Act and the Rehabilitation Act do not waive immunity against monetary relief Attorneys' fees and costs may be awarded pursuant to the waiver of immunity contained in the Equal Access to Justice Act

April 18, 1994

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

This memorandum responds to your request for our opinion concerning the authority of the Secretary of Agriculture to award damages and other forms of monetary relief, attorneys' fees, and costs to individuals who the Department of Agriculture ("USDA") has determined have been discriminated against as applicants for, or participants in, USDA conducted programs.[1] You have informed us that the statutes authorizing these programs do not authorize such relief and have asked our opinion whether various civil rights statutes authorize the Secretary to afford such relief.

The Secretary has authority to award monetary relief, attorneys' fees, and costs if a court could award such relief in an action by the aggrieved person. Accordingly, the dispositive questions regarding your inquiry are whether the anti-discrimination provisions of the individual civil rights statutes apply to federal agencies, and if so, whether the statutes waive the sovereign immunity of the United States against imposition of such relief. In considering your request, we have reviewed Title VI of the Civil Rights Act of 1964, the Fair Housing Act, the Rehabilitation Act, and the Equal Credit Opportunity Act. With respect to attorneys' fees and costs, we have also reviewed the Equal Access to Justice Act.

[1] *See* Letter for Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, from James S. Gilliland, General Counsel, Department of Agriculture (Oct 8, 1993).

We conclude that the anti-discrimination provisions of Title VI do not apply to federal agencies. Some anti-discrimination provisions in each of the other statutes that we reviewed do apply to federal agencies, but only one of the statutes, the Equal Credit Opportunity Act, waives sovereign immunity with respect to monetary relief, authorizing imposition of compensatory damages. The Fair Housing Act and the Rehabilitation Act do not waive immunity against monetary relief. Attorneys' fees and costs may be awarded pursuant to the waiver of immunity contained in the Equal Access to Justice Act.

I. *BACKGROUND*

A federal agency must spend its funds only on the objects for which they were appropriated. 31 U.S.C. § 1301(a). Consistent with this requirement,[2] appropriations law provides that agencies have authority to provide for monetary relief in a voluntary settlement of a discrimination claim only if the agency would be subject to such relief in a court action regarding such discrimination brought by the aggrieved person.

This principle has been applied in a number of Comptroller General opinions. For example, the Comptroller General has concluded that agencies have the authority to settle administrative complaints of employment discrimination by awarding back pay because such monetary relief is available in a court proceeding under Title VII of the Civil Rights Act of 1964 ("Title VII"); however, "[t]he award may not provide for compensatory or punitive damages as they are not permitted under Title VII." *Equal Employment Opportunity Commission*, 62 Comp. Gen. 239, 244-45 (1983).[3] The Comptroller General has come to the same conclusion with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"). *Albert D. Parker*, 64 Comp. Gen. 349, 352 (1985). The Comptroller General has applied this appropriations law limitation directly to USDA. *See Nina R. Mathews*, B-237615, 1990 WL 278216, at 1 (C.G. June 4, 1990) ("Employee may not be reimbursed for economic losses pursuant to a resolution agreement made under [ADEA or Title VII] since there is no authority for reimbursement of compensatory damages under either statutory authority.").[4]

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[2] *See also* 31 U.S.C. § 1341(a)(1) (Anti-Deficiency Act)

[3] Waiving sovereign immunity, Title VII expressly authorizes awards of back pay against federal agencies. A provision in Title VII entitled "Employment by Federal Government," 42 U.S.C. § 2000e-16, prohibits discrimination by federal agencies (subsec. (a)); authorizes a civil action in which "the head of the department, agency, or unit . . . shall be the defendant" (subsec. (c)), and incorporates the remedies provisions of 42 U.S.C. § 2000e-5 for such civil actions (subsec. (d)). Awards of back pay are expressly authorized by 42 U.S.C. § 2000e-5(g). Subsequent to issuance of the Comptroller General opinions cited in the text, Title VII was amended to provide for compensatory damage awards against all parties, including federal agencies, and punitive damage awards against all non-government parties. 42 U.S.C. § 1981a(b).

[4] The same appropriations limitation exists for settlements of litigation by the Department of Justice as exists for settlements of administrative proceedings by agencies. This Office has previously opined that the permanent appropriation established pursuant to 31 U.S.C. § 1304 ("the judgment fund") is available "for the payment of non-tort settlements authorized by the Attorney General or his designee, whose payment is 'not

Therefore, the question you have raised regarding the Secretary's authority to award monetary relief in administrative proceedings turns on whether the various civil rights statutes authorize the award of such relief against federal agencies in a court proceeding. That question requires a two-step analysis: whether federal agencies are subject to the discrimination prohibitions of the statute; and, if so, whether the statute waives the sovereign immunity of the United States against monetary relief. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 613-14 (1992) (Energy Department conceded it was subject to procedural requirements of Clean Water Act and Resource Conservation and Recovery Act and liable for coercive fines under those statutes; therefore, only question presented was whether the statutes waived sovereign immunity from liability for punitive fines).[5]

The first step of the analysis requires application of conventional standards of statutory interpretation. The second step, however, requires application of a special, "unequivocal expression" interpretive standard that the Supreme Court has established to govern determinations as to whether a statute waives sovereign immunity — either the inherent constitutional immunity of the federal government or the Eleventh Amendment immunity of the States:

> Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed. . . . [T]he Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] beyond what the language requires . . . . As in the Eleventh Amendment context, 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, 33-37 (1992) (internal quotation marks and citations omitted). Thus, "[t]here is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." *United States v. Idaho, ex rel. Dir., Dep't. of Water Resources*, 508 U.S. 1, 6 (1993).

The methodology required by this "unequivocal expression" standard may be illustrated by the decision in *Nordic Village*. Seven Justices joined in an opinion for the Court that found that although a provision of the Bankruptcy Code could be

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otherwise provided for,' *if and only if the cause of action that gave rise to the settlement could have resulted in a final money judgment.*" *Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op O.L.C. 98, 104 (1989) (emphasis added) (quoting 31 U.S.C. § 1304).

[5] The Court in *Department of Energy* expressly identified the fundamental difference between the substantive coverage of a statute and liability for violations of the statute, stating that the Clean Water Act contains "separate statutory recognition of three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements, administrative authority; and 'process and sanctions, whether 'enforced' in courts or otherwise. Substantive requirements are thus distinguished from judicial process." 503 U.S. at 623.

read to effect a waiver of sovereign immunity for monetary claims against the United States by a bankruptcy trustee, the provision was "susceptible of at least two interpretations that do *not* authorize monetary relief." 503 U.S. at 34. The Court made no effort to apply traditional rules of statutory construction to determine which was the better reading of the provision and simply concluded:

> The foregoing [two alternative interpretations] are assuredly not the only readings of [the provision], but they are plausible ones — which is enough to establish that a reading imposing monetary liability on the Government is not "unambiguous" and therefore should not be adopted.

Id. at 37.[6] The Court held that sovereign immunity against imposition of monetary relief had not been waived.

In consultation with the Civil and Civil Rights Divisions of the Department of Justice, and having received and considered submissions from various interested governmental and nongovernmental parties,[7] we have identified four civil rights statutes that may apply to USDA programs: Title VI of the Civil Rights Act of 1964, the Fair Housing Act, the Rehabilitation Act, and the Equal Credit Opportunity Act. We will discuss Title VI first. That analysis presents the least difficulty, because it is well established that the anti-discrimination provisions of Title VI do not apply to federal agencies and thus there is no need to discuss whether sovereign immunity has been waived. The remaining three statutes require more discussion. The first step of the analysis is satisfied in each case because federal agencies are covered by the anti-discrimination provisions of each statute, at least to some extent. Applying the "unequivocal expression" standard required under the second step, however, we have concluded that sovereign immunity has been waived with respect to monetary relief by only one of the statutes: the Equal Credit Opportunity Act. The final section of the memorandum discusses attorneys' fees and costs.

II. *TITLE VI*

Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

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[6] Applying its rule that waivers of sovereign immunity must be unequivocally expressed in the statutory text, the Court declined to consider the legislative history in an attempt to resolve the ambiguity. *Id.*

[7] *See* Letters from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, and Nelson Diaz, General Counsel, U S Department of Housing And Urban Development (Nov 15, 1993), Elaine R. Jones, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (Oct 28, 1993); Bill Lann Lee, Western Regional Counsel, NAACP Legal Defense and Educational Fund, Inc. (Nov 12, 1993, Nov 24, 1993); Les Mendelsohn, Esq , Speiser, Krause, Madole & Mendelsohn (Nov 4, 1993), David H Harris, Jr , Executive Director, Land Loss Prevention Project (Nov. 5, 1993, Nov 8, 1993).

subjected to discrimination under any program or activity receiving Federal financial assistance." By its terms, this anti-discrimination provision does not apply to programs conducted directly by a federal agency, but rather applies only to "any program or activity receiving federal financial assistance." The conclusion that this provision does not include federal agencies is reinforced by the definitions of "program or activity" and "program" contained in 42 U.S.C. § 2000d-4a. That provision specifically identifies the kinds of entities that are covered, including State and local governments, but contains no reference to the federal government. The courts have held that Title VI "was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary." *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *Fagan v. United States Small Business Admin.*, 783 F. Supp. 1455, 1465 n.10 (Title VI inapplicable to SBA direct loan program), *aff'd*, 19 F.3d 684 (D.C. Cir. 1992).

In light of our conclusion that the discrimination prohibition of Title VI does not apply to federal agencies, there is no need to consider whether Title VI waives sovereign immunity.

III. *THE FAIR HOUSING ACT*

A.

The Fair Housing Act, 42 U.S.C. §§ 3601-3619,[8] prohibits covered persons and entities from engaging in any "discriminatory housing practice," which is defined as "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602(f). Section 3604 prohibits discrimination in the sale or rental of housing. Section 3603(a)(1)(A) of the Act provides that "the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 . . . shall apply" to "dwellings owned or operated by the Federal Government." Thus, a federal agency is subject to the discrimination prohibitions of § 3604 whenever the agency itself is engaged in selling or renting real estate.

In contrast to the language explicitly subjecting federal agencies to the discrimination prohibitions of § 3604, it is unclear whether federal agencies are subject to § 3605(a), which prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction." The definition section of the Act does not include governments or government agencies in the definition of "person," *see* § 3602(d), and unless otherwise specified, the term "person" in a statute does not include the federal government or a federal agency. *United States v. United Mine Workers*, 330 U.S. 258,

[8] The Fair Housing Act was originally enacted as Title VIII of the Civil Rights Act of 1968, Pub L. No. 90-284, 82 Stat. 73 (1968).

275 (1947) ("In common usage," the term person "does not include the sovereign, and statutes employing it will ordinarily not be construed to do so."). The term "entity" is not defined at all in the Act. It is not necessary to resolve this question for purposes of this opinion, however, because we conclude in the next section that the Act does not waive the sovereign immunity of the United States against monetary liability.[9]

B.

Whether federal agencies are subject to monetary liability for violations of § 3604 of the Fair Housing Act turns on application of the "unequivocal expression" standard for waivers of sovereign immunity discussed in section I of this memorandum. We conclude that the Act does not waive sovereign immunity because its text falls well short of satisfying the "unequivocal expression" standard.

Section 3613 authorizes aggrieved persons to enforce the Fair Housing Act's anti-discrimination prohibitions in court. Although § 3613 is silent as to whom this action may be brought against, it does specify what relief may be awarded. Subsection (c)(1) authorizes a court to award an aggrieved person "actual and punitive damages," as well as injunctive relief. In addition, under subsection (c)(2), the court "may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."

We do not believe that § 3613 waives sovereign immunity, except with respect to attorneys' fees and costs. Although the Fair Housing Act expressly establishes a general cause of action for redress of discriminatory practices, it is silent as to the parties against whom such a cause of action may be brought and it does not contain language expressly subjecting the United States to such a suit.

It is possible to infer from the fact that § 3603 expressly subjects the United States to the discrimination provisions of § 3604 that Congress intended that the cause of action established by § 3613 would also apply to the United States. However, § 3613 does not say so and the Supreme Court has held that subjecting a governmental entity to the substantive or procedural requirements of a statute does not necessarily mean that sovereign immunity has been waived or abrogated with respect to claims for damages. *See, e.g., United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (federal agencies subject to procedural requirements of Clean Water Act and Resource Conservation and Recovery Act but immune from actions

[9] For the same reason it is also unnecessary to resolve whether the discrimination prohibitions in §§ 3606 and 3617 apply to federal agencies We note, however, that these sections do not appear to be directed at government activities. Section 3606 makes it unlawful to discriminate with respect to "access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings." Section 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person" with respect to the exercise of rights protected by §§ 3603-3606 of the Act.

for punitive fines); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244-46 (1985) (States subject to section 504 of Rehabilitation Act but immune from actions for monetary relief); *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973) (States subject to Fair Labor Standards Act but immune from actions for monetary relief).[10] The Court has stated that additional language in the suit authorization provision is necessary to "indicat[e] in some way by clear language that the constitutional immunity [is being] swept away." *Id.* at 285.

The only additional relevant language in § 3613 is subsection (c)(2), which authorizes the award of attorneys' fees:

> In a civil action [brought by an aggrieved person under section 3613], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

The presence, in a provision authorizing the bringing of suits by private parties, of language indicating that the United States may be liable for attorneys' fees and costs certainly indicates a recognition that the United States may be subject to suits under the provision. The question remains whether that is a sufficient expression of a waiver of sovereign immunity against damages or any other monetary relief except attorneys' fees and costs.

We recognize that it is a plausible reading of the statute to answer that question in the affirmative. We note, however, that the Supreme Court has declined to give such a reading to an attorneys' fees provision in a State sovereign immunity context. *See Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (stating in decision holding State sovereign immunity not abrogated by Education of the Handicapped Act: "The 1986 amendment to the EHA deals only with attorney's fees, and does not alter or speak to what parties are subject to suit."). In any event, we conclude that the statute does not meet the "unequivocal expression" standard because there is another plausible interpretation of the attorneys' fees language that would not entail waiver of immunity for damages and other monetary relief. Just because the United States is subject to the cause of action does not necessarily mean it is subject to the full range of remedies that are set forth in the statute. These remedies include not only compensatory and punitive damages, but also a "permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such [discriminatory housing] practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c)(1).

[10] The Supreme Court has stated that the standard for establishing a waiver of the federal government's sovereign immunity is substantially the same as the standard for finding congressional abrogation of state Eleventh Amendment immunity *See Nordic Village*, 503 U S at 37. Eleventh Amendment cases like *Atascadero* and *Missouri Public Health Dep't* are therefore helpful in our analysis

The alternative plausible interpretation of the statute is that the attorneys' fees provision contemplates an action that is limited to seeking relief other than money damages. This reading is based on the fact that the sovereign immunity of the United States against non-monetary relief already has been waived by the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-706 which provides that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

5 U.S.C. § 702.[11] "[T]he caselaw of [the Court of Appeals for the District of Columbia Circuit] confirms that 'the [APA] waiver applies to any suit, whether under the APA . . . or any other statute.'"[12] Other Circuits are in accord,[13] and the Supreme Court has implicitly held that the APA waiver is not limited to actions brought under the APA, *see Bowen v. Massachusetts*, 487 U.S. 879, 891-901 (1988) (APA waiver applied in action brought under 28 U.S.C. § 1331).

Under the Supreme Court's "unequivocal expression" standard, the availability of this alternative interpretation of the Fair Housing Act attorneys' fees provision — that it contemplates an action for non-monetary relief based on the APA waiver of sovereign immunity — precludes finding a waiver of sovereign immunity. *See Nordic Village*, 503 U.S. at 37 (when a provision is subject to more than one plausible interpretation, the "reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted").[14]

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[11] The legislative history of this APA provision indicates that its purpose was "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a Federal officer." S. Rep. No. 94-996, at 2 (1976). *See also* H.R. Rep. No. 94-1656, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.") *See generally* Kenneth C. Davis, *Administrative Law Treatise* § 23.19, at 192 (2d ed. 1983) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple. Sovereign immunity in suits for relief other than money damages is no longer a defense.").

[12] *Alabama v. Bowsher*, 734 F. Supp. 525, 533 (D.D.C. 1990), *aff'd*, 935 F.2d 332 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 981 (1991) (quoting P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1154 (3d ed. 1988), and citing *National Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)). *Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982), *Sea-land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

[13] *See, e.g., Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir. 1993) ("the waiver of sovereign immunity contained in [the APA] is not limited to suits brought under the APA."), *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ("[T]he waiver of sovereign immunity contained in [the APA] is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief.")

[14] Another alternative interpretation may also be possible. Because the United States may intervene in private actions brought under § 3613 in order to seek broader relief, *see* 42 U.S.C. § 3613(e), it is possible that the United States could incur liability for attorneys' fees and costs without being a defendant. We find

We therefore conclude that the text of the Fair Housing Act as amended does not waive the sovereign immunity of the United States against imposition of monetary relief. The APA waives sovereign immunity as to any non-monetary relief available under the Act.

C.

The foregoing conclusion is reinforced by consideration of the text and legislative history of the Fair Housing Act when it was originally enacted as Title VIII of the Civil Rights Act of 1968 ("Title VIII"), *supra*, and of the 1988 amendments to the Fair Housing Act (the "1988 Amendments"), Pub. L. No. 100-430, 102 Stat. 1619 (1988). This is a useful methodology for considering whether the Act waives sovereign immunity because it allows a focused analysis of whether Congress specifically intended to waive sovereign immunity.[15]

As discussed above, the language in the Fair Housing Act that provides the most specific basis for an argument that sovereign immunity for monetary liability has been waived is the language in the attorneys' fees provision authorizing a court to award "the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person." 42 U.S.C. § 3613(c)(2). This specific reference to the United States was not contained in the original Fair Housing Act's (Title VIII's) attorneys' fees provision, which authorized the courts to "award to the plaintiff . . . reasonable attorney fees in the case of a prevailing plaintiff: Provided, [t]hat the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." Pub. L. No. 90-284, § 812(c), 82 Stat. 89, 107 (1968). As with the current version of the Act, the original provision on enforcement by private persons authorized an award of damages to an aggrieved person but was silent as to who could be potential defendants in the civil actions. *Id.* § 812, 82 Stat. at 107.

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this interpretation to be less plausible than the non-monetary relief interpretation because the latter gives effect to provisions in the same subsection, which is devoted to "[r]elief which may be granted," 42 U.S.C. § 3613(c), while the former requires reading together separate subsections and inferring that Congress may have contemplated in subsection (c) that interventions by the Attorney General under subsection (e), in cases where she "certifies that the case is of general public importance" and seeks broader relief, might result in awards of attorneys fees and costs against the United States

[15] Justice Scalia criticized this methodology in *Pennsylvania v. Union Gas Co.*, 491 U.S. at 29-30 (Scalia, J., concurring in part and dissenting in part) ("That methodology is appropriate . . if one assumes that the task of a court of law is to plumb the intent of the particular Congress that enacted a particular provision. That methodology is not mine . . It is our task . . not to enter the minds of the Members of Congress . . but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.") Notwithstanding this criticism, we believe the methodology is appropriate here Whatever the merit of Justice Scalia's emphasis of code meaning over congressional intent in other contexts, we do not think that approach is required or desirable where the question presented is whether sovereign immunity has been waived and more than one statutory enactment is involved. We note that no other Justice expressed agreement with Justice Scalia's statement in *Union Gas*. Moreover, the Court's majority in *Dellmuth* used this approach *See* 491 U.S. at 227-32

Thus, the original Fair Housing Act contained no express or implied reference to any cause of action against the United States in its provisions establishing a private cause of action and authorizing awards of attorneys' fees. The 1988 Amendments to the Act removed the "ability to pay" limitation on attorneys' fee awards and added language making it clear that the United States was subject to an award of attorneys' fees and costs. The 1988 Amendments, however, did not add any language suggesting that the United States was subject to damages claims.

The legislative history of the 1988 Amendments reinforces the conclusion that the Fair Housing Act does not waive the sovereign immunity of the United States for monetary relief.[16] The principal legislative history for those amendments is contained in the report of the Committee on the Judiciary of the House of Representatives. H.R. Rep. No. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173. In a paragraph giving an overview of the purpose of the amendments made by the committee, the report stated that the revision "brings attorney's fee language in title VIII closer to the model used in other civil rights laws." *Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. at 2174. The committee went on to state later in the report that "[t]he bill strengthens the private enforcement section by expanding the statute of limitations, removing the limitation on punitive damages, and brings [sic] attorney's fee language in title VIII closer to the model used in other civil rights laws." *Id.* at 17, *reprinted in* 1988 U.S.C.C.A.N. at 2178.[17]

The committee report indicates that the thrust of the amendments was to remove limitations on effective private enforcement by changing the statute of limitations, removing the limit on punitive damages, and removing the "ability to pay" limitation on the award of attorneys' fees. It also indicates an intent to conform the language of the attorneys' fees provision to that in other civil rights laws.[18] There is no discussion whatsoever of actions against the United States, much less any refer-

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[16] Although legislative history cannot be relied upon to provide the "unequivocal expression" the Supreme Court requires, *Nordic Village*, 503 U S at 37, we believe it is permissible to cite legislative history to reinforce a text-based conclusion that a statute does not waive sovereign immunity. Confidence in a conclusion based on the text can be strengthened where the legislative history reveals no evidence of intent to waive sovereign immunity

[17] In the discussion of section 813(c) in the section-by-section portion of the report, the committee focused on removing the punitive damages limitation. The following is the entirety of the discussion of section 813(c)

> Section 813(c) provides for the types of relief a court may grant This section is intended to continue the types of relief that are provided under current law, but removes the $1000 limitation on the award of punitive damages The Committee believes that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law The Committee intends that courts be able to award all remedies provided under this section. As in Section 812(o), the court may also award attorney's fees and costs.

H R. Rep. No. 100-711, at 39-40, *reprinted in* 1988 U.S.C C.A.N at 2200-01.

[18] For example, the attorneys' fees provision in Title VII of the Civil Rights of 1964 (employment discrimination) contains the following similar language concerning the United States. "[T]he court . . . may allow the prevailing party, other than . . . the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and . . the United States shall be liable for costs the same as a private person." 42 U S.C. § 2000e-5(k)

ence to an intent to waive sovereign immunity or to establish monetary liability for the United States.

Given the focused nature of the 1988 Amendments to the Fair Housing Act, it is not reasonable to infer any intent to waive the sovereign immunity of the United States against imposition of monetary relief. At most, the amendments can be read to waive sovereign immunity against awards of attorneys' fees. Reading into the amendment a broader waiver would be impermissible under the interpretative method required by the Supreme Court and would amount to finding an accidental waiver or a waiver by inadvertence.

D.

Our conclusion regarding waiver of sovereign immunity under the Fair Housing Act is supported by the case law on other statutes. In *Dellmuth v. Muth*, 491 U.S. 223 (1989), the Supreme Court discussed whether the Education of the Handicapped Act ("EHA"), which, like the Fair Housing Act, had been amended to impose liability for attorneys' fees on an otherwise immune governmental entity (in that case, the States), subjected the States to suit. Although the textual basis for arguing waiver of sovereign immunity under that statute appears to be stronger than is the case under the Fair Housing Act, the Court declined to find waiver.

The EHA "enacts a comprehensive scheme to assure that handicapped children may receive a free public education appropriate to their needs. To achieve these ends, the Act mandates certain procedural requirements for participating state and local educational agencies." *Id.* at 225. In *Dellmuth*, the Supreme Court reversed a decision of the Third Circuit Court of Appeals that the EHA abrogated the States' sovereign immunity against suit for damages. According to the Supreme Court,

> [T]he Court of Appeals rested principally on three textual provisions. The court first cited the Act's preamble, which states Congress' finding that "it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the education needs of handicapped children in order to assure equal protection of the law." Second, and most important for the Court of Appeals, was the Act's judicial review provision, which permits parties aggrieved by the administrative process to "bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." Finally, the Court of Appeals pointed to a 1986 amendment to the EHA, which states that the Act's provision for a reduction of attorney's fees shall not apply "if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation

> of this section." In the view of the Court of Appeals, this amendment represented an express statement of Congress' understanding that States can be parties in civil actions brought under the EHA.

Id. at 228 (citations omitted).

We quote at length the Supreme Court's rejection of the Court of Appeals' analysis, because it can be applied directly to the Fair Housing Act:

> We cannot agree that the textual provisions on which the Court of Appeals relied, or any other provisions of the EHA, demonstrate with unmistakable clarity that Congress intended to abrogate the States' immunity from suit. The EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity. Nor does any provision cited by the Court of Appeals address abrogation in even oblique terms, much less with the clarity *Atascadero* requires. The general statement of legislative purpose in the Act's preamble simply has nothing to do with the States' sovereign immunity. The 1986 amendment to the EHA deals only with attorney's fees, and does not alter or speak to what parties are subject to suit. . . . Finally, [the private cause of action provision] provides judicial review for aggrieved parties, but in no way intimates that the States' sovereign immunity is abrogated. As we made plain in *Atascadero*, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."
>
> . . . We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. *This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation.*

Id. at 231-32 (emphasis added) (citations omitted).

Dellmuth presented a stronger case for waiver of sovereign immunity than the Fair Housing Act because the EHA contains "frequent reference[s] to the States" and is obviously very much focused on the activities of the States, while the Fair

Housing Act is focused on the private sector and has relatively minor relevance to the activities of federal agencies. Nonetheless, the Supreme Court refused to find that the EHA waived sovereign immunity, relying on specific points that are directly applicable to the Fair Housing Act: that an attorneys' fees provision speaks only to attorneys' fees and does not address who is subject to suit or what remedies are available; that a general authorization for suit is not an "unequivocal expression"; and that legitimate inferences that Congress intended a damages cause of action are not "unequivocal expressions."[19]

The Department of Housing and Urban Development ("HUD") has submitted a letter stating its conclusion that "a federal agency . . . may be required to pay damages and other relief . . . [for] violations of the [Fair Housing Act]."[20] HUD relies principally on the analysis contained in *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991), which held that the Rehabilitation Act waives the sovereign immunity of the United States against damage awards. As discussed in the next section of this memorandum, we believe that *Doe* used a method of statutory interpretation that is impermissible under the Supreme Court precedents and that the case was incorrectly decided.

IV. *REHABILITATION ACT*

We reach fundamentally the same conclusions with respect to the Rehabilitation Act of 1973, as amended (the "Rehabilitation Act"), 29 U.S.C. §§ 794-794c, as we have reached with respect to the Fair Housing Act.

A.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits discrimination on the basis of disability:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under*

[19] The Court's opinion in *Dellmuth* relies heavily on *Atascadero State Hosp. v Scanlon*, 473 U S 234 (1985). *See* 491 U.S. at 227, 230-32 *Atascadero* also strongly supports the conclusion that the Fair Housing Act does not waive sovereign immunity for monetary relief *Atascadero* concerned the discrimination provisions of the Rehabilitation Act of 1973 and is discussed in detail in the next section of this memorandum, which addresses that act. *Atascadero* held that the Rehabilitation Act does not abrogate the sovereign immunity of the States We conclude in the next section that the analysis in that case should apply fully to actions against the federal government The case is significant for purposes of the discussion in this section because the Rehabilitation Act has a structure that is similar to the Fair Housing Act

[20] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, and Nelson Diaz, General Counsel at 1 (Nov 15, 1993).

> *any program or activity conducted by any Executive agency or by the United States Postal Service.*

Id. § 794(a) (emphasis added). The italicized language, which was added to section 504 in 1978,[21] expressly subjects federal agencies to the discrimination prohibitions of the Act.

B.

Section 505 of the Rehabilitation Act (29 U.S.C. § 794a), which also was added in 1978,[22] sets forth the remedies available for violations of the discrimination prohibitions. The following provisions of section 505 are pertinent here:[23]

> (a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id. § 794a(a)(2), (b).

Thus, as with the Fair Housing Act, the Rehabilitation Act has had two legislative enactments that bear on the sovereign immunity question: the original discrimination prohibition and a later amendment that can be argued to effect a waiver of immunity against imposition of monetary relief because it refers to the United States in a way that recognizes that federal agencies may be defendants in private actions. The history of the Rehabilitation Act enactments would at least initially suggest the possibility of a more plausible argument in favor of waiver, however, because its amendments were more sweeping than the Fair Housing Act amendments: while the Fair Housing Act amendments of 1988 merely made relatively minor changes to an existing cause of action and modified an attorneys' fees provision, the section 504 amendments in 1978 added for the first time a provision authorizing a private action for violations and a provision authorizing attorneys' fees awards.

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[21] Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982 (1978).

[22] *Id.* § 120, 92 Stat. at 2982.

[23] The only other provision of section 505 (29 U.S.C. § 794a(a)(1)) concerns discrimination in federal employment, which we do not understand to be covered by your opinion request.

However, after analyzing the Rehabilitation Act enactments under the Supreme Court's "unequivocal expression" standard, we conclude that there is no waiver of sovereign immunity for monetary relief. There is no fundamental difference between the effect of the Rehabilitation Act enactments and the effect of the Fair Housing Act enactments. In both cases, there is no express language authorizing actions against the United States for damages or other monetary relief and it is reasonable to read the cause of action and attorneys' fees provisions as allowing actions against the United States for injunctive relief pursuant to the waiver of sovereign immunity for such relief contained in the Administrative Procedure Act. As the Supreme Court made clear in *Nordic Village*, where a plausible reading is available that does not authorize monetary relief, "a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." 503 U.S. at 37.[24]

C.

Our conclusion is supported by the case law. The Supreme Court already has held that the Rehabilitation Act does not abrogate the sovereign immunity of the States. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), the Court held that sections 504 and 505 of the Act do not abrogate the States' Eleventh Amendment sovereign immunity against imposition of monetary relief. *Id.* at 244-46. Applying an "unequivocally clear" standard,[25] which is substantially the same as the "unequivocal expression" standard governing waiver of federal immunity (*Nordic Village*, 503 U.S. at 37), the Court held that States that receive federal assistance are clearly subject to the discrimination prohibition of section 504,

> [b]ut given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

[24] As we explained in the course of our consideration of the Fair Housing Act, we believe it is permissible to cite legislative history to reinforce a text-based conclusion that a statute does not waive sovereign immunity. We have reviewed the legislative history of the Rehabilitation Act amendments of 1978 and have found, as was the case with respect to the Fair Housing Act amendments of 1988, that it does not include any consideration of the subjects of sovereign immunity or of establishing monetary liability for the United States. Thus, it is consistent with our conclusion that those amendments do not waive sovereign immunity.

[25] *Atascadero* established the following standard: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." 473 U.S. at 242.

473 U.S. at 246 (citations omitted).[26] The Court did not specifically address the section 505 attorneys' fees and costs provision, but its holding contains an implicit conclusion that the provision does not waive immunity for any monetary relief other than the attorneys' fees and costs themselves. The statutory framework with respect to the United States is substantially the same as with respect to the States, and we see no basis for concluding that the language of the Act waives the federal government's sovereign immunity when it does not abrogate the immunity of the States.[27]

A panel of the Ninth Circuit Court of Appeals has concluded otherwise, holding that the Rehabilitation Act does indeed waive the sovereign immunity of the United States against imposition of damages. *Doe v. Attorney General of the United States*, 941 F.2d 780 (1991). We believe, however, that *Doe* was incorrectly decided. First, the Ninth Circuit's analytical approach was inconsistent with the Supreme Court's requirement of an "unequivocal expression" in statutory text without resort to legislative history. *See Nordic Village*, 503 U.S. at 33-37. In the section of its opinion entitled "The Legal Standard for Ascertaining Whether the Government has Waived Sovereign Immunity," 941 F.2d at 787, the Ninth Circuit incorrectly stated that "[t]he key to determining whether there has been a waiver is Congress's intent as manifested in the statute's language and legislative history." *Id.* at 788. Rather than using the special standard established by the Supreme Court, the Ninth Circuit chose to view the issue as requiring application of the factors for implying a private right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975), with an additional sovereign immunity gloss that "only explicit congressional intent in the statutory language and history will suffice" for implying a private right of action against the United States. *Doe*, 941 F.2d at 788.

In addition, the Ninth Circuit's analysis of the Rehabilitation Act is unpersuasive. The court's conclusion was as follows:

> In amending section 504, Congress made certain that federal agencies would be liable for violations of the statute. Congress's insertion of federal agencies in the pre-existing clause subjecting others to liability and its broad-brush remedy provision indicate that Congress intended that there be no distinction among section 504 defendants.

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[26] Responding to the Supreme Court's decision in *Atascadero*, Congress passed legislation expressly abrogating the sovereign immunity of the States under the Rehabilitation Act and other civil rights statutes Pub L No 99-506, § 1003, 100 Stat 1807, 1845 (1986). That legislation contained no provisions bearing on the sovereign immunity of the United States

[27] The only treatment of the federal government in section 505 that is different from the treatment of the States (other than the obvious difference that federal agencies are not recipients of federal assistance) is that the attorneys fees provision (paragraph (b)) does not allow the United States as a prevailing party to recover attorneys' fees That exception says nothing, of course, about the liability of the United States for damages or other monetary relief, and the fact that the United States may be subject to attorneys fees awards does not waive sovereign immunity for damages and other kinds of monetary relief.

Id. at 794. That conclusion is incorrect in two fundamental respects. First, the addition of federal agencies to section 504 was not to a "clause subjecting others to *liability*," but rather to a clause that imposed a non-discrimination substantive requirement and did not address liability in any way; it was not until section 505 was added in 1978 that the Rehabilitation Act addressed remedies. Second, the Supreme Court has rejected the view that the "broad-brush remedy provision [section 505] indicate[s] that Congress intended that there be no distinction among section 504 defendants." *Id.* As discussed above, the Supreme Court opined in *Atascadero State Hospital v. Scanlon* that there are indeed distinctions to be made among section 504 defendants, holding that

> given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

473 U.S. at 246. The United States, of course, also has special constitutional status, and the approach taken in *Atascadero* requiring an unequivocal specific expression of intent to waive sovereign immunity is equally applicable in the context of the federal government. *Nordic Village*, 503 U.S. at 37.

V. *EQUAL CREDIT OPPORTUNITY ACT*

In contrast to our preceding conclusions, we conclude that the Equal Credit Opportunity Act (the "Credit Act"), 15 U.S.C. §§ 1691-1691f, partially waives the sovereign immunity of the United States against the imposition of monetary relief, by authorizing an award of compensatory damages. Although this conclusion is not completely free from doubt because it is possible that the Supreme Court would require a more explicit statement of waiver, we reach this conclusion because we can find no reasonable explanation for a provision exempting all government creditors from liability for punitive damages other than that the provision recognizes that government creditors are liable for compensatory damages. There is no comparable provision in any of the other civil rights statutes addressed in this memorandum.

A.

The Credit Act prohibits any creditor from discriminating against any applicant with respect to any aspect of a credit transaction. *Id.* § 1691(a). The term "creditor" is defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continua-

tion of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." *Id.* § 1691a(e). For purposes of the Act, a "person" is "a natural person, a corporation, *government or governmental subdivision or agency*, trust, estate, partnership, cooperative, or association." *Id.* § 1691a(f) (emphasis added).

Although the Credit Act contains no further indication in its text or legislative history as to whether the governmental references in the definition of "person" were intended to include federal agencies, the natural understanding of the references is that the federal government is included, because the language is unrestricted and there is no language suggesting any different treatment for different levels of government. If it were intended that the federal government was to be exempt and the statute limited in its coverage to State and local governments, we would expect that the text of the statute would make such a distinction — or at least the distinction would be identified in legislative history. Neither the statute nor the legislative history contain any such suggestion.

Our conclusion that the federal government is subject to the discrimination provisions of the Credit Act may be reinforced by reference to another, previously enacted statute that also regulates the extension of credit, the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1681u. Both the Credit Act and TILA are part of the Consumer Credit Protection Act.[28] Statutes addressing the same subject matter — that is, statutes "in pari materia" — should be construed together.[29]

TILA uses the same language as the Credit Act concerning covered government organizations. TILA applies to any "creditor," which is defined as a "person" who regularly extends certain types of consumer credit. *Id.* § 1602(f). "Person" is defined as a "natural person" or an "organization." *Id.* § 1602(d), and "organization" includes a "government or governmental subdivision or agency." *Id.* § 1602(c). As with the Credit Act, there is no further indication of what levels of government are covered. Unlike the Credit Act, however, TILA contains an express assertion of sovereign immunity in the enforcement section of the statute, thus indicating a clear recognition that the federal government is subject to the substantive provisions of TILA:

> [N]o civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State of political subdivision.

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[28] TILA was enacted in 1968 as title I of the Consumer Credit Protection Act, Pub. L. No 90-321, 82 Stat. 146, and the Credit Act was added to the Consumer Credit Protection Act as title VII in 1974, Pub. L. No. 93-495, tit V, 88 Stat. 1500, 1521.

[29] *See* 2B Norman J Singer, *Sutherland Statutory Construction* § 51.02, at 121 (5th ed 1992) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes Thus, they all should be construed together ").

Id. § 1612(b). It is reasonable to assume that when Congress defined "person" in the Credit Act to include a "government, governmental subdivision or agency," it intended those terms to have the same scope as the identical terms used in the previously enacted TILA.[30]

B.

Of course, as discussed in prior sections of this memorandum, the fact that federal agencies are subject to the substantive requirements of the Credit Act does not necessarily mean that there has been a waiver of sovereign immunity against imposition of monetary liability for violation of such requirements. The Credit Act sovereign immunity question is not a simple one, because there is no language directly addressing the subject of sovereign immunity or directly stating that the United States may be subject to an award of monetary relief. However, as discussed below, we find there has been a waiver because the Act contains a provision that indirectly, but in our view unequivocally, indicates that the United States may be required to pay compensatory damages.

Section 1691e of the Credit Act provides for a private right of action against creditors who violate the discrimination prohibitions of the Act. Under subsection (a), all creditors are liable for compensatory damages: "[A]ny creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." Under subsection (b), all creditors except governmental creditors are liable for punitive damages: "[A]ny creditor, other than a government or governmental subdivision or agency . . . shall be liable to the aggrieved applicant for punitive damages . . . ." Equitable relief is authorized under subsection (c).[31] Finally, under subsection (d), costs and attorneys' fees may be imposed: "In the case of any successful action under subsection (a), (b), or (c) . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court . . . ."

Subsection (b) of section 1691e provides the key to finding a partial waiver of sovereign immunity against monetary relief. Coming immediately after a provision (subsection (a)) that states that all creditors are liable for compensatory damages, a provision exempting government creditors from liability for punitive damages necessarily implies a recognition that government creditors are otherwise liable for damages under the Act and remain liable for compensatory damages under the preceding section, which contains no such limitation. "[A] limitation of liability is

[30] *See id* § 51 02, at 122 ("Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense ")

[31] "Upon application by an aggrieved applicant, the [court] may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter." 15 U S C § 1691e(c)

nonsensical unless liability existed in the first place." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 (1989) (holding that CERCLA abrogated State sovereign immunity based in part on implication of provisions exempting States from liability for certain actions).

Thus, the Credit Act is different from the Fair Housing Act and the Rehabilitation Act in the fundamental respect that it contains a provision indicating liability for damages that is susceptible to no other plausible interpretation that would not impose liability. Whereas we concluded that the attorneys' fees provisions in the Fair Housing Act and the Rehabilitation Act did not satisfy the "unequivocal expression" standard because there was another plausible interpretation that did not impose monetary liability, *see Nordic Village*, 503 U.S. at 37, the interpretation of subsections (a) and (b) that subjects government creditors, including the United States, to liability for compensatory damages is the only plausible interpretation. Accordingly, we conclude that the Credit Act waives sovereign immunity with respect to compensatory damages.[32]

VI. *ATTORNEYS' FEES AND COSTS*

The analysis for whether attorneys' fees and costs may be awarded under the civil rights statutes whose anti-discrimination provisions apply to federal agencies is simpler than the foregoing analysis on whether monetary relief may be awarded. There is no need to decide whether the individual civil rights statutes waive sovereign immunity for attorneys' fees and costs, because the Equal Access to Justice Act (the "EAJA") expressly waives sovereign immunity. Immunity for costs is waived by 28 U.S.C. § 2412(a), and immunity for attorneys' fees is waived by 28 U.S.C. §§ 2412(b) and 2412(d). Each of these sections contains language authorizing an award of attorneys' fees or expenses to "the prevailing party in any civil action brought by or against the United States."

The EAJA also specifically addresses the *extent* of the United States' liability for attorneys' fees and costs. There are two separate attorneys' fees regimes under the EAJA. Under 28 U.S.C. § 2412(b), a court may award attorneys' fees against the United States, and if it does, "[t]he United States shall be liable for [attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such

[32] Our conclusion with respect to the waiver of sovereign immunity under the Credit Act has implications with respect to claims alleging violations of the Fair Housing Act. Although the latter statute does not waive sovereign immunity, conduct violative of that statute may also violate the Credit Act. The fact that the two statutes are, to some extent, coextensive is acknowledged in the Credit Act's provision that "[n]o person aggrieved by a violation of this subchapter and by a violation of section 3605 of [the Fair Housing Act] shall recover under this subchapter and section 3612 of [the Fair Housing Act], if such violation is based on the same transaction." 15 U.S.C. § 1691e(i). Thus, where a federal agency is discriminating in the extension of credit, that conduct may violate both statutes. If it does, the agency would have authority pursuant to the Credit Act's waiver of sovereign immunity to provide monetary relief in settlement of a claim, even if the claim cites only the Fair Housing Act, to the extent allowed by the Credit Act.

an award."[33] Because the common law applies the "American Rule," which provides that each litigant must ordinarily pay his or her own lawyer, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), the extent of liability for attorneys' fees under the individual civil rights statutes should generally be governed by the specific fee-shifting language of the statutes, each of which authorizes the court to award "a reasonable attorneys' fee."[34]

As an alternative to an award of attorneys' fees under § 2412(b), the EAJA provides in § 2412(d) for a mandatory award of attorneys' fees against the United States (upon application by the prevailing party), except when the United States' position was substantially justified or when special circumstances would make an award of fees unjust. Under subsection (d), attorneys' fees are capped at the rate of $75 per hour, absent a special judicial finding that special factors justify higher fees, § 2412(d)(2)(A), and parties may only recover if they have incomes or net worths below certain levels, § 2412(d)(2)(B).

The EAJA also provides for the extent of the United States' liability for costs: "A judgment for costs when taxed against the United States shall . . . be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. § 2412(a)(1). Because this provision begins with the caveat "[e]xcept as otherwise specifically provided by statute," it is necessary to decide whether the civil rights statutes provide differently with respect to costs. The Rehabilitation Act and the Equal Credit Opportunity Act do not contain language specifically addressing the liability of the United States for costs. *See* 29 U.S.C. § 794a(b); 15 U.S.C. § 1691e(d). Therefore, the EAJA provision applies under those two statutes. The Fair Housing Act, however, does contain a specific provision that displaces the EAJA provision. It provides that "[t]he United States shall be liable for . . . costs to the same extent as a private person." 42 U.S.C. § 3613(c)(2).

VII. *CONCLUSIONS*

The Supreme Court has established a strict "unequivocal expression" standard for determinations on whether a statute waives the sovereign immunity of the United States against imposition of monetary relief. One of the civil rights statutes that we have been asked to review, Title VI of the Civil Rights Act of 1964, does not prohibit discrimination by federal agencies. Anti-discrimination provisions in the remaining statutes do apply to federal agencies, but only one of them, the Equal Credit Opportunity Act, contains a waiver of sovereign immunity regarding monetary relief, and that waiver is limited to compensatory damages. Agencies there-

[33] Because § 2412(b) begins with the caveat "[u]nless expressly prohibited by statute," we have reviewed the civil rights statutes to determine whether they "expressly prohibit" an award of attorneys' fees against the United States. They do not.

[34] *See* Fair Housing Act, 42 U.S.C. § 3613(c)(2), Rehabilitation Act, 29 U.S.C. § 794a(b), Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d).

fore have authority to provide compensatory damages to the extent allowed by the Credit Act in their voluntary settlement of discrimination claims if the conduct complained of violates the Credit Act. In addition, the Equal Access to Justice Act authorizes awards of attorneys' fees and costs against federal agencies.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Equitable Transfers of Forfeited Monies or Property

When the federal government makes an equitable transfer of forfeited monies or property to a state or local law enforcement agency, that transfer is more appropriately characterized as a conditional gift to the agency rather than as a formal contract between the federal government and the agency.

If the state or local agency fails to use the transferred property for law enforcement purposes, the federal government may be able to pursue restitution of the property.

April 19, 1994

MEMORANDUM OPINION FOR THE DIRECTOR AND CHIEF COUNSEL
EXECUTIVE OFFICE FOR ASSET FORFEITURE

You have requested our assistance in determining whether equitable transfers of forfeited property to state and local law enforcement agencies should be viewed as contracts or as conditional gifts. Pursuant to 21 U.S.C. § 881 and 19 U.S.C. § 1616a, the Attorney General has the authority to share forfeited monies or tangible property with any state or local law enforcement agency which participated directly in the investigative or prosecutorial efforts leading to the seizure and forfeiture of the property. The local agency wishing to share in the forfeited property must apply by submitting an "Application for Transfer of Federally Forfeited Property — Form DAG-71" ("DAG-71") within sixty days of the seizure. *See A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, December 1990, at 3 ("Guide"). Both the shared property and any income generated from it "*must* be used for the law enforcement purposes" specified by the requesting agency in its DAG-71 form. *Id.* at 4; *see also The Attorney General's Guidelines on Seized and Forfeited Property*, July 1990, at 8 ("Guidelines").[1] Permissible law enforcement purposes include, but are not limited to, the purchase of vehicles, weapons, or protective equipment and the payment of salaries and other expenses. Guide at 4.

The question about the appropriate characterization of equitable transfers has arisen because of the failure of some local agencies to comply with the Guidelines. Specifically, a 1992 audit by the Inspector General revealed that some agencies have failed to use transferred monies and property for permissible law enforcement purposes. The General Counsel of the Office of the Inspector General concluded that the Justice Department could seek to recover these misspent monies through restitution because the equitable transfer created a contractual relationship.[2] *See*

[1] Both the DAG-71 form and its accompanying instructions also state that all assets transferred must be used for the law enforcement purpose specified in the request.

[2] The General Counsel also concluded that the Department could act to preclude future disbursements to an agency misusing funds The availability of this remedy has not been questioned

Memorandum for Guy Zimmerman, Assistant Inspector General for Audit, from Howard L. Sribnick, General Counsel, Office of the Inspector General (Sept. 9, 1992). The Executive Office of Asset Forfeiture, however, has stated that it is more inclined to view equitable transfers as conditional gifts rather than contractual relationships and thus believes the Department is powerless to seek restitution of transferred funds. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture (Dec. 17, 1993).

We believe that the equitable transfers at issue here are more analogous to a conditional gift than to a formal contractual relationship. Although it is true that the Guide states that the DAG-71 should be "treated as a contract" between the requesting agency and the Department of Justice, *see* Guide at 4, we believe that this language is better read as signifying that the conditions placed on the transfer are binding on the local agency rather than as creating a formal contract. A formal contract is not created for three reasons. First, the language of both the Guide and the Guidelines suggests that the intent of the program is to reward local law enforcement agencies for their valuable past assistance in securing the property, rather than to create a bargained-for exchange of the agency's promise to use the money for law enforcement in return for a share in the forfeited property. For example, the amount of the equitable share awarded depends in part on the degree of direct participation in the law enforcement effort by the local agency and on whether the local agency provided unique or indispensable assistance. Guidelines at 9. A promise to reward past conduct is not sufficient to create a contract under settled principles of contract law. *Restatement (Second) of Contracts* § 86 (1981). Second, the absence of bargained-for legal detriment on the part of the requesting agency suggests that the relationship created is that of a conditional gift rather than a formal contractual relationship. Even though the requesting agency promises not to use the money for any purpose other than that specified in the request, this is not an example of a promise not to do something the agency would otherwise have the right to do. Finally, neither the DAG-71 form nor the Guidelines suggest that the federal government is ever bound to make the requested transfer. *See, e.g.*, Guidelines at 1 (Guidelines are not intended to create any rights on behalf of claimants or petitioners).

It is also our belief, however, that the conclusion that an equitable transfer is a conditional gift does not necessarily preclude the federal government from seeking restitution of transferred funds being used for non-law-enforcement purposes. As an initial matter, it is clear that a promise to use the transferred property for

[3] The legislative history of the amendments to 21 U.S.C. § 881 and 19 U.S.C. § 1616a also makes plain that the purpose of allowing the Attorney General to transfer funds to local agencies was to recognize the assistance of those agencies in securing the forfeiture and to enhance cooperation between local and federal law enforcement agencies. H.R. Rep. No. 98-1030, at 216, 219 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3399, 3402.

law enforcement purposes is in fact a condition of receiving an equitable share from the federal government. *See, e.g.*, DAG-71 (requiring requestor to certify that property will be used for law enforcement purpose stated); Guidelines at 8 (stating that all property transferred shall be used for law enforcement purposes). The DAG-71 further reinforces the interest of the federal government in ensuring that the money is used for law enforcement purposes by requiring the local agency to certify that it will report on the actual use of equitably shared property upon request. In addition, the Guidelines make plain that "the integrity of the entire forfeiture program depends upon the faithful stewardship of forfeited property and the proceeds thereof." Guidelines at 1. Permitting local agencies to use the proceeds of forfeited property for any purpose whatsoever would undermine the integrity of the program.

The fact that the Department has placed such a clear condition on the use of funds received under the equitable sharing program and has reserved the right to confirm that an agency uses transferred funds as promised suggests that the Department did not intend to pass unconditional control of the funds to the local agency. Instead, it appears that the Department intended to make a conditional gift, which remains in effect only so long as the gift is being used for its intended purpose. "A gift may be conditioned upon the donee's performance of specified obligations . . . If the obligation is not performed, the donor is entitled to restitution." *Ball v. Hall*, 274 A.2d 516, 520 (Vt. 1971). In the analogous context of federal grants to state and local agencies, courts have stated that the federal government may use principles of restitution to recover monies that were granted for specific purposes and then used in contravention of those purposes, even in the absence of statutory authority expressly permitting such recovery. *See, e.g.*, *West Virginia v. Secretary of Educ.*, 667 F.2d 417, 419 (4th Cir. 1981) (per curiam); *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). *But see* 2 Richard B. Cappalli, *Federal Grants and Cooperative Agreements* § 8:15, at 80-82 (1982) (suggesting that federal agency may have forfeited its right to recover improperly used funds if it has not established a right to recovery in the grant agreement or in duly promulgated regulations). Restitutionary remedies are available because, although not a formal contractual relationship, federal grant programs are nonetheless "much in the nature of a contract: in return for federal funds, the [grantee] agree[s] to comply with federally imposed conditions." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981).

Whether to pursue restitution against local agencies misusing funds transferred to them under the equitable sharing program is a policy question not suited for

[4] The Supreme Court has not yet resolved the question whether the federal government has a common law right to recover funds whenever a grant recipient fails to comply with the conditions of the grant. *Bell v. New Jersey*, 461 U.S. 773, 782 n 7 (1983)

resolution by this office. We mean to suggest only that a right to recover misspent funds on a restitution theory may well be supportable under current case law.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

MARAD Rulemaking Authority Under Cargo Preference Laws

The U.S. Maritime Administration has the authority to promulgate rules establishing mandatory uniform charter terms for the carriage of cargoes subject to the Cargo Preference Act of 1954.

April 19, 1994

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

This responds to your letter requesting our opinion whether the U.S. Maritime Administration ("MARAD") has authority to promulgate rules establishing mandatory uniform charter terms for the carriage of cargoes subject to the Cargo Preference Act of 1954, section 901(b) of the Merchant Marine Act of 1936, as amended ("MMA"), Pub. L. No. 83-664, ch. 936, 68 Stat. 832, 1034 (1954) ("CPA"). In addition to the submission accompanying your letter, on November 23, 1993, the Department of Agriculture ("USDA") and the U.S. Agency for International Development ("USAID") each submitted memoranda setting forth their views in opposition to MARAD's position (hereinafter cited as "USDA Mem." and "USAID Mem."). On January 25, 1994, we received a final submission from MARAD in reply to the submissions of USDA and USAID.

We conclude that MARAD's statutory authority is broad enough to warrant issuance of charter term regulations. Under the CPA, agencies are only required to allocate the targeted share of cargo to U.S.-flag carriers to the extent that shipment on such carriers is available at "fair and reasonable rates." The proposed regulations appear to be a reasonable means of containing charter-related pass-through costs incurred by U.S.-flag carriers in the preference trade, thereby helping those carriers to maintain "reasonable" rates and to utilize the full statutory allocation of cargo preference, both overall and by "geographic areas," *see* 46 U.S.C. app. § 1241(b)(1). MARAD has explicit authority to issue regulations governing federal agencies in the "administration" of their cargo preference programs, and there is persuasive historical evidence that such program administration, as understood by Congress, encompasses the promulgation of charter party terms.

I. BACKGROUND

A. *The Cargo Preference Act of 1954*

This dispute centers around the nation's cargo preference laws, which require that a minimum percentage of ocean cargo generated by certain U.S. government programs (e.g., foreign food aid grants or foreign purchases financed by U.S. Gov-

ernment loans) must be transported in U.S.-flag vessels. The Cargo Preference Act provides in relevant part:

> Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, . . . the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities . . . which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas . . . .

46 U.S.C. app. § 1241(b)(1). As a result of amendments enacted in the 1985 Farm Bill, the percentage of food aid program shipments subject to cargo preference was increased from 50% to 75%. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1496, 46 U.S.C. § 1241b.

In 1970, Congress enacted section 27 of the Merchant Marine Act of 1970, Pub. L. No. 91-469, § 27, 84 Stat. 1018, 1034, which added the following explicit cargo preference rulemaking authority as § 901 of the MMA:

> Every department or agency having responsibility under this subsection shall administer its programs with respect to this subsection under regulations issued by the Secretary of Transportation. The Secretary of Transportation shall review such administration and shall annually report to the Congress with respect thereto.

