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OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

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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 eighteen volumes of opinions published covered the years 1977 through 1994; the present volume covers 1995. The opinions included in Volume 19 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 1995 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 her function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Opinions of the Office of Legal Counsel in Volume 19

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Relationship Between Department of Justice Attorneys and Persons on Whose Behalf the United States Brings Suits Under the Fair Housing Act

When the Department of Justice undertakes a civil action on behalf of a complainant alleging a discriminatory housing practice under the Fair Housing Act, Department attorneys handling the action do not enter into an attorney-client relationship with the complainant, nor do they undertake a fiduciary obligation to the complainant.

Because no attorney-client relationship is established in such undertakings, no retainer agreement between the complainant and the Department attorneys should be entered into.

January 20, 1995

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

You have requested that this Office clarify the legal relationship between Department attorneys and individuals on whose behalf the United States institutes civil actions pursuant to the Fair Housing Act, as amended. 42 U.S.C. §§ 3604–3616a.

Description of the program

The Fair Housing Act uses the resources of the federal government to address housing discrimination against private persons. Persons alleging a discriminatory housing practice may file a complaint with the Secretary of Housing and Urban Development ("the Secretary" or "HUD"), or the Secretary may undertake action at his or her own behest. The statutory structure attempts to ensure that such complaints are vigorously investigated and, if meritorious, pursued by the government. Under § 3610(e), the Secretary may authorize a civil action for appropriate temporary or preliminary relief, to be filed by the Department of Justice. When a complaint is filed with HUD under § 3610, the complainant, respondent, or person on whose behalf a complaint was filed may elect to have the claims asserted in that charge heard in a civil action under § 3612(o). Subsection 3612(o) provides that, if an election to proceed in a civil action is made: "the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action *on behalf of* the aggrieved person in a United States district court seeking relief under this subsection." (Emphasis added.)

Section 3613 grants aggrieved private persons a cause of action, whether or not the person has filed a complaint administratively. However, if the Secretary has already obtained a conciliation agreement with the consent of the aggrieved

person, then the aggrieved person may only file a suit to enforce the terms of such an agreement.

Subsection 3614(a) authorizes the Attorney General to file suits alleging a pattern or practice of violations of the chapter; subsection (d) of this section authorizes the courts, in either a pattern or practice case or a case filed upon a referral by the Secretary, to award injunctive relief, damages to the person aggrieved, civil penalties, and attorneys fees to parties other than the United States.

Relationship between Department attorneys and the complainant

We believe that when the Department of Justice undertakes a matter "on behalf of" a complainant, the Department attorney does not enter into an attorney-client relationship with the complainant. Likewise, when the Department files a pattern or practice case under § 3614, seeking damages on behalf of aggrieved persons, no attorney-client relationship is established with those for whom damages are sought.

The structure of the statute compels this conclusion. Congress recognized not only that the government's interests in large measure coincide with those of aggrieved parties, but also — and importantly for our purposes here — that the interests of the complainant or aggrieved persons may diverge from that of the government. Such potential divergence of interest would be inconsistent with interpreting the statute as establishing attorney-client relationships between the government and the complainants on whose behalf the Department litigates. First, the statute has separate sections for enforcement by private persons under § 3613 and enforcement by the Attorney General under § 3614. More specifically, § 3613(a) illustrates that Congress recognized the potential for diverging interests within the statute itself. It provides that an aggrieved person may file a civil action, regardless of whether an administrative complaint was filed under § 3610.[1] Similarly, § 3613(e), which provides for intervention by the Attorney General in suits brought by private persons, and its companion provision, § 3614(e), which provides for intervention by aggrieved persons in suits brought by the Attorney General, indicate that the Attorney General may have separate interests or positions from those advanced by the complainant. Likewise, § 3612(o)(2) provides that an aggrieved person may intervene as of right in any administrative action filed by the Secretary. Finally, if the Department (or a HUD attorney, in the case of an administrative filing) were the attorney for the complainant, Congress would not have needed to provide for the complainant's individual representation, or for court appointment of an attorney for the complainant under § 3613(b).

Moreover, Congress nowhere in the Fair Housing Act itself decreed or authorized the establishment of an attorney-client relationship between the Department

[1] The only limit on filing in court in such a circumstance is that the aggrieved person may not file if a conciliation agreement has already been obtained with the consent of the aggrieved person, or if the administrative law judge has already commenced a hearing on the record. § 3613(a)(2)–(3).

attorney and the complainant or aggrieved person. Nor have we located anything in the legislative history that would indicate that Congress intended the Department to serve as the complainant's personal attorney, rather than the attorney for the government. Congress apparently intended that the government use its resources to vindicate civil rights with respect to housing, and to attempt to achieve redress for the complainants who bring violations to the government's attention, as it has in other areas of civil rights. Yet the Fair Housing Act does not provide personal attorneys for those who believe that they have suffered housing discrimination.

Other civil rights laws attempt to involve the government in the promotion of civil rights by mustering the government's litigative resources on behalf of private individuals or groups of aggrieved individuals. In those situations, courts have not found that an attorney-client relationship was established between the government and those for whom the government sought relief. *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 669 (9th Cir. 1980); *Williams v. United States*, 665 F. Supp. 1466, 1470 (D. Or. 1987).[2] Courts have also recognized that the United States has broader and somewhat different litigative interests from that of the individual complainants or aggrieved persons. *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 324, 326 (1980); *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1345 n.9 (6th Cir. 1978) ("The District Court suggested that specificity was required in the complaint because the EEOA's purpose was to vindicate 'the individual rights of those discriminated against' as opposed to a 'national policy of school desegregation.' This reading is totally inconsistent with the Act's statement of purpose . . . .") (citation omitted); *EEOC v. Whirlpool Corp.*, Local 808, 80 F.R.D. 10 (N.D. Ind. 1978).

In the few situations in which Congress has provided that attorneys employed by the government shall serve as the attorney for a party other than the government, its intent that the attorneys represent a party other than the government itself is manifest in the statute. For example, judges advocate of the Army, Navy, Air Force, and Marine Corps, and law specialists of the Coast Guard may be detailed to serve as defense counsel, 10 U.S.C. § 827, pursuant to the defendant's "right to be represented at that investigation by counsel." 10 U.S.C. § 832(b). Within the statute providing for government-provided counsel through judges advocate, Congress included provisions addressing conflicts of interest, to ensure that the judge advocate truly does represent the accused, rather than broader governmental interests. *Id.* § 827(a)(2). Likewise, attorneys employed by the Fed-

[2] In *Gormin v. Brown-Forman Corp.*, 133 F.R.D. 50 (M.D. Fla. 1990), the court held that there was no attorney-client relationship with aggrieved employees listed in the complaint, although the decision left open the possibility of establishing such a relationship if an aggrieved person filed a complaint with the agency. We believe that under the Fair Housing Act, even if an aggrieved person did file a complaint with the Secretary and the case were referred to the Department, the Department would not formally represent the complaint in the Department's action. This issue was not reached by the District Court in *Gormin*.

eral Public Defender Organization clearly do not represent the government in litigation, but represent the defendants. 18 U.S.C. § 3006A(g)(2)(A).

The Attorney General also may provide that an attorney-client relationship is established with a party other than the government itself. With respect to formal representation of government employees, regulations establish that any such representation undertaken by the Department is protected by the attorney-client privilege, although the employee must be informed that the government attorney will not assert any legal position on behalf of the employee that is not in the interests of the United States. 28 C.F.R. § 50.15(a)(3), (a)(8)(ii) (1994). The Attorney General has not authorized Department attorneys to undertake representation of Fair Housing Act complainants. Due to the absence of clear statutory or regulatory authority to represent a party other than the government itself, as provided by Congress and the Attorney General in other areas, we conclude that neither Congress nor the Attorney General has authorized the establishment of formal, attorney-client representation of complainants by Department attorneys.

Our conclusion, based principally on the Fair Housing Act statute itself, is confirmed by the strong legal policy considerations that require the government attorney to represent the government rather than the complainant. First, Department attorneys are to be guided in their conduct by the Code of Professional Responsibility of the American Bar Association, 28 C.F.R. § 45.735–1(b) (1994). The Code, like the Model Rules which have largely succeeded it, requires attorneys to avoid conflicts of interest. Model Code of Professional Responsibility DR 5–105(A); Model Rules of Professional Conduct Rule 1.7 (1994). If the government attorney were not only to represent the government, but also a complainant, conflicts would sometimes arise between the government's interest and the private complainant-client's interest. *See United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988) (conflicts of interest arise whenever an attorney's loyalties are divided; courts may decline proffers of waivers regarding conflicts). If the government attorney were formally representing the complainant, the possibility of violating other rules would also rise. For instance, the Model Rules of Professional Conduct Rule 1.2 (1994) requires that a lawyer follow a client's decisions concerning the objectives of representation, mandates that an attorney consult with the client as to means, and requires that the attorney heed a client's decision whether to accept an offer of settlement. If formal representation were undertaken, these ethical provisions might sometimes conflict with the attorney's duties towards the government.

For example, we understand that some complainants may want to accept a confidentiality provision as part of settlement negotiations, when Department policy and public records laws may preclude Department attorneys from agreeing to such terms. Similarly, we understand that the Civil Rights Division prefers in-court settlements, so as to promote enforceability of the agreements, and to deter civil rights violations by others, whereas complainants may wish to settle out of court.

Losing complainants might wish to press an appeal, when the Department's procedures repose ultimate authority for such appeal decisions with the Solicitor General. 28 C.F.R. §0.20(b) (1994). Complainants also might wish to institute collection actions in the event of a failure to pay on the part of the defendant when the particular Departmental office responsible for debt collection may have other priorities. In all likelihood, complainants will typically favor a strategy of seeking the maximum damages for themselves, rather than injunctive relief. In all these circumstances, then, the establishment of an attorney-client relationship would require the government attorney to take actions that might deviate from Department policy and priorities.

The role of the government attorney is somewhat more complicated than that of a private attorney: that is, the government attorney may have a higher obligation to "do justice" and to correct public or societal wrongs, rather than simply to advocate the position of the attorney's client. *See EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977); *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975). The government attorney, then, typically perceives him or herself as being obliged to undertake a more thorough investigation of the facts before filing a suit than the rules of pleading and ethics would strictly require. The force of an accusation lodged in the form of a complaint filed by the government is stronger than that of a complaint filed by an ordinary citizen. Likewise, at the end of the case, government attorneys attempt to arrive at a just settlement (not always the maximum possible, due to the government's negotiating advantages), and, as noted above, government attorneys may prefer to seek injunctive relief, rather than damages on behalf of one person. Were the government attorney simply serving as the attorney for the private complainant, the attorney would seek to maximize a dollar recovery for the private complainant, regardless of the strength of the case or the desirability of injunctive relief. *See McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977). Finally, the government attorney may be required to consider overall governmental policy and the government's litigative posture in other cases in litigation. As a consequence, the government attorney may refrain from making certain arguments permissible under the law, but contrary to the government's position in other cases. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) (recognizing that federal agencies may not be able to serve the interest of both private and public interests). For all of these reasons, we conclude that the government attorney does not serve as the attorney for the private complainant in a Fair Housing Act case, as such formal representation might require the government attorney to file prematurely or make accusations that are not fully supported, urge settlements that do not best promote the public interest, and make arguments that may be at odds with the government's litigative positions in other cases.

Fiduciary Duties

You also asked whether the government attorney has a "fiduciary duty" to the complainant. For the same reasons that the government attorney does not undertake an attorney-client relationship with the complainant, he or she does not have fiduciary duties to the complainant. The term "fiduciary duty" underscores the obligation to act in the client's best financial interest, and, again, we can foresee cases when, contrary to the interest of the complainant, the government attorney may determine that seeking injunctive relief is most appropriate, or seeking relief on behalf of a broader class of aggrieved persons would be the best strategy. Moreover, undertaking a fiduciary relationship might trigger a host of obligations under the relevant state law regarding fiduciaries.

Retainer Agreements

You asked whether you should formally enter into retainer-like agreements with the complainants at the beginning of the litigation and, if so, what should be addressed in such an agreement. Because there is no attorney-client relationship established, no retainer agreement should be entered into. The question of *disclosure* is outside the expertise of the Office of Legal Counsel, but in view of the potential confusion on behalf of complainants regarding the nature of the relationship, it would seem prudent to advise them that the government attorney is not their attorney, although the government is bringing a case on their behalf, and that they are entitled to retain their own counsel. We have reviewed the form letter used by the Civil Rights Division, which you transmitted to us, as well as the Department of Housing and Urban Development's sample letter to complainants in administrative proceedings. The Civil Rights Division's letter tracks the statutory language in stating that it is bringing suit "on your behalf," whereas HUD uses the word "represents" unless and until there is a conflict. The HUD letter thus may create confusion by overstating the nature of the relationship. However, both letters are perfectly clear in stating that the possibility exists that the government's interests may diverge from the complainant's, and that the complainant is entitled to retain his or her own attorney.

Other Duties Towards Complainants

You asked what further obligations the government has toward the complainant in involving them in various litigation decisions. The statute does not set forth such obligations, and we decline to read them into the statute. *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47 (1982) (absent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation to which the United States is a party), 28

U.S.C. §516 (conduct of litigation reserved to the Department of Justice); 28 U.S.C. §519 (Attorney General shall supervise all litigation to which the United States is a party and shall direct assistants in the course of their duties). It falls within the expertise of litigating divisions to determine how best to work with complainants, in view of the statute's intent, the litigation decisions to be made, and attorney time-management concerns.

Other Privileges

You ask whether other privileges could protect communications with the complainant. Because we are not experts on litigation privileges, we will not undertake a full assessment of the common interest/joint defense privilege, but will simply note its existence, recognition, and apparent applicability here. *See In re Grand Jury Subpoenas, 89–3 and 89–4*, 902 F.2d 244, 249 (4th Cir. 1990) (citing cases); *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124 n.3 (4th Cir. 1994); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (citing Supreme Court Standard 503(b): "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest . . . ."); *In re Auclair*, 961 F.2d 65 (5th Cir. 1992); *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989). In *Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460, 461–62 (N.D. Ill. 1990), the court protected documents transmitted from the complainant to the Equal Employment Opportunity Commission ("EEOC"), notwithstanding the fact that there is not a formal attorney-client relationship between the EEOC and a complaining party. Here, the complainant and the government would have a mutual interest in vindicating federally established protection from housing discrimination, and disclosures made by the complainant to the Department would facilitate the rendition of legal services to both the government as client and to the complainant. Accordingly, in jurisdictions recognizing the privilege, courts should find that the privilege applies to communications between fair housing complainants and the Department attorneys filing on their behalf, when those communications are made in the course of an ongoing common enterprise and are intended to further the enterprise. *Schwimmer*, 892 F.2d at 243.

In sum, we conclude that no formal attorney-client relationship exists between the government and a complainant or aggrieved party in a case referred to the Department under the Fair Housing Act.

WALTER DELLINGER
Assistant Attorney General
Office of LegalCounsel

The Balanced Budget Amendment

The lack of any enforcement mechanism in current proposals to amend the Constitution to require a balanced budget could result in the transfer of power over fundamental political questions of taxing and spending to the courts. This would represent a substantial reordering of our basic constitutional structure.

Before resorting to the drastic step of amending the Constitution, Congress should explore other reasonable alternatives, including line item veto legislation.

January 23, 1995

STATEMENT BEFORE THE JOINT ECONOMIC COMMITTEE
UNITED STATES CONGRESS

I appreciate this opportunity to present the views of the Department of Justice on proposals to amend the Constitution to require a balanced budget, including Senate Joint Resolution 1 and House Joint Resolution 1. For the most part, my comments will reflect the concerns that I raised on behalf of the Administration in testimony last year before the Senate Appropriations Committee[1] and in testimony and statements this year before the Senate Judiciary Committee[2] and the Subcommittee on the Constitution of the House Judiciary Committee.[3] I will also respond to some of the comments and suggestions made during this year's hearings in both the House and the Senate.

As I indicated in my earlier testimony and statements, the primary concern of the Department of Justice is that the proposed amendments fail to address the critical question of how they will be enforced. Were a balanced budget amendment to be enforced by the courts, it would restructure the balance of power among the branches of government and could empower unelected judges to raise taxes or cut spending — fundamental policy decisions that judges are ill-equipped to make. If the amendment proves unenforceable, it would diminish respect for the Constitution and for the rule of law.

The leading proposed balanced budget amendments all leave unanswered the central question of who will enforce the amendment — the courts or the President — or whether it is intended to be enforceable at all. Some versions of a bal-

[1] *Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong. 131–48 (1994) (testimony and prepared statement of Assistant Attorney General Walter Dellinger) ("1994 Senate Hearings"), *see also id.* at 27–37 (testimony and prepared statement of Attorney General Janet Reno). The version of the amendment that was at issue in the 1994 Senate Hearings, S.J. Res. 41, 103d Cong. (1993) (as reported by the Senate Judiciary Committee), was identical, in all respects except the date on which it would take effect, to this year's S.J. Res. 1, 104th Cong. (1995). S.J. Res. 1 and H.J. Res. 1, 104th Cong. (1995), are described in Section 1 of this Statement.

[2] *The Balanced-Budget Amendment: Hearing on S.J. Res. 1 Before the Senate Comm. on the Judiciary*, 104th Cong. 68–79 (1996) (testimony and prepared statement of Assistant Attorney General Walter Dellinger) ("1996 Senate Hearing").

[3] *Balanced Budget Constitutional Amendment: Hearings on H.J. Res. 1 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 227–34 (1995) (prepared statement of Assistant Attorney General Walter Dellinger).

anced budget amendment have made efforts to restrict the authority of the courts to order remedies for violations of the amendment. However, even these versions have failed to address whether and to what extent the President would have authority to enforce the amendment through impoundment or other means, apparently deferring this question for judicial resolution.[4]

Before resorting to the drastic step of amending the Constitution, every other reasonable alternative should be explored. In addition to aggressive budget cutting measures,[5] such alternatives include line item veto legislation that has been introduced in this session of Congress. President Clinton has long supported the line item veto, and the Administration has pledged to work with Congress towards the development of an effective line item veto measure that can promptly be put into place. The line item veto legislation currently pending before Congress would increase the government's ability to reduce the deficit; unlike the balanced budget amendment proposals, however, it would do so in a manner that would not disrupt the basic structure of our government.

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[4] In addition to the versions being debated in the House and in the Senate this year, a number of balanced budget amendment proposals have been considered by the Congress during the last 20 years. Useful discussions can be found not only in the most recent hearings, but also in: *Balanced-Budget Amendment to the Constitution: Hearing on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 103d Cong. (1995); *Constitutional Amendment to Balance the Budget: Hearings Before the Senate Comm. on the Budget*, 102d Cong. (1992); *The Balanced Budget Amendment Volumes I & II: Hearings Before the House Comm. on the Budget*, 102d Cong. (1992) ("1992 House Hearings"); *Proposed Constitutional Amendments to Balance the Budget: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong. (1991) ("1991 House Hearings"); *Balanced Budget Amendments: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong. (1990); *Balanced Budget Amendments: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong. (1989); *Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong. (1989) ("1989 House Hearings"); *Balanced Budget Constitutional Amendment: Hearing on S.J. Res. 13 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong. (1985); *Proposed Balanced Budget/Tax Limitation Constitutional Amendment: Hearings on S.J. Res. 5 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong. (1984); *Constitutional Amendments Seeking to Balance the Budget and Limit Federal Spending: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. (1983) ("1983 House Hearings"); *Balanced Budget-Tax Limitation Constitutional Amendment: Hearings on S.J. Res. 9, 43 & 58 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. (1981); *Balancing the Budget: Hearing on S.J. Res. 58 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97th Cong. (1982); *Constitutional Amendment to Balance the Federal Budget: Hearings on S.J. Res. 126 Before the Senate Comm. on the Judiciary*, 96th Cong. (1980); *Constitutional Amendments to Balance the Federal Budget: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong. (1980) ("1980 House Hearings"); *Proposed Constitutional Amendment to Balance the Federal Budget: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong. (1980); *Balancing the Budget: Hearing on S.J. Res. 55 & 93 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong. (1975).

[5] Under the Clinton Administration, the deficit is projected to decline for three consecutive years for the first time since President Truman was in office. The drop in the deficit over the last two years was the largest two-year drop in the history of the United States. The Fiscal Year 1994 deficit is more than $100 billion less than was projected prior to passage of President Clinton's economic plan.

I. *The Leading Proposals*

I will begin by briefly summarizing the two leading proposals that I have been advised are of particular interest to your committee: Senate Joint Resolution 1 and House Joint Resolution 1.

Senate Joint Resolution 1 would propose a constitutional amendment mandating that "[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote." S.J. Res. 1, § 1. In addition, it would require a three-fifths rollcall vote of the whole number of each House for any increase on the public debt, *id.* § 2; would require the President to submit a balanced budget prior to each fiscal year, *id.* § 3; and would require a majority rollcall vote of the whole number of each House for any bill to increase revenue, *id.* § 4. Congress would be allowed to waive these requirements "for any fiscal year in which a declaration of war is in effect . . . [or] for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by joint resolution . . . which becomes law." *Id.* § 5. Additional sections provide for implementing legislation; define receipts and outlays in broad general terms; and provide that the amendment shall take effect no earlier than 2002.

House Joint Resolution 1 would require Congress to "adopt a statement of receipts and outlays for [each] fiscal year in which total outlays are not greater than total receipts," unless three-fifths of the whole number of each House "provide in that statement for a specific excess of outlays over receipts by a vote directed solely to that subject." H.J. Res. 1, § 1. Both Congress and the President would be required to "ensure that actual outlays do not exceed the outlays set forth in such statement," which may be amended by law, "provided [that] revised outlays are not greater than revised receipts." *Id.* In addition, the amendment would require a three-fifths vote of the whole number of each House for any bill to increase receipts, *id.* § 2, or to increase the debt held by the public, *id.* § 6; would require the President to submit a budget prior to each fiscal year "consistent with the provisions of this Article," *id.* § 3; and would require that all votes taken under the amendment be rollcall votes, *id.* § 7. Congress could waive these requirements "for any fiscal year in which a declaration of war is in effect" or "for any fiscal year in which the United States faces an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law." *Id.* § 4. As with S.J. Res. 1, additional sections would provide for implementing legis-

lation; define receipts and outlays in broad general terms; and provide that the amendment shall take effect no earlier than 2002.[6]

While I have no doubt that you will wish to consider the relative merits of each of these provisions, I will not focus much further today on the differences between the two amendments. Rather, my comments will be directed to the fundamental problems stemming from the failure of either amendment to specify an enforcement mechanism.

II. *How Would the Balanced Budget Amendment Be Enforced?*

The aspect of the proposed balanced budget amendments that is of greatest concern to the Department of Justice is that they provide no enforcement mechanism and may lead to judicial involvement in the budgetary process.[7] The Senate proposal, for example, simply declares that total outlays shall not exceed total expenditures, without explaining how this state of affairs shall come about. Mandating that Congress "shall adopt" a balanced budget will not assist Members of Congress to reach an agreement on how to balance the budget. While one Member of Congress might vote to cut military spending, another to reduce retirement or other entitlement benefits, and a third to raise taxes, each of these measures may fail to gain a majority in one or the other House of Congress. Nor could we be sure, if no majority could agree on a particular method of balancing

[6] Although the core structure of the two provisions is quite similar, the House proposal does differ from the Senate proposal in some significant respects, only the first of which has been the subject of much debate thus far:

(1) H.J. Res. 1 would require that no bill to raise receipts may be passed except by three-fifths rollcall vote of the whole number of each House of Congress, rather than by majority rollcall vote of the whole number of each House of Congress.

(2) H.J. Res. 1 seems in more explicit terms than S.J. Res. 1 to contemplate granting impoundment authority to the President, as § 1 states that the President "shall ensure" that actual spending not exceed the outlays set forth in the budget.

(3) Even assuming that a balanced budget is passed, H.J. Res. 1 does not always require the Government to spend no more than it takes in. Rather, it requires Congress and the President to ensure that actual outlays do not exceed projected outlays. Accordingly, a deficit that results from overly optimistic projections of revenues would not violate the amendment.

(4) H.J. Res. 1 slightly expands the class of situations in which the provisions of the amendment could be waived, authorizing waiver for "an imminent and serious military threat" even when no actual hostilities are taking place.

(5) H.J. Res. 1 does not explicitly authorize Congress to rely on estimates in passing implementing legislation.

[7] For other expressions of concern about the enforceability of similar balanced budget amendment proposals, *see, e.g.*, 1996 Senate Hearing at 119–39 (testimony and prepared statement of David Strauss, Professor of Law, University of Chicago); *id.* at 176–89 (testimony and prepared statement of Alan Morrison, Public Citizen Litigation Group); *id.* at 133–35 (prepared statement of Cass Sunstein, Professor of Law, University of Chicago); 1994 Senate Hearings at 149–162 (testimony and prepared statement of Archibald Cox, Professor of Law, Harvard University); *id.* at 162–76 (testimony and prepared statement of former Attorney General Nicholas Katzenbach); *id* at 177–93 (testimony and prepared statement of Kathleen Sullivan, Professor of Law, Stanford University); *id.* at 193–207 (testimony and prepared statement of Burke Marshall, Professor of Law, Yale University); *id.* at 289–95 (testimony and prepared statement of Norman Ornstein, American Enterprise Institute); 1991 House Hearings at 104–06, 114 (statement of Professor Henry Monoghan,Professor of Constitutional Law, Columbia University); Letter for The Honorable Thomas F. Foley, Speaker of the House of Representatives, from Robert H. Bork (July 10, 1990), *reprinted in* Robert H. Bork, *A Seasoned Argument*, Wash. Post, June 10, 1992, at A23.

the budget, that sixty percent of both Houses of Congress could agree on an unbalanced budget. The result would be unworkable in a way that other supermajority requirements are not: while a failure to override a veto or ratify a treaty simply leaves the status quo in place, no governmental action would be authorized without a budget.

Even if Congress is able to agree on a balanced budget, or a sixty percent majority agrees to a particular unbalanced budget, the problems would not be over. If later in the fiscal year expenditures turn out to be greater than expected (perhaps because a recession increases claims on unemployment insurance), sixty percent of at least one House of the Congress may fail to agree on a resolution to exceed the spending limit, or a majority may fail to approve a change in the budget to accommodate the increase. In that situation, all members of Congress might be acting in good faith, and yet Congress would have failed to carry out its constitutional command under the amendment to ensure, in the case of S.J. Res. 1, that outlays do not exceed receipts, or, in the case of H.J. Res. 1, that actual outlays do not exceed those set forth in the budget resolution.

Should this occur, the President might well conclude that the constitutional command that "[t]otal outlays shall not exceed total receipts" — to use the language of S.J. Res. 1 for a moment — must take precedence over mere statutes, including appropriations bills, entitlement packages, and the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601–692. Although the President might interpret that command to authorize him to impound funds,[8] nothing in the amendment guides the exercise of that power. For example, the proposal does not say whether the President may select particular areas of his choosing for impoundment, or whether certain areas — such as Social Security and other entitlement programs — would be beyond the purview of his impoundment authority.[9]

[8] The argument for presidential action, such as impoundment, would be even stronger under H.J. Res. 1, which requires the President to "ensure" that actual outlays do not exceed those set forth in the budget resolution However, because H.J. Res. 1 does not require that actual outlays not exceed actual revenues, any presidential enforcement authority under H.J. Res. 1 would be limited to lowering spending, and would not include the authority to increase revenues, for example by imposing fees for the use of certain government services.

[9] Attorney General William Barr has argued that S.J. Res. 1 does not provide the President with impoundment authority. 1996 Senate Hearing at 121–39 (testimony of Attorney General Barr). He reasoned that there would be no constitutional violation for the President to remedy until the last moment of the fiscal year, because of the possibility that Congress would ratify the budget imbalance by a sixty percent vote. *Id.* at 122.

While this is one way to read the amendment, it is certainly not the only one. Suppose that the President is faced with clear evidence that the budget will be far out of balance and that Congress will not reach a consensus on either a sixty percent vote or on a way to balance the budget. Suppose further that the President expresses to Congress his great concern that the Constitution will be violated and the need for congressional action, but that none is forthcoming. I am by no means convinced that the language of section 1 bars a President in these circumstances from ignoring the clear evidence that a constitutional violation is imminent and that only he can prevent it. Nothing in the amendment necessarily requires that the President wait until the last moment of the fiscal year to take action to avoid the constitutional violation (by which time such action might well be futile). Indeed, as Solicitor General Fried has suggested, section 1 may impose a *duty* on the President to impound funds to ensure that the Constitution is not violated. *See* 1994 Senate Hearings at 82 (testimony of Charles Fried, Professor of Law, Harvard University) ("I would think [the President's] claim to impound would be very strong. Not only his claim, but he could argue with considerable plausibility his duty to do so.").

Because the amendment lacks any specific mechanism for achieving a balanced budget, this amendment, once part of the Constitution, may be read to authorize, or even to mandate, judicial involvement in the budgeting process. When confronted with litigants claiming to have been harmed by the government's failure to comply with the amendment, or by impoundment undertaken by the President to enforce the amendment, courts may well feel compelled to intervene. This would be a substantial distortion of our constitutional system. If some judicial or executive enforcement mechanism is not inferred, then the amendment would constitute an empty promise in the very charter of our government. Either of these alternatives would work a fundamental alteration in the nature of our constitutional system.

A. *Judicial Enforcement*

The proposal appears to contemplate a significant expansion of judicial authority: state and federal judges may be required to make fundamental decisions about taxing and spending in order to enforce the amendment. These are decisions that judges lack the institutional capacity to make in any remotely satisfactory manner.[10] As former Solicitor General and federal judge Robert Bork declared in opposing a balanced budget constitutional amendment:

> The result . . . would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results. By the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing toward the Supreme Court.[11]

Another distinguished former Solicitor General, Professor Charles Fried of Harvard Law School, observed in testifying against S.J. Res. 41 last February that neither the political question doctrine nor limitations on standing would nec-

[10] For expressions of this view, *see, e.g.*, 1996 Senate Hearing at 121–39 (testimony and prepared statements of former Attorney General William Barr); *id.* at 176–89 (testimony and prepared statement of Alan Morrison, Public Citizen Litigation Group); *id.* at 119–39 (testimony and prepared statement of David Strauss, Professor of Law, University of Chicago); *id.* at 133–35 (prepared statement of Cass Sunstein, Professor of Law, University of Chicago); 1994 Senate Hearings at 291–92 (testimony of Norman Ornstein, American Enterprise Institute); *id.* at 152–53, 156–57 (testimony and prepared statement of Archibald Cox, Professor of Law, Harvard University); *id.* at 183, 186–87 (testimony and prepared statement of Kathleen Sullivan, Professor of Law, Stanford University); 1983 House Hearings at 340–45 (testimony and prepared statement of Phillip B. Kurland, Professor of Law, University of Chicago); *id.* at 542–50 (testimony and prepared statement of Archibald Cox, Chairman, Common Cause).

[11] Robert H. Bork, *On Constitutional Economics*, Am. Ent. Inst. J. on Gov't and Soc'y 14, 18 (Sept.–Oct. 1983), *reprinted in* 1989 House Hearings at 645, 649.

essarily preclude litigation that would ensnare the judiciary in the thicket of budgetary politics.[12]

The Supreme Court has explained that "the political question doctrine . . . is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[13] On its face, such a statement would seem to constrain the courts' review of a balanced budget amendment. The most recent decisions of the Supreme Court, however, suggest that the Court is prepared (wisely or unwisely) to resolve questions that might once have been considered "political." For example, in *United States v. Munoz-Flores*,[14] the Court adjudicated a claim that an assessment was unconstitutional because Congress had failed to comply with the Origination Clause, which mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. The Court rejected the argument that this issue was a nonjusticiable political question. And in 1992, the Court held that congressional selection of a method for apportionment of congressional elections is not a "political question" and is therefore subject to judicial review.[15] Indeed, some of the legislative history surrounding previous versions of the balanced budget amendment suggests that at least limited judicial review is contemplated.[16] Accordingly, we cannot be at all sure that courts would refuse to hear claims on political question grounds.

Moreover, it is possible that courts would hold that either taxpayers or Members of Congress would have standing to adjudicate various aspects of the budget process under a balanced budget amendment.[17] Even if taxpayers and Members

[12] 1994 Senate Hearings at 82–83, 86–87 (testimony and prepared statement of Professor Charles Fried). Although Professor Fried concluded that the specter of judicial enforcement might be minimized by careful drafting, he nonetheless opposed the proposed amendment as "profoundly undemocratic" because it would shift power to a minority of Congress. *Id.* at 85.