46 U.S.C. app. § 1241(b)(2). Based on this authority (delegated to MARAD by the Secretary of Transportation, *see* 49 C.F.R. § 1.66(e)(1993)), MARAD has promulgated regulations governing participating agencies in the administration of their cargo preference responsibilities. 46 C.F.R. pt. 381 (1992). Those regulations establish various reporting requirements, rules governing the cargo "mix" of covered shipments, and other matters relative to compliance with the CPA's requirement for allocating a minimum cargo share to U.S-flag carriers. However, none of the existing CPA regulations purports to establish or regulate the substantive terms of cargo charters utilized by agencies in contracting for shipments covered by the CPA. MARAD's attempt to promulgate regulations that would do just that gave rise to this dispute between MARAD and the chief agencies (USDA and USAID) administering food aid programs subject to cargo preference.

B. *Agricultural Export Programs*

USDA and USAID both participate in various overseas food aid programs involving shipments covered by the CPA, including programs authorized by the Agricultural Trade Development and Assistance Act of 1954, as amended, 7 U.S.C. §§ 1691-1738r, commonly known as "Public Law 480." Under these programs, agricultural commodities and other forms of food aid are shipped overseas to foreign governments pursuant to grants or U.S. Government-financed purchases. USDA is in charge of market development credit sales to friendly developing countries under title I of Public Law 480, while USAID is in charge of grant programs for emergency food assistance and food donation programs benefiting least developed countries under titles II and III.

In 1990, Public Law 480 was amended to provide the Secretary of Agriculture and the AID Administrator with certain additional powers in connection with the administration of their respective food aid programs. *See* 7 U.S.C. § 1736a(a)(2) (USDA) and (d)(2), (4) (USAID). These provisions authorize the Secretary and the Administrator to purchase ocean transportation for their program shipments under such competitive bid procedures as they consider appropriate. USDA and USAID contend that the imposition of uniform charter party rules by MARAD would undercut their ability to establish such competitive bidding procedures.

C. *MARAD's Proposed Rule*

The proposed rule that precipitated this dispute was developed by MARAD in response to complaints from U.S. shipowners that they were being adversely affected by various practices in the awarding of cargo preference ocean transport contracts, referred to as "charter parties." *See* Liberty Maritime Corporation; Filing of Rulemaking Petition, 57 Fed. Reg. 8287 (1992).[1] In brief, the shipowners claim that U.S. agencies administering CPA programs, as well as recipient nations, have increasingly included terms and conditions in charter parties that place an excessive burden of cost and risk upon the shipowner, as opposed to the shipper or the recipient. Thus, MARAD's notice of proposed rulemaking stated that it was issued "in response to vessel owners' complaints of discriminatory, non-commercial contracting terms in the preference trade." NPRM at 1.[2] An important example of such objectionable terms is a provision requiring the shipowner (as opposed to the charterer or the recipient nation) to absorb the added costs caused by delays in unloading the cargo. As the NPRM continued:

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[1] MARAD's draft notice of proposed rulemaking ("NPRM") defines "Charter Party" as "a contract between the cargo charterer and the vessel owner/operator reflecting the terms and conditions agreed to by both parties regarding the shipment of the cargo." NPRM at 18. The draft NPRM was transmitted to the Office of Management and Budget ("OMB") for pre-promulgation clearance on December 29, 1992, but it was not cleared by OMB due to the inter-agency legal dispute over MARAD's authority to issue it.

[2] The shipowner's petition also asked MARAD to issue a rule requiring sealed bidding in all CPA charter tenders, but MARAD declined to include such a requirement in the NPRM.

> These discriminatory terms increase vessel owners' costs and risks. This, in turn, causes higher freight rates and unnecessary expenditure of U.S. Government funds. Currently, there is a vast array of contracting procedures affecting U.S. flag vessels carrying preference cargoes; some programs have uniform charter parties containing minimal onerous, non-commercial terms, whilst others allow a multiplicity of nonstandard, discriminatory charter parties. . . . This regulation attempts to harmonize all the disparate charter parties into one consistent, orderly, fair and commercially justifiable charter party.

Id. 1-2.

The MARAD proposed rule would (1) require MARAD's pre-approval of all freight tenders (i.e., bid solicitations) for CPA charter parties; and (2) require the utilization of a uniform charter party ("UCP") by all agencies in arranging for their CPA program shipments. The mandatory provisions proposed for the UCP encompass a range of subjects, including loading and discharging conditions and procedures; shipment cancellations due to delays; procedures for handling bills of lading; arrangements for the use of stevedores; and various rules and procedures for allocating contractual responsibility with respect to the timeliness of various actions (e.g., readiness to load or discharge the cargo).

The NPRM described the anticipated effect of the proposed rules as follows:

> It would substantially affect the operation of U.S.-flag vessels in the preference trade by improving their prospects for achieving a reasonable profit through eliminating unfavorable conditions now existing under the affected Government sponsored programs. Based on a survey of participating vessel owners, adoption of these uniform charter party provisions could result in significant annual savings.

NPRM at 16.

MARAD contends that it has authority to promulgate the UCP regulations under 46 U.S.C. app. § 1114(b) and 46 U.S.C. app. § 1241(b)(2). Both USDA and USAID contend that those provisions do not authorize MARAD to impose substantive charter terms on agencies administering cargo preference programs. Those agencies also contend that MARAD's attempt to impose mandatory terms to govern all CPA cargo charters conflicts with the statutory powers assigned to them under the foreign food aid programs.

II. ANALYSIS

A. *The Secretary's General Authority under § 204(b) of the MMA*

We first examine the general authority given the Secretary of Transportation under section 204(b) of the MMA, 46 U.S.C. app. § 1114(b), to ascertain whether

it provides a legal basis for issuance of the charter term regulations. That section provides that the Secretary is "authorized to adopt all necessary rules and regulations to carry out the powers, duties and functions vested in [him] by [the Act]." *Id.* Construing the Secretary's authority under section 204(b) in *States Marine Int'l. v. Peterson*, 518 F.2d 1070, 1079 (1975), *cert. denied*, 424 U.S. 912 (1976), the U.S. Court of Appeals for the D.C. Circuit observed:

> [U]nder this grant of authority the Secretary . . . has broad discretionary authority to deal with the everchanging technological and economic conditions of the commercial shipping industry, as long as its actions are reasonable and consistent with the 1936 Act.

The legislative history underlying section 204(b) confirms that Congress intended to give the Secretary broad (but not unlimited) authority and discretion to respond to problems afflicting the U.S. merchant shipping industry. As stated in the Senate Commerce Committee Report on the 1936 Act:

> Title II creates a Maritime Authority . . . . The Authority is given a considerable amount of discretion in the solution of its problems. This discretion is necessary since many questions will require prompt treatment. Shipping is a business of a highly competitive and constantly changing nature, and its governmental contact must be given the power of prompt decision in dealing with situations as they arise. Such discretion, however, must have limits, and in framing the bill it has been our endeavor to confer no greater powers than are necessary and proper considering the ends in view.

S. Rep. No. 74-713, at 4 (1935).

These authorities raise the question of whether MARAD's issuance of the proposed regulations is both a reasonable response to developments in the merchant shipping business and consistent with the 1936 Act.

There seems little doubt that the proposed regulations are "consistent with the 1936 Act." That Act was intended "to help develop an American merchant fleet that would be competitive with foreign flag fleets." *Peterson*, 518 F.2d at 1076. We think MARAD could reasonably determine that regulating charter parties in a manner designed to eliminate terms having a disproportionately adverse affect on U.S.-flag carriers would further the competitive interests of the U.S. merchant fleet. Thus, the proposed regulations appear generally consistent with the permissive standards for sustaining regulatory actions by the Secretary under the general authority of section 204(b) of the MMA. In that regard, cases construing the

MMA have been consistently deferential to the Secretary's discretion in regulating merchant shipping matters.[3] As stated by the Federal Circuit in *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1578 (Fed. Cir. 1987), "The [Merchant Marine] Act gave the Secretary very broad powers and authority and wide discretion in administering programs under its provisions."

Thus, the language and judicial construction of section 204(b) confirm that it constitutes a broad grant of discretionary authority and indicate that the Secretary's issuance of regulations reasonably framed to enhance the competitiveness of the U.S. merchant fleet would normally fall within that authority. However, although this factor lends support to MARAD's position, we do not view the breadth of section 204(b)'s grant of *general* regulatory authority as necessarily conclusive on the more specific and difficult question posed here: Whether the Secretary's admittedly broad rulemaking authority within his areas of statutory responsibility encompasses the power to dictate the specific terms that must be included in contracts governing cargo preference charters *issued by other federal agencies*.[4] Resolution of this question must address the more particular grant of regulatory power found in the CPA itself, 46 U.S.C. app. § 1241(b)(2).

B. *The Secretary's Authority under § 901(b)(2) of the MMA*

1. *"Administration" of Cargo Preference "Programs".* In 1970, Congress amended the CPA to provide that, "Every department or agency having responsibility under this subsection [i.e., the CPA] shall administer its programs with respect to this subsection under regulations issued by the Secretary of [Transportation]." MMA, § 901(b)(2) (codified as amended at 46 U.S.C. app. § 1241(b)(2)). The Senate Commerce Committee Report explained the purpose behind the amendment.

> The Committee amended the bill to provide that each agency having responsibilities under [the CPA] will administer its program with

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[3] *E.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 585 (1980) (Secretary's broad contracting powers and discretion to administer the MMA encompassed authority to release shipowner from its obligation to operate subsidized ship exclusively in foreign trade); *American President Lines, Ltd.*, 821 F.2d at 1578 (court defers to Secretary's authority to charge buyer only one-half of layup costs in determination of trade-in allowance under obsolete vessels trade-in program, stating, "The Act gave the Secretary very broad powers and authority and wide discretion in administering programs under its provisions"), *American Maritime Ass'n v. United States*, 766 F.2d 545, 560 (D.C. Cir. 1985) ("*AMA*" case) (substantial deference standard applied in sustaining MARAD rules fixing rate structure for subsidized ships in preference trade, stating, "MarAd's attempt to implement the 1970 amendments 'represents a reasonable accommodation of the conflicting policies that were committed to the agency's care by the statute'" (quoting *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 844-46 (1984))

[4] Moreover, a letter written by the MARAD Administrator in 1969 (when MARAD could rely only on the general authority granted the Secretary under § 204(b) of the MMA) suggests that MARAD did not lay claim to substantial authority in this area prior to the 1970 CPA amendments that gave it specific regulatory authority over other agencies in their administration of cargo preference programs. That letter stated "[O]ur surveillance over the program is very limited. We have no jurisdiction over the activities of the government agencies that actually ship government-sponsored cargoes." Letter for the Hon. James A. Burke, House of Representatives, from J.W. Gulick, Acting Administrator, Maritime Administration at 3 (Mar. 6, 1969).

> respect thereto in accordance with regulations promulgated by the Secretary. . . .
>
> Although the cargo preference program is generally recognized as an important pillar of our maritime policy, its administration has tended to be uneven and chaotic. *A lack of uniform and rational administration has worked to the disadvantage of shippers, carriers, and various geographic areas of our nation*, and has also made it exceedingly difficult to assess and review the overall impact of the program. The situation is easily understandable when one considers the fact that at present each shipping agency administers its own program independently and that none of the agencies primarily involved has an expertise in, or a mandate with respect to, overall U.S. maritime policy.

S. Rep. No. 91-1080, at 19, 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4188, 4193, 4232 (emphasis added).[5]

The Committee then explained how it intended to foster uniformity of administration and to advance the basic goals of the CPA by giving the Secretary the power to impose regulatory control over participating agencies in their administration of cargo preference programs. *Id.* at 58-59, *reprinted in* 1970 U.S.C.C.A.N. 4232-33:

> Thus, in order to bring some order out of chaos, to correct some of the inequities which have resulted from lack of uniformity in administration, and to facilitate the achievement of the program's objectives . . . the committee amended H.R. 15424 to provide that each agency having responsibilities under section 901(b) of the Merchant Marine Act, 1936, will administer its program in accordance with regulations promulgated by the Secretary . . . . This provision should prove beneficial in bringing some uniformity to the administration of the cargo preference laws. . . . It also has the advantage of giving some control over the administration of laws designed to assist the merchant marine to the government official who has the primary responsibility for the merchant marine — an altogether logical and sound approach.

[5] The Senate floor debate on the measure expressed similar sentiments and purposes Senator Magnuson stated that the provision vesting the Secretary with rulemaking authority over the administration of cargo preference programs "should alleviate some of the anomalies and injustices that have resulted from a lack of coordinated administration of cargo preference. Section 901 is promotional legislation and the promotional agency for maritime matters should guide its administration." 116 Cong. Rec. 32,491 (1970)

In adopting the provision referred to in the Senate Report, the Conference Committee expressed a similar legislative purpose:

> There is a clear need for a centralized control over the administration of preference cargoes. In the absence of such control, *the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented.* Since these laws were designed by Congress to benefit American shipping, they should be administered to provide maximum benefits to the American merchant marine. Localizing responsibility in the Secretary . . . to issue standards to administer these cargo preference laws gives the best assurance that the objective[s] of these laws will be realized.[6]

H.R. Conf. Rep. No. 91-1555, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4260, 4262-63 (emphasis added).

This legislative history confirms that Congress intended the Secretary to have substantial authority and leeway in imposing a degree of uniformity upon other departments and agencies in the administration of their cargo preference programs. *See AMA*, 766 F.2d 545 at 551 (Congress gave MARAD "broad discretion to supervise the implementation of the 1970 amendments"). We therefore must determine whether the promulgation of mandatory charter party terms to govern CPA tenders is properly regarded as an aspect of the "administration" of cargo preference "programs" as those terms are used in the CPA. If so, the proposed charter term regulations would appear to be a proper exercise of the Secretary's statutory authority.

Although the legislative history of the 1970 amendments does not address this precise point, evidence that Congress understood agency administration of cargo preference programs to encompass regulation of charter terms can be found in the Senate Commerce Committee report prepared in 1962 concerning problems in the administration of the cargo preference laws. *See* S. Rep. No. 87-2286 (1962) ("1962 Senate Report"). That report included a summary of various representative episodes in which the Commerce Committee had worked with departments and agencies to achieve results favorable to American shipping interests "in keeping administration of the cargo preference policy in line with the intent of Congress as expressed in the statutes." *Id.* at 3. One of the seven episodes cited by the Committee as "excellent guidance for the future" was described in the Report as follows:

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[6] The underscored language in the Conference Report could reasonably be viewed as encompassing the very kind of practice addressed by the proposed rulemaking at issue here — i.e., the practice of imposing charter terms that are unfavorable to U.S.-flag carriers in their efforts to attain and retain at least the statutory minimum share of cargo preference traffic.

> Complaints from tramp ship operators that the Department of Agriculture had revised certain procedures for the handling of Government-financed cargoes, to the detriment of U.S.-flag vessel owners, were taken up with Secretary [of Agriculture] Freeman, in a letter by the chairman on June 4, 1962.
>
> The Secretary's reply, under date of July 3, presented the Government's side of the matter, and gave assurance that —
>
> "The Department has recognized the problem presented in your letter concerning *charter terms on U.S. vessels which are sometimes burdensome to owners. We are of the opinion that the adoption of a uniform charter party would be helpful in this matter.* Experience has demonstrated that diverse requirements of individual importing countries make uniformity of charter party terms and conditions difficult to obtain. We have recognized for some time, however, that to the extent practicable uniformity is desirable. To that end, about a year ago a form of charter party was developed, and since that time has been in use for a part of the chartering required under Public Law 480 programs. The possibility of extending the use of the uniform contract is presently being studied."

Id. at 7 (emphasis added).

This pertinent material from the 1962 Senate Report strongly indicates that agency "administration" of cargo preference programs has long been understood to encompass the subject of charter terms or "uniform charter party". While we do not regard this 1962 report as actual legislative history on the CPA — since it is not material prepared or contemplated by the same Congress that passed or amended that act — the report does represent pertinent historical material evidencing congressional and executive branch understanding of what the "administration" of cargo preference programs encompasses. Moreover, we are not aware of evidence demonstrating a contradictory understanding of the term in subsequent years.[7]

2. *Implementing the "Reasonable" Rate Standard.* It also appears that MARAD's regulatory authority under section 901(b)(2) would extend to aspects of

[7] MARAD called to our attention a 1993 report issued by the House Merchant Marine Committee that touches on this subject, but that report likewise does not constitute legislative history as to the relevant provisions of the MMA and the CPA because it was not issued in connection with the enactment or successful amendment of those acts. *See* H.R. Rep No 103-251, at 56 (1993) Nonetheless, in stating the Committee's view that charter terms do fall within the Secretary's regulatory authority under 46 U S.C. app § 1241(b)(2), the 1993 Committee Report lends contemporary reenforcement and continuity to the general congressional understanding indicated in the 1962 Senate Report — i.e , that the regulation or control over charter terms is part and parcel of the "administration of the cargo preference policy " *see* 1962 Senate Report at 3.

cargo preference administration that affect the rates charged by United States-flag carriers. Under section 901(b)(1), U.S. carriers are only eligible for cargo preference to the extent that they charge "fair and reasonable rates for United States-flag commercial vessels." 46 U.S.C. app. § 1241(b)(1). Exercising the Secretary's substantial administrative discretion, MARAD could reasonably conclude that erratic charter party terms imposing increased costs and risks on U.S.-flag carriers might undercut the carriers' ability to calculate and offer rates that are "reasonable." MARAD could also reasonably conclude that the effect of burdensome charter party terms on the rate-setting practices of the U.S. carriers would adversely affect MARAD's ability to apply the "fair and reasonable" rate standard in a correct and consistent manner. Thus, the proposed UCP regulations could be justified on the basis of MARAD's authority to regulate the administration of cargo preference programs in a manner that effectively implements the "reasonable rate" standard of the CPA.

In that regard, we reject USDA's argument (USDA Mem. at 8) that the proposed UCP rules must be "practically indispensable and essential" to the performance of MARAD's statutory responsibilities (quoting from *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449, 1454 (8th Cir. 1990)) in order to be sustainable. The opinion from which that language was quoted held that an Article I bankruptcy court could not conduct jury trials on the basis of authority allegedly implied by the Bankruptcy Amendments Act of 1984. The reasoning of that opinion, and the test of "necessity" that it employed, have little relevance here, where (1) MARAD's authority to promulgate regulations governing other agencies in the administration of their cargo preference programs is explicit, not implied; and (2) the legislative history of the 1970 amendments unambiguously demonstrates that Congress intended MARAD to use that authority to eradicate agency practices in cargo preference programs that are adverse to the interests of U.S.-flag carriers. *See supra* note 6 and accompanying text.

3. *Reduction of the Rate Gap and Cargo Preference Costs.* The NPRM and MARAD's submissions also indicate that the Government's interest in reducing the costs of the cargo preference program — primarily by reducing the rate gap between American- and foreign-flag carriers — provides an additional valid basis for issuance of the UCP regulations. This contention finds some support in caselaw and legislative history construing the 1970 amendments to the CPA. In the *AMA* case, the court concluded that "Congress clearly intended the 1970 amendments [to the CPA] to reduce the government cost of preference cargo carriage." 766 F.2d at 561.[8] Relatedly, the House Report underlying the 1970 amendments explained

[8] The same opinion also concluded that

> Congress clearly intended the 1970 amendments . . . *gradually*, to phase out the expensive and ineffective system of indirect subsidies paid to existing bulk shippers in the form of premium rates for preference cargo carriage

766 F.2d at 549. Rate-gap reductions achievable through UCP regulations would serve that end

how the bill was intended to achieve such cost reductions in the long run: "The aim of the Administration's program and the bill is to enable American bulk carriers, eventually at least, to carry government cargoes at world rates." H.R. Rep. No. 91-1073, at 38 (1970).

MARAD's proposed UCP regulations appear reasonably designed to reduce shipowner costs and risks entailed by burdensome and inconsistent charter party terms, such as those shifting the cost of unloading delays to the shipowner. The reduction in shipowner costs and risks contemplated by the regulations should lead to reduced cargo rates, which in turn would naturally reduce the *government's* costs in subsidizing cargo preference. Therefore, as the court similarly concluded in the *AMA* case, "[W]e believe that MarAd's . . . rule reasonably accomplishes Congress' aim to lower the overall government costs of the preference cargo program . . . ." 766 F.2d at 560.

C. *Reasonable Participation by Geographic Areas*

The CPA not only requires that U.S.-flag carriers be allocated an overall minimum share of covered cargo, but also requires that the cargo allocation be done "in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes *by geographic areas.*" 46 U.S.C. app. § 1241(b)(1) (emphasis added). The meaning of this particular clause of the CPA was explained by the Seventh Circuit in *City of Milwaukee v. Yeutter*, 877 F.2d 540, 543 (7th Cir. 1989), as follows:

> The command . . . speaks of "a fair and reasonable *participation of United States-flag commercial vessels* in such cargoes", not of a fair and reasonable participation of ports or port ranges. Section 1241(b)(1) is special-interest legislation, but the interest is that of U.S.-flag lines, not of ports. "By geographic areas" means "by destination", not "by origin". This ensures that the government can't short-haul domestic carriers. It can't send shipments from Bangor, Maine, to Providence, Newfoundland, on U.S. ships while reserving all the traffic from Philadelphia to Bangkok for foreign bottoms.

Thus, MARAD's regulation under the CPA may include measures intended to assure that U.S.-flag carriers receive a proportional share of CPA shipments to particular geographic destinations, such as the former Soviet republics or other distant regions.

The charter term regulations may also be sustained, therefore, because they facilitate the "reasonable-participation-by-geographic-areas" requirement of the CPA. As stated in the NPRM, vessel dimension and cargo size requirements employed in charter parties used in some countries "often do not match the history of

the port(s) to be served." NPRM at 10. As the NPRM further stated, "Owners who have recently successfully discharged in these ports are now being denied access to cargoes to be shipped to those ports." *Id.*

There has been testimony before Congress that such unfavorable charter party terms have been particularly injurious to U.S.-flag vessels in their efforts to deliver and unload preference cargo bound for Russia and other former republics of the Soviet Union. *See Hearing by Joint Subcomms. on U.S. Flag Shipping Rates on Grain Sales to the Former Soviet Union: Hearing Before the Subcomm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies and Commerce, State, Justice and Judiciary of the House Comm. on Appropriations*, 103d Cong. 9-13, 57-62 (1993) ("1993 Hearings"). According to this testimony, when adverse charter terms are combined with the chaotic and difficult conditions in Russian ports, the U.S.-foreign freight differential increases and American-flag vessels are disproportionately harmed in the effort to compete for Russia-bound cargoes. *Id.* at 9, 14-15, 57-58.

MARAD could reasonably find that such adverse charter terms might ultimately discourage U.S.-flag carriers from maintaining a reasonable degree of participation in CPA shipments to geographic areas where American shipping interests are disproportionately harmed by such charter terms. Issuing UCP regulations in an effort to prevent that from occurring would appear to be a valid means for MARAD to further the "reasonable geographic participation" standard of the CPA.

D. *Claims of Conflict with AID's and USDA's Statutory Authority Regarding Transportation Arrangements under the Food Aid Programs*

The 1990 Food Act provides both the Secretary of Agriculture and the AID Administrator with authority to establish competitive bid procedures for the procurement of ocean transportation for the food aid shipment programs they administer. Pub. L. No. 101-624, 104 Stat. 3650 (1990). Thus, 7 U.S.C. § 1736a(a)(2) ("Invitation for bid") provides with respect to USDA:

> All awards in the purchase of commodities or ocean transportation financed under subchapter II of this chapter shall be consistent with open, competitive, and responsive bid procedures, as determined appropriate by the Secretary.

Similar authority is provided to the AID Administrator under 7 U.S.C. § 1736a(d)(2) with respect to the programs he administers.[9] Additionally, 7 U.S.C. § 1736a(d) provides as follows with respect to USAID program cargo arrangements:

[9] That subsection provides that purchases of ocean transportation under the relevant programs must be made "on the basis of full and open competition utilizing such procedures as are determined necessary and appropriate by the Administrator." *Id*

> (1) Acquisition.— The Administrator [of USAID] shall transfer, *arrange for the transportation*, and take other steps necessary to make available agricultural commodities to be provided under subchapter[s] III and . . . III-A of this chapter.
>
> . . . .
>
> (4) Ocean transportation services. — Notwithstanding any provision of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 *et seq.*) or other similar provisions relating to the making or performance of Federal Government contracts, the Administrator may procure ocean transportation services under this chapter *under such full and open competitive procedures as the Administrator determines are necessary and appropriate.*

(Emphasis added.) These provisions thus authorize USAID to arrange for the shipment of Public Law 480 cargoes under such "competitive procedures" as the Administrator considers "necessary and appropriate."

USDA and USAID contend that the charter party regulations proposed by MARAD are incompatible with their authority to establish the competitive procedures they deem appropriate for the procurement of food aid shipping arrangements.

There is nothing to indicate that the "competitive procedures" provisions of the 1990 Food Act were intended to interfere with the Secretary of Transportation's administration of the Cargo Preference laws. *See* S. Rep. No. 101-357, at 169 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 4825. On the contrary, the legislative history of the 1990 Food Act states as follows: "None of the revisions to Public Law 480 contained in this legislation are intended to modify, alter or reduce the 75[%] U.S. flag shipping requirement provided for under current law." *Id.*

We conclude that the Food Act's competitive procedures provisions can be reconciled with MARAD's authority to regulate the administration of USDA's and USAID's cargo preference programs.[10] For example, Congress plainly did not believe that the competitive procedures provisions would be incompatible with the basic 75% cargo preference set-aside for U.S.-flag vessels, *see id.*, which imposes far more severe restrictions on competition than those presented by UCP regulations. Rather, the Food Act provisions authorize USDA and USAID to establish

[10] The requirement for sealed bidding on all CPA charter parties initially proposed by the petitioning shipowner, but not included by MARAD in the NPRM it proposed, would appear to present another matter Whether or not to require sealed bidding would seem to be the very kind of "competitive procedures" that were left to the determination of USDA and USAID under the 1990 Food Act However, we do not understand MARAD's request for opinion to extend to this issue, since MARAD itself declined to include a sealed bidding requirement in its draft NPRM.

competitive procedures for the procurement of ocean transportation in a manner that is compatible with the requirements of the CPA. *Cf. AMA*, 766 F.2d at 561 n.25 ("Congress clearly intended MarAd to control the subsidized carriage of preference cargoes and that shipper agencies would adjust their preference cargo procedures to conform with MarAd's."). We find nothing in the 1990 legislation or its legislative history indicating that USDA or USAID authority over the terms of charter parties was considered necessary to the establishment of competitive procurement procedures. Uniform charter party regulations would merely represent an element of the unique cargo preference trade environment *within which* USAID and USDA have been authorized to establish competitive procurement procedures.[11]

E. *Allocation v. Availability*

USDA and USAID also contend that MARAD's proposed imposition of UCP is fundamentally different than the kind of regulatory authority contemplated under the CPA — i.e., the authority to assure that a 75% share of cargo subject to the CPA is allocated to U.S.-flag carriers "to the extent such vessels are available at fair and reasonable rates," 46 U.S.C. app. § 1241(b)(1). *See* USAID Mem. at 17-20; USDA Mem. at 8-15. The covered agencies have consistently satisfied the CPA's 75% requirement for eligible U.S-flag vessels, and MARAD does not contend otherwise. The opposing agencies therefore contend that the proposed UCP regulations are unnecessary and bear no valid relationship to what they view as MARAD's limited statutory authority. In this regard, the more favorable charter terms proposed by the NPRM would presumably affect the overall and long-term availability of rate-qualified U.S. carriers rather than MARAD's application of the 75% preference requirement to the pool of available U.S.- and foreign-flag carriers. Thus, this dispute also raises the question whether the CPA grants MARAD the authority to take regulatory action designed to encourage the *availability* of qualifying U.S.-flag carriers but not directly related to the *allocation* of preference cargo among the available and eligible carriers.

MARAD's allocation authority is largely inconsequential unless there is a substantial number of U.S. merchant vessels "available" to take on the preference cargo at reasonable rates. *Cf. Yeutter*, 877 F.2d at 541-45 (agencies could properly allocate cargo preference tonnage on a nationwide, rather than port-by-port, basis; effect of this action was to force diversion of cargo preference shipping of Midwest

[11] Although the point is not pressed in the submissions, we assume that MARAD's authority under the proposed rule to review and approve freight tenders for preference cargo prior to release to the trade would be exercised in a manner that would not unreasonably delay or impede the affected agencies' ability to issue freight tenders in a timely fashion. If MARAD's actual practice in exercising such authority unduly interfered with the affected agencies' food aid operations, it might well exceed even its expansive statutory authority in this area. *See* S. Rep. No. 74-713, at 4 (although MARAD's discretionary authority to deal with problems falling within its jurisdiction is "considerable," it nonetheless "must have limits").

grain from more cost-effective Great Lakes ports, where U.S. carriers did not operate and were thus not "available," to more distant coastal ports, where they were "available"). For MARAD to enforce the 75% requirement on behalf of a sparse and dwindling fleet of available U.S. carriers would do little to further the broad objectives of the MMA and the CPA — i.e., to assure the maintenance of a vigorous and competitive U.S. merchant fleet. We conclude therefore that MARAD's regulatory jurisdiction encompasses administrative measures designed to foster the availability of reasonable-rate U.S. vessels to pursue the preference trade, as well as overseeing the allocation of the minimum cargo preference percentages.

That leaves the question of whether the proposed UCP regulations represent a reasonable means of seeking to enhance or sustain U.S.-flag vessel availability for the preference trade. We think that the proposed regulations do pass that test. As demonstrated by the 1962 Senate Report quoted above, the relevance of charter terms to effective implementation of the cargo preference program was recognized by the Secretary of Agriculture over 30 years ago.

In the absence of any restrictions sensitive to U.S. merchant fleet concerns, onerous and erratic charter party terms might deter some U.S.-flag carriers from pursuing their statutory share of cargo preference trade. Although USDA and USAID reasonably point out that U.S. carriers may include the increased costs caused by adverse charter terms in their proposed rates, and although MARAD retains considerable discretion to approve such rate increases as reasonable, that discretion is not unlimited. Rates could conceivably be raised to a level that is objectively too high for the United States to continue to sustain within realistic budgetary constraints. Further, rote approval of escalating charter-driven rate increases would conflict with MARAD's duty to "*reduce* the government cost of preference cargo carriage," *AMA*, 766 F.2d at 561, in keeping with the goals of the 1970 Amendments.

F. *MARAD Authority to Fix Freight Rates*

Another argument against MARAD's proposed regulation is that it is designed to reduce the rates charged by U.S.-flag carriers, whereas USDA contends that MARAD lacks authority to fix rates (USDA Mem. at 14-18). In support of this contention, USDA relies upon the Fifth Circuit's observation in *United States v. Bloomfield Steamship Co.*, 359 F.2d 506, 509 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004 (1967), that, "[T]here is nothing in the Cargo Preference Act that indicates that it is intended to fix freight rates." USDA Mem. at 16.

Whether or not MARAD has such authority, the proposed MARAD regulation would not "fix freight rates." It instead aims to remove obstacles to the reduction of the rate gap between the U.S. merchant fleet and foreign-flag carriers that might otherwise occur in the absence of such obstacles.

Placed in context, the Fifth Circuit's statement in *Bloomfield* does not significantly relate to the issue presented here. That statement was made in the course of

demonstrating that Congress did not intend to provide still further subsidies to U.S. shipowners "by having the Government pay *higher* rates for shipping than it might bargain for." 359 F.2d at 509 (emphasis added). More specifically, the *Bloomfield* opinion rejected the proposition that the CPA was intended to *prohibit* rates for U.S. carriers that "are lower than rates shown to be fair and reasonable." *Id.* at 509-10. The quoted statement from *Bloomfield*, and the holding of which it was a part, simply do not address the distinct issue of whether MARAD could properly take regulatory measures designed to reduce the "rate gap" between U.S. and foreign carriers in the interests of fostering a more competitive and cost-efficient U.S. merchant fleet. The reduction of that rate gap could advance the overall competitive interests of the U.S. merchant fleet and help reduce the costs of the cargo preference program.

Conclusion

To conclude that issuance of UCP regulations exceeds the Secretary's authority would require an overly narrow construction of the mandates of the MMA, the CPA, and the 1970 amendments. MARAD's authority under those statutes is not limited to rote application of the statutory percentage formula to whatever number of U.S. shipowners find it profitable to apply for CPA shipments. Rather, MARAD may regulate the administration of cargo preference programs with a view to achieving recognized goals of the MMA and the CPA: developing a merchant fleet that is at "parity with foreign competitors," *Peterson*, 518 F.2d at 1076; reducing the costs of the cargo preference program, *AMA*, 766 F.2d at 561; and eradicating divergent agency practices in the preference trade that are "not American shipping oriented," H.R. Conf. Rep. No. 1555, at 6, *reprinted in* 1970 U.S.C.C.A.N. at 4262. MARAD could reasonably conclude that erratic and burdensome charter party terms hinder the achievement of those goals, and it follows that UCP regulations aimed at eliminating such terms would be a valid exercise of MARAD's authority under sections 204(b) and 901(b) of the MMA.

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Assistant Attorney General
Office of Legal Counsel

Eligibility of Involuntary Wartime Relocatees to Japan for Redress Under the Civil Liberties Act of 1988

The proposed Department of Justice change in its interpretation of the Civil Liberties Act of 1988 to extend redress under the Act to minors who accompanied their parents to Japan during World War II and to adults who are able to show that their relocation to Japan during that period was involuntary is a reasonable and permissible interpretation of the statute

Although an agency interpretation that has been modified or reversed is likely to receive less deference by a reviewing court than a consistent and contemporaneous interpretation, the fact of modification does not preclude the court from granting deference to the new interpretation

May 10, 1994

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

This memorandum is in response to your request for this Office's review of the proposed change in eligibility determinations under the Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989 (1988)) ("the Act"). The proposed change would extend redress under the Act to minors who accompanied their parents to Japan during World War II and to adults who are able to show that their relocation to Japan during that period was involuntary. We conclude that the proposed change is a reasonable and permissible interpretation of the statute.

We also have analyzed the implications of this change as to the deference the Department can expect from a reviewing court in the event of a challenge. An agency interpretation that has been modified or reversed is likely to receive less deference than a consistent and contemporaneous interpretation, but the fact of modification does not preclude a court from granting deference to the new interpretation.

1. The Civil Liberties Act of 1988 enacts into law the recommendations of the Commission on Wartime Relocation and Internment of Civilians established by Congress in 1980. H.R. Conf. Rep. No. 100-785, at 1 (1988). The Commission submitted a unanimous report to Congress in 1983, entitled *Personal Justice Denied*, "which extensively reviewed the history and circumstances of the decision to exclude, remove," and ultimately to intern "Japanese Americans and Japanese resident aliens from the West Coast, as well as the treatment of the Aleuts during World War II." Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. 34,157 (1989). The final part of the Commission's report, *Personal Justice Denied 2: Recommendations*, concluded that these events were influenced by ra-

cial prejudice, war hysteria, and a failure of political leadership and recommended that Congress and the President take remedial action. *Id.*

The Civil Liberties Act of 1988 was signed into law by President Reagan on August 10, 1988. The purposes of the Act are to acknowledge and apologize for the fundamental injustice of the evacuation, relocation, and internment of Japanese Americans and permanent resident aliens of Japanese ancestry; to make restitution to the individuals who were interned; and to fund a public education program to prevent the occurrence of any similar event in the future. 50 U.S.C. app. §§ 1989-1989a. Any "eligible individual" living on the date of enactment is entitled to a restitution payment of $20,000. 50 U.S.C. app. § 1989b-4(a)(1).

The Attorney General is responsible for identifying, locating, and authorizing payment to all eligible individuals. 50 U.S.C. app. § 1989b-4. The Attorney General delegated the responsibilities and duties assigned by the Act to the Assistant Attorney General for Civil Rights, who created the Office of Redress Administration in the Civil Rights Division (the "Division") to execute the duties of the Department under the Act. The regulations governing eligibility and restitution were drafted in the Office of Redress Administration and published under the authority of the Department in 1989. 54 Fed. Reg. 34,157 (1989) (final rule) (codified at 28 C.F.R. § 74).

Section 108(2) of the Act defines the individuals eligible for redress payments as any United States citizen or permanent resident alien of Japanese ancestry who was evacuated, relocated, or interned during World War II.[1] This provision specifically excludes from eligibility "any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to another country while the United States was at war with that country." 50 U.S.C. app. § 1989b-7(2) ("the relocation exclusion"). The relocation exclusion in the regulations governing eligibility determinations under the Act uses precisely the same language. 28 C.F.R. § 74.4.

The regulations do not specifically address the eligibility of minors who accompanied their parents to Japan during this period or of adults who claim that their relocation was involuntary. However, the notice accompanying the publication of the final regulations noted that the Department had received sixty-one comments supporting eligibility for the minors. After considering these comments, the Department determined that "the exclusionary language of the Act would preclude from eligibility the minors, as well as [the] adults, who were relocated to Japan during that particular time period." 54 Fed. Reg. at 34,160.

In a 1989 memorandum outlining the eligibility determinations, the Civil Rights Division considered the claims of the minor evacuees. The Division noted that

[1] As enacted in 1988, the Act limited eligibility to those of Japanese descent. The 1992 amendments added language extending eligibility to any spouse or parent of an individual of Japanese descent who accompanied her spouse or child through the evacuation, internment, or relocation. Civil Liberties Act Amendments of 1992, Pub. L. No. 102-371, 106 Stat. 1167. The question of the eligibility of the minor and involuntary adult relocatees was not considered or discussed in the debates on the 1992 amendments.

minor children were not in a position to make their own choice regarding emigration. However, in light of the language excluding *any* individual who relocated to Japan during the period and the lack of any expression of legislative intent to distinguish the minor relocatees from adults, the Division took the position that these minors were ineligible. Memorandum for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from James P. Turner, Acting Assistant Attorney General, Civil Rights Division at 11-12 (Feb. 27, 1989). OLC concurred in this determination without exposition. Memorandum for James P. Turner, Acting Assistant Attorney General, Civil Rights Division, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Apr. 17, 1989).

In litigation challenging the Division's current eligibility standards, counsel for the plaintiffs have advanced an analysis that was not considered by the Department in 1989. In that analysis, claimants' counsel contend that the use of the active voice in the language of the relocation exclusion provision renders the statute ambiguous as to the eligibility of relocatees who were involuntarily returned to Japan. Given this ambiguity, counsel argue, an interpretation which allows involuntary relocatees to recover under the Act is reasonable. The Division is persuaded by this analysis and takes the position that while its original interpretation of the statute deeming involuntary relocatees ineligible was reasonable, the proposed new interpretation is equally reasonable. The proposed change in eligibility determinations is thus a change in the Department's interpretation of its own regulation. Since the language of the regulation is identical to the language of the statute, the Department would effectively be changing its interpretation of the statute as well.

2. In reviewing the Division's proposed modification to the interpretation of the regulation, this Office's task is to determine whether the construction adopted by the Civil Rights Division is a permissible one. As the Supreme Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> 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. If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). The Department cannot revise its interpretation of the Act's eligibility exclusion if the original interpretation is mandated by the plain language of the statute. If, however, the statutory language is ambiguous and the proposed modification is reasonable, the Division's proposed interpretation is permissible.

3. As enacted, section 108(2)(B)(ii) of the Act expressly excludes from eligibility "any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, *relocated* to [another] country while the United States was at war with that country" (emphasis added). This language does not specifically address the eligibility of minor relocatees who accompanied their parents, or the voluntariness of these repatriations.

While the statute uses the active voice in this exclusion clause, the eligibility clauses of the statute use the passive voice. For example, section 108 begins by defining an "eligible individual" as a person of Japanese ancestry "who, during the evacuation, relocation and internment period — . . . *was* confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of . . . [various Executive Orders and Acts]." 50 U.S.C. app. § 1989b-7(2) (emphasis added). Title II of the Act, which provides reparations to Aleuts evacuated from their home islands during World War II, similarly defines an eligible Aleut as a person "who, as a civilian, *was* relocated by authority of the United States from his or her home village . . . to an internment camp." 50 U.S.C. app. § 1989c-1(5) (emphasis added). The use of the active voice in the exclusion clause suggests the possibility that Congress intended to exclude only those individuals who voluntarily relocated to an enemy country during the war.

We agree that this language creates an ambiguity which provides a reasonable basis for distinguishing between voluntary relocatees, who are ineligible under the statute, and involuntary relocatees. The U.S. Courts of Appeals for the District of Columbia and the Ninth Circuits have deemed the use of the active as opposed to the passive voice relevant for purposes of statutory interpretation. *Dickson v. Office of Personnel Management*, 828 F.2d 32, 37 (D.C. Cir. 1987) (isolated use of passive voice in phrase defining liability is significant and allows suit against OPM whenever an adverse determination "is made," even if by another agency); *United States v. Arrellano*, 812 F.2d 1209, 1212 (9th Cir.) (clause of statute defining criminal intent phrased in active voice applies to conduct of the accused, while second clause phrased in passive voice applies only to the conduct of others), *as amended*, 835 F.2d 235 (9th Cir. 1987).

The legislative history of the Act does not provide any insight into congressional intent regarding the eligibility of involuntary relocatees. As originally introduced, neither the House or the Senate bill included a relocation exclusion provision in the section defining eligible individuals. Entering conference, the House version of the Act contained the exclusion, while the Senate version had no such provision. The conferees agreed to adopt the House provision, which excluded "those individuals who, during the period from December 7, 1941, through September 2, 1945, relocated to a country at war with the United States." H.R. Conf. Rep. No. 100-785, at 22. There is no additional discussion of the relocation

exclusion or of the circumstances surrounding the relocation of internees to Japan in the conference report.[2]

While the Civil Rights Division's proposed interpretation is not the only possible interpretation of the statute, it is neither precluded by the plain language of the statute nor unreasonable. Since minor relocatees below a certain age lacked the legal capacity to consent to relocation, their relocation was involuntary per se.[3] The statute does not bar the Civil Rights Division from declaring these minors eligible for relief. Similarly, it is reasonable to conclude that the statute does not bar from relief claimants who can provide evidence that their relocation was in fact involuntary.

Arguably, the Civil Rights Division's proposed narrowing of the breadth of the relocation exclusion is *more* reasonable than its earlier interpretation. Generally, remedial statutes should be interpreted broadly to effectuate their remedial purpose. Any exceptions should be interpreted narrowly. Norman J. Singer, Sutherland Statutory Construction § 60.01 (5th ed. 1992). While courts have generally held that waivers of sovereign immunity granting rights of action against the United States must be strictly construed, they "have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent." *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citing, *e.g.*, *Franchise Tax Bd. of Calif. v. United States Postal Serv.*, 467 U.S. 512, 517-19 (1984) (statute authorizing Postal Service to "sue and be sued" waives immunity from orders to garnish wages issued by state administrative boards); *Block v. Neal*, 460 U.S. 289, 298 (1983) (plaintiff's claim under Federal

[2] The sole discussion of whether individuals who were returned to Japan should be included in the definition of "eligible individuals" is contained in two witness statements submitted to the House and Senate subcommittees considering the legislation. In testimony opposing the enactment of the bill, the Assistant Attorney General for the Civil Division, Richard K. Willard, noted that as then written (without the relocation exclusion), the breadth of the definition would cover any individual who had been subject to exclusion, relocation, or internment including persons living outside the United States. In the Department's view, this overlooked the fact that at least several hundred of the detainees were "fanatical pro-Japanese, . . . and [had] voluntarily sought repatriation to Japan after the end of the war." The Department believed that allowing these disloyal individuals to receive the benefit of the legislation would be unfair to the United States and to loyal persons of Japanese descent. *To Accept the Findings and to Implement the Recommendations of the Commission on Wartime Relocation and Internment of Civilians. Hearing on S. 1009 Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 281, 296 (1987) ("Hearings").

Responding to the Department's objections, another witness argued that many of these repatriates acted as they did for reasons unrelated to disloyalty to the United States, namely, their sheer frustration at being incarcerated in prison camps like common criminals and summarily deprived of their personal and constitutional rights. Hearings at 145, 196-97 (statement of Mike Masaoka, representing the Go For Broke Nisei Veterans Assn.). Neither of these statements reveals, or even suggests, an intention to exclude persons who *involuntarily* relocated to an enemy country.

[3] Young children are not capable of exercising the judgment required to manifest legal consent. Furthermore, a minor generally has no right to leave the custody and control of his parents until he reaches majority or is granted emancipation. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925) (parents' constitutionally protected liberty includes the right to direct the upbringing of their children), *Gimlett v. Gimlett*, 629 P.2d 450, 452 (Wash. 1981) (upon emancipation or majority a person is released from parental authority and becomes sui juris); *In re Luscier's Welfare*, 524 P.2d 906, 908 (Wash. 1974) (the interest of a parent in the custody and control of his minor child is recognized as a sacred right).

Tort Claims Act for negligent inspection not barred by exception disallowing claims for negligent misrepresentation); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-55 (1951) (FTCA waives immunity where U.S. impleaded as third-party defendant)). The compensatory character of the Act's grant of reparations to specific individuals of Japanese descent interned by the government is of a different nature than a general waiver of immunity in actions that will be brought by unknown plaintiffs. It is appropriate to narrowly construe an exception to this Act.

4. There are potentially two groups of plaintiffs who would have standing to challenge the proposed modified interpretation in court. Because section 104 of the Act provides for payments to be made in order of date of birth, with no more than $500 million to be paid in any year, the newly eligible claimants could "bump" other eligible claimants, delaying or jeopardizing their payments. The age and relatively low number of minor relocatees (as estimated by the Department) make it unlikely that the minor relocatees would significantly affect the payment schedule, but the number and age of involuntary adult relocatees is harder to ascertain.[4] The second group of potential plaintiffs consists of relocatees who are unable to prove that their relocations were involuntary. This second type of challenge is more likely to focus upon the burden of proof and the definition of "voluntary" than upon the reasonableness of the Department's interpretation of the regulation.[5]

It is true that a contemporaneous, consistent interpretation of a regulation or statute by the agency charged with its enforcement will be accorded the greatest deference by the courts, while "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably

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[4] Under the Act, the order of payment is determined by date of birth, with the oldest eligible individuals receiving payment first. 50 U.S.C. app. § 1989b-4(b). Payment from the trust established by the Act is authorized until August 1998 or until the funds appropriated are depleted. 50 U.S.C. app. § 1989b-3(d). The 1992 amendments placed an additional $400 million in the trust because the Department had already located more eligible individuals than originally estimated.

Estimates of the number of minors who were relocated to Japan vary widely. Plaintiffs' counsel in a suit seeking restitution payments for fourteen minor relocatees cite a Department estimate "that as many as 135 minor children were relocated to Japan" with their parents during the war. Memorandum for James P. Turner, Acting Assistant Attorney General, Civil Rights Division from Gen Fujioka, Asian Law Caucus, Jim McCabe & Owen Clements, Morrison & Foerster at 3-4 (Sept. 22, 1993). In contrast, a witness before the Senate relying on figures published in a monograph by the former director of the War Relocation Authority testified that between 1942 and 1946 a total of 4724 repatriates and expatriates sailed for Japan. Of this total, 1659 were alien repatriates, 1949 were American citizens, virtually all children under 20 years of age accompanying their alien parents, and 1116 were former American citizens who had renounced their citizenship. Hearings at 197 (statement of Mike Masaoka, representing the Go For Broke Nisei Veterans Assn.) (citing Dillon S. Meyer, Uprooted Americans: The Japanese Americans and the War Relocation Authority During World War II).

Approximately 75 adult relocatees have filed claims with the Office of Redress Administration alleging that their relocations were not voluntary. Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from James P. Turner, Acting Assistant Attorney General, Civil Rights Division at 4 (Mar. 16, 1994).

[5] The 1992 amendments require that individual claimants receive the benefit of the doubt where "there is an approximate balance of positive and negative evidence regarding the merits of an issue material to [a] determination of eligibility." 50 U.S.C. app. § 1989b-4(a)(3).

less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citation omitted); *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976). However, in both *Cardoza* and *General Electric*, the Court concluded that the agency's revised interpretation was in conflict with the plain language of the statute in question. The underlying rationale for judicial deference to agency interpretations is as applicable to a modified interpretation of a statute as to the agency's initial construction. *See Chevron*, 467 U.S. at 865 ("it is entirely appropriate" for the agency "to make . . . policy choices"). Accordingly, the Court of Appeals for the D.C. Circuit has held that the principle of deferring to an agency's reasonable construction of an *open-ended* statutory provision "applie[s] equally where . . . we review modification of a previous policy." *Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062, 1068-69 (D.C. Cir. 1978). *Cf. Phoenix Hydro Corp. v. FERC*, 775 F.2d 1187, 1191 (D.C. Cir. 1985) (an administrative agency is entitled to change its prior erroneous interpretation of a statute).

Conclusion

The Civil Rights Division's proposed interpretation of the regulation governing eligibility for redress payments is a reasonable interpretation of the regulation and of the Act. The language of the exclusion provision is ambiguous as to whether Congress intended to prevent involuntary relocatees from receiving restitution. The proposed interpretation does not contradict the language of the statute or the statute's legislative history and is consistent with the strong remedial purpose underlying the Act. Although there is a litigation risk associated with this modification, it is unlikely that a court would overturn the proposed interpretation. While this modification does not require formal rulemaking procedures, it would be advisable for the Department to publish a notice of the change and the underlying reasons in the Federal Register.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies

Because substantial separation of powers concerns would be raised by construing the Fair Housing Act to authorize the Department of Housing and Urban Development to initiate enforcement proceedings against other executive branch agencies, the Act cannot be so construed unless it contains an express statement that Congress intended HUD to have such authority Because the Act does not contain such an express statement, it does not grant HUD this authority

There is no basis for construing the Act so that the HUD investigative and administrative process under the Act may be deemed applicable, but the judicial enforcement procedures deemed inapplicable

May 17, 1994

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

Pursuant to Executive Order No. 12146, 3 C.F.R. 409 (1979) you have asked us to resolve a dispute between the Department of Agriculture ("USDA") and the Department of Housing and Urban Development ("HUD") regarding "whether a Federal agency, such as USDA, may be a respondent under the enforcement process contained in sections 810-812 and [814] of [the Fair Housing Act, 42 U.S.C. §§ 3601-3619 ("the Act")], 42 U.S.C. §§ 3610-3612, 3614."[1]

Applying the standard the Supreme Court has used when a particular interpretation or application of an Act of Congress would raise separation of powers or federalism concerns, we believe that because substantial separation of powers concerns would be raised by construing the Act to authorize HUD to initiate enforcement proceedings against other executive branch agencies, we cannot so construe the Act unless it contains an express statement that Congress intended HUD to have such authority. Because the Act does not contain such an express statement, we conclude that it does not grant HUD this authority. In light of this conclusion, we do not decide whether such a grant of authority would be constitutional.

I. *Background*

A. *Enforcement Procedures under the Fair Housing Act*

The procedures for enforcement of the Act by the government are set forth in §§ 3610-3614 of title 42. Under § 3610, an aggrieved individual may file a dis-

[1] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from James Michael Kelly, Associate General Counsel, USDA, at 1 (Jan. 6, 1994) ("Kelly Letter")

crimination complaint with HUD, or HUD may file such a complaint on its own initiative. HUD must then investigate the complaint and engage in conciliation with respect to it.[2] If HUD finds that reasonable cause exists to believe that a discriminatory housing practice has occurred, then HUD issues a charge on behalf of the complainant.

Under § 3612, the HUD charge results in either an administrative proceeding before a HUD administrative law judge ("ALJ") or, if elected by the complainant or any respondent, a civil action in federal district court. In the HUD administrative proceeding, the ALJ makes findings of fact and conclusions of law and may order relief for any discriminatory housing practice, including damages and civil penalties. Judicial review of the final HUD decision (including any review by the Secretary) is available in a federal court of appeals. If there is an election for a civil action instead of the administrative proceeding, the Act provides that the Secretary of HUD "shall authorize" and the Attorney General "shall commence and maintain" the civil action in federal district court on behalf of the complainant. The court may award the same relief that is available to private plaintiffs under section 3613, including injunctive relief and monetary damages.[3]

Finally, under § 3614(a), the Attorney General may bring a civil action in federal district court if she believes that "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted [under the Act], or that any group of persons has been denied any of the rights granted by [the Act] and such denial raises an issue of general public importance." She may also bring a civil action with respect to a breach of a conciliation agreement referred to her by HUD.

B. *USDA's Position*

USDA concedes that it is subject to discrimination prohibitions in the Act, Kelly Letter at 1 (citing 42 U.S.C. §§ 3603, 3608(d)), and that it is required to cooperate with HUD to further the purposes of the Act, *id.* at 2 (citing 42 U.S.C. § 3608(d), Exec. Order No. 12259). USDA takes the position, however, that it may not be made be made a respondent in enforcement proceedings brought by HUD under the Act.

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[2] Section 3611 authorizes HUD to "issue subpoenas and order discovery in aid of investigations [under § 3610] and hearings [under § 3612]." "Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place," § 3611(a), and criminal penalties are authorized for failure to comply with the subpoenas or orders, § 3611(c).

[3] Section 3613 governs enforcement of the Act by private parties, but it also provides that the Attorney General may intervene in a private action if she certifies that the case "is of general public importance" (§ 3613(e)). This Office's conclusion that the Act does not waive the sovereign immunity of federal agencies against imposition of monetary relief in private actions under § 3613 is set forth in a recent opinion to you. *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52 (1994) ("Monetary Relief Memorandum").

USDA argues that "the Act does not provide a sufficiently clear and unequivocal waiver of the sovereign immunity of the United States to permit Federal agencies to be subjected to the enforcement procedures of the Act or to pay money damages as is allowed under the Act in either an administrative or a judicial forum." *Id.* at 2-3. It also argues that "allowing Federal agencies to be respondents under the Act offends the unitary nature of the Executive Branch by allowing one Executive agency to use a unilateral compulsory process against another," *id.* at 3, and that if HUD's invocation of these procedures against USDA resulted in an action in court, that "would create the untenable situation of having the Attorney General representing both the aggrieved person and USDA," *id.* at 5. Finally, USDA argues that such a suit "would fail to constitute a justiciable controversy under Article III of the Constitution" because "a person may not sue himself and there would appear to be serious constitutional difficulties with suits between two officers of the Executive Branch, each serving in his or her official capacity." *Id.*

C. *HUD's Position*

HUD takes the position that "it may issue charges against Federal agencies, prosecute such claims through administrative proceedings, and have [the Department of Justice] prosecute election cases through judicial proceedings." Letter to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Nelson A. Diaz, General Counsel, Department of Housing and Urban Development, at 6 (Jan. 26, 1994) ("Diaz Letter").

HUD argues that the term "respondent" is defined in the Act "as broadly as possibly so as to include any 'person or entity' without limitation," Diaz Letter at 1, and that both the Act and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-706, provide a sufficient waiver of sovereign immunity for actions against federal agencies, *id.* at 1-3. HUD rejects USDA's "unitary Executive" argument and notes that "there exists precedent for allowing one Executive agency to sue another" and in any event an enforcement action under the Act "is not a controversy solely between two Federal agencies, but in addition, involves a controversy between the USDA and an individual complainant." *Id.* at 4-5. HUD's concluding argument is that

> [A]ggressive enforcement of civil rights statutes requires that [HUD] proceed wherever reasonable cause exists to believe that a violation has occurred. [HUD's] mandate from Congress is to enforce fair housing. Congress gave no indication either in the statute or legislative history that it intended that [HUD] make a special exception for Federal agency respondents that would deprive persons aggrieved by Governmental discrimination to the right to have their

> claim prosecuted in a fair and impartial manner through the procedures established in the Act.

Id. at 6.

II. *Analysis*

The initial question presented is whether the Act's government enforcement scheme may be construed to apply to executive branch agencies as a general matter. If we conclude that it may not be, then there is no need to resolve the Article II and Article III constitutional issues raised by USDA, although it will be necessary to determine whether the Act may be construed in such a way that only certain aspects of the scheme that may raise less of a constitutional problem may found applicable. We conclude that neither construction is permissible.[4]

A. *Whether the Act's Enforcement Scheme Applies to Executive Branch Agencies*

Relying on the Act's definition of "respondent" as meaning "person" or "entity," 42 U.S.C. § 3602(n), HUD argues that "Congress gave no indication either in the statute or legislative history that it intended that [HUD] make a special exception for Federal agency respondents . . . ." Diaz Letter at 6.

We do not believe that HUD is correct that Congress's silence in the context of a broad definition of "respondent" justifies the conclusion that Congress intended that executive branch agencies could be made respondents. In the course of considering whether the APA applies to the President, the Supreme Court made a factual statement that was similar to HUD's statement about the Fair Housing Act: "The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either." *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). Because of the separation of powers concerns that would arise from a conclusion that the APA applies to the President, the Court applied an "express statement" standard and concluded that the President is not covered by the APA:

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it

[4] Because the dispute presented to us is between two executive branch agencies fully under the supervision of the President, there is no need to address whether the Act authorizes HUD to initiate enforcement proceedings against an independent agency. In addition, because of our conclusion that the Act's government enforcement scheme does not apply to executive branch agencies, there is no need to address the sovereign immunity issue raised by USDA. That issue would only arise if the judicial enforcement aspect of the enforcement scheme were found applicable.

> intended the President's performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.

Id. at 800-01.[5] The Supreme Court's use of an "express statement" standard in *Franklin* represented an example of the Court's traditional

> reluctance to decide constitutional issues[,] [which] is especially great where, as here, they concern the relative powers of coordinate branches of government. Hence, [the Court is] loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.

Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989) (construing Federal Advisory Committee Act not to apply to Justice Department's consultations with American Bar Association regarding judicial candidates).[6]

We believe that an "express statement" requirement is necessary in the present context, for the same reasons one was applied in *Franklin* and the federalism cases cited above. Substantial separation of powers concerns would arise if the Fair Housing Act were construed to authorize HUD to initiate enforcement proceedings against other executive branch agencies. The concerns relate to both the President's authority under Article II of the Constitution to supervise and direct executive branch agencies and the Article III limitation that the jurisdiction of the federal courts extends only to actual cases and controversies. These concerns were succinctly summarized by President Reagan in his statement vetoing legislation containing a provision that would have authorized the Special Counsel of the Merit Systems Protection Board to litigate against executive branch agencies:

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[5] *Cf* Monetary Relief Memorandum, 18 Op. O.L.C. at 54-55 (Supreme Court requires an "unequivocal expression" of Congressional intent to waive the sovereign immunity of the United States or to abrogate the Eleventh Amendment immunity of the States).

[6] The Supreme Court also applies an "express statement" or "clear statement" requirement when a particular construction of a statute would raise federalism concerns.

> [An] ordinary rule of statutory construction [is] that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) . . . was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981), *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991) (applying "plain statement" standard and holding that Age Discrimination in Employment Act does not apply to state judges).

> Implementation of this provision would place two Executive branch agencies before a Federal court to resolve a dispute between them. The litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive power to the President, which includes the authority to supervise and resolve disputes between his subordinates. In addition, permitting the Executive branch to litigate against itself conflicts with constitutional limitations on the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests.

Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, *Pub. Papers of Ronald Reagan* 1391, 1392 (Oct. 26, 1988).

As USDA indicated in its submission for this dispute, *see* Kelly Letter at 4-6, this Office has discussed in other contexts the separation of powers concerns that it raises. With respect to the Article III issue, this Office has consistently said that "lawsuits between two federal agencies are not generally justiciable." *Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138 (1989) (citing *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79 (1977)). We have reasoned that federal courts may adjudicate only actual cases and controversies, that a lawsuit involving the same person as both plaintiff and defendant does not constitute an actual controversy, and that this principle applies to suits between two agencies of the executive branch. *See* 13 Op. O.L.C. at 138-39.[7] With respect to Article II, we have indicated that construing a statute to authorize an executive branch agency to obtain judicial resolution of a dispute with another executive branch agency implicates "the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them." *INS Review of Final Order in Employer Sanctions Cases*, 13 Op. O.L.C. 370, 371 (1989) (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

The foregoing separation of powers concerns are the essential backdrop for our analysis of whether the Fair Housing Act authorizes HUD to initiate enforcement proceedings against other executive branch agencies. Like the Supreme Court, we

[7] Our opinions have carefully distinguished the reported cases in which executive agencies were nominally both plaintiff and defendant. In all of these cases, we have concluded, "one of the executive agencies is not the 'real part[y] in interest' but simply a stand-in for private interests." 13 Op. O.L.C. at 139 (citing 1 Op. O.L.C. at 81). HUD asserts that an action under the Act on behalf of a private complainant falls within the exception where one of the agencies is not the real party in interest. Diaz Letter at 5. Although we readily concede that the private complainant is *one* of the parties in interest, the issue is not as simple as HUD suggests because the Attorney General, in bringing the action upon a referral from HUD, would also be representing government interests. Thus, this Department and HUD might also properly be viewed as parties in interest and under this view could not be characterized as mere "stand-ins" for the complainant. Indeed, HUD's submission makes this very point: "This is not a controversy *solely between two Federal agencies*, but *in addition*, involves a controversy between the USDA and an individual complainant." *Id.* (emphasis added). *See generally, Ability of the Environmental Protection Agency to Sue Another Government Agency*, 9 Op. O.L.C. 99 (1985) (reviewing cases on "real party in interest" issue).

are "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen v. Department of Justice*, 491 U.S. at 466.

Nothing in the text of the Act indicates that Congress contemplated enforcement actions against executive branch agencies, which would involve (in the administrative proceeding) a contest between HUD and a respondent agency and (in any judicial proceeding) a contest between this Department and the respondent agency, which would be entitled to be represented by this Department. Indeed, we are inclined to agree with USDA that, in light of the Act's various express references to the United States and the federal government, *see, e.g.*, 42 U.S.C. §§ 3603(a), 3608(d), 3612(p), 3613(c)(2), 3614(d)(2), Congress's "failure to include the United States in the definition of respondent [42 U.S.C. § 3602(n)] — a term used repeatedly throughout the statutory description of the enforcement mechanism — evinces an intent that Federal agencies are not subject to the administrative procedure." Kelly Letter at 3. In any event, "no purpose to alter the President's usual superintendent role is evident from the text of the statute." *Franklin v. Massachusetts*, 505 U.S. at 800.[8]

Because initiating statutory enforcement proceedings that could result in judicial resolution of disputes between HUD and respondent executive branch agencies would necessarily "prevent[] [the President] from exercising his accustomed supervisory powers over his executive officers" (*id.*), and raise substantial justiciability questions if litigation ensued, we believe that the "express statement" standard used by the Supreme Court in *Franklin* and other cases applies here. We conclude in the absence of such an express statement in the Act that the Act does not authorize enforcement actions against executive branch agencies.

B. *Whether Non-Judicial Aspects of the Act's Enforcement Scheme Apply to Executive Branch Agencies*

The foregoing discussion makes it clear that the most constitutionally problematic aspect of applying the Act's government enforcement scheme to executive branch agencies is that such an interpretation might result in judicial rather than Presidential resolution of inter-agency disputes. We therefore consider now whether the Act may be construed so that the HUD investigative and administrative process may be deemed applicable, but the judicial enforcement procedures deemed inapplicable.

The executive branch, which is constitutionally charged with enforcing the Act, may enjoy somewhat greater latitude to construe a statute to avoid constitutional

[8] Nor does the Act's legislative history suggest in any way an intent to authorize HUD to initiate enforcement proceedings against executive branch agencies. As with the statutory text, the legislative history simply speaks of "respondents" when it lays out the enforcement procedures *See* H.R Rep No 100-711 (1988), *reprinted in* 1988 U S C C A N. 2173

difficulties than does a court. In this instance, however, while construing the Act to remove the courts from any role in HUD's enforcement against other executive branch agencies would reduce the constitutional problem, it would not eliminate it. Such a construction would remove the Article III "case or controversy" issue, but it would merely substitute one interference with the President's Article II authority to supervise and guide the executive branch for another: although no judicial role would threaten the President's ability to resolve an intra-executive branch dispute, the Act as construed would mandate a dispute resolution mechanism within the executive branch. This Department has long objected on separation of powers grounds to congressional micromanagement of executive branch decisionmaking. The manner and method of resolving disputes within the executive branch should be determined by the President, not by Congress.

Moreover, even if there were no constitutional difficulty presented by a construction of the Act that authorized HUD to bring enforcement proceedings against executive branch agencies so long as resolution of the dispute would remain within the executive branch, we do not believe that such a construction would be permissible in this instance because it would amount to a rewrite rather than a construction of the statute. *See generally Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991) (discussing distinction between construing and rewriting a statute). To read out of the Act's government enforcement scheme the provisions authorizing judicial review of final HUD administrative action and authorizing complainants and respondents to elect judicial resolution and the Attorney General to bring enforcement actions would "create a program quite different from the one the legislature actually adopted," which is the mark of illegitimate rewriting. *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). Nothing in the text or legislative history of the Act provides us any indication of a congressional intent that would serve as a basis for us to even consider such an exercise.

III. *Conclusion*

Because of the absence of an express statement in the Fair Housing Act authorizing HUD to initiate enforcement proceedings against other executive branch agencies under the Act, we conclude that the Act does not grant such authority to HUD. We find no basis for construing the Act to eliminate judicial resolution of intra-executive branch disputes while retaining the statutory administrative mechanism.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities

Contrary to the view expressed in an earlier opinion of the Office of Legal Counsel, the plain language of the Davis-Bacon Act does not bar its application to a lease contract on the ground that such contracts are *per se* not contracts for construction. The applicability of the Davis-Bacon Act to any specific lease contract can be determined only by considering the details of the particular contract.

May 23, 1994

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF LABOR
AND
THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

At the request of the Attorney General, we have reviewed the principles and reasoning of a 1988 Office of Legal Counsel opinion concluding that the Davis-Bacon Act did not cover a contract entered into by the Veterans Administration (now Department of Veterans Affairs) ("VA") for the long-term lease and construction of a building to be used as an outpatient clinic. *Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 12 Op. O.L.C. 89 (1988) ("1988 O.L.C. Opinion," or "1988 Opinion"). We have concluded that the 1988 Opinion erred in concluding that the plain language of the Davis-Bacon Act bars its application to any lease contract, whether or not the lease contract also calls for construction of a public work or public building. We believe that the applicability of the Davis-Bacon Act to any specific lease contract can be determined only by considering the facts of the particular contract.

I.

The 1988 O.L.C. opinion arose out of a dispute between the VA and the Department of Labor. The VA had entered into a contract (the "Crown Point contract") with a developer for the long-term lease of space for use as a VA health clinic, in a building that the developer would build to house the clinic. *In re Applicability of Davis-Bacon Act to Lease of Space for Outpatient Clinic, Crown Point, Indiana*, WAB Case No. 86-33, 1987 WL 247049, at 2 (W.A.B. June 26, 1987) ("1987 WAB Opinion"). The dispute concerned whether the contract was covered by the Davis-Bacon Act. That Act applies to

> every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or

> repair, including painting and decorating, of public buildings or public works . . . .

40 U.S.C. § 276a(a). The Act provides that such contracts shall include provisions that mechanics and laborers employed on these projects be paid prevailing wages to be determined by the Secretary of Labor. *Id.* Although the Crown Point contract called for the lease of clinic space, it also included numerous provisions requiring that the building be constructed according to VA specifications, on a VA timetable, and subject to VA inspection. 1987 WAB Opinion at 4-5. Nonetheless, the VA had concluded that the Act did not apply to the Crown Point agreement because it was a lease and, in the VA's view, a lease is not a "contract . . . for construction" under the Act. Therefore, the contract contained no provisions mandating compliance with the prevailing wage requirements of the Davis-Bacon Act.

Upon learning of VA's plans, the Building and Construction Trades Department of the AFL-CIO requested a ruling from the Wage and Hour Administrator of the Department of Labor that the construction of the building was covered by the Davis-Bacon Act. The Administrator, applying the Wage Appeals Board's ("WAB") analysis in a similar case, agreed that the contract should have included Davis-Bacon prevailing wage provisions. *See* 1987 WAB Opinion at 1-2 (noting Administrator's reliance on *In re Military Housing, Ft. Drum*, WAB Case No. 85-16 (Aug. 23, 1985)). The VA appealed to the WAB, which upheld the Administrator's action. *Id.*

However, the VA continued to resist the Department of Labor's interpretation of the Act. While the AFL-CIO sought a court judgment to compel the VA to comply with the WAB's decision, the VA sought an opinion from the Attorney General that the WAB had misread the law. The result was a court determination that the WAB decision was a reasonable interpretation of ambiguous language in the Act under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *Building and Constr. Trades Dep't, AFL-CIO v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988), and an O.L.C. ruling that the WAB decision conflicted with the plain language of the Act (the 1988 Opinion). The Department of Justice did not appeal the *Turnage* case because of the confused procedural posture it presented, but instructed Labor to comply with the reasoning of the 1988 O.L.C. opinion in future cases. Letter for Jerry G. Thorn, Acting Solicitor, Department of Labor, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Jan. 23, 1989).

You have asked that we review our ruling in the 1988 Opinion that the plain language and legislative history of the Davis-Bacon Act indicate that the Act does not extend to leases. We have reviewed the prior opinion, solicited the views of affected executive departments, and conducted a thorough review of the legislative history, case law, and executive, judicial, and congressional interpretations of the Act. We have concluded that the portion of the 1988 Opinion that addressed the

meaning of the Davis-Bacon Act was incorrect. We do not, however, address the question whether the particular contract at issue in that case was a contract for construction of a public work within the meaning of the Davis-Bacon Act, because the decision not to appeal the ruling in the *Turnage* case has mooted the point. Nevertheless, we can say that the fact that a contract is a lease is not the sole determinative factor in deciding whether that contract is also a contract for construction within the meaning of the Davis-Bacon Act.

II.

The 1988 OLC Opinion concluded that a lease-construction contract for a Veterans Administration outpatient clinic was not a contract for construction of a public building or public work within the meaning of the Davis-Bacon Act, because the plain meaning of the term "contract . . . for construction" could not be read to include a lease, even one that contemplated, and resulted in, the construction of a building for long-term public use.

We do not think the question is so simple. The words "contract . . . for construction . . . of public buildings or public works" do not plainly and precisely indicate that a contract must include provisions dealing only with construction. Rather, the plain language would seem to require only that there be a contract, and that one of the things required by that contract be construction of a public work. This interpretation of the Act is supported not only by its language, but also by the legislative history, by reference to the goals of the Act, by judicial and executive interpretation of the Act, and by the interpretation of similar language in related Acts.

A.

Since the 1988 Opinion rested on its reading of the plain language of the Act, we begin by setting forth that language. The Act provides that

> [t]he advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of

> a character similar to the contract work in the [area where] the work is to be performed . . . .

40 U.S.C. § 276a(a).[1]

The 1988 Opinion concluded that this language "plainly and precisely" limited the Act's coverage to "construction contracts," and thus could not be read to include a lease. 1988 Opinion at 93-94.[2] While this may be true so far as it goes, we do not think the term "construction contract" sheds much light on the meaning of the more elaborate statutory term "contract . . . for construction, alteration, and/or repair, including painting and decorating." In particular, we do not think the term "construction contract," any more than the term "contract . . . for

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[1] An earlier version of the Act provided for coverage of

> every contract in excess of $5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States.

Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494, 1494 (1931) *See* Armand J Thieblot, Jr., *Prevailing Wage Legislation. The Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and the Service Contract Act* 31 (1986) ("Thieblot")

The Act was revised in 1935 to add coverage of public works and of painting and decorating contracts, to lower the contract threshold from $5,000 to $2,000 (to reflect the relatively small dollar value of painting and decorating contracts), to provide for predetermination of wage rates by the Department of Labor, and to provide for remedies for workers not paid the proper rates on covered contracts *See* S. Rep No. 74-1155 (1935), H R Rep No. 74-1756 (1935); Thieblot at 3, 28, 29 (discussing purpose of Act); *id* at 32-34 (discussing 1935 amendments) There is no suggestion in the legislative history that the switch from "contract . which requires or involves the employment of laborers or mechanics in . construction" to the current language of "contract . . . for construction . . . which requires or involves the employment of mechanics and/or laborers" was intended to have any narrowing effect *See, e.g* , S Rep No. 1155; H R Rep No. 74-1756 The Act was modified again in 1964 to include fringe benefits in the calculation of prevailing wages *See* S Rep. No 88-963 (1964), *reprinted in* 1964 U.S.C C A N 2339; Thieblot at 34.

The 74th Congress — the same one that amended the Davis-Bacon Act to include the language at issue here (Act of Aug. 30, 1935, ch 825, § 1, 49 Stat 1011) — also passed the closely related Miller Act, 40 U S C § 270a (Act of Aug 24, 1935, ch. 642, § 1, 49 Stat. 793). The Miller Act provides that contractors shall furnish bonds on "any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work " The language of the Miller Act is almost identical to that used in the 1935 amendments to the Davis-Bacon Act then being considered, and the Miller Act originally included the same $2,000 threshold as the 1935 Davis-Bacon Act Thieblot at 37 n 40, *Universities Research Ass'n v. Coutu*, 450 U.S 754, 758-59 (1981). *See also* S Rep No. 74-1155, at 4, H.R Rep No 74-1756, at 4, 5 (noting relation between Davis-Bacon amendments and the Heard Act (which the Miller Act replaced))

The nearly identical language of the Miller Act has been applied to construction even of public works that would be privately owned, *see, e g , United States ex rel Noland Co v Irwin*, 316 U S 23 (1942) (construction of Howard University library), and to the relocation of a privately-owned railroad that would be flooded by a federal dam, *Peterson v. United States*, 119 F.2d 145 (6th Cir 1941) These cases focused on whether the construction in question was of a public work; there seems to have been no challenge on the basis that the contracts were not for construction The one difference in language between the Miller and Davis-Bacon Acts — that the Davis-Bacon Act refers to contracts "to which the United States or the District of Columbia is a party," 40 U S C. § 276a(a), while the Miller Act does not, *see* 40 U.S C § 270a(a) — is not significant in this setting, since the United States is undeniably a party to the contract to build and lease the Crown Point facility; the difficulty is in determining what sort of contract that contract is.

[2] The 1988 Opinion does not indicate where the new term "construction contracts" comes from. It is not a technical term drawn from case law interpreting the Davis-Bacon Act, or used elsewhere as a means of explaining what the Act covers or does not cover Rather, it appears to be an improvised shorthand for the more elaborate statutory language. We can see no justification for using a shorthand phrase neither endorsed by Congress nor explained in the case law to buttress a narrow reading of the statutory language

construction," unambiguously excludes a contract for the long-term lease of a building to be constructed to comply with the contract, especially when the contracting agency contemplates the construction of a new building and includes substantial provisions concerning construction in the contract. Even prominent critics of the Act have conceded as much. *See, e.g.*, Thieblot at 39 n.50 ("In some circumstances, privately financed construction may be subject to prevailing wage requirements if, for example, the facilities are specially constructed with the intention of leasing them to government occupants."). To rule otherwise would leave substantial room for agencies to evade the requirements of the Act by contracting for long-term lease rather than outright ownership of public buildings and public works.

The Crown Point lease provides a good illustration of the principle that a lease may look very much like a "contract . . . for construction."[3] According to the 1987 WAB Opinion, the Solicitation for Offer "specifically provides for lease of a building to be 'constructed in accordance with VA specifications.'" *Id.* at 3. The requirements under the Solicitation include "preliminary plans and specifications; other working drawings; issuance of a building permit; completed construction documents; start of construction; completion of principal categories of work; phase completion; and final construction completion;" along with "name and experience of the proposed construction contractor," and "evidence of award of the construction contract within 15 days of award." *Id.* Under the terms of the Solicitation, the winning bidder would be required to submit construction progress reports to the VA and to allow the VA to inspect the site. *Id.* All of these requirements indicate that while the contract was labeled a lease, it called for the construction of a building, at least as one expected means of satisfying the terms of the contract. To say that the contract is not "for construction" ignores what the contract itself says.

In short, to regard all lease-construction contracts as outside the scope of the Davis-Bacon Act is contrary to the plain language of the Act: many such leases are in fact contracts that call for the construction of a public work. The difficulty is in determining whether a particular lease is really a contract for construction of a public building or public work, or just a contract to secure the use of private premises on a temporary basis. "Plain language" is of little use in policing this borderline.

[3] There can be no question that a lease is a contract, obliging each party to take certain actions. *See* 1 Arthur Linton Corbin, *Corbin on Contracts* §§ 1.2-1.3 (rev. ed., Joseph M. Perillo, ed., 1993) (defining "legal obligation" and "contract," respectively); *Alaska v. United States*, 16 Cl. Ct. 5 (1988) (document need not be labeled a contract to be a contract). The real question is whether such a contract is "for construction."

B.

The legislative history and the purposes of the Act strongly support this interpretation as well. The Act was passed in 1931, and amended in 1935, to ensure that contractors bidding on public works projects would not lower wages so as to be sure to make the lowest bid; and to permit government agencies, which were required to accept the lowest bids, to employ contractors who paid a "fair" wage rather than those who competed by reducing wage rates. S. Rep. No. 74-1155, (1935); H.R. Rep. No. 74-1756 (1935); S. Rep. No. 71-1445, at 1-2 (1931); H.R. Rep. No. 71-2453, at 1-2 (1931);[4] *see also* 74 Cong. Rec. 6505 (1931) (remarks of Rep. Welch). The sponsor, Representative Bacon, justified the bill by stating that the "Government must not be put in the position of helping to demoralize the local labor market."[5]

The Davis-Bacon Act was passed during the Depression, when federal construction accounted for a large portion of construction overall[6] and workers desperate to take any job could be hired at wages far below those available in the past.[7] The result was a concern that the federal public works program would not achieve its desired effect of assisting local communities in regaining prosperity, but instead would allow contractors — and indeed the government itself — to exploit

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[4] These reports stated that

> The Federal Government has entered upon an extensive public building program . . intended [in part] . . to benefit the United States at large through distribution of construction throughout the communities of the country without favoring any particular section
>
> The Federal Government must, under the law, award its contracts to the lowest responsible bidder This has prevented representatives of the departments involved from requiring successful bidders to pay wages to their employees comparable to the wages paid for similar labor by private industry in the vicinity of the building projects under construction. [S]ome successful bidders have selfishly imported labor from distant localities and have exploited this labor at wages far below local wage rates
>
> This practice, which the Federal Government is now powerless to stop, has resulted in a very unhealthy situation. Local artisans and mechanics, many of whom are family men . . can not hope to compete with this migratory labor Not only are local workmen affected, but qualified contractors residing and doing business in the section of the country to which Federal buildings are allocated find it impossible to compete with the outside contractors, who base their estimates for labor upon the low wages they can pay to unattached, migratory workmen . . . .

S Rep. No. 71-1445, at 1-2; H.R. Rep No. 71-2453, at 1-2.

[5] 74 Cong Rec. 6510 (1931). *See also* S. Rep No. 74-1155, at 1-2, H.R Rep. No. 74-1756, at 1 (both stating that the amendments were needed to make the Act more enforceable, because "unscrupulous contractors have taken advantage of the wide-spread unemployment among the buildings crafts to exploit labor and to deprive employees of the wages to which they were entitled under the law"); S. Rep. No. 88-963, at 1, 2 (1964), *reprinted in* 1964 U S C C.A N 2339, 2340 (reviewing the purposes of the Act), Thieblot at 3, 28, 29, 32-34 (reviewing the purposes of this and related acts and discussing the 1935 amendments).

[6] *See, e.g.*, Thieblot at 29, 29 n.18 (between 1929 and 1933, public construction rose from less than one-quarter to more than one-half of all construction nationwide); S Rep. No. 71-1445, at 1 (1931) (federal government has embarked on new, large-scale public works construction program); H R Rep No. 71-2453, at 1 (1931) (same), 74 Cong. Rec 6511 (1931) (remarks of Rep. Bacon) (same).

[7] *See, e g*, Thieblot at 28 (indicating that average construction wages had fallen to half their pre-Depression rates by 1931); 74 Cong Rec 6510 (1931) (remarks of Rep. Johnson hypothesizing wage reduction from $4 to $2 75 per day)

desperate laborers, in some cases imported from other parts of the country.[8] While Congress was presented with evidence that the loss of jobs to outsiders was rare, *see* 74 Cong. Rec. at 6506 (chart noting origins of workers on public building projects), the evidence before Congress also showed that it did occur. Representative Bacon, for example, who sponsored the bill in the House, saw a contract for a Veterans' Bureau hospital in his district go to an outside contractor who employed laborers from Alabama, "huddled in shacks living under most wretched conditions and being paid wages far below the standard," 74 Cong. Rec. at 6510 (statement of Rep. LaGuardia). Meanwhile, unemployed workers in Representative Bacon's own community apparently remained jobless, unable or unwilling to compete for jobs with those willing to accept the substandard conditions.

This view of the purposes of the Act — that government should not act to depress labor conditions, but should ensure that government and government contractors employ workers at fair wages — continues to prevail. *See, e.g., Walsh v. Schlecht*, 429 U.S. 401, 411 (1977) (Davis-Bacon protects workers, not contractors, setting a floor but not a ceiling for wage rates); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954) (same), *Unity Bank & Trust Co. v. United States*, 756 F.2d 870, 873 (Fed. Cir. 1985) (same); *Building and Constr. Trades Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 613-14, 620-21 (D.C. Cir. 1983) (noting that Davis-Bacon was designed to counteract the potential effect of the government's low-bid requirement on wages), *cert. denied*, 464 U.S. 1069 (1984).[9] In view of these purposes, we believe that the device of lease-construction, at least to the extent that it is used to build public works outside the prevailing wage system, lies well within the contours of the Act. Whether the government construction is paid for upfront or by means of a long-term lease is of no significance to workers

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[8] *See, e.g.*, S. Rep. No. 74-1155, at 2, H.R. Rep. No. 71-2453, at 2, 74 Cong. Rec. at 6510. Some commentators have suggested that the purposes of the Act were not all benign and that some of the concern about outside labor may have been based on the fact that some of the new competition for jobs came from black workers. *See* Thieblot at 30, David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 Am. U. L. Rev. 85, 114-16 (1993) (arguing that Davis-Bacon reinforced labor unions' discrimination against black workers by eliminating nonunion workers' ability to compete by offering to work for lower wages), 74 Cong. Rec. at 6513 (remarks of Rep. Allgood). Indeed, the contract to build the Veterans' hospital in Representative Bacon's district went to an Alabama contractor who brought black laborers to Long Island to build the project. Bernstein at 114, *see also* 74 Cong. Rec. at 6513 (remarks of Rep. Allgood, apparently concerning the project in Rep. Bacon's district). Other Congressmen, however, without discussing the race of the workers involved, argued that the imported workers were being exploited by the substandard wage rates and working conditions. *See, e.g.*, 74 Cong. Rec. at 6510 (remarks of Rep. LaGuardia concerning the situation in Rep. Bacon's district).

[9] *See also* Thieblot at 122-23 (quoting *Davis-Bacon Works and Works Well!: An Interview with former U.S. Labor Secretary Ray Marshall*, 3 Builders Special Rep. (March 7, 1981), in turn quoting Secretary Marshall as stating that "[t]he basic rationale for the Davis-Bacon law is really quite simple. It is based on the idea that the federal government should not use taxpayers' money to undercut local area employment conditions. . . . [I]f the federal government permitted its construction dollars to be used [in this way to] undercut prevailing pay standards[, w]e would be helping to drive down wages in any community in which such federal or federally-assisted construction was taking place . . .").

who must take lower pay or to local contractors forced to compete by cutting labor costs. The effect on them is the same.

While the public generally has an undeniable interest in paying as little as possible for the construction of public works, the purpose of the Davis-Bacon Act was precisely to subordinate that interest to the extent necessary to set minimum wage standards for such construction work. If an agency decides to construct a public work — not just acquire a privately-owned building — that agency cannot evade the purposes of this country's labor laws by clever drafting. This does not mean that construction related to any lease is "construction, alteration and/or repair" of a public work within the meaning of the Act — but neither can the "plain language" of the Act be read as declaring that a 99-year lease of a brand new building that would never otherwise have been built is not the construction of a public work. The answer in any particular case will depend on the facts.

C.

The Department of Labor's longstanding interpretation of the Davis-Bacon Act is designed to counteract just such evasion, and the views of the courts, Comptrollers General, and Attorneys General, with few exceptions, support this interpretation of the Act.

The Department of Labor consistently has taken the position that a contract is a contract for construction within the meaning of the Davis-Bacon Act "if more than an incidental amount of construction-type activity is involved in the performance of a government contract." 1987 WAB Opinion at 2 (quoting *In re Military Housing, Ft. Drum*, WAB Case No. 85-16, at 4 (Aug. 23, 1985)). Similarly, the Federal Acquisition Regulations instruct agencies that Davis-Bacon wage rates should be included in nonconstruction contracts involving some construction work when "[t]he contract contains specific requirements for a substantial amount of construction work," 48 C.F.R. § 22.402(b)(ii) (1994), which is "physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract," 48 C.F.R. § 22.402(b)(iii). *See also* 29 C.F.R. § 4.116(c)(2) (1994) (providing that Davis-Bacon wage rates shall apply in similar circumstances in contracts otherwise covered by the wage and hour provisions of the Service Contract Act).

This interpretation has been approved by the Comptroller General. *In re Fischer Eng'g & Maintenance Co.*, No. B-223359, 1986 WL 64093, at 2 (C.G. Sept. 16, 1986) (Davis-Bacon applies to lease-construction of military housing, so long as project is "clothed sufficiently with elements indicating that [it] indeed . . . serv[es] a public purpose"); *In re D.E. Clarke*, No. B-146824, 1975 WL 8417, at 1 (C.G. May 28, 1975) (contract is covered if it "essentially or substantially contemplates the performance of work described by the enumerated items"); 40 Comp. Gen. 565, 565, 567 (1961) ("[t]he test for determination of the applicability of the

Davis-Bacon Act . . . is not the nature of the specific work but the nature of the contract, that is, whether the contract essentially or substantially contemplates the performance of work described by the enumerated items 'construction, alteration, and/or repair, including painting and decorating'"; applying this standard to a contract ostensibly dealing with "maintenance," the Comptroller General ultimately determined that the work required was in fact maintenance rather than construction); 34 Comp. Gen. 697 (1955) (lease-purchase agreements fall within the Davis-Bacon and related Acts); 10 Comp. Gen. 461 (1931) (Act applies to temporary housing and other buildings erected for use during construction of the Hoover Dam).

The 1988 O.L.C. Opinion, however, relied heavily on a 1962 Comptroller General opinion at odds with the Comptroller's other cases, without discussing the more recent cases. In that opinion, the Comptroller General argued that leases are never contracts for the construction of public works. 42 Comp. Gen. 47 (1962). The 1962 opinion addressed the concept of lease and lease-option contracts in the abstract, and concluded that such contracts are not Davis-Bacon contracts because "of the basic distinction which exists between the procurement of a right to use improvements, even though constructed for that particular usage, and the actual procurement of such improvements." *Id.* at 49. The opinion asserted that "the mere fact that construction work is prerequisite to supplying a public need or use does not give such work a Davis-Bacon status." *Id.* In rejecting such a sweeping interpretation of the Davis-Bacon Act, the Comptroller General unnecessarily suggested that no leases are covered unless the government ultimately acquires title to the work. In contrast, the Attorney General had already determined that acquisition of title was not necessary to bring a contract within the Davis-Bacon Act, *Wage Law Applicable to Alley Dwelling Authority for the District of Columbia*, 38 Op. Att'y Gen. 229, 233 (1935); and the courts had reached the same conclusion in construing the nearly identical language of the closely related Miller Act, *e.g.*, *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23 (1942) (construction of Howard University library).

In a later opinion, the Comptroller General emphatically rejected the 1962 opinion's reading of the statute, approving instead the Department of Labor's analysis of a particular lease-construction contract similar to the one involved in the 1988 O.L.C. Opinion. *In re Fischer Eng'g & Maintenance Co.*, No. B-223359, 1986 WL 64093 (C.G. Sept. 26, 1986). The *Fischer Engineering* case emphasized that the 1962 opinion had addressed the issue only in the abstract. Even were we to regard the decisions of the Comptroller General as controlling, which we do not, we think the reasoning of the more recent *Fischer Engineering* case is both more consistent with other Comptroller General opinions and more accurate in its reading of the Act, because it is more attentive to the underlying intent of the Act.

Similarly, the courts have identified the Davis-Bacon Act as a remedial statute that should be "liberally construed to effectuate its beneficent purposes." *E.g.*, *Drivers Local Union No. 695 v. NLRB*, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966) (citing *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954), for conclusion that statute is remedial). While the courts have not addressed the lease-construction contract situation directly, except in the *Turnage* case (which concluded that the Crown Point contract was covered by the Davis-Bacon Act), they have made clear that public ownership is not essential for a finding that a contract is for construction of a public work under the related Miller Act. *See, e.g.*, *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23 (1942) (Howard University library). This and similar cases did not even consider the possibility that the contracts were not for construction; rather they focused on whether the construction was of a public work, defining the term as "including 'any projects . . . carried on either directly by public authority or with public aid to serve the interests of the general public.'" *Id.* at 28, 30 (quoting the National Industrial Recovery Act's definition of "public work" and applying it to a Miller Act bond case). The classic definition of a public work for purposes of the Depression-era labor statutes was set forth in the case of *Peterson v. United States*, 119 F.2d 145 (6th Cir. 1941), which stated that

> The term "public work" as used in the [Miller Act] is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. "Public work" as used in the act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds.
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> . . . .
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> There is nothing in [*Title Guaranty & Trust Co. v. Crane Co.*, 219 U.S. 24 (1910) (holding that ships are public works under predecessor Heard Act, though not on public soil, because they are publicly owned)] from which an inference may be drawn that ownership was the sole criterion. To so circumscribe the act would destroy its purpose.

Id. at 147. *See also* 29 C.F.R. § 5.2(k) (1994) (project is a public work if it is "carried on directly by authority of or with funds of a Federal agency," and "serve[s] the interest of the general public regardless of whether title thereof is in a Federal agency").

While *Peterson* and other cases do not address directly the question whether a lease-construction contract is covered by the Davis-Bacon Act, they do suggest that a technical reading of the Act that defeats its purpose is inconsistent with the text

as well as the purpose of the Act. *See also Title Guaranty & Trust Co. v. Crane Co.*, 219 U.S. 24 (1910) (ships are public works under Heard Act though not affixed to public property); *Applicability of Certain Acts to Construction, Alteration, and Repair of Coast Guard Vessels, Boats, and Aircraft*, 38 Op. Att'y Gen. 418 (1936) (same, under Davis-Bacon Act); *Fidelity and Deposit Co. v. Harris*, 360 F.2d 402, 408 (9th Cir. 1966) (construction of building for the Jet Propulsion Laboratory at the California Institute of Technology is a public work under the Miller Act); *Autrey v. Williams and Dunlap*, 343 F.2d 730, 734 (5th Cir. 1965) (Capehart Housing Act military housing project is a public work under Miller Act, "[a]lthough title . . . does not pass immediately to the United States, due to the novel financing plan" of the Capehart Act); *United States ex rel. Gamerston & Green Lumber Co. v. Phoenix Assurance Co.*, 163 F. Supp. 713 (N.D. Cal. 1958) (Miller Act applies to construction of post library at the Presidio, though paid for from nonappropriated funds).[10]

Finally, past Attorney General opinions also support a broad reading of the Act. *See, e.g., Federal Aid Highway Program — Prevailing Wage Determination*, 41 Op. Att'y Gen. 488, 500-01 (1960) (definition of mechanics and laborers under Davis-Bacon Act "is not to be given a niggardly construction" because the Act "is to be interpreted broadly to accomplish its purpose"); *Wage Law Applicable to Alley Dwelling Authority for the District of Columbia*, 38 Op. Att'y Gen. 229, 233 (1935) ("broad construction" that Act covers buildings that may be resold to private parties is "supported both by the language of the Act and by the apparent pur-

[10] The 1988 Opinion did not address the question whether the clinic construction called for under the Crown Point contract fell within the definition of a "public building[] or public work[]" for purposes of the Davis-Bacon Act, and the status of the Crown Point contract is no longer a matter of dispute in light of *Building and Constr. Trades Dep't, AFL-CIO v Turnage*, 705 F. Supp 5 (D D C 1988) (holding that lease-construction of Veterans Administration outpatient clinic under the Crown Point contract was covered by Davis-Bacon). With respect to the Crown Point contract, however, we would note that veterans' hospitals, when constructed under ordinary financing mechanisms, were among the principal public buildings that the drafters had in mind, *see, e.g.*, 74 Cong. Rec 6510-11 (1931) (remarks of Rep Bacon), *id* at 6506 (chart), and unquestionably serve a public purpose Furthermore, it is well established that the government need not have either initial or permanent title to a building for the construction project to be deemed a public work (though government-owned property presents an easier case) *See, e.g., Wage Law Applicable to Alley Dwelling Authority for the District of Columbia*, 38 Op. Att'y Gen 229 (1935) (housing constructed under D C. Alley Dwelling Authority Act of 1934 is a public work even though it may later be sold to private parties), *United States ex rel. Noland Co v. Irwin*, 316 U S. 23, 29-30 (1942) (construction of Howard University library is a public work under related Miller Act, though library was to be the property of a private university), *Peterson v. United States*, 119 F 2d 145 (6th Cir 1941) (relocation of privately-owned railway that would be flooded by federal dam is a public work) We believe that, in general, the determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement. These may include such factors as the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will be used for private rather than public purposes, the extent to which the costs of construction will be fully paid for by the lease payments, and whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act, a possibility contemplated by the dissenter from the 1987 WAB Opinion. However, we further believe that the fact that a novel financing mechanism is employed should not in itself defeat the reading of such a contract as being a contract for construction of a public building or public work.

poses intended to be accomplished"). The sole exception to this trend is the 1988 O.L.C. Opinion.

The 1988 Opinion quoted language from the 1935 and 1960 Attorney General opinions to suggest that the use of direct federal funds was an absolute requirement for Davis-Bacon coverage, citing a statement in the 1935 opinion that the Act applied to "buildings erected with funds supplied by the Congress," 38 Op. Att'y Gen. at 233, and a statement in the 1960 opinion that it applied to "direct Federal construction," 41 Op. Att'y Gen. at 495. Neither the opinions nor the quoted excerpts suggest that these are the only situations in which Davis-Bacon would apply. In both opinions, the Attorney General explicitly rejected narrow readings of the Act in favor of quite expansive ones, and used the "federal funds" concept to argue that a narrower reading would undermine the Act and the public goals it was designed to serve. Neither opinion discussed lease-construction or any similar construction financing mechanism, nor did either opinion suggest that the Act would not apply if the construction was not built with federal funds but instead was built under federal direction and later paid for with federal funds. A consideration of the context in which these opinions arose will illustrate the point. The 1935 opinion involved construction and demolition of buildings under the D.C. Alley Dwelling Authority, which was empowered to tear down old buildings and construct new ones to redevelop alleys in the District of Columbia. Because the Act contemplated that the new dwellings might later be leased or sold to private parties, it was contended that Davis-Bacon should not apply. Attorney General Cummings, however, determined that the prospect that the buildings would be sold did not detract from the public character of the construction:

> I approve the broad construction which has thus been placed upon the statute and regard it as supported both by the language of the Act and by the apparent purposes intended to be accomplished. Under this view buildings erected with funds supplied by the Congress for the furtherance of public purposes are not to be distinguished, so as to affect the application of the statute, upon consideration of their character or the particular public purpose which their building is intended to further; nor do I regard it as controlling that some of them will be, or may be, conveyed for a consideration to private persons at some time after completion.

38 Op. Att'y Gen. at 233.

The 1988 Opinion's quote from the 1960 opinion is itself a quote from the legislative history of the Federal Highway and Highway Revenue Acts of 1956, and was drawn from a section of the history urging that Davis-Bacon wage standards should apply not only to "direct Federal construction" — highways constructed by the government (without regard to financing mechanisms) — but also to highways

constructed by state and local governments, with federal financial assistance. 41 Op. Att'y Gen. at 495; H.R. Rep. No. 84-2022, at 12-13 (1956); 23 U.S.C. § 113 (successor Act). While the quoted legislative history indicates that the Congress thought that federally-aided *non*federal highway projects were not covered, this distinction is irrelevant to the question at issue here. Neither the 1960 opinion nor the Highway Act nor the quoted legislative history defines "direct Federal construction" in such a way as to exclude lease-construction contracts. The only light these sources shed on the question of how lease-construction should be categorized is to emphasize that where the government is financially responsible for construction costs, the purposes of the Davis-Bacon Act may be implicated. Furthermore, this commentary was meant as background. The question at issue in the 1960 opinion was whether independent owner-operators of trucks on a Davis-Bacon project were nonetheless employee "mechanics and laborers," subject to the Act's prevailing wage requirement. The Attorney General concluded that they were, in part because a "niggardly construction" of the term "mechanics and laborers" would be inconsistent with the remedial purposes of the Act. 41 Op. Att'y Gen. at 500.

In short, the cited Attorney General opinions interpreted the Davis-Bacon Act expansively to ensure that its beneficial purposes would not be evaded. Consequently, we do not think that these opinions support the argument that particular financing mechanisms remove public construction projects, such as those paid for by long-term lease, from the Act.

D.

One final argument has been put forth to support the conclusion reached by the 1988 Opinion: that Congress, in other statutes, explicitly indicated that Davis-Bacon requirements would apply to particular lease contracts; and that these statutes "indicate[] not only that Congress knows how to insure that leases are covered by the Davis-Bacon Act in those few situations where it so chooses, but also that section 276a(a) by itself does not include leases." 1988 Opinion at 95. The primary statute relied upon is 39 U.S.C. § 410(d)(1), which states that

> A lease agreement by the Postal Service for rent of net interior space in excess of 6,500 square feet in any building or facility, or part of a building or facility, to be occupied for purposes of the Postal Service shall include a provision that all laborers and mechanics employed in the construction, modification, alteration, repair, painting, decoration, or other improvement of the building or space covered by the agreement, or improvement at the site . . . shall be paid [Davis-Bacon wage rates].

This statute covers not just the lease-construction of entire buildings, but construction involved in short-term use of relatively small amounts of space in larger buildings, including incidental construction and improvements beyond those cited in the Davis-Bacon Act. It would take a more expansive reading of the Davis-Bacon Act than Labor has urged in this case to match this coverage. In light of this, the House Report cited in the 1988 Opinion almost certainly was correct in concluding that the statute extended Davis-Bacon coverage. H.R. Rep. No. 91-1104, at 27 (1970). Too, the Act was passed in 1970, before the Comptroller General reversed his 1962 decision that Davis-Bacon did not apply to leases. In view of these factors, we do not believe that this statute sheds much light on how Congress intended Davis-Bacon to apply in other lease-construction settings.

III.

The Department of Labor also suggests that we should defer to its determination whether a particular contract is covered by Davis-Bacon, citing 29 C.F.R. §§ 5.13 and 7.1(d) (1994), Reorg. Plan No. 14 of 1950, 3 C.F.R. 1007 (1950), *reprinted in* 5 U.S.C. app. at 1261 (1988),[11] and a variety of cases. While the authorities cited clearly indicate that Labor has authority to set wage rates, they do not indicate whether Labor's resolution of legal questions relating to coverage disputes supercedes the Attorney General's authority, under Executive Order No. 12146, 3 C.F.R. 409 (1979), to resolve legal disputes between executive branch agencies. Rather, these sources state that the contracting agency has the initial responsibility for determining coverage, *see, e.g.*, *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 759 n.6, 760 (1981); *North Georgia Building and Constr. Trades Council v. Goldschmidt*, 621 F.2d 697, 703 (5th Cir. 1980); and that the Reorg. Plan and Labor Department regulations provide for review by Labor of contracting agencies' coverage determinations. Reorg. Plan No. 14 of 1950; 29 C.F.R. §§ 5.13 and 7.1(d); *Coutu*, 450 U.S. at 760; *North Georgia*, 621 F.2d at 704.[12]

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[11] Reorg Plan No. 14 provides

> In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts [including the Davis-Bacon Act] by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable

5 U.S.C. app. at 1261

[12] While the *North Georgia* case also states that the Wage Appeals Board is "authorized [by 29 C.F.R. § 7.1(d)] to act with finality on behalf of the Secretary of Labor" in reviewing determinations made by agencies in applying the Davis-Bacon Act, 621 F.2d at 704, the quoted language indicates only that the WAB has final authority to act for the Secretary of Labor and does not indicate whether, and to what extent, the Department's exercise of that authority is reviewable by the Attorney General or by the courts. 29 C.F.R. § 7.1(d) says only that the Board "shall act as fully and finally as might the Secretary of Labor concerning such matters."

It is true that Reorganization Plan No. 14 of 1950 seeks coordination of administration and consistency of enforcement of, among other statutes, the Davis-Bacon Act, and that the Plan places the principal authority for bringing about consistent administration of the statute with the Department of Labor. 5 U.S.C. app. at 1261. That authority, however, must be reconciled with the authority of the Attorney General to make final decisions for the executive branch on legal determinations under Executive Order No. 12146, which provides that the Attorney General may resolve "legal disputes" between executive agencies. *See also* 28 U.S.C. § 511 ("The Attorney General shall give [her] advice and opinion on questions of law when required by the President") and 28 U.S.C. § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department"). We believe that, read together, the Davis-Bacon Act, the Reorganization Plan, 28 U.S.C. §§ 511 and 512, and Executive Order No. 12146, while granting the primary responsibility for interpreting Davis-Bacon to Labor, also confer on the Attorney General, at the request of appropriate officials, the authority to review the general legal principles underlying certain of the Secretary's decisions under the Act. *Accord Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding*, 11 Op. O.L.C. 92, 94-95 (1987) (Reorganization Plan 14 "speaks only to the respective functions of HUD [the contracting agency] and Labor in administering [Davis-Bacon provisions of] the Housing and Community Development Act," and "does not preclude either the head of a department from seeking, or the Attorney General from rendering, an opinion on a question of law arising in the administration of his department").[13]

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[13] This view is consistent with prior decisions of the Attorney General sometimes cited for the proposition that Labor has final authority to interpret the Davis-Bacon Act. Thus, for example, in *Federal Aid Highway Program — Prevailing Wage Determination*, 41 Op. Att'y Gen. 488 (1960), the Attorney General agreed only that Labor has authority under the Reorganization Plan and the statute to determine whether certain employees were "laborers or mechanics" within the meaning of the Davis-Bacon Act — not whether the contract itself was covered. Since this opinion resolved a dispute between the Departments of Labor and Commerce over which of those two agencies should make the determination, it did not fully address the question of the extent of the authority of the Department of Justice to review Labor Department legal determinations under the Act.

Similarly, in *Office of Federal Procurement Policy — Authority to Determine Whether the Service Contract Act, Walsh-Healey Act, or Davis-Bacon Act Applies to Classes of Federal Procurement Contracts*, 43 Op. Att'y Gen. 150 (1979), while the Attorney General did conclude that the Department of Labor had authority to make contract coverage determinations under the Walsh-Healey and Service-Contract Acts that are "binding on the procurement agencies," *id.* at 161, and that the Office of Federal Procurement Policy does not have statutory authority to make coverage determinations under those statutes, *id.*, these statements do not undermine the authority of the Attorney General to review legal aspects of interagency disputes relating to coverage decisions made by the Department of Labor. Furthermore, the 1979 Attorney General opinion made no such express determination concerning the Secretary's authority to make final Davis-Bacon coverage decisions, and indeed, no one had contended that Davis-Bacon covered the particular contract at issue in that case. *See id.* at 151. While the 1979 opinion also stated that Labor has authority to make coverage determinations under "the contract labor standards statutes," including Davis-Bacon, *id.* at 153, this statement does not address the disputed question: whether this authority precludes the Department of Justice from reviewing such decisions, and neither the opinion nor the cases cited in support of this passage indicate

IV.

For these reasons, we conclude that the ruling of the 1988 O.L.C. Opinion that the plain language of the Davis-Bacon Act indicates that it can never apply to a lease that calls for construction of a public work was incorrect. We believe that the determination whether a particular lease-construction contract is a "contract . . . for construction" of a public building or public work within the meaning of the Davis-Bacon Act will depend upon the details of the particular agreement.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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that the Attorney General may not address legal questions arising from Labor Department Davis-Bacon coverage decisions.

Deputization of Members of Congress as Special Deputy U.S. Marshals

The deputization of Members of Congress as special Deputy U.S. Marshals is inconsistent with separation of powers principles and with the statutory language and historical practice governing special deputation.

May 25, 1994

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
UNITED STATES MARSHALS SERVICE

You have requested our assistance in determining whether the United States Marshals Service may deputize Members of Congress as special Deputy U.S. Marshals. The Director of the Marshals Service is authorized to deputize the following individuals to perform the functions of Deputy Marshals: selected officers or employees of the Department of Justice; federal, state or local law enforcement officers; private security personnel to provide courtroom security for the Federal judiciary; and other persons designated by the Associate Attorney General. 28 C.F.R. § 0.112; *see also* 28 U.S.C. § 561(f) (authorizing Director of Marshals Service to appoint "such employees as are necessary to carry out the powers and duties of the Service").

We believe that deputation of Members of Congress is inconsistent with separation of powers principles and with the statutory language and historical practice governing special deputation.[1] First, deputizing Members of Congress violates the principle recognized in *Bowsher v. Synar*, 478 U.S. 714 (1986), that Congress may not exceed its constitutionally prescribed authority by playing a direct role in executing the laws. The Marshals Service is clearly a part of the executive branch[2] and the primary duties of Deputy Marshals are the execution and enforcement of federal law. *See Steele v. United States*, 267 U.S. 505, 508 (1925) (deputy marshals are "chiefly charged with the enforcement of the peace of the United States"); *United States v. Krapf*, 285 F.2d 647, 649 (3d Cir. 1960) (duties of marshals include the "enforcement, maintenance and administration of federal authority"); 28 U.S.C. § 566 (describing the duties of the Marshals Service). Permitting Members of Congress to execute and enforce the laws encroaches upon the very heart of the executive authority and violates one of the fundamental tenets of separation of

[1] Because we think that the result is clear under a separation of powers analysis, we do not address the argument that special deputation of Members of Congress is invalid under the Incompatibility Clause.

[2] The United States Marshals Service is a bureau within the Department of Justice and under the authority and direction of the Attorney General. 28 U.S.C. § 561.

powers jurisprudence: "The structure of the Constitution does not permit Congress to execute the laws." *Bowsher v. Synar*, 478 U.S. at 726.

Members of Congress presumably request special deputation so that they may carry weapons for personal security and not so that they may actually execute or enforce the law. Nonetheless, deputized Members of Congress will have statutory authority to enforce the law. Moreover, the fact that a legislative usurpation of executive power may prove to be innocuous or inchoate does not mean that it is constitutionally permissible. Legislative intrusions into the executive sphere that may prove harmless in practice nonetheless violate separation of powers principles. *See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.* 501 U.S. 252 (1991); *Bowsher*, 478 U.S. 714. "The separated powers of our Government cannot be permitted to turn on" speculative assessments about the likelihood of a legislative official actually exercising usurped executive authority; "in the long term, structural protections against abuse of power [are] critical to preserving liberty." *Bowsher*, 478 U.S. at 730.