[13] *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.").

[14] 495 U.S. 385 (1990).

[15] *Department of Commerce v. Montana*, 503 U.S. 442 (1992).

[16] *See, e.g.*, 140 Cong. Rec. 3026–47 (1994) (containing debate over amendment to S.J. Res. 41 limiting judicial review, indicating that Senators considered that, at least in the absence of such an amendment, judicial involvement was contemplated); 138 Cong. Rec. 17,320 (1992) (statement of Sen. Lautenberg, noting that "the sponsor of the leading proposal for a balanced budget amendment has said that if the President and the Congress could not agree on a balanced budget, a district court could enforce the amendment through a tax increase"), 1992 House Hearings, Vol. II at 461, 465–66 (statement of Rep. Stenholm, sponsor of a leading House proposal, to the effect that judicial review would be available should Congress and the President fail to meet their constitutional duties).

[17] In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court held that a taxpayer may challenge congressional action under the Taxing and Spending Clause that violates a limitation on the exercise of that power. Although later cases have narrowed the doctrine of taxpayer standing, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the reasoning of *Flast* might well permit a taxpayer to bring suit seeking to prohibit outlays in excess of receipts, or outlays in excess of the "statement of outlays" adopted prior to the fiscal year in question, since the amendment expressly limits the congressional taxing and spending powers. Taxpayers also might challenge any increase in receipts, including the repeal of tax loopholes, where the special procedural requirements of the amendment, such as the three-fifths voting requirement of section 2, were not followed.

of Congress[18] were not granted standing, the amendment could lead to litigation by recipients whose benefits, mandated by law, were curtailed by the President in reliance upon the amendment, in the event that he determines that he is compelled to enforce the amendment by impounding funds.[19] In addition, a criminal defendant, prosecuted or sentenced under an omnibus crime bill that improved tax enforcement or authorized fines or forfeitures, could argue that the bill "increase[d] revenues" within the meaning of Section 4.[20] Surely such a defendant would have standing to challenge the failure of the Congress to enact the entire bill—not just the revenue-raising provisions—by the constitutionally required means of a majority rollcall vote of the whole number of each House of Congress. Budget bills that include enforcement provisions could prove similarly vulnerable.[21]

All told, then, the standing and political question cases decided to date do not definitively resolve whether and to what extent courts would become involved in enforcing a balanced budget amendment. In any event, the addition of the amendment to the Constitution might alter the analysis: a litigant could argue that, even if the traditional political question and standing doctrines would in the past have given courts reason to pause before they injected themselves into budget matters, the adoption of an amendment constitutionalizing budget matters now mandates judicial involvement. I cannot be confident that a court would reject such an argument, since the proposed amendment does not specifically bar judicial enforcement of its requirements.[22]

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[18] Some have also suggested that a Member of Congress who voted against an unbalanced budget would have standing to sue to prevent its adoption. There is some case support for such a view. *See, e.g., Coleman v. Miller*, 307 U.S. 433, 438 (1939) (finding that Kansas state senators had standing to protest lack of effect of votes for ratification of proposed Child Labor Amendment, which ratification had been rescinded by subsequent act of the legislature); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (holding that legislators have standing to challenge constitutionality of pocket veto). *But see Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (holding that legislators do not have standing to challenge executive failure to act in compliance with statute). At the least, this case law suggests that there is some possibility that a court would accord legislators standing to challenge a congressional failure to comply with the terms of the balanced budget amendment, while proponents of the amendment may well be right that according legislators standing would be unwise, they cannot, in the face of these cases, confidently assert that such a view would never be adopted by the courts

[19] *See* 1994 Senate Hearings at 82 (testimony of Charles Fried, Professor of Law, Harvard University) ("[A] beneficiary of impounded funds surely could . . . enlist the aid of the courts."), *see also* 1996 Senate Hearing at 119–39 (testimony and prepared statement of David Strauss, Professor of Law, University of Chicago).

[20] The argument would be strengthened by the broad definition of "receipts" in Section 7, to include "all receipts of the United States except those derived from borrowing."

[21] A similar argument could be made on the basis of section 2 of H.J. Res. 1, which requires that a "bill to increase receipts" must be passed by three-fifths rollcall vote of the whole number of each House of Congress. A criminal defendant might argue that a crime bill that included increased resources for prosecution of income tax evasion, for example, was a "bill to increase tax revenues" within the meaning of this provision.

[22] Indeed, the Court has at times indicated that it may have a duty to become involved in cases challenging clear constitutional violations, however "political" they might appear to be. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990) (rejecting claim that Origination Clause raised a political question, because "this Court has the duty to review the constitutionality of congressional enactments"), *cf. Bruneau v. Edwards*, 517 So.2d 818, 824 (La. Ct. App. 1987) (refusal of state court to stay out of question arising under balanced budget amendment on political question grounds) ("Defendants contend there exist no justiciable issues in this case because the courts should not 'step in and substitute their judgment for that of the legislative and executive branches' in the budget

Continued

During my testimony before the Senate Judiciary Committee on January 5, 1995, Senators Brown and Simon suggested that the states' experience with balanced budget amendments did not support the argument that there is a serious risk that courts will become involved in enforcing such an amendment at the federal level. As I responded in a letter to Senator Hatch dated January 9, 1995, it appears that there has not been a significant amount of litigation in the states interpreting their balanced budget provisions, and I agree with Senators Brown and Simon that this is a factor that weighs against the argument that there would be an avalanche of litigation under a federal balanced budget amendment.

I am less certain than they, however, that the states' experience suggests we should be sanguine about the potential role of the courts in enforcing a federal balanced budget amendment.[23] While the states have not seen large numbers of suits, there have in fact been some cases in which courts have injected themselves into the state budget process. *See, e.g., Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991) (invalidating Governor's restructuring of appropriations for failure to comply with constitutional requirements; foster children plaintiffs had standing as taxpayers); *Town of Brookline v. Governor*, 553 N.E.2d 1277 (Mass. 1990) (holding that court had power to review authority of Governor to impound funds); *Bruneau v. Edwards*, 517 So.2d 818, 824 (La. Ct. App. 1987) (affirming judicial power to review legislators' challenge to constitutionality of Governor's revision of budget); *Michigan Ass'n of Counties v. Department of Management and Budget*, 345 N.W.2d 584 (Mich. 1984) (reviewing Governor's power to reduce funds sent to local governments under a balanced budget provision in the state constitution); *Wein v. New York*, 347 N.E.2d 586 (N.Y. 1976) (finding that taxpayers had standing to seek a declaratory judgment that the issuance of anticipation notes to New York City violated the state constitutional balanced budget requirement; the court held that the state could grant the notes so long as they would be paid by the end of the fiscal year).[24]

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process. We disagree. The determination of whether the Legislature has acted within, rather than outside, its constitutional authority must rest with the judicial branch of government.").

[23] Nor does the experience of the states prove that balanced budget amendments always produce balanced budgets. Even proponents of the balanced budget amendment have acknowledged that almost all of the states at times fail to balance their budgets and stand in violation of their constitutions. *See, e.g.*, David Lubecky, *Comment: The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. Cin. L. Rev. 563, 572–73 (1986). So we cannot conclude that, while Congress and the President would feel obligated to comply with the amendment, they would always succeed in doing so. Furthermore, the states, unlike the federal government, separate their capital and operating budgets. Thus, under federal accounting rules, states would be deemed to be running unbalanced budgets. In addition, many states have been accused of using gimmicks to evade the strictures of their constitutional provisions. Finally, the states are not responsible for national defense, for most future public investment planning, or for monetary policy. As a result, the strictures that a balanced budget amendment places on the states does not interfere with the ability of the nation to set responsible public policy in these crucial areas.

[24] *See also* 1994 Senate Hearings at 86 (statement of former Solicitor General Charles Fried) (opining that, while "the greatest part of [state] litigation has dealt with the validity of debt instruments issued to supplement budgets that would otherwise have been out of balance," "[t]here is no reason to believe that litigation under a federal balanced budget would be so confined"), *id.* at 279, 283–87 (prepared statement of Louis Fisher, Congressional Research Service) (analyzing state cases), Lubecky, *supra* note 23.

In addition, there are reasons to doubt that the state experience is a good predictor of what federal courts would do. I should note one factor that would suggest that there would be less federal litigation over a balanced budget amendment than the states have experienced. Many state court systems readily accept cases that federal courts would reject as nonjusticiable and routinely issue advisory opinions. Thus, some barriers that ought to limit federal court involvement are not present in all of the states.

Other factors, however, suggest a greater potential for litigation under a federal balanced budget amendment. Compliance with the federal balanced budget amendment likely would prove more difficult than compliance with state balanced budget amendments. Since the credit markets place strong external pressures on states to balance their budgets — pressure that they do not have the power to place on the federal government — state officials have less freedom to violate constitutional balanced budget requirements. In addition, the responsibilities of the federal government over national defense and macroeconomic policy will bring compliance with the amendment up against far more powerful pressures.

The nature of the state balanced budget amendments also makes compliance easier and litigation less likely. For example, almost all of the governors have impoundment authority, a line item veto, or other powerful tools to assist them in enforcing state balanced budget requirements. While I do not mean to suggest that this makes the actual decisions on what to cut easy ones, it probably does make compliance easier by shifting much of the power to decide how to balance the budget from the legislature to the unilateral judgment of an executive officer. Furthermore, it eliminates the possibility of litigation over whether the amendment creates such authority. Finally, the states may comply with their balanced budget amendments even if they do not balance their budgets, but issue bonds to finance long-term expenditures. This distinction between capital budgets and operating budgets may have served to insulate certain questions from judicial resolution.

Thus, while the experience of the states does tend to support, as Senators Brown and Simon suggest, the argument that there would be no avalanche of litigation under such an amendment, it does not prove that judicial involvement would be limited to unusual cases, or that even a restrained judicial role would be unproblematic.

In the end, there is a range of views as to the extent to which courts would involve themselves in issues arising under the balanced budget amendment. Former Solicitor General Bork believes that there "would likely be hundreds, if not thousands, of lawsuits around the country" challenging various aspects of the amendment.[25] Similarly, Professor Archibald Cox of Harvard Law School believes that "there is a substantial chance, even a strong probability, that . . . federal courts all over the country would be drawn into its interpretation and

[25] Robert H. Bork, *On Constitutional Economics*, Am. Ent. Inst. J. on Gov't and Soc'y 14, 18 (Sept.-Oct. 1983), *reprinted in* 1989 House Hearings at 645, 649.

enforcement,"[26] and former Solicitor General Charles Fried has testified that "the amendment would surely precipitate us into subtle and intricate legal questions, and the litigation that would ensue would be gruesome, intrusive, and not at all edifying."[27] Other commentators, such as former Attorney General William Barr, believe that the political question and standing doctrines likely would persuade courts to intervene in relatively few situations,[28] and that there will not be an "avalanche" of litigation,[29] but that, "[w]here the judicial power can properly be invoked, it will most likely be reserved to address serious and clearcut violations."[30]

Former Attorney General Barr may well be right that courts would be reluctant to get involved in most balanced budget cases—and I agree with him that it would be proper for them to be so reluctant. However, none of the commentators, including former Attorney General Barr himself, believes that the amendment would bar courts from at least occasional intrusion into the budget process. Accordingly, whether we would face an "avalanche" of litigation or fewer cases alleging "serious and clearcut violations," there is clearly a consensus that the amendment creates the potential for the involvement of courts in issues arising under the balanced budget amendment, and that these issues are plainly inappropriate subjects for judicial resolution.[31] And, should it turn out that courts do not become involved, we would be faced with the prospect of an amendment that includes no enforcement mechanism, and of constitutional violations, including unconstitutional taxation, for which there will be no judicial remedy. As I will discuss below, this prospect also would be deeply troubling.

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[26] 1994 Senate Hearings at 157 (prepared statement of Archibald Cox, Professor of Law, Harvard University).

[27] *Id.* at 83 (testimony of Charles Fried, Professor of Law, Harvard University).

[28] Attorney General Barr has stated that "I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past." 1996 Senate Hearing at 126 (prepared statement of former Attorney General William Barr).

[29] *Id.* at 129 (prepared statement of former Attorney General William Barr).

[30] *Id.*; *see also* 1994 Senate Hearings at 82–83 (testimony of Charles Fried) ("I cannot be confident that the courts would treat as a political question a demand by a taxpayer or by a member of Congress that further spending in the course of that year which would unbalance the budget should be enjoined. . . . I cannot be confident that the courts would stay out of this.").

Former Attorney General Barr's acknowledgment that there may be "serious and clearcut violations" that courts could remedy appears to be inconsistent with his suggestion, discussed in footnote 9, *supra*, that there can never be a constitutional violation of section 1 of S.J. Res. 1 until the very last moment of the fiscal year, and that the President therefore would not have impoundment authority under that proposed amendment. This construction of section 1 of the amendment would appear to deprive courts of jurisdiction as well: it means that claims would be unripe until the very end of the fiscal year, when it could finally be known whether Congress would ratify a budget imbalance, but would be moot immediately thereafter.

[31] In rejecting the majority's conclusion in *Missouri v. Jenkins*, 495 U.S. 33 (1990), that a court could order a state to raise taxes, Justice Kennedy admonished: "[O]ur Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. . . . It is not surprising that imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens." 495 U.S. at 69 (Kennedy, J., concurring in part and concurring in judgment).

S.J. Res. 1 also fails to state whether federal courts would or would not be empowered to order tax increases in order to bring about compliance.[32] In *Missouri v. Jenkins*,[33] the Supreme Court held that a federal district court could mandate that a state increase taxes in order to fund a school desegregation program.[34] Once the outcome of the budgeting process has been specified in a constitutional amendment, a plaintiff with standing might successfully argue that he or she had a right to have a court issue whatever relief is necessary to remedy the constitutional violation. The failure of the amendment to preclude such powers might even be thought to suggest, in light of *Jenkins*, that the possibility deliberately was left open.

To summarize my concerns about the potential for judicial involvement, the failure to specify any enforcement mechanisms for the amendment could result in the transfer of power over fundamental political questions of taxing and spending to the courts. This would represent a substantial reordering of our basic constitutional structure. The placing of the "power over the purse" in the hands of the legislature — and not in the hands of the executive or judicial branches — was not a decision lightly made by the framers of the Constitution. James Madison wrote in the 58th *Federalist* that the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[35] The framers explicitly rejected the notion that such untrammeled discretion over the power of the purse should be granted to either the executive[36] or to the judiciary.[37] We should be reluctant to reconsider this basic balance of powers among the branches of government, particularly while legislative alternatives are available.

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[32] Because section 1 of H.J. Res. 1 does not require that outlays not exceed receipts, but only that actual outlays not exceed estimated outlays, a tax increase would not eliminate the constitutional violation. Accordingly, a court would not possess authority to order a tax increase under H.J. Res. 1.

[33] 495 U.S. at 50–58.

[34] The Court held, however, that the details of how to implement that mandate must be left to state authorities. *Id.* at 51; *see also id.* at 55–56 (listing additional cases in which the Supreme Court upheld orders to local governments to "levy taxes adequate to satisfy their debt obligations" or obligations to fund desegregated school systems).

[35] *The Federalist* No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

[36] *See, e.g.*, 3 *Annals of Cong.* 938–39 (1793) (remarks of Rep. James Madison) (summarizing Rep. Findley as having concluded that "appropriations of money were . . . the great bulwark which our Constitution had carefully and jealously established against Executive usurpations," during the course of a congressional debate over the propriety of the President's using funds appropriated to satisfy the foreign debt for another purpose; Madison appears to have been of the view that this would be acceptable provided that a careful accounting was kept and the funds repaid to the account against which they had been drawn); *see also* 3 Joseph Story, *Commentaries on the Constitution* § 1342, at 213–14 (1833) (noting that "[i]f [the power of the purse were not placed in congressional hands], the executive would possess an unbounded power over the public purse of the nation," and that "[t]he power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation").

[37] *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the judicial branch did not pose as great a danger to liberty as opponents feared because it "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society").

One such alternative is a statute that would grant the President the equivalent of a line item veto. President Clinton has long supported the concept of a line item veto; the Administration will work with Congress towards enactment of a statute that would confer line item veto power on the President and that would survive constitutional challenge. Toward that end, the Office of Legal Counsel has, on behalf of the Justice Department, conducted a thorough analysis of the line item veto proposals that have been introduced in this session of Congress. Those proposals are H.R. 2, 104th Cong. (1995), S. 4, 104th Cong. (1995), and S. 14, 104th Cong. (1995). H.R. 2 and S. 4 would give the President the authority to rescind discretionary budget authority after an appropriations bill has been enacted. In our view, this delegation of power to the President is constitutional.[38] S. 14 would establish expedited procedures under which Congress would consider proposed presidential rescissions of discretionary authority. We believe that this proposal is constitutional as well.

Like the balanced budget amendment, the line item veto is intended to tackle the Nation's deficit problem. But unlike the balanced budget amendment, a statute modeled on the line item veto proposals that we have reviewed would not disrupt the basic structure of our government. In contrast to the balanced budget amendment, these proposals would carefully delineate the budget-cutting authority that is to be conferred on the President. As a result, the proposals would be unlikely to lead to extensive judicial involvement in the budget process. Moreover, as legislation, a line item veto statute could be revised if it turned out to have unintended consequences.

B. *The Prospect of an Unenforceable Amendment*

In the absence of enforcement mechanisms such as presidential impoundment of funds or judicial involvement in the budgeting process, a balanced budget amendment is unlikely to bring about a balanced budget. To have the Constitution declare that the budget shall be balanced, while providing no mechanism to make that happen, would place an empty promise in the fundamental charter of our government and lead to countless constitutional violations. Moreover, to have a provision of the Constitution routinely violated would inevitably make all other provisions of the Constitution seem far less inviolable. As Alexander Hamilton noted:

> Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity,

[38] H.R. 2 would also authorize the President to cancel targeted tax benefits after the enactment of a revenue bill. We believe that, with minor changes that would preserve its purpose, the targeted tax benefit provision of H.R. 2 would be constitutional as well. *See* Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Line Item Veto Act* (Jan. 4, 1995).

> impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[39]

Some have suggested that even if the amendment failed to eliminate the deficit, it would nonetheless have the salutary effect of creating pressure to reduce the deficit. While this might be true, the effect would come at considerable cost. Even supposing that the amendment brought about a reduction in the size of the deficit, the remaining excess of expenditures over receipts would constitute a continuing multi-billion-dollar violation of the Constitution, every day that the budget is not in balance. For how long would we as a people continue to make difficult decisions to comply with the First Amendment or with the Due Process or Takings Clauses of the Fifth Amendment if we had routinely failed, for lack of an enforcement mechanism, to come within a billion dollars of complying with the most recent amendment to our Constitution?

III. *Conclusion*

It would be wonderful if we could simply declare by constitutional amendment that from this day forward the air would be clean, the streets free of drugs, and the budget forever in balance. But merely saying those things in the Constitution does not make them happen. As countries around the world have discovered, placing a statement of principle in a constitution does not mean that such a principle, however laudatory, will be obeyed. Many constitutions "guarantee" environmental purity or freedom from poverty; the only effect when such promises fail is that the constitution is not taken seriously as positive law, the kind of law that is invocable in court by litigants. The framers of the American Constitution, on the contrary, understood that provisions of the Constitution must be enforceable if the rule of law is to be respected. We should hesitate long before

[39] *The Federalist* No. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For further expression of this concern, as it relates to proposed balanced budget amendments quite similar to this one, *see, e.g.*, Peter W. Rodino, *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 Hastings Const. L.Q. 785, 800 (1983); Letter for Warren Grimes, Counsel, House Judiciary Committee, from William Van Alstyne, Professor of Law, Duke University, *reprinted in* 1989 House Hearings at 614–15, Letter for the Honorable Peter W. Rodino, Jr., Chairman, House Judiciary Committee, from Jonathan Varrat, Professor of Law, U C.L.A., *reprinted in* 1989 House Hearings at 606–13; and 1980 House Hearings, at 22 (prepared testimony of Paul A. Samuelson, Nobel-prize-winning economist) ("If the adopted amendment provides escape valves so easy to invoke that the harm of the amendment can be avoided, the amendment degenerates into little more than a pious resolution, a rhetorical appendage to clutter up our magnificent historical Constitution. . . . There is no substitute for disciplined and informed choice by a democratic people of their basic economic policies.").

placing an unenforceable promise in the fundamental document that binds our nation together.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Internal Revenue Service Notices of Levy on Undelivered Commerce Department Fishing Quota Permits

The Department of Commerce may lawfully withhold delivery of fishing quotas or quota shares to eligible fishermen under the federal fishery laws in order to comply with a notice of levy served on the Department by the Internal Revenue Service to satisfy federal tax delinquencies.

January 26, 1995

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

This responds to your letter of November 4, 1994, requesting our opinion whether the Department of Commerce ("DOC") may withhold delivery of quota shares or individual fishing quotas issued to eligible fishermen under the provisions of federal fishery laws in order to comply with a notice of levy served on the DOC by the Internal Revenue Service ("IRS"), demanding that the permits be surrendered to IRS to satisfy tax delinquencies.[1] Upon receipt of your letter, we solicited and received a submission from the IRS setting forth its views on this inter-departmental dispute.[2]

We conclude that the IRS notices of levy may be lawfully applied to the undelivered quota shares and individual fishing quotas, and we find no legal basis for the DOC to refuse to comply with them. Our analysis follows.

I. BACKGROUND

A. *The Halibut and Sablefish Fishing Quota Programs*

The Secretary of Commerce ("Secretary") is authorized to maintain limited access to certain fisheries under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 ("Magnuson Act"), and the Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773–773k ("Halibut Act"). Under the authority of these acts, the Secretary has instituted a system whereby the allowable catch of a species is divided into shares or quotas, which are then allocated among the eligible fishermen.

The resultant system is based upon quota shares and individual fishing quotas ("IFQ"). A quota share is a long-term permit to fish for a particular species (here, halibut or sablefish) in a particular area. These shares are issued to "quali-

[1] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Ginger Lew, General Counsel, U.S. Department of Commerce (Nov. 4, 1994) ("DOC Ltr.").

[2] Letter for Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Stuart L. Brown, Chief Counsel, Internal Revenue Service (Dec. 23, 1994) ("IRS Ltr."). In resolving this matter, we also considered the Letter for Jay S. Johnson, Deputy General Counsel, National Marine Fisheries Service, from Arnold E. Kaufman, Assistant Chief Counsel, Internal Revenue Service (Oct. 12, 1994) ("Kaufman Ltr.").

fied persons''—i.e., those who have owned or leased vessels which harvested halibut or sablefish during the qualifying years of 1988 through 1990. Quota shares (which are represented by Quota Share Certificates) are transferable to other qualified persons, subject to approval by the National Marine Fisheries Service (''NMFS''), the agency within DOC that administers the fisheries laws. *See* 50 C.F.R. §§ 676.20–21 (1995).

An IFQ is an annual permit issued only to the owners of quota shares.[3] In early 1995, the NMFS plans to issue IFQ's for halibut and sablefish based upon the ratio between a qualified fisherman's quota share and the total number of quota shares in the applicable pool for the species and area. The IFQ is represented by an ''IFQ Annual Fishing Permit,'' certifying that the bearer may take a specified poundage of the indicated species in a specific area for the year in question. IFQ's may also be sold, leased, or otherwise transferred with NMFS approval. Only persons with IFQ's are allowed to fish for halibut and sablefish.

NMFS regulations state that quota shares and IFQ's are not absolute rights or interests subject to the Fifth Amendment's Takings Clause. *See* 50 C.F.R. § 676.20(g). Both DOC and IRS recognize that the quota shares and IFQ's are temporary, revocable, and alterable permits. At the same time, it is not disputed that both quota shares and IFQ's have monetary value and are, or will be, saleable in a secondary market.

From the standpoint of the federal fisheries laws, the purpose of the IFQ system was described as follows in commentary accompanying NMFS's promulgation of a Final Rule on this subject:

> [The IFQ] will modify the distribution of harvesting allocations among fishermen. Therefore, the IFQ program sustains existing management measures that prevent overfishing. Further, the IFQ program will improve the prevention of overfishing by providing for reductions in bycatch and deadloss that normally increase with increased fishing effort in open access fisheries.

58 Fed. Reg. 59,375, 59,377 (1993). The Commerce Department describes the purpose and effect of the IFQ system as follows:

> An IFQ system is considered to improve fishery management by decreasing fleet size and effort levels; dispersing fishing effort over a longer season; allowing a closer monitoring of landings; ameliorating unsafe fishing practices; reducing bycatch, deadloss, and lost fishing gear; enhancing the quality and price of fish landed; and

[3] As defined in the regulations at 50 C.F.R. § 676.11 (1995), an IFQ means:

> [T]he annual catch limit of sablefish or halibut that may be harvested by a person who is lawfully allocated a harvest privilege for a specific portion of the total allowable catch of sablefish or halibut.

> giving the participants more of a stake in the long-term health of the fishery.

DOC Ltr. at 2. Under the governing statutory criteria, allocations of these fishing privileges among U.S. fishermen must be: (1) fair and equitable to all such fishermen; (2) reasonably calculated to promote conservation; and (3) carried out in such a manner that no individual, corporation, or other entity acquires an excessive share of such privileges. 58 Fed. Reg. at 59,378.

NMFS was prepared to issue quota shares to qualified Alaska fishermen starting November 7, 1994. However, NMFS has withheld issuance of the quota shares to some 300 qualifying fishermen due to the notices of levy received from the IRS.

B. *IRS Procedures and Actions*

On October 11, 1994, the IRS issued a Notice of Levy (IRS Form 668A) to the NMFS in Juneau, Alaska, asserting a lien for $8,793,465, in unpaid taxes, interest, and penalties owed by some 250 fishermen identified as delinquent taxpayers. The Notice stated: "This levy requires you to turn over to us this person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are already obligated to pay this person." [4] By letter to the DOC dated October 12, 1994, the IRS further explained the nature of the levy it is asserting:

> Based on our understanding that the Halibut IFQs at issue are transferable and have value in the marketplace, we conclude that they constitute property or rights to property which are subject to the tax lien and levy. . . . The Service can levy on these rights by serving the levy on NMFS before NMFS actually transfers the IFQs to the delinquent taxpayers. Such a levy obligates NMFS to turn over to the IRS all IFQ rights of the taxpayers who are covered by the levy, including coupons, certificates or other documents which represent the IFQ rights.
>
> We note that the property interest which the Service is proposing to attach is only the taxpayers' right to receive the IFQs as determined by NMFS. Upon service of the levy, the Service will merely be "standing in the shoes" of the taxpayers and will be eligible to receive what the taxpayers were eligible to receive.

[4] Also on October 11, 1994, the IRS issued a Press Release announcing its action ("IRS Levies on Quota Shares"), stating: "The Internal Revenue Service (IRS) today took action which will prevent the issuance of halibut and sablefish quota shares to approximately 250 Alaska fishermen who owe back taxes." *Id.* at 1. The Release further stated: "This is the first in a series of IRS levies to NMFS [the National Marine Fisheries Service]. Subsequent levies will also include those fishermen who have failed to file one or more returns and who have not responded to IRS inquiries."

Kaufman Ltr. at 4 (footnote omitted).

An additional Notice of Levy issued October 19, 1994, brought the total of tax-delinquent fishermen covered by the notices to some 300. By letter dated November 16, 1994, IRS reiterated its demand that DOC turn over "all property and rights to property of the listed taxpayers pursuant to our levy authority under section 6331 [of the Internal Revenue Code], with respect to the updated list of taxpayers and tax liabilities which is attached." Letter for Steven Pennoyer, Regional Director, NMFS, from Charles M. Stromme, Chief, Special Procedures, IRS at 1 (Nov. 16, 1994). The letter further explained:

> The property and rights to property of the taxpayers in your possession or control include the taxpayers' rights to receive permanent fishing allocations, known as Quota Shares, as well as the rights to receive annual allocations of poundage, known as Individual Fishing Quotas, pursuant to the fishery management programs for halibut and sablefish under your jurisdiction. Pursuant to section 6332 [of the Internal Revenue Code], this demand for turnover requires you to surrender this property and rights to property to the Internal Revenue Service.

Id. at 1–2.

C. *Positions of the Agencies*

Although the DOC and IRS have differing views on the legal effect of the IRS levy on the issuance of quota shares and IFQ's, the agencies appear to be in agreement on one aspect of the matter. Specifically, the DOC letter states:

> The Department of Commerce does not question the IRS's authority to levy upon delinquent taxpayers' property, nor that these quota shares and IFQs might constitute the sort of property to which an IRS lien attaches. No doubt the IRS could serve a notice of levy on a permit holder, who would have to settle his debt or risk seizure and sale of the permit. The IRS, however, has not cited any precedent for enforcing a levy upon a Federal permit at the very moment it is issued by the agency, *before it is even in the hands of the permit holder, and before any monetary value is associated with it.*

DOC Ltr. at 3 (emphasis added). Consequently, the issue in dispute is not whether the IRS can properly levy upon quota shares or IFQ's as rights to property as

such, but whether it can do so *before* such rights have actually been issued and delivered to the taxpayers who have otherwise qualified for them.

II. ANALYSIS

A. *Property Interest Subject to Levy*

Section 6331(a) of the Internal Revenue Code provides that the Government may collect the taxes of a delinquent taxpayer "by levy upon all property and rights to property . . . belonging to such person." 26 U.S.C. §6331(a). The scope of this authority has been broadly construed by the courts. In *United States v. National Bank of Commerce*, 472 U.S. 713, 719–20 (1985), for example, the Supreme Court observed: "The statutory language 'all property rights and rights to property,' appearing in §6321 (and, as well, in §§6331(a) and, essentially, in 6332(a) . . .), is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have."

The rights subject to IRS levy include intangible personal property. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350 (1977). For example, the courts have upheld IRS authority to assert a levy against a delinquent taxpayer's state liquor license, *Paramount Finance Co. v. United States*, 379 F.2d 543, 544 (6th Cir. 1967), or federal broadcast license, *In re Atlantic Business and Community Development Corp.*, 994 F.2d 1069, 1075 (3d Cir. 1993). The key issue in such cases is whether the right at issue is transferable and has value. *See id.* at 1072 ([L]iquor license held to constitute property under §6321 "because it was alienable and had value."); *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354, 357 (3d Cir. 1986). Despite the recognition that licenses and permits are considered privileges and not rights under state law, that the state controls their alienability, and that they are beyond the reach of private creditors, the courts nonetheless treat them as property subject to levy within the meaning of §6321. *In re Atl. Bus.*, 994 F.2d at 1072; *21 West Lancaster*, 790 F.2d at 356–58.

A third party served with an IRS notice of levy is required to surrender to the IRS all of the taxpayer's property (or rights to property) in its possession, except property subject to prior attachment or execution under judicial process. As stated by the Court in the *National Bank* opinion, when a levy is served upon a third party, the IRS "steps into the taxpayer's shoes" and acquires whatever rights the taxpayer himself possesses in property held by the third party. 472 U.S. at 725. That party's failure to comply with the levy results in liability to the IRS up to an amount equal to the value of the property that the party declines to surrender. 26 U.S.C. §6332(d).

Here, the right at issue is a fisherman's right to be issued a quota share and IFQ by the NMFS, entitling him to catch certain quantities of a species of fish that is otherwise protected from fishing. It does not appear to be in dispute that,

once issued, the quota shares and IFQ's may be sold to others in a secondary market, and thus have marketable money value. The DOC has stipulated that "quota shares and IFQs might constitute the sort of property to which an IRS lien attaches" and that "the IRS could serve a notice of levy on a permit holder, who would have to settle his debt or risk seizure and sale of the permit." DOC Ltr. at 3.

We find no sound basis for concluding that the quota shares or IFQ's do not qualify as "property or property rights" generally subject to IRS levy under the governing provisions. The courts have held that such intangible interests as liquor licenses and broadcast licenses are subject to levy, and there appears to be no logical basis for distinguishing the fishing quota permits in that regard. *See generally* Jon David Weiss, Comment, *A Taxing Issue: Are Limited Entry Fishing Permits Property?*, 9 Alaska L. Rev. 93 (1992).

B. *Levy Asserted Against Unissued and Undelivered Permit in Government Hands*

In the case of a delinquent taxpayer, § 6331(a) authorizes the IRS to collect the tax due "by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." Where the DOC has not yet issued or delivered a quota share or IFQ to a person, the question arises whether the quota or share in question—or the right to receive it—falls within the coverage of § 6331(a).