Deputation of Members of Congress, furthermore, is not authorized by the statute and regulations governing special deputation. 28 U.S.C. § 561(f) states that the Director of the Marshals Service may appoint "such employees *as are necessary to carry out the powers and duties of the Service*." (emphasis added). Similarly, 28 C.F.R. § 0.112 provides that the Director may deputize certain persons "to perform the functions of a Deputy U.S. Marshal." Both the Marshals Service and this Office have repeatedly taken the position that the use of the special deputation authority should be limited to those circumstances where the United States Marshal needs the deputations in order to accomplish his or her specific mission. *See Special Deputations of Private Citizens Providing Security to a Former Cabinet Member*, 7 Op. O.L.C. 67 (1983) (concluding that Marshals Service could not deputize Henry Kissinger's private security service); Memorandum for the Attorney General, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel (Mar. 28, 1977) (advising that it would be unlawful for the Marshals Service to deputize former Vice President Rockefeller's security detail). The Marshals Service does not need Members of Congress to serve as deputy marshals in order to perform its assigned functions; indeed, Members of Congress *cannot* perform the functions of the Marshals Service without running afoul of separation of powers principles.

It is therefore our conclusion that the Marshals Service cannot continue to grant requests from Members of Congress for special deputation.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Prejudgment Interest Under the Back Pay Act for Refunds of Federal Insurance Contributions Act Overpayments

The Back Pay Act's authorization of prejudgment interest does not apply to the return of a Federal Insurance Contributions Act tax overpayment.

Even if the Back Pay Act did apply to such returns, an agency's specific exemption from liability under the Federal Insurance Contributions Act would override the provisions of the Back Pay Act.

May 31, 1994

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This memorandum responds to your Office's request for our opinion whether civilian employees of the Department of Defense ("DoD") who receive from the Internal Revenue Service ("IRS") a refund of taxes that were deducted from their pay pursuant to 26 U.S.C. § 3121(a) of the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128 ("FICA"), as amended, are entitled to receive prejudgment interest on the refund from DoD pursuant to the Back Pay Act, 5 U.S.C. § 5596, as amended. We conclude that these DoD employees are not entitled to receive additional interest from DoD.

I.
BACKGROUND

FICA imposes a tax on the income of every employee, calculated as a percentage of wages, for the support of old-age, survivors, disability, and hospital insurance. 26 U.S.C. § 3101. A corresponding payroll tax for the same purpose is imposed on every employer with respect to each employee. *Id.* § 3111. Under FICA, every employer must deduct its employees' share of the FICA tax from their wages "as and when paid." *Id.* § 3102(a). All sums collected must be paid over to the IRS. *Id.* § 3102(b). In 1983, FICA taxation was extended to all subsequently hired civilian federal employees. *See* Social Security Act Amendments of 1983, Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 65, 69 (codified as amended at 26 U.S.C. § 3121(b)(5), (6)); S. Rep. No. 98-23, at 5 (1983). Each federal agency is treated as a separate employer for purposes of FICA. *See* 26 U.S.C. § 3122.

Certain civilian DoD employees receive allowances for living quarters and for temporary lodging costs pursuant to the Overseas Differentials and Allowances Act, 5 U.S.C. § 5923, as amended ("ODAA allowances"). ODAA allowances have

always been expressly exempted from income tax. *See* 26 U.S.C. § 912(1)(C); *Anderson v. United States*, 929 F.2d 648, 649 (Fed. Cir. 1991). Because FICA does not expressly exempt ODAA allowances from taxation, an issue arose as to whether such payments were taxable for that purpose. DoD concluded that they were and, accordingly, deducted appropriate sums from its employees' ODAA allowances and paid those funds over to the IRS. *See Anderson v. United States*, 16 Cl. Ct. 530, 532-33 (1989) At least some of the affected employees filed administrative claims for refunds, which the IRS denied. *Id.* at 533-34.

The IRS's denial of these claims did not survive judicial scrutiny. In *Anderson*, a number of DoD employees brought suit against the United States, seeking a refund of the FICA taxes paid on ODAA allowances for the years 1984 through 1987. The Court of Federal Claims granted them summary judgment, holding that ODAA allowances are exempt from FICA taxation. 16 Cl. Ct. at 541. The decision was affirmed on appeal. *Anderson v. United States*, 929 F.2d 648 (Fed. Cir. 1991). The United States did not petition the Supreme Court for a writ of certiorari. As a result of *Anderson*, certain DoD employees (and other similarly situated federal employees) will receive refunds of the contested FICA taxes ("*Anderson* employees").

II.
ISSUE FOR CONSIDERATION

We have been asked to determine the amount of interest that must be paid on FICA tax refunds to *Anderson* employees. Absent a waiver of sovereign immunity, the United States and its agencies are not liable for prejudgment interest. *See, e.g.*, *Library of Congress v. Shaw*, 478 U.S. 310, 310, 314-15 (1986); *Loeffler v. Frank*, 486 U.S. 549, 554, 556-57 (1988). The Internal Revenue Code ("Code") contains such a waiver with respect to refunds of FICA tax overpayments. *See* 26 U.S.C. §§ 6413(b), 6611(a). The Office of Personnel Management ("OPM") and DoD agree that the IRS must pay *Anderson* employees prejudgment interest on their FICA tax refunds pursuant to these provisions.

The Back Pay Act, however, also expressly permits prejudgment interest on an award of "back pay," as defined by that Act. *See* 5 U.S.C. § 5596(b); *Brown v. Secretary of the Army*, 918 F.2d 214, 216-18 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991). OPM believes that *Anderson* employees are entitled to receive interest on their refunds under the Back Pay Act. *See* Letter for Albert V. Conte, Director, Defense Finance and Accounting Service, Department of Defense, from Constance Berry Newman, Director, Office of Personnel Management at 1 (Apr. 27, 1992) ("Newman Letter"); Letter for Philip M. Hitch, Deputy General Counsel (Fiscal), Department of Defense, from Arthur Troilo III, General Counsel, Office of Personnel Management at 3-4 (Nov. 30, 1992) ("Troilo Letter"). Accordingly, OPM instructed federal agencies that: "Because IRS computes interest in a manner

that would result in a smaller interest payment to employees, agencies must compute interest due employees under the back pay law (5 U.S.C. 5596)." Attachment to Memorandum for Directors of Personnel from Claudia Cooley, Associate Director for Personnel Systems and Oversight at 3 (Dec. 3, 1991). OPM further instructed that each agency must add to the IRS's interest payment an amount sufficient to make the total equal to the larger amount of interest prescribed under the Back Pay Act. Newman Letter at 1-2. OPM suggests that agencies failing to make this payment could be held liable for the additional amount. Troilo Letter at 3, 4. DoD's position is that it has no legal obligation to pay any additional interest.[1]

III.
LEGAL ANALYSIS

We conclude that the Back Pay Act's authorization of prejudgment interest does not apply to the return of a FICA tax overpayment. The Back Pay Act was not intended to remedy this type of injury. Indeed, as discussed below, FICA contains a provision that exempts employers from liability in these circumstances. Consequently, there is no legal basis for OPM's instruction to agencies to pay additional interest computed under the Back Pay Act.

A. THE REQUIREMENTS FOR APPLICATION OF THE BACK PAY ACT ARE NOT MET

The Back Pay Act provides:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> . . . is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

[1] DoD estimates that paying additional interest under the Back Pay Act would cost approximately $7 million. Memorandum for Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Jamie S. Gorelick, General Counsel, Department of Defense at 6 (June 21, 1993).

> . . . an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.

5 U.S.C. § 5596(b).

In general, the Back Pay Act grants a cause of action to an employee who has lost pay as a result of a wrongful personnel action. Its purpose is to permit such an employee to recover money damages sufficient to make the employee whole. *United States v. Testan*, 424 U.S. 392, 407 (1976); *Wells v. FAA*, 755 F.2d 804, 807 (11th Cir. 1985). The need for the Act arises "by the fact that, absent specific command of statute or authorized regulation, an appointed employee subjected to unwarranted personnel action does not have a cause of action against the United States." *United States v. Hopkins*, 427 U.S. 123, 128 (1976). The Supreme Court repeatedly has adhered to a narrow construction of the Back Pay Act, finding that it authorizes money damages only in the "'carefully limited circumstances'" expressly set forth in the statute. *United States v. Mitchell*, 463 U.S. 206, 217 (1983) (quoting *United States v. Testan*, 424 U.S. at 404).

OPM maintains that the Back Pay Act applies concurrently with the provisions of the Code as a remedy for an agency's erroneous deduction of too much FICA tax from its employees' earnings. OPM has not, however, cited (nor have we found) any reported decision applying the Back Pay Act in such circumstances. In light of the Supreme Court's strict construction of the Back Pay Act, the absence of authority suggests that OPM's novel application should be approached with skepticism.

OPM, moreover, has not demonstrated that the specific requirements of a Back Pay Act action have been met. The first requirement is that an employee must have been subject to an "unjustified or unwarranted personnel action." The legislative history of the Back Pay Act discusses the types of personnel actions falling within its purview:

> H.R. 1647 does not prescribe the specific types of personnel actions covered. Separations, suspensions, and demotions constitute the great bulk of cases in which employees lose pay or allowances, but other unwarranted or unjustified actions affecting pay or allowances could occur in the course of reassignments and change from full-time to part-time work. If such actions are found to be unwarranted or unjustified, employees would be entitled to backpay benefits when the actions are corrected.

S. Rep. No. 89-1062, at 3 (1966); *see United States v. Testan*, 424 U.S. at 405-06 (quoting this cited legislative history).

The examples given in the Senate report all involve an alteration of the terms of employment, such as the downgrading of an employee's appointed position, that cause an employee to earn less money. The damages owed to the employee equal the reduction of earnings arising out of the adverse personnel action. In contrast, the *Anderson* employees did not suffer a loss of earnings: they concededly earned the money that was deducted from their paychecks. Their claim, rather, was that the United States was indebted to them to the extent that the FICA deductions exceeded their actual tax liability. *See Stone v. White*, 301 U.S. 532, 534-35 (1937) (claim of tax overpayment is in the nature of one for money had and received); *King v. United States*, 641 F.2d 253, 259 (5th Cir. 1981) (same); *Missouri Pac. R.R. Co. v. United States*, 338 F.2d 668, 670 (Ct. Cl. 1964) (taxpayer bringing action for refund must show payment of excess taxes that equitably belong to him or there can be no recovery). At least one court has held that a claim for money due is not cognizable under the Back Pay Act:

> Mere failure by a government agency to pay money due is not the kind of adverse personnel action contemplated in the Back Pay Act. We are not called upon to correct an adverse personnel action. . . . Plaintiffs' claims are analogous to ones for unpaid salary for time actually worked.

Bell v. United States, 23 Cl. Ct. 73, 77 (1991). Thus, we conclude that DoD's erroneous deduction of too much FICA tax was not an adverse personnel action within the contemplation of the Back Pay Act. OPM has not called our attention to, and we have not discovered, any decision that might compel a different conclusion.

A second essential element under the Back Pay Act is that the personnel action must have caused the "withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." OPM suggests that an agency's deduction of too much FICA tax constitutes a reduction in pay (or, in this case, allowances). Section 3123 of FICA, however, provides:

> Whenever under . . . [FICA] . . . an employer is required or permitted to deduct any amount from the remuneration of an employee and to pay the amount deducted to the United States, . . . then for purposes of [FICA] *the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.*

26 U.S.C. § 3123 (emphasis added). *See Pope v. University of Washington*, 852 P.2d 1055, 1062 (Wash. 1993), *cert. denied*, 510 U.S. 1115 (1994); IRS Private

Ruling 7702012130A, 1977 PRL Lexis 60. *Cf. Slodov v. United States*, 436 U.S. 238, 243 (1978) ("[o]nce net wages are paid to the employee, the taxes withheld are credited to the employee regardless of whether they are paid by the employer, so that the IRS has recourse only against the employer for their payment"). DoD was "required or permitted" to determine the amount of remuneration subject to tax and to make the appropriate deduction. *See* 26 U.S.C. § 3102(b); *id.* § 3122. Thus, the deductions at issue here must be considered as having been paid to the *Anderson* employees.[2]

Finally, the Back Pay Act requires that the employing agency have been found by an "appropriate authority" to have engaged in a wrongful personnel action. OPM has defined this term in its regulations: "*Appropriate authority* means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including . . . the Office of Personnel Management." 5 C.F.R. § 550.803.

OPM regards itself as the "appropriate authority" that has found that DoD has engaged in a wrongful personnel action with respect to the *Anderson* employees:

> OPM clearly meets the definition [of an "appropriate authority" set forth in 5 C.F.R. § 550.803] . . . and, in addition, is specifically mentioned as such an authority [in the regulation]. . . . In the case of the FICA tax issue, OPM, consistent with its mission as the Federal personnel administrator, was compelled to issue guidance to Federal agencies setting forth instructions on how to implement the *Anderson* decision, including how to correct the erroneous withholdings of FICA taxes.

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[2] Section 3123, by its terms, applies only "for purposes" of FICA. Thus, it is possible that the deduction might be treated as a non-payment of wages for purposes of some other statute. But there is no basis for doing so here, because the Back Pay Act is purely remedial: it restores pay lost to an employee from the violation of a right granted under another "applicable law, rule, regulation, or collective bargaining agreement." 5 U S C. § 5596(b) The "applicable law" in this case—FICA—expressly authorized DoD to make the contested deductions and commanded that they be considered as a payment of remuneration Thus, DoD's erroneous FICA deductions cannot serve as the predicate for an action under the Back Pay Act, which requires that the claimant have suffered a loss of pay resulting from a wrongful personnel action.

We note also that the clash of assumptions between FICA and the Back Pay Act concerning whether an agency's deduction of FICA tax is a payment of wages could expose the *Anderson* employees to unpleasant tax consequences if, as OPM proposes, the two schemes were applied concurrently. It is settled law that awards under the Back Pay Act are taxable earnings for FICA and income tax purposes, subject to tax withholding when they are paid to the employee. *See, e.g., Tanaka v. Department of Navy*, 788 F.2d 1552, 1553 (Fed. Cir. 1986), *Ainsworth v. United States*, 399 F 2d 176, 185-86 (Ct Cl 1968), *Kopp v. Department of Air Force*, 37 M.S P R 434, 436 (1988) This tax treatment comports with the theory that the Back Pay Act provides "'reparation . based upon the loss of wages which the employee has suffered from the employer's wrong.'" *Ainsworth*, 399 F 2d at 185 (quoting *Social Security Bd. v. Nierotko*, 327 U S 358, 364 (1946)). Thus, although ODAA allowances ordinarily are excluded from FICA and income taxation, the *Anderson* employees' recovery would be taxable as ordinary wage earnings if they were received as an award of back pay rather than as a tax refund (absent an equitable adjustment). This anomaly highlights the dubious nature of any suggestion that the Back Pay Act has a role to play in the return of a tax overpayment.

Troilo Letter at 3.

We do not agree that OPM is an "appropriate authority" under the Back Pay Act. Whatever OPM's authority to "issue guidance" to agencies concerning how to correct the FICA tax treatment of ODAA allowances in light of *Anderson*, it did not have authority to correct the improper FICA tax deductions contested in *Anderson*, which is "the case at hand." DoD was vested with initial authority to determine the amount of FICA tax to be deducted from its *Anderson* employees' pay. 26 U.S.C. § 3122. That determination was subject to review and correction by the Secretary of the Treasury. *Id.* (As noted in § I, *supra*, the Secretary agreed with DoD and allowed the deductions to stand.) The Secretary's decision was final within the executive branch. *See* 26 U.S.C. § 6406.[3] Judicial review of the Secretary's decision was available in either the federal district courts or the Court of Federal Claims. *See* 26 U.S.C. § 7422; 28 U.S.C. § 1346. (The *Anderson* employees proceeded in the Federal Claims Court.) In either case, the decision was not subject to further review by the executive branch. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (executive branch revision of final judgments of the judicial branch violates the separation of powers); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874) (same). Thus, at no point did OPM have authority to "correct or direct the correction of" the decision to deduct FICA taxes from the ODAA allowances of the *Anderson* employees. Therefore, OPM does not meet the criterion set forth in its own regulation defining an "appropriate authority."

B. OPM'S PROPOSED APPLICATION OF THE BACK PAY ACT IS INCONSISTENT WITH FICA'S EXPRESS GRANT OF AN EXEMPTION FROM LIABILITY FOR EMPLOYERS

As a general matter, the Code's remedial provisions have been held to be the exclusive remedy for those seeking a return of tax overpayments. *See, e.g., Bruno v. United States*, 547 F.2d 71 (8th Cir. 1976) (suit for refund of taxes was governed by the specific limitation period in the Internal Revenue Code and not the general limitations period for civil actions against the United States in title 28); *Michigan State Employees Ass'n v. Marlan*, 608 F. Supp. 85, 90-92 (W.D. Mich. 1984) (the existence of specific remedial procedures in the Internal Revenue Code to redress tax overpayments foreclosed any possibility of relief under 42 U.S.C. § 1983). In this case, moreover, Congress provided specific procedures to apply "[i]f more than the correct amount of [FICA] tax . . . is paid [by an employee] with respect to any payment of remuneration." 26 U.S.C. § 6413; *see* 26 C.F.R. § 31.6413. *See generally* Rev. Rul. 81-310, 1981-2 C.B. 241; Rev. Proc. 81-69, 1981-2 C.B. 726;

[3] Ordinarily, 26 U S C. § 6406 permits review of the Secretary's decisions by the Tax Court Such review was not available here because the Tax Court has no jurisdiction to adjudicate FICA tax liability 26 U.S.C. § 7442

Atlantic Dep't Stores, Inc. v. United States, 557 F.2d 957 (2d Cir. 1977); *Macy's New York, Inc. v. United States*, 484 F. Supp. 181 (S.D.N.Y. 1980); *Entenmann's Bakery, Inc. v. United States*, 465 F. Supp. 1118 (E.D.N.Y. 1979).[4] It seems unlikely that Congress intended the very general remedial provisions of the Back Pay Act to apply as well, thereby giving federal employees a more generous remedy than that available to employees in the private sector.

Even if the Back Pay Act were generally applicable here, OPM's proposal that each agency pay additional interest to its *Anderson* employees is inconsistent with § 3102(b) of FICA. That section provides that an employer who has collected FICA taxes and paid them over to the IRS "shall be indemnified against the claims and demands of any person for the amount of any such payment." *Id.*[5] An "indemnity" is a "legal exemption from liability for damages." American Heritage Dictionary of the English Language 917 (3d ed. 1992). Section 3102(b), furthermore, has been held to serve the same purpose as 26 U.S.C. § 3403,[6] which applies to the collection of income taxes. *See United States Fidelity & Guaranty Co. v. United States*, 201 F.2d 118, 119 (10th Cir. 1952) (equating 26 U.S.C. § 3102(b) with § 3403). Section 3403, in turn, invariably has been construed to mandate that an employer is immune from suit by its employees concerning federal income taxes that have been withheld by the employer and paid over to the IRS. *See, e.g., Edgar v. Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984); *Pascoe v. IRS*, 580 F. Supp. 649, 654 (E.D. Mich. 1984), *aff'd*, 755 F.2d 932 (6th Cir. 1985); *Chandler v. Perini Power Constructors, Inc.*, 520 F. Supp. 1152, 1156 (D.N.H. 1981). Therefore, we conclude that § 3102 provides an employer with a legal exemption from liability to the extent of the amount of FICA taxes collected and paid over to the IRS.[7]

OPM's proposal that federal agencies pay their *Anderson* employees additional interest under the Back Pay Act contravenes this exemption. Under familiar prin-

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[4] An employer has an incentive to calculate the tax correctly because its own share of the FICA tax mirrors that of its employees *See* 26 U S C § 3111. Also, an employer who has collected too much FICA tax is not permitted to receive a return of its own overpayment unless it has repaid the affected employees (or former employees) or has made a reasonable effort to perfect their claims for a refund *See* Rev Rul. 81-310, at 242.

[5] *See also* 26 C F.R § 31.3102-1(c) ("The employer is indemnified against the claims and demands of any person for the amount of any payment of such tax made by the employer to the district director ")

[6] Section 3403 provides

> The employer shall be liable for the payment of the [income] tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment

[7] An indemnity can also be a "[s]ecurity against damage, loss, or injury." American Heritage Dictionary of the English Language at 917 Under the latter definition, § 3102(b) might be read as a promise to compensate employers for their liability arising out of the FICA tax collection process rather than as a legal exemption from liability in the first instance It is, however, a recognized rule of statutory construction that a waiver of sovereign immunity must be unequivocal. Thus, if two readings are plausible, the one that does not waive sovereign immunity must be adopted. *See United States v Nordic Village, Inc* , 503 U S 30, 33-37 (1992). Consequently, we read § 3102(b) as conferring a legal exemption Indeed, § 3102(b) fails to name an indemnitor, which supports our reading and also fatally undermines any claim that § 3102(b) contains an unequivocal waiver of sovereign immunity

ciples of statutory construction, the exemption in § 3102(b), which is specifically applicable to the collection of FICA taxes, must prevail over the more generally applicable interest provision of the Back Pay Act. *See Brown v. Secretary of Army*, 918 F.2d at 218 (Title VII's limit of two years on recovery of back pay would take precedence over the more generous term in the Back Pay Act when both remedies were facially available to federal employees who had successfully sued their employer under Title VII). *See generally Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (a provision of the Code specifically addressed to the computation of interest on carry-back tax refunds would prevail over provision on computation of interest on tax refunds generally); 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (5th ed. 1992) ("Where a conflict exists the more specific statute controls over the more general one."). Thus, even if the Back Pay Act's interest provision were facially applicable, it could not be applied in these circumstances.

CONCLUSION

We conclude that DoD is not required to pay its *Anderson* employees any interest under the Back Pay Act. The Back Pay Act does not apply in these circumstances. Even if it did, the interest provision of the Back Pay Act must yield to the legal exemption from liability granted to employers under FICA. Thus, OPM's instruction to agencies to pay additional interest has no legal basis.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee

An executive branch officer or employee appointed to the Board of Directors of Connie Lee would be a "director" within the meaning of 18 U S.C § 208(a) and therefore would be disqualified from participating "personnally and substantially" in any "particular matter" implicating the financial interests of Connie Lee unless the conditions of subsection 208(b) are satisfied.

June 22, 1994

MEMORANDUM OPINION FOR THE ASSISTANT GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum is in response to your request of May 23, 1994, for an opinion as to whether the Deputy Assistant Secretary, if appointed to the Board of Directors of the College Construction Loan Insurance Association ("Connie Lee"), would be subject to the requirements imposed by 18 U.S.C. § 208 on "directors" of outside organizations. We have concluded that if appointed, the Deputy Assistant Secretary would be a "director" of an outside organization within the meaning of § 208, and accordingly would have to comply with the provisions of that section in discharging his or her government duties. This conclusion does not preclude the appointment of the Deputy Assistant Secretary or another Treasury official to the board of Connie Lee. Rather, it means that if appointed, the official could not participate in any particular matter in his or her government capacity in which Connie Lee had a financial interest, unless he or she received a waiver issued pursuant to § 208(b).

Background

Connie Lee was incorporated as a private, for-profit corporation of the District of Columbia in 1987 as directed by Title VII of the Higher Education Amendments of 1986, Pub. L. No. 99-498, sec. 701, § 751, 100 Stat. 1268, 1528 (codified at 20 U.S.C. §§ 1132f-1132f-9).* At that time, many colleges and universities were unable to obtain private financing for capital improvements and routine maintenance of their physical plants. By providing financial insurance and guarantees for qualifying loans, Connie Lee enhances the credit quality of these educational institu-

* **Editor's Note** The statutory provisions concerning Connie Lee that are discussed in this opinion were subsequently repealed in 1996 and replaced by the provisions that are now codified at 20 U.S.C. § 1132f-10 *See* Student Loan Marketing Association Reorganization Act of 1996, Pub. L No. 104-208, § 603, 110 Stat 3009-275, 3009-209 (enactment of current section), 3009-293 (repeal) The changes to the statute do not affect the analysis or conclusions of this opinion.

tions, facilitating their access to private credit. H.R. Rep. No. 99-383, at 71-73 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2572, 2642-44 ("House Rep."). In form and function, Connie Lee is similar to the Student Loan Marketing Association ("Sallie Mae").

Connie Lee began operating as a joint venture of the Secretary of Education, Sallie Mae and interested members of the higher education community. Congress "intended that the Corporation . . . initially operate under the stewardship of the Student Loan Marketing Association, subject to the direction and control of the Corporation's Board of Directors. . . . [T]he direct interest of the federal government in the Corporation is expected to diminish and eventually terminate." House Rep. at 74, *reprinted in* 1986 U.S.C.C.A.N. at 2645. The statute authorized the Secretary of Education and Sallie Mae to subscribe to voting common stock in a four to one ratio. *See* 20 U.S.C. § 1132f-4(a), (b). Congress gave the board the authority to issue additional shares of voting common stock for sale to the public and institutions of higher education. *Id.* § 1132f-4(d). After five years, the statute authorized the Secretary of Education to sell the stock held by that department, and gave Sallie Mae a right of first refusal in the event of such a sale. *Id.* § 1132f-7(a).

Connie Lee is governed by an eleven member board of directors. At present, two directors are appointed by the Secretary of Education, two by the Secretary of the Treasury, and three by Sallie Mae. The remaining four directors are elected by the holders of the voting common stock. *Id.* § 1132f-3(a). A director serves for a term of one year or until a successor has been appointed and qualified. *Id.* If Sallie Mae acquires enough voting common stock from the Secretary of Education to own more than fifty percent of the outstanding voting shares, the entire board is to be elected by the shareholders. *Id.* § 1132f-7(c).

In the past, the individuals appointed by the Secretary of the Treasury have been private citizens. The Secretary is now considering appointing a Deputy Assistant Secretary to the board of Connie Lee. You are concerned that if appointed, the Deputy Assistant Secretary would no longer be able to participate in the formulation of the Department's policies regarding its interests in Connie Lee.

Discussion

Under § 208, no officer or employee in the executive branch may participate "personally and substantially" in any "particular matter" in which an "organization in which he is serving as officer, director, trustee, general partner or employee . . . has a financial interest" unless he obtains a waiver or satisfies an exception as outlined in subsection 208(b). 18 U.S.C. § 208(a). However, this Office has previously taken the position that "a federal official serving on the board of an essentially private entity by virtue of a federal statutory mandate is not an 'officer, director or trustee' of that entity within the meaning of section 208." Memorandum for David H. Martin, Director, Office of Government Ethics, from Samuel A.

Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: USIA Director's Service on the Board of the United States Telecommunications Training Institute* at 2 (Dec. 3, 1986) ("USTTI Memo"). You have suggested that the Secretary's appointment of a Deputy Assistant Secretary to the Connie Lee board would establish a position analogous to an "ex officio" director and therefore should not trigger the application of § 208. Unfortunately, we cannot agree.

This Office has found that a government official serves on the board of a private entity in an ex officio rather than personal capacity where that service is expressly authorized by statute.[1] We have also ruled that a government official's service as a director does not violate § 208 where the rules of the private entity designate that official as a member of the board and neither the rules or state law appear to impose a fiduciary duty to the private entity on that director.[2]

The proposed arrangement for Connie Lee would not fall into either of these categories. While the governing statutes do not prohibit the appointment or election of federal officers to the Connie Lee board, no government official is designated as a board member in either a personal or official capacity. *See* 20 U.S.C. §§ 1132f-3, 1132f-7(c). As we stated in the USTTI opinion:

> [S]ection 208 is premised on a concern to avoid any conflict between a federal official's public and private obligations and interests. . . . [W]here a government official is authorized by statute to serve on the board of a private group as part of his or her official governmental duties, in what is essentially an ex officio capacity, the reasonable inference to be drawn is that the official is to serve the interests of the government in the event of any conflict between those interests and the interests of the private organization.

Id. at 2. Any fiduciary duty the director owes to the organization in question is clearly subordinate to that director's duties to his or her government office and the United States.

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[1] Thus this Office has determined that the restrictions of § 208 did not apply where a federal statute explicitly designated the Attorney General as an ex officio member of the Board of Trustees of the National Trust for Historic Preservation, *Questions Raised by the Attorney General's Service as a Trustee of the National Trust for Historic Preservation*, 6 Op. O.L.C. 443, 446 (1982), or where the Director of the U.S. Information Agency served on the board of a private institute pursuant to a federal statute authorizing several executive agencies to provide official support to that institute "including . . . service on the board of the Institute," USTTI Memo at 2 (quoting the Omnibus Diplomatic Security and Anti-Terrorism Act of 1988, Pub. L. No. 99-399, § 1307, 100 Stat. 853, 899).

[2] Nor did § 208 apply where the constitution of the American Bar Association designated the Attorney General as an ex officio member of the ABA House of Delegates, Memorandum for Thomas E. Kauper, Assistant Attorney General, Antitrust Division, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Contemplated ABA Suit* (May 21, 1976), or where every Director of the National Bureau of Standards since 1951 had served on the board of a private standard setting organization and that organization amended its bylaws to designate the Director as a non-voting ex officio member of the board. Letter for the Hon. Warren G. Magnuson, Chairman, Senate Committee on Commerce, Science and Transportation, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 4-6 (Dec. 13, 1977).

There is no indication that the fiduciary duty of a Connie Lee director appointed by the Secretary is subordinate to any duty to the government. Congress expressly provided that absent a conflict with the provisions of the Higher Education Act, Connie Lee was to be subject to the corporation law of the District of Columbia. 20 U.S.C. § 1132f(c). The language and structure of the statutory provisions governing the board of directors are in no way inconsistent with the proposition that all Connie Lee directors, including those appointed by the Secretary, owe the fiduciary duty dictated by D.C. law to the corporation and its shareholders. While the Secretaries of Education and the Treasury were both granted the power to appoint two directors and to replace these directors by appointing replacements anytime after the end of their one year term because of the "significant interests" of the government in the early years of operation, *see* House Rep. at 73, *reprinted in* 1986 U.S.C.C.A.N. at 2644; 20 U.S.C. § 1132f-3(a), the articles and bylaws of Connie Lee vest limited removal power in the board, not in any of the appointing bodies.[3] If a government official appointed by the Secretary resigned or was removed from that government position, he or she could retain a seat on the Connie Lee board for the duration of the term unless he or she resigned or was removed by the remaining board members.[4] This structure suggests that Congress did not intend for the Secretary to exercise direct control over his appointees once they were appointed.

Connie Lee's status as a private, for-profit corporation with outstanding voting shares held by private individuals and institutions strengthens the conclusion that its directors are bound by a fiduciary duty to the corporation and to these shareholders in their capacity as directors. 20 U.S.C. § 1132f(a),(b); Bylaws, art. III, § 3.8. Furthermore, directors may receive compensation for their service to the corporation "in their capacities as Directors or otherwise." Bylaws, art. III, § 3.8. While you have indicated that a Treasury official appointed to the board would waive any compensation, this provision is additional evidence of the directors' fiduciary duty to the corporation and potentially presents the appearance of a conflict of interest. These obligations and the attendant potential for conflict are precisely the circumstances that § 208 is designed to address.

Conclusion

An executive officer or employee appointed to the board of Connie Lee by the Secretary would be a "director" within the meaning of 18 U.S.C. § 208(a). Ac-

[3] Article VII, clause 4 of the original articles of incorporation, *see* District of Columbia Department of Consumer and Regulatory Affairs, Business Regulation Administration Certificate of Incorporation, College Construction Loan Insurance Association (Feb. 13, 1987), and article III, section 3 6 of the bylaws, *see* Bylaws of the College Construction Loan Insurance Association (Sept. 11, 1991) ("Bylaws"), both specify that "[a]ny Director may be removed for cause by vote of a majority of the remaining Directors."

[4] Thus, even if the Secretary ordered the Deputy Assistant Secretary to vote in a particular way on the Board, the Secretary could not enforce that order by removing him or her from the Board.

cordingly, he or she would be disqualified from participating "personally and substantially" in any "particular matter" implicating the financial interests of Connie Lee unless the conditions of subsection 208(b) were satisfied.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Review of 1988 Opinion Concerning the Applicability of Section 504 of the Rehabilitation Act to Individuals Infected with HIV

The 1988 Office of Legal Counsel opinion accurately describes the duties imposed by section 504 of the Rehabilitation Act with respect to individuals infected with the Human Immunodeficiency Virus

The subsequent passage of the Americans with Disabilities Act did not alter the analysis of cases arising under the Rehabilitation Act, although an amendment to section 504 now requires reference to standards set forth in the ADA

Application of the standards set forth under section 504 in any particular case requires consideration of current scientific understanding of HIV infection. Advances in the scientific understanding of HIV infection since 1988 may undermine some of the discussion in the 1988 opinion about the application of these standards to individual cases

July 8, 1994

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

You have asked us whether an Office of Legal Counsel Memorandum of September 27, 1988, 12 Op. O.L.C. 209 (1988), entitled "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," ("1988 O.L.C. Memorandum") accurately reflects the state of the law on this issue. That memorandum concluded that section 504 of the Rehabilitation Act, 29 U.S.C. § 794, bars discrimination against individuals infected with the Human Immunodeficiency Virus ("HIV"), whether or not the infection has resulted in illness. *Cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that section 504 bars discrimination on the basis of infection with tuberculosis, but reserving the question whether the Act applies to asymptomatic carriers of infectious diseases).

We have reviewed the 1988 O.L.C. Memorandum, and have concluded that it accurately describes the duties imposed by section 504 of the Rehabilitation Act with respect to individuals infected with HIV. We do, however, have a few comments to update the analysis of that Memorandum.

A. *Impact of the Americans with Disabilities Act of 1990*

First of all, we note that section 504 of the Rehabilitation Act has been amended to indicate that

> [t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under

> this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794(d).[1] Because the anti-discrimination in employment provisions of the Americans with Disabilities Act ("ADA") were in large part modeled on those established in the Rehabilitation Act, and because the legislative history of the ADA reaches the same conclusions as to the reach of the Rehabilitation Act as did the 1988 O.L.C. Memorandum and indicates an intent to codify those conclusions as the standards for evaluating cases brought under the ADA, this amendment to section 504 of the Rehabilitation Act for the most part reinforces rather than supplants our earlier analysis.[2] Furthermore, the ADA specifically states that, "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201 (citation omitted).[3] As a general matter, therefore, the passage of the ADA requires reference to the standards set forth in that statute in litigation involving the Rehabilitation Act, but it does not alter the analysis of cases arising under the Rehabilitation Act, and indeed indicates that the interpretation of the Rehabilitation Act set forth in the 1988 O.L.C. Memorandum was correct.

Specifically, the text and legislative history of the ADA confirm that:

1. HIV infection, whether or not an individual has developed any overt symptoms as a result of that infection, is a disability under the Rehabilitation Act and under the Americans with Disabilities Act. *See* S. Rep. No. 101-116, at 22-24 (listing "infection with the Human Immunodeficiency Virus" as a disability; citing

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[1] In addition, the term "disability" has been substituted for the term "handicap" in section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a).

[2] *See, e.g.*, H.R. Rep. No. 101-485, pt. 2, at 52-57, 67-70, 76, 149 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334-39, 349-52, 358, 432, *id.* pt. 3, at 29, 33-35, 40, 42, 45-46, *reprinted in* 1990 U.S.C.C.A.N. 451, 455-57, 462, 464, 468-69, S. Rep. No. 101-116, at 22, 25-26, 31, 36, 40 (1989) (all stating that the basic anti-discrimination provisions in title I of the ADA are modeled on those set forth in section 504, and in some instances explicitly endorsing the interpretations of section 504 set forth in *Arline*, 480 U.S. 273, and in the 1988 O.L.C. Memorandum), *see also* H.R. Conf. Rep. No. 101-596 (1990); Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35,726 (1991) (Supplementary Information to regulations codified at 29 C.F.R. pt. 1630) ("The format of part 1630 reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973.")

[3] The legislative history notes, for example, that the provisions of the ADA setting forth requirements for the provision of access to public accommodations by providers who do not receive federal funding are less stringent than the corresponding provisions of the Rehabilitation Act addressing the provision of access to publicly funded accommodations. *E.g.*, H.R. Rep. No. 101-485, pt. 3, at 69-70, *reprinted in* 1990 U.S.C.C.A.N. at 492-93. No such explicit differences exist with respect to the employment provisions of the two Acts.

the 1988 O.L.C. Memorandum for the proposition that those infected with HIV have "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual" within the meaning of both Acts; and describing disability definition generally); H.R. Rep. No. 101-485, pt. 2, at 51-54 (same), *reprinted in* 1990 U.S.C.C.A.N. at 333-36; *id.* pt. 3, at 28-30 (same), *reprinted in* 1990 U.S.C.C.A.N. at 450-52; *see also* 29 C.F.R. pt. 1630 app. at 403-05 (1993) (Interpretive Guidance to § 1630.2(j)) (stating that HIV infection is inherently "substantially limiting" within the meaning of both Acts). Indeed, the need to protect those infected with HIV from discrimination in employment was frequently cited by those supporting the bill. *See, e.g.*, S. Rep. No. 101-116, at 8, 19 (citing views of the President's Commission on the Human Immunodeficiency Virus Epidemic); 136 Cong. Rec. 10,872-73 (1990) (remarks of Rep. Weiss); *id.* at 10,912-13 (remarks of Reps. McCloskey and Waxman); *id.* at 17,292-93 (remarks of Rep. Waxman).[4] Furthermore, both the ADA and the Rehabilitation Act include within the definition of an individual with a disability an individual who, even though he or she has no actual physical or mental impairment or history of such impairment, is regarded as having an impairment. 42 U.S.C. § 12102(2)(C) (ADA); 29 U.S.C. § 706(8)(B) (Rehabilitation Act). This definition often will provide an additional basis for concluding that those infected with HIV are protected by section 504.

2. The definitions of "discrimination" and of "qualified individual" under the ADA are drawn from the definitions of these terms set forth in the section 504 regulations. *See* 42 U.S.C. §§ 12111(8) (definition of "qualified individual with a disability") and 12112 (definition of "discrimination"); H.R. Rep. No. 101-485, pt. 3, at 32-33 ("qualified individual"), *reprinted in* 1990 U.S.C.C.A.N. at 454-55; *id.* at 35 ("discrimination"), *reprinted in* 1990 U.S.C.C.A.N. at 457.

3. The legislative history indicates that the use of the term "direct threat" in the ADA is designed to "codify" the ruling of the *Arline* case discussed in the 1988 O.L.C. Memorandum.[5] The ADA indicates that an employer may raise as a de-

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[4] In addition, recent cases construing the Rehabilitation Act have held that HIV infection is a disability within the meaning of the Act *E.g.*, *Buckingham v United States*, 998 F.2d 735 (9th Cir. 1993), *Chalk v United States Dist Court*, 840 F.2d 701 (9th Cir. 1988), *Roe v District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993), *vacated as moot*, 25 F.3d 1115 (D.C. Cir. 1994); *Doe v District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992); *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987); *Thomas v Atascadero Unified School Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987).

[5] In addressing the issue of the effect of the risk posed by an infectious disease on an individual's qualifications for a job, *Arline* indicated that "[a] person who poses a *significant* risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. at 287 n.16 (emphasis added). The Court stated that in making a judgment as to whether a person is qualified for a job, the employer should take into account

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious); (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

fense to a claim of discrimination under the Act the argument that the employee was not otherwise qualified for the job because he or she posed a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). The statute defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," 42 U.S.C. § 12111(3), apparently drawing on the "significant risk" language used by the *Arline* Court. 480 U.S. at 287 n.16. As noted above, the legislative history indicates that this language is intended to "codify" the standard set forth in *Arline*. H.R. Rep. No. 101-485, pt. 3, at 34, 45-46, *reprinted in* 1990 U.S.C.C.A.N. at 456, 468-69; *see also id.*, pt. 2, at 56-57, 150, *reprinted in* 1990 U.S.C.C.A.N. at 338-39, 433; H.R. Conf. Rep. No. 101-596, at 60, *reprinted in* 1990 U.S.C.C.A.N. at 568; S. Rep. No. 101-116, at 27-28, 40. In addition, the Equal Employment Opportunity Commission has issued regulations implementing the Act that use the test set forth in *Arline* for evaluating the risk posed by an employee with disabilities. 29 C.F.R. § 1630.2(r) (1993) (defining "direct threat" and requiring that employer consider "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm");[6] 29 C.F.R. pt. 1630 app. at 410-11 (Interpretive Guidance to 29 C.F.R. § 1630.2(r)) (employer must consider "objective, factual evidence," rather than "subjective perceptions, irrational fears, patronizing attitudes, or stereotypes," and must determine that there is a "high probability of substantial harm," rather than merely a "speculative or remote risk"). While the point is not free from doubt, the Interpretive Guidance also indicates that an employer may consider whether the individual would pose a direct threat to his or her own safety. *Id.*

4. The text and legislative history of the ADA indicate that the definition of reasonable accommodation is to include the possibility of reassignment, a question that was unsettled under the Rehabilitation Act before the recent amendment. 42 U.S.C. § 12111(9) (ADA definition of "reasonable accommodation"); S. Rep. No. 101-116, at 31-32 (indicating that "reasonable accommodation" under the ADA includes the possibility of reassignment); *see also* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 Berkeley J. Empl. & Lab. L. 201, 206, 235-43 (1993) (arguing that for this reason, case law interpreting the Rehabilitation Act that indicates that employers need not consider reassignment to meet their duties to

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Id at 288 (quoting Brief for American Medical Association as Amicus Curiae 19, brackets in original). Furthermore, the Court stated that "[i]n making these findings, courts normally should defer to the reasonable medical judgments of public health officials." *Id*

[6] The regulation further provides that the determination whether an individual poses a direct threat shall be based on an individualized assessment of the individual s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R § 1630.2(r).

provide reasonable accommodation should not be relied upon as precedent in suits brought under the ADA). Because neither statute purports to list all conceivable reasonable accommodations, *see* 42 U.S.C. § 12111(9) (ADA); 29 U.S.C. § 794 (Rehabilitation Act), and because the Rehabilitation Act indicates that the standards of the ADA are to be used to determine whether the Rehabilitation Act has been violated, 29 U.S.C. § 794(d), reassignment must be considered a possible reasonable accommodation under the Rehabilitation Act as well. *See also Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993) (Postal Service must consider, as a possible accommodation, relocating HIV-infected employee to area of country with better health care services for those infected with the virus).

5. The legislative history of the ADA clearly states that the term "undue hardship" for purposes of the ADA, and by implication section 504, *see* 29 U.S.C. § 794(d), is not to be construed as referring to the standard set forth in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (construing Title VII as requiring an employer to accommodate religious beliefs only if it could be done with no more than a "de minimis" cost to the employer).[7] Rather, the ADA defines "undue hardship" as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A). Among the factors to be considered in determining whether the difficulty or expense involved would be "significant" are the "overall financial resources" of the entity that must take the action. 42 U.S.C. § 12111(10)(B)(ii) and (iii).

B. *Changes in Scientific Understanding*

Finally, we would note that advances in the scientific understanding of HIV infection since 1988 may undermine some of the discussion in our earlier opinion about the application of these standards to individual cases. *See, e.g.*, 12 Op. O.L.C. at 219-20, 229-30 (citing examples of situations in which it was thought that an individual infected with HIV might pose a direct threat to the health or safety of others).

Thus, for example, recent studies suggest that the risk of transmission from a health care worker to a patient is actually quite low. *See, e.g.*, Centers for Disease Control and Prevention, *Update: Investigations of Persons Treated by HIV-Infected Health Care Workers — United States*, 41 Morb. & Mort. Wkly. Rep. 329 (1993) (No. 17); National Commission on AIDS, *Preventing HIV Transmission in*

[7] *See* S. Rep No 101-116, at 36 (discussing *Hardison*); 29 U S.C § 794(d) (stating that standards of ADA apply in Rehabilitation Act cases), H R. Rep No 101-485, pt 2, at 87 (provision is derived from Rehabilitation Act and should be applied consistently with provisions construing that Act), *reprinted in* 1990 U S.C C A N. at 369; Lee, *supra*, at 206-07, Robert L Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv C.R -C L L Rev. 413, 462-63 (1991)

Health Care Settings 7, 11-12, 15-18 (1992).[8] The Centers for Disease Control have suggested guidelines for control of transmission of the virus that reflect this information. Centers for Disease Control and Prevention, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 Morb. & Mort. Wkly. Rep. 1 (1991) (No. RR-8); *see also* National Commission on AIDS, *supra* (discussing CDC Guidelines and other publications addressing techniques for preventing transmission of HIV in health care settings).[9]

We do not attempt to review the scientific data here, but we would emphasize that a determination under the ADA, and thus by implication under section 504, that an individual poses a "direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. § 12113(b), which is to say "a *significant* risk to the health or safety of others that cannot be eliminated by reasonable accommodation," 42 U.S.C. § 12111(3) (emphasis added), must be made on an individualized basis, using the four-prong test set forth in *Arline*, 480 U.S. at 287-88, and adopted by the statute and regulations. *See* 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r) (restating

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[8] Indeed, the Centers for Disease Control have indicated that the only documented cases of transmission from a health care worker to a patient are those involving a Florida dentist who infected six of his patients through unknown means. 41 Morb. & Mort. Wkly. Rep. at 331, *see also* National Commission on AIDS, *supra*, at 7. As of 1993, the Centers for Disease Control had reviewed the cases of 19,036 patients treated by 57 HIV-infected health care workers. 41 Morb. & Mort. Wkly. Rep. at 329.

[9] While courts typically have upheld restrictions on health care workers, *see, e.g., Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994), *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990); *Doe v. Washington Univ.*, 780 F. Supp. 628 (E.D. Mo. 1991), the reasoning of these cases often appears to be based on outdated medical information or weak scientific analysis that greatly overstates the risks posed by such workers and thus may not apply the statute appropriately. *Cf. In re Westchester County Med. Ctr.*, Department of Health & Human Services, Departmental Appeals Board, Docket No. 91-504-2, Decision No. 191 (Apr. 20, 1992) (restrictions on duties of HIV-positive pharmacist violated Rehabilitation Act; federal funding to hospital terminated).

We would emphasize that the standards set forth in 29 C.F.R. § 1630.2(r) for determining whether an individual poses a direct threat must be applied to health care workers as well as to workers in other fields. Accordingly, current medical information and consideration of the risks posed by the essential functions of the job must form the basis for a decision. In light of the current views of the Centers for Disease Control that the risks posed by HIV-infected health care workers are, in most health care settings, remote or nonexistent, we think that proper application of 29 C.F.R. § 1630.2(r) frequently will result in a finding that the worker does not pose a direct threat.

For more general discussion of the risks posed by HIV infection in other settings, *see Chalk v. United States Dist. Court*, 840 F.2d 701, 710 (9th Cir. 1988) (granting preliminary injunction reinstating HIV-infected junior high school teacher to classroom duties, reasoning that Chalk had "strong probability of success on the merits" of his Rehabilitation Act claim because there was no evidence to support a risk of transmission), *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988) (mandatory hepatitis B Virus ("HBV") and HIV testing of employees of agency assisting mentally retarded clients not justified; there was insufficient evidence that infection would pose a danger to others), *aff'd*, 867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989).

For discussion of the risk in public safety professions, *see Roe v. District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993) (limitations on activities of firefighter infected with HBV unjustified, as firefighter would not pose direct threat when performing mouth-to-mouth resuscitation; in reaching this conclusion, the court noted that hospitals generally do not bar HBV-infected employees from performing CPR), *vacated as moot*, 25 F.3d 1115 (D.C. Cir. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (refusal to hire HIV-infected applicant violates Rehabilitation Act, as individual does not pose direct threat), *cf. Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991) (firefighter and paramedics may be tested for HIV in light of risk).

definition of "direct threat" set forth in *Arline*); H.R. Conf. Rep. No. 101-596, at 60 (Section 12111(3) is intended to codify the test set forth in *Arline*), *reprinted in* 1990 U.S.C.C.A.N. at 568; S. Rep. No. 101-116, at 27-28 (same). Furthermore, a determination that an individual poses a direct threat must be based on information about the essential functions of the particular job at stake and on current scientific information about the nature of the risks involved; speculative concerns, including unfounded and exaggerated fears of transmission risks, may not be relied upon to defend a conclusion that an individual poses a direct threat. *See, e.g.*, 29 C.F.R. pt. 1630 app. at 410-11 (Interpretive Guidance to 29 C.F.R. § 1630.2(r)).

Similarly, while the 1988 O.L.C. Memorandum, 12 Op. O.L.C. at 220, suggested that persons infected with HIV are subject to "dementia attack" and therefore may be unqualified for jobs in which a sudden loss of mental faculties could pose a safety risk, this discussion may be subject to misinterpretation. The discussion of hypothetical HIV-related problems in the 1988 O.L.C. Memorandum was not intended to be relied upon for litigation purposes, and the reference to dementia attacks was intended to refer only to the risk that an individual suffering from HIV-related dementia might occasionally be particularly severely affected. It is certainly true that an individual with symptoms of dementia, whether related to HIV or not, may not be "otherwise qualified" for certain jobs. However, neither the 1988 O.L.C. Memorandum nor any other source of which we are aware indicates that HIV-induced dementia occurs suddenly and thus would pose certain of the risks described in that memorandum. Furthermore, unpublished data compiled by the Centers for Disease Control and Prevention on June 30, 1993 indicated that less than 6% of adults known to the CDC to have AIDS were also known to have HIV-related encephalopathy, the most common cause of HIV-related neurological symptoms. *See* Centers for Disease Control and Prevention, *Adult Female AIDS Cases by Disease: CDC AIDS Data as of June 30, 1993* (indicating that 5.1077% were affected); and Centers for Disease Control and Prevention, *Adult Male AIDS Cases by Disease: CDC AIDS Data as of June 30, 1993* (indicating that 5.5688% were affected). Other sources indicate that neurological problems are most common in individuals with advanced HIV disease. *E.g.*, Richard W. Price, et. al., *The Brain in AIDS: Central Nervous System HIV-1 Infection and AIDS Dementia Complex*, 239 Science 586 (Feb. 5, 1988). Accordingly, we would caution readers that an argument that an individual is not otherwise qualified for a job because of the risk of dementia, like arguments based on the risk of transmission, must be grounded in scientific evidence that such a risk exists with respect to that individual, and is relevant to the determination whether the individual is otherwise qualified for the job.

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United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking

The Aircraft Sabotage Act of 1984 applies to the police and military personnel of foreign governments. In particular, the Act applies to the use of deadly force by such foreign governmental actors against civil aircraft in flight that are suspected of transporting illegal drugs There is accordingly a substantial risk that United States Government officers and employees who provide flight tracking information or certain other forms of assistance to the aerial interdiction programs of foreign governments that have destroyed such aircraft, or that have announced an intent to do so, would be aiding and abetting conduct that violated the Act.

July 14, 1994

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL*

This memorandum summarizes our earlier advice concerning whether and in what circumstances United States Government ("USG") officers and employees may lawfully provide flight tracking information and other forms of technical assistance to the Republics of Colombia and Peru. The information and other assistance at issue have been provided to the aerial interdiction programs of those two countries for the purpose of enabling them to locate and intercept aircraft suspected of engaging in illegal drug trafficking.

Concern over the in-flight destruction of civil aircraft as a component of the counternarcotics programs of foreign governments is not novel. In 1990, soon after the inception of the USG assistance program, the United States made an oral démarche to the Colombian government informing that government that Colombian use of USG intelligence information to effect shootdowns could result in the suspension of that assistance.

More recently, we understand that the government of Peru has used weapons against aircraft suspected of transporting drugs and that the government of Colombia has announced its intention to destroy in-flight civil aircraft suspected of involvement in drug trafficking. The possibility that these governments might use the information or other assistance furnished by the United States to shoot down civil aircraft raises the question of the extent to which the United States and its governmental personnel may lawfully continue to provide assistance to such programs.

On May 1, 1994, in light of these concerns, the Department of Defense suspended a variety of assistance programs. Thereafter, in a draft opinion, an interagency working group concluded that the United States aid was probably unlawful.

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* Editors Note: In response to this opinion, Congress enacted Pub. L. No 103-337, § 1012, 108 Stat 2663, 2837 (1994) (codified at 22 U S C § 2291-4 (1994)).

The group included lawyers from the Criminal Division, the Departments of State, Defense (including the Joint Chiefs of Staff), the Treasury, and Transportation (including the Coast Guard), and the Federal Aviation Administration. On May 26, 1994, this Department advised all relevant agencies that assistance programs directly and materially supportive of shootdowns should be suspended pending the completion of a thorough review of the legal questions.

After careful consideration of the text, structure and history of the Aircraft Sabotage Act of 1984, the most relevant part of which is codified at 18 U.S.C. § 32(b)(2), we have concluded that this statute applies to governmental actors, including the police and military personnel of foreign countries such as Colombia and Peru. Accordingly, there is a substantial risk that USG personnel who furnish assistance to the aerial interdiction programs of those countries could be aiding and abetting criminal violations of the Aircraft Sabotage Act. *See* 18 U.S.C. § 2(a) (aiding and abetting statute). We caution, however, that these conclusions are premised on our close analysis of § 32(b)(2) and should not be taken to mean that other domestic criminal statutes will necessarily apply to USG personnel acting officially.

I.

International law forms an indispensable backdrop for understanding § 32(b)(2). A primary source of international law regarding international civil aviation is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 ("the Chicago Convention"). The Chicago Convention is administered by the International Civil Aviation Organization ("ICAO").

Article 3(d) of the Chicago Convention declares that "[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Parties have interpreted the due regard standard quite strictly, and have argued that this provision proscribes the use of weapons by states against civil aircraft in flight.[1] For example, the United States invoked this provision during the international controversy over the Korean Air Lines Flight 007 ("KAL 007") incident.[2] While acknowledging that Article 1 of the Chicago Convention recognized the customary rule that "every State has complete and exclusive sovereignty over the airspace above its territory," the United States argued that the Soviet Union had violated both Article 3(d) and customary international legal norms in shooting down KAL

[1] Article 89 of the Chicago Convention relieves a state party from its obligations under the Convention if it declares a national emergency and certifies that declaration to ICAO. To date, neither Colombia nor Peru has made such a certification. The Chicago Convention contains no explicit exemption permitting the in-flight destruction of aircraft suspected of carrying contraband or of otherwise being involved in the drug trade.

[2] On September 1, 1983, a Soviet military aircraft shot down a civil aircraft, KAL 007, that had overflown Soviet territory while on a scheduled international flight to Seoul.

007. The Administrator of the Federal Aviation Authority stated to the ICAO Council that:

> The ICAO countries have agreed that they will "have due regard for the safety of navigation of civil aircraft" when issuing regulations for their military aircraft. It is self-evident that intercepts of civil aircraft by military aircraft must be governed by this paramount concern.
>
> The international community has rejected deadly assault on a civil airliner by a military aircraft in time of peace as totally unacceptable. It violates not only the basic principles set forth in the [Chicago] convention but also the fundamental norms of international law . . . .[3]

In the wake of KAL 007, the ICAO Assembly unanimously adopted an amendment to the Chicago Convention to make more explicit the prohibitions of Article 3(d).[4] This amendment, Article 3 *bis*, reads in part as follows:

> (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.[5]

Article 3 *bis* should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is self-defense from attack.[6] We understand that the United States has not yet ratified Article 3 *bis*. There is, however, support for the view that the principle it announced is declaratory of customary international law.[7]

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[3] *FAA Administrator Helms' Statement, ICAO Council, Sept 15, 1983 Montreal*, Dep't St Bull., Oct. 1983, at 17, 18. We further note that the ICAO Council Resolution of September 16, 1983, condemned the shootdown of KAL 007 and "[r]eaffirm[ed] the principle that States, when intercepting civil aircraft, should not use weapons against them." *Id.* at 20.

[4] *See* Jeffrey D. Laveson, *Korean Airline Flight 007. Stalemate in International Aviation Law — A Proposal for Enforcement*, 22 San Diego L. Rev. 859, 882-84 (1985).

[5] USG representatives proposed a reference to the United Nations Charter ("Charter") to reflect the view that an international law prohibition on the use of weapons against civil aircraft in flight would not restrict a state's right of self-defense as provided for in Article 51 of the Charter.

[6] *See* Steven B. Stokdyk, Comment, *Airborne Drug Trafficking Deterrence: Can A Shootdown Policy Fly?*, 38 UCLA L. Rev. 1287, 1306 (1991).

[7] *See, e.g.*, Andreas F. Lowenfeld, *Looking Back and Looking Ahead*, 83 Am. J. Int'l L. 336, 341 & n.17 (1989); Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 Loy. L.A. Int'l &

In addition to the Chicago Convention, the United States has ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 U.S.T. 567, 10 I.L.M. 1151 (1971) ("the Montréal Convention"). Article 1 of the latter Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1,1(b) states that "[a]ny person commits an offence if he unlawfully and intentionally . . . destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Article 1,2 makes it an offense to attempt to commit a previously enumerated offense, or to be an accomplice of an offender.[8] Further, Article 10 requires states "in accordance with international and national law," to "endeavour to take all practicable measures for the purpose of preventing" substantive offenses.

The Montréal Convention imposes on states certain duties with respect to offenders or alleged offenders. Article 3 declares that the contracting states "undertake[] to make the offences mentioned in Article 1 punishable by severe penalties." This obligation is specified by requiring states to take measures to establish jurisdiction over certain offenses (Article 5), to take custody of alleged offenders within their territory (Article 6), and either to extradite the alleged offender or to submit the case to their competent authorities for prosecution (Article 7). Further, states have the obligation to report the circumstances of an offense, and the results of their extradition or prosecution proceedings, to the ICAO (Article 13).

Nearly all nations with a significant involvement in air traffic are parties to the Montréal Convention, and have thus incurred the responsibility to execute it. The United States implemented the Convention in 1984 by enacting the Aircraft Sabotage Act, Pub. L. No. 98-473, §§ 2011-2015, 98 Stat. 1837, 2187-90 (1984). Congress specifically stated that legislation's purpose was "to implement fully the [Montréal] Convention . . . and to expand the protection accorded to aircraft and related facilities." *Id.* § 2012(3); *see also* S. Rep. No. 98-619 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682.[9] The criminal prohibition now codified at 18 U.S.C. § 32(b)(2) was enacted as part of that legislation.

Comp. L J 513, 519-20 (1994) *But see* D J Harris, *Cases and Materials on International Law* 221 (4th ed 1991)

[8] In general, the furnishing of information or assistance to another nation in circumstances that clearly indicate a serious risk that the information or assistance will be used by that nation to commit a wrongful act may itself be a wrongful act under international law. *Cf* Article 27 of the International Law Commission's Draft Convention on State Responsibility, which provides that "[a]id or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation " *Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2 Y B Int'l L Comm'n 33, U.N. Doc. A/35/10.

[9] It is undoubtedly within Congress's power to provide that attacks on civil aircraft should be criminal acts under domestic law, even if they were committed extraterritorially and even absent any special connection between this country and the offense An attack on civil aircraft can be considered a crime of "universal concern" to the community of nations *See United States v Yunis*, 924 F 2d 1086, 1091 (D.C. Cir. 1991),

II.

We turn to the question of criminal liability under domestic law. At least two criminal statutes are relevant to this inquiry. The first is 18 U.S.C. § 32(b)(2), which implements Article 1,1(b) of the Montréal Convention, and prohibits the destruction of civil aircraft. The second is 18 U.S.C. § 2(a), which codifies the principle of aiding and abetting liability.[10]

A.

18 U.S.C. § 32(b)(2) was enacted in 1984, one year after the destruction of KAL 007. The statute makes it a crime "willfully" to "destroy[] a civil aircraft registered in a country other than the United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight."[11] The text, structure and legislative history of the statute establish that it applies to the actions of the Peruvian and Columbian officials at issue here.

The term "civil aircraft," as used in § 32(b)(2), is defined broadly to include "any aircraft other than . . . an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days." 49 U.S.C. app. § 1301(17), (36) (definitions section of Federal Aviation Act of 1958). *See* 18 U.S.C. § 31 (in chapter including § 32(b)(2), "civil aircraft" has meaning ascribed to term in Federal Aviation Act). The qualifying language providing that the section applies to "civil aircraft *registered in a country other than the United States*," 18 U.S.C. § 32(b)(2) (emphasis added), has an expansive rather than restrictive purpose — to extend United States criminal jurisdiction over persons destroying

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see generally Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev 785 (1988)

[10] Other criminal statutes may also be relevant For example, 49 U.S.C app § 1472(i)(1) makes it a crime to commit, or to attempt to commit, aircraft piracy "Aircraft piracy" is defined to "mean[] any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." *Id.* § 1472(i)(2). The "special aircraft jurisdiction of the United States" includes "civil aircraft of the United States" while such aircraft is in flight *Id.* § 1301(38)(a) We do not consider in this memorandum whether the prohibition on aircraft piracy, or any criminal statutes other than § 32(b) and the aiding and abetting and conspiracy statutes, would be applicable to the USG activities in question here

[11] Section 32(b) is a felony statute, and pursuant to 18 U S C § 34, persons who violate § 32 are subject to "the death penalty or to imprisonment for life" if the crime "resulted in the death of any person." However, § 34 predates the Supreme Court decision in *Furman v Georgia*, 408 U S 238 (1972), and may not be applicable consistent with that decision In a pending case, *United States v Cheely*, 21 F.3d 914 (9th Cir. 1994), a divided panel of the Ninth Circuit issued an opinion on April 11, 1994, concluding that the death penalty provided for by 18 U S C. § 844(d) (which incorporates § 34 by reference) is unconstitutional. However, the court has, *sua sponte*, requested the parties to address the issue whether the case should be reheard en banc, and it remains uncertain whether § 34 can be applied constitutionally Pending crime legislation would resolve this issue for future violations by providing a constitutional death penalty provision.

civil aircraft "'even if a U.S. aircraft was not involved and the act was not within this country.'" *United States v. Yunis*, 681 F. Supp. 896, 906 (D.D.C. 1988) (citation omitted).[12]

Section 32(b)(2) was intended to apply to governmental actors (here, the military and police forces of Colombia and Peru) as well as to private persons and groups. When Congress adopted § 32(b)(2) in 1984, it had been a crime for nearly thirty years under § 32(a)(1) for anyone willfully to "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1).[13] This Department has sought, under § 32(a), to prosecute state actors whom it believes to have sponsored terrorist acts (specifically, the bombing of Pan American Flight 103 at the behest of Libya). Because of the obvious linguistic and structural similarities between §§ 32(a)(1) and 32(b)(2), we read those sections to have the same coverage in this regard, i.e., to apply to governmental and non-governmental actors alike.[14]

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[12] It might be argued that § 32(b)(2)'s reference to aircraft "registered in a country other than the United States" is restrictive in meaning, i e , that the section does not protect *unregistered* aircraft Moreover, we are informed that the registration numbers of aircraft engaged in drug trafficking over Colombia and Peru have in some cases been painted over or otherwise obscured It is suggested that unregistered aircraft, or aircraft whose registration is concealed, may be made targets under a shootdown policy without violating the statute There are several flaws in this suggestion. (1) Congress stated that its purpose in enacting the Aircraft Sabotage Act was "to implement fully" the Montréal Convention *See* 18 U.S.C § 31 note. Article 1,1(b) of the Convention (from which 18 U.S.C § 32(b)(2) is derived) prohibits the destruction of civil aircraft *as such*, without regard to registration Because § 32(a)(1) had already forbidden the willful destruction of "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce," Congress evidently sought to discharge this country's remaining obligations under the Montréal Convention by affording the same protection to all other civil aircraft Accordingly, the protections provided by § 32(b)(2) should not be deemed to hinge on whether a foreign civil aircraft is in fact registered, had Congress done no more than that, the United States would have fallen short of fulfilling its treaty obligations, although Congress intended that it should fulfill them. Section 32(b)(2)'s reference to "civil aircraft registered in a country other than the United States" "must be taken to refer to the class with which the statute undertakes to deal " *United States v Jin Fuey Moy*, 241 U S 394, 402 (1916) (Holmes, J.) (construing scope of registration requirement in criminal statute) *See also United States v. Rodgers*, 466 U S. 475, 478-82 (1984), *Continental Training Services Inc. v Cavazos*, 893 F 2d 877, 883 (7th Cir 1990) (2) We are advised by the Federal Aviation Authority that the concealment or obscuring of a registration number does not legally "deregister" an airplane, and that only an official act by the registering government can achieve that effect Accordingly, suspected drug traffickers whose registration is concealed cannot be deemed to be unregistered (3) There is no logical connection between the class of aircraft engaged in drug smuggling and the class of unregistered aircraft Nor do we know of any empirical evidence that the two classes significantly overlap Further, drug traffickers may own, lease or steal planes; and even if it were their practice not to register the planes they own, the owners of the planes they have leased or stolen might normally do so. (4) We are also unaware of any reliable means by which foreign law enforcers who have intercepted a plane could determine while it was in flight whether it was registered or not Indeed, the very act of destroying a plane might prevent investigators from determining its registration (if any) Thus, it would be difficult, if not impossible, to monitor a "shoot down" policy so as to ensure that the participants in it avoided criminal liability by targeting only unregistered planes

[13] Section 32(a) was adopted in 1956, *see* Pub. L No. 84-709, 70 Stat 538, 539 (1956)

[14] While § 32(a) does not have the broad extraterritorial scope of § 32(b)(2), it does apply to acts against United States-registered aircraft abroad, and thus would apply with respect to any such aircraft shot down by Colombian or Peruvian authorities.

The legislative history of the Aircraft Sabotage Act confirms that Congress intended § 32(b)(2) to reach governmental actions. The original bill was introduced as part of a package of four related measures proposed by the Administration and designed to enable the United States to combat international terrorism, including state-sponsored actions, more effectively. In submitting this legislative package to Congress, the President explained that it was largely concerned with

> a very worrisome and alarming new kind of terrorism . . .: the direct use of instruments of terror *by foreign states*. This "state terrorism" . . . accounts for the great majority of terrorist murders and assassinations. Also disturbing is state-provided training, financing, and logistical support to terrorists and terrorist groups.

Message to the Congress Transmitting Proposed Legislation To Combat International Terrorism, *Pub. Papers of Ronald Reagan* 575 (1984) (emphasis added).

Further, in testimony given at a Senate Judiciary Committee hearing on these bills on June 5, 1984, Wayne R. Gilbert, Deputy Assistant Director of the Criminal Investigative Division of the Federal Bureau of Investigation, underscored that:

> Recent years reflect increasing concern both in the United States and in foreign nations over the use of terrorism *by foreign governments* or groups. We have seen an increased propensity on the part of terrorist entities to plan and carry out terrorist acts worldwide.

Legislative Initiatives to Curb Domestic and International Terrorism: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 98th Cong. 44 (1984) ("Hearings") (statement of Wayne R. Gilbert) (emphasis added). In written testimony, the Department of Justice also explained that "[t]hese four bills address some of the risks caused by the growing worldwide terrorism problem, *especially state-supported terrorism*." *Id.* at 46-47 (prepared statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division) (emphasis added).[15] The legislative history of § 32(b)(2) thus shows that the statute was intended to reach shootdowns by officials or agents of governments as well as by private individuals and organizations.

Because § 32(b)(2) applies generally to foreign governments, it must apply to shootdowns of foreign-registered civil aircraft by law enforcement officers or military personnel of the governments of Colombia and Peru. The statute contains no exemption for shootdowns in pursuance of foreign law enforcement activity; nor

[15] In a colloquy between Senator Denton and Mr Gilbert on the bill addressed to aircraft sabotage, Senator Denton commented that "we should not ignore the fact that in Libya a General Wolf, whose full name is Marcus Wolf, set up and acts as the chief of Libyan Intelligence." *Id.* at 81 In context, Senator Denton's comment seems to reflect his understanding that the legislation would reach state-sponsored attacks on civil aircraft or air passengers and the officials responsible for such attacks

does it exempt shootdowns of aircraft suspected of carrying contraband.[16] USG personnel who aid and abet violations of § 32(b)(2) by the Colombian or Peruvian governments are thus themselves exposed to criminal liability by virtue of 18 U.S.C. § 2(a), *see* Part II B below.[17]

Our conclusion that § 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially. Our Office's precedents establish the need for careful examination of each individual statute. For example, we have opined that USG officials acting within the course and scope of their duties were not subject to section 5 of the Neutrality Act, 18 U.S.C. § 960. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) ("Neutrality Act Opinion"). In general terms, that statute forbids the planning of, provision for, or participation in "any military or naval expedition or enterprise to be carried on from [the United States] against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace," 18 U.S.C. § 960; it does not explicitly exempt USG-sponsored activity. Our conclusion with respect to the Neutrality Act was based upon an examination of the legislative history of the Act, its practical construction over two centuries by Presidents and Congresses, and the judicial decisions interpreting it.[18]

B.

The question we have been asked presupposes that USG personnel would not themselves directly carry out shootdowns of civil aircraft or encourage others to do

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[16] Although the legislative history emphasizes the dangers of state-sponsored "terrorism," we do not understand the statute to exempt state activity that could arguably be characterized as "law enforcement." An action such as the Soviet Union's shooting down of KAL 007 could have been viewed as the enforcement of national security laws regulating overflights in militarily sensitive airspace, and thus distinguished from acts of terrorist violence. Nevertheless, we think that § 32(b)(2) would apply to such attacks on civil aviation.

[17] Section 32(b)(2) would also apply directly to USG personnel who themselves shot down foreign-registered civil aircraft, although on the facts as we understand them such conduct — as distinct from aiding and abetting foreign governmental violations — is not at issue here. (For further discussion, *see* Part V below.) Nothing in the legislative history of § 32(b)(2) suggests that that statute would not apply to USG personnel in proper cases as much as it does to foreign governmental personnel.

[18] We noted in the Neutrality Act Opinion that "the Act's purpose was to enhance the President's ability to implement the foreign policy goals that have been developed by him, with appropriate participation by Congress." *Id.* at 72. Accordingly, we found that "it would indeed be anomalous" to construe that Act to limit what USG officials acting under Presidential foreign policy directives could lawfully do. *Id.* By contrast, interpreting the Aircraft Sabotage Act to reach such actors would not obstruct the statute's purpose, which in any case was not to ensure the President's ability to conduct a unified and consistent foreign policy unimpeded by private citizens' interferences. If anything, it would be contrary to the Aircraft Sabotage Act's policy of protecting international civil aviation from armed attacks to allow USG officials, but not those of any other country, to carry out such attacks. Furthermore, although it is often true that "'statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect,'" *id.* (quoting *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947)), that maxim is "'no hard and fast rule of exclusion,' and much depends on the context, the subject matter, legislative history, and executive interpretation." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)).

so. Thus, the lawfulness of USG activities and the potential liability of USG personnel, under the circumstances outlined to us, depend on the proper application of the federal aider and abettor statute, 18 U.S.C. § 2(a).

Section 2(a) does not itself define any criminal offense, but rather provides that a person who is sufficiently associated with the criminal act of another is liable as a principal for that act.

> Under the "classic interpretation" of this offense, "[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)) (internal quotation marks and citations omitted).

Aiding and abetting liability for a crime can be usefully analyzed as consisting of three elements: "[1] *knowledge* of the illegal activity that is being aided and abetted, [2] a *desire* to help the activity succeed, and [3] some *act* of helping." *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (enumeration added), *aff'd*, 506 U.S. 534 (1993). All three elements must be present for aiding and abetting liability to attach. *Id.*

1. Knowledge of unlawful activity. A person must know about unlawful activity in order to be guilty of aiding and abetting it: "a person cannot very well aid a venture he does not know about." *United States v. Allen*, 10 F.3d 405, 415 (7th Cir. 1993). With respect to most or perhaps all countries to which the United States provides information or other assistance (other than Colombia and Peru), the absence of this first element of aiding and abetting eliminates entirely any possibility that the USG activities implicate 18 U.S.C. § 32(b). In the absence of some serious reason to think otherwise, the United States is entitled to assume that the governments of other nations will abide by their international commitments (such as the Chicago Convention) and customary international law. The fact that another government theoretically could act otherwise cannot render USG aid activities legally problematic. Furthermore, the United States is under no general obligation to attempt to determine whether another government has an as-yet unrevealed intention to misuse USG assistance in a violation of § 32(b). *See United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) ("Aider and abettor liability is not negligence liability."). Therefore, if a foreign nation with no announced policy or known practice of unlawful shootdowns did in fact use USG aid in carrying out a shootdown, that event would create no liability for the prior acts of USG personnel,

although it probably would require a reevaluation of USG assistance to that country and, depending on the circumstances, might require changes in that assistance.

The same analysis, however, does not apply where the foreign state does have an announced policy or known practice of carrying out shootdowns that violate § 32(b)(2) — precisely the situation with respect to Colombia and Peru. It is obvious that the United States has knowledge of Colombia's publicly avowed policy. We believe that the United States is equally on notice about Peru's *de facto* shootdown policy on the basis of the incidents that have occurred.[19] It appears to be settled law that the knowledge element of aiding and abetting is satisfied where the alleged aider and abettor attempted to escape responsibility through a "deliberate effort to avoid guilty knowledge" of the primary actor's intentions. *Giovannetti*, 919 F.2d at 1229. Someone who suspected the existence of illegal activity that his or her actions were furthering and who took steps to ensure that the suspicion was never confirmed, "far from showing that he was not an aider and abettor . . . would show that he was." *Id.* On the facts as presented to us, we think that the knowledge element is met with respect to Colombia and Peru unless there is a change in the policies of those countries.

2. Desire to facilitate the unlawful activity. "[T]he aider and abettor must share the principal's purpose" in order to be liable under 18 U.S.C. § 2. *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986). The contours of this element in the definition of aiding and abetting are not without ambiguity, *see Zafiro*, 945 F.2d at 887, although as a general matter mere knowledge of the criminal activity (the existence of the first, knowledge element) does not in itself satisfy this second, purpose element. Many courts state the purpose element in terms of a "specific intent that [the aider and abettor's] act or omission bring about the underlying crime," *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985), and the Supreme Court's most recent restatement of the aiding and abetting statute's reach suggests — if it does not quite endorse — this view. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 181 (1994) (section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime") (citing *Nye & Nissen*, 336 U.S. at 619).

At first glance it might appear that the United States could negate this element of aiding and abetting — and thus render USG assistance to Colombia and Peru lawful and USG personnel free of potential liability under 18 U.S.C. § 32(b)(2) — simply by announcing this Government's opposition to any violations of § 32(b) by anyone. It might seem that after such an announcement it would not be possible to say that USG personnel acted with a desire to help unlawful shootdowns succeed.

[19] For the purposes of the aiding and abetting statute, it is immaterial whether an aider and abettor knew of the unlawful activity because the primary actor told him or her, or simply took actions that made obvious what was happening. *See generally Giovannetti*, 919 F.2d at 1226-29.

However, "there is support for relaxing this requirement [of specific intent to bring about the criminal act] when the crime is particularly grave: . . . 'the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use'" would be guilty of aiding and abetting the buyer's subsequent use of the "cocktails" in an act of terrorism. *Fountain*, 768 F.2d at 798 (quoting with approval *People v. Lauria*, 251 Cal. App. 2d 471, 481 (1967) (*dictum*)). Where a person provides assistance that he or she knows will contribute directly and in an essential manner to a serious criminal act, a court readily may infer a desire to facilitate that act. *See Zafiro*, 945 F.2d at 887 (if someone "knowingly provides essential assistance, we can infer that [that person] does want [the primary actor] to succeed, for that is the natural consequence of his deliberate act").[20]

Were this a case in which a foreign government provided direct and material assistance to an attack upon United States civil aircraft, both our Government and, we believe, the courts of this country would view the offense against § 32(b)(2) to be of a very serious nature, and would adopt an expansive view of the "desire to help the [unlawful] activity succeed" that constitutes this element of aiding and abetting. *United States v. Carson*, 9 F.3d 576, 586 (7th Cir. 1993), *cert. denied*, 513 U.S. 844 (1994). As we understand the facts, USG assistance is critical to the ability of Colombia and Peru to effect shootdowns. USG personnel have been fully engaged in the air interdiction operations of each country, providing substantial assistance that has contributed in an essential, direct and immediate way (whether by "real time" information or otherwise) to those countries' ability to shoot down civil aircraft. Moreover, our assistance has been of a type and extent that Colombia and Peru would have difficulty in providing for themselves or in obtaining from other sources. In the absence of changes in the policies and practices of Colombia and Peru, there is a very substantial danger that the USG activities described to us meet the purpose element of aiding and abetting.

3. Acts of assistance. The application of the third element to the question we are considering is, we think, fairly straightforward. As the Supreme Court recently reiterated, aiding and abetting "'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'" *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). Gauged by this definition, many or most forms of USG activities that have been described

[20] In general, USG information-sharing and other forms of assistance to foreign nations do not implicate the United States in those nations' actions because, among other reasons, the purpose element of aiding and abetting is not met. However important USG aid may be as an overall matter, the provision of information, resources, training, and support to a foreign nation would not in itself provide a basis for concluding that the United States intended to facilitate that nation's unlawful actions. Indeed, the general nature of such aid and its legitimate purposes (the furtherance of the diplomatic, national security, and democratization goals of USG foreign policy) rebut any assertion that its purpose is to support the occasional or unexpected unlawful acts of recipient governments. *See generally United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir.) (en banc) (aiding and abetting requires "a fuller engagement with [the primary actor's] activities" than accidental or isolated assistance creates), *cert. denied*, 493 U.S. 901 (1989).

to us could be fairly described as "act[s] of helping" Colombia or Peru to carry out a shootdown policy. That conclusion, when combined with our analysis of the knowledge and purpose elements, leads us to think that there is grave risk that the described USG activities contravene 18 U.S.C. § 32(b)(2).

C.

It has been suggested that the problems for USG information-sharing and other assistance to Colombia and Peru that are posed by 18 U.S.C. §§ 2(a) and 32(b) might be eliminated by seeking assurances from the governments of those countries with respect to their shootdown activities. Two possible forms of such an assurance have been posited: an assurance that Colombia and Peru would engage in no more shootdowns of civil aircraft, or an assurance that Colombia and Peru would make no use of information (or other aid) provided by the United States in effecting shootdowns. The argument would be that such assurances would negate either the first, knowledge element, or the second, purpose prong of aiding and abetting.

An initial point applies to both forms of assurance: to be of any legal significance, an assurance must be made by an official of the other government with authority to bind that government, and it must be deemed reliable by a high officer of the United States, acting with full knowledge of the relevant facts and circumstances. Assurances from subordinate officials could not reasonably be taken to represent a position that would be adhered to by other officials of that government. The acceptance of assurances that were not deemed credible *in fact* by USG officials might readily be characterized as a "deliberate effort to avoid [the] knowledge," *Giovannetti*, 919 F.2d at 1229, that the assurance did not represent the actual intentions of the other government. In light of the gravity of the issue, the decision to accept and act on such an assurance would be a policy decision of such significance that it could be appropriately made only by a very high officer of this Government.

A reliable assurance (as we have defined it) that the foreign government would carry out *no* shootdowns falling within the prohibition of § 32(b)(2) would, in our opinion, clearly negate the knowledge element of aiding and abetting. With such an assurance, there would be no known or suspected intention to effect unlawful shootdowns for USG officials to have knowledge of; put another way, the acceptance of such an assurance as reliable would constitute a judgment that the foreign government was engaged in no criminal activity in this respect. If it subsequently became apparent that this judgment was mistaken, a reevaluation of the legal status of USG assistance would be necessary, but until and if evidence emerged that the other government intended to violate its assurance, USG aid of all sorts, including the provision of real-time flight information, would be lawful. For similar reasons, a reliable assurance that the foreign government would

not carry out any unlawful shootdowns would eliminate any argument that USG officials had a "desire to help the activity succeed," *Carson*, 9 F.3d at 586, because it would represent a judgment that no unlawful activity was contemplated or under way.

A more problematic case is posed if the foreign government declined to renounce its shootdown policy but offered assurances that it would not use USG-supplied information or other assistance in carrying out shootdowns violating § 32(b)(2). (In such a case, the foreign government might carry out such activities using information or assistance obtained from other sources.) A bare assurance to that effect, without more, would be insufficient to remove the risk of contravening the statute, given what we understand to be the widespread use of USG-supplied information, the commingling of USG and foreign government information, and the temptation on the part of the foreign government's operational officers to make use of information or assistance extremely valuable to effecting their own government's law enforcement program.

We believe that there are conditions in which such assurances would be sufficiently reliable to permit the United States to continue to provide information and assistance to a foreign country's antinarcotics program even if that country declined to renounce its shootdown policy. First, the United States and the foreign country should agree that the sole purpose for which USG information and other assistance would be provided and used was to assist in the execution of a ground-based end game (searches, seizures and arrests), and that such information and assistance would not be used to target civil aircraft for destruction. Second, the agreement should establish mechanisms by which USG personnel would obtain detailed and specific knowledge as to how the USG-provided information and assistance were in fact being used, and thus be able to identify at an operational level any instances of non-compliance with the agreement. Third, the agreement should stipulate that if any incident should occur in which the foreign government's agents fired on a civil aircraft, USG personnel would be able to verify whether USG-provided information and assistance had been used in that instance, or whether the foreign country had employed only information and assistance from other sources in carrying out that operation. Finally, the agreement should provide for the termination of USG-supplied information and assistance in the event of material non-compliance. Were it possible to reach an agreement that incorporated such safeguards, we believe that it would insulate USG personnel from liability in the event the foreign government destroyed a civil aircraft.

III.

United States aid to Colombia and Peru might also implicate USG personnel in those governments' shootdown policies on a conspiracy rationale. *See* 18 U.S.C.

§ 371. The concept of conspiracy is distinct from that of aiding and abetting.[21] Aiding and abetting liability does not depend on an actual agreement between the primary actor and the aider and abettor.[22] In contrast, "agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact." *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). In addition, liability for participation in a conspiracy may attach to someone even though he or she provides no material assistance toward the conspiracy's goals, and even if the primary criminal activity that is the object of the conspiracy never takes place. *See, e.g., United States v. Townsend*, 924 F.2d 1385, 1399 (7th Cir. 1991).[23] USG activities — including information-sharing and technical advice — that would be of material assistance in effecting shootdowns do not in themselves constitute an agreement between USG personnel and others to carry out shootdowns, but as we understand the facts the following are both true. (1) The United States intends, and has agreed with the governments of Colombia and Peru, to bolster the antinarcotics law enforcement activities of those countries. (2) The governments of Colombia (expressly) and Peru (in practice) regard shootdowns as an integral part of their antinarcotics law enforcement activities. In those circumstances, courts might well view the distinction between USG assistance to their antinarcotics programs generally and USG assistance to the shootdown component of those programs as thin or non-existent, and thus construe ongoing USG assistance as evidence of an agreement. *See United States v. Lechuga*, 994 F.2d 346, 350 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 982 (1993).

We believe that it is imperative to make this Government's disapproval of shootdowns in violation of § 32(b) clear in order to eliminate any suggestion that

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[21] In this memorandum, we focus on the potential for aiding and abetting liability for two reasons. First, it is unclear that under the circumstances outlined to us the relationship between the activities of USG personnel and shootdown actions by foreign governments could reasonably be deemed an "agreement" to violate 18 U.S.C. § 32(b)(2). A lesser degree of association with a criminal venture suffices to create aiding and abetting liability, however, and we think that a more serious argument can be made that some forms of USG assistance could fall within the definition of aiding and abetting. *See United States v. Cowart*, 595 F.2d 1023, 1031 (5th Cir. 1979) (the "'community of unlawful intent'" present in aiding and abetting, although "similar to the 'agreement' upon which the crime of conspiracy is based, does not rise to the level of 'agreement'"). In addition, and vitally, as stated in the text we believe the risk that USG personnel might plausibly be viewed as conspirators can and should be eliminated by the communication to foreign governments and USG operational personnel of the United States's firm opposition to any shootdowns of civil aircraft contrary to § 32(b)(2) or international law.

[22] The Seventh Circuit recently hypothesized a case illustrating this point.

> Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members — with whom he had no previous, or for that matter subsequent, dealings — of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it.

Carson, 9 F.3d at 586 (quoting *Zafiro*, 945 F.2d at 884).

[23] Thus, USG personnel theoretically could be liable for conspiracy if their actions were construed as constituting an agreement with officials of the foreign government to carry out shootdowns and if the latter took some overt action toward accomplishing a shootdown. It would be unnecessary under the law of conspiracy for a shootdown to take place or for any USG actions actually to contribute to a shootdown.

USG personnel have entered into a conspiratorial agreement with foreign officials involving unlawful shootdowns since liability as a conspirator attaches even if the substantive unlawful act never takes place. In addition, we think that USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shootdowns. *See generally Iannelli*, 420 U.S. at 777-79.

IV.

This case is characterized by a combination of factors: it involves a criminal statute that explicitly has extraterritorial reach, that is applicable to foreign government military and police personnel, and that defines a very serious offense. Moreover, our government is fully engaged in furnishing direct and substantial assistance that is not otherwise available to the foreign nations involved, and at least some of the USG personnel who provide that assistance have actual knowledge that it is likely to be used in committing violations.

Given this combination of factors, we conclude that, in the absence of reliable assurances in the sense defined above, USG agencies and personnel may not provide information (whether "real-time" or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.

Furthermore, we note that § 32(b)(2) prohibits the destruction of civil aircraft "while such aircraft is *in service*," as well as "damage to such an aircraft which renders that aircraft incapable of flight" (emphasis added). The statute defines "[i]n services" to "mean[] any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing." 18 U.S.C. § 31. Thus, USG assistance for certain operations against aircraft *on the ground* may come within the statutory prohibitions. Section 32(b)(2) does not preclude ordinary law enforcement operations directed at a plane's crew or cargo during those times.[24] It does, however, appear to forbid airborne law enforcers to bomb or strafe a suspect plane that has landed or that is preparing to take off.[25]

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[24] For example, nothing in the section forbids the police to order the crew of a suspected drug trafficking plane to surrender upon landing, or to search or seize the plane or its cargo. (Consequential damage to the aircraft would not constitute a violation of the statute.) Nor does the section forbid the police to use deadly force against a plane if they are themselves endangered by its crew's armed resistance to their legitimate orders. The police may also use force to rescue any hostages held aboard the plane.

[25] A valid law enforcement operation intended to seize a pane on the ground and arrest its crew and an attack on the airplane itself in violation of § 32(b)(2) may both result in the disabling or destruction of the aircraft. No liability under the section would attach, either to primary actors or to those who assist them, in the former circumstance. As described to us, however, the Colombian and Peruvian counternarcotics programs each encompass (potential) actions that would intentionally fall within the latter, forbidden category. Obviously, on different facts we could reach a different conclusion.

We will be pleased to cooperate with legal counsel for other agencies in evaluating specific programs or forms of aid under that standard.

V.

Our conclusions here must not be exaggerated. We have been asked a specific question about particular forms of USG assistance to the Colombian and Peruvian aerial interdiction programs. The application of the legal standard described here to any other USG programs — including other programs designed to benefit Colombia or Peru — will require careful, fact-sensitive analysis. We see no need to modify USG programs whose connection to those governments' shootdown policies is remote and attenuated, and (as noted above) we perceive no implications for USG assistance to any other foreign country unless another government adopts a policy of shooting down civil aircraft.

Other limitations on our conclusions should be noted. In certain circumstances, USG personnel may employ deadly force against civil aircraft without subjecting themselves to liability under § 32(b)(2). "The act is a criminal statute, and therefore must be construed strictly, 'lest those be brought within its reach who are not clearly included.'"[26] Although these circumstances are extremely limited, they may in fact arise.

Specifically, we believe that the section would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities.[27] As discussed above, § 32(b)(2) was intended to implement the United States's obligations under the Montréal Convention. That Convention does not appear to apply to acts of armed forces that are otherwise governed by the laws of armed conflict.[28] (The general rule under the law of armed conflict is that civil

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[26] *Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries*, 42 Op. Att'y Gen 229, 232 (1963) (quoting *United States ex rel Marcus v Hess*, 317 U.S. 537, 542 (1943))

[27] We do not mean to confine a "state of hostilities" to some specific legal category, such as a state of declared war in the constitutional sense, *see* U S Const. art I, § 8, cl. 11, or a situation such as to trigger the reporting requirements of the War Powers Resolution, *see* 50 U S C § 1543(a)

[28] International agreements such as the Montréal Convention are generally concluded with a view to regulating ordinary, peace-time conditions. Accordingly, one treatise writer has stated it to be the general rule that "'[i]f, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention.'" Bin Cheng, *The Law of International Air Transport* 483 (1962) (quoting *The S S Wimbledon* (Gr Brit et al v Germ.), 1923 P C I J (ser. A) No 1, at 36 (Aug. 17) (dissenting opinion of Judges Anzilotti and Huber)) *Accord* Preliminary Objections Submitted by the United States of America, *Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* at 200, 203 (Mar 4, 1991) ("the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions . . . Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces.') This conclusion is corroborated by article 89 of the

aircraft are immune from attack unless they are being used for military purposes or pose an immediate military threat.[29]) We do not think that § 32(b)(2) should be construed to have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict. We note specifically that the application of § 32(b)(2) to acts of United States military personnel in a state of hostilities could readily lead to absurdities: for example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution. Unless Congress by a clear and unequivocal statement declares otherwise, § 32(b)(2) should be construed to avoid such outcomes.[30] Thus, we do not think the statute, as written, should apply to such incidents as the downing on July 3, 1988 of Iran Air Flight 655 by the United States Navy cruiser *Vincennes*.[31]

Furthermore, even in cases in which the laws of armed conflict are inapplicable, we believe that a USG officer or employee may use deadly force against civil aircraft without violating § 32(b)(2) if he or she reasonably believes that the aircraft poses a threat of serious physical harm to the officer or employee or to another person.[32] A situation of this kind could arise, for example, if an aircraft suspected of narcotics trafficking began firing on, or attempted to ram, a law enforcement aircraft that was tracking it. Assuming that such aggressive actions posed a direct and immediate threat to the lives of USG personnel or of others aboard the tracking

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Chicago Convention, which declares in part that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals." *See* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 Yale J Int'l L 245, 267 (1991) ("the nature of the Montreal Convention as an anti-hijacking and sabotage treaty seems to preclude its application to the acts of armed forces governed by the law of armed conflict under article 89 of the Chicago Convention") *See also* 7 Green Hackworth, *Digest of International Law* 552-55 (1943) (describing earlier practice and theory).

[29] *See* Department of the Air Force, *International Law — The Conduct of Armed Conflict and Air Operations*, ¶ 4-3(a)(1), (b) (1976); Stokdyk, Comment, *Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?*, *supra* note 6, at 1321

[30] *Cf. United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869) (holding that statute punishing obstruction of mail did not apply to temporary detention of mail caused by carrier's arrest for murder); *Nardone v United States*, 302 U.S. 379, 384 (1937) (public officers may be implicitly excluded from statutory language embracing all persons because "a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").

[31] *See* Marian Nash Leich, *Denial of Liability. Ex Gratia Compensation on a Humanitarian Basis*, 83 Am. J. Int'l L. 319, 321-22 (1989) (quoting Congressional testimony of State Department Legal Adviser Sofaer that "[i]n the case of the Iran Air incident, the damage caused in firing upon #655 was incidental to the lawful use of force The commander of the U.S.S. *Vincennes* evidently believed that his ship was under imminent threat of attack from a hostile aircraft, and he attempted repeatedly to identify or contact the aircraft before taking defensive action Therefore, the United States does not accept legal responsibility for this incident . . ").

[32] *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (discussing constitutionally reasonable use of deadly force); *New Orleans and Northeastern R.R. v. Jopes*, 142 U.S. 18, 23 (1891) ("the law of self-defence justifies an act done in honest and reasonable belief of immediate danger").

aircraft, and that no reasonably safe alternative would dispel that threat, we believe that the use of such force would not constitute a violation of § 32(b)(2).[33]

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[33] To the extent that § 32(b)(2) does not apply to the use of deadly force by USG military or other personnel in the circumstances described above, it would of necessity be inapplicable as well to the actions of similarly situated personnel of the Colombian or Peruvian governments That is, such foreign governmental agents could employ deadly force against civilian aircraft in the same circumstances in which USG personnel were able to do so USG personnel who assisted foreign government agents in such lawful and legitimate acts of self-defense would of course not be subject to liability, since one cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime. *See Shuttlesworth v. City of Birmingham*, 373 U S. 262 (1963)

Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners

Because United States Parole Commissioners may be removed by the President at will, legislation extending the terms of office of certain Parole Commissioners, does not violate the Appointments Clause.

July 15, 1994

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our opinion as to whether Pub. L. No. 101-650, § 316, 104 Stat. 5089, 5115 (1990), which extends the terms of United States Parole Commissioners to November 1, 1997, violates the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. We conclude that it does not.

I.

The United States Parole Commission ("Parole Commission") is an "independent agency in the Department of Justice," 18 U.S.C. § 4202, and is vested with authority to establish the organizational structure for receiving, hearing, and deciding requests for parole; to grant or deny an application for parole; to impose reasonable conditions on an order granting parole; to modify or revoke an order paroling any prisoner; to request probation officers and any other appropriate individuals or entities to assist or supervise parolees; and to issue rules and regulations for effectuating these powers. *Id.* § 4203. In addition, the Chairman of the Parole Commission has the authority to appoint and fix the compensation of the Parole Commission's employees, including hearing officers, to assign duties among officers and employees of the Parole Commission, and to otherwise administer the Parole Commission. *Id.* § 4204. The Parole Commission comprises nine Commissioners appointed for six year terms. *Id.* § 4202. The statute also includes a holdover provision under which Commissioners continue to serve until a successor is appointed, "except that no Commissioner may serve in excess of twelve years." *Id.*

The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984), abolished parole for all federal offenders sentenced under its provisions. To accomplish this, the SRA repealed the parole provisions, including the provision establishing the Parole Commission, of title 18 of the United States Code, effective November 1, 1987. In order to accommodate those prisoners sentenced under the sentencing system in place before enactment of the SRA — and therefore still eligible for parole — the SRA specifically provided that the parole

provisions would remain in effect for five years after the SRA's effective date. It added that, § 4202 notwithstanding, "the term of office of a Commissioner who is in office on the effective date is extended to the end of the five year period after the effective date of this Act." Pub. L. No. 98-473, § 235(b)(2), 98 Stat. at 2032. In 1990, Congress realized that there would be a need for the Parole Commission beyond the five year extension period and amended § 235(b) to provide a ten year period, Pub. L. No. 101-650, 104 Stat. at 5115, which apparently will carry the Parole Commission through to November 1, 1997. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Michael A. Stover, General Counsel, United States Parole Commission (June 2, 1994).

In 1987, this office issued an opinion concluding that the five year extension in SRA § 235(b)(2) was unconstitutional, apparently on the grounds that any legislation purporting to extend the term of an incumbent officeholder violates the Appointments Clause. *See Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135 (1987). The opinion concluded, however, that since the pre-existing holdover provision at 18 U.S.C. § 4202 is valid, incumbents whose terms expired could remain in place for up to a total of twelve years, unless a successor was sooner appointed. We are informed that this twelve year period will elapse in early 1995 for at least three Commissioners who were in office on the effective date of the SRA. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jamie S. Gorelick, Deputy Attorney General, *Re: Request for Opinion on Term Lengths of United States Parole Commissioners* at 2 (June 1, 1994). Because we conclude that the term extension at SRA § 235(b)(2) is in fact valid, any Commissioners who were validly in office on the effective date of the SRA may continue in office until November 1, 1997.[1]

II.

A.

The Constitution prohibits Congress from exercising the power to appoint officers of the United States. U.S. Const. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 124-41 (1976). On the other hand, the Constitution endows Congress with authority to create and structure offices. U.S. Const. art. I, § 8, cl. 18. This power has been taken to encompass the authority to add germane duties to an office, *see Shoemaker v. United States*, 147 U.S. 282 (1893), and to set and amend the term of an office. *See In re Investment Bankers Inc.*, 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *In re Benny*, 812 F.2d 1133 (9th Cir. 1987), *cert.*

[1] The question we have been asked to address is the general one of whether the Appointments Clause stands as a bar to the operation of § 235(b)(2) Answering this question does not depend upon the specific circumstances of any particular Commissioner Moreover, we have not been provided any such information, and thus do not draw any conclusions as to how or whether § 235(b)(2) applies to any specific Commissioner

denied, 510 U.S. 1029 (1993); *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986); *Civil Service Retirement Act — Postmasters — Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 314 (1927).

These provisions are placed in potential tension when Congress extends the term of an office and seeks to apply the extension to the incumbent officeholder. Whether any tension actually results depends on how the extension functions. If applying an extension to an incumbent officer would function as a congressional appointment of the incumbent to a new term, then it violates the Appointments Clause. The classic example of legislation that raises this tension is an extension of the tenure of an officer whom the President may remove only "for cause."[2]

At the other end of the continuum is legislation that extends the term of an office, including its incumbent, the holder of which is removable at will. In this instance, it has long been the position of the Office of Legal Counsel and the Department of Justice that there is no violation of the Appointments Clause, for here the President remains free to remove the officer and embark on the process of appointing a successor — the only impediment being the constitutionally sanctioned one of Senate confirmation. In short, such legislation leaves the appointing authority — and incidental removal power — on precisely the same footing as it was prior to the enactment of the legislation. *See* Sentencing Commission Opinion at 7-9 ("In sum, the extension of tenure of officers serving at will raises no Appointments Clause problem"); *Displaced Persons Commission — Terms of Members*, 41 Op. Att'y Gen. 88, 89-90 (1951).[3] This office has opined that Parole Commissioners are removable at will. *See* Memorandum for Rudolph W. Giuliani, Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power to Remove Parole Commissioners* (Aug. 11, 1981) ("Parole Commisioner Removal Memorandum"). If we adhere to this view, the extension of the Parole Commissioners' terms does not violate the Appointments Clause.

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[2] While such a statute "is constitutionally questionable," it would not represent a per se violation of the Appointments Clause *See* Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute* at 9 (Apr 5, 1994) ("Sentencing Commission Memorandum"); *see also Benny*, 812 F 2d at 1141

[3] Our 1987 opinion asserts that an extension of the term of an officer violates the Appointments Clause. It does not discuss any distinction between offices held at will and those that include removal protection. Since the only two Office of Legal Counsel opinions cited in the 1987 opinion both held that Parole Commissioners are removable at will by the President, *see Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135, 136 n 1 (1987), the best reading of the opinion is that it meant that every legislative extension of the term of an incumbent officer violates the Appointments Clause. This assertion was, at the time it was made, contrary to this Department's long-standing position, *see, e.g.*, 41 Op. Att'y Gen. at 89-90, 35 Op Att'y Gen at 314, and has not been followed since that time, *see* Sentencing Commission Opinion Moreover, and most importantly, the 1987 opinion is irredeemably unpersuasive It makes no effort to explain how legislation extending the term of an officer who serves at will impinges on the power of appointment, and we can conceive of no credible argument that an infringement rising to the level of a constitutional violation may result from such legislation. Consequently, we withdraw the holding in the 1987 opinion that any legislation extending the term of an officer who is removable at will violates the Appointments Clause.

B.

The statute establishing the Parole Commission provides that it is an independent agency within the Department of Justice and that the Commissioners are to serve six-year terms. 18 U.S.C. § 4202. The statute, however, is silent as to whether the President may remove the Commissioners at will or only "for cause." As indicated, we have opined that Parole Commissioners are removable by the President at will. Our conclusion had two bases — first, that there was no indication that Congress intended to limit the President's removal authority and, second, that any attempt to limit the President's removal authority would be unconstitutional since the Commissioners are "purely executive" officers. *See* Parole Commissioner Removal Memorandum. The second basis of our conclusion followed then-applicable Supreme Court precedent on the constitutionality of restrictions on the President's authority to remove officers.

The Supreme Court first addressed the question of such removal restrictions in *Myers v. United States*, 272 U.S. 52 (1926), which involved a statute that required the President to obtain the Senate's advice and consent before removing a Postmaster of the first, second, or third class. The *Myers* Court held that Congress may not limit the President's authority to remove any officer who is appointed by the President by and with the advice and consent of the Senate. *Id.* at 159. Several years later, the Court narrowed this holding significantly, ruling that the Constitution only prohibits removal restrictions with respect to "purely executive" officers. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935). The Court held that, as to offices that are essentially quasi-legislative or quasi-judicial in nature, Congress may limit the President's removal authority. Some years later, the Court addressed the related question of whether, in the absence of an express statutory provision, a removal restriction could be inferred. The Court ruled that such restrictions could be inferred with respect to quasi-legislative or quasi-judicial offices "whose tasks require absolute freedom from Executive interference." *Wiener v. United States*, 357 U.S. 349, 353 (1958). Following this framework, we opined that Parole Commissioners — whose term is fixed by a statute that is silent on the topic of removal — are purely executive officers; therefore, inferring a limit on the President's authority to remove them would violate the Constitution. As such, we concluded that Parole Commissioners must be removable at will.

In the interim, the Supreme Court has abandoned this mode of analysis. Specifically, *Morrison v. Olson*, 487 U.S. 654 (1988), determined that Congress could place an express "for cause" limitation on the President's removal authority even with respect to "purely executive" officers. *See id.* at 689-93. The Court refused simply to apply the category-driven approach that *Humphrey's Executor* had been taken to institute. Instead, the Court recast its prior references to the category of an office's functions as merely a shorthand for the animating concern in such cases — whether a given removal restriction violates separation of powers principles. Spe-

cifically, under the Court's current formulation, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Morrison*, 487 U.S. at 691.

In devising this formulation, the Court recharacterized the references to functional categories in its earlier opinions as simply a means of examining whether the office and its functions were of such a nature as to require that they be vested in an officer who is subject to a high degree of presidential control; that is, one who may be removed at will. *Id.* at 687-91. It is important to note that, under the *Morrison* formulation, the nature of an office and its functions remain essential factors in determining whether a removal restriction violates separation of powers; however, the category with which those functions might be labeled does not end the inquiry.

The statute establishing the Parole Commission is silent regarding removal, *see* 18 U.S.C. § 4202, and therefore we must determine whether it is appropriate to infer such a restriction. *Morrison*, however, spoke directly only to the constitutionality of an explicit removal restriction. It therefore only expressly rejected the label-driven approach in that context. Nevertheless, the *Wiener* Court stated that its holding followed logically from *Humphrey's Executor*. *See* 357 U.S. at 356. We view *Morrison*, then, as doing away with the label-driven analysis in the context of inferred removal restrictions as well.

In *Morrison*, the Court looked to what the earlier decisions were trying to accomplish by inquiring into the nature of the office and functions at issue to resolve whether, and when, Congress may expressly limit the President's removal authority. Taking a similar approach in the context of implied removal restrictions, we are persuaded that *Wiener* turned on the Court's determination that the Commission could not have effectively carried out its functions unless the Commission was "'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress." *Wiener*, 357 U.S. at 355-56 (quoting *Humphrey's Executor*, 295 U.S. at 629).

Therefore, our inquiry regarding inferred removal restrictions will focus on whether it is necessary in order for the entity in question to be able to perform its statutory mission that it be "free from the control or coercive influence, direct or indirect, of either the Executive or Congress." Only where this level of independence is necessary will we infer that Congress intended the President's removal authority to be limited.[4] Here again, the type of function being performed is a relevant consideration, but it is not dispositive.[5]

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[4] We have no doubt that, even after *Morrison*, courts will continue to infer removal restrictions with respect to offices charged primarily with the adjudication of disputes between private individuals. However, it is less clear what other circumstances, if any, would justify inferring a limitation on the President's removal authority

[5] If it is determined that an implied removal limitation is necessary, we must then examine whether such a limitation would violate the doctrine of separation of powers by "imped[ing] the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691.

Under this standard, we have no trouble adhering to our 1981 opinion that the President may remove Parole Commissioners at will. Because the power to remove is incident to the power to appoint, we begin with the presumption that the President has authority to remove Parole Commissioners at will. *See, e.g., Removal of Members of the Advisory Council on Historic Preservation*, 6 Op. O.L.C. 180, 188 (1982); 1 Annals of Cong. 496 (Joseph Gales ed., 1789) (statement of James Madison) ("the power of removal result[s] by a natural implication from the power of appointing"). Our 1981 opinion analyzed the Parole Commission's functions and concluded that the Commission is purely executive in nature. This is an important indication, though not determinative, that it is not necessary to the Commission's function that it have the level of independence that "for cause" removal protection entails. Our earlier opinion also searched the legislative history and examined the statutory language and concluded that "[n]either . . . disclose[d] a Congressional intent to limit the President's implied power to remove the Commissioners." Parole Commissioner Removal Memorandum at 2.[6] We see no reason to revisit any of these conclusions.

We find compelling the history of the discharge of the parole function. "[P]arole originated as a form of clemency; to mitigate unusually harsh sentences, or to reward prison inmates for their exemplary behavior while incarcerated." S. Rep. No. 94-369, at 15 (1975), *reprinted in* 1976 U.S.C.C.A.N. 335, 336. Clemency, like the correctional functions it at least partially supports, has long been and typically remains a power exercised by or under the direction of a politically accountable executive official. *Cf.* U.S. Const. art. II, § 2, cl. 1 (vesting the pardon power in the President).

Until the relatively recent establishment of the Parole Commission, the function of administering the federal parole system was discharged by the Board of Parole. This board was a component of the Department of Justice, and its members were clearly removable at will. *See* Act of Sept. 30, 1950, ch. 1115, 64 Stat. 1085, 1085 ("There is hereby created in the Department of Justice a Board of Parole . . . ."); Act of June 25, 1948, ch. 645, 62 Stat. 683, 854 (containing no provision of a fixed or abbreviated term). The legislative history contains no indication that the threat of removal at will or other political pressures played any role in the operations of the Board of Parole or motivated the establishment of the Parole Commission. *See* S. Rep. No. 94-369, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 336. In the face of this long-standing practice of entrusting the administration of the federal parole system to officers who are removable at will, we cannot say that a limitation on the President's authority to remove Parole Commissioners is necessary to allow the Commission effectively to carry out its statutorily prescribed functions.

[6] The opinion expressly considered and persuasively rejected arguments that either the provision creating the Commission as an independent agency in the Department of Justice or establishing fixed terms for the Commissioners could support an inference of a restriction on the President's removal authority *Id* at 1-4.

III. Conclusion

Legislation extending the term of an officer who serves at will does not violate the Appointments Clause. As stated, we adhere to our opinion that the President may remove Parole Commissioners at will. Consequently, Pub. L. No. 101-650, § 316, 104 Stat. at 5115, which extends the terms of office of certain United States Parole Commissioners, does not violate the Appointments Clause, and we recede from our earlier opinion (*Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135 (1987)) to the extent that it contradicts this conclusion.

WALTER DELLINGER
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Deployment of United States Armed Forces into Haiti

The President possessed the legal authority to deploy United States Armed Forces into Haiti

The planned deployment accorded with the sense of Congress, satisfied the requirements of the War Powers Resolution, and was not a "war" within the meaning of the Constitution.

September 27, 1994

LETTER OPINION FOR FOUR UNITED STATES SENATORS

I write in response to your letter of September 15, 1994, in which you requested a copy or summary of any legal opinion that may have been rendered, orally or in writing, by this Office concerning the lawfulness of the President's planned deployment of United States military forces into Haiti. After giving substantial thought to these abiding issues of Presidential and congressional authority, we concluded that the President possessed the legal authority to order that deployment.

In this case, a combination of three factors provided legal justification for the planned deployment. First, the planned deployment accorded with the sense of Congress, as expressed in section 8147 of the Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1474 (1993) ("Defense Appropriations Act"). That resolution expressed Congress's sense that the President would not require express prior statutory authorization for deploying troops into Haiti provided that he first made certain findings and reported them to Congress. The President did make the required findings and reported them. We concluded that the resolution "evince[d] legislative intent to accord the President broad discretion" and "'invite[d]' 'measures on independent presidential responsibility.'" *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Second, the planned deployment satisfied the requirements of the War Powers Resolution. Finally, after examining the circumstances, nature, scope, and duration of the anticipated deployment, we determined that it was not a "war" in the constitutional sense. Specifically, the planned deployment was to take place with the full consent of the legitimate government, and did not involve the risk of major or prolonged hostilities or serious casualties to either the United States or Haiti. For those reasons, which are set out in detail below, we concluded that the President had legal and constitutional authority to order United States troops to be deployed into Haiti.