Initially, the mere fact that the right to property at issue is in the hands of a government agency does not prevent the IRS from asserting a tax levy against it. As recognized by the court in *United Sand and Gravel Contractors, Inc. v. United States*, 624 F.2d 733, 736 (5th Cir. 1980):

> [T]here is nothing in the general levy authorization statute, I.R.C. § 6331, excepting from its reach property which is in the hands of an agency of the United States. The authorization to collect unpaid taxes by levy applies to "all property and rights to property (except . . . property . . . exempt under section 6334)," *id.* (emphasis added), of the tax delinquent. *See Field v. United States*, 263 F.2d 758, 763 (5th Cir. 1959).

(Footnote omitted).

The more significant question is whether the undelivered fishing permits constitute property or rights to property "belonging to" the subject taxpayers, such as to fall within the coverage of 26 U.S.C. §§ 6321 (tax lien authority) and 6331 (tax levy authority). We believe that a government permit can be said to "belong" to a person for IRS collection purposes when all the necessary preconditions to

the issuance of the permit to that person have been fulfilled and all that remains is for the issuing agency to issue and deliver the permit. Under the analysis in the *National Bank* opinion, for example, the organization receiving a notice of levy must comply unless it is neither "in possession of" nor "*obligated with respect to*" the property or "rights to property" in issue. 472 U.S. at 721–22 (emphasis added). This opinion also stressed that the language of § 6331(a) was broadly intended by Congress "to reach every interest in property that a taxpayer might have." *Id.* at 719–20. Once a government agency becomes legally "obligated" to issue a license or permit to the taxpayer, we think the license can be said to "belong to" the taxpayer for purposes of IRS lien and levy authority.

These fishing quota permits constitute a right to intangible property—i.e., a valuable and transferable legal right to catch and land certain quantities of halibut or sablefish. Under 50 C.F.R. § 676.20(a) (1995), once a person's status as a "qualified person" is established, the NMFS Regional Director is obligated to assign such person a quota share. As that section states: "The Regional Director *shall* initially assign to qualified persons . . . halibut and sablefish fixed gear fishery QS [quota shares] that are specific to IFQ regulatory areas and vessel categories." *Id.* (emphasis added). Similarly, the regulations provide for the allocation of IFQ's to qualified persons in mandatory terms: "The Regional Director *shall* assign halibut or sablefish IFQs to each person holding unrestricted QS for halibut or sablefish, respectively, up to the limits prescribed at § 676.22(e) and (f)." *Id.* § 676.20(f) (emphasis added).

In that regard, we have been advised by the DOC that the fishermen identified in the notices of levy have satisfied all requirements to be classified as "qualified persons" by NMFS and are therefore entitled to be issued quota shares and the associated IFQ's.[5] In other contexts, it is recognized that an IRS levy attaches to all rights of the taxpayer which are fixed and determinable at the time of the levy, even though such rights have not been fully perfected or matured. *See St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1302 (8th Cir. 1980) ("The unqualified contractual right to receive property is itself a property right subject to seizure by levy, even though the right to payment of the installments has not matured at the time of the levy."). Here, a qualified fisherman's right to be issued a quota share, as well as an associated IFQ, is recognized in the provisions of 50 C.F.R. § 676.20(a). The full extent of that right, to be determined on an annual basis when IFQ's are issued, need not be fixed with precision in order for it to fall within the coverage of § 6331.

Consequently, we conclude that the quota shares and IFQ's which the fishermen are entitled to receive under 50 C.F.R. § 676.20 constitute rights to property

[5] The NMFS regulations define a "qualified person" as follows:

> (1) *Qualified person.* As used in this section, a "qualified person" means a "person," as defined in § 676.11 of this part, that owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year.

50 C.F.R. § 676.20(a)(1)(1994).

"belonging to" them within the meaning of § 6331(a). Absent a countervailing legal requirement, DOC/NMFS would therefore be obligated to comply with the IRS Notice of Levy.

C. *Interference with the Statutory Fisheries Programs*

DOC's request for opinion suggests that the notices of levy at issue are legally invalid because they would unduly interfere with the performance of DOC's obligations under the Magnuson Act and the Halibut Act. As the DOC's letter states: "Although the IRS's novel collection action may be helpful in accomplishing its statutory goals, it is detrimental to our efforts to implement our own statutory mandate. We doubt that Congress intended such a result in enacting the authority cited by the IRS in this matter." DOC Ltr. at 4.

This contention calls into play the provisions of 26 U.S.C. § 6334(c), which state: "*Notwithstanding any other law of the United States* . . . no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." (emphasis added). Federal permits or licenses such as those at issue are not among the categories of property or property rights that are itemized and exempted from levy under § 6334(a). Moreover, courts have held that the list of exemptions enumerated in § 6334(c) is exclusive and definitive. *Sea-Land Service, Inc. v. United States*, 622 F. Supp. 769, 772–73 (D. N.J. 1985); *United States v. Offshore Logistics Int'l, Inc.*, 483 F. Supp. 1055, 1057 (W.D. La. 1979).

As noted above, the courts have recognized that the IRS's levy authority extends to property or entitlements that are held by federal government agencies. *United Sand and Gravel*, 624 F.2d at 736; *Simpson v. Thomas*, 271 F.2d 450, 452 (4th Cir. 1959). Thus, there is no implied exception from the levy authority for property, interests, or rights to property that are in the government's possession or control. Additionally, the legislative history of § 6334(c) indicates that Congress intended the IRS levy authority to prevail over other provisions of federal law in the case of conflicting provisions.[6] This view has been confirmed in court decisions. *E.g., Sea-Land*, 622 F. Supp. at 773; *Offshore Logistics*, 483 F. Supp. at 1056–57.

In any event, it is not evident that DOC's compliance with the levies at issue would significantly undercut the purposes and policies of the applicable federal fisheries statutes. The general purpose of those statutory schemes is to preserve the viability of the covered fish species and the health of dependent fishing indus-

[6] *See* H.R. Rep. No. 83–1337, at A409 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4556, which states:

> Subsection (c) of this section states that no property or rights to property, other than the properties specifically made exempt in this section, shall be exempt from levy by reason of any other law of the United States. . . . *[T]his subsection makes it clear that no other provision of Federal law shall exempt property from levy.*

(Emphasis added).

tries by maintaining limited and orderly fishing access. *See generally United States v. Cameron*, 888 F.2d 1279, 1280–81 (9th Cir. 1989) (Halibut Act); *Lovgren v. Byrne*, 787 F.2d 857, 861 (3d Cir. 1986) (Magnuson Act). If DOC surrenders the targeted quota shares and IFQ's in accordance with the levies, there is no reason to believe that any excessive take of the covered species will result, or that beneficial management of the halibut and sablefish fisheries will be significantly disrupted or impaired.

DOC's most specific contention regarding the adverse effect of the levies on the fisheries programs is the following: "The Secretary of Commerce cannot manage fisheries in a responsible manner if one of our most effective techniques — allocating harvesting privileges by assignment of individual quotas — is compromised by our having to serve as a collection arm of the IRS." DOC Ltr. at 4.

Initially, an agency's compliance with a lawful federal tax levy does not, without more, render it a "collection arm of the IRS." As shown by cases cited above, other departments and agencies have complied with such levies without apparent damage or compromise to their statutory mandates.

Moreover, the mere desire to avoid possible "compromise" of one regulatory approach chosen by an agency to comply with a general statutory mandate does not provide a justification for disregarding § 6334(c)'s provision that compliance with federal tax levies takes primacy over other statutory obligations.[7] Although DOC has not provided a detailed explanation of how compliance with the IRS levies would adversely affect its implementation of the relevant statutory requirements, it might be argued that one potential consequence would be some delay or disruption in the planned utilization of a small percentage of overall IFQ's.[8] This might conceivably have some marginal affect on the overall planned catch of the subject fisheries during this season. Even that prospect appears conjectural, however, inasmuch as quota shares and IFQ's levied by IRS and not reclaimed by the delinquent taxpayer would likely be sold to other qualified persons who would then utilize them. We do not consider such a conjectural and marginal disruption to the fishing quota systems to be of sufficient magnitude to override § 6334(c)'s provision that its levy requirements trump the provisions of other laws. No other adverse consequence that would provide a basis for a different conclusion has been demonstrated.

Given all the foregoing considerations, we find no persuasive basis for recognizing an implied exception from 26 U.S.C. § 6334(c)'s straightforward declaration

[7] Significantly, neither the Magnuson Act nor the Halibut Act *requires* DOC to utilize a quota share system in managing limited access to the protected fisheries. DOC has merely settled on that system as its chosen method of complying with the statutory requirements.

[8] According to the IRS submission, the approximately 300 fishermen-taxpayers affected by the levies represent only about 3.9% of the total applicant pool (about 7,600 applicants) for quota shares. IRS Ltr. at 18.

that all property is subject to IRS levy except those categories enumerated in subsection 6334(a).

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of FBI Agents, Serving As Special Deputy United States Marshals, to Pursue Non-Federal Fugitives

Regardless of whether federal process is outstanding or anticipated, agents of the Federal Bureau of Investigation have authority to investigate fugitive felons when there is a reasonable basis to believe that doing so will detect or prevent the commission of a federal crime.

U.S. Marshals, including FBI agents serving as Special Deputy U.S. Marshals, have authority under 28 U.S.C. § 566(e)(1)(B) to investigate and pursue fugitives wanted under state felony warrants whenever such action is undertaken pursuant to a special apprehension program approved by the Attorney General.

Where a U.S. Marshal or Special Deputy U.S. Marshal is engaged in an approved investigation of state law fugitives under section 566(e)(1)(B), the marshal's derivative state sheriff powers under 28 U.S.C. § 564 and the marshal's inherent authority to take enforcement actions necessary to carry out his federal duties provide valid grounds for the marshal to arrest such fugitives.

February 21, 1995

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

Summary

You have requested our opinion on the authority of agents of the Federal Bureau of Investigation ("FBI"), serving as Special Deputy United States Marshals, to participate in federal-state task force efforts to locate and arrest fugitives charged with violations of state law where federal process is neither outstanding nor anticipated. Our conclusions on this matter may be summarized as follows:

(1) Regardless of whether federal process is outstanding or anticipated, FBI agents have authority to investigate (and sometimes arrest) fugitive felons when there is a reasonable basis to believe that doing so will detect or prevent the commission of a federal crime, including violations of the Fugitive Felons Act, 18 U.S.C. § 1073 ("FFA"). That may include situations where a state fugitive has not yet crossed state lines but has engaged in evasive movements or a course of conduct that manifests an intent to cross a state or national border and violate the FFA.

(2) Under 28 U.S.C. § 566(e)(1)(B), the U.S. Marshals Service ("USMS") has authority to investigate fugitive matters "as directed by the Attorney General." This authority is not confined to fugitives who are sought on federal charges. In a series of special apprehension programs authorized by three Administrations, the Attorneys General have directed the USMS and other federal agen-

cies to engage in cooperative operations with state and local police that encompass the investigation, pursuit, and arrest of fugitives wanted under state as well as federal warrants. Section 566(e)(1)(B) authorizes U.S. Marshals (including FBI agents serving as deputy marshals) to investigate and pursue fugitives wanted under state warrants whenever it is done pursuant to a special apprehension program approved by the Attorney General.

(3) Although section 566(e)(1)(B) does not explicitly provide for authority to participate in task force *arrests* in state warrant cases, we conclude that where a U.S. Marshal is engaged in an approved investigation of state law fugitives under that section, arrest authority may be validly based upon (a) the marshal's derivative state sheriff powers granted under 28 U.S.C. § 564; and (b) the marshal's inherent authority to take enforcement actions necessary to carry out his federal duties, which now include participation in cooperative fugitive pursuit operations with state and local police.

(4) However, we conclude that neither the doctrine of legislative ratification nor the U.S. Marshal's asserted "federal common law authority" provide independent, non-statutory legal authority for marshals to pursue or arrest fugitives sought for state law violations only.

I. BACKGROUND

This matter arises from the operations of intergovernmental fugitive task forces, in which federal law enforcement personnel work with state and local law enforcement agencies in locating and apprehending fugitives from justice. The most prominent of these task forces began in 1981 and were classified as Fugitive Investigative Strike Teams, or "FIST," under a congressionally funded program of the USMS. Similar task force operations have also been authorized by the Attorneys General in more recent years, including Operation Gunsmoke (1992) and Operation Trident (1993). These operations are designed to locate and apprehend both federal and state law fugitives. Although the operations have been successful in arresting both categories of fugitives, arrests of state law fugitives have predominated. The USMS has stated that "[t]he cooperative assistance of state and local officers is essential to the apprehension of federal fugitives under the FIST program and vice versa." [1] Federal personnel assigned to these intergovernmental task forces are sometimes expected to assist not only in locating, but also arresting, the fugitives in question.

[1] Memorandum for William Sessions, Director, Federal Bureau of Investigation, from Stanley E. Morris, Director, U S. Marshals Service, Attachment p.2 (Dec. 8, 1987) ("1987 Mem.").

The FBI's fugitive apprehension efforts have generally been based upon the Fugitive Felons Act ("FFA" or "UFAP"), 18 U.S.C. § 1073,[2] which prohibits persons from moving or traveling in interstate commerce in order to avoid prosecution, confinement, or service of process in connection with felonies under the laws of the place from which flight is taken. The Department of Justice has issued procedural standards governing the FBI's exercise of its authority under the FFA, but these standards are not statutory and could be changed by administrative action. FBI agents have clear statutory authority to pursue and arrest both federal and state law fugitives who have violated the FFA by crossing state lines. The more difficult question raised by the FBI arises when the target fugitive has not been charged with any federal crime, has not fled across state lines, and seemingly presents no other independent basis for the exercise of federal law enforcement jurisdiction.

The FBI has considered its own authority to pursue and arrest fugitives to be limited by the parameters of the FFA and by Department procedures governing the routine handling of its general criminal investigations. It now inquires whether deputation of FBI agents as Special Deputy U.S. Marshals will enhance or broaden their authority to pursue and arrest fugitive felons charged only with state law crimes. In its memorandum requesting this opinion, however, the FBI questions whether the authority of the USMS extends that far.

The USMS asserts a broader range of federal authority to investigate and apprehend "non-federal" or "state law" fugitives. It asserts that this authority may be based on a number of sources apart from the FFA: 28 U.S.C. § 564 (marshal's authority to exercise powers of the state sheriff while executing federal law in that state); 28 U.S.C. § 566(e)(1)(B) (marshal's authority to investigate fugitive matters as directed by the Attorney General); and the U.S. Marshal's "inherent" or "federal common law" authority to take such enforcement measures as are necessary to carry out its federal duties. The USMS also asserts that repeated enactment of appropriations earmarked for the fugitive apprehension programs, after Congress had been made well aware that federal officals pursued and arrested large numbers of state law fugitives under those programs, provides sufficient legal authority for such activities under the doctrine of congressional ratification.

Contrary to assertions in the FBI submission, the USMS states that its personnel "do not routinely make state and local arrests on state and local fugitive warrants," as opposed to providing assistance when such arrests are made by a federal-state task force.[3] Nonetheless, it is evident that USMS personnel sometimes perform such arrests in special apprehension program operations, and it is the

[2] This statute is also sometimes referred to as the Unlawful Flight to Avoid Prosecution law, or UFAP.

[3] Memorandum for Walter E. Dellinger, Assistant Attorney General, Office of Legal Counsel, from Deborah C Westbrook, General Counsel, U.S. Marshals Service, *Re: Authority of United States Marshals Service to Participate in Joint Federal/State/Local Fugitive Apprehension Task Forces* at 2 (Oct. 7, 1994).

legal basis for such federal arrest activity that the FBI most strongly questions in its submission.

II. ANALYSIS

A. *Extent of FBI's Existing Statutory Authority*

Federal law enforcement officials have authority to participate in the investigation and arrest of some fugitives wanted for state law violations under the provisions of the Fugitive Felons Act. *See* 18 U.S.C. § 1073. The FFA makes it a federal crime to "move[] or travel[] in interstate or foreign commerce" in order to avoid prosecution, custody, confinement, or service of process in connection with felonies under the laws of the state from which the person is fleeing. The purpose and policy underlying the FFA was explained by the court in *Lupino v. United States*, 268 F.2d 799, 801 (8th Cir. 1959):

> [F]lights by perpetrators of crimes against the states are a common means of hindering state justice as is well known and, as it is the federal government which accords the freedom of movement throughout the country that makes the flights possible, it is plainly within the province of that government to regulate this abuse of it.

A threshold issue is whether FBI agents may have dormant authority under the FFA to participate in the investigation or arrest of those "state law" fugitives whose cases may have heretofore been considered outside that statute's coverage. If a more expansive interpretation of existing FFA authority is warranted, the necessity for additional authority to be derived from the USMS through deputation might be reduced.

The FBI submission reflects a somewhat restrictive interpretation of its current authority to investigate and arrest under the FFA. It states, for example, that its fugitive investigation authority is constrained by the preliminary inquiry requirements of the Attorney General's Guidelines on Investigations.[4] On the other hand, it does not explore the FBI's clear statutory authority to make warrantless arrests whenever there are reasonable grounds to believe the person to be arrested is in the process of committing any federal crime, including a violation of the FFA. *See* 18 U.S.C. § 3052.

Where there is a reasonable expectation that an investigation will lead to evidence of a violation of federal law, FBI agents have authority to undertake that investigation under 28 U.S.C. § 533. *See Authority of the Federal Bureau of Inves-*

[4] Memorandum for Walter E. Dellinger, Assistant Attorney General, Office of Legal Counsel, from Howard M. Shapiro, General Counsel, FBI, *Re: Authority of FBI Agents Who Have Been Deputized as Special Deputy United States Marshals to Locate and Apprehend State and Local Fugitives* at 2 (Aug. 23, 1994).

tigation to Investigate Police Killings, 5 Op. O.L.C. 45, 49 (1981). As this Office also stated in a 1977 opinion on a similar issue: "As long as there remains a legitimate basis for the view that the investigation . . . may unearth violations of federal law, we believe that the FBI is authorized to proceed with the investigation." Memorandum for the Director of the FBI, from Mary C. Lawton, Deputy Assistant Attorney General, *Re: FBI Cooperation with Local Authorities* at 1 (Nov. 9, 1977). This is consistent with the Attorney General's 1989 Guidelines for FBI general crimes investigations, which provide:

> A general crimes investigation may be initiated by the FBI when facts or circumstances *reasonably indicate that a federal crime* has been, *is being, or will be committed.* The investigation may be conducted to prevent, solve, and prosecute such criminal activity.
>
> The standard of "reasonable indication" is substantially lower than probable cause.

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations §II.C(1) (Mar. 21, 1989) (emphasis added) ("AG Guidelines"). The Guidelines further state that a preliminary inquiry is not a required step "when facts or circumstances reasonably indicating criminal activity are already available; in such cases, a full investigation can be immediately opened." *Id.* §II.B(1). These provisions show that the FBI has ample authority to investigate a state law fugitive whenever there is some reasonable indication that he may violate the FFA or another federal law.[5]

Various courts have held that the crossing of state lines is a necessary element for a violation of the FFA. *See, e.g., Lupino v. United States*, 268 F.2d at 801 (FFA violation "is complete when the offender crosses the border.").[6] However, the line separating a so-called "non-federal" fugitive and a fugitive subject to federal pursuit under the FFA can be a thin one. Many fugitives will "move" or "travel" on interstate highways as they continue to evade arrest, even if they have not been detected crossing state lines. Under appropriate circumstances, such fugitives may be deemed to be moving in interstate commerce and there may well be a reasonable basis to believe that a violation of the FFA is in progress.

This view is bolstered by Supreme Court and lower federal court opinions that have adopted a flexible construction of the interstate movement element in federal criminal statutes similar to the FFA. In *McElroy v. United States*, 455 U.S. 642,

[5] In other contexts, the FBI has even been subjected to potential liability under the Federal Tort Claims Act for failing to take the initiative under 28 U.S.C. §533 when a developing violation of federal law has been detected. *See Bergman v. United States*, 565 F. Supp. 1353, 1396–1401 (W.D. Mich. 1983). There, the United States was held liable for injuries sustained by civil rights "Freedom Riders" when FBI agents failed to take preventive action to thwart a developing conspiracy to violate civil rights which had been disclosed by an informant.

[6] This view is arguably at variance with the statute's text, which requires only that the fugitive "move[] or travel[] in interstate or foreign commerce," 18 U.S.C. §1073 (emphasis added), without stating that a state line must be crossed for a violation to occur. In similar contexts, the Supreme Court has declared that movement in interstate commerce may occur without crossing a state border. *See* cases discussed in note 7 and accompanying text.

653 (1982), for example, the Court observed that "interstate commerce begins well before state lines are crossed."[7] If a fugitive is "in the course" of travel on the highways with an intent to proceed across the border, the mere failure to reach the border should not negate a violation of the statute. *Cf. United States v. Schardar*, 850 F.2d 1457, 1461–62 (11th Cir. 1988) ("Goods have been adjudged to have moved in interstate . . . commerce when they are in the course of such a crossing, even when they have not yet crossed the technical boundaries."); *United States v. Ajlouny*, 629 F.2d at 837.

We therefore conclude that FBI agents have statutory authority to investigate state law fugitives whenever, as part of their evasive course of conduct, they have begun to travel on interstate highways or manifested any other reasonable indication (such as the purchase of a bus or airplane ticket to another state) that they will violate the FFA. Moreover, the FBI's authority to detect and investigate federal crimes under 28 U.S.C. § 533 encompasses the authority to "take whatever steps are necessary to bring criminal charges against the suspect criminals." *Bergman v. United States*, 551 F. Supp. 407, 417 (W.D. Mich. 1982) ("While [section 533] confers investigative powers upon an FBI official, it also confers a prosecutorial duty to follow up any investigation undertaken."). Under 18 U.S.C. § 3052, FBI agents have the authority to make warrantless arrests "for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed *or is committing* such a felony." (Emphasis added). Consequently, the fact that a state fugitive has commenced evasive travel on the highways may sometimes establish that he is "in the course" of interstate flight and therefore provide grounds for federal arrest under the FFA.

B. *Authority of USMS*

In some instances, there may be no reasonable grounds to believe that a state law fugitive sought by a task force will violate the FFA or any other federal statute (e.g., a fugitive who "goes underground" within the state and gives no indication of resorting to interstate travel). This office has previously opined that FBI agents, as such, have no authority to investigate criminal suspects under state law where there are no federal charges outstanding and no reasonable grounds to believe that a federal offense has been or will be committed. *See* 5 Op. O.L.C. at 49. This raises the question whether, in the context of federal-state task force operations, FBI agents serving as Deputy U.S. Marshals would have additional

[7] *Cf. United States v. Ajlouny*, 629 F.2d 830 (2d Cir. 1980), concerning a violation of the federal law against the transportation of stolen goods in interstate or foreign commerce. The defendant was arrested just before he was able to ship stolen goods from New York to Qatar. The court rejected the argument that no offense had occurred because no international boundary had been crossed, stating: "Congress was not aiming only at stolen goods moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing." *Id.* at 837.

authority to pursue and/or arrest state fugitives that would otherwise be unavailable to them.

1. *28 U.S.C. § 566*

The Marshal Service's authority to investigate fugitive felons is found in 28 U.S.C. § 566(e)(1)(B), which provides: "The United States Marshals Service is authorized to . . . investigate *such fugitive matters, both within and outside the United States, as directed by the Attorney General.*" (emphasis added). Significantly, this authorization was passed in 1988, when Congress was already familiar with five years of USMS participation in FIST programs, wherein USMS personnel repeatedly participated in large numbers of arrests of state law fugitives. Section 566(e)(1)(B) authorizes the Attorney General to "direct" the USMS to investigate fugitive matters to the fullest extent permitted by the Constitution in the exercise of her discretion.[8]

In 1988, the Attorney General issued a "Policy on Fugitive Apprehension in FBI and DEA Cases." After providing that the FBI generally has jurisdiction "in locating fugitives pursuant to the Unlawful Flight Statutes (Title 18, Sections 1073 and 1074)", the Policy stated:

> The above provisions shall not preclude the USMS from providing available information to state and local law enforcement agencies about fugitives being sought by their jurisdictions. The initiation of formal fugitive investigations involving State and local fugitives will be done through the Unlawful Flight process set forth above, *except for special apprehension programs (such as Fugitive Investigative Strike Teams and Warrant Apprehension Narcotics Teams) and other special situations approved by the Associate Attorney General.*

Id. at 3 (emphasis added). In this regard, the Attorney General's approval of USMS pursuit and arrest of state law fugitives in FIST and subsequent special apprehension programs is authorized by the "as directed" provision of 28 U.S.C. § 566(e)(1)(B).

Subsequent to 1988, the Attorney General has "directed" the USMS to undertake additional "special apprehension programs." In early 1992, for instance, the Attorney General ordered the USMS to participate in Operation Gunsmoke, a pro-

[8] Regulations generally describing the marshals' authority in the fugitive area are included under the "General Functions" provisions of the DOJ regulations. *See* 28 C.F.R. §0.111(q) (1995). This subsection merely provides that among the activities of the USMS that are subject to the supervision of the USMS Director are: "Exercising the power and authority vested in the Attorney General under 28 U.S.C. 510 to conduct and investigate fugitive matters, domestic and foreign, involving escaped federal prisoners, probation, parole, mandatory release, and bond default violators." This provision does not purport to define the outer limits of USMS fugitive authority, and we do not consider its enumeration of authorized activities to be exclusive.

gram in which U.S. marshals worked with state and local police to apprehend armed fugitives charged or convicted of serious crimes involving violence with weapons. In this operation, the Attorney General again authorized the USMS to investigate, pursue, and arrest fugitives wanted on state as well as federal warrants. Indeed, of the 3,313 Operation Gunsmoke arrests, *2,562* were on state warrants. In 1993, the USMS was directed to participate in Operation Trident, another cooperative federal-state fugitive manhunt focusing on the identification and arrest of major narcotics and violent crime fugitives. In his memorandum requesting the Attorney General's approval of Operation Trident (which was given), the USMS Director specifically stated that the operation would include the apprehension of "State and local fugitives wanted for homicide and other violent offenses" and "State and local fugitives wanted on firearms violations."[9] Of the 5,788 arrests made by Operation Trident investigators, 4,825 were based on state charges.

These operations confirm that, pursuant to 28 U.S.C. § 566(e)(1)(B) and the more general authorities granted by 28 U.S.C. §§ 503, 509, and 515, the Attorney General has repeatedly authorized the USMS to participate with state and local police in the investigation, pursuit, and arrest of fugitives wanted on state as well as federal charges. FBI agents serving as Deputy U.S. Marshals could also undertake such activities under the same lawful authority.

When investigations duly conducted under § 566 reveal ongoing or inchoate violations of the FFA or another federal law, marshals and deputy marshals also have authority to arrest under the provisions of 18 U.S.C. § 3053. That section provides (emphasis added):

> United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States *if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.*

This language provides authority for marshals to arrest a state law fugitive if, as discussed in section II.A, above, there are reasonable grounds to believe he is in the process of violating the FFA. When there is no indication of such an ongoing *federal* violation, however, the question arises whether USMS authority to *investigate* state fugitives under § 566 may be extended to participation in the *arrest* of such fugitives.

[9] Memorandum for the Attorney General, from Henry E. Hudson, Director, USMS, *Re: Proposed National Fugitive Apprehension Operation* at 1–2 (Apr. 1, 1993).

2. *Marshal's Authority under 28 U.S.C. § 564*

Another pertinent source of the authority in question here is 28 U.S.C. § 564, which provides:

> United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.

We do not think that § 564 provides an independent basis for the *initiation* of investigation or pursuit of state law fugitives by marshals or deputy marshals. Rather, it provides that they may employ the full powers of a state sheriff in executing federal law within a state only when they are *already* exercising valid federal authority within that state.

When marshals participate in a task force investigation of state law fugitives pursuant to the Attorney General's direction under 28 U.S.C. § 566, they are "executing the laws of the United States within a State." As stated by the Supreme Court in *In re Neagle*, 135 U.S. 1, 59 (1890), "any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of [the Supremacy Clause]." Within that context, the marshals may exercise the same law enforcement powers as those of a sheriff in the host state. *See United States v. St. Onge*, 676 F. Supp. 1041, 1043 (D. Mont. 1987); *United States v. Laub Baking Co.*, 283 F. Supp. 217, 221 (N.D. Ohio 1968). That would include the power to arrest a state law fugitive on probable cause. *See United States v. Red Feather*, 392 F. Supp. 916, 919 (D. S.D. 1975) (U.S. marshals exercising federal authority at Wounded Knee uprising had full authority of state sheriff under South Dakota law to "keep and preserve the peace" and to "pursue and apprehend *all* felons.") (emphasis added).

3. *Congressional Ratification of Special Apprehension Programs*

Even if (contrary to our conclusion) none of the statutes discussed above provide authority for the pursuit and arrest of fugitives by federal marshals for purely state law violations, the USMS contends that Congress has nonetheless authorized such activities by passing specific appropriations to fund them after they had clearly been brought to the attention of Congress. Various opinions have recognized that, under appropriate circumstances, Congress may "ratify" an agency's exercise of previously unsettled authority by appropriating funds for the continuation of the activity in question where that activity was specifically brought to Congress's attention beforehand. *See Ex Parte Endo*, 323 U.S. 283, 303 n.24

(1944); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147–48 (1937); *Alabama v. TVA*, 636 F.2d 1061, 1069 (5th Cir. 1981), ("[C]ontinued congressional funding of allegedly improper agency action can be viewed in appropriate circumstances as a ratification of that agency practice."). For an effective ratification, the appropriation must manifest a purpose to approve the particular authority which is claimed. *See Ex Parte Endo*, 323 U.S. at 303 n.24.

Subsequent Supreme Court opinions, however, have sharply curtailed this doctrine's applicability. In *TVA v. Hill*, 437 U.S. 153 (1978), for example, the Court rejected arguments that Congress's continued appropriation of funds to proceed with construction of the Tellico Dam, even after the appropriations committees had been fully apprised of the project's adverse impact on the endangered snail darter, could be viewed as legislative ratification of the project notwithstanding its conflict with the requirements of the Endangered Species Act. The Court held that the rule against repeals by implication trumps the legislative ratification doctrine; stressed that allowing the enactment of substantive law via appropriations measures would violate the Rules of Congress; and rejected the view that the statements and understandings of the congressional appropriations committees can be ascribed to Congress as a whole for purposes of effecting a ratification through appropriations. *Id.* at 190–92. In *Greene v. McElroy*, 360 U.S. 474 (1959), the Court held that congressional ratification of security clearance regulations, adopted by the Secretary of Defense without explicit authorization from Congress or the President, could not be implied from the continued appropriation of funds to finance aspects of the clearance program. The Court stressed that the doctrine of implied ratification is especially unsuitable when the administrative action in question is based on unsettled constitutional authority. *Id.* at 506–07.

More recently, the D.C. Circuit described additional limitations upon the ratification doctrine:

> While appropriations acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not [citing *TVA v. Hill*], and that when they do, the change is only intended for one fiscal year. . . . Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year unless its language clearly indicates that it is intended to be permanent.

Building & Constr. Trades Dep't v. Martin, 961 F.2d 269, 273–74 (D.C. Cir. 1992).[10]

[10] *See also EEOC v. CBS, Inc.*, 743 F.2d 969, 974 (2d Cir. 1984), where the court said that "*Chadha*'s strict interpretation of the principles of bicameralism, presentment, and separation of powers reinforces the need for strong evidence of ratification." In rejecting a claimed legislative ratification argument, that court added, "an appropriations

The USMS has cited excerpts from congressional hearings and reports indicating that Congress has repeatedly passed Justice Department appropriations earmarked for the FIST program, even though the participation of USMS personnel in the pursuit and arrest of state law fugitives was repeatedly brought to the attention of the appropriations committees. 1987 Mem., Attachment at 3–6. The Service contends that these materials are adequate to demonstrate legislative ratification of all actions taken in connection with its special apprehension programs under the standards of the foregoing cases. The FBI's submission also acknowledges that Congress was made aware that FIST operations entailed federal apprehension of state fugitives before it passed appropriations funding such operations, but suggests that the record is insufficient to establish a valid legislative ratification.