I.

First, the Haitian deployment accorded with the sense of Congress, as expressed in section 8147 of the Defense Appropriations Act.[1] That provision was sponsored by, among others, Senators Dole, Simpson and Thurmond. *See* 139 Cong. Rec. S14,021-22 (daily ed. Oct. 20, 1993).

Section 8147(b), 107 Stat. at 1474, of the Act states the sense of Congress that "funds appropriated by this Act should not be obligated or expended for United States military operations in Haiti" unless certain conditions (including, in the alternative, prior Congressional authorization) were met. Section 8147(c), 107 Stat. at 1475, however, added that

> [i]t is the sense of Congress that the limitation in subsection (b) should not apply if the President reports in advance to Congress that the intended deployment of United States Armed Forces into Haiti—
>
> > (1) is justified by United States national security interests;
> >
> > (2) will be undertaken only after necessary steps have been taken to ensure the safety and security of United States Armed Forces, including steps to ensure that United States Armed Forces will not become targets due to the nature of their rules of engagement;
> >
> > (3) will be undertaken only after an assessment that—
> >
> > > (A) the proposed mission and objectives are most appropriate for the United States Armed Forces rather than civilian personnel or armed forces from other nations, and

[1] In speaking of the deployment, we should be understood to include, not only the actual deployment begun on September 19, but also the military operation that was planned, and in part initiated, before an agreement with the Haitian military leadership was negotiated on September 18 by former President Jimmy Carter, Senator Sam Nunn and General Colin Powell (the "September 18 agreement"). As the President noted in his televised address of September 18, that agreement "was signed after Haiti received evidence that paratroopers from our 82nd Airborne Division, based at Fort Bragg, North Carolina, had begun to load up to begin the invasion which I had ordered to start this evening." *Text of Clinton's Address*, The Washington Post, Sept. 19, 1994, at A17

> (B) that the United States Armed Forces proposed for deployment are necessary and sufficient to accomplish the objectives of the proposed mission;
>
> (4) will be undertaken only after clear objectives for the deployment are established;
>
> (5) will be undertaken only after an exit strategy for ending the deployment has been identified; and
>
> (6) will be undertaken only after the financial costs of the deployment are estimated.

In short, it was the sense of Congress that the President need not seek prior authorization for the deployment in Haiti provided that he made certain specific findings and reported them to Congress in advance of the deployment. The President made the appropriate findings and detailed them to Congress in conformity with the terms of the resolution. *See* Letter to the Speaker of the United States House of Representatives from the President (Sept. 18, 1994). Accordingly, this is not, for constitutional purposes, a situation in which the President has "take[n] measures incompatible with the expressed or implied will of Congress," *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Rather, it is either a case in which the President has acted "pursuant to an . . . implied authorization of Congress," so that "his authority is at its maximum," *id.* at 635, or at least a case in which he may "rely upon his own independent powers" in a matter where Congress has "enable[d], if not invite[d], measures on independent presidential responsibility." *Id.* at 637.

II.

Furthermore, the structure of the War Powers Resolution ("WPR") recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). The WPR requires that, in the absence of a declaration of war, the President must report to Congress within forty-eight hours of introducing armed forces into such circumstances and must terminate the use of United States armed forces within sixty days (or ninety days, if military necessity requires additional time to effect a withdrawal) unless Congress permits otherwise. *Id.* § 1544(b). This structure makes sense only if the President may introduce troops into hostilities or potential hostilities without

prior authorization by the Congress: the WPR regulates such action by the President and seeks to set limits to it.[2]

To be sure, the WPR declares that it should not be "construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1547(d)(2). But just as clearly, the WPR *assumes* that the President already has such authority, and indeed the WPR states that it is not "intended to alter the constitutional authority of the . . . President." *Id.* § 1547(d)(1). Furthermore, although the WPR announces that, in the absence of specific authorization from Congress, the President may introduce armed forces into hostilities only in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," *id.* § 1541(c), even the defenders of the WPR concede that this declaration — found in the "Purpose and Policy" section of the WPR — either is incomplete or is not meant to be binding. *See, e.g.*, Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. Pa. L. Rev. 79, 81 (1984).[3]

The WPR was enacted against a background that was "replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980). While Congress obviously sought to structure and regulate such unilateral deployments,[4] its overriding interest was to prevent the United States from being engaged, without express congressional authorization, in major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.

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[2] It should be emphasized that this Administration has not yet had to face the difficult constitutional issues raised by the provision of the WPR, 50 U.S.C. § 1544(b), that requires withdrawal of forces after sixty days involvement in hostilities, absent congressional authorization.

[3] The WPR omits, for example, any mention of the President's power to rescue Americans; yet even the Comptroller General, an agent of Congress, has acknowledged both that "the weight of authority" supports the position that "the President does possess some unilateral constitutional power to use force to rescue Americans," and that § 1541(c) "does not in a strict sense operate to restrict such authority." 55 Comp. Gen. 1081, 1083, 1085 (1976). *See also* Peter Raven-Hansen and William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 Va. L. Rev. 833, 879 (1994) ("[a] custom of executive deployment of armed force for rescue and protection of Americans abroad has developed at least since 1790"); *id.* at 917-18 ("[s]ince 1868 the so-called Hostage Act has authorized and required the President to 'use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate [the] release' of American citizens 'unjustly deprived of [their] liberty by or under the authority of any foreign government.' . . . [T]he Hostage Act lends further support to custom and may constitute congressional authorization for at least this limited defensive war power.")

[4] Even though the President has the inherent power to deploy troops abroad, including into situations of hostilities, Congress may, within constitutional limits, regulate the exercise of that power. *See, e.g., Santiago v. Nogueras*, 214 U.S. 260, 266 (1909) (President had power to institute military government in occupied territories until further action by Congress); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-28 (1814).

Further, in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed.[5] *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *cf. Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis and Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"). By declining, in the WPR or other statutory law, to prohibit the President from using his conjoint statutory and constitutional powers to deploy troops into situations like that in Haiti, Congress has left the President both the authority and the means to take such initiatives.

In this case, the President reported to Congress, consistent with the WPR, that United States military forces, together with units supplied by foreign allies, began operations in Haitian territory, including its territorial waters and airspace. The President stated in his report that he undertook those measures "to further the national security interests of the United States; to stop the brutal atrocities that threaten tens of thousands of Haitians; to secure our borders; to preserve stability and promote democracy in our hemisphere; and to uphold the reliability of the commitments we make, and the commitments others make to us, including the Governors Island Agreement and the agreement concluded on September 18 in Haiti." Letter to the Speaker of the United States House of Representatives from the President at 2 (Sept. 21, 1994). We believed that the deployment was fully consistent with the WPR, and with the authority Congress reserved to itself under that statute to consider whether affirmative legislative authorization for the continuance of the deployment should be provided.

III.

Finally, in our judgment, the Declaration of War Clause, U.S. Const. art. I, § 8, cl. 11 ("[t]he Congress shall have Power . . . [t]o declare War"), did not of its own force require specific prior congressional authorization for the deployment of troops at issue here. That deployment was characterized by circumstances that sufficed to show that the operation was not a "war" within the meaning of the Declaration of War Clause.[6] The deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country

[5] We recognize, of course, that the WPR provides that authority to introduce the armed forces into hostilities or situations where hostilities are clearly indicated may not be inferred from an appropriation act, unless that statute "states that it is intended to constitute specific statutory authorization within the meaning of this chapter." 50 U.S.C. § 1547(a).

[6] *See* Note, *Congress, The President, And The Power To Commit Forces To Combat*, 81 Harv. L. Rev. 1771, 1790 (1968) (describing other limited interventions and suggesting conclusion that "'war' in the sense of article I, section 8, requiring congressional sanction, does not include interventions to maintain order in weak countries where a severe contest at arms with another nation is not likely to result"). Here, of course, there is still less reason to consider the deployment a "war," since it was undertaken at the request of the recognized, democratically-elected government, and not merely to "maintain order."

involved.[7] Taking that and other circumstances into account, the President, together with his military and intelligence advisors, determined that the nature, scope, and duration of the deployment were not consistent with the conclusion that the event was a "war."

In reaching that conclusion, we were guided by the initial premise, articulated by Justice Robert Jackson, that the President, as Chief Executive and Commander in Chief, "is exclusively responsible" for the "conduct of diplomatic and foreign affairs," and accordingly that he may, absent specific legislative restriction, deploy United States armed forces "abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. at 789. Presidents have often utilized this authority, in the absence of specific legislative authorization, to deploy United States military personnel into foreign countries at the invitation of the legitimate governments of those countries. For example, during President Taft's Administration, the recognized government of Nicaragua called upon the United States to intervene because of civil disturbance. According to President Taft, "[t]his led to the landing of marines and quite a campaign . . . . This was not an act of war, because it was done with the consent of the lawful authorities of the territory where it took place." William Howard Taft, *The Presidency* 88-89 (1916).[8]

In 1940, after the fall of Denmark to Germany, President Franklin Roosevelt ordered United States troops to occupy Greenland, a Danish possession in the North Atlantic of vital strategic interest to the United States. This was done pursuant to an agreement between the United States and the Danish Minister in Washington, and was welcomed by the local officials on Greenland.[9] Congress was not consulted or even directly informed. *See* James Grafton Rogers, *World Policing and the Constitution* 69-70 (1945). Later, in 1941, the President ordered United States troops to occupy Iceland, an independent nation, pursuant to an agreement between himself and the Prime Minister of Iceland. The President relied upon his authority as Commander in Chief, and notified Congress only after the event. *Id.* at 70-71. More recently, in 1989, at the request of President Corazon Aquino, President Bush authorized military assistance to the Philippine government to suppress a coup attempt. *Pub. Papers of George Bush* 1615 (1989).

Such a pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, "evidences the existence of broad constitutional power." 4A Op. O.L.C. at 187.

We are not suggesting, however, that the United States cannot be said to engage in "war" whenever it deploys troops into a country at the invitation of that coun-

[7] Moreover, the deployment accorded with United Nations Security Council Resolution No 940 (1994). There can thus be no question but that the deployment is lawful as a matter of international law

[8] President Grover Cleveland had also opined that a "military demonstration" on the soil of a foreign country was not an "act of war" if it was "made either with the consent of the [foreign] government . or for the *bona fide* purpose of protecting the imperiled lives and property of citizens of the United States " 9 *Messages and Papers of the Presidents 1789-1897*, at 466 (James Richardson ed , 1898).

[9] The Danish King and ministers were in German hands at the time

try's legitimate government. Rather, we believe that "war" does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of "war."

In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary, the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.[10] Indeed, it was the President's hope, since vindicated by the event, that the Haitian military leadership would agree to step down before exchanges of fire occurred. Moreover, while it would not be appropriate here to discuss operational details, other aspects of the planned deployment, including the fact that it would not involve extreme use of force, as for example preparatory bombardment, were also relevant to the judgment that it was not a "war."

On the basis of the reasoning detailed above, we concluded that the President had the constitutional authority to deploy troops into Haiti even prior to the September 18 agreement.

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[10] Although the President found that the deployment would not be without risk, he and his senior advisers had also determined that the United States would introduce a force of sufficient size to deter armed resistance by the Haitian military and thus to hold both United States and Haitian casualties to a minimum. The fact that the United States planned to deploy up to 20,000 troops is not in itself dispositive on the question whether the operation was a "war" in the constitutional sense, since the very size of the force was designed to reduce or eliminate the likelihood of armed resistance.

Availability of Money Damages Under the Religious Freedom Restoration Act

Section 3(c) of the Religious Freedom Restoration Act, which makes available "appropriate relief" in judicial proceedings against federal and state government entities, does not waive or abrogate the sovereign immunity of federal and state governments against the award of money damages.

October 7, 1994

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

We have considered whether the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, authorizes the recovery of money damages in suits against the United States or state governments.* The specific question we have addressed is whether section 3(c) of RFRA, which makes available "appropriate relief" in judicial proceedings against federal and state government entities,[1] waives or abrogates the sovereign immunity that would otherwise bar the award of money damages against the United States and state governments. On this point, we are in agreement with the conclusion of the Second Working Draft ("Working Draft") prepared by the Department's RFRA Task Force: RFRA's reference to "appropriate relief" is not sufficiently unambiguous to abrogate or waive sovereign immunity for damages. *See* Working Draft at 43-44.

"Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (internal quotation marks and citations omitted); *see also United States v. Idaho, ex rel. Dir., Dep't of Water Resources*, 508 U.S. 1, 6 (1993). Under this "unequivocal expression" standard, a statutory provision waives sovereign immunity for monetary claims only if there is unavailable any plausible reading of the provision that would not authorize monetary relief. *Nordic Village*, 503 U.S. at 34, 37. It is not enough, in other words, that the provision in question can be read, and even read naturally, to authorize monetary recovery; so long as the provision also is "susceptible" of an interpretation that does not authorize monetary relief, there has been no effective waiver. *Id.* The standard for finding congressional abrogation of state Eleventh Amendment immunity from damages awards is substantially the same. *See id.* at 37; *see also Hoffman v. Connecticut Dep't of Income Mainte-*

* Editor's Note. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court found the Religious Freedom Restoration Act to be unconstitutional as applied to state governments. However, RFRA continues to apply to actions against the federal government.

[1] Section 3(c) provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." "Government" is defined in section 5(1) of RFRA to include both the United States and state governments.

nance, 492 U.S. 96, 101-02 (1989) (plurality opinion) (analyzing provision at issue in *Nordic Village* under Eleventh Amendment); *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (abrogation of Eleventh Amendment immunity must be "unmistakably clear in the language of the statute"). This strict standard applies even to statutes that are remedial in nature. *See Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (applying strict construction rule to find that Title VII does not waive immunity with respect to recovery of interest).

RFRA's use of the phrase "appropriate relief" does not meet the "unequivocal expression" standard. To be sure, "appropriate relief" could be read broadly to encompass monetary damages. But such language does not clearly and unequivocally reflect an intent to waive sovereign immunity for money damages. The term "appropriate relief" inherently conveys the possibility that the nature and scope of the remedy for different conduct by different defendants could be subject to variance. Accordingly, "appropriate relief" against a sovereign defendant easily can be interpreted to encompass only equitable, non-monetary relief. This narrower construction is further supportable on the ground that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, already has waived the sovereign immunity of the United States against non-monetary relief.[2] *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 57-60, 65-66 (1994) (concluding that Fair Housing Act and Rehabilitation Act do not waive federal government's immunity from monetary damages). This waiver applies to any suit against the federal government, whether under the APA or under another statute. *See id.* at 59.[3] At least with respect to the federal government, then, RFRA's provision for "appropriate relief" may well have contemplated actions for non-monetary relief based on the APA waiver. In any event, whether or not the narrow reading of "appropriate relief" is the best reading, it is certainly a "plausible" interpretation. Under *Nordic Village*, this is enough to "establish that a reading imposing monetary liability on the Government [or state governments] is not 'unambiguous' and therefore should not be adopted." 503 U.S. at 37.[4]

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[2]The APA provides that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States.

5 U.S.C. § 702.

[3]*See also Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir. 1993); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988); *Alabama v. Bowsher*, 734 F. Supp. 525, 533 (D.D.C. 1990) (discussing D.C. Circuit case law).

[4]Although legislative history cannot supply the "unequivocal expression" that the Supreme Court requires, *see Nordic Village*, 503 U.S. at 37; *Dellmuth*, 491 U.S. at 230, legislative history may be relevant where it reinforces a text-based conclusion that a statute does not waive or abrogate sovereign immunity. RFRA's legislative history is largely silent on this point. It may be of some significance, however, that in estimating the effect of RFRA on direct spending by the federal and state governments, the Congressional Budget Office anticipated awards of attorney's fees but made no mention of possible damages awards. *See* S. Rep. No. 103-111, at 15-16 (1993); H.R. Rep. No. 103-88, at 11 (1993).

It was suggested at a RFRA Task Force meeting that this conclusion is in tension with *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), in which the Supreme Court held that a damages remedy is available under Title IX despite the absence of explicit congressional authorization. *Franklin*, however, is not on point here. *Franklin* involved a suit against a school district, and school districts generally are not treated as "arms of the state" to which Eleventh Amendment immunity extends. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995 (10th Cir. 1993). Accordingly, the Court in *Franklin* was not faced with a sovereign immunity claim, and had no occasion to apply the "unequivocal expression" standard that governs RFRA suits against the federal and state governments.

It should be noted that the conclusion reached here is hardly anomalous. Money damages are similarly unavailable in civil rights enforcement suits against the states (or, more accurately, against state officers in their official capacities) under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 & n.10 (1989); *Quern v. Jordan*, 440 U.S. 332 (1979). Congress quite reasonably could have chosen to limit RFRA plaintiffs to the same kind of equitable remedies available in such § 1983 actions. Conversely, to the extent § 1983 allows recovery of money damages against state officers in their personal capacities, *see Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officers personally liable for damages under § 1983, subject to qualified immunity), a RFRA claimant also may recover damages against an officer in his or her personal capacity by asserting RFRA in a § 1983 action.

Finally, it is important to recognize that the federal and state governments are not the only potential defendants under RFRA. RFRA's definition of a "government" from which "appropriate relief" may be obtained extends also to state "subdivision[s]," to "official[s]," and to "other person[s] acting under color of law." RFRA § 5(1). Political subdivisions that cannot be characterized as "arms of the state," such as counties and municipal corporations, are not protected by Eleventh Amendment immunity, *see Mt. Healthy*, 429 U.S. at 280; likewise, sovereign immunity poses no bar to the recovery of damages against officials sued in their personal capacities or private parties acting under color of law, *see Hafer v. Melo*, 502 U.S. 21, 25-28 (1991). Accordingly, the "unequivocal expression" standard that governs sovereign immunity cases would not apply in RFRA suits against such entities.

Rather, such cases would be governed by the traditional presumption that all customary judicial relief, including damages, is available when Congress provides a statutory right of action. *See Franklin*, 503 U.S. at 76 (damages available under Title IX's implied cause of action); *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under § 1983 though Congress did not "address directly the question of damages"); *see generally Bell v. Hood*, 327 U.S. 678, 684 (1946). When sovereign immunity concerns are removed from the equation, in other

words, the interpretive presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide "clear direction to the contrary" if it wishes to make money damages unavailable in a cause of action under a federal statute. *See Franklin*, 503 U.S. at 70-71 ("absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute"). Because RFRA's reference to "appropriate relief" does not clearly exclude money damages, there is a strong argument that under the *Franklin* standard money damages should be made available to RFRA plaintiffs in suits against non-sovereign entities. *Cf. Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1190-94 (1st Cir. 1994) (under *Franklin* presumption, statute providing for "all appropriate relief" authorizes recovery of money damages).

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The Twenty-Second Decennial Census

Neither the Enumeration Clause of the Constitution nor the Census Act precludes the Bureau of the Census from statistically adjusting "headcounts" in the decennial census for the year 2000 or conducting the non-response follow-up on a sample basis.

The provision in the Census Act prohibiting sampling for purposes of apportionment of the House of Representatives does not preclude reliance upon statistical adjustments that would improve the accuracy of "headcount" data

October 7, 1994

MEMORANDUM FOR THE SOLICITOR GENERAL

You have asked, on behalf of the Department of Commerce, for our advice on the questions whether the use of statistically adjusted census figures would be consistent with the Constitution, U.S. Const. art. I, § 2, cl. 3, and with the Census Act, 13 U.S.C. §§ 1-307. The questions arise because the traditional method of taking the census fails to count a significant portion of the population, and in particular disproportionately undercounts identifiable racial and ethnic minorities. In light of these problems, the Department of Commerce is considering the use of statistical adjustments in the twenty-second decennial census (for the year 2000) before the final count is completed in order to improve the accuracy of that census. The Department of Commerce is also considering the use of sampling to conduct the follow-up on households that did not respond to its initial mailing of questionnaires. Accordingly, it desires to know whether such procedures would be lawful. We conclude that both of the proposed changes in conducting the census would be lawful.*

I.

The Constitution "provides the basis for the decennial censuses, but does not specify the details of their administration." *Seventeenth Decennial Census*, 41 Op. Att'y Gen. 31, 32 (1949). Instead, the Constitution vests in Congress the power to conduct an "actual Enumeration . . . in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. Congress's power has in turn been vested in the Bureau of the Census (the "Bureau"), a component of the Department of Commerce. *See* 13 U.S.C. § 2.

* Editor's Note: Subsequent to the date of this opinion, the Supreme Court held that the Census Act prohibits the proposed uses of statistical sampling in calculating population for congressional apportionment purposes. *See Department of Commerce v United States House of Representatives*, 119 S Ct 765, 779 (1999). The Court did not reach the constitutional question. *Id.*

The primary purpose of the decennial census[1] is to provide the basis for Congress's apportionment of seats in the House of Representatives among the States.[2] The census also serves several other legally significant objectives. Historically, the decennial census has been "an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 536 (1870). "The census today serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982); *see generally* Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 844-45 (1981).

The traditional method for conducting the decennial census "is a headcount rather than an estimation based on sampling." *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1412 (7th Cir.), *cert. denied*, 506 U.S. 953 (1992).[3] The term "headcount" is somewhat misleading, however. "The census . . . is not a headcount in which each and every person residing in the United States on a given date is counted by the Census Bureau. Rather, it is a survey of the population that through the responses of one member of each household attempts to enumerate the entire population." *Carey v. Klutznick*, 508 F. Supp. 420, 426 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

In the 1990 census, the Bureau's tabulation had four phases. First, relying on lists compiled by commercial sources and its own fieldwork, the Bureau derived a mailing list of as many households as it could locate. Second was the "mail out/mail back" phase, in which the Bureau mailed out questionnaires to each household on its list, and requested their return by April 1, 1990. (The return rate was 63%.) The third phase was a follow-up in which the Bureau sent out another round of mailings. The fourth phase comprised efforts by census enumerators, in person, to contact non-responding households (or other reliable sources) to obtain the needed information. Following that, the Bureau undertook "coverage improvement programs" designed to reach non-respondents in other ways, including rechecks of all vacant or uninhabitable housing units, recanvassing of selected blocks, an advertising campaign, checks of parolees and probationers, and a local

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[1] There is also a mid-decade census. *See* 13 U.S.C. § 141(d)

[2] The apportionment of Representatives among the States in turn affects the allocation of Electoral College votes to the States. *See* U.S. Const. art. II, § 1, cl. 2.

[3] The first statute authorizing a census, "An Act providing for the enumeration of the Inhabitants of the United States" (Mar. 1, 1790), declared that "the marshals of the several districts of the United States" were "authorized and required to cause the number of the inhabitants within their respective districts to be taken," omitting Indians not taxed. 4 *National State Papers of the United States, 1789-1817*, at 1 (Eileen Daney Carzo ed., 1985). It further placed on "each and every person more than sixteen years of age" the obligation to provide the census-taker "a true account, if required, to the best of his or her knowledge, of all and every person belonging to [the respondent's] family." *Id.* at 3.

government review. *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114 (2d Cir. 1994), *rev'd*, 517 U.S. 1 (1996).[4]

Like earlier censuses, the 1990 census concededly did not count the entire population of the United States.[5] Given the inherent difficulties of census-taking and the existence of financial and time constraints, some degree of inaccuracy in the census count is perhaps inevitable. The Bureau itself believes that "every census has necessarily involved an undercount," *Young v. Klutznick*, 497 F. Supp. 1318, 1327 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), and the courts agree that "a perfectly accurate count of upwards of 250 million people" is simply not "feasible." *City of Detroit v. Franklin*, 4 F.3d at 1377.[6] Far more troubling than the bare existence of an undercount is the fact that the 1990 census perpetuated a pattern, the existence of which has been recognized since 1940, of *differentially* undercounting African Americans.[7] The 1990 census also differentially undercounted Hispanics: the estimated undercount for that group was 5.2%, as against an estimated undercount of 2.1% for the population at large.[8] The Bureau "specifically acknowledge[d] an undercount in the 1990 census ranging from 1.7 percent of whites to 5.2 percent of Hispanics."[9]

Despite that acknowledgement, the Secretary of Commerce declined in 1991 to adjust the 1990 census figures to correct for the undercounts.[10] The Secretary's

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[4] The Bureau's efforts to obtain as accurate a count as possible have been found to be "extraordinary According to one court, the 1990 census is said to be one of the best ever taken in this country because despite our large population, approximately 98 percent of the population was counted." *City of Detroit v. Franklin*, 4 F 3d 1367, 1376 (6th Cir. 1993), *cert denied*, 510 U.S 1176 (1994).

[5] The first census in 1790 counted over 3,890,000 people, but fell short of the expected 4,000,000 figure George Washington thought it "certain" that "our *real* numbers will exceed, greatly, the official returns of them," and Thomas Jefferson considered the uncounted population "very great." *See Baldrige v Shapiro*, 455 U.S at 353 n 8.

[6] *See also Karcher v Daggett*, 462 U S 725, 732 (1983) ("the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed"); *id* at 772 (White, J , dissenting) ("the census . . cannot be perfect"), *Gaffney v Cummings*, 412 U.S. 735, 745 (1973) (decennial census figures "may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate ").

[7] In the 1990 census, "Blacks were undercounted by 4 8%, Hispanics by 5 2%, Asian-Pacific Islanders by 3.1%, American Indians by 5.0%, and non-Blacks by 1.7% " *Senate of California v Mosbacher*, 968 F 2d 974, 975 (9th Cir 1992) "In 1940, 10 3 percent of blacks were missed, compared to 5 1 percent of whites, a gap of 5.2 percentage points. In 1980, 6 2 percent of blacks were missed, compared to 1 3 percent of whites, for a similar disparity of 4 9 percentage points." Samuel Issacharoff & Allan J Lichtman, *The Census Undercount and Minority Representation The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 8 (1993) *See also Gaffney v. Cummings*, 412 U S at 745 n.10

[8] *See* Stephen E Fienberg, *The New York City Census Adjustment Trial: Witness for the Plaintiffs*, 34 Jurimetrics J. 65, 70-71 (1993)

[9] *Tucker*, 958 F.2d at 1413; *see generally Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population*, 56 Fed Reg. 33,582 (1991)

[10] The Secretary's reasoning, as recapitulated by the Seventh Circuit, was that

> while adjustment by the best method available would increase the census totals, it would not significantly alter the apportionment of seats in the House of Representatives among the states, in part because there is overcounting as well as undercounting After the dust settled, Illinois's representation would be unchanged, although California and Arizona would pick up a few seats at the expense of Pennsylvania and Wisconsin Federal grant allocations might not be much af-

decision not to make the adjustment has been the subject of litigation in three circuits, with conflicting results. *Compare Tucker* (plaintiffs had no judicially enforceable rights) and *City of Detroit* (same) *with City of New York* (remanding with instruction that refusal to adjust could not be upheld unless shown to be necessary to a legitimate governmental interest).

The Bureau is currently considering whether to adjust the "raw count" of the next decennial census for the year 2000. Sampling was used in connection with the 1990 census to carry out the "Post-Enumeration Survey" (the "PES") that measured the undercount for that year. *See City of New York*, 34 F.3d at 1117; David A. Freedman, *Adjusting the Census of 1990*, 34 Jurimetrics J. 99, 102-03 (1993). In that census, the Bureau tested the accuracy of the count by a PES of some 174,000 households and then matching the questionnaires for households in the PES against the same households in the census (including both mail-backs and non-response follow-ups). The matching process provided the Bureau with data to develop adjusting factors, or "multipliers," to capture the estimated under- or overcount for some 1,392 demographic subgroups. The application of the multipliers to the enumeration data for the subgroups produced the conclusion that 1.6% of the total population had not been counted in the census. For the 2000 census, the Bureau is considering the use of a sample-based adjustment as in 1990, except that it would complete the adjustment before its deadline for reporting State totals to the President.

The Bureau is also considering whether to conduct the non-response follow-up on a sample basis, rather than sending enumerators to each non-responding household. Specifically, it is proposing to contact, by telephone or in person, between 25% and 50% of the households that failed to return the census questionnaire. The Bureau would then extrapolate from the results of this sample to estimate the whole non-respondent population. The Bureau believes that the use of this procedure would save it between $300 and $600 million. At the same time, it advises us that the procedure would also produce greater accuracy than was achieved in the 1990 census.

In the past, the Bureau took the position that it would be legally precluded from adjusting the census for apportionment purposes. *See Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69,366, 69,371-73 (1980). This claim was based on both constitutional and statutory grounds. First, the Bureau has argued that

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fected either Moreover, any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors — and ones of considerable technical complexity to boot, — open the census process to charges of political manipulation And while a statistical adjustment for the undercount would undoubtedly improve the accuracy of the nationwide census total, there is no consensus among statisticians and demographers that it would make the state and district census totals — the level at which the adjustment would actually affect representation and funding — more accurate

Tucker, 958 F.2d at 1413 (citations omitted); *see also City of New York*, 34 F 3d at 1122-23; *Senate of California*, 968 F 2d at 975

> interpretation of the phrase "actual enumeration" in Article 1, Section 2, Clause 3 must begin with the words themselves, and that the terms "census" and "enumeration" mean nothing more or less than a headcount. [It] say[s] that the use of the modifier "actual" with the word "enumeration" can only reinforce the conclusion that the framers of the Constitution intended a headcount, and nothing but a headcount. [It] further rel[ies] upon the fact that, with the exception of the 1970 census when imputations were performed which added approximately 4.9 million people, the census has been, since 1790, an actual headcount and nothing more.

Young v. Klutznick, 497 F. Supp. at 1332. The Bureau has also argued in the past that "even if the Constitution does not prohibit an adjustment for apportionment of Representatives, Congress has by statute prohibited such an adjustment." *Id.* at 1334. We consider these issues in turn.

II.

The Enumeration Clause of the Constitution reads in relevant part as follows:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. art. I, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . .").

The Enumeration Clause was one facet of the "Great Compromise" at the Constitutional Convention, which provided for equal representation of the States in a Senate, and representation of "the People of the several States" in a House of Representatives. U.S. Const. art. I, § 2, cl. 1; *see generally Wesberry v. Sanders*, 376 U.S. 1, 10-16 (1964); *Demography and Distrust*, 94 Harv. L. Rev. at 846. Because the Framers "intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants . . . [t]he Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people'" *Wesberry*, 376 U.S. at 13-14 (citations omitted).

Before the first decennial census in 1790, no modern Nation had undertaken a census (although all the States of the United States, with some exceptions in the South, had done so). *See* Hyman Alterman, *Counting People: The Census in*

History 164 (1969). Thus, when the Framers were apportioning seats in the first House of Representatives, their decisions were the outcome of "conjecture and political compromise: [they] apparently assigned some of the smaller States a number of Representatives not justified by the size of their populations." Memorandum for Wendell L. Wilkie II, General Counsel, Department of Commerce, from Stuart M. Gerson, Assistant Attorney General, Civil Division at 4 (July 9, 1991) (the "Gerson Memorandum").[11] The Constitution's reference to an "*actual* Enumeration" must be explained by reference to the Framers' ignorance of the exact size of the population and its distribution among the States: "[w]hen the Constitution speaks of actual enumeration, it speaks of that as opposed to *estimates*." *Young v. Klutznick*, 497 F. Supp. at 1332 (emphasis added). *Accord* Memorandum for Alice Daniel, Assistant Attorney General, Civil Division, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Pending Litigation Concerning Statistical Adjustment of 1980 Decennial Census Population Data* at 2 (Sept. 25, 1980) (the "Harmon Memorandum") ("the phrase ['actual Enumeration'] was chosen because an accurate population count was essential once the Convention decided, in the Great Compromise, that representation in the House would be apportioned on the basis of population.").

The proposal for a periodic enumeration of the population originated, as noted above, with Edmund Randolph, as an incident to the Great Compromise. On July 10, Randolph moved a proposal calling for Congress "to cause a census, and estimate to be taken within one year after its first meeting; and every [left blank] years thereafter — and that the Legisl[ature] arrange the Representation accordingly." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 265 (Adrienne Koch ed., 1966) (bracketed material added). George Mason spoke in favor of the motion on the next day, declaring that "[h]e did not object to the conjectural ratio which was to prevail in the outset; but considered a Revision from time to time according to some permanent & precise standard as essential to [the] fair representation required in the [first] branch." *Id.* at 266. Later in the debate, Randolph repeated Mason's point that "the ratio fix[ed] for the [first] meeting [of Congress] was a mere conjecture." *Id.* at 267. On August 21, Madison repeated that "[t]he last apportionment of Cong[ress], on which the number of Representatives was founded, was conjectural and meant only as a temporary rule till a Census should be established." *Id.* at 497. Madison also explained in *The Federalist* that the provision in Article I, Section 2, Clause 3 of the Constitution for a House of Representatives that would consist of sixty-five members in the First Congress was merely "a temporary regulation," to be revised when the findings of the census

[11] *See also* Hyman Alterman, *Counting People* at 187-88 ("The Convention had available to it estimates of the white and slave populations in the various states Mainly on the basis of these estimates the Convention decided how many representatives each state should have until the first census was taken.").

of 1790 became known. *The Federalist* No. 55, at 343 (James Madison) (Clinton Rossiter ed., 1961).[12]

These discussions make it clear that, in requiring an "*actual*" enumeration, the Framers meant a set of figures that was not a matter of conjecture and compromise, such as the figures they had themselves provisionally assumed. An "actual" enumeration would instead be based, as George Mason put it, on "some permanent & precise standard." There is no indication that the Framers insisted that Congress adopt a "headcount" as the sole method for carrying out the enumeration, even if later refinements in the metric of populations would produce more accurate measures.

Furthermore, the Framers left it to Congress to conduct the enumeration "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. That explicit delegation implies that the Framers were willing to allow for innovation in the choice of measuring techniques; and, not surprisingly, "the Census Bureau's unbroken historical practice really has been to use modern knowledge and scientific techniques to get further and further away from simple headcounting." *Young v. Klutznick*, 497 F. Supp. at 1333.[13] "The result, and not the method, is the important lesson of the historical experience." Harmon Memorandum at 2.

In addition, Article I, Section 2, Clause 3 of the Constitution was amended by section 2 of the Fourteenth Amendment. Section 2 declares that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. Further, section 5 confers on Congress the "power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. Congress's powers under section 5 have been "equated . . . with the broad powers expressed in the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18. 'Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (plurality opinion) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). It follows that Congress has broad power to determine how to carry out the apportionment called for by section 2, and to conduct the enumeration on which that apportionment is based. *See Massachusetts v. Mosbacher*, 785 F. Supp. 230, 253 (D. Mass.) (three-judge court) ("the exercise of Section 5 powers here in defining the methodology for reapportionment falls

[12] U S Const art. I, § 2, cl 3 provided that "until such enumeration shall be made," the States were to have predetermined numbers of Representatives: three for New Hampshire, eight for Massachusetts, one for Rhode Island, five for Connecticut, six for New York, four for New Jersey, eight for Pennsylvania, one for Delaware, six for Maryland, ten for Virginia, five for North Carolina, five for South Carolina and three for Georgia, for a total of sixty-five

[13] "Instead of headcounting people, [the Bureau] uses the mail-out form and the mail-out/mail-back format to enumerate most persons today." *Id. See also City of Detroit*, 4 F 3d at 1377 ("[t]he Census Bureau has not undertaken a door-to-door campaign since the 1960 census and plaintiffs have presented no evidence indicating that such an effort would lead to any more accurate results")

squarely within the settled recognition of the competence of Congress as a legislative fact finder"), *rev'd sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992). It would be strange indeed to suppose that Congress — or its delegate, the Bureau — lacked the power to authorize a statistical adjustment that would correct the persistent and acknowledged undercounting of African Americans in that enumeration, particularly in view of the fact that the Fourteenth Amendment was primarily intended for the protection of that class. *See Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

Finally, constitutional plaintiffs injured by the decision to use adjusted census data for apportionment might argue that so sharp a departure from the Bureau's longstanding practices was unjustified.[14] *See Senate of California*, 968 F.2d at 978 ("the method by which the Secretary is to do the count . . . is generally expected to be a head count"); *see also Seventeenth Decennial Census*, 41 Op. Att'y Gen. at 34 (if the Director "has consistently followed the practice in question over a long period of time, and it has not been challenged in the Congress or elsewhere . . . his interpretation ought not to be disturbed except for very weighty reasons").[15] It could be contended that the use of unadjusted "headcounts" almost invariably since the first census of 1790 represents a practical construction of the Enumeration Clause which the Executive, at least absent weighty reasons, may not reverse. *See, e.g., Smiley v. Holm*, 285 U.S. 355, 369 (1932) ("long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights . . . ."); *The Pocket Veto Case*, 279 U.S. 655, 688-90 (1929). We believe, however, that the change in the Bureau's policy would be upheld against an attack of this nature if there were adequate proof that statistical adjustments would be feasible and would generate more accurate counts of both the total population and of minorities.

Thus, in *Franklin v. Massachusetts*, the Court upheld the Bureau's changed policy of allocating overseas government personnel to the several states for residence purposes for the 1990 census. The Court stated that

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[14] The Court has held that "[c]onstitutional challenges to apportionment are justiciable." *Franklin v. Massachusetts*, 505 U.S. at 801. Whether constitutional plaintiffs "have standing to challenge the accuracy of the data" tabulated by the Bureau, and "whether the injury is redressable by the relief sought," *id.* at 802, are of course separate issues. We shall assume here that those conditions might be met. The availability of review under the Administrative Procedure Act (the "APA") of the use of adjusted data for reapportionment seems doubtful after *Franklin*, however. The APA permits review only of certain "final" agency actions under 5 U.S.C. § 704. In this case, as in *Franklin*, it would appear that "the final action complained of is that of the President, and the President is not an agency within the meaning of the Act." 505 U.S. at 796. We note that *Franklin*'s ruling on the APA represented the view of a bare majority of five Justices (including Justice White), and might not be extended by the present Court.

[15] For analogous reasons, if APA review were available, a change in policy to allow statistical adjustments might be attacked as arbitrary, capricious or abusive of discretion under 5 U.S.C. § 706(2)(A). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-45 (1983) (presumption in favor of settled agency practice). We believe that the proposed policy change would survive review under that standard.

> the Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress . . . . The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality.

505 U.S. at 806.

In the present case, the validity of the policy change would turn largely on the evidentiary showing that the use of statistical adjustments will produce a more accurate count of the population than the bare "headcount" data alone. It appears to us that the factual predicate for the change to adjusted figures is adequate. As the Second Circuit pointed out, the district court in *City of New York* found "that the PES-indicated statistical adjustment was feasible; that for most purposes and for most of the population that adjustment would result in a more accurate count than the original census; and that the adjustment would lessen the disproportionate undercounting of minorities." *City of New York*, 34 F.3d at 1129. Assuming that similar findings would hold true for the next decennial census, then we see no reason why the Bureau, in the exercise of its expertise and discretion, may not alter its past practice and adjust the census figures it obtains through a "headcount."[16]

Accordingly, we conclude that the Constitution does not preclude the Bureau from employing technically and administratively feasible adjustment techniques to correct undercounting in the next decennial census.

III.

The Census Act includes two provisions authorizing the use of statistical methods, including "sampling," in conducting its statutory responsibilities. The first statute, 13 U.S.C. § 141(a), states that

> [t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys.

[16] Moreover, in light of the Bureau's position that the use of a sample-based follow-up for enumerating non-respondent households would improve the accuracy of the final count while at the same time saving the Bureau upwards of $300 million, we can see no constitutional objection to the introduction of that procedure.

The second statute, 13 U.S.C. § 195, authorizes, indeed mandates, the use of sampling, but with a limitation relating to apportionment

> [e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

In the past, the Bureau has taken the position that § 195 prohibits statistical adjustment of census data for purposes of apportionment. The difficulty centered on § 195's prohibition on the use of "sampling" in determining the size of the population for purposes of apportionment. Since the scope of § 195's exception is not plain from the language of the statute, we turn to the legislative history of that section.

Congress enacted § 195 in 1957, but in a form that authorized, rather than required, the use of sampling; a 1976 amendment transformed the Secretary's authorization into the conditional mandate of the current statute.[17] The enacting Congress of 1957 considered § 195 to be merely a change "of an administrative nature" that was "needed for the timely and efficient performance of the biggest jobs the Bureau of the Census has ever undertaken." S. Rep. No. 85-698, at 2 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1706, 1707. The proviso gave the Bureau the "authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes." *Id.* at 3, *reprinted in* 1957 U.S.C.C.A.N. at 1708.

What Congress originally meant by "sampling" is not clear. In testimony in support of the 1957 legislation, Robert W. Burgess, the Director of the Bureau of the Census, explained that

> [t]he use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term "census" implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete enumeration basis and that under some circumstances a sample enumeration or a sample census might be substituted for a

[17] As enacted in 1957, the statute had stated that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Pub. L. No. 85-207, § 14, 71 Stat. 481, 484 (1957).

> full census to the advantage of the Government. This section, in combination with section 193, would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so.

Amendment of Title 13, United States Code, Relating to Census: Hearings on H.R. 7911 Before the House Committee on Post Office and Civil Service, 85th Cong. 7-8 (1957).

The Director's testimony suggests that in enacting § 195, Congress intended that the Bureau conduct a "complete enumeration" or a "full census" when determining the size of the population for apportionment purposes, but that the Bureau could use "sampling" in other contexts, where a "sample enumeration" or a "sample census" might be used "to the advantage of the Government." Read in the light of the testimony, the statute's preclusion of "sampling" need not have meant that statistical adjustment of census figures was forbidden: Congress may well have intended only that the decennial census not be a "sample census." Moreover, a "complete enumeration" or "full census" may affirmatively *require* statistical adjustments of "headcount" data to be made.

Our Office has previously argued that the 1957 legislative history should not be understood to preclude statistical adjustment. Citing the testimony quoted above, we argued that "[s]ampling refers to a representative portion of the whole . . . while adjustment refers to additions to the whole, here the headcount. As we read the Census Act, there is no statutory prohibition of statistical adjustment." Harmon Memorandum at 3 (citation omitted). The Congressional Research Service (the "CRS"), however, reviewed the same testimony and drew a contrary inference:

> it appears that when Section 195 was originally enacted, the Department of Commerce took the position that an actual enumeration was required for all decennial census purposes. Section 195 was enacted in order to relieve this restriction for purposes other than apportionment by sanctioning the use of sampling when appropriate. There was no need to mention other forms of estimating population since this section was making an exception to the general requirement of an actual enumeration only for sampling. Therefore, one may conclude that Section 195 was not intended to sanction the use of methods of estimating population other than "sampling," and did not intend to permit the use of this method for purposes of apportionment.

Congressional Research Service, Library of Congress, *Legal Considerations in Census Bureau Use of Statistical Projection Techniques to Include Uncounted*

Individuals For Purposes of Congressional Reapportionment (Mar. 27, 1980), (report prepared for Congressional use), *reprinted in Problems with the 1980 Census Count: Joint Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations, and the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 96th Cong. 190 (1980) (the "Joint Hearing").

The 1976 legislation amending the Census Act, Act of Oct. 17, 1976, Pub. L. No. 94-521, 90 Stat. 2459, 2464, was primarily concerned with the establishment of mid-decade censuses. In carrying forward (and amending) § 195, we believe that Congress meant that while reliance on sampling *alone* might be appropriate or desirable for mid-decade censuses, it should not be the exclusive procedure for tabulating the population in decennial censuses.[18] So understood, the 1976 reenactment does not bar the statistical adjustment of the decennial census if such adjustments would improve their accuracy.

This interpretation of the 1976 legislative history is not uncontroverted. *See* Gerson Memorandum at 11 ("Congress' amendment of Section 195 in 1976 is similarly open to two alternative interpretations."). The CRS, noting that both the Comptroller General and the Bureau had advised Congress in 1976 of ongoing developments in estimating or allocating populations other than sampling, argued that "it would be logically inconsistent for Congress to prohibit sampling for purposes of reapportionment, but at the same time to permit the use of other techniques whose reliability had not yet been determined." Joint Hearing at 188. Based on its review of the legislative history, CRS concluded that "the use of demographic estimates for purposes of apportionment of Representatives among the States . . . is prohibited by Section 195 of Title 13." *Id.* at 192.[19]

In our judgment, the better view is that the Census Act does not preclude the Bureau from engaging in statistical adjustments of the next set of decennial census figures. *See Franklin v. Massachusetts*, 505 U.S. at 820 (Stevens, J., joined by

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[18] The Senate Report stated that the section of the 1976 legislation that modified 13 U.S.C. § 195 "differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that, whenever possible, sampling shall be used." S. Rep. No. 94-1256, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5468.

[19] One further aspect of the 1976 legislative history should be noted. In the 1970 decennial census, the Bureau used "sampling" to add to the national total the figure of almost five million people believed missing from the headcount. The Bureau estimated that it had not contacted some 10.2 million people, or about 5% of the population. Of this 10.2 million not actually counted, 4.9 million were included in the official count by "imputation" and allocated among the States for apportionment of House seats. *Young v. Klutznick*, 497 F. Supp. at 1321, *see also* Gerson Memorandum at 15 ("In effect, a portion of the population was not tabulated directly in 1970. Instead, the Bureau obtained an estimate of its size from the results of statistical sampling and added that estimate to the total population count."). The district court in *Young* inferred that when Congress amended § 195 in 1976, it was "well aware" of the Bureau's adjustment of the 1970 census data and impliedly consented to that practice. 497 F. Supp. at 1334-35. The court cited no direct evidence, however, that Congress was aware of, and approved, the 1970 census adjustment. *See* Gerson Memorandum at 15. Moreover, as the Bureau argued, *see Young*, 497 F. Supp. at 1334, the re-enactment of § 195 (with essentially minor changes from 1957) could be interpreted as a ratification of the Bureau's more traditional practice of using only a headcount.

Blackmun, Kennedy and Souter, JJ., concurring in part and concurring in judgment) (Census Act "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment"). A non-preclusive reading gives due weight to the fact that, when it re-enacted § 195 in 1976, Congress was primarily concerned with instituting *mid-decade* censuses. Its prohibition on "sampling" in decennial censuses appears to have meant only that while a procedure relying on "sampling" alone might be the most cost-effective means to discover the information sought in a mid-decade census, the Bureau should not rely on "sampling" as its *exclusive* method of tabulating population figures in the decennial census. The use of sampling techniques in the mid-decade census is "probably a pragmatic necessity in that instance, given the vast mobilization of people and resources needed to conduct an even somewhat accurate head count." *Senate of California*, 968 F.2d at 978. Despite the additional costs entailed, however, Congress did not wish the decennial census to consist of "a mere statistical manipulation through the use of sampling and other techniques." *Id.* Nothing in amended § 195 *proscribed* the use of sampling or other statistical devices in connection with the decennial "headcount," however, if such adjustments would result in a more accurate tabulation.

Furthermore, in adopting the Census Act, Congress "left the actual administration of a great number of necessary details to the judgment and discretion of the Director of the Census." *Seventeenth Decennial Census*, 41 Op. Att'y Gen. at 33. Standing alone, § 141(a), which authorizes the Director to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys," would seem to permit statistical adjustments, if in the Director's judgment they would produce greater accuracy. While § 195 undoubtedly makes an exception for the use of sampling in apportionment, that exception can be construed narrowly, as befits Congress's otherwise broad delegation of power to the Bureau: the section could be taken to mean that while census figures used for apportionment may not be based on sampling alone, it is permissible to use population samples as one element in a more complex operation by which a prior "headcount" is corrected. Such a reading has in fact generally been adopted by the courts. *See Carey v. Klutznick*, 508 F. Supp. at 415; *Young v. Klutznick*, 497 F. Supp. at 1334-35; *see also* Gerson Memorandum at 18 ("the weight of existing caselaw" is "that Section 195 does not preclude statistical adjustment").[20]

Moreover, if § 195 were read as preclusive, its constitutionality would be highly suspect. Because (as shown above) a non-preclusive reading is a reasonable one, it should be preferred.

Substantial constitutional issues would arise under both the Enumeration Clause and the Fifth Amendment if § 195 were construed to prevent the Bureau from ad-

[20] *But see* Jeffrey S. Cramptor, Comment, *Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1990 Det. C.L. Rev. 71 (criticizing case law); Gerson Memorandum at 18 ("[w]e can foresee a court deciding that Section 195, on its face, prohibits statistical adjustment").

justing census data for apportionment. The Enumeration Clause prescribes that Representatives be apportioned to the several States "according to their respective Numbers," and it can be argued that the Clause is violated if Representatives are apportioned on the basis of a census count that is known to be deficient, but that could be rendered more accurate by feasible adjustments. *See Franklin v. Massachusetts*, 505 U.S. at 806 (Bureau's decision to allocate government personnel stationed abroad to State designated as home of record "does not hamper the underlying constitutional goal of equal representation, but . . . actually promotes equality"); *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992) (Court "might well find" that requirement that Representatives be apportioned by reference to the populations of the several States "embod[ied] the same principle of equality" as found in *Wesberry*), *Carey v. Klutznick*, 508 F. Supp. at 414 (language of Enumeration Clause evinces "an intent that apportionment be based on a census that most accurately reflects the true population of each state"); *cf. Wesberry*, 376 U.S. at 13-14.

Furthermore, "[t]he Fifth Amendment . . . might be thought, by analogy to the decisions invalidating the malapportionment of state legislatures under the equal protection clause, to require the federal government to apportion congressional seats . . . in accordance with an accurate estimate of the number of people in each state." *Tucker*, 958 F.2d at 1414. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise"). Thus, the Second Circuit has found that the Bureau's decision not to adjust the 1990 census figures was constitutionally suspect under the Fifth Amendment:

> [B]oth the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups. . . . That the goal of precise equality cannot be achieved nationwide . . . does not relieve the federal government of the obligation to make a good-faith effort to achieve voting-power equality "as nearly as is practicable."

City of New York, 34 F.3d at 1128, 1129 (citation omitted).

We need not here consider whether the Second Circuit's view of the merits is correct; nor need we address the issue whether the question the court decided was litigable. Suffice it to say that there would be substantial constitutional difficulties under both the Enumeration Clause and the Fifth Amendment if § 195 were understood to prohibit the Bureau from making practicable statistical adjustments that would result in a more accurate tally than the traditional headcount. Section 195

should be construed, if "'fairly possible,'" to avoid those difficulties. *See, e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (citation omitted). Because a constitutionally unproblematic reading is justified (and has, in fact, been adopted by most courts), it should be adopted.

Accordingly, § 195 does not preclude reliance upon technically feasible statistical adjustments to improve the accuracy of "headcount" data, and specifically to correct the differential undercounting of minority group populations. It also does not prohibit the Bureau from conducting the non-response follow-up on a sample basis, rather than sending enumerators to every non-responding household, where the use of the former technique would improve accuracy while substantially lowering administrative costs.

Conclusion

Neither the Constitution nor the Census Act precludes the Bureau from making the proposed statistical adjustments of "headcount" data in the decennial census for the year 2000.

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Presidential Authority to Decline to Execute Unconstitutional Statutes

This memorandum discusses the President's constitutional authority to decline to execute unconstitutional statutes.

November 2, 1994

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and I have a few thoughts to share with you. Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.

First, there is significant judicial approval of this proposition. Most notable is the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).

Second, consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. *See, e.g., Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer); *see also* attached annotations of Attorney General and Office of Legal Counsel opinions. Moreover, as we discuss more fully below, numerous Presidents have provided advance notice of their intention not to enforce specific statutory requirements that they have viewed as unconstitutional, and the Supreme Court has implicitly endorsed this practice. *See INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions and indicate that they will not comply with those provisions).

While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. To continue our conversation about these complex issues, I offer the following propositions for your consideration.

1. The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws — including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office.

2. When bills are under consideration by Congress, the executive branch should promptly identify unconstitutional provisions and communicate its concerns to Congress so that the provisions can be corrected. Although this may seem elementary, in practice there have been occasions in which the President has been presented with enrolled bills containing constitutional flaws that should have been corrected in the legislative process.

3. The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional. In reaching a conclusion, the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.

4. The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be

reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.

One example of a Presidential challenge to a statute encroaching upon his powers that did result in litigation was *Myers v. United States*, 272 U.S. 52 (1926). In that case, President Wilson had defied a statute that prevented him from removing postmasters without Senate approval; the Supreme Court ultimately struck down the statute as an unconstitutional limitation on the President's removal power. *Myers* is particularly instructive because, at the time President Wilson acted, there was no Supreme Court precedent on point and the statute was not manifestly unconstitutional. In fact, the constitutionality of restrictions on the President's authority to remove executive branch officials had been debated since the passage of the Tenure of Office Act in 1867 over President Johnson's veto. The closeness of the question was underscored by the fact that three Justices, including Justices Holmes and Brandeis, dissented in *Myers*. Yet, despite the unsettled constitutionality of President Wilson's action, no member of the Court in *Myers* suggested that Wilson overstepped his constitutional authority — or even acted improperly — by refusing to comply with a statute he believed was unconstitutional. The Court in *Myers* can be seen to have implicitly vindicated the view that the President may

refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional. As Attorney General Civiletti stated in a 1980 opinion,

> *Myers* is very nearly decisive of the issue [of Presidential denial of the validity of statutes]. *Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980).

7. The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. Moreover, every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions. *See* annotations of attached signing statements. As we noted in our memorandum on Presidential signing statements, the President "may properly *announce* to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 134 (1993). (Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.) Finally, the Supreme Court recognized this practice in *Chadha*, 462 U.S. at 942 n.13: the Court stated that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds" and then cited the example of President Franklin Roosevelt's memorandum to Attorney General Jackson, in which he indicated his intention not to implement an unconstitutional provision in a statute that he had just signed. These sources suggest that the President's signing of a bill does not affect his authority to decline to enforce constitutionally objectionable provisions thereof.

In accordance with these propositions, we do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the

authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.