The cited legislative materials show that the USMS has repeatedly described the nature of its special apprehension programs to the congressional appropriations committees. For example, USMS Director Morris described FIST operations in considerable detail in 1986 hearings before the House Appropriations Subcommittee for Commerce-Justice-State:

> [W]e go in and set up what is a 10-week round up in which we bring in people from out of district, plus dedicate people in the district to work jointly with state and local officers in partnership. They identify their worst fugitive felons, we identify ours. We cross deputize their officers. We make them special deputy U.S. marshals. For 10 weeks *their officers and ours work in the same cars, the same command posts, going out and arresting felons.*
>
> . . . .
>
> . . . I will tell you in all candor that the reason we can make 3,300 arrests in a 10-week period is that local law enforcement has not been funded adequately to deal with this problem.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before a Subcomm. of the House Comm. on Appropriations, 99th Cong., pt. 7, at 737 (1985) (emphasis added). Similarly, in testimony in support of the FY 1985 appropriations request, Morris described how USMS agents worked with NYPD officers in the FIST program: "*We would look for local fugitives* and they would look for federal fugitives." *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act for 1985: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., pt. 8, at 784 (1984) (emphasis added). That year the Director was also quite explicit in his request for specific Congressional approval for FIST operations: "Our plans are to try to begin one more FIST this year, and if this

bill is a particularly unsuitable vehicle for an implied ratification of unauthorized actions funded therein." *Id.* at 975.

appropriation is granted by this committee, we would hope to run two in fiscal year 1985." *Id.* at 785. An appropriation of "$1,000,000 above the budget request for FIST operations" was granted in the FY 1985 appropriations bill. H.R. Conf. Rep. No. 98–952, at 26 (1984).

More recently, Congress appropriated an additional $2.5 million "for [USMS] expenses and equipment related to the apprehension of fugitives." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102–393, 106 Stat. 1729, 1742 (1992). The 1992 Report of the House Appropriations Committee contained material again demonstrating that committee's awareness and approval of cooperative state-federal law enforcement programs to apprehend "dangerous drug fugitives" and other fugitive felons. As the report states:

> Cooperative law enforcement programs, involving all levels of government, have proven to be the most effective and efficient way to apprehend dangerous drug fugitives. . . . The Committee has recommended $3 million for the United States Marshals Service to enhance the efforts to apprehend and incapacitate criminals wanted for drug related offenses. . . . The Committee expects that the Marshals Service will work closely with state and local law enforcement agencies . . . to conduct this special operation against drug offenders.

H.R. Rep. No. 102–618, at 42 (1992).

As a departure from the norm that legislative action should be textually explicit, the legislative ratification doctrine should be invoked with caution and only on the basis of a convincing showing that Congress actually intended to grant the authority in question. Here, there is ample evidence that the appropriations committees were repeatedly informed that federal officers participated in thousands of arrests based on state law warrants as an integral part of the FIST operations for which specific appropriations were subsequently passed. On the other hand, there is little or no evidence that awareness of this activity extended beyond the appropriations committees. Nor is there evidence that the appropriations committees, let alone Congress as a whole, regarded the FIST appropriations as a permanent authorization for direct federal participation in arrests based solely on state law violations.

As stressed by the Supreme Court in *Greene v. McElroy*, 360 U.S. at 506–07, when the agency action at issue is based on unsettled or controversial legal authority, reliance on the ratification doctrine is particularly questionable. Here, the use of federal officers to arrest persons charged solely with state law violations cannot be viewed as a settled and uncontroversial legal matter. Given these considerations, and the more restrictive interpretation of the ratification doctrine reflected in more recent court opinions, we conclude that it does not provide a reliable

legal basis for federal marshals to participate in the arrest of fugitives wanted on state warrants only.

4. *Inherent or Federal Common Law Authority*

The USMS also contends that it has inherent or "federal common law" authority to pursue and arrest state law fugitives even if no federal statute applies in the particular case. We conclude that in circumstances where there is good reason to believe that the pursuit or arrest will prevent the commission of a federal felony (including a violation of the FFA), the USMS does have limited inherent authority to take the necessary preventive measures. In the absence of such circumstances, U.S. marshals would generally lack any inherent or common law authority to pursue or arrest fugitives wanted solely for state law violations.[11] However, as discussed in section II.B.2, *supra*, whenever a marshal or deputy marshal is already executing federal law within a state, he may exercise the powers of a sheriff in that state in carrying out all reasonable aspects of the federal assignment. *See United States v. Laub Baking Co.*, 283 F. Supp. 217, 220–22 (N.D. Ohio 1968).

In 1970, this office opined that Department of Transportation personnel deputized as Special Deputy Marshals had inherent authority to serve as armed air marshals on civil aircraft in order to prevent acts of air piracy prohibited by 49 U.S.C. § 1472(h).[12] The thrust of that opinion was that the United States "has inherent authority to take reasonable and necessary steps to *prevent [federal crimes].*" Air Piracy Op. at 2 (emphasis added); *see id.* at 3 (stating that federal law enforcement personnel have "the inherent authority to protect against violation of federal criminal laws"). We most recently reaffirmed this position in advising the USMS that it had inherent legal authority to provide protective services to abortion clinics and providers, without regard to the applicability of a court order, in order to prevent violations of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.

The most prominent judicial authority for the claim of inherent federal enforcement authority is *In re Neagle*, 135 U.S. 1 (1890). There, the Court held that, even in the absence of specific legislation, "any duty of the marshal to be derived from the general scope of his duties under the laws of the United States is 'a law' within the meaning of [the Supremacy Clause]." *Id.* at 59. Although Marshal David Neagle's actions in shooting a would-be assassin to protect the life of a Circuit Justice were not specifically authorized by federal statute, the Court

[11] Under exigent circumstances, federal officers qualifying as peace officers under state law sometimes have the authority, or even the duty, to intervene in state offenses committed in their presence, particularly when responding to the call of a local law enforcement officer. *See* 5 Op. O.L.C. at 48. We adhere to that interpretation, but it applies only in narrow circumstances that do not encompass the issue posed here.

[12] Memorandum for Wayne B. Colburn, Director, U.S. Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Law Enforcement Authority of Special Deputies Assigned to DOT to Guard Against Air Piracy* (Sept. 30, 1970) ("Air Piracy Op.").

considered them to be within the general scope of his duties. The Court has re-acknowledged and reapplied the "inherent authority" principle in subsequent cases. *See, e.g., In re Debs*, 158 U.S. 564 (1895).

Based on *Neagle* and the principles underlying our Air Piracy opinion, we believe that U.S. marshals have inherent authority to take reasonable and necessary steps to prevent federal crimes.[13] Participation by federal marshals in cooperative federal-state task forces approved by the Attorney General to pursue and apprehend fugitive federal felons would appear to be a reasonable and necessary step to prevent violations of the FFA and other federal statutes. We do not think that such participation is rendered legally invalid, or constitutes an insupportable expansion of federal law enforcement authority, merely because it also entails the pursuit and arrest of state law fugitives as the *quid pro quo* that motivates the participation of state and local police in these operations. State and local governments cannot be expected to participate in these joint operations unless they receive reciprocal assistance in rounding up fugitives wanted under their laws and warrants.

The validity of that aspect of joint task force operations is also fortified by the prospect that many state law fugitives will "move or travel in interstate commerce," and thus violate the FFA, in the course of their evasive activities. In other words, many of the state law fugitives arrested by these joint task forces are also potential violators of the FFA and other federal laws.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[13] We do not base this position on the view that the scope of federal law enforcement jurisdiction may be expanded on the basis of "federal common law." Rather, federal common law only provides authority for taking necessary actions to implement federal authority that *already exists* or for taking emergency action to prevent crimes committed in the presence of the federal officer. This view is codified in 28 U.S.C. §564 (formerly §570), which gives U.S. marshals the common law authority of a state sheriff in the respective states, *but only insofar as he is already enforcing federal law within that state in the first place.*

Permissibility of the Administration and Use of the Federal Payroll Allocation System by Executive Branch Employees for Contributions to Political Action Committees

Federal employees who would offer the use of, or administer, the federal salary-allocation system for allotments to political action committees, would not, without more, violate 18 U.S.C. §§ 602 and 607, or the civil provisions of the Hatch Act Reform Amendments of 1993.

The Hatch Act Reform Amendments of 1993 would prohibit certain high-level and Executive Office employees identified in 5 U.S.C. § 7324(b), the duties and responsibilities of whose positions continue outside normal duty hours and while away from the normal duty post, from using the salary-allocation system to make contributions to political action committees.

The Hatch Act Reform Amendments of 1993 would not prohibit the remainder of federal employees covered by those Amendments from making contributions to political action committees through the salary-allocation system; however, 5 U.S.C. § 7324(a) would expressly prohibit such employees from taking steps to use the salary-allocation system to make such contributions while they are on duty or in a federal building.

While use of the salary-allocation system for contributions to political action committees would be lawful under certain circumstances, the head of each federal agency has the discretion to decide whether to make the system available for that purpose to employees of the agency.

February 22, 1995

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

Early last year, the Office of Personnel Management ("OPM") advised executive branch officials that executive branch employees now are permitted to make voluntary salary allotments to political action committees ("PACs"), using the mechanisms otherwise available to federal employees for salary allotments to other organizations and institutions.[1] Under the salary-allotment system, a federal employee can authorize federal payroll administrators to transmit portions of his or her salary, on a regular basis, to certain persons or institutions designated by the assigning employee. *See* 5 C.F.R. pt. 550, subpart C.

The Criminal Division of the Department of Justice has questioned whether federal employees offering or administering the salary-allotment procedure for PAC contributions, or the employees who would make such contributions using that procedure, would thereby violate the Hatch Act Reform Amendments of 1993, Pub. L. No. 103–94, 107 Stat. 1001 ("HARA"), or two related criminal statutes,

[1] *See* Memorandum for Heads of Executive Departments and Agencies, from James B. King, Director, Office of Personnel Management (Feb. 17, 1994); Memorandum for [all Executive Branch] Chiefs of Staff from Michael Cushing, Chief of Staff, Office of Personnel Management (Apr. 4, 1994).

18 U.S.C. §§ 602 and 607.[2] In response, OPM contends that such employees would not violate the HARA or those criminal statutes.[3]

We have reached the following conclusions with respect to the use of the salary-allocation system for contributions to PACs:[4]

1. None of the federal employees who would engage in the practices in question — offering the use of or administering the salary-allocation system, or making contributions to PACs through that system — would, without more, violate the relevant criminal provisions, 18 U.S.C. §§ 602 and 607.

2. Federal employees offering use of or administering the salary-allocation system for PAC contributions would not, without more, violate the civil provisions of the HARA. If, in practice, such employees were to request, urge or coerce other employees to make PAC contributions, they could thereby violate the HARA and the criminal statutes. But this potential for abuse does not render the proposed practice unlawful per se.

3. Certain high-level and Executive Office employees identified in 5 U.S.C. § 7324(b), the duties and responsibilities of whose positions continue outside normal duty hours and while away from the normal duty post, may not use the salary-allocation system to contribute money to PACs, because to do so would violate the HARA requirement that those employees not engage in political activity using "money derived from the Treasury of the United States." 5 U.S.C. § 7324(b)(1).

4. The remainder of federal employees covered by the HARA may not, while they are on duty or in a federal building, take steps to use the salary-allocation system to make contributions to PACs, because 5 U.S.C. § 7324(a) expressly prohibits those federal employees from engaging in political activity while on duty or while in a federal building. Thus, for example, a covered employee may not, while on duty or in a federal building, fill out direct-deposit forms for salary allocations to PACs and deliver such forms to the employees who would process or administer those allocations. A more difficult question is whether these contributing employees would violate the HARA if they were off duty and off federal premises when they take the steps necessary to trigger the use of the salary-alloca-

[2] *See* Memoranda for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jo Ann Harris, Assistant Attorney General, Criminal Division (Sept. 9, 1994; Oct. 24, 1994).

[3] *See* Letters for Dawn E. Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management (Oct. 27, 1994; Nov. 4, 1994; Nov. 10, 1994; Dec. 13, 1994).

[4] PACs, or "political action committees," are not defined as such under federal law However, 26 U.S.C. § 9002(9) defines "political committee" as:

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

See also 2 U.S.C. § 431(4) (similar definition with respect to committees making contributions and expenditures for federal elections). For purposes of this Opinion, "PAC" refers only to an organization that comes within this definition. In theory, there could exist other sorts of PACs that do not make contributions or expenditures for the purpose of influencing elections for partisan political office. In this Opinion, references to "PACs" do not include such committees, and insofar as federal employees might wish to use the salary-allocation system to make contributions to such committees, such a practice would be beyond the scope of the questions we address in this Opinion.

tion system—e.g., if an employee completes the direct-deposit form at home, and sends it from home to the appropriate administrative employees. Although the question is a close one, we conclude that such actions would not violate the HARA, because they are not proscribed by the literal terms of the prohibitions found in 5 U.S.C. §7324(a).

While we have concluded that use of the salary-allocation system for PAC contributions would be lawful under certain circumstances, nevertheless the head of each federal agency has the discretion to decide whether to make the system available for that purpose to employees of the agency.[5]

I. STATUTORY BACKGROUND

A. *The Hatch Act Before the 1993 Amendments*

In 1939, Congress passed the original Hatch Act, which declared unlawful certain political activity of federal employees. *See* Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147. In section 9(a) of the Hatch Act, 53 Stat. at 1148, Congress provided in pertinent part:

> No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.[6]

The prohibition in section 9(a) eventually was codified at 5 U.S.C. §7324(a)(2) (Supp. III 1965–1967), which provided that "[a]n employee in an Executive agency . . . may not . . . take an active part in political management or in political campaigns."[7]

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[5] *See* 5 U.S.C. §5525 ("The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate."); 5 C.F.R. §550.311(b) (an agency may permit an employee to make an allotment "for any legal purpose deemed appropriate by the head of the agency"). *Accord* Memorandum for Heads of Executive Departments and Agencies, from James B. King, Director, Office of Personnel Management at 1 (Feb. 17, 1994) (noting that, under OPM's proposal, the head of each executive agency would have the option of allowing that agency's employees to use salary allotments for distributing portions of their salaries to PACs).

[6] Section 9(a) further provided that heads and assistant heads of executive departments, and certain officers appointed by the President by and with the advice and consent of the Senate, were not "officers" or "employees" for purposes of that section.

[7] This prohibition did not apply to certain federal employees. *See* 5 U.S.C. §§7324(d)(1)–(3) (Supp. III 1965–1967). What is more, by a 1940 amendment to the Hatch Act, Congress exempted from the scope of section 9(a) any political activity in connection with nonpartisan campaigns, and activity in connection with any question not identified with a political party, such as constitutional amendments and referenda. Act of July 19, 1940, ch. 640, §4, 54 Stat. 767, 772 (subsequently codified at 5 U.S.C. §7326 (Supp. III 1965–1967)). Thus, under the old Hatch Act, "only *partisan* political activity [was] interdicted." *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (emphasis added).

B. *The Hatch Act Reform Amendments of 1993*

In 1993, Congress eliminated many of the restrictions that previously had cabined the political activities of federal employees. *See* Hatch Act Reform Amendments of 1993, Pub. L. No. 103–94, 107 Stat. 1001. Most importantly, Congress did an about-face on the prohibition at the very heart of the Hatch Act: under a new 5 U.S.C. §7323(a), effective February 3, 1994, covered federal employees "*may* take an active part in political management or in political campaigns," subject to specific exceptions.[8] Thus, the very category of activities that was prohibited under the old Hatch Act is now expressly permitted.

Congress did, however, specify several important exceptions to the general rule of §7323(a). *See* 5 U.S.C. §§7323(a)(1)–(4), 7323(b), 7324. For present purposes, three of those exceptions are germane:

1. Under 5 U.S.C. §7323(a)(2), a covered employee may not "knowingly solicit, accept, or receive a political contribution from any person," except under limited circumstances not material here (*see infra* note 11).

2. Under 5 U.S.C. §§7323(b)(2)–(4), employees of certain enumerated federal agencies, departments and entities — including, for example, the Criminal Division of the Department of Justice — will continue to be bound by the proscription of section 9(a) of the old Hatch Act (i.e., former 5 U.S.C. §7324(a)(2) (1988)): unlike most other federal employees, such "HARA-exempt" employees *cannot* "take an active part in political management or in political campaigns."[9]

3. Finally, almost all federal employees, including those who are "HARA-exempt," may not engage in "political activity" while: (i) on duty; (ii) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; (iii) wearing a uniform or official insignia identifying the office or position of the employee; or (iv) using any vehicle owned or leased by the federal government or any agency or instrumentality thereof. 5 U.S.C. §7324(a). An exception to this prohibition is made for certain high-level and executive office employees identified in 5 U.S.C. §7324(b), the duties and respon-

[8] This provision in §7323(a) applies to any individual — other than the President, the Vice President, members of the uniformed services, and employees in particular agencies and departments specified in §7323(b) — who is employed or holding office in (i) an Executive agency other than the General Accounting Office; (ii) a position within the competitive service which is not an Executive agency; or (iii) the government of the District of Columbia (other than the Mayor, members of the City Council, and the Recorder of Deeds). *See* 5 U.S.C. §§7322(1), 7323(b). However, on September 20, 1994, this Office opined that Congress should not be understood to have intended that the President be precluded from limiting the political activities of employees who are political appointees; indeed, as we noted, if the HARA were instead interpreted to prevent a President from limiting the political activities of even his high-level political appointees, the statute would raise serious constitutional questions. Letter for Lorraine P. Lewis, General Counsel, Office of Personnel Management, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Sept. 20, 1994). *See also* 59 Fed. Reg. 48,765, 48,767, 48,771 (1994) (discussing proposed 5 C.F.R. §734.104, which reflects the Sept. 20, 1994 OLC letter).

[9] This prohibition does not apply to employees appointed by the President by and with the advice and consent of the Senate, even within the specified agencies, departments and entities. 5 U.S.C. §§7323(b)(2)(A), 7323(b)(3). *See also supra* note 8.

sibilities of whose positions continue "outside normal duty hours and while away from the normal duty post." *Id.* §7324(b)(2)(A). These employees may engage in on-duty or on-premises political activity, but only "if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." *Id.* §7324(b)(1).

It is the responsibility of the Office of Special Counsel ("OSC") to investigate allegations that federal employees have violated the prohibitions that remain in the HARA. If the OSC believes such a violation has occurred, it can present the case to the Merit Systems Protection Board ("MSPB"); the MSPB would then adjudicate the case. *See American Fed'n of Gov't Employees v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 909 (1985). If the MSPB finds that an employee has violated a prohibition in §7323 or §7324, the employee is subject to removal from his or her position. 5 U.S.C. §7326. If the MSPB finds by unanimous vote that the violation does not warrant removal, a penalty of not less than a 30-day suspension without pay shall be imposed by direction of the MSPB. *Id.; see also Special Counsel v. Dukes*, 8 M.S.P.R. 549 (MSPB, 1981) (MSPB lacks discretion to impose a penalty less severe than a 30-day suspension without pay).

C. *OPM's Regulations under the Hatch Act and under the HARA*

In 1984, OPM issued regulations that specifically interpreted the old Hatch Act to forbid use of the federal salary-allocation system for PAC contributions by federal employees. *See* 49 Fed. Reg. 17,431–32 (1984).[10] As we explain *infra* pp. 66–72, these regulations arguably were undermined by subsequent decisions of the federal courts and by other authorities. Nonetheless, between 1984 and the present date, the federal salary-allocation system has not been used to facilitate federal employees' PAC contributions.

On February 2, 1994, this Office concluded that, under the HARA, OPM continues to have certain responsibility for issuing regulations concerning permitted and prohibited activities under the Act. *See Authority for Issuing Hatch Act Regulations*, 18 Op. O.L.C. 1 (1994).

On February 4, 1994 (the day after the HARA took effect), OPM superseded its previous Hatch Act regulations, including the 1984 regulations that had proscribed the use of the salary-allocation system for PAC contributions. *See* 59 Fed. Reg. 5313–15. Thereafter, OPM advised executive branch officials that, in OPM's view, executive branch employees now are permitted to make voluntary salary allotments to PACs using the mechanisms otherwise available to federal

[10] Under the original Hatch Act, the Civil Service Commission ("CSC") was delegated limited authority to issue interpretive regulations defining the scope of permitted and prohibited activities. *See infra* pp. 63–66. In the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, Congress eliminated the CSC, and OPM became "responsible for promulgating Hatch Act regulations." *American Fed'n of Gov't Employees*, 747 F.2d at 753. *See infra* p. 67.

employees for salary allotments to other organizations and institutions. *See supra* note 1.

On September 23, 1994, OPM published interim regulations, which would inform federal employees of the political activities that are permitted and prohibited under the HARA. 59 Fed. Reg. 48,765–77. Those interim regulations do not address directly the issue presented in this Opinion, though they do consider several subsidiary issues that are germane here, and that we will consider herein.

D. *Related Criminal Statutes — 18 U.S.C. §§ 602, 607*

The Criminal Division also has questioned whether participants in the proposed practice would violate either of two criminal statutes, 18 U.S.C. §§ 602 and 607. Those statutes prohibit federal employees from soliciting political contributions from other federal employees (§ 602), and prohibit persons from soliciting or receiving political contributions while in a federal building (§ 607). *See infra* pp. 53, 58.

II. APPLICATION OF THE HARA AND RELATED CRIMINAL STATUTES

Federal employees could be involved in the salary-allocation process in three distinct ways. First, under the procedure envisioned by OPM, certain federal employees — in particular, the heads of federal agencies — would *offer* other federal employees the opportunity to use the federal salary-allocation system to make contributions to PACs. Second, certain employees — possibly both within and outside the contributing employees' agency — would *administer* the salary allocations to PACs. Such employees would, for instance: collect the direct-deposit forms on which employees request an allocation to a PAC; perform the ministerial functions associated with such an allocation (such as recording the allocation, and sending the forms on to other federal employees involved in the processing); and transmit a portion of the contributor's salary to the PAC, or to a PAC bank account. Finally, certain federal employees would actually *make contributions to PACs* by way of the salary-allocation procedure. These employees would fill out direct-deposit forms indicating that they wish part of their salaries to be allocated and transmitted to various PACs, and would transmit those forms to the appropriate officials (such as the payroll officer in their agency or department) to begin processing. Subsequently, as a result of the contributing employees' allocations, other federal employees would transfer money to the designated PACs from the contributing employees' salaries.

In section A, *infra*, we discuss whether the federal employees who would offer other employees the opportunity to use the federal salary-allocation system for

PAC contributions would thereby violate the prohibitions on solicitation found in 5 U.S.C. §7323(a)(2) and 18 U.S.C. §§602 and 607.

In section B, *infra*, we discuss whether the employees who would administer the transmission of PAC contributions would thereby violate the prohibition in 5 U.S.C. §7323(a)(2) on accepting or receiving political contributions, or the prohibition in 18 U.S.C. §607 on receiving political contributions in a federal building.

In section C, *infra*, we discuss whether administrative employees in "HARA-exempt" agencies and components who would handle and transmit other employees' PAC contributions would thereby violate the prohibition in 5 U.S.C. §7323(b) on "tak[ing] an active part in political management or political campaigns."

Finally, in section D, *infra*, we discuss whether any of the participants in the proposed procedure would violate the "on-duty," "on-site," and related prohibitions found in 5 U.S.C. §7324.

A. *Solicitation — 5 U.S.C. §7323(a)(2) and 18 U.S.C. §§602 and 607*

The Criminal Division has asked whether the act of offering employees use of the salary-allocation system to make PAC contributions would be "solicitation" of political contributions in violation of any or all of the following three statutes:

> * 5 U.S.C. §7323(a)(2), which prohibits covered employees from soliciting "political contributions," except that one union member may solicit another union member to contribute to the union's PAC under certain circumscribed circumstances; [11]
>
> * 18 U.S.C. §602(a), which makes it a felony for a federal officer or employee "to knowingly solicit any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971," from any other federal officer or employee; and
>
> * 18 U.S.C. §607(a), which makes it a felony "for any person to solicit . . . any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by [any officer or employee of the United States]."

[11] Specifically, an employee can solicit or receive political contributions if (i) the person being solicited or making the contribution is a member of the same federal labor organization or federal employee organization as the covered employee; (ii) the person being solicited or making the contribution is not a subordinate employee of the covered employee; and (iii) the solicitation is for a contribution to a multicandidate PAC of the labor organization or employee organization of the employees, and that PAC was established prior to October 6, 1993 5 U.S.C. §7323(a)(2)(A)–(C).

We conclude that federal employees, including the heads of agencies, would not violate the prohibition on "solicitation" in any of these three statutes merely by offering employees use of the salary-allocation system to make voluntary PAC contributions.

All three statutes ultimately are derived from the prohibitions on solicitation in sections 11 and 12 of the Civil Service Act of 1883, ch. 27, 22 Stat. 403 ("the Pendleton Act");[12] and we see no reason why "solicit" should not have the same meaning in all three statutes.[13] However, Congress has not provided a definition of the term "solicit" in any of the three provisions. Therefore, we must give that term its ordinary meaning. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

In two recent opinion letters, the Office of Special Counsel — which has the authority under 5 U.S.C. § 1212(f) to issue advisory opinions on the Hatch Act[14] — offered this definition of "solicit": "to try to obtain by entreaty, persuasion or formal application."[15] Under this definition, asking, requesting, or urging another federal employee to make a political contribution would be prohibited (putting aside the exception described in 5 U.S.C. § 7323(a)(2), which is not relevant here). *See also People v. Murray*, 307 Ill. 349, 365, 138 N.E. 649, 655 (Ill. 1923) (to solicit a contribution is "to try to obtain by asking; to ask for the purpose of receiving").

We think the Special Counsel's definition of "solicit" is an appropriate one.[16] Under the Special Counsel's definition — indeed, under any ordinary under-

[12] Section 602(a), for example, is derived from section 11 of the Pendleton Act, which provided in pertinent part that no congressional, judicial or executive branch officer or employee "shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, . . . or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States." 22 Stat. at 406. In 1980, section 11 of the Pendleton Act was amended to eliminate the provision prohibiting *receipt* of contributions by federal employees. Pub. L. No. 96-187, tit. II, § 201(a)(3), 93 Stat. 1339, 1367. *See* H.R. Rep. No. 96-422, at 25 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2860, 2885.

Similarly, the prohibition currently found in § 607 is a descendent of section 12 of the Pendleton Act, which provided in pertinent part that "no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States . . ., solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever." 22 Stat. at 407.

[13] In enacting the HARA, Congress added § 602(b), which states that an activity cannot be a violation of § 602(a) "unless that activity is prohibited by section 7323 or 7324" of the HARA. *See* Pub. L. No. 103-94, § 4(b), 107 Stat. at 1005. Thus, a person's conduct cannot violate § 602(a) unless it is also a civil violation of the HARA. Congress did not impose a similar restriction on § 607. Thus, in theory, "solicit" could have a meaning in § 607 distinct from its meaning in the other two statutes. But we see no reason not to treat the term identically in all three statutes.

[14] *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").

[15] *See* Letter for Cheryl D. Mills, Associate Counsel to the President, from William E. Reukauf, Associate Special Counsel for Prosecution, Office of Special Counsel at 2 (Feb. 4, 1994); Letter for Dennis I. Foreman, Deputy General Counsel, Department of the Treasury, from William E. Reukauf, Associate Special Counsel for Prosecution, Office of Special Counsel at 2 (Feb. 4, 1994).

[16] This definition is, for example, consistent with pertinent dictionary definitions of "solicit." As we have explained, the solicitation prohibitions derive from the Pendleton Act. Shortly after enactment of that Act, Black's Law Dictionary defined "solicitation" as "Asking; enticing; urgent request." *Black's Law Dictionary* 1105 (1st ed. 1891); *see also Black's Law Dictionary* 1392 (6th ed. 1990) ("Asking; enticing, urgent request. . . . Any action which the relation of the parties justifies in construing into a serious request."); *Webster's Third New Int'l Dictionary*

standing of the term — it is hard to see how the conduct in question here would rise to the level of "solicitation." Pursuant to OPM's proposal, the head of each agency would send a memorandum to all employees informing them that "there is now no legal ban to voluntary allotments by Federal employees directed to political action committees." *See* Memorandum for [all Executive Branch] Chiefs of Staff, from Michael Cushing, Chief of Staff, Office of Personnel Management (Apr. 4, 1994), Attachment 2. The proposed memorandum further would "emphasize" to employees that "this program is entirely voluntary on your part, a service we have added for our employees." *Id.* Such a memorandum would not urge employees to make contributions, and would not request or encourage such action. We conclude that such an offer of use of the salary-allocation system for voluntary PAC contributions would not thereby be a "solicitation" of such contributions. *Cf., e.g., In re Dodds*, 2 Political Action Reporter 253 (Civil Service Comm'n, 1945) (announcing to employees under one's supervision that they had the legal right to make voluntary contributions to political campaign funds if they so desired is not, without more, "solicitation").

Moreover, the statutory context of the solicitation ban in § 7323 supports this conclusion. In § 7323(a), Congress has prohibited only those solicitations that can be said to constitute "tak[ing] an active part in political management or in political campaigns." [17] The "tak[ing] an active part" standard was derived from the prohibition in section 9(a) of the old Hatch Act. *See supra* p. 49. Under the old Act, two courts of appeals held that a covered federal employee could violate the "tak[ing] an active part in political management or in political campaigns"

2169 (1986) (defining "solicit" as, inter alia, "to make petition to: entreat, importune . . .; *esp*: to approach with a request or plea (as in selling or begging)"; "to move to action: serve as an urge or incentive to. incite"; "to strongly urge (as one's cause or point): insist upon"; "to endeavor to obtain by asking or pleading: plead for . . .; *also*: to seek eagerly or actively"; "to demand as a requisite: call for: require"). Also notable is 47 U.S.C. § 227(a)(3), which defines "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." This definition would require some encouragement or urging, at the very least.

OPM, in its interim regulations, has proposed that "solicit" should mean "to *request expressly* of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group." 59 Fed. Reg. 48,771 (1994) (proposed 5 C.F.R. § 734.101) (emphasis added). We believe OPM is correct that a "request" (or an "urging") is required, but we have no occasion to decide whether such a request necessarily must be "express[]." A strong argument could be made that even an "implicit," or veiled, request is a solicitation. For example, the Special Counsel has concluded that it would be a solicitation for an official to "suggest" that an individual work for a political campaign. *See* Letter for Dennis I. Foreman, Deputy General Counsel, Department of the Treasury, from William E. Reukauf, Associate Special Counsel for Prosecution, Office of Special Counsel at 3 (Feb. 4, 1994); *see also People v. Murray*, 307 Ill. at 365, 138 N.E. at 655 ("Solicitation [of political contributions] is not necessarily by word of mouth or writing."); *Civil-Service Law—Political Contributions—Solicitation of by Federal Officer*, 24 Op. Att'y Gen. 133, 134–35 (1902) (dissemination to federal employees of a circular stating that financial assistance is "needed" for Republican state committee, and that supervisory officials "will be greatly obliged" if the recipients "will aid to the extent of [their] ability and inclination," even though not a "demand," was a "request" constituting an impermissible solicitation under section 11 of the Pendleton Act); *Special Counsel v. Rivera*, 61 M.S.P.R. 440, 443–44 (MSPB, 1994) (letter stating that "[w]e hope you can . . . contribute to this worthy cause [viz., a partisan candidacy]" was a solicitation of contributions).

[17] That section *permits* employees to "take an active part in political management or in political campaigns." The prohibition of solicitation is enumerated as one of the few exceptions to this rule; thus, it is fair to read the statute as prohibiting only those solicitations that in fact constitute "tak[ing] an active part in political management or in political campaigns."

prohibition only if that employee acted "*in concert with* a partisan political campaign or organization." *Biller v. MSPB*, 863 F.2d 1079, 1090 (2d Cir. 1988) (emphasis added); *accord Blaylock v. MSPB*, 851 F.2d 1348, 1356 (11th Cir. 1988) ("the Hatch Act is violated only by actions taken in concerted effort with partisan activity or formal, organized, political groups"). Were an employee, such as the head of an agency, merely to inform other employees of their legal rights, and in a neutral manner make available to them a means of exercising those rights, that employee would not thereby be acting "in concert with a partisan political campaign or organization." Therefore, such an offering employee would not have taken an "active part in political management or in political campaigns," and, accordingly, would not have engaged in improper solicitation under § 7323(a). [18]

Notwithstanding the foregoing, the Criminal Division has suggested that the act of offering access to the salary-allocation system for PAC contributions may violate the law because, in practice, such an offer may be *perceived* as soliciting such contributions. The Criminal Division's argument is that, as a result of the paperwork associated with the salary-allocation system, an employee's "giving history" can be "accessed and examined by management." Moreover, the Federal Election Campaign Act ("FECA") requires that political committees, such as the PACs in question here, publicly identify all persons who have contributed more than $200 in a calendar year. 2 U.S.C. § 434(b)(3)(A); *see also id.* § 438(a)(4) (names of such contributors available for public inspection). The fact that management can thereby discover an employee's political contributions "provides fertile ground for the proposed payroll withholding program to assume a most sinister cast." Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jo Ann Harris, Assistant Attorney General, Criminal Division at 6–7 (Oct. 24, 1994). According to the Criminal Division,

> once employees realize that their political giving patterns can be individually accessed and traced through payroll records or through FECA reports, offers of payroll withholding made by management are susceptible of being understood by employees as suggestions that an affirmative response is expected. Once that occurs, it seems to us that the offer of payroll withholding for PAC donations becomes a "solicitation' on the part of those in management that circulate it.

[18] The case would be very different, of course, if the offer were not neutral, such as where contributions were permitted only to certain PACs deemed acceptable to the agency head. In that case, *the Biller/Blaylock* standard might be met, and the action might fairly be considered "taking an active part in political management or in political campaigns"; such differential treatment in favor of some PACs to the exclusion of others might, therefore, amount to an improper "solicitation," depending on the circumstances. But that is not the scenario OPM proposes.

Id. at 7. This argument is similar to that used by OPM itself in 1984 to justify its prohibition on salary allotments to PACs. [19]

This argument has two principal problems. First, the hypothesized danger—that management may be able to discover employees' contribution practices—is not unique to the making of PAC contributions through the salary-allotment procedure. The public has access, by virtue of the FECA, to significant information about contributors to PACs, and this will be the case whether or not those contributions are made through the salary-allocation system. The risk of access to contribution information should not be significantly greater as a result of use of the salary-allocation system: federal officials should not have any additional access to contribution practices of their subordinates through payroll records. Records of employees' financial contributions retained in personnel files within the employees' agency are protected by the Privacy Act, *see* 5 U.S.C. § 552a(a)(4)–(5), and may not be revealed to the officers and employees of the agency, *id.* § 552a(b). [20]

Second, and more important, it is not legally dispositive that some subordinate employees might *perceive* that they are expected to contribute to PACs. The mere possibility that an offer of access to a salary-allocation system may be susceptible of being misunderstood by some employees as a solicitation does not automatically transform all offers into solicitations. Section 7323(a) of the HARA and 18 U.S.C. §§ 602 and 607 do not prohibit a "sinister cast"; they prohibit conduct that is, in fact, solicitation.

What is more, even if the proposed practice might be susceptible to a risk of actual (rather than merely perceived) solicitation, that risk does not render the practice unlawful per se. Whether any particular "offer" of access to the salary-allocation system for PAC contributions would be an impermissible solicitation

[19] OPM explained that such a prohibition was required for prophylactic reasons:

> Use of the Federal payroll system as a vehicle for collecting political contributions, as well as the convenience of making these contributions through payroll deductions, would increase the opportunities for coercion of employees. Introducing the political contribution process into Government would make it possible for supervisors, administrative officers, and others in a position to affect careers or working conditions to discover the identity of political contributors and other information concerning their contributions. Because allotments or payroll deduction authorizations pass through many hands during processing, there exists the risk of either intentional or inadvertent disclosure of sensitive data. Although such a disclosure could be cause for discipline, tracing the disclosure to its source in the processing chain would not be possible in every case. The authority to discipline thus would not be a complete deterrent and where exercised would not forestall potential misuse of the information already disclosed. Even if the integrity of payroll data is not compromised, individual employees could be directly approached by colleagues or superiors seeking to identify contributors. *Even if not so intended, this could create among employees a perception of pressure to contribute to a particular political action fund.*

49 Fed. Reg. at 17,432 (emphasis added).

[20] There is an exception to this prohibition where those officers or employees "have a need for the record in the performance of their duties." *Id.* § 552a(b)(1). It is difficult, however, to imagine a situation in which supervisors would have a legitimate "need . . . in the regular performance of their duties" for information concerning their subordinates' political contributions. *See Parks v. IRS*, 618 F.2d 677, 680–81 (10th Cir. 1980).

would depend on the particular facts of each case.[21] In those cases where ostensible offers do cross the line to become actual solicitations, the makers of such solicitations will be subject to penalty under 5 U.S.C. §§7323(a)(2) and 7324(a), and may be subject to criminal sanctions under 18 U.S.C. §§602 and 607, as well. In addition, if a supervisor does tell (or suggest to) subordinate employees that their contribution practices will be "accessed and examined by management," or if a supervisor (or other employee) otherwise pressures an employee to contribute to PACs, such action could constitute impermissible "coercion" under 18 U.S.C. §610.[22] But the fact that there may be such instances of abuse does not mean that every offer of access to the system automatically becomes a solicitation.

B. *Receipt—5 U.S.C. §7323(a)(2) and 18 U.S.C. §607*

The Criminal Division has questioned whether the federal employees who would implement and administer other employees' salary allocations to PACs would violate 5 U.S.C. §7323(a)(2) or 18 U.S.C. §607, which prohibit some forms of "receiving" or "accepting" political contributions:

> * Under §7323(a)(2), a covered federal employee may not "accept, or receive a political contribution from any person," except that one union member may receive another union member's contribution to the union's PAC, as long as the contributing employee is not a subordinate of the receiving employee.
>
> * Under §607, it is a felony "for any person to . . . receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by [any officer or employee of the United States]."

Under the proposed practice, some administrative employees would process the direct-deposit forms, and would transmit to PACs a portion of contributing employees' salaries. Even if it could be argued that these administering employees would (in some sense) handle the money from the contributing employees' salaries prior to transmitting the contributions to the PACs, we conclude that this cannot

[21] *See The President—Interpretation of 18 U.S.C. §603 [now §607] as Applicable to Activities in the White House*, 3 Op. O.L.C. 31, 32 n.3 (1979) ("We have not considered a . . . critical question, which turns primarily on matters of fact, i.e., whether a solicitation within the terms of the statute has occurred.").

[22] Section 610, which was enacted as part of section 4 of the HARA, 107 Stat. at 1005, provides:

> It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in [HARA] section 7322(1) . . . to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote, for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.

be considered "receipt" or "acceptance" of the contributions in the sense intended under the two pertinent statutes.

The Attorney General addressed this issue in the early years of the Pendleton Act. Section 11 of the Pendleton Act, which was the direct predecessor of the statutes at issue here, provided in pertinent part that no congressional, judicial or executive branch officer or employee "shall, directly or indirectly, . . . receive, or be in any manner concerned in . . . receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, . . . or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States." 22 Stat. at 406.

In 1896, Attorney General Harmon opined that section 11 should not be strictly construed to make criminal the "purely mechanical" handling of a political contribution by a federal employee. *Contributions for Political Purposes*, 21 Op. Att'y Gen. 298 (1896). In the case the Attorney General considered, one Bellman, an agent of the Postmaster General, was detailed to be the conduit for payments by the government to secret agents. Under the "established practice," secret agents sent orders to Bellman to make payments out of their government remittance directly to the agents' families, creditors, etc. *Id.* at 299. One agent asked Bellman to pay $50 to another person, in aid of a political campaign. Bellman — who had nothing whatever to do with soliciting or inducing such a diversion of funds — did as the agent asked him. Despite the fact that Bellman knew the diversion of funds was in aid of a political campaign, *id.*, and the fact that Congress in section 11 "absolutely prohibited the . . . receipt of political contributions by all persons in the Government service in any place or in any way," *id.* at 300, the Attorney General concluded that "I can not see how it can fairly be said that [Bellman's action] was a violation of the provisions of [section 11]." *Id.* The Attorney General reasoned:

> It is admitted that [Bellman] did not solicit the contribution. Nor can it be said, in any proper sense of the term, that he received it. He physically took the money from the package, but he did so merely as the agent of the owner, and so long as it remained in his possession he held it as the agent of the owner, who had a right at any time to revoke his order and reclaim the money. This right continued until Bellman actually handed the money over to the third person, who alone can be said to have received it. When he received it it was from the secret agent in Chicago by the hand of Bellman and not from Bellman. He was accountable to the agent in Chicago and not to Bellman for its use or misuse. Bellman had no more to do with the transaction than a mere messenger would have had to whom the owner had handed it for delivery. The receipt

> of money, etc., intended by [section 11] is acceptance of possession which confers a right of disposal, not possession which simply constitutes the taker a mere custodian without right on his own behalf or that of others.

Id. at 300–01.[23]

We agree with Attorney General Harmon's reasoning, and think it directly applicable here.[24] "The receipt of money . . . intended by [§ 7323(a)(2) and by § 607] is acceptance of possession which confers a right of disposal, not possession which simply constitutes the taker a mere custodian without right on his own behalf or that of others." Indeed, the ministerial employees under the proposed practice would not even have the option to decline to handle the contributions in question: as a part of their assigned duties, they would be required to treat allocations to PACs as they do all other allocations. We therefore conclude that, because the administering employees — like postal employees who pick up and deliver mail containing PAC contributions — would be "mere custodians," or conduits, of the contributions, they would not be recipients thereof.

Moreover, the employees administering the allocated contributions to PACs would not be acting "*in concert with* a partisan political campaign or organization." *Biller*, 863 F.2d at 1090 (emphasis added). Therefore, like the employees who "offer" the use of the allocation system, *see supra* pp. 55–56, they would not be "tak[ing] an active part in political management or in political campaigns," and, accordingly, could not be in violation of § 7323(a)(2).[25]

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[23] *See also In re Harper, reported in* Thirty-fifth Annual Report of the Civil Service Commission 178 (1919) (the Justice Department, citing the "pettiness of the offense," refused to prosecute a federal employee who had acted as a conduit, or "temporary custodian," of political contributions).

[24] The Civil Service Commission subsequently disagreed with the Attorney General's interpretation of section 11; the CSC reasoned instead that "even if [a federal employee] acts as the agent or messenger of another officer or employee for the purpose of delivering a contribution, voluntary or otherwise, to a political committee, the receipt by the agent of money from his principal, knowing it to be for the purpose mentioned, and both being officers or employees of the United States, is prohibited by the statute." *In re LeRoy, reported in* Thirtieth Annual Report of the Civil Service Commission 149, 151 (1914). And, in the *LeRoy* case and in another case occurring at approximately the same time, certain United States Attorneys and two district judges apparently agreed with the CSC's interpretation, rather than with that of Attorney General Harmon. *See id.* at 152 (reporting successful prosecution of LeRoy); *In re Dutro, reported in* Thirtieth Annual Report of the Civil Service Commission 158 (1914) (quoting judge's ruling rejecting 1896 Attorney General Opinion, and reporting eventual conviction for violation of section 11). The CSC subsequently cited the *Dutro* case as having "definitively establishe[d] the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of [section 11]." CSC Form 1236, "Political Activity and Political Assessments of Federal Officeholders and Employees," § 39, at 20 (1939). We are, however, more persuaded by the 1896 Attorney General Opinion.

[25] Under the proposed definitions of "accept" and "receive" in the interim OPM regulations, the ministerial handling of contributions could not constitute "acceptance" or "receipt" of those contributions, because the employees in question would not be acting "officially on behalf of" the PACs to which the contributions were made. *See* 59 Fed. Reg. at 48,770–71 (proposed 5 C.F.R. § 734.101). This interpretation is consistent with the holdings in *Biller* and *Blaylock*. *See id.* at 48,768–69 (discussing *Biller* and *Blaylock*).

C. *Handling of Contributions by Employees in "HARA-Exempt" Agencies and Components — 5 U.S.C. § 7323(b)*

Under 5 U.S.C. §§ 7323(b)(2)–(4), employees of certain enumerated federal agencies, departments and components — including, for example, the Criminal Division of the Department of Justice — cannot "take an active part in political management or political campaigns." *See supra* p. 50. The statutory definition of this "take an active part" standard is, moreover, the same under the HARA as it was under the pre-HARA Hatch Act.[26] Congress's intent was that the employees in question would be "exempt from coverage under the [HARA] and maintained under the current [*i.e.*, pre-HARA] law." 139 Cong. Rec. 15,789 (1993) (statement of Sen. Roth).[27]

Under the old Hatch Act, OPM had interpreted the "take an active part" standard to prohibit federal employees from handling or accounting for other federal employees' PAC contributions,[28] and OPM had, in fact, specifically determined that the persons administering the federal salary-allocation system would violate the law if the system were used for PAC contributions.[29] *See supra* p. 51; *infra* pp. 68–70. The Criminal Division has argued that "HARA-exempt" employees should still be subject to these regulatory prohibitions:

> [I]t appears to us that under 5 U.S.C. § 7323(b)(4), employees of . . . excluded components remain bound by the prohibitions concerning political activity by federal employees that were in effect prior to 1940 which contain prohibitions on "handling" or "accounting for" political funds, as well as the "solicitation," "acceptance," or "receipt" of political contributions. 5 C.F.R. § 733.122(b)(3). The terms "handling" and "accounting for" seem to us broader than the terms "solicit," "accept," or "receive" that apply to employees in the remainder of the government. If we are correct in that conclusion, and if we are correct in assuming that employees of the Criminal Division continue to be governed by the broader terms of 5 C.F.R. § 733.122(b)(3), one might reasonably argue the mere administrative processing of payroll withholding forms concerning PAC donations by the Division support staff places them at risk of inadvertently violating the Act.

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[26] *Compare* 5 U.S.C. § 7324(a)(2) (1988) *with* the current 5 U.S.C. § 7323(b)(4).

[27] *See also, e.g.*, 139 Cong. Rec. at 15,743 (statement of Sen. Roth) (exempt employees "should continue to be Hatched"), *id.* at 15,789 (statement of Sen. Roth) (certain employees would be "exempted from the relaxation of the Hatch rule"); *id.* at 16,043 (statement of Sen. Roth) (employees of the DOJ Criminal Division would be "exempt from the changes in the Hatch Act"); *id.* at 21,810 (statement of Rep. Myers) (exempt employees "will . . . continue to be covered under the [old] Hatch Act"); *id.* at 21,811 (statement of Rep. Byrne) (exempt employees are "exclude[d] . . . from the reforms").

[28] *See* 5 C.F.R. § 733.122(b)(3) (1994), *superseded*, 59 Fed. Reg. 5313–15 (1994).

[29] *See* 49 Fed. Reg. 17,431, 17,431–33 (1984) (establishing new regulations at 5 C.F.R. §§ 733.101(g)–(h), 733.122(b)(14)–(16)).

Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jo Ann Harris, Assistant Attorney General, Criminal Division at 8 (Oct. 24, 1994).

We conclude, however, that the HARA-exempt employees do not necessarily "remain bound by the prohibitions" contained in the pre-HARA OPM regulations. In the sections that follow, we demonstrate: first, that OPM's pre-HARA regulations may not have interpreted the Hatch Act accurately; and second, that, in any event, OPM has the authority to amend those pre-HARA regulations in the manner reflected in its new regulations. In order to demonstrate why this is so, it is necessary to describe in some detail the historical treatment of the "take an active part" legal standard.

1. *Before the Hatch Act: 1883–1939*

The Civil Service Act of 1883, ch. 27, 22 Stat. 403, better known as the Pendleton Act, declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service," 22 Stat. at 404 and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body," *id.* The Act authorized the President to promulgate rules to carry out the provisions of the Act, and created the Civil Service Commission ("CSC") to administer the Act under the rules promulgated by the President. 22 Stat. at 403–05.

In 1907, in accordance with an executive order issued by President Roosevelt, Civil Service Rule I was amended to read, in pertinent part:

> Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, *shall take no active part in political management or in political campaigns.*

Twenty-fourth Annual Report of the Civil Service Commission 104 (1908) (emphasis added).

The CSC thereafter exercised its authority to investigate and adjudicate alleged violations of this Rule. The scope and meaning of the "take no active part" clause were defined "in the mode of the common law" through these CSC adjudications. *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 559 (1973). Between 1907 and 1939, the CSC applied Rule I in over 3000 adjudicated cases. The CSC from time to time summarized its adjudicatory rulings in the form of guidelines. Most important for present purposes, section 17 of CSC Form 1236, published in 1939, stated: "An employee may make political contributions to any committee, organization, or person not employed by the United States, *but may not solicit, collect, receive, or otherwise handle or disburse the contribu-*

tions." CSC Form 1236, "Political Activity and Political Assessments of Federal Officeholders and Employees," § 17, at 7 (1939) [hereinafter "1939 CSC Form 1236"], *quoted in* Appendix to *Letter Carriers*, 413 U.S. at 584 (emphasis added).

2. *The Hatch Act—1939–1940*

In section 9(a) of the Hatch Act, 53 Stat. at 1148, Congress by statute extended to the entire federal service the prohibition reflected in Rule I. Section 9(a) provided in pertinent part:

> No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, *shall take any active part in political management or in political campaigns.* All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.

In its next session, Congress attempted to give some substantive content to section 9(a)'s prohibition on taking an "active part in political management or in political campaigns." The Senate Committee, led by Senator Hatch, first proposed that a new section 15 of the Hatch Act authorize and direct the CSC to promulgate rules or regulations defining the term "active part in political management or in political campaigns." *See Letter Carriers*, 413 U.S. at 570 n.16 (quoting proposed section 15 in S. Rep. No. 76–1236, at 4 (1940)). But this proposed conferral of "broad rulemaking authority" to the CSC was greeted on the Senate floor with "strong objections," as being "an unwise and invalid delegation of legislative power to the Commission." *Id.* at 570. *See, e.g.*, 86 Cong. Rec. 2352 (1940) (statement of Sen. McKellar); *id.* at 2426–27 (statement of Sen. Lucas); *id.* at 2875 (statement of Sen. Thomas); *id.* at 2924–27 (statement of Sen. Thomas); *see also* Henry Rose, *A Critical Look at the Hatch Act* ("Rose, Critical Look"), 75 Harv. L. Rev. 510, 513 (1962) (opposition in Senate to such a broad delegation of rulemaking authority to CSC "was strong and persistent").

In response to this opposition to the delegation of broad rulemaking authority to the CSC, Senator Hatch offered a substitute section 15, which limited the reach of the prohibition in section 9(a) to "the same activities . . . as the United States Civil Service Commission has heretofore determined are at the time of the passage of this act [*viz.*, July 19, 1940] prohibited on the part of employees in the classified civil service of the United States by the provisions of [Civil Service Rule I]." *See* 86 Cong. Rec. 2928, 2937 (1940). Congress passed this substitute amendment. *Id.* at 2958–59. *See* Act of July 19, 1940, ch. 640, 54 Stat. 767, 771. As later codified in 5 U.S.C. § 7324(a)(2) (Supp. III 1965–1967), the phrase "an active part in political management or in political campaigns" was defined to mean:

> those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service

> before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

Thus, under the Hatch Act, the pre-1940 "determinations" of the CSC defined what behavior was unlawful. The decisions in these CSC cases, however, were not reported, nor were they (or are they) even available to the public; rather, the decisions were "buried in the raw file in a dusty storage cabinet" at the CSC. Rose, *Critical Look*, 75 Harv. L. Rev. at 516.[30] Therefore, it was (and is) difficult to ascertain how, under Rule I, the CSC treated actions by federal employees involving the handling of political contributions.[31] In addition, those adjudicatory rulings were widely perceived to be "inconsistent, or incapable of yielding any meaningful rules to govern present or future conduct." Letter Carriers, 413 U.S. at 571.

Federal employee unions eventually challenged the definition in section 15 as being impermissibly vague. In rejecting that challenge, the Supreme Court held that Congress had not codified into law the inaccessible, "impenetrable jungle of Commission proceedings, orders, and rulings," *id.*; rather, the Court held, Congress intended section 15 to transform into codified law the CSC's "administrative restatement of Civil Service Rule I law"—namely, the 1939 version of CSC Form 1236—modified as necessary to reflect provisions in the 1939 and 1940 Acts themselves. *Id.* at 572–74.

The Court's holding in Letter Carriers meant that the prohibitions summarized in the 1939 CSC Form 1236—included as an appendix to the Court's opinion in Letter Carriers, 413 U.S. at 581–95—defined the scope of the prohibition contained in section 9(a) of the Hatch Act. *Id.* at 572–75.[32] As of 1939, the CSC rule as to political contributions was as follows: "An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (*See* provisions of the Criminal Code, discussed in secs. 36 to

[30] *See also id.* at 522; Marick F. Masters & Leonard Bierman, *The Hatch Act and the Political Activities of Federal Employee Unions: A Need for Policy Reform*, 45 Pub. Admin. Rev. 518, 520 (1985) (quoting CSC's acknowledgement that the public cannot go to original sources to study CSC's pre-Hatch-Act determinations, because those determinations are " 'embodied in diffused files and records of the commission' ").

[31] Some of the CSC's decisions were summarized in annual reports. One can glean from these reports, that the CSC, at least in certain instances, concluded that the ministerial handling of political contributions by federal employees violated Rule I, even where those employees had no political objectives of their own and were acting solely as agents of the contributors. For instance, in one case, the CSC requested the removal from federal service of an employee who had acted as a mere conduit for another's contributions. *In re LeRoy*, reported in Thirtieth Annual Report of the Civil Service Commission 149, 152 (1914) (reporting events that occurred in 1910–1913). On the other hand, in a case occurring at virtually the same time as *LeRoy*, the CSC considered similar behavior merely a "technical[] violat[ion of] the law," and found it sufficient simply to issue a warning to the employee not to engage in similar conduct in the future. *In re Wagner, reported in* Twenty-ninth Annual Report of the Civil Service Commission 164, 164 (1913) (reporting events that occurred in 1910–1911).

[32] *Accord Political Activity by Government Employees*, 40 Op. Att'y Gen. 14, 26 (1941). *But see* Rose, *Critical Look*, 75 Harv. L. Rev. at 513–14, 518 n.33 (arguing, contrary to the conclusion in *Letter Carriers*, that the congressional purpose was in fact to codify the more than 3000 individual pre-1940 CSC determinations, rather than the Form 1236 pamphlet restatement).

50.)." 1939 CSC Form 1236 at 7, *quoted in Letter Carriers*, 413 U.S. at 584.[33] In 1940, in light of the Hatch Act itself, the CSC changed the rule to the following:

> *Employees may not solicit, collect, receive, disburse, or otherwise handle contributions made for political purposes.* They may make voluntary contributions to a regularly constituted political organization for its general expenditures.

CSC Form 1236a, "Political Activity and Political Assessments of Persons Employed by State and Local Agencies in Connection with Activities Financed in Whole or in Part by Loans or Grants Made by the United States or by any Federal Agency," § 14, at 8 (1940) (emphasis added).

However, this rule, like the others the CSC promulgated in 1939–1940, did not set in stone the scope of prohibited activities under the Hatch Act. In *Letter Carriers*, the Court recognized that the CSC's definition of prohibited activities had changed over time in accordance with the CSC's reformulation of Form 1236 and, after 1970, in accordance with the regulations that the CSC promulgated in lieu of Form 1236. 413 U.S. at 575 (citing 5 C.F.R. pt. 733). The post-1970 CSC regulations were, the Court held, the "wholly legitimate descendants of the 1940 restatement adopted by Congress and were arrived at by a process that Congress necessarily anticipated would occur down through the years." *Id.* Thus, the Court held that the contours of the "take an active part" prohibition in section 9(a) of the Hatch Act properly had *evolved* in accordance with the CSC's revised rules and regulations.

Significantly, however, the Court held that Congress had established two substantial limitations on the CSC's authority to promulgate regulations defining prohibited activities. First, those regulations were *not* to be promulgated pursuant to a "broad rulemaking authority" on the part of the CSC; indeed, Congress expressly had rejected such a broad delegation of rulemaking power. *Id.* at 570–71. Thus, the CSC's regulations were merely interpretive, rather than legislative, or substantive.[34] Second, Congress placed a specific limit on the CSC's power to alter Form 1236 (and subsequently, to alter its regulations): the CSC's further development of the law of prohibited activities had to be "within the bounds of, *and necessarily no more severe than*, the 1940 rules." *Letter Carriers*, 413 U.S. at 575 (emphasis added). That is to say, the 1940 rules (i.e., the 1939 CSC Form 1236 as amended by the provisions of the 1939 and 1940 Acts themselves) provided the "outer limits" of any subsequent redefinition of prohibited activities.

[33] Sections 36 to 50 of Form 1236, referenced in section 17, discussed several criminal statutes, including, most important, sections 11 and 12 of the Pendleton Act, at that time codified at 18 U.S.C. §§ 208, 209. *See* 1939 CSC Form 1236 at 17–22.

[34] *See, e.g., Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (discussing differences between interpretive and legislative regulations), *Health Ins. Ass'n v. Shalala*, 23 F.3d 412, 422–24 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); *Alcaraz v. Block*, 746 F.2d 593, 613–14 (9th Cir. 1984); *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 558–60 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Id. at 576; *see also id.* at 571–72 (CSC could not fashion a more expansive definition of prohibited activities); *id.* at 574 (CSC was to proceed to perform its role under the Hatch Act "within the limits" of the 1940 rules).

In sum, by interpreting the Hatch Act, the CSC could over time loosen, or eliminate, prohibitions found in its 1939–1940 rules, but it could not establish more restrictive prohibitions than those identified in the 1940 version of CSC Form 1236a.

3. *CSC Interpretations—1942–1978*

Despite the broad ban expressed in the 1939–1940 CSC rule on the solicitation, collection, receipt, disbursement and handling of contributions made for political purposes, the CSC did not apply this rule in a literal fashion in adjudications after 1940. Most important, the CSC held in various adjudications that "handling" political contributions did not, without more, necessarily constitute taking "an active part in political management or in political campaigns."

For instance, the Commission acknowledged that a postman (a federal employee) carrying mail "handles" campaign contributions without violating the statute. *In re Burns, et al.*, 1 Political Activities Reporter ("P.A.R.") 538, 540 (1952). By the same token, an employee who did a "trivial favor" for a friend by delivering membership cards to a political club did not thereby violate the statute. *In re Hendershot*, 1 P.A.R. 166, 173 (1946).

In a series of cases, the Commission ruled that employees did not violate the Act by delivering fellow employees' remittance for tickets for a political organization's dinner, or by delivering the organization's dinner tickets to fellow employees, so long as the employees performing the ministerial task were not involved in promoting the dinner. *In re Burns, et al. (McDonald, Green, Higgins, Chandler and Kearns)*, 1 P.A.R. 538, 542–43 (1952); *In re Hargadine*, 1 P.A.R. 629, 633 (1952); *In re Edwards*, 1 P.A.R. 714 (1954); *In re Villone*, 1 P.A.R. 719 (1954). In such cases, the charged employees were "merely endeavoring to accommodate friends," by "acceding" to their "requests." *Hargadine*, 1 P.A.R. at 633. The Commission accordingly refused to find a violation on the basis of such a "minimal errand service." *Villone*, 1 P.A.R. at 719.

Finally, in a case of particular relevance here, the Commission found that a federal employee did not violate the Act when, "[a]s a favor" to three supervisory employees, "he mailed their contributions to the campaign committee of their choice." *In re Branlund*, 1 P.A.R. 752, 753 (1955). Although undoubtedly this was a "handling" of political contributions in a literal sense, *id.*, the Commission nevertheless ruled that the employee "took no active part in political management or in a political campaign," *id.*

Despite these adjudicatory decisions, the CSC continued to publish more stringent rules. And in 1970, the CSC retained the strict prohibitions when it issued regulations on this subject. 35 Fed. Reg. 16,785 (1970). Thus, although under the regulations a federal employee had the right to "[m]ake a financial contribu-

tion to a political party or organization," 5 C.F.R.§733.111(a)(8) (1971), an employee still was prohibited from "[d]irectly or indirectly soliciting, receiving, collecting, *handling, disbursing, or accounting for* assessments, contributions, or other funds for a partisan political purpose," *id.* §733.122(b)(3). Because §733.122(b)(3) did not define a prohibition more stringent than those identified in the 1939 and 1940 CSC rules, this regulation was within the CSC's delegated authority, according to the Court's subsequent decision in *Letter Carriers*. By the same token, the CSC's adjudicatory decisions limiting the severity of this prohibition, *see supra* p. 66, also were within the Commission's power, because they reflected a diminution, rather than an enhancement, of the activities defined in 1939 and 1940 as constituting an "active part in political management or in a political campaign."

4. *Dissolution of the CSC and Creation of OPM—1978*

Under the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, Congress eliminated the CSC, and OPM took over CSC's responsibility for promulgating Hatch Act regulations. *See American Fed'n of Gov't Employees v. O'Connor*, 747 F.2d 748, 753 & n.13 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 909 (1985).[35] This authority, however, did not mean that Congress gave OPM either unlimited or dispositive power to interpret the Hatch Act. For one thing, OPM's regulatory authority was to be no more extensive than that previously given to the CSC—that is, OPM did not inherit any "broad rulemaking authority," *see Letter Carriers*, 413 U.S. at 570–71; therefore, OPM's Hatch Act regulations are merely interpretive (rather than "legislative").[36] Moreover, those regulations may not identify activities as prohibited unless such activities were within the group of prohibited activities defined in the CSC's 1939 and 1940 rules. *See supra* pp. 64–66.[37]

[35] *See also Authority for Issuing Hatch Act Regulations*, 18 Op. O.L.C. 1, 3 & n.6 (1994).

[36] *See supra* p. 65 & note 34. By contrast, in another section of the Hatch Act, Congress had granted the CSC express "legislative" rulemaking authority with respect to another matter, namely, identifying geographical areas where federal employees could take a more active role in political campaigns and management. *See* Act of July 19, 1940, ch. 640, §16, 54 Stat. 767, 771, Pub. L. No. 89–554, 80 Stat. 378, 526 (1966). Accordingly, the CSC's rules issued pursuant to this grant of authority were legislative in nature, rather than interpretive. *See Joseph v. CSC*, 554 F.2d 1140, 1153 & nn.24–25 (D.C. Cir. 1977). This rulemaking authority was passed on to OPM in 1979, *see* 5 U.S.C. §7327 (Supp. III 1979); and OPM retains this rulemaking authority with respect to the geographic exceptions under the HARA, *see* 5 U.S.C. §7325. Accordingly, regulations issued pursuant to that authority, *see, e.g.*, 59 Fed. Reg. 5313, 5314 (1994) (proposed 5 C.F.R. §733.102), presumably are legislative, rather than interpretive.

[37] In some ways, OPM's regulatory authority is more limited than that previously enjoyed by the CSC. The MSPB has been assigned the task of reviewing the "rules and regulations of the Office of Personnel Management," 5 U.S.C. §1204(a)(4); *see also id.* §1204(f). Thus, the MSPB has 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. Furthermore, the Supreme Court has explained that Hatch Act regulations themselves (now issued by OPM) should continue to be "refined by further adjudications," "within the outer limits of the 1940 rules." Letter Carriers, 413 U.S. at 576. This refinement role once was committed to the same agency that issued the regulations—the CSC. However, the MSPB—not OPM—has "inherited the CSC's 'accustomed role' of refining the law of prohibited political activities through the continual decision of cases." *American Fed'n of Gov't Employees*, 747 F.2d at 755.

5. OPM's Amended Regulations on Salary Allocations to PACs—1982–1984

Before 1982, no agency or court had considered or addressed the applicability of the Hatch Act to PAC contributions. On December 28, 1982, OPM published proposed regulations "to clarify the . . . existing regulatory prohibition [in 5 C.F.R. § 733.122(3)] on the solicitation, payment, collection, and receipt of political contributions." 47 Fed. Reg. 57,724, 57,724. In order to make clear that the federal payroll-deduction system could not be used for political contributions, including contributions to PACs, OPM proposed to expand the Hatch Act definition of "contribution,"[38] and to add three new subsections to the list of "prohibitions."[39] OPM reasoned that automatic salary allocations to PACs should be impermissible because "the use of a Federal payroll deduction scheme or the Government's allotment system as a conduit for political contributions by Federal employees subject to the Hatch Act would involve the use of Federal workplaces and instrumentalities to pay, collect, and receive such contributions." *Id.* OPM also alleged that such a practice would "raise[] the unacceptable possibility of abuse," and would "enable or encourage supervisors and co-workers to bring varieties of impermissible pressures upon the employee to [contribute]." *Id.*; *see also supra* note 19.

Public-employee unions raised numerous objections to the proposed regulations. Moreover, the Office of Special Counsel informed OPM that, in the opinion of the Special Counsel, the Hatch Act would not be violated by employees who perform the administrative and clerical "handling" of other employees' PAC contributions:

> The employees who perform the administrative and clerical chores which effect another employee's contribution to AFGE-PAC arguably violate the Hatch Act since their duties cause them to "indirectly . . . handle . . . contributions . . . for a partisan political purpose." (*See* section 733.122(b)(3), Part 733.5 C.F.R.). However, this indirect, per[ip]heral "handling" of political contributions

[38] The proposed definition of contribution was "any gift, subscription, loan, advance, deposit of money, allotment of money, or anything of value given or transferred by one person to another, including in cash, by check, by draft, through a payroll deduction or allotment plan, by pledge or promise, whether or not enforceable, or otherwise." 47 Fed. Reg. at 57,725 (proposed 5 C.F.R. § 733.101(h)) (emphasis added).