We recognize that these issues are difficult ones. When the President's obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure. In these circumstances, a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Brief Description of Materials

Attorney General Opinions

1) *Memorial of Captain Meigs, 9 Op. Att'y Gen. 462 (1860)*: In this opinion the Attorney General concluded that the President is permitted to disregard an unconstitutional statute. Specifically, Attorney General Black concluded that a statute purporting to appoint an officer should not be enforced: "Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop." *Id.* at 469.

2) *Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21 (1980)*: In this opinion Attorney General Civiletti instructed Secretary of Education Hufstedler that she was authorized to implement regulations that had been disapproved by concurrent congressional resolutions, pursuant to a statutory legislative veto. The Attorney General noted that "the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt." *Id.* at 29. He concluded, however, that "[t]o regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality. More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." *Id.*

3) *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980)*: Attorney General Civiletti, in answer to a congressional inquiry, observed that "*Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." *Id.* at 59. He added as a cautionary note that "[t]he President has no 'dispensing power,'" meaning that the President and his subordinates "may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." *Id.* at 59-60.

4) *Letter for Peter W. Rodino, Jr., Chairman, House Judiciary Committee from William French Smith, Attorney General (Feb. 22, 1985)*: This letter discussed the legal precedent and authority for the President's refusal to execute a provision of the Competition in Contracting Act. The Attorney General noted that the decision "not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts." *Id.* at 8. The letter also stated that "the 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." *Id.* at 3.

Office of Legal Counsel Opinions

1) *Memorandum for the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sept. 27, 1977)*: This opinion concluded that the President may lawfully disregard a statute that he interprets to be unconstitutional. We asserted that "cases may arise in which the unconstitutionality of the relevant statute will be certain, and in such a case the Executive could decline to enforce the statute for that reason alone." *Id.* at 13. We continued, stating that "[u]nless the unconstitutionality of a statute is clear, the President should attempt to resolve his doubts in a way that favors the statute, and he should not decline to enforce it unless he concludes that he is compelled to do so under the circumstances." *Id.* We declined to catalogue all the considerations that would weigh in favor of non-enforcement, but we identified two: first the extent of the harm to individuals or the government resulting from enforcement; and, second, the creation of an opportunity for a court challenge through non-enforcement (*e.g.*, *Myers*).

2) *Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980)*: In this opinion we rejected the constitutionality of a proposed legislative veto, prior to the Court's decision in *Chadha*. We opined that "[t]o regard this provision as legally binding would impair the Executive's constitutional role and would constitute an abdication of the responsibility of the Executive Branch." *Id.* at 734. It should be noted that the legislation in question was pending in Congress, and the possibility that President Carter would sign the legislation did not affect our analysis of the constitutional issue. We simply stated that, "if enacted, the [legislative veto provision] will not have any legal effect." *Id.*

3) *Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37 (1990)*: This opinion also addressed then-pending legislation, in this case the foreign relations authorization bill for fiscal years 1990 and 1991. The opinion found that a provision of the bill was unconstitutional and severable. Regarding non-execution, the opinion stated that "at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws." *Id.* at 50. The opinion concluded that "if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce" the constitutionally objectionable section. *Id.* at 37.

4) *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992)*: This opinion concluded that two statutory provisions that limited the issuance of official and diplomatic passports were unconstitutional and were severable from the remainder of the two statutes. On the question of non-execution, the opinion rejected "the argument that the President may not treat a statute as invalid prior to a judicial determination." *Id.* at 36. The opinion concluded that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional.

5) *The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131 (1993)*: This opinion discusses different categories of signing statements, including those construing bills to avoid constitutional problems and those in which the President declares "that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it." *Id.* at 133. The opinion concludes that such "uses of Presidential signing statements generally serve legitimate and defensible purposes." *Id.* at 137.

Presidential Signing Statements

1) *Statement by the State Department (Announcing President Wilson's Refusal to Carry Out the Section of the Jones Merchant Marine Act of June 5, 1920, directing him to terminate treaty provisions restricting the Government's right to impose*

discriminatory tonnage dues and tariff duties), 17 A Compilation of the Messages and Papers of the Presidents 8871 (Sept. 24, 1920) (Pres. Wilson): The State Department announced that it "has been informed by the President that he does not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any constitutional power possessed by the Congress." *Id.* The statement also defended President Wilson's decision to sign the bill and noted that "the fact that one section of the law involves elements of illegality rendering the section inoperative need not affect the validity and operation of the Act as a whole." 5 Green Haywood Hackworth, *Digest of International Law* 324 (1943).

2) *Special Message to the Congress Upon Signing the Department of Defense Appropriation Act, Pub. Papers of Dwight D. Eisenhower 688 (July 13, 1955)*: President Eisenhower, in signing a bill (H.R. 6042) that contained a legislative veto, stated that the legislative veto "will be regarded as invalid by the executive branch of the Government in the administration of H.R. 6042, unless otherwise determined by a court of competent jurisdiction." *Id.* at 689.

3) *Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, Pub. Papers of John F. Kennedy 6 (Jan. 9, 1963)*: President Kennedy stated that a provision in the bill he was signing contained an unconstitutional legislative veto. He announced that "[i]t is therefore my intention . . . to treat this provision as a request for information." *Id.*

4) *Statement by the President Upon Approving the Public Works Appropriations Act, Pub. Papers of Lyndon B. Johnson 104 (Dec. 31, 1963)*: President Johnson also found that a legislative veto provision was unconstitutional and stated that he would treat it as a request for information.

5) *Statement About Signing the Public Buildings Amendments of 1972, Pub. Papers of Richard Nixon 686 (June 17, 1972)*: President Nixon stated that a clause conditioning the use of authority by the executive branch on the approval of a congressional committee was unconstitutional. He ordered the agency involved to comply with "the acceptable procedures" in the bill "without regard to the unconstitutional provisions I have previously referred to." *Id.* at 687.

6) *Statement on Signing the Department of Defense Appropriation Act of 1976, Pub. Papers of Gerald R. Ford 241 (Feb. 10, 1976)*: President Ford stated that a committee approval mechanism was unconstitutional and announced that he would "treat the unconstitutional provision . . . to the extent it requires further Congressional committee approval, as a complete nullity." *Id.* at 242.

7) *Statement on Signing Coastal Zone Management Improvement Act of 1980, Pub. Papers of Jimmy Carter 2335 (Oct. 18, 1980)*: President Carter stated that a legislative veto provision was unconstitutional and that any attempt at a legislative veto would "not [be] regarded as legally binding." *Id.*

8) *Statement on Signing the Union Station Redevelopment Act of 1981, Pub. Papers of Ronald Reagan 1207 (Dec. 29, 1981)*: President Reagan stated that a legislative veto was unconstitutional and announced that "[t]he Secretary of Transportation will not . . . regard himself as legally bound by any such resolution." *Id.*

9) *Statement On Signing the National and Community Service Act of 1990, Pub. Papers of George Bush 1613 (Nov. 16, 1990)*: President Bush rejected the constitutionality of provisions that required a Presidentially appointed board exercising executive authority to include, among its 21 members, "seven members nominated by the Speaker of the House of Representatives . . . [and] seven members nominated by the Majority Leader of the Senate." *Id.* at 1614. He announced that the restrictions on his choice of nominees to the board "are without legal force or effect." *Id.*

10) *7 A Compilation of the Messages and Papers of the Presidents 377 (Aug. 14, 1876) (Pres. Grant)*: This is one of the earliest of many instances of a President "construing" a provision (to avoid constitutional problems) in a way that seems to amount to a refusal to enforce a provision of it. An 1876 statute directed that notices be sent to certain diplomatic and consular officers "to close their offices." President Grant, in signing the bill, stated that, "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive." *Id.* In order to avoid this problem, President Grant "construe[ed]" this provision "only to exercise the constitutional prerogative of Congress over the expenditures of the Government," not to "imply[] a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government." *Id.* at 378.

Other Presidential Documents

1) *A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953)*: This was a legal opinion from President Franklin Roosevelt to Attorney General Jackson. President Roosevelt stated that he was signing the Lend-Lease Act despite a provision providing for a legislative veto, "a provision which, in my opinion, is clearly unconstitutional." *Id.* at 1357. The President stated that, "[i]n order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional, and in order that my approval of the bill, due to the

existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature." *Id.* at 1358.

2) *Message to the Congress on Legislative Vetoes, Pub. Papers of Jimmy Carter 1146 (Jun. 21, 1978)*: In this memorandum President Carter expressed his strong opposition to legislative vetoes and stated that "[t]he inclusion of [a legislative veto] in a bill will be an important factor in my decision to sign or to veto it." *Id.* at 1148. He further stated that, "[a]s for legislative vetoes over the execution of programs already prescribed in legislation and in bills I must sign for other reasons, the Executive Branch will generally treat them as 'report-and-wait' provisions. In such a case, if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding." *Id.* at 1149.

Historical Materials

1) *Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution 418 (1836)*: Wilson argued that the Constitution imposed significant — and sufficient — restraints on the power of the legislature, and that the President would not be dependent upon the legislature. In this context, he stated that "the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the 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." *Id.* at 445-46.

2) *Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (1874)*: Chase stated that President Johnson took the proper action in removing Secretary of War Stanton without Senate approval, in light of Johnson's belief that the statutory restriction on his removal authority was unconstitutional. In this regard, Chase commented that "the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure-of-Office Act

was unconstitutional and for the purpose of bringing the question before the Supreme Court." *Id.* at 578.

Congressional Materials

1) *The President's Suspension of the Competition in Contracting Act is Unconstitutional, H.R. Rep. No. 99-138, 1st Sess. (1985)*: The House Committee on Government Operations concluded that the President lacked the authority to refuse to implement any provision of the Competition in Contracting Act. The Committee stated that, "[t]o adopt the view that one's oath to support and defend the Constitution is a license to exercise any available power in furtherance of one's own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others' roles." *Id.* at 11. The Committee also stated that "[t]he Executive's suspension of the law circumvents the constitutionally specified means for expressing Executive objections to law and is a constitutionally impermissible absolute veto power." *Id.* at 13.

2) *Memorandum from the Congressional Research Service to the Committee on Government Operations concerning "The Executive's Duty to Enforce the Laws" (Feb. 6, 1985), reprinted in Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong. 544 (1985)*: This memorandum stated that the President lacks the authority to decline to enforce statutes. The CRS argued that "[t]he refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power." *Id.* at 554.

Cases

1) *Myers v. United States, 272 U.S. 52 (1926)*: The President refused to comply with — that is, enforce — a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional.

2) *United States v. Lovett, 328 U.S. 303 (1946)*: The President enforced a statute that directed him to withhold compensation from three named employees, even

though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, *amicus curiae*, to defend the statute.)

3) *INS v. Chadha, 462 U.S. 919 (1983)*: This case involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes (*see* Carter Presidential memorandum, *supra*), the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with *Lovett*, the Justice Department argued against the constitutionality of the statute.

4) *Morrison v. Olson, 487 U.S. 654 (1988)*: The President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as *amicus curiae*, and the independent counsel herself.

5) *Freytag v. Commissioner, 501 U.S. 868 (1991)*: A unanimous Court ruled that the appointment of special trial judges by the Chief Judge of the United States Tax Court did not violate the Appointments Clause. Five Justices concluded that the Tax Court was a "Court of Law" for Appointments Clause purposes, despite the fact that it was an Article I court, so that the Tax Court could constitutionally appoint inferior officers. Four Justices, in a concurrence by Justice Scalia, contended that the Tax Court was a "Department" under the Appointments Clause. The concurrence stated that "Court of Law" did not include Article I courts and that the Framers intended to prevent Congress from having the power both to create offices and to appoint officers. In this regard, the concurrence stated that "it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring).

6) *Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc)*: The President refused to comply with provisions of the Competition in Contracting Act that he viewed as unconstitutional and thereby allowed for judicial resolution of the issue. The Ninth Circuit rejected the President's arguments about the constitutionality of the provisions. The court further determined that Lear Siegler was a prevailing

party and was entitled to attorneys' fees, because the executive branch acted in bad faith in refusing to execute the contested provisions. In this regard, the court stated that the President's action was "utterly at odds with the texture and plain language of the Constitution," because a statute is part of the law of the land that the President is obligated to execute. *Id.* at 1121, 1124. On rehearing en banc, the court ruled that Lear Siegler was not a prevailing party and withdrew the sections of the opinion quoted above.

Application of 18 U.S.C. § 205 to Communications Between the National Association of Assistant United States Attorneys and the Department of Justice

The restrictions of 18 U.S.C. § 205 preclude current federal employees from representing the National Association of Assistant United States Attorneys before the Department of Justice regarding compensation, workplace issues, and other issues that focus on the interests of Assistant United States Attorneys or another discrete and identifiable class of persons or entities

Section 205 does not preclude several other kinds of communications between the Department and NAAUSA or similar associations. The Department is not precluded from dealing with individual AUSAs or groups of AUSAs in their official capacities on matters affecting AUSAs, even if those AUSAs are coincidentally members of NAAUSA Nor does section 205 place any restrictions on representatives who are not current federal employees, such as NAAUSA's executive director or former AUSAs no longer employed by the government Finally, discussions of broad policy directed towards a large and diverse group of persons would be permissible under the statute.

November 7, 1994

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked for our opinion as to whether and how the provisions of 18 U.S.C. § 205 apply to communications between employee members of the National Association of Assistant United States Attorneys ("NAAUSA") and officials of the Department. After consulting with the Office of Government Ethics ("OGE"), whose views on this question were provided to us in an advisory opinion dated September 28, we have concluded that while discussions of broad policy options are not "covered matters" within the meaning of the statute, several of the issues NAAUSA may wish to present constitute "covered matters" under § 205. Accordingly, that section's prohibition on representational activities would bar a federal employee from representing NAAUSA's position on those matters before department officials.

Section 205 is not a barrier to other types of communications between the Department and NAAUSA or similar associations. The Department is in no way precluded from dealing with individual or groups of Assistant United States Attorneys ("AUSAs") in their official capacities on matters affecting AUSAs, even if those AUSAs are coincidentally members of NAAUSA. Nor does § 205 place any restrictions on representatives who are not current federal employees, such as NAAUSA's executive director or any former AUSAs no longer employed by the government. Finally, discussions of broad policy directed towards a large and diverse group of persons would be permissible under the statute.

I. *Background*

NAAUSA characterizes itself as a professional, non-governmental association with the primary objective of promoting and protecting the career and professional interests of AUSAs. It is incorporated as a non-profit corporation in the District of Columbia, and is organized to operate as a business league or trade association within the meaning of § 501(c)(6) of the Internal Revenue Code. NAAUSA Articles of Incorporation. NAAUSA's membership, currently numbering almost 1,000, is open to all current and former AUSAs, including supervisors and managers. The founders of NAAUSA patterned the organization after the Federal Bureau of Investigation Agents Association, founded in 1981, and also compare their activities to those of national, state, and local bar associations. According to its promotional materials, NAAUSA's immediate priorities include soliciting the views of its members on legal and law enforcement issues and presenting those views to the Department, Congress and the public; seeking greater AUSA compensation from the Department and from Congress, including a retirement plan comparable to those enjoyed by other law enforcement personnel, bonuses and cash awards; and working with the Department on workplace issues, such as parental leave and child care. Membership solicitation letter from Lawrence J. Leiser, President, NAAUSA (Jan. 1994); *see also* Newsletter of the NAAUSA, vol. 1, issue 1 (June 1994).

The executive director of NAAUSA, who is not a federal employee, and its president, an AUSA, have requested meetings with the Attorney General, the Attorney General's Advisory Committee ("AGAC"), the Executive Office of U.S. Attorneys ("EOUSA"), and other department officials to discuss their concerns on behalf of NAAUSA and its members. You have asked us to identify any restrictions § 205 would place on NAAUSA's communications with department officials.

II. *Section 205: Overview*

Section 205 subjects any "officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States" who, "other than in the proper discharge of his official duties . . . acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest" to penalties including imprisonment for up to one year and a civil fine of not more than $50,000. 18 U.S.C. §§ 205(a), 216. For the purposes of § 205, the term "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." *Id.* § 205(h).

There are several classes of representations which are not restricted in any way by § 205. Representations before Congress, which is not a department, agency, or court, are not covered by § 205.[1] In addition, since § 205's prohibitions apply only to officers and employees of the United States, any non-federal employee representative of NAAUSA, such as its current executive director or a former AUSA no longer employed by the government, may represent NAAUSA before the Department without violating the statute.[2]

Where a federal employee wishes to represent NAAUSA before the Department, the OGE has stated, and we concur, that

> [a]s a general proposition, it seems clear that § 205 would bar an employee from representing an employee organization before the Government unless the representation was part of the employee's official duties, or otherwise met one of the exceptions in the statute, or was undertaken in accordance with a statute that explicitly exempted the activity from the proscription of § 205. There is no indication that Congress intended to generally exempt employees from the prohibition of § 205 when representing employee interest groups.

OGE Opinion at 2 (footnote omitted).

A. *Official Duties*

By its terms, § 205 does not apply to activity undertaken pursuant to an employee's official duties. For this reason, the activities of employees such as the U.S. Attorney members of the AGAC are not restricted by § 205. The members of the AGAC, at the direction of the Attorney General, participate in a process estab-

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[1] We address in a separate opinion certain First Amendment and related issues pertaining to testimony by an AUSA on legislation in which the Department has an interest, where the AUSA is not authorized to speak on behalf of the Department but rather is appearing in a personal capacity on behalf of NAAUSA

[2] Section 205 does not apply to representations made by an employee on his own behalf, or to purely factual communications As the OGE has explained,

> Because § 205 does not prohibit self-representation, an employee may represent his own views before the Government in connection with a particular matter even if those views are the same as those held by an organization in which the employee happens to be a member. . [A]n examination of all of the circumstances surrounding the communication might[, however,] indicate that the employee was in fact representing the organization to the Government on the matter. For example, if the employee's views were submitted in writing on the organization's stationery, or if the employee identified himself as an officer or member of the organization in stating his views, the Government might properly conclude that the employee was really acting as the organization's representative

Letter for the Honorable Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Stephen D Potts, Director, Office of Government Ethics at 2-3 (Sept 28, 1994) ("OGE Opinion") Finally, OGE also noted that the prohibitions of § 205 are not applicable to "[c]ommunications of a purely ministerial nature," such as "responding to requests from the Government for factual information " *Id* at 3

lished and directed by department officials to accomplish the Department's mission. *See* 28 C.F.R. § 0.10 (1994). AGAC members are clearly acting pursuant to their official duties, and their representation of other employees or of the Committee does not violate the statute.

NAAUSA cannot be characterized as an internal management committee akin to the AGAC. As a corporation, NAAUSA has a legal identity independent of that of the Department or its members. Department officials played no role in its creation, and exercise no control over its officers or its activities. NAAUSA's membership includes individuals who are no longer employees of the federal government. While NAAUSA's agenda focuses on issues arising from its members' status and responsibilities as AUSAs or former AUSAs, an employee's decision to participate in or represent NAAUSA is not an obligation of his employment, and, concomitantly, not an official duty.

B. *The Exceptions to Section 205*

NAAUSA's proposed activities do not fall within the scope of the limited exceptions to § 205's prohibitions. The exception for representation in "personnel administration proceedings" is somewhat related to NAAUSA's objectives. It provides that "[n]othing in subsection (a) or (b) prevents an officer or employee . . . from acting [with or] without compensation as agent or attorney for, or otherwise representing . . . any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings." 18 U.S.C. § 205(d)(1). When advising on the appropriateness of instituting criminal charges, we have declined to give the term "personnel administration proceedings" an "overly narrow reading," instead suggesting that it should be read as applying to the general class of "personnel matters." Memorandum for the Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: AUSA's Representation of Removable Justice Department Official* at 5-6 (Aug. 31, 1982) ("Olson Memorandum"). The personnel proceedings exception, however, is limited to the representation of individual employees, and cannot be read as permitting employees to represent associations or corporations in personnel matters. OGE has rejected extending the exception for self-representation to representations of employee associations "because it appears that the same theory would necessarily apply in cases where an employee represents the interest of any organization of which he is a member." OGE Opinion at 4. Our conclusion that the personnel administration exception does not apply to the representation of an employee association such as NAAUSA is consistent with this reasoning.

The legislative history of § 205 indicates that Congress included this exception to allow "government employees, who are subject to disciplinary or other personnel action . . . to obtain a government lawyer to ensure the effective representation

of their rights without having to incur the expense of hiring private counsel." *See* Olson Memorandum at 2 (internal quotation marks omitted). The advisory opinions of the Office of Government Ethics construing this exception involve the representation of individual employees in matters affecting them individually. *See, e.g.*, O.G.E. Informal Adv. Op. 85 x 1, (Jan. 7, 1985) *in Informal Advisory Letters and Memoranda and Formal Opinions 1979-1988*, at 511 (1990) ("*OGE Informal Opinions*") (noting application of this exception to appearances before Military Discharge Review Boards and the Boards for the Correction of Military Records on behalf of an individual employee). There is no indication in either the legislative history of § 205 or in those advisory opinions that Congress intended, in addition to facilitating assistance for individual employees facing personnel action, to authorize the representation of employee associations in such matters.[3]

While there are no decisions considering the application of the personnel administration exception to representation of an association or corporation, this Office has addressed the question of whether the implied exception for self-representation under § 205 allows an employee to represent a corporation in which he is the sole shareholder. In that opinion, we advised an agency that § 205 would prohibit an employee from acting as agent or attorney on behalf of such a corporation. *Conflict of Interest-Litigation Involving a Corporation Owned by Government Attorney*, 1 Op. O.L.C. 7 (1977). Analyzing the same issue, OGE has advised that

> [t]he implied exception in section 205 for self-representation does not extend to the representation of a distinct legal entity such as a corporation (e.g., through an appearance by its President). Moreover, there is nothing in the legislative history on section 205 that would indicate that a corporation wholly owned by natural persons enumerated in 18 U.S.C. § 205 should also be regarded as being covered by the self-representation exception.

O.G.E. Informal Adv. Op. 84 x 14 (Oct. 31, 1984) *in OGE Informal Opinions* at 493, 494 (referring to the list of immediate family members the exception codified in subsection (e) permits an employee to represent in certain circumstances).

C. *Statutory Exemptions: Labor Relations Statutes*

Section 7102 of title 5 gives "employee" members of "labor organization[s]" the right "to form, join, or assist any labor organization. . . . [S]uch right [i]ncludes

[3] Congress's consideration and enunciation of the principles governing collective employee activity are found in the Federal Labor Relations statutes, not in the conflict of interest laws As we explain *infra*, with the exception of representation on behalf of a certified labor organization, the labor statutes do not evince any intent to exempt associational representation from the ethics provisions of title 18.

the right . . . to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government." 5 U.S.C. § 7102. After consulting with the Justice Management Division, we have concluded that § 7102 does not itself create any right to represent a labor organization or to "bargain" with an agency. Bargaining rights are available only to labor organizations that satisfy the requirements for certification in §§ 7111-7114. Under the labor management relations statutes, "bargaining" is not limited to negotiations for a binding collective agreement. A "discussion" between an agency and a labor organization of compensation or parental leave, for example, would probably be considered "bargaining" for these purposes. Since NAAUSA is not certified to bargain under the relevant provisions, § 7102 confers no representational rights on its employee members. The Justice Management Division agrees with this conclusion.

III. *The Scope of "Covered Matter" and NAAUSA's Objectives*

Since an employee's representation of NAAUSA would not be an aspect of his official duties, would not fall under one of the exceptions to § 205, and would not be undertaken pursuant to any statute exempting his actions from § 205, the prohibitions of the statute would apply. Section 205 penalizes any federal employee who "acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission 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). A "covered matter" is defined for purposes of the statute 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*." *Id.* § 205(h) (emphasis added).

A. *Covered Matter: A Definition*

Section 205 was enacted as part of the comprehensive reform of the government ethics laws in 1962. Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119, 1122 ("the Act"). In interpreting the term "covered matter" in § 205, it is therefore appropriate to consider the language and structure of the other ethics provisions contained in the same section of the Act. The portions of the Act codified at 18 U.S.C. §§ 203, 207-208 all restrict employees' conduct in connection with "particular matters" or a list of matters essentially identical to that in § 205(h). [4]

[4] As originally enacted, § 205 prohibited any employee of the United States from acting as an agent or attorney before any agency or department "in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular

We find the Office of Government Ethics' regulations and the opinions of this Office construing § 208 especially helpful in interpreting the term "covered matter" in § 205. Section 208 prohibits any executive branch officer or employee from participating "personally and substantially" in any "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" in which he has a "financial interest." 18 U.S.C. § 208(a). Like § 205, § 208 is designed to prevent a government employee from misusing his official position to advance the interest of a non-governmental entity. In addition, the list describing the official actions covered by § 208 contains all but one of the terms listed as "covered matters" in § 205. *Compare* § 208(a) (the term "investigation" is not among the listed matters) to § 205(h).

The Office of Government Ethics has issued regulations defining the term "particular matter" for the purposes of § 208. In those regulations, "particular matter" is defined as

> encompass[ing] only matters that involve deliberation, decision, or action that is *focused upon the interests of specific persons, or a discrete and identifiable class of persons.* Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, *does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.*

5 C.F.R. § 2635.402(b)(3) (1994) (emphasis added).

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matter " 76 Stat at 1122. The term "covered matter" was introduced in the 1989 amendments to the statute, which also divided § 205 into lettered subsections Ethics Reform Act of 1989, Pub L No. 101-194, § 404, 103 Stat. 1716, 1750. The language sanctioning a federal employee who acts as an agent or attorney was placed in subsection (a), and modified to prohibit acting as an agent or attorney "in connection with any covered matter." The list of terms beginning with "proceeding, application, request for a ruling" was moved to the definition of "covered matter" in subsection (h) *Id.*

Section 203 prohibits federal employees from seeking or accepting compensation for any representational service "in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest " 18 U.S.C § 203(a)(1).

Section 207(a) restricts former employees of the executive branch from appearing before or communicating to federal employees "in connection with a particular matter" in which the former employee "participated personally and substantially " A "particular matter" is defined as including "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." *Id* § 207(i)(3).

OGE has applied the same standard in construing the terms in § 205. In their advisory opinion, OGE noted that

> there may be situations where a member of an employee organization wishes to represent the organization to the Government on a matter which is not a "particular matter" within the meaning of § 205. In such a case, the representation would be made *in connection with a broad policy matter that is directed to the interests of a large and diverse group of persons rather than one that is focused on the interests of a discrete and identifiable class.*

OGE Opinion at 4 (emphasis added).

With the OGE advice and regulations as guidance, we look also to our own opinions examining the scope of the term "particular matter" as used in § 208. In an unpublished 1990 opinion, this Office addressed that question in some detail. Memorandum for C. Boyden Gray, Counsel to the President, from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. § 208 to General Policy Deliberations, Decisions and Actions* (Aug. 8, 1990) ("Gray Memorandum"). That analysis was driven by the principle of *ejusdem generis*, the canon which directs that "'a general statutory term should be understood in light of the specific terms that surround it.'" *Id.* at 3 (quoting *Hughey v. United States*, 495 U.S. 411, 419 (1990)). To determine the scope of the term "particular matter" in § 208, it was therefore necessary to ascertain the common characteristics of the more specific matters enumerated in the list of covered matters in § 208(a): a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter. Each of these specific terms, we concluded, involves a determination of the interests of "specific individuals or entities, or a discrete and identifiable class of individuals or entities." *Id.* at 5. "'The purpose of this [particular matter] language throughout the federal conflict of interest laws is to limit application of the laws to actions focusing upon particular, distinct, and identifiable sets of facts with reasonably measurable implications and consequences.'" *Id.* at 5 n.8 (quoting R. Jordan, *Ethical Issues Arising From Present or Past Government Service, in Professional Responsibility* 171, 177 (1978)).

To illustrate these principles, that opinion observed:

> [The] decision to pursue an administrative enforcement action against a specific company or group of companies is sufficiently focused upon the interests of a specific entity or a discrete and identifiable group of entities as to be comparable in particularity to an "investigation," a "judicial proceeding," or a "contract" negotiation. . . . In contrast, deliberations on the general merits of an omnibus

> bill, such as the Tax Reform Act of 1986, are too diffuse in their focus to be analogous to an "application," "request for a ruling," or a "claim . . . ." In sum, whether or not the object of deliberation, decision, or action constitutes a "particular matter" will depend upon how closely analogous the object of deliberation, decision, or action is to the object of a typical "judicial proceeding," "claim," "application," or other matter enumerated in section 208.

Id. at 6. We also noted that "governmental action such as legislation or policymaking that is *narrowly focused upon the interests of a specific industry or a specific profession* is concerned with a 'discrete and identifiable class' and may implicate section 208." *Id.* at 7 (emphasis added).

Applying these principles, we consider whether representations on behalf of NAAUSA would constitute "covered matters" under § 205.

B. *Are NAAUSA's Objectives Particular Matters?*

None of the correspondence we have seen between NAAUSA and the EOUSA identifies specific topics for discussion between NAAUSA and department officials. We are of the opinion that many of the issues listed as "immediate objectives" in NAAUSA's promotional materials, including those focusing upon the terms and conditions of employment for AUSAs, would qualify as "covered matters" under § 205.

AUSAs are a "discrete and identifiable class" by virtue of their employing agency, their profession, and their position. *See* Gray Memorandum at 7 (governmental action such as legislation or policymaking that is narrowly focused upon the interests of a specific industry or a specific profession is concerned with a "discrete and identifiable class"). Whether particular legislation or policy determinations constitute "covered matters" will depend upon how closely the matter focuses upon the interests of AUSAs and upon whether the determination can be expected to have a direct and predictable effect on those interests. The inquiry is necessarily fact specific and not susceptible to bright line rules.

With that caveat, we are able to draw some general conclusions. The compensation and workplace issues NAAUSA has identified as priorities for action will generally be covered matters under § 205. Any determination or legislation that addressed topics such as raising the AUSA salary cap, improving AUSA retirement benefits, reinstating immunity for federal prosecutors, or allowing unscheduled overtime bonuses for AUSAs would be focused exclusively on the interests of the class of AUSAs.

It is not as clear that discussions of general policy, such as the Crime Bill, would inevitably be particular matters. It would be necessary to analyze the factual context using the principles outlined above. For example, the question of the ap-

propriate emphasis that the Department should place on prevention programs may not sufficiently focus on the interests of AUSAs to be deemed a particular matter, while addressing a provision that would increase the number of prosecutors probably would.

It may thus be possible for department officials to meet with employee representatives of NAAUSA to discuss certain broad policy issues. All parties should be aware of the limitations § 205 imposes on the discussion before such a meeting, and the agenda should be reviewed to ensure that the discussion does not reach "covered matters."

IV. *The Covington Memorandum*

Upon learning that this Office would be drafting an opinion analyzing the application of § 205 to communications with NAAUSA representatives, NAAUSA's counsel submitted a memorandum for our consideration explaining why in their view the restrictions of § 205 do not apply. *See* Memorandum for Carol DiBattiste, Director, Executive Office for U.S. Attorneys, from Sean F. Foley, Counsel to NAAUSA, Covington & Burling (Sept. 13, 1994) ("Covington Memorandum"). This section addresses the reasoning of that memorandum.

NAAUSA's counsel makes three broad arguments that § 205 should not apply to activities undertaken on behalf of NAAUSA. First, since the interests of the officers and members of NAAUSA are the interests of AUSAs *qua* AUSAs (or former AUSAs), the interests served by contacts between NAAUSA and department officials do not involve the outside, private interests that Congress sought to restrict in § 205. Covington Memorandum at 6. Second, it is argued that the contacts by NAAUSA involve "generalized legal and policy issues and do not pertain to the day-to-day departmental proceedings covered by § 205." *Id.* at 7; *see also* discussion *infra* at p. 4. Finally, Covington argues that interpreting § 205 to restrict contacts between members of a professional association and employing agencies would be inconsistent with the practice of the Federal Government as evidenced by association participation in the National Performance Review, the activities of the member associations of the Public Employees Roundtable, and the absence of any discussion of § 205 in the chapters of the rescinded Federal Personnel Manual which encouraged agencies to cultivate a working relationship with professional associations. *Id.* at 8-9.

A. *"Outside Interests" and the Policy Underlying § 205*

We agree with NAAUSA's counsel that the purpose of § 205 is to prohibit a Federal employee from representing outside, private interests. We do not agree with his contention that NAAUSA should not be considered an "outside" interest. As a non-profit corporation with an independent legal identity, NAAUSA is a pri-

vate entity with interests that are distinct from those of the Department and its members. NAAUSA has an institutional interest in raising funds, attracting new members, increasing its visibility to the public, and building a reputation as a credible, influential body. Gaining access to government decisionmakers serves these institutional interests, which cannot be characterized as internal to the Department. Nor are these institutional interests necessarily identical to its members' interests as present or former department employees.

The structure of § 205 contradicts the contention that Congress did not intend for the prohibition of § 205(a) to cover contacts related to employment matters. If this were the case, there would have been no need to include the exception for representation of employees in "personnel administration proceedings" in § 205(d). Moreover, as explained in section II.B, this exception cannot be fairly extended to cover representing a corporation or association, even one entirely composed of covered employees.

B. *NAAUSA's Objectives are not Covered Matters*

The Covington Memorandum does not address the "particular matter" language in § 208 and the accompanying regulations. Counsel for NAAUSA relies instead on the language of § 207, portions of which forbid conduct related to "particular matters" while others apply to "any matter on which such person seeks official action." *Id.* at 5 (comparing 18 U.S.C. § 207(i)(3) to § 207(c)&(d)). Given the use of both terms in § 207, that memorandum argues that Congress could not have meant for the term "particular matter" to include "every matter in which a Federal employee might become involved in a representational capacity" in § 207, nor by analogy in §§ 205 or 203. *Id.*

We agree with the conclusion that matters such as the formulation of broad policy are not necessarily "particular matters" under § 205. As OGE stated in their opinion, "[i]n such a case, the representation would be made in connection with a broad policy matter that is directed to the interests of a large and diverse group of persons rather than one that is focused on the interests of a discrete and identifiable class." OGE Opinion at 4. A definition of "particular matter" which is limited to actions affecting a "discrete and identifiable class" is narrower in scope than the language "any matter on which such person seeks official action" in § 207, and is consistent with previous constructions of "particular matter" under § 208 and its regulations.

The Covington Memorandum does not specify the "legal and policy positions affecting AUSAs" that NAAUSA is interested in communicating. Determinations regarding the compensation, pensions, or working conditions of AUSAs, which have been identified as NAAUSA objectives in NAAUSA publications, would constitute covered matters under this definition. Any agent representing NAAUSA

in the discussion of such matters should therefore not be a current federal employee.

C. *Inconsistency with Federal Government Practice*

The Covington Memorandum argues that interpreting § 205 as restricting contacts between agency officials and professional associations would be inconsistent with the practice of several federal agencies and groups, including the participation of associations in the National Performance Review, the activities of the Public Employees Roundtable associations, and the guidelines provided by former chapters 251 & 252 of the Federal Personnel Manual. We are not familiar with the procedures of the National Performance Review or of other federal agencies with respect to communications with professional organizations. Compliance with § 205 would not necessarily preclude achieving the objectives of the National Performance Review. An employee's participation in a working group or management committee structured along the lines of the Attorney General's Advisory Committee could be undertaken pursuant to his official duties. Section 205 would not restrict that employee from representing the views of his colleagues or of his office in that forum.

We have reviewed the former chapter 252 of the Federal Personnel Manual, which did indeed note that "an agency may consult with any association or organization on matters related to its mission and programs" and that "the relationship between the agency and the association or organization may be very close and mutually beneficial" without any mention of § 205 and its restrictions on communications. Federal Personnel Manual, ch. 252 at 3-4 (Jan. 16, 1990). These statements are consistent with our conclusion that such an organization may make its views known to the Department or meet with Department officials through the organization's staff or members who are not government employees. However, it is a sufficient response to the argument in the Covington Memorandum to state that the Department and its employees cannot avoid complying with a criminal statute simply because it is not mentioned in the Federal Personnel Manual.

CONCLUSION

We agree with the Office of Government Ethics that there is no general exception for employment related matters or employee associations from the restrictions of § 205. A deliberation, decision, or action focused upon the interests of AUSAs or another discrete and identifiable class would be a "covered matter," and accordingly, communications between a current federal employee acting as a representative of NAAUSA and the Department on those matters would violate the statute.

Section 205 is not an impediment to several other kinds of communications between the Department and NAAUSA or similar associations. The Department is in no way precluded from dealing with individual or groups of AUSAs in their official capacities on matters affecting AUSAs, even if those AUSAs are coincidentally members of NAAUSA. Nor does § 205 place any restrictions on representatives who are not current federal employees, such as NAAUSA's executive director or any former AUSAs no longer employed by the government. Finally, discussions of broad policy directed towards a large and diverse group of persons would be permissible under the statute.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Congressional Testimony of an Assistant United States Attorney on Behalf of the National Association of Assistant United States Attorneys

The Department of Justice correctly takes the position that it may not prohibit an Assistant United States Attorney from testifying before Congress in his or her personal capacity on behalf of the National Association of Assistant United States Attorneys.

The Department's rules regulating such testimony are consistent with the First Amendment Those rules require that the AUSA make it clear that he or she is not speaking for the Department, avoid using or permitting the use of his or her official title or position in connection with the testimony (except as one of several biographical details), and comply with rules on the protection of confidential information

November 7, 1994

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked for our opinion on certain issues pertaining to testimony by an Assistant United States Attorney ("AUSA") on legislation in which the Department has an interest, where the AUSA is not authorized to speak on behalf of the Department but rather is appearing in a personal capacity on behalf of the National Association of Assistant United States Attorneys ("NAAUSA"). We conclude that the Department's position, that it may not prohibit an AUSA from testifying before Congress in his or her personal capacity, is correct. We also conclude that the rules that regulate such testimony are consistent with the First Amendment. Those rules require that the AUSA make it clear that he or she is not speaking for the Department, avoid using or permitting the use of his or her official title or position in connection with the testimony (except as one of several biographical details), and comply with rules on the protection of confidential information.

I. *Protection Afforded by the First Amendment*

The Supreme Court's approach for reviewing government restrictions on the exercise of First Amendment rights by their employees involves a balancing of employee and governmental interests. Because balancing tests by their nature turn on the facts of specific situations, for purposes of this memorandum we will analyze hypothetical congressional testimony by an AUSA on behalf of NAAUSA that would oppose a crime bill supported by the Department and recommend a different allocation of funds within the Department's appropriations bill than that requested by the Department.

Although the government obviously cannot prevent private citizens from presenting views on pending legislation, "the government's role as employer . . . gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large. . . . [T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (O'Connor, J., plurality opinion). As Justice O'Connor has recently explained,

> the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Id. at 674-75. The balancing test that the Supreme Court applies in reviewing regulation of speech by government employees is well established:

> There is no dispute . . . about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Id. at 668 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).[1]

Justice O'Connor has noted that while "a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, [the Court has] never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." *Waters v. Churchill*, 511 U.S. at 672. In its starkest terms, the question presented by the hypothetical we are addressing is whether this principle applies to an AUSA testifying about the crime bill on be-

[1] In adopting this balancing test that accommodates both governmental interests and employee speech rights, the Court has "rejected Justice Holmes' approach to the free speech rights of public employees, that '[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892)).

half of NAAUSA. A review of relevant Supreme Court decisions strongly suggests that the Court would hold that it does not.

Before any balancing is undertaken, the court must be satisfied that the speech in question was on a matter of public concern. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. at 146. The Court held in *Connick* that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," review of the government employer's actions in a federal court is unwarranted in the absence of "the most unusual circumstances." *Id.* at 147.

This threshold "matter of public concern" requirement is easily met in the NAAUSA testimony hypothetical. Testimony before Congress about pending legislation is by its very nature a matter of public concern. The Department's appropriations legislation, which sets forth the relative priority of the Department's various missions, obviously is of public concern, and testimony by Department prosecutors about a crime bill would appear to be of particularly high public concern, given the weight that can be given the expert views of federal prosecutors. These considerations are significant when balancing the strength of the AUSA's interest in giving the testimony against the Department's interest in preventing its employees from testifying in ways that are inconsistent with, and potentially undercut, the Department's position on the legislation. Two Supreme Court decisions are particularly relevant to that balancing.

In *Pickering*, the seminal public employee speech case, the Court held that a board of education's dismissal of a teacher for writing a letter to the editor of the local newspaper criticizing the board's communication to taxpayers related to several bond issues and its allocation of resources between athletic and educational programs violated the teacher's First Amendment rights. The first part of the Court's analysis rejected the board's argument that a government employee's duty of loyalty requires that he avoid public comments critical of the employer. The Court found that the teacher's statements were "in no way directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here." 391 U.S. at 569-70. Nor were the teacher's relationships with the board or the school superintendent "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. This part of the Court's analysis in *Pickering* suggests that the Department could not make employee loyalty a significant part of an argument justifying the suppression of the hypothetical NAAUSA testimony.

Of even greater significance for the NAAUSA hypothetical is the part of the Court's analysis in *Pickering* that focused on the public interest in the difference of opinion between the teacher and the board concerning the school system's budget, including specifically the disagreement over the allocation of funds between athletics and academics. The Court opined that a school system's budget

> is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72. The Court concluded that the principle that "the government as employer . . . has far broader powers than does the government as sovereign" (*Waters*, 511 U.S. at 671) was inapplicable to the facts of the case: "we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S. at 573.

The Court's strong statement in *Pickering* on the important contribution teachers can make to public debate on a school system's budget is directly pertinent to our consideration of the hypothetical NAAUSA testimony. Just as teachers are "the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," we expect that the Court would conclude that the line prosecutors represented by NAAUSA have such "informed and definite opinions" on matters addressed in the crime bill and on "how funds allotted to the operation of the [Department] should be spent" that they must be allowed "to contribute to public debate."

The view that the hypothetical NAAUSA testimony would be speech protected by the First Amendment is also supported by the Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972). Citing *Pickering*, the Court held in *Perry* that a complaint stated a First Amendment violation by alleging that a state college terminated the employment of a professor (who was also president of a teachers' association) in retaliation for his legislative testimony and other public statements disagreeing with the policies of the college administration. *Id.* at 598. It appears to us that the hypothetical testimony by an AUSA as an officer of an association of AUSAs presenting views in conflict with those expressed by the Department is on

all fours with the facts of *Perry*, which involved testimony by a teacher as president of a teacher's association disagreeing with the employer's policies.

Not only would it be difficult to distinguish the NAAUSA testimony from the speech held protected by the First Amendment in *Pickering* and *Perry*, it is also unclear whether the Court would even consider the Department's interest in pending crime and appropriations bills to constitute an interest that would qualify as a "government as employer" interest under the Court's balancing test: that is, an "interest of the [Department], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Since the public service of the Department in this circumstance is influencing Congress's consideration of legislation, the Department's interest as employer would appear to extend only to employees that participate in that service. Thus, the Department may have the right to require employees of the Office of Legislative Affairs or witnesses the Department chooses as its representatives to adhere to Department positions (just as it has the right to require AUSAs to adhere to Department litigation positions when they appear in court on behalf of the Department), but it is questionable whether the Department has that right with respect to individuals who do not perform functions in connection with the Department's legislative activities.[2]

In sum, whether it is because the Court would invoke the *Pickering* rationale and find that the Department's interest "in limiting [AUSAs'] opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public," 391 U.S. at 573, or because the Court would simply find that the Department's interest is not of the kind recognized under the balancing test, we believe that it is almost certain that the Court would hold the hypothetical NAAUSA testimony to be protected speech. Although the question might be closer in circumstances involving testimony on matters on which the views of AUSAs might not be deemed to be of significant congressional interest, we do not view this hypothetical as presenting a close question.

II. *Limited Restrictions on the Content of the Testimony*

Although the Department generally may not prohibit AUSAs from testifying before congressional committees in their personal capacities on legislation of interest

[2] Moreover, as a factual matter, so long as it is clear that AUSAs testifying on behalf of NAAUSA are not presenting the views of the Department, it does not appear that the Department's ability to discharge its function of presenting Department and Administration views would be significantly compromised. While it may be that the expression of inconsistent views could affect the legislative outcome, that would be the result of the "free and open debate [that] is vital to informed decision-making by the [Congress]," *Pickering*, 391 U.S. at 571-72, not the Department's inability to discharge its responsibilities.

to the Department, we do not believe that the First Amendment makes impermissible the Department's traditional position that its employees must protect confidential information and must make clear that they are not speaking in their official capacities.

The Department has a legitimate need to ensure that the Department speaks with one voice concerning official positions and a significant responsibility to protect confidential Department information. In furtherance of these Department interests, the Department provides standard instructions to current (and sometimes former) employees of United States Attorneys' offices who testify before Congress concerning Department matters, whether in their official or personal capacities. *See, e.g.*, Letter for Lawrence J. Leiser, Esq., from Anthony C. Moscato, Director, Executive Office for United States Attorneys (May 2, 1994). The instructions specify that the AUSAs are not authorized to appear in their official capacity as an AUSA and that they have no authority to speak for the Department or their United States Attorney's Office.[3] They include a request that the employee make it clear, both at the beginning of the testimony and when questions of opinion arise, that the employee's opinions are personal and do not constitute an official position of the Department.

The standard instructions encourage AUSAs to answer fully and candidly all questions concerning matters within their personal knowledge. They stress in addition, however, that the appearance before the congressional committee does not relieve the employees of any obligations of secrecy that arise from their official duties as AUSAs. They give examples of the types of information that should not be revealed and direct that requests for Department records be referred to the Office of Legislative Affairs. The instructions conclude with the admonition that:

> You should be aware at all times of your obligations to be truthful and fair in responding to questions posed to you during the [testimony]. You should also carefully consider the scope of your answers in light of all requirements of law, rule, policy, and ethical standards, whether specifically discussed in this letter or not.

Id. at 2. To the limited extent that such efforts curtail speech by Department employees, the effect is to protect confidential Department information that employees are not free to disclose. Such efforts to ensure that the Department speaks with one voice and to protect confidential Department information fall squarely within the enhanced regulatory power the Department has as employer and are consistent with the First Amendment.

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[3] *See United States Attorneys' Manual*, Ch 8, § 1-8.040 ("The Attorney General reserves the right to determine whether the Department will be represented at any Congressional hearing and, if so, who will appear on behalf of the Department ").

An AUSA who testifies in his or her personal capacity is also subject to government-wide ethics regulations which prohibit the AUSA from using or permitting the use of his or her official title or position in connection with the testimony except as one of several biographical details. Office of Government Ethics regulations provide that

> an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When . . . speaking . . . in a personal capacity, he may refer to his official title or position only as permitted by § 2635.807(b).

5 C.F.R. § 2635.702(b) (1994). The only permissible reference to official title or position is that "[a]n employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his . . . speaking . . . , provided that his title or position is given no more prominence than other significant biographical details." 5 C.F.R. § 2635.807(b)(1) (1994).

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Whether Uruguay Round Agreements Required Ratification as a Treaty

The Uruguay Round Agreements concluded under the auspices of the General Agreement on Tariffs and Trade did not require ratification by the Senate as a treaty, but could constitutionally be executed by the President and approved and implemented by Act of Congress

November 22, 1994

MEMORANDUM OPINION FOR THE
UNITED STATES TRADE REPRESENTATIVE

This memorandum supplements our earlier opinion on the question whether the Uruguay Round Agreements concluded under the auspices of the General Agreement on Tariffs and Trade (the "GATT") must be ratified as a treaty.[1] It replies to two later papers by Professor Laurence H. Tribe, and his testimony before the Senate Committee on Commerce, Science, and Transportation, that have disputed our conclusion on that subject.[2] After considering Professor Tribe's arguments, we again conclude that the Uruguay Round Agreements may constitutionally be adopted by the passage of implementing legislation by both Houses of Congress, together with signing by the President.

I. The Treaty Clause

Professor Tribe argues that there exists, for constitutional purposes, "a discrete subset of international agreements properly categorized as treaties."[3] Professor

[1] *See* Memorandum for Ambassador Michael Kantor, U S Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re· Whether the GATT Uruguay Round Must be Ratified as a Treaty* (July 29, 1994) (the "OLC GATT Memorandum"). The GATT originated in 1947 *See* 61 Stat. A-3, T I.A S No. 1700 "Essentially the GATT is now a group of some 200 treaties consisting of very complex amendments, side codes, special agreements and so on" *What's Needed for the GATT After the Uruguay Round?*, Remarks by John H Jackson, 1992 Proc Am. Soc'y Int'l L 69, 71. In 1979, Congress approved fourteen trade agreements on matters ranging from antidumping and government procurement to a bilateral trade agreement with Hungary *See* 19 U.S.C. § 2503. The Uruguay Round Agreements include successor agreements to many of these prior trade agreements

[2] *See* Letter for the President from Professor Laurence H. Tribe (Sept 12, 1994) (the "Tribe Letter"), Memorandum for Walter Dellinger, Abner J Mikva, George J. Mitchell and Robert Dole, from Laurence H. Tribe, *Re The Constitutional Requirement of Submitting the Uruguay Round as a Treaty* (Oct. 5, 1994) (the "Tribe GATT Memorandum"), *S. 2467, GATT Implementing Legislation. Hearings Before the Senate Comm on Commerce, Science, and Transportation*, 103d Cong (1994) (Prepared Statement of Laurence H Tribe, Professor, Harvard University Law School) (the "Tribe Prepared Statement") The bulk of the Tribe GATT Memorandum, and parts of the Tribe Prepared Statement, are devoted to criticizing the views of Professors Bruce Ackerman and David Golove in their Letter to the President (Sept 21, 1994), and in a forthcoming book. We take no position in the dispute among Professors Tribe, Ackerman and Golove

[3] Tribe GATT Memorandum at 2.

Tribe "readily admit[s]," however, "that the Constitution itself provides little guidance about the content of this category."[4] He also concedes that "[t]he Supreme Court has never addressed directly the constitutionality of using the congressional-executive agreement to deal with matters that fall within the Constitution's 'treaty' category."[5] Nor does he attempt "to construct any sort of general test for determining whether any given agreement should be considered a treaty."[6] Despite that, Professor Tribe insists that "[the Uruguay Round] warrants the high level of deliberation and consensus that the formal requirements of the Treaty Clause guarantee."[7]

Like Professor Tribe, we find that neither the text of the Constitution, nor the materials surrounding its drafting and ratification, nor subsequent Supreme Court case law interpreting it, provide clear-cut tests for deciding when an international agreement must be regarded as a "treaty" in the constitutional sense, and submitted to the Senate for its "Advice and Consent" under the Treaty Clause, U.S. Const. art. II, § 2, cl. 2.[8] In such circumstances, a significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the executive and legislative branches acting together. *See, e.g., The Pocket Veto Case*, 279 U.S. 655, 689-90 (1929) ("[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. Compare . . . *State v. South Norwalk*, 77 Conn. 257, 264 [(1904)], in which the court said that a practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'"); *Youngstown Sheet & Tube Co.*

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[4] *Id* at 17

[5] *Id* at 12

[6] *Id.* at 17, *see also* Tribe Prepared Statement at 310 ("I do not offer a comprehensive set of criteria for defining the boundary between treaties and other international agreements . . . ").

[7] Tribe GATT Memorandum at 20, *see also* Tribe Prepared Statement at 310

[8] Professor Tribe has invented his own five-part test for concluding that the Uruguay Round Agreements must be considered a treaty in the constitutional sense *See* Tribe GATT Memorandum at 19-20; *see also* Tribe Prepared Statement at 310 (four-factor test) The suggested criteria might provide useful guidelines to executive branch policymakers in deciding whether to submit an international agreement to the Senate for its concurrence rather than to Congress as a whole, but we see no reason to think that Professor Tribe's tests are *constitutionally* compelled (Further, Professor Tribe's application of his own tests rests on erroneous assumptions about the powers of the World Trade Organization and the effects of the Uruguay Round Agreements. *See* Part III below)

Professor Tribe also notes that the State Department has its own longstanding guidelines for advising policymakers when to consider an international agreement to be a treaty requiring Senate concurrence. *See* Tribe GATT Memorandum at 18-19 (citing State Dep't Circular 175 (Dec 13, 1955), as amended, 11 Foreign Affairs Manual, ch. 700, § 721 3) By Professor Tribe's own showing, however, the application of these guidelines to the Uruguay Round Agreements is inconclusive, even accepting Professor Tribe's analysis, only four of the eight factors on the State Department's list support the view that Senate concurrence should be obtained for the Uruguay Round Agreements Tribe GATT Memorandum at 18. Moreover, the State Department's guidelines are not intended to be constitutional *tests* determining whether or not an international agreement must be ratified as a treaty, but rather to articulate the *policy* considerations that the executive branch should follow in deciding what procedures to follow with regard to such agreements

v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature."). Indeed, the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions that involve foreign relations. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *see also* Harold H. Koh, *The National Security Constitution* 70-71 (1990) (historical precedent serves as "quasi-constitutional custom" in foreign affairs); Griffin B. Bell & H. Miles Foy, *The President, the Congress, and the Panama Canal: An Essay on the Powers of the Executive and Legislative Branches in the Field of Foreign Affairs*, 16 Ga. J. Int'l & Comp. L. 607, 640-41 (1986); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. Chi. L. Rev. 463, 478 (1976).

Such practical construction has long established (and Professor Tribe acknowledges) that "there are many classes of agreements with foreign countries which are not required to be formulated as treaties" for constitutional purposes.[9] Most pertinently here, practice under the Constitution has established that the United States can assume major international trade obligations such as those found in the Uruguay Round Agreements when they are negotiated by the President and approved and implemented by Act of Congress pursuant to procedures such as those set forth in 19 U.S.C. §§ 2902 & 2903.[10] In following these procedures, Congress acts under its broad Foreign Commerce Clause powers,[11] and the President acts pursuant to his constitutional responsibility for conducting the Nation's foreign affairs.[12] The use of these procedures, in which both political branches deploy sweeping constitutional powers, fully satisfies the Constitution's requirements; the Treaty Clause's provision for concurrence by two-thirds of the Senators present is not constitutionally mandatory for international agreements of this kind.[13]

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[9] *Validity of Commercial Aviation Agreements*, 40 Op. Att'y Gen. 451, 452 (1946), *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), Tribe GATT Memorandum at 2-3.