[39] Under OPM's proposed regulation, the following three prohibitions would have been added to the list in 5 C.F.R. § 733.122:

> (14) Soliciting, collecting, or receiving a contribution from any employee for any political party, *political fund*, or other partisan recipient;
>
> (15) Paying a contribution to any employee who is the employer or employing authority of the person making the contribution for any political party, *political fund*, or other partisan recipient; and
>
> (16) Soliciting, paying, collecting, or receiving a contribution, at or in any Federal workplace, for any political party, *political fund*, or other partisan recipient.

47 Fed. Reg. at 57,725. "Political fund," in turn, was defined to include any PAC that, inter alia, expends or transfers money or anything of value to any candidate or organization, "for purposes of influencing in any way the outcome of any partisan election." *Id.* (proposed 5 C.F.R. § 733.101(g)).

> can be distinguished from that which is performed by someone as an incident to holding office in a political party or PAC. The employees who process the paperwork which accomplish the contribution to AFGE-PAC are performing their official duties. The individual who "handles contributions" for the Democratic or Republican party has identified himself with the success of a partisan political party. The Hatch Act was intended to restrict federal employees with respect to the latter not the former.

Memorandum for William E. Reukauf, Deputy Associate Special Counsel for Prosecution, Office of the Special Counsel, from John R. Erck, Attorney, *Re: Closure Recommendation AFGE—PAC-DC, OSC Matter No. 10-3-00469* (Dec. 2, 1983) (concurred in by Deputy Associate Special Counsel Reukauf on Dec. 6, 1983; transmitted to OPM on Apr. 6, 1984).

Despite the unions' objections and the Special Counsel's opinion, OPM issued its amended regulations in final form on April 24, 1984. 49 Fed. Reg. at 17,431–32. In the comment stage, the American Federation of Government Employees ("AFGE") had contended that OPM lacked the authority to issue the new regulations; AFGE argued that OPM would be acting outside its statutory authority by creating a new prohibition, beyond those enumerated in the 1940 CSC Rules.[40] In the final regulations, OPM responded to this argument by stating that "these regulations do not exceed the boundaries set forth in the Hatch Act. They merely clarify an existing OPM regulation (5 CFR 733.122(b)(3))." 47 Fed. Reg. at 17,431.

OPM's defense of its authority was well-founded. OPM's new 1984 regulations technically did not create any prohibition broader than that already contained in the sweeping proscription found in the 1939 and 1940 CSC rules regarding the handling of contributions, *see supra* pp. 64–66; rather, OPM simply issued clarifying regulations to explain how that already-existing prohibition (5 C.F.R. § 733.122(b)(3)) applied to a new fact situation—namely, salary allocations to PACs.

It is important to note, however, that whereas OPM was empowered to issue the 1984 regulations, it was not required to do so; indeed, OPM could instead have modified its previous rules to permit the practice in question, which would have been in accord with the opinion of the Special Counsel (*see supra* pp. 68–69) and with the adjudicatory decisions of the CSC (*see supra* pp. 66–67).[41] What

[40] *See Comments of American Federation of Government Employees on Proposed Rule of Office [of] Personnel Management Amending 5 CFR Part 733, Political Activity of Federal Employees* at 20 n.13 (submitted to OPM March 4, 1983).

[41] In publishing its regulations, OPM stated that "[t]he overwhelming majority of the former Civil Service Commission's decisions . . . have held that these activities are violations of the Hatch Act." 49 Fed. Reg. at 17,431. OPM did not, however, cite any CSC "decisions" in support of this proposition, and, as explained *supra* p. 66, this claim is belied by the historical evidence: in contrast to the strict CSC rules, the CSC adjudications almost uniformly

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is more, exercising its power to reinterpret the Hatch Act to loosen its prohibitions, *see supra* pp. 65–67, OPM could have eliminated altogether the broad prohibition found in §733.122(b)(3) of the regulations against "handling, disbursing, or accounting for" political contributions.

6. *The Biller and Blaylock Cases—1988*

As we previously have noted, *supra* pp. 55–56, in two cases in 1988, federal courts of appeals ruled that the test of whether a federal employee had taken "an active part in political management or in political campaigns" was whether that employee had acted "*in concert with* a partisan political campaign or organization." *Biller*, 863 F.2d at 1090 (emphasis added); *accord Blaylock*, 851 F.2d at 1356 ("the Hatch Act is violated only by actions taken in concerted effort with partisan activity or formal, organized, political groups").

The legal status of federal-employee salary allocation to PACs thus was in a state of flux following *Biller* and *Blaylock*. On the one hand, the OPM regulations plainly prohibited any federal employee from "directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose," 5 C.F.R. §733.122(b)(3) (1994); and the 1984 amendments to the regulations made clear that this prohibition extended to salary-allotment systems, *id.* §733.101(h), and included contributions to a PAC so long as that PAC "expends" or "transfers" money to, *inter alia*, any political party, candidate, or organization, *id.* §733.101(g). On the other hand, *Biller* and *Blaylock* could fairly be read to indicate that federal employees who performed the ministerial acts of handling, processing, and transferring fellow employees' PAC contributions would not violate the Hatch Act, because those ministerial actions would not be undertaken "in concert with" any partisan political campaign or organization, including the PAC itself.

7. *The Hatch Act Amendments—1993–94*

In the HARA, Congress retained the old Hatch Act definition of "tak[ing] an active part in political management or in a political campaign": i.e., "those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." 5 U.S.C. §7323(b)(4). There is, moreover, no reason to believe that Congress intended the content or scope of this definition to be anything other than what the Supreme Court described in *Letter Carriers*. *See supra* pp. 63–66.

OPM continues to have the same regulatory authority that it enjoyed under the pre-1993 Hatch Act to define the contours of "tak[ing] an active part in political management or in a political campaign." *See supra* pp. 66–67. Pursuant to that

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had held that mere ministerial handling of political contributions by federal employees did not constitute taking an "active part in political management or in a political campaign."

authority, OPM superseded its old Hatch Act regulations on February 4, 1994. 59 Fed. Reg. 5313–15. Thereafter, on September 23, 1994, OPM published interim regulations. In those regulations, OPM has eliminated from the list of prohibited activities — including from the list of activities prohibited for "HARA-exempt" employees — the four subsections (formerly 5 C.F.R. §§ 733.122(b)(3), (14)–(16)) that were the basis for OPM's conclusion in 1984 that salary allocations to PACs were prohibited, *see supra* pp. 68–70. Thus, there currently is nothing in OPM's regulations prohibiting "handling," or "accounting for," political contributions.

8. *Summary*

This historical survey demonstrates why, for two reasons, HARA-exempt employees are not bound by law to the terms of OPM's pre-HARA regulations.

First, it is far from clear that it would have been impermissible to "handle" or "account for" other employees' PAC contributions prior to the HARA. While it is true that, by their plain terms, the OPM regulations previously found at 5 C.F.R. §§ 733.122(b)(3), (14)–(16) prohibited the actions at issue, it also is true that those regulations were contradicted by: (i) the adjudicatory decisions of the CSC in the years immediately following passage of the Hatch Act, *see supra* pp. 66–67; (ii) the opinion of the Special Counsel in 1983, *see supra* pp. 68–69; and, most importantly, (iii) the decisions of the Second and Eleventh Circuits in *Biller and Blaylock*, respectively, *see supra* p. 70. These other authorities held that the ministerial "handling" of political contributions was not proscribed by the Hatch Act if the employee doing the handling was not acting on behalf of the political group or candidate to which the contribution was made.

Second, even if the pre-1994 OPM regulations had constituted binding and applicable law prior to the HARA, the HARA did not codify into law the terms of those prior regulations with respect to HARA-exempt employees. Rather, the HARA simply left intact the Hatch Act definition of "active part in political management or in political campaigns." As we have explained, *supra* pp. 65–70, this definition was not static: OPM (previously the CSC) was empowered to alter the definition in the direction of more permissive regulation. OPM continues to have that authority under the HARA.

In the proposed regulations, OPM has exercised its delegated authority to redefine what constitutes an "active part in political management or in political campaigns." Whereas "handling" and "accounting for" such contributions once were proscribed by the OPM regulations, they no longer are. OPM's redefinition, moreover, comports with the great weight of authority over the years respecting the ministerial handling of political contributions, including the adjudicatory decisions of the CSC after the Hatch Act and the decisions of the courts of appeals in *Biller* and in *Blaylock*. Therefore, the OPM regulations now are in accord with the other authorities on the matter, and there no longer is any bar on the ministerial handling of, or "accounting for," political contributions, including contributions to PACs.

D. *Political Activity On Duty and in a Federal Building—5 U.S.C. § 7324*

The Criminal Division has asked whether any of the participants in the proposed practice would violate the prohibitions stated in 5 U.S.C. § 7324. Almost all covered employees, whether or not they are HARA-exempt, may not engage in "political activity": (i) while on duty; (ii) while in "any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof"; (iii) while wearing a uniform or official insignia identifying the employee's office or position; or (iv) while using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a)(1)–(4). An exception to these prohibitions is made for certain employees whose duties and responsibilities continue "outside normal duty hours and while away from the normal duty post." *Id.* § 7324(b)(2)(A). These employees may engage in on-duty or on-premises political activity, but only "if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." *Id.* § 7324(b)(1).

Congress did not define "political activity" in the HARA. OPM has proposed that "political activity" be defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 59 Fed. Reg. at 48,770–71 (proposed 5 C.F.R. § 734.101). We think that this definition, as far as it goes, comports with Congress's intent. But it is important to note one other salient fact: It is evident from the statements of the HARA's leading sponsors that Congress intended to create a bright-line rule, with no exceptions: section 7324(a) prohibits covered employees from engaging in all on-duty and on-site political activity.[42] As the principal Senate

[42] *See, e.g.*, 139 Cong. Rec. 15,365–68 (1993) (statement of Sen. Glenn) ("no political activity of any kind on the job"; "nothing political on the job, not even a lapel button of any size"; political activity on the job "would be absolutely and unequivocally prohibited . . . ; no political activity on the job, zero, including even what is permitted under today's Hatch Act"; "Nothing on the job. Cannot even wear a campaign button on the job."; "all political activity on the job would be banned"; "Absolutely no political activity will be acceptable on the job"); *id.* at 15,376 (statement of Sen. Glenn) ("unequivocally, . . . —no political activity on the job"); *id.* at 15,531–32 (statement of Sen. Glenn) ("Simply put . . . what S. 185 does is say that you do not even permit anything on the job that has been permitted all these years under the Hatch Act. You cut it out. There will be no politics on the job, none."; "On the job, you can do nothing, period.", "no button [of] any kind, on the job, no kind of political activity on the job period"; "No political activity on the job—zero—including even what is permitted today."); *id.* at 15,739–41 (statement of Sen. Glenn) ("[T]here will be no political activity on the job. There are no exceptions to that. There will be no political activity of any kind on the job."; "This bill would say on the job, you can do absolutely nothing political. You cannot have a campaign button on. You cannot do anything."); *id.* at 16,038 (statement of Sen. Glenn) ("We prohibit all political activity on the job with S. 185. I keep hammering . . . and hammering that thought home, because there has been so much misunderstanding. We tighten up the Hatch Act and make it tougher than it now is. No political contributions, no political activity, no wearing of a button on the job."; "[o]n the job, zero"); *id.* at 16,054 (statement of Sen. DeConcini) ("The prohibition on workplace activity is an absolute prohibition.").

In an earlier session of Congress, Senator Glenn—the chief sponsor of Hatch Act reform legislation—expressed the same understanding with respect to an identical provision, noting that the on-the-job prohibition "has to be Simon pure—you cannot do anything." 136 Cong. Rec. 9156 (1990); *see also id.* at 9358–59 (statement of Sen. Glenn) ("None. A one-word answer, no political activity on the job.", "nothing of a political nature is permitted on the job; I mean nothing"; "This would clarify it. This would say anything on the job is verboten, it is out, it is not permitted. . . . If you are on duty and you are on the job, that is it, no politics."); *id.* at 10,034 (statement of Sen. Glenn) ("there can be no political indication, there can be no political activity on the job; none, period;

sponsor of the bill stated, on-the-job political activity "would be absolutely and unequivocally prohibited." 139 Cong. Rec. 15,366 (statement of Sen. Glenn).[43] Thus, for example, Congress intended to prohibit the wearing of political buttons on duty.[44] Nor can covered employees stuff envelopes with political materials or send out campaign materials while they are on the job or in a federal building—such activities are permitted only off-site and "off the job."[45] Most important for present purposes, political contributions, including PAC contributions, cannot be "request[ed]" nor "given" while on the job: "[i]t would be

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no solicitation, no public statement, no nothing on the job of a political nature"); *id.* at 15,098 (statement of Sen. Glenn) ("Nothing can be done of a political nature while you are on the job during the day. Nothing. Zero. That is it."; "All political activity on the job is banned. Everything.").

Earlier in that same session, several sponsors of equivalent legislation in the House also spoke of the on-duty ban in absolutist terms. *See, e.g.*, 135 Cong. Rec. 6767 (1989) (statement of Rep. Horton) ("No on-the-job political activity will be allowed. Just that simple, none whatsoever."); *id.* at 6773 (statement of Rep. Martin) ("prohibits any political activity whatsoever on the job"); *id.* (statement of Rep. Morella) ("It will ban absolutely all politicking in the Federal workplace . . . . By taking this black and white approach, no partisan political activities on the job, any otherwise legal activities off the job, the Hatch Act reform bill would clear up the ambiguity and vagueness . . . ."); *id.* at 6777 (statement of Rep. Parris) ("'bright line' rule"—"prohibiting all on-the-job political activity while permitting participation in any otherwise legal political activity during the Federal employees' own time"—"would provide clear guidance on permissible activity").

[43] OPM's proposed regulations reflect this absolute, bright-line rule, creating distinctions that might otherwise seem hypertechnical. *See* 59 Fed. Reg. at 48,774 (proposed 5 C.F.R. §734.306, Example 10) ("An employee may stuff envelopes for a mailing on behalf of a candidate for partisan political office while the employee is sitting in the park during his lunch period if he is not considered to be on duty during his lunch period."); *id.* (proposed 5 C.F.R. §734.306, Example 11) ("An employee may engage in political activity in the courtyard outside of a Federal building where no official duties are discharged as long as the employee is not on duty.").

[44] *See, e.g.*, S. Rep. No. 103–57, at 14 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1802, 1815; 139 Cong Rec. 15,366–67 (1993) (statement of Sen. Glenn); *id.* at 15,532 (statement of Sen. Glenn); *id.* at 15,741 (statement of Sen. Glenn); *id.* at 15,785 (statement of Sen. Sarbanes); *id.* at 16,039 (statement of Sen. Glenn); *id.* at 16,054 (statement of Sen. DeConcini); *id.* at 3275 (statement of Rep. Upton); *see also, e.g.*, 135 Cong. Rec. 6773 (1989) (statement of Rep. Morella).

Insofar as the broad ban on "political activity" in §7324 establishes an across-the-board prohibition on certain forms of on-duty *expressive* activity—such as, e.g., wearing buttons or putting up bumper stickers—it may raise difficult constitutional questions. *Compare, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) (insofar as state law restricts public employees from wearing political buttons or displaying political bumper stickers, such restrictions "may be . . . unconstitutional"); *Hobbs v. Thompson*, 448 F.2d 456, 475 (5th Cir. 1971) (banning firefighters from displaying political bumper stickers is unconstitutional); *American Fed'n of Gov't Employees v. Pierce*, 586 F. Supp. 1559, 1561–63 (D.D.C. 1984) (Veterans Administration policy absolutely prohibiting employees from wearing political buttons on duty is unconstitutional); *McNea v. Garey*, 434 F. Supp. 95, 108–11 (N.D. Ohio 1976) (municipal regulation prohibiting police officers from all discussions or expressions of politics is unconstitutional); *Weaver v. Shaffer*, 170 W. Va. 107, 108–09, 114, 290 S.E.2d 244, 245–46, 251 (W. Va. 1980) (state law prohibiting deputy sheriffs from engaging in "any political activity of any kind" would be unconstitutionally overbroad were it not for court's interpretation of that ban to proscribe only those political activities that the Supreme Court in *Letter Carriers* decided may constitutionally be proscribed), *with, e.g., Wicker v. Goodwin*, 813 F. Supp. 676, 678, 681 (E.D. Ark. 1992) (state law prohibiting state troopers from publicly and openly espousing candidacies is not unconstitutional); *Connealy v. Walsh*, 412 F. Supp. 146, 158 (W.D. Mo. 1976) (juvenile court regulation prohibiting employees from displaying political bumper stickers on vehicles used for court business or parked in court parking lot is not unconstitutional); *State ex rel. Trautman v. City of Farmington*, 799 S.W.2d 638, 642–43 (Mo. App. 1990) (municipal laws and regulations prohibiting police officers from expressing opinions on political subjects and candidates on duty, and from displaying on duty any political pictures, stickers, badges or buttons, are not unconstitutional); *Ferguson Police Officers Ass'n v. City of Ferguson*, 670 S.W.2d 921, 928–29 (Mo. App. 1984) (city provision prohibiting police officers from speaking, literally or through bumper stickers, signs and buttons, in favor or against candidates for city council, is not unconstitutional); *State v. Stuler*, 122 So. 2d 1 (Fla. 1960) (state statute prohibiting state employees from "advising" other employees to make political contributions is not unconstitutional, even as to "advice" that is not coercive in nature). We have no occasion in this Opinion to address these constitutional questions.

[45] *See, e.g.*, 139 Cong. Rec. at 1233 (statement of Sen. Glenn); *id.* at 15,368 (statement of Sen. Glenn); *id.* at 15,785 (statement of Sen. Sarbanes); *see also, e.g.*, 136 Cong. Rec 10,035 (1990) (statement of Sen. Glenn).

illegal to give as well as to ask for" such contributions while on duty. 139 Cong. Rec. 16,039 (statement of Sen. Glenn).[46]

With this understanding of the meaning of "political activity" in §7324, we can now examine whether and under what circumstances any of the participants in the proposed salary-allocation practice would violate the restrictions in that statute.

1. *Offerors*

The Criminal Division has argued that "the circulation of the proposed payroll withholding offer . . . may constitute [on-duty and on-site] 'political activity.'" Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jo Ann Harris, Assistant Attorney General, Criminal Division at 7 (Oct. 24, 1994) (citing 5 U.S.C. §7324).

But, just as making available the salary-allocation system for PAC contributions cannot fairly be considered "solicitation," *see supra* pp. 53–58, neither can it fairly be considered "political activity." As long as the heads of agencies making such offers do not request employees to make use of the allocation system, and do not favor one PAC over another (or favor allocation to PACs over nonallocation), then it is hard to see how they would be engaged in "political activity," any more than they would be when they authorize their employees to take an excused absence, with pay, in order to vote in an election. *See, e.g.*, Department of Justice Order No. 1630.1B, ch. 14, §91(b) (July 22, 1991) (heads of components may, under certain circumstances, authorize excused absence for employees who wish to vote or register to vote in any election). Under OPM's proposed regulation — which we think is an accurate interpretation of §7324 — activity becomes "political," and thus proscribed on duty and in federal buildings, only when it is "directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." *See supra* p. 72. The neutral offer of access to the salary-allocation system proposed by OPM would not be proscribed under this standard; while such action may facilitate political activity, it is not political activity itself.

2. *Administering Employees*

The Criminal Division further has suggested that federal employees implementing other employees' salary allocations to PACs may violate the HARA prohibition against "political activity" on duty or in federal facilities. Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jo Ann Harris, Assistant Attorney General, Criminal Division at 7 (Oct. 24, 1994).

[46] *Accord* 136 Cong. Rec. 9777 (1990) (statement of Sen. Glenn with respect to materially identical legislation) ("No political activity, *no political contributions*, no nothing by Federal employees while they are on the job.") (emphasis added).

We conclude, however, that the employees who would perform the acts of ministerial facilitation of PAC contributions would not thereby engage in "political activity." The actions of those employees would not be undertaken with any *intent* to benefit the PACs; the employees in question would merely be providing a service that they are required by duty to provide, in response to requests by other employees over which the facilitating employees have no control. (Indeed, insofar as the authorization forms merely request salary assignments to particular bank accounts, the employees administering those assignments may well be unaware that they are dealing with PAC contributions—that is to say, the administering employees' involvement in political activity could be entirely unwitting.)

Again, under OPM's proposed regulation, an activity is "political activity"—and therefore cannot be performed on duty—if that activity is "directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." We think the "political activity" ban in the statute, and the "directed toward the success or failure" language of the proposed regulation, fairly read, contain an implicit intent requirement: an employee's activity is not "political activity" unless that employee intends that the activity be directed toward the success or failure of a political party, candidate, or group. If an employee merely acts at the behest, or "direction," of another employee, and has no independent intent to assist in the "success or failure" of the political party, candidate, or group, then that employee would not herself be engaged in "political activity." [47] The employees in question here would facilitate the PAC contributions not because they intended to assist the PAC, but because their duty required them to do so: they would have no discretion in the matter. Were it the case that employees could violate § 7324(a) by virtue of any ministerial and/or unwitting assistance in political activity, regardless of an intent to advance any political end, then any postal employee delivering a mailed political contribution would violate § 7324(a). That could not have been Congress's intent.

3. *Contributors*

The most troublesome aspect of the proposed use of the salary-allocation system for PAC contributions arises with respect to the federal employees who would actually be making the contributions through the use of that system. [48]

We first must address a threshold question: whether an employee engages in "political activity" under § 7324 when the employee takes steps to have a portion of his or her salary transmitted to a PAC. Federal employees are, as a general matter, permitted under the HARA to make contributions to partisan political candidates and to partisan political organizations such as PACs. *See, e.g.*, 59 Fed.

[47] This assumes, of course, that the facilitating employee, as part of her job duties, simply administers all salary allocations equally and without favor, and does not have an independent intent to "direct," or effect, the political contribution.

[48] There is nothing in OPM's regulations that speaks directly to the questions raised in this section. Nonetheless, we note that none of our conclusions in this section is in any way inconsistent with those proposed regulations.

Reg. at 48,772 (proposed 5 C.F.R. § 734.208(a)). However, it also is clear under the HARA that making such a political contribution is "political activity," *see* 18 U.S.C. § 610, and therefore is subject to the restrictions of § 7324. Furthermore, in light of Congress's obvious intent that "political activity" be read as broadly as possible, *see supra* pp. 72–74, it is plain that a federal employee also engages in "political activity" by taking action sufficient to effect the making of a political contribution, such as by taking steps to ensure that a portion of his or her salary is contributed to a political campaign or to a PAC.

OPM does not dispute that making contributions to partisan political campaigns or candidates is "political activity."[49] OPM contends, however, that under the Second Circuit's holding in *Biller*, making contributions *to PACs* is not a "political activity," because such contributions are not necessarily *partisan* in nature. *See* Letter for Dawn E. Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management at 9 (Nov. 4, 1994); Letter for Dawn E. Johnsen, Deputy Assistant [Attorney General], Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management at 3–4 (Dec. 13, 1994).

In *Biller*, two union presidents had urged their members — fellow federal employees — to contribute funds to the unions' PACs. The Second Circuit ruled that the fundraising pleas of the union presidents were not solicitations in concert with a partisan political campaign or organization. 863 F.2d at 1090. The court reasoned as follows:

> [A]s the ALJ found, the funds [contributed to union PACs] were "not designated for any political campaign, party, committee or candidate *at the time they were made.*" . . . [T]here is no proof in the record that suggests either that petitioners were acting in concert with a partisan political campaign *or that the funds were actually distributed or spent for that purpose.* On that subject, the record is silent.

Id. (emphasis added). The court did not address whether its decision would have been different if the record *had* indicated that the union PACs "actually distributed or spent" their collected funds for a partisan political campaign.

Even if we assume that PAC contributions could not be considered "partisan" activities under *Biller*'s interpretation of the old Hatch Act,[50] OPM's reliance on this aspect of *Biller* is unpersuasive *under the HARA*, for the following reasons.

[49] This is confirmed in OPM's proposed regulations. Making political contributions to a political candidate would be "political activity" because it is "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 59 Fed. Reg. at 48,770–71 (proposed 5 C.F.R. § 734.101).

[50] The Second Circuit suggested that this might not be the case if and when the contributed PAC funds "were actually distributed or spent" by the PACs on partisan political campaigns. 863 F.2d at 1090. The subsequent confusion engendered on this question is exemplified by the positions articulated by the Special Counsel. In 1992, the Special Counsel commented that, under her reading of *Biller*, encouraging contributions to PACs did not implicate

Although there are indications in the congressional floor debates that some members of Congress may have intended the HARA to prohibit only *partisan* political activity on duty and in a federal building,[51] the language of § 7324 does not refer to "*partisan* political activity"—an omission that seems fairly conspicuous in light of the Hatch Act's prior focus on partisan activity. For purposes of this Opinion, we need not decide whether § 7324 of the HARA does (or constitutionally may) prohibit any or all political activity relating to *non*partisan issues and elections. It is sufficient for present purposes simply to note that, regardless of how that question would be answered, and whether or not PACs can in some sense be considered "nonpartisan," one thing is clear: Congress intended that making contributions to PACs *is* to be considered "political activity" under the terms of the HARA.

This conclusion is compelled by the language of the statute itself. Congress indicated in section 4 of the HARA, 107 Stat. at 1005 (creating 18 U.S.C. § 610) that "making . . . any political contribution" is "political activity." "Political contribution," in turn, is defined to include "any gift . . . or deposit of money or anything of value, made for *any* political purpose." 5 U.S.C. § 7322(3)(A). Indeed, Congress specifically identified contributions to multicandidate political committees as "political contributions" in § 7323(a)(2) of the statute.[52] Because a multicandidate political committee is a type of PAC,[53] it follows that making a contribution to a PAC is "political activity," at least as that term is understood in the HARA.[54] This conclusion is bolstered by the fact that the leading Senate

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the Hatch Act if those contributions "were not earmarked for distribution to partisan groups or candidates when the request was made." Transcript of *Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 276 (1992) (comments of Special Counsel Kathleen Koch). However, that same year, the Special Counsel informed covered employees that "active participation" or "active involvement" in a PAC was prohibited with respect to those PACs that "function to ensure the success or failure of certain partisan political candidates." Office of Special Counsel, *Hatch Act Facts . . . About PACs* 2–3, 4 (1992).

[51] *See, e.g.*, 139 Cong. Rec. at 3278 (statement of Rep Ford) ("employees would continue to be prohibited from engaging in partisan political activity while on duty"); *id.* at 3281 (statement of Rep. Gephardt) (taxpayer money may not be used for "partisan political purposes"); *id.* at 15,370 (statement of Sen. Roth) (bill would prohibit "partisan political activity" on duty), *id.* at 16,038–39 (statement of Sen. Glenn) (the prohibition "means that no partisan political activity can occur during working hours"); *id* at 21,818 (statement of Rep. Ford) ("employees would continue to be prohibited from engaging in partisan political activity while on duty").

[52] In § 7323(a), Congress banned solicitation of all "political contributions" except those made under certain circumstances to particular multicandidate political committees. Congress must have considered contributions to such committees to be "political contributions," because otherwise there would have been no need to carve out the exception.

[53] Section 7323(a)(2)(C) refers to "multicandidate political committees," as that term is defined under section 315(a)(4) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(a)(4). Such a committee, by definition, "has made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4). This is a PAC under the definition we are using in this Opinion, *see supra* note 4.

[54] Under the definition of PAC that we are using in this opinion, *see supra* note 4, PACs that are not multicandidate political committees also make contributions or expenditures to influence campaigns for partisan political office; therefore, there is nothing about such PACs to distinguish them from multicandidate political committees for purposes of the present discussion. A federal employee contributing to any PAC would know that her contribution would be used—at least in part—to support one or more partisan candidates for political office. *See FEC v. California Med. Ass'n*, 502 F. Supp. 196, 201–03 (N.D. Cal. 1980) (holding that it is necessary to presume, as a matter of law, that at least a portion of every contribution to a PAC that makes contributions in federal elections will be used by the PAC for contributions to such elections, even if the PAC uses a majority of its funds for other purposes);

Continued

sponsor of the HARA, Senator Glenn, referred specifically to PAC contributions in explaining what activity would be prohibited on duty. *See* 139 Cong. Rec. 16,038 (1993).

Thus, a federal employee does engage in political activity by taking steps—such as transmitting direct-deposit forms to the appropriate payroll officials—sufficient to ensure that a portion of his or her salary is transferred to a PAC. In the following sections, we discuss whether and when such activity would violate § 7324.

a. *Employees Covered Under § 7324(b)*

In § 7324(b), Congress addressed the political activity of certain employees who are not covered under § 7324(a), to whom we will refer as "7324(b) employees." The employees in question are those "the duties and responsibilities of whose positions continue outside normal duty hours and while away from the normal duty post," *and* who are either (i) "employee[s] paid from an appropriation for the Executive Office of the President"; or (ii) "employee[s] appointed by the President, by and with the advice and consent of the Senate, whose position[s] [are] located within the United States, who determine[ ] policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." 5 U.S.C. § 7324(b)(2).[55] Such employees "may engage in political activity otherwise prohibited by subsection (a)," 5 U.S.C. § 7324(b)(1), such as political activity on duty. This special treatment was necessary because these employees are, for purposes of the HARA, "considered to be continuously on duty," and "[w]ithout this exception, the language of [§ 7324(a)] could be read to preclude political activity at any time by these individuals." H.R. Rep. No. 103-16, at 22 (1993). Because the "on-duty" prohibitions were therefore unworkable for the § 7324(b) employees, Congress allowed those employees to engage in political activity, but only "*if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.*" 5 U.S.C. § 7324(b)(1). Therefore, the § 7324(b) employees cannot use the federal salary-allotment system to make political contributions, such as contributions to PACs, because the costs incurred in making such contributions—

see also California Med. Ass'n v. FEC, 453 U.S. 182, 199 n.19 (1981) (plurality opinion) (even if person contributing to PAC attempts to "earmark[ ]" such contribution for nonpolitical purposes (e.g., "administrative support"), it must be assumed as a matter of law that the funds will be used for the PAC's contributions to political campaigns). Insofar as federal employees might wish to make contributions to political committees that have not made, and do not make, contributions or expenditures to influence campaigns for partisan political office—that is, to committees other than those we have defined as "PACs"—such employee contributions would be beyond the scope of this Opinion. *See supra* note 4.

[55] It may be unclear whether certain employees are covered under the two-part test of § 7324(b). And, as OPM itself has noted, "in view of the different circumstances of each employee who might claim coverage," it would be "impractical to seek to identify all positions which qualify" for § 7324(b) status. 59 Fed. Reg. at 48,769. If it is unclear whether a particular employee falls within the aegis of § 7324(b), a request can be made to the Office of Special Counsel for an advisory opinion on that question. *See* 5 C.F.R. § 1800 3.

specifically, the costs of processing and transmitting the money to the PACs—would be "paid for by money derived from the Treasury of the United States."[56]

b. *All Other Federal Employees Covered by the HARA*

All other federal employees covered by the HARA[57] may not engage in "political activity": (i) while on duty; (ii) while in "any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof"; (iii) while wearing a uniform or official insignia identifying the employee's office or position; or (iv) while using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a)(1)–(4).

It follows that such an employee may not make contributions to PACs while in a federal building or while on duty. Furthermore, if such an employee wishes to take steps to effect a transfer of a portion of her salary to a PAC—such as transmitting to the appropriate authorities the forms authorizing such salary transfers—she must do so only when off-duty and outside a federal facility. Under the proposed practice, then, covered employees would violate § 7324(a) if they were to fill out and transmit the necessary direct-deposit forms while on duty or in a federal building.

OPM contends that "[t]o allow employees to mail allotment authorizations but not hand them directly to payroll personnel would result in an illogical and unenforceable arrangement." Letter for Dawn E. Johnsen, Deputy Assistant [Attorney General], Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management at 4 (Dec. 13, 1994). Indeed, requiring employees to be off duty when they transmit authorization forms to payroll personnel may seem like a legalistic technicality. Nonetheless, this result comports with Congress's objective to create a bright-line rule—that the § 7324(a) prohibitions be "absolute[] and unequivocal[]"—so that there could be no ambiguity or vagueness about what is and is not permitted on duty. *See supra* pp. 72–74 & nn. 42–46. Accordingly, the prohibition we have identified here is similar to some of the examples OPM has identified in its proposed regulations—for

[56] Under the Federal Leave Act, *see* 5 U.S.C. §§ 6301(2)(x) and (xi), certain employees are not subject to the annual-leave and sick-leave provisions of chapter 63 of title 5, in part because such employees are, for leave purposes, considered to have duties that continue beyond normal duty hours. *See also* 5 C.F.R. §§ 630.211(b)(1)–(3). As the House Report on HARA noted, such employees may, *for Leave Act purposes*, be "presumed to be on duty at all times." *See* H.R. Rep. No. 103–16, at 23 (1993). However, some of these employees will not satisfy one of the other requirements to fall within HARA § 7324(b)—for example, their appointment may not be subject to the advice and consent of the Senate. It is important to note that these leave-exempted employees who are not covered by § 7324(b) should not be considered "continuously on duty" for purposes of HARA § 7324, even where their exclusion from the Leave Act is "based on the presumption that the position requires the employee to be on duty at all times." *Id.* If such employees were considered "continuously on duty" for purposes of § 7324, they would never be permitted to engage in any political activity—including voting, making contributions, etc. But Congress intended that § 7324 would not "preclude political activity" for employees "at any time." *Id.* at 22. Therefore, for purposes of HARA § 7324 (albeit not necessarily for purposes of the Leave Act), such employees should be considered to be on duty only during their "regular," or "ordinary," duty hours, and remain "free to engage in political activity . . . [o]n their own time." *Id.* at 23.

[57] *See supra* note 8.

example, that an employee may not stuff envelopes with political literature while in a federal building, but may do so while sitting in a park during his lunch period *if* he is not considered to be on duty during that lunch period. *See* 59 Fed. Reg. at 48,774 (proposed 5 C.F.R. §734.306, Example 10); *see also supra* note 43. Given that Congress has precluded all political activity from occurring (for example) in federal buildings, it is not illogical to require employees who engage in such activity to do so outside of those buildings.

The question then becomes whether contributing employees would violate §7324(a) even if they are off duty and outside a federal building when they fill out the relevant forms and transmit those forms to the appropriate administrative officials. Such a practice might at first glance appear objectionable, because an employee acting in such a manner would cause other federal employees—i.e., the "administering employees"—to do, on her behalf, precisely what the contributing employee may not herself do: send a contribution to a PAC while on duty and from a federal building.[58] Although, for reasons explained below, this is a close question, we conclude that an employee acting in this manner would not violate §7324(a), because none of that employee's "political activities," or activities "directed toward the success" of the PAC, would violate the plain terms of the four prohibitions in that subsection. In particular, such an employee would not be on duty or in a federal building when she engaged in political activity.

Of course, the federal government subsidizes the transmission costs associated with transferring funds from employees' salaries to PACs. And there is some evidence that one of Congress's goals in enacting §7324 was to prevent federal employees from using taxpayers' funds to engage in political activity.[59] For example, the House Majority Leader stated: "Any on-the-job political activities are prohibited. It prohibits any use of taxpayer money for partisan political purposes." 139 Cong. Rec. 3281 (1993) (statement of Rep. Gephardt).[60] Moreover,

[58] We explained above that, in such a case, the administering employees would not themselves violate the on-duty prohibition, because they are not the persons "directing" the activity toward the success or failure of the PAC to which the contribution is made, and may even be entirely unaware that their activity in any way involves political allocations. *See supra* p. 75. By contrast, however, the contributing employee would be engaged in "directing" the on-duty, on-premises activity toward the success of the PAC.

[59] In 1984, OPM itself apparently was of the view that, under the pre-HARA Act, similar considerations warranted a restriction prohibiting the practice at issue here: "[T]he use of a Federal payroll deduction scheme or the Government's allotment system as a conduit for political contributions by Federal employees subject to the Hatch Act would involve the use of Federal workplaces and instrumentalities to pay, collect, and receive such contributions." 47 Fed. Reg. at 57,724.

[60] Several House members in an earlier Congress expressed the same understanding with respect to a materially identical "on-duty" prohibition in H.R. 3400, 100th Cong. (1987) (proposing new 5 U.S.C. §7324(a)(1)–(4)(B)). *See, e.g.*, 133 Cong. Rec. 32,087 (1987) (statement of Rep. Horton) ("It . . . prohibits use of taxpayer money for political purposes"); *id.* at 32,088 (statement of Rep. Ridge) ("[P]olitical work . . . cannot be allowed on the taxpayer's time. It cannot be done on Federal Government time, with Federal information or equipment."); *id.* at 32,104 (statement of Rep. Rahall) (bill prohibits "use of taxpayer money for political activities"); *id.* at 32,105 (statement of Rep. Biaggi) (same); *see also* 135 Cong. Rec. 6776 (1989) (statement of Rep. Gephardt) (bill would "prohibit government facilities from being used for partisan political purposes").

This is not to say that legislators provided no other reasons for the "on-duty" prohibition. For example, there are snippets of the legislative history of the HARA in 1993 suggesting that Congress also expected the "on-duty" prohibition to: (i) foreclose the possibility of coercion of subordinate employees by supervisory employees, *see, e.g.*, 139 Cong. Rec. 15,367–68 (statement of Sen. Glenn); *id.* at 15,531–32 (statement of Sen. Glenn); *id.* at 15,741

as we have explained, § 7324(b) expressly forbids the employees identified in that section from using federal funds for political activity. It might seem anomalous to forbid the § 7324(b) employees from using the salary-allocation system, but to permit all other federal employees to use that system — and the federal funds associated with it — for political activity, just because the latter are not, under the HARA, considered to be continuously on duty. In that case, the "continuously on duty" employees, *see supra* pp. 78–79, would in a significant respect be more restricted in the exercise of their political activity than all other federal employees.

Nevertheless, in stark contrast to § 7324(b), § 7324(a) does not include an express prohibition on the use of federal funds for political activity. In the four subsections of § 7324(a), Congress saw fit to ban political activity by a federal employee while (i) on duty; (ii) in a federal building; (iii) in uniform; or (iv) using a federal vehicle. Conspicuously absent from this list is any prohibition on political activity "using instrumentalities owned by the United States," "using any federal facilities," or "using money derived from the Treasury of the United States." [61]

Indeed, the fact that Congress *did* include such a prohibition in § 7324(b) only strengthens the argument against reading such a prohibition into the previous, companion subsection. A fundamental canon of statutory construction, frequently invoked by the Supreme Court in recent years, is that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). [62] The language of § 7324(b) "shows that Congress knew how to draft" a prohibition on the use of federal funds for political activity "when it wanted to." *City of Chicago v. Environmental Defense Fund*,

(statement of Sen. Glenn); *id.* at 16,051–52 (statement of Sen. Glenn); and (ii) to prevent the "specter," or appearance to the public, that the federal government is supporting particular candidates, *see, e.g.*, H.R. Rep. No. 103–16, at 19 (1993).

[61] By contrast, several state "Little Hatch Acts" do include such specific prohibitions. *See, e.g.*, Ala. Code § 17-1-7(c) (1987) (no state employee "shall use any state funds, property or time, for any political activities"); Alaska Stat. § 24.60.030(a)(5) (1992) (legislative employee may not, with certain exceptions, "use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource" for certain political purposes); Conn. Gen. Stat. Ann. § 5–266a(b) (1988) (state employee shall not "utilize state funds, supplies, vehicles, or facilities" for certain political purposes); N.C. Gen. Stat. § 126–13(a)(2) (1993) (state employee may not "utilize State funds, supplies or vehicles" for certain political purposes); Tenn. Code Ann. § 2–19–206(a) (1985) (state employee may not "use any of the facilities of the state, including equipment and vehicles," for certain political activity).

[62] *See also Brown v. Gardner*, 513 U.S. 115, 120 (1994); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Custis v. United States*, 511 U.S. 485, 492 (1994); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 476 n.10 (1991); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404–05 (1991); *General Motors Corp. v. United States*, 496 U.S. 530, 537 (1990); *United States v. Monsanto*, 491 U.S. 600, 610–11 (1989); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987); *Lawrence County v. Lead-Deadwood School Dist. No. 40–1*, 469 U.S. 256, 267 (1985); *United States v. Erika, Inc.*, 456 U.S. 201, 207–08 (1982); *Lehman v. Nakshian*, 453 U.S. 156, 162–63 (1981); *Fedorenko v. United States*, 449 U.S. 490, 512–13 (1981).

511 U.S. 328, 338 (1994); *accord Custis v. United States*, 511 U.S. 485, 492–93 (1994).

The discrepancy between §§ 7324(a) and 7324(b) might be explained by the fact that Congress may have considered such an explicit "no federal funds" prohibition to be superfluous in the former subsection. Congress might not have contemplated any situation in which otherwise lawful political activity could be accomplished using federal funds without violating one of the four subsections of § 7324(a); thus, Congress could well have believed that the prohibitions in that subsection precluded the need for a separate "no federal funds" provision. But "[t]hat expectation, even if universally shared [by members of Congress], is not an adequate substitute for a legislative decision," *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 824–25 (1990), to prohibit the use of federal funds for political activity. *See also Fort Stewart Schools v. FLRA*, 495 U.S. 641, 650 (1990) ("There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate."). Even if Congress intended a complete ban on federal funds for political activity, "[t]he short answer is that Congress did not write the statute that way." *Russello*, 464 U.S. at 23 (citation omitted). Therefore, the "no federal funds" prohibition of § 7324(b) does not apply to employees who are not identified in that section, and those employees may make contributions to PACs through the use of the salary-allocation system so long as they are off duty and off federal premises when they take the steps sufficient to trigger the use of the system.

CONCLUSION

None of the federal employees who would engage in the practices in question would, without more, violate the relevant criminal provisions, 18 U.S.C. §§ 602 and 607. What is more, federal employees offering use of or administering the salary-allocation system for PAC contributions would not, without more, violate the civil provisions of the HARA.

However, the federal employees identified in 5 U.S.C. § 7324(b) may not use the salary-allocation system to contribute money to PACs. The heads of agencies may, in their discretion, permit all other federal employees covered by the HARA to make political contributions to PACs through use of the salary-allocation system, but only if such employees are off duty and off federal premises when they take the steps necessary to use that system.

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Use of the Exchange Stabilization Fund to Provide Loans and Credits to Mexico

As part of an international financial support package for Mexico, the President and the Treasury Secretary have the authority under section 10(a) of the Gold Reserve Act of 1934 to use the Treasury Department's Exchange Stabilization Fund to provide loans and credits to Mexico in the form of (i) short-term currency "swaps" through which Mexico will borrow U.S. dollars in exchange for Mexican pesos for ninety days; (ii) medium-term currency swaps through which Mexico will borrow U.S. dollars for up to five years; and (iii) guaranties through which the United States will backup Mexico's obligations on government securities for up to ten years.

March 2, 1995

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

On January 31, 1995, the President proposed to use the Treasury Department's Exchange Stabilization Fund ("ESF" or "fund") to provide $20 billion in loans and credits to Mexico as part of a financial support package for that country (the "support package"). On February 21, 1995, the Treasury Secretary ("Secretary") signed a series of agreements with the Mexican government implementing the support package. Prior to the execution of the agreements, we orally advised your office that, in our view, the President and the Secretary could use the ESF in the manner contemplated by the President when he proposed the support package. We also provided comments on drafts of a legal opinion, prepared by your office for the Secretary, regarding such use of the ESF. This memorandum confirms the oral advice we provided to your office. It also confirms that we have reviewed the final version of your legal opinion, and that we concur in your conclusion that the President and the Secretary have the authority to use the ESF in connection with the support package. We would like to take this opportunity to set forth briefly the basis for our determination that your conclusion is correct.

I. Background

A. *The Support Package*

Under the support package,[1] the loans and credits to Mexico from the ESF will take three forms: (i) short-term currency "swaps" through which Mexico

[1] Our understanding of the support package is derived from the following sources. (i) public information released by the Treasury Department when the President proposed the support package on January 31, 1995; (ii) the Secretary's testimony on the support package at a February 9, 1995 hearing before the House Committee on Banking and Financial Services, *see United States and International Response to the Mexican Financial Crisis: Hearings Before the House Comm. on Banking and Financial Services*, 104th Cong. 92–97 (1995) ("1995 Hearings"); (iii) public

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will borrow U.S. dollars in exchange for Mexican pesos for ninety days; (ii) medium-term currency swaps through which Mexico will borrow U.S. dollars for up to five years; and (iii) guaranties through which the United States will backup Mexico's obligations on government securities for up to ten years. The ESF loans and credits will supplement billions of dollars in financial assistance that will be provided to Mexico by the International Monetary Fund ("IMF") and other lenders. As a whole, the support package is intended to help Mexico resolve its serious economic problems, which, in turn, have resulted in a significant destabilization of the Mexican peso and have threatened to disrupt the international currency exchange system.

B. *The ESF*

The ESF was established by Congress in 1934 pursuant to section 10(a) of the Gold Reserve Act, which is now codified at 31 U.S.C. § 5302. The ESF "is under the exclusive control of the Secretary," whose use of the fund is "[s]ubject to approval by the President." *Id.* § 5302(a)(2). Initially, the statute provided that the ESF was to be used "[f]or the purpose of stabilizing the exchange value of the dollar." Act of Jan. 30, 1934, ch. 6, § 10(a), 48 Stat. 337, 341.[2] That is no longer the case. The provision governing the Secretary's use of the ESF now states:

> Consistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates, the Secretary or an agency designated by the Secretary, with the approval of the President, may deal in gold, foreign exchange, and other instruments of credit and securities the Secretary considers necessary. However, a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months.

31 U.S.C. § 5302(b).

The first sentence of the current provision stems from 1976 amendments to section 10(a) of the Gold Reserve Act. Those amendments eliminated the requirement that the ESF be used "for the purpose of stabilizing the exchange value of the dollar," and provided instead that the fund was to be used consistent with

information released by the Treasury Department when the Secretary signed the agreements implementing the support package on February 21, 1995; and (iv) your legal opinion for the Secretary.

[2] *See also* H.R. Rep. No. 73–292, at 2 (1934).

U.S. obligations in the IMF. *See* Bretton Woods Agreements Act Amendments, Pub. L. No. 94–564, 90 Stat. 2660, 2661 (1976).[3] The second sentence of the current provision stems from a 1977 amendment to section 10(a) of the Gold Reserve Act. *See* Act of Oct. 28, 1977, Pub. L. No. 95–147, 91 Stat. 1227, 1229.[4] The intention of that amendment was to ensure that longer-term lending from the ESF was limited to "unique or exigent circumstances."[5]

II. Statutory Analysis

In carrying out the support package, the Secretary will be "deal[ing] in gold, foreign exchange, and other instruments of credit and securities" within the meaning of 31 U.S.C. §5302.[6] The first question in the statutory analysis is whether use of the ESF in connection with the support package is "[c]onsistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates." *Id.* §5302(b). We believe that it is. Again, the stated purpose of the support package is to stabilize the value of the Mexican peso and prevent disruption of international currency exchange arrangements—which is entirely in keeping with U.S. obligations in the IMF.[7] Moreover, since the statute states that the Secretary may use the ESF as he "considers necessary," it is up to the Secretary (subject to the President's approval) to decide when such action is consistent with U.S. obligations in the IMF. The Secretary's decisions in that regard "are final." *Id.*

[3] The 1976 amendments to section 10(a) of the Gold Reserve Act were part of a law that modified the Bretton Woods Agreements Act—the statute that implements U.S. obligations in the IMF. Congress concluded that those modifications were necessary because of an early 1970s shift in international monetary arrangements from fixed to variable currency exchange rates. As a result of that shift, the United States was not, in 1976, pursuing a policy "to stabilize the exchange value of the dollar at any par value, or fixed rate." H.R. Rep. No. 94–1284, at 13–14 (1976). Rather, its policy was "to permit a wide degree of fluctuation for the exchange value of the dollar, and to conduct exchange rate policy subject only to [its] obligations" in the IMF. *Id.* at 14. The modifications to the Bretton Woods Agreements Act authorized the U.S. to "accept amendments to the IMF Articles of Agreement . . . [that] permitted [members] to choose any . . . exchange arrangement, fixed or floating, subject to a general obligation to avoid exchange rate manipulation, promote orderly economic, financial, and monetary conditions, and foster orderly economic growth with reasonable price stability." S. Rep. No. 94–1295, at 2–3 (1976) ("1976 Senate Banking Comm. Report") When the ESF statute was first drafted, the dollar was pegged to a fixed rate. Therefore, a change to the statute that corresponded with changes in U.S. and international monetary policy was required. Simply put, the original language from 1934 specifying that the ESF was to be used to stabilize the dollar had become "anachronistic" by 1976 H R. Rep. No. 94–1284, at 14.

[4] The amendment was originally proposed in the Senate as part of the 1976 amendments to section 10(a). *See* 1976 Senate Banking Comm. Report at 11; *see also* 123 Cong. Rec. 33,219–20 (1977) (statement of Sen. Helms) (introducing amendment requiring that the President notify Congress of any use of the ESF for loans of greater than six months, and commenting that the amendment had been proposed in connection with Senate consideration of the 1976 amendments).

[5] 1976 Senate Banking Comm. Report at 11.

[6] The short- and medium-term swap arrangements are loans, in that Mexico will borrow dollars from the United States in exchange for pesos. The guaranties of Mexico's government securities obligations essentially serve as a line of credit from the United States on which Mexico can draw in the event that it cannot satisfy those obligations.

[7] As your legal opinion for the Secretary notes, Article IV of the IMF Articles of Agreement requires the United States to "collaborate with the [IMF] and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates." Members are to fulfill that obligation "by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions." *See also supra* note 3 (discussing 1976 modifications to federal statute that implements U.S. obligations in the IMF).

§ 5302(a)(2). In short, in implementing the support package, the Secretary has exercised the discretion that Congress has vested in him.[8]

The plain language of the statute also provides the President and the Secretary with the legal authority to use the ESF for the currency swaps of up to five years and the guaranties of up to ten years. The statute explicitly states that loans or credits with repayment terms of more than six months can be extended from the ESF "if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months." *Id.* § 5302(b). When the support package was proposed on January 31, 1995, the President announced that he had determined that the financial crisis in Mexico constituted unique and emergency circumstances.[9] The President made his announcement in a joint statement that he issued with the congressional leadership, who expressed their collective view that the use of the ESF in connection with the support package was both lawful and necessary.[10]

The authority of the President and the Secretary to use the ESF as a source of loans or credits of more than six months has been invoked once before in the years since the statute was amended in 1977 to provide expressly for such action. That came in 1982, when President Reagan, acting in response to an earlier instance of financial turmoil in Mexico, turned to the ESF to provide loans to Mexico with maturities of up to one year. In accordance with the statutory requirements, President Reagan notified Congress in writing on September 8, 1982, that

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[8] At the February 9, 1995 hearing on the support package that was held by the House Banking and Financial Services Committee, Representative Barr suggested that, when considering possible financial assistance to Poland in 1989, the Treasury Department had concluded that it was unlawful to use the ESF for purposes other than to stabilize the dollar. 1995 Hearings at 131. Any such conclusion would have contravened the express terms of the ESF statute. In any event, that is *not* what Treasury concluded in that case. Rather, Treasury said that it would not be "improper or illegal" to use the ESF to extend a "bridge loan" to Poland if the Secretary "concluded that such a loan would be consistent with U.S. obligations in the IMF and was necessary." *United States Economic Programs for Poland and Hungary: Hearings and Markup on H.R. 3402 Before the House Comm. on Foreign Affairs*, 101st Cong. 175 (1989) ("1989 Hearings"). Treasury determined that, in the particular circumstances of that case, "it [was] highly unlikely that such a conclusion could be justified." *Id.* Moreover, in the absence of a commitment from the IMF, Poland had no means of guaranteeing repayment of any ESF loan. In Treasury's view, the use of the ESF in such circumstances would be "much closer to foreign aid." *Id.* at 149 (statement of William E. Barreda, Deputy Assistant Secretary for Trade and Investment Policy); *see also id.* at 162–63. Therefore, Treasury decided to seek legislative authorization for assistance to Poland. *Id.* at 148–49 (statement of Mr. Barreda). Here, by contrast, the IMF is playing an integral role in the support package, and the ESF loans and credits will have an assured source of repayment. *See* discussion *infra* note 12.

[9] It is our understanding that the President will promptly provide Congress with written notice of that determination, as required by the ESF statute.

[10] In pertinent part, the joint statement was as follows:

> We agree that, in order to ensure orderly exchange arrangements and a stable system of exchange rates, the United States should immediately use the Exchange Stabilization Fund (ESF) to provide appropriate financial assistance for Mexico. We further agree that under Title 31 of the United States Code, Section 5302, the President has full authority to provide this assistance. Because the situation in Mexico raises unique and emergency circumstances, the required assistance to be extended will be available for a period of more than 6 months in any 12-month period . . . . We must act now in order to protect American jobs, prevent an increase flow of illegal immigrants across our borders, ensure stability in this hemisphere, and encourage reform in emerging markets around the world. This is an important undertaking, and we believe that the risks of inaction vastly exceed any risks associated with this action. We fully support this effort, and we will work to ensure that its purposes are met.

Statement With Congressional Leaders on Financial Assistance to Mexico, 1 Pub. Papers of William J. Clinton 130 (1995).

he had determined on August 24, 1982, that unique and exigent circumstances required that the ESF loan to Mexico have repayment terms in excess of six months.[11] It is true that no prior precedents under the ESF involved loans or credits of maturity lengths and dollar amounts comparable to those at issue in the support package.[12] That said, such use of the ESF is clearly authorized by the language of the statute.

We find it telling that when Congress was considering what eventually became the 1977 amendment to section 10(a) of the Gold Reserve Act, it apparently gave some thought to restricting use of the ESF to short-term lending exclusively so that the ESF would not compete with the IMF — which was seen as the primary vehicle for longer-term lending. In fact, a question to that effect was posed to a Treasury Department official during the course of a Senate Banking Committee hearing that explored, among other things, the relationship between lending under the ESF and lending under the IMF.[13] In response, the Treasury official stated:

> [A] statutory requirement that [the ESF] be used for short-term lending exclusively would not be appropriate and would unnecessarily impair U.S. flexibility, especially in unforeseen circumstances, in implementing our international monetary policy . . . . [I]t is conceivable that, in some instances, use of the ESF for a somewhat more extended period may be necessary. External factors (such as natural disasters, trade embargoes, unforeseen economic developments . . .) may lead a country which has obtained a short-term credit from the ESF to seek an extension of that credit. It is also conceivable that political assassination or other unanticipated catastrophic event might justify a longer extension of credit, and the possibility of ESF operations in such cases should not be excluded. In none of these cases would the ESF compete with the IMF, and in all of these cases it well may be in the U.S. interests to provide somewhat more extended ESF financing.[14]

That sentiment carried the day, and ultimately found its way into the statute through the 1977 amendment. The report of the Senate Banking Committee on what turned out to be that amendment puts its succinctly:

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[11] *See* Letter for Thomas P. O'Neill, Jr., Speaker of the House of Representatives, from President Ronald Reagan (Sept. 8, 1982), *reprinted in* 1989 Hearings at 161–62.

[12] It is our understanding, however, that other critical elements of the loans and credits to Mexico in connection with the support package — in particular, the structure of the agreements and the existence of an assured source of repayment — are fully consistent with past practice under the ESF.

[13] *Amendments of the Bretton Woods Agreements Act: Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 157 (1976).

[14] *Id.* at 158 (statement of Edwin H. Yeo, III, Under Secretary for Monetary Affairs, Department of the Treasury).

> The Committee recognizes that there may be circumstances where longer-term ESF credits may be necessary, and the amendment provides for that possibility. But the Committee intends, and the amendment expressly provides, that such longer-term financing be provided only where there are unique or exigent circumstances. As indicated by Treasury, these would include natural disasters, trade embargoes, unforeseen economic developments abroad, political assassinations, or other catastrophic events. In none of these cases should the ESF compete with the IMF, however, and every effort should be made to bring all medium and longer-term financing within the framework of the IMF or other appropriate multi-lateral facilities.[15]

The Mexican economic crisis would appear to be a prime example of the type of unique or exigent circumstances that the Senate Banking Committee had in mind when crafting the 1977 amendment: according to some observers, Mexico's financial troubles were exacerbated by the shocking assassinations in 1994 of two key Mexican political leaders and the unanticipated strife in the Chiapas region of Mexico.[16] Furthermore, the support package appears to honor the Committee's admonition that longer-term use of the ESF not "compete" with the IMF. It is our understanding that the loans and credits from the ESF complement the substantial financial assistance that the IMF and other lenders are furnishing to Mexico. Indeed, the Treasury Department has worked closely with the IMF in fashioning the support package.

Finally, it is worth noting that Congress plays an important oversight role with respect to use by the President and the Secretary of the ESF for loans of more than six months. As the Senate Banking Committee described Congress's function, "[t]he requirement that the President report to the Congress on any such longer-term financing will provide the Congress with an opportunity to scrutinize such longer-term ESF credits and take appropriate steps to insure that they are consistent with U.S. interests and U.S. obligations under the IMF."[17] In that role, Congress has, over the years, considered various proposals to cabin the authority of the President and the Secretary under the ESF statute. Those proposals have

[15] 1976 Senate Banking Comm. Report at 11 (footnote omitted). The Committee echoed that theme elsewhere in the report:

> [The] amendment would not bar the United States from making longer-term credits to foreign countries for exchange market intervention, but it would insure that such longer-term credits are not extended unless the President finds that unique or exigent circumstances exist, such as the unavailability of IMF or other international financial resources for that purpose. By helping to keep ESF financing short-term in nature, the amendment would help insure consistency between use of the ESF and U.S. obligations as a member of the IMF. *Id.* at 17–18.

[16] *See* Henry A. Kissinger, *Aiding Mexico is Not Just Economics—It's National Security*, L.A. Times, Jan. 29, 1995, at M2; Tod Robberson, *Mexico's Meltdown*, Wash. Post, Jan. 8, 1995, at A24; *see also* Time, Jan. 9, 1995, at 44.

[17] Senate Banking Comm. Report at 11.

been repeatedly rejected, however.[18] This history reflects the judgment of Congress that the President and the Secretary should retain the flexibility to use the ESF, as they consider necessary, to respond promptly to sudden and unexpected international financial crises that undermine the global currency exchange system and jeopardize vital U.S. economic interests.[19]

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[18] For example, in 1984, then-Representative (and now Senator) Brown introduced legislation that he said was designed to restore the ESF to its original purpose, and thereby prevent the ESF from being used as a "slush fund to bail out American banks" that make bad loans abroad. *See Exchange Stabilization Fund and Argentina: Hearings Before the Subcomm. on International Trade Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong. 129 (1984) (statement of Rep. Brown). Other members of the House took issue with the premises underlying Representative Brown's proposal. *See id.* at 135–36 (statement of Rep. Neal); *id.* at 138–39 (statement of Rep. Leach); *id.* at 156–57 (statement of Rep. Barnard). In the end, Congress did not act on the proposal. Similarly, in 1990, a House Committee held a hearing that was intended, among other things, to probe whether the ESF had been used "to circumvent the appropriations process" through which financial assistance to foreign countries is normally tendered. *See Review of Treasury Department's Conduct of International Financial Policy: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 2 (1990) (statement of Rep. Gonzalez) ("1990 Hearings"). There too, the hearing produced no changes to the authority of the President and the Secretary under the ESF statute.

[19] As a senior Treasury Department official in the Reagan and Bush Administrations articulated the issue:

> Globalization of the world economy and financial markets has changed the nature and scope of strains on the balance of payments adjustment process. There is more latitude for exchange rates to fluctuate, and indebtedness problems have arisen with serious implications for world financial markets. The ESF . . . is the U.S. Government's only instrument providing the means for a rapid and flexible response to international financial disruption which can impact adversely on the U.S. economy. The ESF provides a powerful and flexible means for the Secretary of the Treasury, with the approval of the President, to support our obligations in the IMF, especially those concerning orderly exchange arrangements and a stable system of exchange rates.

1990 Hearings at 4 (statement of David C. Mulford, Under Secretary for International Affairs).

Authority to Issue Executive Order on Government Procurement

The Federal Property and Administrative Services Act vests the President with authority to issue Executive Order No. 12954, entitled "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts," in light of his finding that it will promote economy and efficiency in government procurement.

March 9, 1995

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

On March 6, 1995, we issued a memorandum approving as to form and legality a proposed executive order entitled, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts." On March 8, 1995 the President signed the proposed directive, making it Executive Order No. 12954. This memorandum records the basis for our prior conclusion that the Federal Property and Administrative Services Act vests the President with authority to issue Executive Order No. 12954 in light of his finding that it will promote economy and efficiency in government procurement.

I.

Executive Order No. 12954 establishes a mechanism designed to ensure economy and efficiency in government procurement involving contractors that permanently replace lawfully striking workers. After a preamble that makes and discusses various findings and ultimately concludes that Executive Order No. 12954 will promote economy and efficiency in government procurement, the order declares that "[i]t is the policy of the Executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees." Exec. Order No. 12954, § 1. The order makes the Secretary of Labor ("Secretary") responsible for its enforcement. *Id.* § 6. Specifically, the Secretary is authorized to investigate and hold hearings to determine whether "an organizational unit of a federal contractor" has permanently replaced lawfully striking employees either on the Secretary's own initiative or upon receiving "complaints by employees" that allege such permanent replacement. *Id.* § 2.

If the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary is directed to exercise either or both of two options. First, the Secretary may make a finding that all contracts between the government and that contractor should be terminated for convenience. *Id.* § 3. The Secretary's decision whether to issue such a finding is to be exercised to advance

the government's economy and efficiency interests as set forth in section 1. *Id.* § 1 ("All discretion under this Executive order shall be exercised consistent with this policy."). The Secretary is then to transmit the finding to the heads of all departments and agencies that have contracts with the contractor.[1] Each such agency head is to terminate any contracts that the Secretary has designated for termination, unless the agency head formally and in writing objects to the Secretary's finding. *Id.* § 3. An agency head's discretion to object is also limited to promoting the purpose of economy and efficiency as set forth in the policy articulated in section 1.

The Secretary's second option is debarment. If the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary is to place the contractor on the debarment list until the labor dispute has been resolved, unless the Secretary determines that debarment would impede economy and efficiency in procurement. The effect of this action is that no agency head may enter into a contract with a contractor on the debarment list unless the agency head finds compelling reasons for doing so. *Id.* § 4.

Executive Order No. 12954, taken as a whole, sets forth a mechanism that closely ties its operative procedures — termination and debarment — to the pursuit of economy and efficiency. The President has made a finding that, as a general matter, economy and efficiency in procurement are advanced by contracting with employers that do not permanently replace lawfully striking employees. Additionally, the President has provided for a case-by-case determination that his finding is justified on the peculiar facts and circumstances of each specific case before any action to effectuate the President's finding is undertaken.

II.

The Supreme Court has instructed that "[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The President's authority to issue Executive Order No. 12954 is statutory; specifically, the Federal Property and Administrative Services Act of 1949 ("FPASA"). That statute was enacted "to provide for the Government an economical and efficient system for . . . procurement and supply." 40 U.S.C. § 471. The FPASA expressly grants the President authority to effectuate this purpose,

> The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator [of General Services] and

[1] We will refer to this class of officials generically as agency head(s).

> executive agencies in carrying out their respective functions hereunder.

Id. § 486(a). An executive order issued pursuant to this authorization is valid if (a) "the President acted 'to effectuate the provisions' of the FPASA," and (b) the President's "action was 'not inconsistent with' any specific provision of the Act." *American Fed'n of Gov't Employees v. Carmen*, 669 F.2d 815, 820 (D.C. Cir. 1981) (quoting 40 U.S.C. § 486(a)). We are not aware of any specific provision of the FPASA that is inconsistent with Executive Order No. 12954. Therefore, we turn to the question whether the President acted to effectuate the purposes of the FPASA.

Every court to consider the question has concluded that § 486(a) grants the President a broad scope of authority. In the leading case on the subject, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, addressed the question of the scope of the President's authority under the FPASA, and § 486(a) in particular. *See AFL–CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979). A plausible argument that the FPASA granted the President only narrowly limited authority was advanced and rejected. *See id.* at 799–800 (MacKinnon, J., dissenting). After an extensive review of the legislative history of that provision, the court held that the FPASA, through § 486(a), was intended to give the President "broad-ranging authority" to issue orders designed to promote "economy" and "efficiency" in government procurement. *Id.* at 787–89. The court emphasized that " '[e]conomy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789; *see also* Peter E. Quint, *The Separation of Powers under Carter*, 62 Tex. L. Rev. 785, 792–93 (1984) (although § 486(a) "easily could be read as authorizing the President to do little more than issue relatively modest housekeeping regulations relating to procurement practice. . . . The *Kahn* court found congressional authorization of sweeping presidential power . . . ."); Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 Duke L.J. 285, 333 n.266; Jody S. Fink, *Notes on Presidential Foreign Policy Powers (Part II)*, 11 Hofstra L. Rev. 773, 790–91 n.132 (1983) (characterizing *Kahn* as reading § 486(a) to grant President "virtually unlimited" authority).