[10] For a survey of the various statutory régimes relating to international trade agreements in the period from 1930 onwards, *see* Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. Int'l L. & Pol. 1191, 1192-1208 (1986). On Congressional-Executive agreements generally, *see* Kenneth C. Randall, *The Treaty Power*, 51 Ohio St. L.J. 1089, 1093-96 (1990).

[11] *See* U.S. Const. art. I, § 8, cl. 3; *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 329 (1994), *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 59 (1974). The Treaty Clause should not be interpreted to curtail Congress's power under the Foreign Commerce Clause. *See Downes v. Bidwell*, 182 U.S. 244, 313 (1901) (White, J., joined by Shiras and McKenna, JJ., concurring), *id.* at 370 (Fuller, C.J., joined by Harlan, Brewer and Peckham, JJ., dissenting).

[12] *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)), *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976) ("the conduct of [foreign policy] is committed primarily to the Executive Branch"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (President is "the constitutional representative of the United States in its dealings with foreign nations.").

[13] Although we insist on the variety of legal instruments by which the United States may make agreements with foreign nations, we do not dispute Professor Tribe's view that some such agreements may have to

Professor Tribe recognizes the existence of these decades-old practices, which have resulted in the approval of such fundamental trade pacts as the North American Free Trade Agreement (the "NAFTA").[14] But he disparages the use of Congressional-Executive agreements as merely a matter of "political leaders' casual approach to the Constitution."[15] This dismissive characterization gives virtually no weight to the considered constitutional judgments of the political branches.[16] We believe that that approach is mistaken. Disagreements and uncertainties surrounding the scope of the Treaty Clause — including its interaction with Congress's power to regulate commerce — are two centuries old. *See below.* Congress's Foreign Commerce Clause authority and the President's responsibility for foreign affairs are unquestionably broad. In such circumstances, the political branches can fairly conclude — and have in fact concluded — that even major trade agreements such as the Uruguay Round Agreements may be approved and implemented by Acts of Congress, rather than ratified as treaties.[17] Indeed, Professor Tribe himself wrote in 1988 that "it does appear settled that a hybrid form of international agreement — that in which the President is supported by a Joint Resolution of Congress — *is coextensive with the treaty power.* Such Congressional-Executive

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be ratified as treaties. Thus, Professor Tribe is incorrect in asserting that we believe that the treaty ratification process and the ordinary legislative process are interchangeable *See* Tribe GATT Memorandum at 3 On the contrary, we explicitly stated that we were not considering that claim *See* OLC GATT Memorandum at 4-5 n 8 (Indeed, as Professor Tribe points out, the State Department's guidelines in Circular 175 themselves attest to the executive branch's view that some international agreements should be considered to be treaties. *See* Tribe Prepared Statement at 298.) Moreover, absolutely nothing in the OLC GATT Memorandum implies that "the Treaty Clause is to be read out of the Constitution " Tribe Letter at 3 Whatever may be true of other international agreements such as the United Nations Charter, *see* Tribe GATT Memorandum at 8, our contention is only that trade agreements such as the Uruguay Round Agreements do not require ratification as "treaties "

[14] *See* Tribe GATT Memorandum at 7 The Tribe Prepared Statement specifically questions the constitutionality of two earlier free trade agreements — NAFTA and the 1988 Free Trade Agreement with Canada. *Id.* at 14 In the earlier Tribe GATT Memorandum, however, Professor Tribe wrote that NAFTA "is surely less sweeping in its scope [than the Uruguay Round Agreements] and at most shows that the Uruguay Round might represent the second, even if not the first, agreement of its kind that became law without Senate ratification " *Id.* at 8 In view of his varying statements, we are uncertain of the status of *existing* trade agreements — NAFTA, the Canadian Free Trade Agreement, the 1979 Tokyo Round, and the United States-Israel Free Trade Agreement — on Professor Tribe's theory

[15] Tribe GATT Memorandum at 11, *see also id* at 2 ("prior manifestations of a casual attitude toward the Constitution's structural requirements are insufficient in this context to justify abandoning the precise guarantees of the Treaty Clause").

[16] Professor Tribe himself acknowledges that "[t]he issue whether major international agreements should be submitted for majority approval by Congress or for supermajority approval by the Senate was the topic of fierce debate in the halls of Congress, the popular press, and the pages of law reviews during the 1940s." Tribe GATT Memorandum at 6 In light of that vigorous and protracted debate, it is strange that Professor Tribe should dismiss the political branches' practice as a mere matter of "political convenience " *Id* at 11

[17] If the Senate believed that this practice trenched on powers that belong to it, then it had "both the incentive to protect its prerogatives and institutional mechanisms to help it do so." *United States v Muñoz-Flores*, 495 U.S 385, 393 (1990) The fact that it has not done so "is relevant to the substantive task of interpreting" the Treaty Clause *Id* at 404 n 2 (Stevens, J., concurring in judgment) It is not at all unlikely that the Senate might guard against perceived encroachments on its constitutional prerogatives: as Professor Tribe notes, the Senate has in other recent contexts insisted on its claimed prerogatives under the Treaty Clause. *See* Tribe GATT Memorandum at 3 (Vienna Convention); *see also* Harold H Koh, *The National Security Constitution* at 43 (Anti-Ballistic Missile Treaty)

agreements are the law of the land, superseding inconsistent state or federal laws." Laurence H. Tribe, *American Constitutional Law* 228 n.18 (2d ed. 1988) (emphasis added).

Historically, the scope of the Treaty Clause, and its interplay with other constitutional clauses, have provoked controversies of several different kinds. The persistence of these controversies (which trace back to the eighteenth century), and the nearly complete absence of judicial decisions resolving them, underscore the necessity of relying on congressional precedent to *interpret* the relevant constitutional provisions. No one could deny that "congressional practice alone cannot justify abandonment of the Constitution's structural provisions,"[18] but it begs the question to assume that the treaty ratification process *is* structurally required by the Constitution in cases such as this.[19] Like other "great ordinances of the Constitution," the Treaty Clause "do[es] not establish and divide fields of black and white." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., joined by Brandeis, J., dissenting).

One recurring kind of dispute over the Treaty Clause has been whether international agreements could be given effect by Executive action alone, or whether they required submission to the Senate for its concurrence. *See, e.g.*, 2 *Messages and Papers of the Presidents* 33 (James D. Richardson ed., 1896) (President Monroe's message to the Senate of April 6, 1818, expressing uncertainty whether the Executive alone could make an international agreement for the naval disarmament of the Great Lakes, or whether Senate advice and consent was required).[20] A second type

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[18] Tribe Prepared Statement at 299

[19] Professor Tribe's repeated invocation in this connection of *INS v Chadha*, 462 U S 919 (1983), which invalidated the one-House "legislative veto," is not to the point *See, e g* , Tribe Prepared Statement at 299-300, Tribe GATT Memorandum at 10-11 First, the *Chadha* Court found Article I's provisions for bicameral passage of legislation and its presentment to the President, which it held offended by the legislative veto, to be "[e]xplicit and unambiguous " 462 U S at 945. That cannot be said of the Treaty Clause, whose meaning and scope have long been found to be highly indeterminate. Second, the Executive, albeit not invariably, had long taken the position that the legislative veto violated separation of powers principles. *See id.* at 969-74 (White, J., dissenting); *see also Reprogramming—Legislative Committee Objection*, 1 Op O.L.C 133, 135 (1977) (Indeed, the Senate Judiciary Committee, after careful historical study, reached a similar conclusion *See* S Rep. No 54-1335, at 8 (1897).) By contrast, the practice of submitting major trade pacts as Congressional-Executive agreements has obviously required the approval of the Senate — the constitutional actor whose prerogatives Professor Tribe asserts have been jeopardized Finally, *Chadha* certainly does not imply that the longstanding practices of the political branches are *irrelevant* to the interpretation of the Constitution

We also note that while it is generally true that legislative precedent is most persuasive when it can be traced back to the Nation's founding, *see* Tribe GATT Memorandum at 10, Tribe Prepared Statement at 299, the Court's case law on the subject is in fact more complex than Professor Tribe indicates Even early legislative decisions may have violated the Constitution, *see, e g., New York Times Co v Sullivan*, 376 U S. 254, 276 (1964) (Sedition Act of 1798 violated First Amendment). On the other hand, in *United States v Midwest Oil Co.*, 236 U.S. 459 (1915), the Court upheld an 80-year old Presidential practice of temporarily withdrawing public lands from entry despite the absence of any express grant of authority for the practice It stated that "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation." *Id* at 473

[20] President Monroe's uncertainty over the scope and meaning of the Treaty Clause is particularly striking, given that he himself had spoken to the Treaty Clause in the Virginia Ratifying Convention *See* 9 *The*

of recurring dispute, more pertinent here, centered on the respective powers of the Senate and the House of Representatives in such areas as the regulation of foreign trade, where different clauses of the Constitution assign responsibilities either to one House alone or to both Houses together. As Secretary of State Dulles explained in testimony before the Senate Judiciary Committee in 1953, there is an

> undefined, and probably undefinable, borderline between international agreements which require two-thirds Senate Concurrence, but no House concurrence, as in the case of treaties, and agreements which should have the majority concurrence of both Chambers of Congress. . . . This is an area to be dealt with by friendly cooperation between the three departments of Government which are involved, rather than by attempts at constitutional definition, which are futile, or by the absorption, by one branch of Government, of responsibilities which are presently and properly shared.

Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong. 828 (1953).

Intra-branch disputes over the Treaty Clause can be traced as far back as 1796, when Representative Albert Gallatin argued that the "[t]reaty-making power . . . may be considered as clashing" with Congress's "authority of regulating trade," and that "[a] difference of opinion may exist as to the proper construction of the several articles of the Constitution, so as to reconcile those apparently contradictory provisions." 5 Annals of Cong. 437 (1796); *see also id.* at 466-74 (arguing that Foreign Commerce Clause limits Treaty Clause); Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 Colum. L. Rev. 505, 511 (1961); *contrast* Tribe Letter at 3 (Treaty Clause limits Foreign Commerce Clause).

Again, in 1844, the Senate Foreign Relations Committee, under Senator Rufus Choate, presented a report on the Prussian and Germanic Confederation Treaty, in which the Committee urged rejection of the treaty because "the legislature is the department of government by which commerce should be regulated and laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgement or participation, to Congress." *Compilation of Reports of the Senate Committee on Foreign Relations, 1789-1901*, S. Doc. No. 56-231, pt. 8, at 36 (2d Sess. 1901).

Documentary History of the Ratification of the Constitution 1115 (John P. Kaminski, Gaspare J Saladino, et al eds., 1990), 10 *id.* at 1235 (1993).

From time to time, the House of Representatives has also insisted that a treaty be made dependent on the consent of both Houses of Congress. This has occurred when, for example, the House's power over appropriations has been at issue, as in the Gadsden purchase treaty of 1853 and the Alaskan purchase treaty of 1867.[21] In 1880, the House asserted that the negotiation of a commercial treaty that fixed duties on foreign imports would be an unconstitutional invasion of its prerogatives over the origination of revenues; in 1883, it demanded, in connection with a proposed commercial treaty with Mexico, to have a voice in treaties affecting revenue.[22]

In 1898, the United States annexed Hawaii by joint resolution, Joint Res. 55, 55th Cong., 30 Stat. 750 (1898), even though the Senate had previously rejected an annexation treaty, and even though opponents of the measure argued strenuously both in Congress and in the press that such an annexation could be accomplished only by treaty, and not by a simple legislative act.[23]

More recently, the court in *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (per curiam), *cert. denied*, 436 U.S. 907 (1978), rejected the claim by members of the House of Representatives that the treaty power could not be used to transfer the Panama Canal to Panama. The plaintiffs relied on the Constitution's Property Clause, U.S. Const. art. IV, § 3, cl. 2, which commits to "[t]he Congress" the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The court answered this claim by pointing out that

> [t]he grant of authority to Congress under the property clause states that "The Congress shall have Power . . .," not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that "The Congress shall have Power . . . ." Many of the powers thereafter enumerated in § 8 involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. [I], § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to ac-

[21] *See* Louis Fisher, *Constitutional Conflicts between Congress and the President* 226 (3d ed 1991)

[22] *Id* at 227

[23] *See* Memorandum for Abraham D Sofaer, Legal Adviser, Department of State, from Douglas W Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, *Re. Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, 12 Op O L C 238, 251-52 (1988).

> complish through legislation what may concurrently be accomplished through other means provided in the Constitution.

580 F.2d at 1057-58. As the court noted, the Constitution on its face permits foreign commerce to be regulated either through the Treaty Clause or through the Foreign Commerce Clause. Nothing in the language of the Constitution privileges the Treaty Clause as the "sole" or "exclusive" means of regulating such activity.[24] In actual practice, Congress and the President, understanding that nothing in the Constitution constrained them to choose one procedure rather than the other, have followed different procedures on different occasions.[25]

In general, these inter- and intra-branch disputes over the scope of the Treaty Clause have been resolved through the political process, occasionally with marked departures from prior practices. *See Goldwater v. Carter*, 444 U.S. 996, 1004 n.1 (1979) (Rehnquist, J., concurring in judgment); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 Law & Contemp. Probs. 293, 305-08 (1993). For example, after the House of Representatives objected to the concentration of power over Indian affairs in the hands of the Senate through the Treaty Clause, Congress in 1871 enacted a rider to an Indian appropriation bill

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[24] Accordingly, it has been held that a trade agreement executed by the President pursuant to the Reciprocal Trade Agreements Act of 1934, Pub L. No 73-316, 48 Stat 943, was a valid exercise of Congress's delegated Foreign Commerce Clause powers together with the President's inherent powers, and did not require separate ratification as a treaty, even if commercial treaties might also have covered the same subject matter *See Star-Kist Foods, Inc v United States*, 275 F 2d 472, 483-84 (C C.P.A 1959)

[25] The difficulties in attempting to privilege the Article II treaty ratification process over the powers conferred by Article I on Congress as a whole can be illustrated from Professor Tribe's own discussions of the war powers. Professor Tribe has recently joined several other professors of law in arguing that "the totality of Congress's Article I, § 8 powers reserves *to Congress alone* the prerogative and duty to authorize initiation of hostilities" Letter for Walter Dellinger, Assistant Attorney General, from Professor Laurence H. Tribe and others, at 3 (n d ; fax received October 14, 1994) (emphasis added). On that assumption, the existence of a mutual defense treaty between the United States and an ally, duly ratified by the Senate, would be legally insufficient, in the absence of further bicameral action by Congress, to justify engagement in hostilities. Yet Professor Tribe has written elsewhere that "[c]ollective defense treaties have become the way of military life in this century These treaties, ratified by the President pursuant to the consent of the Senate, generally commit the United States to come to the aid of any signatory that is militarily attacked. Whether these treaties can serve as a predicate for executive deployment of military force has not been resolved. It seems unlikely that, in the absence of a declaration of war by Congress, a prolonged military operation would be sanctioned by such a treaty Even if the treaty is, in a sense, an inchoate declaration of war, it is one formulated by the treatymakers — that is, the President and the *Senate* — not by the *Congress* as the Constitution demands More plausible, however, is the suggestion that a collective defense treaty justifies presidential use of force in support of a harried ally until Congress has had ample time to determine whether it favors American military involvement in the conflict." Laurence H. Tribe, *American Constitutional Law* at 233-34 (footnotes omitted)

Our point is not that there may be an inconsistency between the bald claim that Article I reserves to Congress alone the power to authorize the initiation of hostilities, and the more nuanced view that a mutual defense treaty can suffice to authorize interim military action on behalf of an ally (In fact, the positions might be reconciled) Rather, we cite these writings only to show that a constitutional scholar as serious and thoughtful as Professor Tribe may experience difficulty in saying precisely when the Article I powers of Congress overlap with, when they oust, and when they are ousted by, the Senate's treaty power under Article II

declaring that no fresh treaties were to be made with the Indian nations. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566. Although the United States had been making Indian treaties for almost a century before that enactment, *see United States v. Kagama*, 118 U.S. 375, 382 (1886), after 1871 "the federal government continued to make agreements with Indian tribes, many similar to treaties, that were approved by both Senate and House," but "the House's action sounded the death knell for treaty making." Felix S. Cohen, *Handbook of Federal Indian Law* 107 & n.370 (1982 ed.). The policy of the 1871 enactment remains in effect. *See* 25 U.S.C. § 71. We are uncertain whether this longstanding legislation would be constitutional by Professor Tribe's lights.[26]

The existence of such recurring disputes over the scope and meaning of the Treaty Clause undermines any dogmatic claim that a major trade agreement such as the Uruguay Round Agreements, which stands at the intersection of the foreign affairs, revenue raising and commerce powers, *must* be ratified as a treaty and *cannot* be implemented by the action of both Houses of Congress. The distinctions between the Federal government's treaty power and the other constitutional powers in play are simply too fluid and dynamic to dictate the conclusion that one method must be followed to the complete exclusion of the other. Here, if anywhere, is an area where the sound judgment of the political branches, acting in concert and accommodating the interests and prerogatives of one another, should be respected. It is simply mistaken to suggest that this established practice of mutual adjustment and cooperation on a constitutional question of inherent uncertainty[27] reflects mere "political convenience rather than constitutional commitment." Tribe Prepared Statement at 300. None of the three political branches involved in working out the procedure for Congressional-Executive agreements has abdicated its constitutional responsibility; none has endangered the basic, structural provisions of Articles I and II.

Finally, Professor Tribe's newly-crafted account of the treaty power entails that the Federal Government may diminish State sovereignty by employing the Treaty Clause to ratify an international agreement, but not by using any other constitu-

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[26] Interestingly, in a footnote in his treatise, Professor Tribe writes that "the power of Congress to regulate commerce with Indian tribes has been rendered partly superfluous by the Supreme Court's extension of the treaty power to encompass federal treaties with Indian tribes." Laurence H. Tribe, *American Constitutional Law* at 305 n.1. This description indicates that Professor Tribe believes (correctly, in our view) that the Indian Commerce Clause and the Treaty Clause overlap, and that either may be used as a source of legal authority for the Federal Government's dealings with the Indian tribes. If so, then the Treaty Clause and the Foreign Commerce Clause ought equally to provide sources of authority for the United States's regulation of commerce with foreign nations.

[27] It has long been recognized that Article II confers the treaty power "in general terms, without any description of the objects intended to be embraced by it." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (plurality op.). More generally, "[o]ne cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authority among the branches. . . . [T]he document grants clearly related powers to separate institutions, without ever specifying the relationship between those powers, as for example, with Congress's power to declare war and the president's power as commander-in-chief." Harold H. Koh, *The National Security Constitution* at 67.

tional procedure for giving such an agreement effect. Basic to Professor Tribe's analysis is the assumption that *some* "set of intrusions on state sovereignty is sufficiently grave to trigger the requirements of the Treaty Clause." Tribe Prepared Statement at 307. On this view, the Federal Government is not constitutionally prohibited from curtailing State sovereignty to a certain degree, but it may not accomplish such a curtailment by the ordinary Article I process of legislation. We find that conclusion odd and unconvincing. If the Federal Government may not trespass on State sovereignty beyond certain limits, then the attempt to do so by making a treaty would not remove the constitutional infirmity: it is by now well-established that treaties may not violate basic constitutional ordinances, including the principles of federalism. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957); *see also* Laurence H. Tribe, *American Constitutional Law* at 228. On the other hand, if it *does* lie within the Federal Government's power to curtail State sovereignty under an international agreement, we see no reason why the Government may not invoke Article I procedures for giving effect to that agreement.[28] In short, if the Uruguay Round Agreements unduly invade State sovereignty, ratification as a treaty will not save them from unconstitutionality; if they are not an undue invasion, they can be given effect by Act of Congress.

II. The Uruguay Round Agreements and Presidential Power

In considering Professor Tribe's critique of the Uruguay Round Agreements — which focuses on the asserted impairment that the agreement causes to State sovereignty[29]— it should be borne in mind that judicial decisions have treated GATT as effectively a "Treat[y]," and hence "supreme Law," within the meaning of the Supremacy Clause, U.S. Const. art. VI, § 2, and have held provisions of State law to be superseded by the GATT when in conflict with it.[30] It is also important to re-

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[28] We do not think that *Missouri v. Holland*, 252 U S 416 (1920), establishes the contrary Language from Justice Holmes's opinion in that case has been taken to imply that treaties might limit State sovereignty in ways that Acts of Congress could not *Id* at 433. But the Court's later jurisprudence has undercut any such supposition. As Professor Tribe has written, "*Missouri v Holland* views the treaty power as a delegation of authority to federal treaty-makers independent of the delegations embodied in the enumeration of Congress' own powers. The decision thus sanctions a legal regime wherein certain subjects may be exclusively within the ambit of the states with respect to domestic legislation, but not with respect to international agreements and laws enacted by Congress pursuant thereto The importance of treaties as independent sources of congressional power has waned substantially in the years since *Missouri v Holland*, however, the Supreme Court in the intervening period has so broadened the scope of Congress' constitutionally enumerated powers as to provide *ample basis for most imaginable legislative enactments quite apart from the treaty power.*" Laurence H. Tribe, *American Constitutional Law* at 227 (emphasis added)

[29] *See, e g* , Tribe Prepared Statement at 302.

[30] *See Inter-Maritime Forwarding Co. v United States*, 192 F Supp 631, 637 (Cust Ct 1961), *Baldwin-Lima-Hamilton Corp. v Superior Court*, 208 Cal App.2d 803, 819-20, 25 Cal Rptr. 798 (1962), *Territory v. Ho*, 41 Haw 565, 568 (1957), *see also Bethlehem Steel Corp v Board of Comm'rs of Dep't of Water & Power*, 276 Cal App 2d 221, 80 Cal Rptr 800, 804 n 9 (1969) (finding it unnecessary "to delve into an extensive analysis of the effect of GATT" on State law because federal power to conduct foreign trade policy "is exclusive in this field"), *K S B Tech. Sales Corp. v North Jersey Dist Water Supply Comm'n*, 381 A.2d 774, 778 (N J 1977) ("[t]he legal significance of GATT has been considered by all parties as equivalent to

member that the existing GATT arrangements include dispute resolution procedures, which often involve referring disputes to panels of individuals, who act in an individual and not a governmental capacity.[31] Professor Tribe does not contend that the existing version of GATT or the dispute resolution procedures that have developed under it are unconstitutional as applied to the Federal or State governments of this country; rather, he alleges that "[t]he Uruguay Round's establishment of the World Trade Organization [the WTO] and its dispute resolution mechanisms represents a [constitutionally] significant departure from prior versions of GATT."[32] Specifically, Professor Tribe objects that if the WTO's dispute settlement body (or an Appellate Body on appeal) were "to find a United States law 'GATT-illegal,' the United States would be bound by that decision unless it could persuade the *entire GATT membership* by consensus to overturn the adverse decision. . . . Unlike other WTO decisions under the Uruguay Round, dispute panel decisions, or Appellate Body decisions in the instance of an appealed case, would be final, unless every WTO Member nation agrees to reject the panel or Appellate Body's recommendation. . . . This 'reverse consensus' requirement is a 180-degree turnaround from prior GATT practice; it means that individual nations, including the United States, no longer maintain a de facto veto over GATT dispute panel decisions. This turnaround . . . is alone sufficient to distinguish the Uruguay Round's potential effects on state sovereignty from the effects of all previous GATT agreements."[33]

Under existing GATT practice, "the Contracting Parties, acting jointly as a whole, have jurisdiction over the final disposition of the dispute procedure."[34] Although decisions on adoption of panel reports have always been made by consensus, the existing GATT permits a vote on these matters. Thus, while the United States, in practice, can exercise a "veto" over any adverse panel decision, this could be changed under existing GATT rules. The Uruguay Round Agreements

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that of a treaty . . In the context of this litigation we do likewise"), *appeal dismissed*, 435 U.S. 982 (1978); *Delta Chem. Corp v. Ocean County Utils Auth.*, 554 A.2d 1381, 1384 (N.J 1988) (GATT exception applied to sewerage facilities products purchased by county), *aff'd in part and rev'd in part*, 594 A 2d 1343 (N.J 1991); *Armstrong v. Taxation Div Director*, 5 N J Tax 117, 133 (1983) ("[a]ssuming that the states are bound by the provisions of GATT, imposition of the New Jersey sales and use tax on sales of gold coins and gold and silver bullion does not discriminate against sales of products of a signatory nation"), *aff'd*, 6 N.J. Tax 447 (1984), 40 Cal Att'y Gen 65 (1962), 36 Cal. Att'y Gen 147, 149 (1960); 34 Cal. Att'y Gen. 302, 304-05 (1959), *but see American Inst for Imported Steel, Inc. v. County of Erie*, 58 Misc 2d 1059, 297 N Y S 2d 602, 607 (1968) (certain GATT provisions did not appear "in and of themselves [to] supersede local legislation"), *rev'd*, 32 A.D.2d 231, 302 N.Y.S.2d 61 (N.Y A D. 1969). *See generally* John H Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich L Rev 249, 280-89 (1967) (GATT has domestic legal effect in the United States insofar as it is Presidentially proclaimed), *id* at 297-311 (GATT is directly applicable to state and local governments in the United States and supersedes conflicting state or local law)

[31] *See* John H. Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 1967 Proc. Am. Soc'y Int'l L. 144, 147-48, 151.

[32] Tribe Prepared Statement at 302

[33] *Id.* at 303-04.

[34] John H Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 1967 Proc Am Soc'y Int'l L. at 149

would alter this procedure by making the panel's or Appellate Body's report final unless the WTO States "decide[] by consensus not to adopt the [panel or] Appellate Body report" within a set period.[35] Professor Tribe appears to take this procedural alteration — the loss of the *de facto* "veto" — as constitutionally decisive. When one asks why that should be so, it appears that his answer is that under the new dispute resolution process, "states to a significant degree will be forced to place their fates under the Uruguay Round in the hands of the Executive Branch, which may have incentives counter to those of particular states in the context of particular disputes . . . . [T]he Executive Branch, not Congress, . . . would determine the fate of *state* laws found to be in violation of GATT. If a state chose not to alter a measure found by the WTO to be GATT-illegal, the United States Trade Representative could choose to bring an action against the state in a federal court, *see* S. 2467, 103d Cong., 2d Sess. § 102(b)(2) (1994) . . . — even if Congress had chosen to allow the state's measure to remain in effect and to accept trade sanctions on behalf of the entire nation rather than preempt the offending state law."[36]

We do not understand why Professor Tribe finds constitutional significance in the Uruguay Round's "reverse consensus" requirement. Under the *current* version of GATT, the States could equally well be said to be "in the hands of the Executive," for the simple reason that the President, as the sole constitutional actor who may represent the United States abroad, alone speaks for the United States in the GATT organization. Thus, the *President*, through his delegate, possesses the "veto" over the outcome of a dispute resolution under existing GATT practice, *and may refuse to exercise it.*[37] In other words, State laws may, even under the current version of GATT, be finally determined to be "GATT-illegal" unless the executive branch takes affirmative action to prevent that result.[38]

Moreover, it is misleading to suggest that the WTO procedures of the Uruguay Round Agreements place State law "at the mercy of the Executive Branch and the Trade Representative."[39] As Professor Tribe himself explains, even if the executive branch decides to bring an action against a State for the purpose of having a State law declared invalid for inconsistency with the Uruguay Round Agreements, the implementing legislation explicitly precludes the WTO panel's (or Appellate Body's) report from being considered "binding or otherwise accorded deference"

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[35] Agreement Establishing The World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art 17 14, 33 I L M 9, 124 (1994) We note that voting is precluded under the new procedures.

[36] Tribe Prepared Statement at 303-04 Actually, the Attorney General, not the Trade Representative, would bring any such suit

[37] This is not to say that the Uruguay Round Agreements would not provide the President with different *incentives* from those that exist under the current GATT arrangements. But the point remains that even under existing arrangements, it would require Executive action to forestall a GATT finding that a State law was inconsistent with this country's commitments under the pact

[38] We note also that the possibility that State laws may be held invalid because they conflict with the provisions of GATT is nothing novel in itself, as discussed above, the courts (including State courts) have held that State law cannot be applied if it is inconsistent with the current version of GATT.

[39] Tribe Prepared Statement at 305

by the court that hears the case. *See* S. 2467, § 102(b)(2)(B)(i). Thus, the State law cannot be declared invalid by the executive branch acting unilaterally, even if the executive is armed with a WTO report that has found the State law GATT-illegal; rather, the independent action of another branch of the government — the courts — is required.[40]

Furthermore, given the breadth of the joint authority of Congress and the President in the field of foreign relations, it would be the truly extraordinary case indeed in which Presidential action in that area, when supported by an Act of Congress, could amount to an unconstitutional invasion of State sovereignty. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring) (Presidential power in such cases is "at its maximum"). The Supreme Court has held that even *unilateral* Executive action, relying on the President's inherent constitutional powers alone, may constitute a "treaty" for purposes of the Supremacy Clause, and hence supersede contrary State law. Thus, in *United States v. Belmont*, 301 U.S. 324, 331-32 (1937), the Court upheld a unilateral Executive agreement in the face of contrary State law, declaring that

> complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate.

In *United States v. Pink*, 315 U.S. 203, 233 (1942), the Court, again upholding a unilateral Executive agreement over State law, reaffirmed that "[p]ower over external affairs is not shared by the States; it is vested in the national government

[40] Professor Tribe acknowledges that the detailed scheme of the implementing legislation, which is designed to make recourse to the courts unlikely, "offers a noteworthy protection to states." Tribe Prepared Statement at 305. The implementing legislation would set up a Federal-State consultation process to keep the States informed of Uruguay Round Agreements matters that would affect them. The States are to be notified by the United States Trade Representative of actions by foreign WTO members that might draw their laws into the WTO dispute resolution process, consulted regarding the matter, and involved in the development of this country's position if the matter is taken up in the dispute resolution process. Should the WTO find a State law to be GATT-illegal, the Trade Representative must consult with the State concerned in an effort to develop a mutually agreed response. *See* S. 2467, § 102(b)(1). In short, the States are to be continuously and closely involved with the Executive in any matter that may involve a challenge to State law under the Uruguay Round Agreements.

The implementing legislation provides other important protections to State law. No plaintiffs other than the executive branch may challenge a State law for inconsistency with the Uruguay Round Agreements, and in any action it brings, the Executive bears the burden of proof. Before bringing any such action, moreover, the executive branch must report to, and consult with, congressional committees in both Houses. *See* S. 2467, § 102(b)(2). Here again, as in the WTO phase of any challenge to State law, the political branches must take account of the State's views.

exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees." Again, in *Zschernig v. Miller*, 389 U.S. 429, 432, 434 (1968), the Court struck down a State probate statute requiring an inquiry into "the type of governments that obtain in particular foreign nations" as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." And in *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), the Court stated that the field of international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *See also United States v. California*, 332 U.S. 19, 35 (1947) ("peace and world commerce are the paramount responsibilities of the nation, rather than an individual state"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (the Federal Government "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."); *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 570 (plurality op.) ("[a]ll the powers which relate to our foreign intercourse are confided to the general government"); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964) (problems posed by "act of state" doctrine implicate foreign relations and thus "are uniquely federal in nature"); *Goldwater v. Carter*, 444 U.S. at 1005, n.2 (Rehnquist, J., concurring in the judgment) (State courts may not "trench upon exclusively federal questions of foreign policy").[41]

Accordingly, we cannot agree that the powers assigned to the President by the Uruguay Round Agreements and their implementing legislation would be unconstitutional (unless the agreement were ratified as a treaty) because they might be exercised in a manner that persuaded the courts to rule that State laws were superseded. Against the massive powers of Congress and the President, acting together, to control the Nation's foreign policy and commerce, the claims of State sovereignty have little force.[42]

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[41] Decisions such as these place wholly beyond doubt the "general constitutional principle that, whatever the division of foreign policy responsibility *within* the national government, *all* such responsibility is reposed at the national level rather than dispersed among the states and localities. . . It follows that all state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility." Laurence H. Tribe, *American Constitutional Law* at 230.

[42] In the context of domestic legislation that assertedly threatens to impair State sovereignty, the Court has held that "States must find their protection . . through the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). If that is the case when Congress acts under the Interstate Commerce Clause, the States' procedural rights in the national legislature can hardly be more extensive when the *Foreign* Commerce Clause is the source of Congress's authority. *See, e.g., Bethlehem Steel Corp. v. Board of*

III. The World Trade Organization

Professor Tribe has also argued that the Uruguay Round Agreements must be ratified as a treaty because its WTO dispute settlement procedures undermines State sovereignty *directly*, rather than by vesting the power to do so in the President. Unfortunately, Professor Tribe's description of the WTO's powers, scope and functions is mistaken.[43] The proposed arrangements for the WTO do *not* represent an invasion of State sovereignty that can be cured only if the Uruguay Round Agreements are ratified as a treaty; rather, the Uruguay Round Agreements are similar in kind to earlier, Congressionally-approved trade pacts, including NAFTA and the Tokyo Round Codes, that were not, and that did not have to be, ratified as treaties.[44]

In Professor Tribe's view, the "basic thrust" of the Uruguay Round Agreements is "that it would empower international tribunals effectively to override state laws."[45] Hence, he argues, approval by two-thirds of the Senators present is required, because "[t]he Senate . . . remains the principal body in which the States *qua* States are represented in our National Government."[46] However, as the court has recently found in *Public Citizen v. Kantor*, 864 F. Supp. 208, 214 (D.D.C. 1994),

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Comm'rs of Dep't of Water & Power, 80 Cal Rptr. at 803, 804 ("[t]he California Buy American Act, in effectively placing an embargo on foreign products, amounts to a usurpation by this state of the power of the federal government to conduct foreign trade policy . . . Only the federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of national concern, not state regulation. . A state law may not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines v Davidowitz*, 312 U S at 67).

[43] *See generally* Letter for Professor Laurence H Tribe from Ambassador Michael Kantor, U S Trade Representative (Oct 14, 1994)

[44] *See, e g* , 19 U.S.C § 2503

[45] Tribe Letter at 2; *see also id.* at 3 (an Act of Congress implementing the Uruguay Round Agreements would "delegat[e] to an international body such as a WTO tribunal the power effectively to override a state tax or regulation").

[46] *Id.* at 2 We do not dispute that, at least at the time of the Framing, the Senate's role in the treaty-making process was seen as protecting the States, and especially the smaller States vis-à-vis the larger ones. *See* OLC GATT Memorandum at 6 n.11 It is open to question, however, whether the Senate was vested with a share in the treaty-making power only, or even primarily, because of the ties between the Senate and the States. The Framers appear to have thought that the Senate would function as a kind of council of advisers to the President on foreign policy matters, and accordingly stressed characteristics of the Senate such as the smallness of its numbers, the relatively long tenure of its members, and the insulation of Senators from the popular electorate, in justifying its role in the treaty-making process *See The Federalist* No. 75 (Alexander Hamilton); No. 64 (John Jay), *see also* Griffin B. Bell & H Miles Foy, *The President, the Congress, and the Panama Canal An Essay on the Powers of the Executive and Legislative Branches in the Field of Foreign Affairs*, 16 Ga. J. Int'l & Comp. L at 624-25 In any event, the Senate would not be *excluded* from the process by which the Uruguay Round Agreements are approved and implemented, on the contrary, it is obvious that Senate passage is necessary for the implementing legislation to become law.

Furthermore, "[i]t has never been doubted that representatives in Congress . represented the entire people of the State acting in their sovereign capacity " *McPherson v Blacker*, 146 U.S 1, 26 (1892) Thus, the House, as well as the Senate, provides the States with a forum in which their distinctive interests can be protected.

> the resolution mechanisms contained in the [Uruguay Round] trade agreement permit disputes to be settled without altering domestic law. If a domestic law is found to violate the agreement, the defending party may implement the decision, negotiate a solution, or pay compensation.

Neither the WTO, nor any dispute settlement panels, will have the authority to enter injunctions or impose monetary sanctions against member countries. Nor will they be able to order any member country that has a federal system to change its component governments' laws. While a WTO dispute settlement may opine on whether a law is inconsistent with a member's obligations under the Uruguay Round Agreements, it is up to the parties to decide how to resolve the situation. The complaining country may suspend reciprocal trade concessions if alternative forms of settlement — e.g., compensation in the form of additional trade concessions, or a change in the defending country's domestic law — are not made. The suspension of trade concessions by a complaining country is likely to mean a temporary increase in the tariffs it imposes on the defending country's goods. No suspension of trade concessions can exceed the amount of the trade injury. Because our foreign trading partners would be able to increase tariffs on American goods even more easily in the absence of a trade agreement, it is hard to see how the attempt in the Uruguay Round Agreements to resolve trade disputes between member countries and to prevent the unilateral imposition of retaliatory tariffs could amount to an unconstitutional invasion of State or local sovereignty.[47]

Professor Tribe objects that it is "no answer that the United States might choose to pay whatever fine is levied by the WTO rather than sacrifice the sovereignty of one of the fifty States, for that makes each State's sovereignty a hostage to the Federal Government's willingness to impose a tax burden on the Nation as a whole. It also puts each State in the dilemma of either accepting the tax burden on its citizens entailed by having the United States pay a WTO fine, or protecting its citizens from that burden by lobbying against the fine and urging instead that the offending State be brought to heel."[48] Setting apart the factual error of assuming that the WTO has the power to "lev[y]" a "fine," Professor Tribe's argument buries the critical point that it is only *the United States*, not the WTO, that would wield the power to limit or displace State law.[49] Even if United States participation in the

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[47] We have explained in some detail how the WTO procedure works in the OLC GATT Memorandum, at 7-8. Furthermore, NAFTA, like the Uruguay Round Agreements, built in the possibility that State laws and regulations might be challenged before international panels in dispute resolution proceedings for inconsistency with the United States's obligations under the trade pact, and that a complaining country that prevailed before a panel was entitled to suspend trade concessions. *See id.* at 2. In light of that history, we fail to understand how Professor Tribe would distinguish the Uruguay Round Agreements from NAFTA or the United States-Canada Free Trade Agreement.

[48] Tribe Letter at 2.

[49] Such displacement of State law, if accomplished by the legal action of the Federal Government, would require either an Act of Congress, or in the alternative a judicial decision in a law suit brought by the execu-

WTO's dispute resolution procedure might create incentives that would otherwise not exist to set aside some State laws, Congress can certainly structure the range of its future choices in a way that tends to have that effect.[50] There is in such a decision no "meaningful shift of control over state sovereignty to foreign tribunals."[51]

Conclusion

We remain persuaded that, in deciding not to submit the Uruguay Round Agreements to the Senate for the concurrence of two-thirds of the Senators present, the President is acting in a wholly proper and constitutional manner. Like other recent trade agreements, including NAFTA, the United States-Canada Free Trade Agreement, the United States-Israel Free Trade Agreement and the Tokyo Round Agreement, the Uruguay Round Agreements may constitutionally be executed by the President and approved and implemented by Act of Congress.

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tive branch. In either case, State law would normally be superseded only if two branches of the national government (the President and Congress, or the President and the Federal courts) acted together.

[50] This is true even assuming that "[u]nder the Uruguay Round, a new dynamic would characterize relations between states and foreign nations and between states and the federal government." Tribe Prepared Statement at 307.

[51] Tribe Letter at 2.

Authority of the Federal Financial Supervisory Agencies Under the Community Reinvestment Act

The federal financial supervisory agencies lack authority under the Community Reinvestment Act of 1977 to provide by regulation that financial institutions that do not meet the credit needs of their communities may be subject to administrative enforcement actions under 12 U.S.C. § 1818.

December 15, 1994

MEMORANDUM OPINION FOR THE COMPTROLLER OF THE CURRENCY

This memorandum responds to your request for our opinion concerning whether the federal financial supervisory agencies ("the agencies")[1] have authority under the Community Reinvestment Act of 1977 ("CRA"), 12 U.S.C. §§ 2901-2907, to provide by regulation that financial institutions that do not meet the credit needs of their communities may be subject to administrative enforcement actions under 12 U.S.C. § 1818. We conclude that the agencies lack such authority.[2]

I.

The purpose of the CRA is "to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b). To further this end, the CRA requires the agencies to assess an "institution's record of meeting the credit needs of its entire community," 12 U.S.C. § 2903(a)(1), and to "take such record into account in its evaluation of an application for a deposit facility by such institution." 12 U.S.C. § 2903(a)(2). "[A]pplication for a deposit facility" is defined to include applications for approval to open a branch, to relocate a main or branch office, or to merge with or acquire another institution. 12 U.S.C. § 2902(3). The agencies must prepare a written evaluation of each institution's performance under the CRA, assign a rating to that performance, and disclose that rating to the public. 12 U.S.C. § 2906. The CRA also authorizes the agencies to promulgate regulations to carry out the purposes of the Act. 12 U.S.C. § 2905.

[1] The federal financial supervisory agencies are the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision

[2] The Office of Thrift Supervision ("OTS") has suggested in a letter to this Office that it has sufficient authority under the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §§ 1461-1468, to enable it to promulgate and enforce a requirement that regulated institutions help meet the credit needs of their communities. We express no opinion on the authority of OTS or the other agencies under HOLA or any other statute besides the CRA

The agencies have proposed substantial revisions to their regulations implementing the CRA. *See* Community Reinvestment Act Regulations, 58 Fed. Reg. 67,466-67,508 (1993). The proposed regulations provide that financial institutions "have a continuing and affirmative obligation to help meet the credit needs of their communities, including low- and moderate-income areas, consistent with safe and sound operations." *See id.* at 67,479 (§ 25.2). The proposed regulations state that an institution rated by an agency to be in "Substantial Noncompliance" with that obligation shall be subject to enforcement actions under 12 U.S.C. § 1818, which authorizes the agencies to issue cease-and-desist orders and levy civil monetary penalties. *See id.* at 67,480 (§ 25.6(b)). The potential monetary penalties the institutions would face range from not more than $5,000 a day for each day during which a "first tier" violation continues to a maximum daily penalty of $1,000,000 or one percent of the institution's total assets, whichever is lower, for a "third tier" violation. *See* 12 U.S.C. § 1818(i)(2).

As discussed below, we do not believe that the agencies are authorized to bring actions under 12 U.S.C. § 1818 to enforce the CRA. Our conclusion is based on the clearly expressed intent of Congress in enacting the CRA,[3] and rests on two independent rationales: (1) the CRA application evaluation procedure is the exclusive enforcement mechanism authorized by Congress; and (2) enforcement under 12 U.S.C. § 1818 is unavailable because the CRA does not impose an obligation that could provide the basis for a § 1818 action or authorize the agencies to impose such an obligation.

II.

We believe that Congress has plainly spoken on the question of what enforcement tools are available to the agencies under the CRA. The CRA provides for enforcement only in the application context, requiring that the agencies shall take an institution's record of meeting the credit needs of its community into account when evaluating that institution's application for a deposit facility. Congress specified only this one enforcement mechanism in the CRA, and we do not believe it is permissible for the agencies to employ other enforcement mechanisms, on the authority of the CRA, in the absence of some basis in the text of the statute. Agencies may act only pursuant to delegations of power that are explicit or can fairly be

[3] This is therefore not a situation where *Chevron* deference may be relied upon to support an agency interpretation. In *Chevron U S A. Inc v National Resources Defense Council, Inc* , 467 U S 837 (1984), the Supreme Court 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 discussed in the text, we do not believe that the CRA is silent or ambiguous with respect to the authority being vested in the agencies. Accordingly, there is no basis for deferring to an agency interpretation

implied from the statutory scheme. *See Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 670-71 (D.C. Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1032 (1995).

The CRA contains no express directive for the agencies to use any other modes of enforcement, much less such coercive enforcement as cease-and-desist orders and monetary penalties, and there is no basis for inferring such authority from any provision in the statute. The statute's only general grant of authority to the agencies is the authority to promulgate implementing regulations. We reject the argument that a delegation of broad enforcement authority can be inferred from the statute's delegation of authority to issue implementing regulations and the fact that the CRA does not explicitly state that the agencies may *only* sanction financial institutions through the application process. First of all, the authority to issue regulations is limited to "carry[ing] out the purposes" of the CRA, 12 U.S.C. § 2905, and those purposes are limited to requiring the agencies to "use [their] authority *when examining financial institutions*, to encourage such institutions to help meet the credit needs" of their communities, 12 U.S.C. § 2901(b) (emphasis added). More fundamentally, as the D.C. Circuit wrote recently, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway Labor Executives' Ass'n*, 29 F.3d at 671.

The legislative history of the CRA firmly supports our conclusion that the CRA does not authorize the agencies to employ other methods of enforcement. Neither the House Conference Report nor the Senate Report makes any mention of a method of sanction other than through the application process,[4] and when introducing the bill on the Senate floor, Senator Proxmire stated that "[t]he requirements in the bill apply only to applications otherwise required under existing law or regulations and do not provide any new authority to the bank regulatory agencies." 123 Cong. Rec. 1958 (1977). Similarly, during the floor debate on whether to delete the CRA provisions from the Housing and Community Development Act, Senator Lugar stated that "[t]he sanctions that are finally offered, even if some institution is found guilty in the process, are apparently that the institution would have some difficulty extending its facilities, no more and no less than that." *Id.* at 17,633.

More specifically, it would be inconsistent with the views expressed by Senator Proxmire for the agencies to rely on the CRA for authority to issue cease-and-desist orders or impose monetary penalties. Speaking as the bill's chief sponsor, Senator Proxmire stressed the limited nature of the authority being vested in the

[4] In fact, the conference report describes the purposes of the CRA in very modest terms. "This title and other amendments contained in this bill are designed to encourage more coordinated efforts between private investment and federal grants and insurance in order to increase the viability of our urban communities." H R Conf Rep No. 95-634, at 76 (1977), *reprinted in* 1977 U S C C.A N 2965, 2995

agencies. When introducing the bill, Senator Proxmire stated that the CRA "is intended to establish a system of *regulatory incentives* to *encourage* banks and savings institutions to more effectively meet the credit needs of the localities they are chartered to serve." *Id.* at 1958 (emphasis added). During floor debate on the legislation, he stated that "we have to do something to *nudge* [the banks], *influence* them, *persuade* them to invest in their community." *Id.* at 17,630 (emphasis added). He stated during hearings on the CRA that "[w]hat are we [sic] trying to do here is not to provide for any terrible sanction. . . . All we are saying is that the job that you do in servicing community needs *should be taken into consideration as one element* in whether or not branching should be approved. It is a mild proposal, it seems to me." *Community Credit Needs: Hearings on S. 406 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 323 (1977) (emphasis added).[5]

Finally, it is "an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).[6] "In such cases, '[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.'" *Karahalios*, 489 U.S. at 533 (quoting *Middlesex County Sewerage Auth. v. Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981)). To move from an enforcement scheme that relies upon a system of regulatory incentives to a scheme that entails cease-and-desist orders and potentially substantial monetary penalties is a leap that we do not believe can be justified on the basis of the text, purpose, and legislative history of the CRA. We therefore conclude that enforcement under 12 U.S.C. § 1818 is not authorized by the CRA.

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[5] Senator Proxmire did state when introducing the conference report on the Senate floor that "the intention [of Congress] is as stated in [12 U S C § 2901(b)] that the agencies use the full extent of their authority, including their general regulatory authority, under [12 U.S C. § 2905], to encourage all regulated depository institutions' responsiveness to community needs." 123 Cong Rec. 31,887 (1977) However, at best this statement is ambiguous, the direction to use full regulatory authority probably was simply in reference to the section of the CRA directing the agencies to promulgate implementing regulations and not to some other grant of enforcement authority such as 12 U S C § 1818. It is impossible to know what regulations Senator Proxmire expected the agencies to issue, although we note that (consistent with the phrasing in CRA's statement of purpose section) he used the word "encourage" to describe what impact the regulations should have on institutions rather than a word like "require " Moreover, we do not believe this one statement, even if read broadly, can support a general grant of enforcement authority to the agencies in light of the statutory text and other legislative history.

[6] That *Karahalios* and the cases cited therein involved claimed private rights of action does not make them inapposite. First, the underlying inquiry of those cases and this case is the same· can congressional intent to enforce a statutory scheme in a particular way be inferred from the statutory language, structure or legislative history? Second, courts if anything have broader power than administrative agencies to fashion appropriate relief, courts, for example, may look to their broad equitable jurisdiction

III.

We reach the same conclusion when we analyze the question by focusing directly on 12 U.S.C. § 1818. Under that section, the agencies may issue a cease-and-desist order against a financial institution that "is violating or has violated, or . . . is about to violate, a law, rule, or regulation," 12 U.S.C. § 1818 (b)(1), and they may impose civil monetary penalties against an institution that violates "any law or regulation" or any cease-and-desist order, 12 U.S.C. § 1818(i)(2). It might be argued that such sanctions may be imposed upon an institution that receives a "substantial noncompliance" CRA rating because that would be a violation of the CRA or the proposed regulations. As discussed below, we reject that argument.

By its terms, the CRA provides only that the agencies must evaluate an institution's record of meeting the credit needs of the community, that the agencies must take that record into account when considering an institution's application for permission to merge or expand, and that the agencies must prepare a written record of their evaluations for public dissemination. Nowhere does the CRA expressly impose any obligation on financial institutions themselves. The statute's references to financial institutions are couched in precatory rather than mandatory terms. In the "statement of purpose" provision of the CRA, Congress stated that "[i]t is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority . . . to *encourage* such institutions to help meet the credit needs of [their] communities." 12 U.S.C. § 2901(b) (emphasis added). The CRA does not instruct the agencies to *require* institutions to meet community credit needs. Moreover, although the CRA directs the agencies to take an institution's record of meeting credit needs into account when evaluating the institution's application for a deposit facility, 12 U.S.C. § 2903, it does not require the agencies to deny applications from institutions with questionable records.[7]

Nor are any obligations, violation of which is sanctionable under § 1818, imposed by the following statements in the "Congressional findings" section of the

[7] The case law recognizes that while the agencies are authorized to refuse to approve applications from financial institutions that do not meet the credit needs of their communities, they are not required to do so. In one case that involved a challenge to an agency's approval of an institution's application to open a branch office, the court refused to invalidate the approval on the grounds that the agency and the requesting institution had allegedly failed to comply with the requirements of the CRA *Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 571 F Supp 396 (E.D Ark 1983), *aff'd*, 736 F 2d 479 (8th Cir 1984). The court stated that "[t]he CRA itself does not provide for any sanctions for an unsatisfactory record, nor does it even define what an unsatisfactory record would be The CRA merely requires that the Board assess an institution's community credit record and consider that record when evaluating branch applications." 571 F Supp. at 403 *See also National State Bank v Long*, 630 F 2d 981, 984 (3d Cir. 1980) (in deciding there was no federal law explicitly prohibiting redlining, so that a state anti-redlining statute was not preempted, the court stated that under the CRA, "the Comptroller may, but need not, deny an application for a deposit facility to a national bank that fails to meet the needs of its local community"); *Hicks v Resolution Trust Corp.*, 970 F.2d 378, 382 (7th Cir. 1992) (in concluding that a fired employee could not state a claim for retaliatory discharge because the CRA did not constitute a clearly mandated public policy, the court stated that the Act does not provide for criminal sanctions or private causes of action; agencies may "at most" consider an institution's record when evaluating an application)

CRA: that "[t]he Congress finds that . . . regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered," 12 U.S.C. § 2901(a)(3), and that "[t]he Congress finds that . . . regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business," 12 U.S.C. § 2901(a)(1). These findings are an indicator of congressional intent and may be looked to by the agencies in formulating their regulations to implement the CRA. However, they are not "operative provisions" of the statute and thus cannot by themselves impose obligations on financial institutions or override operative provisions that indicate that Congress did not intend to impose an obligation violation of which is sanctionable under § 1818. *See Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will."). *See also Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449, 453 (D. Haw. 1984) (in determining whether Hawaii legislature intended to regulate collectively bargained health care plans, court rejected defendants' argument that "findings and purpose" section of statute authorized state regulation of the plans when an operative provision of the statute made it clear that the plans were not subject to regulation).

Finally, we do not believe that the agencies' authority under the CRA to issue implementing regulations includes the authority to impose an obligation, enforceable under § 1818, to meet community credit needs that was not imposed by Congress. The agencies' rulemaking authority is limited to "carry[ing] out the purposes" of the CRA, 12 U.S.C. § 2905, and those purposes are limited to requiring the agencies to use their authority to "encourage" financial institutions to help meet community credit needs, 12 U.S.C. § 2901(b). The authority to "encourage" does not include the authority to impose an obligation enforceable by cease-and-desist orders and money penalties. *See New York v. Heckler*, 719 F.2d 1191, 1196 (2nd Cir. 1983) (holding that statutory language directing entities receiving federal funding "to encourage family participation" in minors' receipt of contraceptive services did not authorize HHS to promulgate regulations requiring parental notification following a minor's purchase of contraception).

We emphasize that our conclusion that § 1818 sanctions are not available is not intended to suggest that the provisions of the proposed CRA regulations regarding an obligation to help meet the credit needs of the community are invalid for other purposes under the CRA or any other statute, such as to assist the exercise of agency authority during examinations and in the application process. Nor is it

intended to suggest that other provisions of the proposed CRA regulations imposing requirements on financial institutions, such as data collection and reporting requirements, are not authorized by the grant of authority to promulgate regulations. Moreover, we express no opinion on the availability of § 1818 sanctions for violations of a law, rule, or regulation in any context other than the CRA.

IV.

The purpose of the CRA is to require the federal financial supervisory agencies, in the execution of their examination function, to encourage financial institutions to meet community credit needs. The CRA requires that the agencies assess financial institutions' records in this regard and consider their records when evaluating their applications for deposit facilities. In connection with this requirement, the agencies may promulgate regulations placing reasonable requirements on financial institutions to enable the agencies to assess their performance. We conclude, however, that the agencies lack authority under the CRA to provide by regulation that financial institutions that do not meet the credit needs of their communities may be subject to enforcement actions under 12 U.S.C. § 1818.

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