The court then concluded that a presidential directive issued pursuant to § 486(a) is authorized as long as there is a "sufficiently close nexus" between the order and the criteria of economy and efficiency. *Kahn*, 618 F.2d at 792. Although the opinion does not include a definitive statement of what constitutes such a nexus, the best reading is that a sufficiently close nexus exists when the President's order is "reasonably related" to the ends of economy and efficiency. *See id.* at 793 n.49; Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68

Va. L. Rev. 1, 51 (1982) ("in *AFL–CIO v. Kahn*, the court stated an appropriate standard for reviewing the basis of a presidential action—that it be 'reasonably related' to statutory policies") (footnote omitted).

As one commentator has asserted, under *Kahn*, the President need not demonstrate that an order "would infallibly promote efficiency, merely that it [is] plausible to suppose this." Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations under Government Contract*, 1982 Wis. L. Rev. 1, 26. In our view a more exacting standard would invade the "broad-ranging" authority that the court held the statute was intended to confer upon the President. *See Kahn*, 618 F.2d at 787–89. In addition, a stricter standard would undermine the great deference that is due presidential factual and policy determinations that Congress has vested in the President. *See, e.g.*, Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 738 (1988).[2]

We have no doubt, for example, that § 486(a) grants the President authority to issue a directive that prohibits executive agencies from entering into contracts with contractors who use a particular machine that the President has deemed less reliable than others that are available. Contractors that use the less reliable machines are less likely to deliver quality goods or to produce their goods in a timely manner. We see no distinction between this hypothetical order in which the President prohibits procurement from contractors that use machines that he deems unreliable and the one the President has actually issued, which would bar procurement with contractors that use labor relations techniques that the President deems to be generally unreliable, especially when the Secretary of Labor and the contracting agency head each confirm the validity of that generalization in each specific case.

The preamble of Executive Order No. 12954 sets forth the President's findings that the state of labor-management relations affects the cost, quality, and timely availability of goods and services. The order also announces his finding that the government's procurement interests in cost, quality, and timely availability are best secured by contracting with those entities that have "stable relationships with their employees" and that "[a]n important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights." The President has concluded that "[t]his balance is disrupted when permanent replacement employees are hired." In establishing the policy ordinarily[3] to contract with contractors that do not hire permanent replacement workers, the President has found that he will advance the government's procurement interests in cost, quality, and timely availability of goods and

[2] We do not mean to indicate a belief that Executive Order No. 12954 could not withstand a stricter level of scrutiny. We simply regard the employment of such a standard to be contrary to the holding of *Kahn*, as well as the view of the purposes of the FPASA and its legislative history upon which that decision expressly rests.

[3] Again, the order does not categorically bar procurement from contractors that have permanently replaced lawfully striking workers. The sanctions that the order would authorize would not go into effect if either the Secretary, with respect to either the termination or the debarment option, or the contracting agency head, with respect to the termination option, finds that the option would impede economy and efficiency in procurement.

services by contracting with those contractors that satisfy what he has found to be an important condition for stable labor-management relations.

The order's preamble then proceeds to set forth a reasonable relation between the government's procurement interests in economy and efficiency and the order itself. Specifically, the order asserts the President's finding that

> strikes involving permanent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike. By permanently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services.

We believe that these findings state the necessary reasonable relation between the procedures instituted by the order and achievement of the goal of economy and efficiency.

It may well be that the order will advance other permissible goals in addition to economy and efficiency. Even if the order were intended to achieve goals other than economy and efficiency, however, the order would still be authorized under the FPASA as long as one of the President's goals is the promotion of economy and efficiency in government procurement. "We cannot agree that an exercise of section 486(a) authority becomes illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and efficiency, serves other, not impermissible, ends as well." *Carmen*, 669 F.2d at 821; *see Rainbow Nav., Inc. v. Dep't of the Navy*, 783 F.2d 1072 (D.C. Cir. 1986); Kimberley A. Egerton, Note, *Presidential Power over Federal Contracts under the Federal Property and Administrative Services Act: The Close Nexus Test of AFL–CIO v. Kahn*, 1980 Duke L.J. 205, 218–20.

Since the adoption of the FPASA, Presidents have consistently regarded orders such as the one currently under review as being within their authority under that Act. As the court explained in *Kahn*, Presidents have relied on the FPASA as authority to issue a wide range of orders. 618 F.2d at 789–92 (noting the history of such orders since 1941, especially to institute "buy American" requirements and to prohibit discrimination in employment by government contractors). Not surprisingly this executive practice has continued since *Kahn*. For instance, President Bush issued Executive Order No. 12800, which required all government contractors to post notices declaring that their employees could not "be required to join a union or maintain membership in a union in order to retain their jobs."

57 Fed. Reg. 12,985 (Apr. 13, 1992). The order was supported solely by the statement that it was issued "in order to . . . promote harmonious relations in the workplace for purposes of ensuring the economical and efficient administration and completion of Government contracts." *Id.*[4] This long history of executive practice provides additional support for the President's exercise of authority in this case. *See Kahn*, 618 F.2d at 790.[5] This is especially so where, as here, the President sets forth the close nexus between the order and the statutory goals of economy and efficiency.

It may be that in individual cases, a contractor that maintains a policy of refusing to permanently replace lawfully striking workers may nevertheless have an unstable labor-management relationship while a particular contractor that has permanently replaced lawfully striking workers may have a more stable relationship. As to such situations, however, the Secretary and the contracting agency heads retain the discretion to continue to procure goods and services from contractors that have permanently replaced lawfully striking workers if that procurement will advance the federal government's economy and efficiency interests as articulated in section 1 of Executive Order No. 12954.[6] We recognize that, even with these safeguards, it could happen that a specific decision to terminate a contract for convenience or to debar a contractor pursuant to the order might not promote economy or efficiency. The courts have held that it remains well within the President's authority to determine that such occurrences are more than offset by the economy and efficiency gains associated with compliance with an order generally. *See Kahn*, 618 F.2d at 793.[7]

Similarly, it would be unavailing to contend that Executive Order No. 12954 will secure no immediate or near-term advancement of the federal government's economy and efficiency procurement interests. Section 486(a) authorizes the President to employ "a strategy of seeking the greatest advantage to the Government, *both short- and long-term*," and this is "entirely consistent with the congressional policies behind the FPASA." *Id.* (emphasis added); *cf. Contractors Ass'n v. Sec-*

[4] This order is also significant insofar as it demonstrates that Executive Order No. 12954 is not the first in which a president has found that more stable workplace relations promote economy and efficiency in government procurement.

[5] "Of course, the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect.' . . . [t]he 'construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" *Kahn*, 618 F.2d at 790 (quoting *Board of Governors of the Federal Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234 (1978), and *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979)).

[6] The authority of an agency head is diminished somewhat, though not eliminated entirely, with respect to procuring from a contractor that the Secretary has debarred. An agency head may procure from a debarred contractor only for compelling reasons. *See* Exec. Order No. 12954, §4. Nevertheless, the Secretary has authority to refuse to place a contractor on the debarment list in the first instance if the Secretary believes that debarment would not advance economy and efficiency.

[7] "[W]e find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained in negotiated contracts and in those cases where the lowest bidder is in compliance with the voluntary standards and his bid is lower than it would have been in the absence of standards." *Kahn*, 618 F.2d at 793.

retary of Labor, 442 F.2d 159, 170 (3d Cir.) (deciding on basis of President's constitutional rather than statutory authority), *cert. denied*, 404 U.S. 854 (1971).

The FPASA grants the President a direct and active supervisory role in the administration of that Act and endows him with broad discretion over how best "to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency." *Kahn*, 618 F.2d at 788–89. As explained above, the President has set forth a sufficiently close nexus between the program to be established by the proposed order and the goals of economy and efficiency in government procurement.[8]

Finally, we do not understand the action of Congress in relation to legislation on the subject of replacement of lawfully striking workers to bear on the President's authority to issue Executive Order No. 12954. The question is whether the FPASA authorizes the President to issue the order. As set forth above, we believe that it does. Recent Congresses have considered but failed to act on the issue of whether to adopt a national, economy-wide proscription of the practice applying to all employers under the National Labor Relations Act ("NLRA").[9] This action may not be given the effect of amending or repealing the President's statutory authority, for the enactment of such legislation requires passage by both houses of Congress *and* presentment to the President. *See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501

[8] Moreover, we note that under the Supreme Court's recent decision in *Dalton v. Specter*, 511 U.S. 462 (1994), it is unlikely that the President's judgment may be subjected to judicial review. It is clear that § 486(a) gives the President the power to issue orders designed to promote economy and efficiency in government procurement. *See* 40 U.S.C. § 486(a); *Carmen*, 669 F.2d at 821; *Kahn*, 618 F.2d at 788–89, 792–93. The Supreme Court has recently "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Dalton*, 511 U.S. at 472. The Court held that

> where a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Id. at 474 (quoting *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919)); *see also Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir.), *cert. denied*, 488 U.S. 954 (1988); *Colon v. Carter*, 633 F.2d 964, 966 (1st Cir. 1980); *cf. Heckler v. Chaney*, 470 U.S. 821 (1985); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Judicial review is unavailable for claims that the President had erred in his judgment that the program established in the order is unlikely to promote economy and efficiency. The FPASA entrusts this determination to the President's discretion and, under *Dalton*, courts may not second-guess his conclusion. The Court made it clear that the President does not violate the Constitution simply by acting ultra vires. *See Dalton*, 511 U.S. at 472–74. Judicial review is available only for contentions that the President's decision not only is outside the scope of the discretion Congress granted the President, but also that the President's action violates some free-standing provision of the Constitution.

[9] In the 102d Congress, The House of Representatives passed a bill to amend the National Labor Relations Act to make it an unfair labor practice for an employer to hire a permanent replacement for a lawfully striking employee. *See* H.R. 5, 102d Cong. (1991). The House passed this legislation on a vote of 247–182. *See* 137 Cong. Rec. 18,655 (1991). The Senate considered legislation to the same effect. *See* S. 55, 102d Cong. (1992). The legislation was not brought to the floor for a vote because supporters of the measure were only able to muster 57 votes to invoke cloture. *See* 138 Cong. Rec. 14,874–75 (1992).

Likewise, legislation to categorize the hiring of permanent replacement workers as an unfair labor practice was considered in the 103d Congress. The House of Representatives approved the legislation on a vote of 239–190. *See* 139 Cong. Rec. 12,867 (1993). Again, the Senate did not bring the bill to a vote, because its supporters were unable to attract the supermajority required to invoke cloture. *See* 140 Cong. Rec. 15,863 (1994) (fifty-three senators voting to invoke cloture).

U.S. 252 (1991); *INS v. Chadha*, 462 U.S. 919 (1983). To contend that Congress's inaction on legislation to prohibit all employers from hiring replacement workers deprived the President of authority he had possessed is to contend for the validity of the legislative veto.

In *Youngstown Sheet & Tube*, it was considered relevant that Congress had considered and rejected granting the President the specific authority he had exercised. 343 U.S. at 586. There, however, the President did not claim to be acting pursuant to any statutory power, but rather to inherent constitutional power. In such a case, the scope of the President's power depends upon congressional action in the field, including an express decision to deny the President any statutory authority. *Id. Youngstown Sheet & Tube* is inapposite here because the President does not rely upon inherent constitutional authority, but rather upon express statutory authority — § 486(a) of the FPASA. *See Kahn*, 618 F.2d at 787 & n.13.

Moreover, we note that Congress's action was far from a repudiation of the specific authority exercised in Executive Order No. 12954. Even if a majority of either house of Congress had voted to reject the blanket proscriptions on hiring permanent replacements for lawfully striking workers contained in H.R. 5 and S. 55, this would denote no more than a determination that such a broad, inflexible rule applied in every labor dispute subject to the NLRA would not advance the many interests that Congress may consider when assessing legislation. The order, by contrast, does not apply across the economy, but only in the area of government procurement. Nor does the order establish an inflexible application, rather it provides the Secretary of Labor an opportunity to review each case to determine whether debarring or terminating a contract with a particular contractor will promote economy and efficiency in government procurement and further permits any contracting agency head to override a decision to debar if he or she believes there are compelling circumstances or to reject a recommendation to terminate a contract if, in his or her independent judgment, it will not promote economy and efficiency. In sum, the congressional action alluded to above simply does not implicate the narrow context of government procurement or speak to the efficacy of a flexible case-by-case regime such as the one set forth in the order.[10]

The *Kahn* opinion fully supports this view. There the President promulgated voluntary wage and price guidelines that were applicable to the entire economy. Contractors that failed to certify compliance with the guidelines were debarred from most government contracts. *See* Exec. Order No. 12092, 43 Fed. Reg. 51,375 (1978). The order was issued in 1978 against the following legislative backdrop:

[10] We have found no indication in the legislative history that those opposing the proposed amendments to the NLRA even considered the specialized context of government procurement. *See, e.g.*, S. Rep. No. 103–110, at 35–49 (1993) (stating minority views); H.R. Rep. No. 103–116, pt. 1, at 42–62 (1993) (minority views); H.R. Rep. No. 103–116, pt. 2, at 16–17 (1993) (minority views); H.R. Rep. No. 103–116, pt. 3, at 11–15 (1993) (minority views). Moreover, we note that at least some of the opposition to the legislation was based in part on concerns regarding the breadth of the legislation, *see* H.R. Rep. No. 103–116, pt. 1, at 45 (minority views) (emphasizing absence of "a truly pressing *societal* need" (emphasis added)), as well as its inflexibility, *see id.* at 62 (views of Rep. Roukema).

In 1971 Congress passed the Economic Stabilization Act, which authorized the President to enforce economy-wide wage and price controls. In 1974, a few months after the Economic Stabilization Act expired, the Council on Wage and Price Stability Act ("COWPSA") was enacted. COWPSA expressly provided that "[n]othing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices rents, wages, salaries, corporate dividends, or any similar transfers." Pub. L. No. 93–387, § 3(b), 88 Stat. 750 (1974).

The court concluded that "the standards in Executive Order 12092, which cover only wages and prices, are not as extensive as the list in Section 3(b). Consequently, we do not think the procurement compliance program falls within the coverage of Section 3(b), but rather is a halfway measure outside the contemplation of Congress in that enactment." *Kahn*, 618 F.2d at 795. Similarly, Executive Order No. 12954 is a measure that operates in a manner (case-by-case determination) and a realm (government procurement exclusively) that was outside the contemplation of Congress in its consideration of a broad and inflexible prohibition on the permanent replacement of lawfully striking workers.

III.

Congress, in the FPASA, established that the President is to play the role of managing and directing government procurement. Congress designed this role to include "broad-ranging authority" to issue orders intended to achieve an economical and efficient procurement system. Executive Order No. 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts," represents a valid exercise of this authority.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Impermissibility of Deputizing the House Sergeant at Arms as a Special Deputy U.S. Marshal

Appointment of the House Sergeant at Arms as a Special Deputy U.S. Marshal would entail an overlapping of congressional and executive accountability that is incompatible with separation of powers requirements, and it would impermissibly involve the institution of Congress in executive branch law enforcement.

April 10, 1995

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked our opinion whether there is any constitutional impediment to the deputation of the Sergeant at Arms of the House of Representatives ("HSA") as a Special Deputy United States Marshal ("DUSM"). Given the nature of the HSA's status and statutory duties as an Officer of the House — which include maintaining order in the House under the direction of the Speaker — it would be virtually impossible to separate or segregate those duties from the law enforcement duties of a DUSM, giving rise to inherent conflicts in accountability between the two positions. Consequently, we conclude that the proposed arrangement would raise serious concerns under the constitutional separation of powers.

I. BACKGROUND

On May 25, 1994, this office issued an opinion advising that the appointment of a United States Senator as a DUSM would be inconsistent with separation of powers principles.[1] We primarily based that conclusion upon "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." 18 Op. O.L.C. at 125. Although such an appointment might raise additional problems under the Incompatability Clause of Article I, Section 6, we did not reach that issue in the earlier opinion. *See* U.S. Const. art. I, § 6, cl. 2.

We were subsequently asked whether the deputation of an employee on the personal staff of a U.S. Senator, for purposes of providing protection and personal security against threatened violence[2], would be constitutionally permissible. We concluded that it would. Our views on that issue were reflected in a Memorandum from the Director of the United States Marshals Service ("USMS") to you, reviewed and endorsed by this office, dated January 26, 1995. Memorandum for

[1] *Deputization of Members of Congress As Special Deputy U.S. Marshals*, 18 Op. O.L.C. 125 (1994).

[2] The Senator in question was also President Pro Tempore of the Senate and Chairman of the Armed Services Committee.

the Deputy Attorney General, from Eduardo Gonzalez, Director, United States Marshal Service, *Re: Continued Deputation* (Jan. 26, 1995) ("Joint Memorandum"). In concluding that deputation of the congressional staff member would not violate the separation of powers, the Joint Memorandum stated:

> The deputized staff person is not a Member of Congress and exercises no legislative power under Article I of the Constitution; nor would Congress (or any member thereof) have the authority to grant or revoke his appointment as a special DUSM, *or to control or supervise his official duties as such.*

Joint Memorandum at 2 (emphasis added).

By letter dated February 27, 1995, to the USMS, the Sergeant at Arms of the House has requested special deputation as a DUSM. In justification of the requested deputation, the letter states in pertinent part:

> This letter would like to request special deputation to carry a weapon since I have been recently sworn in as the Sergeant at Arms for the United States House of Representatives (House). As the Chief of law enforcement, my duties involve the protection of House members, investigation of threats, enforcement of the commands of the House, which includes the execution of arrest and search warrants, and the maintenance of order of the House, and other duties relating to the investigation and enforcement of the laws relating to Members of Congress and the general public.

By memorandum to you dated March 31, 1995 ("USMS Memorandum"), the Deputy Director of the USMS has recommended against granting the requested deputation. In so recommending, the USMS memorandum asserts that the deputation in question would raise constitutional separation of powers issues, stating:

> If he were deputized by the Marshals Service, he would use the additional authority from that deputation in furtherance of his duties as the Sergeant at Arms of the House of Representatives. Thus, the purpose of his deputation would be concurrent with his duties as the House Sergeant at Arms. Since the House Sergeant at Arms remains in office subject to removal by the House of Representatives, 2 U.S.C. 83, the House, on its own initiative, could remove the Sergeant at Arms from the position which is intertwined with his deputation.

USMS Memorandum at 2.

In light of our prior opinions in this area, you have now requested our analysis of whether the USMS is precluded on constitutional grounds from deputizing the House Sergeant at Arms.

II. ANALYSIS

The House Sergeant at Arms is an Officer of the Congress. 2 U.S.C. § 60–1(b)(1). As part of his duties he is required

> to attend the House during its sittings, to maintain order under the direction of the Speaker, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House and all processes issued by authority thereof, directed to him by the Speaker.

2 U.S.C. § 78.[3] The HSA is subject to removal by the House of Representatives. 2 U.S.C. § 83.

It is evident that the HSA's appointment as a DUSM for the purposes outlined in his letter of request would entail unavoidable conflicts in accountability with his duties and responsibilities as an Officer of the House. The letter makes it clear that the deputation is sought for the purpose of facilitating the HSA's duties to maintain order in the House and to enforce "the commands of the House." In performing his duty "to maintain order [in the House] *under the direction of the Speaker*," 2 U.S.C. § 78 (emphasis added), the HSA could not maintain the accountability to the Director of the USMS, the Attorney General, and ultimately the President, that is required of a DUSM. Such overlapping of congressional and executive accountability is incompatible with separation of powers requirements. *See Bowsher*, 478 U.S. at 726–32 (Comptroller General, who is "an officer of the Legislative Branch" and "controlled by Congress," cannot constitutionally be permitted to execute the laws).

Moreover, we believe that the proposed deputation of the House Sergeant at Arms, like the deputation of a Member of Congress, would impermissibly involve the institution of Congress in executive branch law enforcement. *See id.* at 726–31. In this context, we do not think the activities of the House Sergeant at Arms for which deputation is sought can be separated from the institution of Congress for separation of powers purposes.

The situation of the staff employee of a Senator whose re-deputation has been recently approved by this office is distinguishable in several important respects. Unlike the HSA, that person's employment as a Senator's aide did not involve institutional duties to enforce order within the congressional sphere which could

[3] *See also* 2 U.S.C. § 79, providing that, "[t]he symbol of his [i.e., the HSA] office shall be the mace, which shall be borne by him while enforcing order on the floor."

come into conflict with his accountability to the Attorney General as a DUSM. As stated in the memorandum approving that deputation, neither Congress, the Senate, nor any member thereof would have legal authority to control or supervise his limited protective duties as a DUSM. The limited protective function for which he was deputized is not subject to congressional supervision, whereas the HSA seeks deputation in connection with the very activities as to which, by statute, he is "under the direction of the Speaker" and subject to "the commands of the House." 2 U.S.C. § 78.

Additionally, we do not think that a staff employee of a Senator or Representative, who is not an Officer of the Congress, *see* 2 U.S.C. § 60–1(b)(1), can be equated with the institution of Congress for purposes of assessing the issue presented here. Unlike the HSA, his employment, duties, and removal are not controlled by either House as an institution; rather, he is hired, supervised, and removable at the discretion of a single Member.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee

Civilian employees and officers in the executive branch would not violate 18 U.S.C. § 603, as amended by the Hatch Act Reform Amendments of 1993, by making contributions to a President's authorized reelection campaign committee, so long as such contributions were not made in a manner that would violate the specific prohibitions of 5 U.S.C. §§ 7324(a)(1)–(4).

May 5, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion with respect to whether 18 U.S.C. § 603 would bar civilian executive branch employees and officers from making contributions to a President's authorized re-election campaign committee. For the reasons expressed below, we conclude that such employees and officers would not violate § 603 by making such contributions, without more.

I.

Between 1980 and 1993, 18 U.S.C. § 603 provided as follows:

> (a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> (b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee.

See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 201(a)(4), 93 Stat. 1339, 1367 (1980).

As this Office explained in a 1984 Memorandum to the Counsel to the President, it was far from clear whether this iteration of § 603 did, or constitutionally could, bar all executive branch employees from making contributions to a President's re-election campaign committee. *See* Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 603 to Federal Employee Contributions to the President's Authorized Re-election Campaign Committee* (Feb. 6, 1984) ("1984 Olson Memo"). We concluded that "[s]erious uncertainty exists concerning whom the statute covers, under what circumstances it was intended to be applicable, and why it was promulgated." *Id.* at 2. In particular, it was uncertain whether the use of the phrase "employing authority" in § 603 was so broad as to proscribe contributions to a President's reelection campaign by *all* executive branch employees; given the President's constitutional authority as Chief Executive and as Commander-in-Chief, a plausible reading of the language of § 603 could have prohibited most, if not all, of the more than five million executive branch employees and military personnel from making such contributions. *See id.* at 6, 33. The ambiguity of § 603's coverage was exacerbated by the fact that there has never been a reported prosecution under § 603 or its predecessor statutes,[1] and by the absence of any determinative legislative history concerning application of § 603 in the executive branch. *See id.* at 18.

In his statement upon signing into law the legislation creating the "employing authority" version of § 603, President Carter stated that the prohibition would cause a "severe infringement of Federal employees' first amendment rights." 1 Pub. Papers of Jimmy Carter 37, 37 (1980). President Carter characterized § 603 as "an unacceptable and unwise intrusion" on the First Amendment rights of federal employees that "raises grave constitutional concerns." *Id.* at 38. Accordingly, he urged that § 603 "be promptly repealed or amended so as to remove its chilling effect on the rights of citizens to make voluntary contributions to the candidates of their choice." *Id.* The chief sponsors of the 1980 revision of § 603 attempted to assure President Carter that the statute was not intended to impose such a broad prohibition, *see* 1984 Olson Memo at 18–20; nevertheless, prior to 1993, Congress failed to repeal the statute or amend it to reflect the narrow scope described and intended by its sponsors.

This Office also was of the opinion that, if former § 603 were read to proscribe contributions to a President's campaign from all (or virtually all) executive branch employees, it would in all likelihood be unconstitutional. *See id.* at 35. Therefore, we opined that the statute would best be interpreted more narrowly, so as to avoid such possible constitutional infirmities. *Id.* at 35–39. In particular, we reasoned that

[1] The Criminal Division has informed us that it is unaware of any prosecutions ever being brought under § 603.

> the constitutional considerations which bear upon the phrase "employer or employing authority" as applied to the President require that the phrase be construed narrowly to apply only to those persons in Government service who may reasonably be expected to be subject to some form of subtle pressure to contribute to the President's re-election committee because of the President's status as their immediate "employer or employing authority."

Id. at 36; *see also id.* at 3.[2]

Despite this conclusion, we nonetheless warned that "it is by no means certain that a court would adopt a construction of § 603 which prohibited contributions only when made by the President's 'inner circle' of political appointees." *Id.* at 39. And, because we were "unable to predict with confidence precisely how the statute would be construed by the courts," *id.* at 42, the White House consistently has advised executive branch employees not to contribute to a President's re-election campaign. *See, e.g.*, Memorandum for the Heads of All Departments and Agencies, from C. Boyden Gray, Counsel to the President, *Re: 18 U.S.C. § 603* (Nov. 15, 1991) ("regret[fully]" advising employees that though a broad reading of § 603 "would raise grave constitutional concerns, prudence requires that any ambiguity in the language of this statute be resolved against placing any Presidential appointee or other Federal employee in the position of inadvertently violating Federal law").

II.

As part of the Hatch Act Reform Amendments of 1993 ("HARA"), Congress added a new subsection (c) to § 603. Pub. L. No. 103–94, § 4(b), 107 Stat. 1001, 1005. 18 U.S.C. § 603(c), which became effective on February 3, 1994, *see* HARA § 12(a), 107 Stat. at 1011, provides that

> [t]he prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.

Congress's evident intent was to "conform" § 603 to the Hatch Act, so that employees subject to the Hatch Act could not be convicted under § 603 for

[2] We further explained that, under such a circumscribed reading, a "reasonable expectation of such political pressure could be argued to exist as a result of three elements in an employment relationship involving the President: (1) the President personally appoints the contributor, or employs him pursuant to his discretionary authority under 3 U.S.C. § 105, (2) the President personally supervises the performance of the contributor; and (3) the contributor works in an office involved with the political activities of the President." *Id.* at 36–37.

engaging in activities that are not prohibited by the civil provisions of the Hatch Act itself. *See, e.g.*, S. Rep. No. 103–57, at 15–16 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1802, 1816–17.

For present purposes, this restriction on the scope of the prohibition in § 603(a) raises but two questions: (A) which employees and officers may be subject to the limitation in § 603(c); and, (B) with respect to those employees and officers who are covered by § 603, whether such persons might violate the civil provisions of the HARA, 5 U.S.C. §§ 7323 and 7324, by making contributions to a President's re-election campaign committee.

A. In addition to individuals "employed in or under the United States Postal Service or the Postal Rate Commission," to whom § 603(c) makes explicit reference, § 603(c) covers all persons who are defined as "employees" under the HARA, 5 U.S.C. § 7322(1). Section 7322(1) reads:

> "[E]mployee" means any individual, other than the President and the Vice President, employed or holding office in —
>
> > (A) an Executive agency other than the General Accounting Office;
> > (B) a position within the competitive service which is not in an Executive agency; or
> > (C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds;
>
> but does not include a member of the uniformed services.

Because this definition includes all employees in "Executive agenc[ies]," it includes in its scope (but is not limited to) all executive branch employees and officers, with the exception of the President, the Vice President, persons employed in or under the United States Postal Service or the Postal Rate Commission, and members of the uniformed services.[3] Section 603 by its terms does not bar the President and the Vice President from making contributions to their own campaign committee, and § 603(c) explicitly includes within the scope of its exception persons "employed in or under the United States Postal Service or the Postal Rate Commission." Therefore, § 603(c) applies to the entire executive branch with the

[3] Section 7322(1) refers to employees in "an Executive agency." "Executive agency" is defined in 5 U.S.C. § 105 to include "Executive department[s]," "Government corporation[s]," and "independent establishment[s]." The "Executive department[s]" are defined in 5 U.S.C. § 101 to include all Cabinet-level agencies "Government corporation[s]" are defined in 5 U.S.C. § 103 to include corporations owned and/or controlled by the United States. An "independent establishment" is defined in 5 U.S.C. § 104(1) to mean, inter alia, "an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." We do not in this Opinion address whether any particular entity or establishment is "in the executive branch" for purposes of title 5.

possible exception of members of the uniformed services.[4] Therefore, the prohibition in § 603(a) does not apply to any activity of such persons unless that activity is prohibited by 5 U.S.C. §§ 7323 and 7324.

B. There is nothing in §§ 7323 and 7324 that bars executive branch employees and officers from making contributions to a President's re-election campaign committee, without more. Indeed, the Hatch Act itself has never barred such action. Prior to the HARA, the Office of Personnel Management ("OPM") interpreted the Hatch Act to permit employees to make financial contributions to a political party or organization. *See* 5 C.F.R. § 733.111(a)(8) (1994) (pre-HARA regulations).[5] Subsequent to the HARA, OPM has reiterated this regulation, and explicitly has added that an employee may make a contribution to a campaign committee of a candidate for public office. *See* 5 C.F.R. §§ 734.208(a), 734.404(d) (1995) (post-HARA regulations).

Therefore, because an executive branch employee or officer would not violate § 7323 or § 7324 simply by making a contribution to a President's re-election campaign committee, it follows that, pursuant to 18 U.S.C. § 603(c), such an executive branch employee or officer (other than a member of the uniformed services) would not violate the criminal prohibition found in § 603(a) simply by making such a contribution.

III.

Two caveats should be mentioned. First, there is one conceivable (albeit unlikely) circumstance under which the making of a contribution to a President's campaign committee might violate § 7324, and therefore be subject to criminal sanctions under 18 U.S.C. § 603. Congress indicated in section 4 of the HARA, 107 Stat. at 1005 (creating 18 U.S.C. § 610) that "mak[ing] . . . any political contribution" is "political activity."[6] Thus, making a contribution to a President's re-election campaign committee is "political activity" under the HARA. Under § 7324, almost all HARA-covered employees may not engage in "political activity": (i) while on duty; (ii) while in "any room or building occupied in the

[4] We do not address herein the status of members of the uniformed services under § 603. We simply note that, if § 603(c) does not apply to members of the uniformed services, then the discussion in the 1984 Olson Memo concerning the ambiguity, constitutionality, and possible limiting constructions of § 603 would continue to be of relevance with respect to such persons.

[5] This interpretation conformed to the regulation promulgated by the Civil Service Commission ("CSC") at the dawn of the Hatch Act in 1939. *See CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 584 (1973) (quoting CSC Form 1236, "Political Activity and Political Assessments of Federal Officeholders and Employees," § 17, at 7 (1939)). Congress effectively adopted this 1939 CSC regulation as a substantive part of the Hatch Act itself. *See* Memorandum for James B. King, Director, Office of Personnel Management, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Whether Use of Federal Payroll Allocation System by Executive Branch Employees for Contributions to Political Action Committees Would Violate the Hatch Act Reform Amendments of 1993 or 18 U.S.C. §§ 602 and 607*, at 17–19 (Feb. 22, 1995) ("1995 Dellinger Memo").

[6] "[P]olitical contribution," in turn, is defined to include "any gift . . . or deposit of money or anything of value, made for any political purpose." 5 U.S.C. § 7322(3)(A); *see also* 1995 Dellinger Memo at 25–28 (discussing Congress's obvious intent that "political activity" be read as broadly as possible).

discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof"; (iii) while wearing a uniform or official insignia identifying the employee's office or position; or (iv) while using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a)(1)–(4).[7] It follows that an executive branch employee covered under § 7324(a) could violate that provision by making a contribution to the President's campaign committee while on duty or while in a federal building — for example, by hand-delivering a contribution to another federal employee who is an officer of that committee. In the unlikely event of such a violation of § 7324, the employee could be subject to the criminal sanctions of § 603, as well.

Second, it should be kept in mind that, even where § 603 does not bar executive branch employees and officers from making political contributions, nonetheless there remain limitations on the solicitation of such contributions by federal employees and officers and by the President. *See, e.g.*, 5 U.S.C. § 7323(a)(2), 18 U.S.C. §§ 602, 607.[8] This Opinion does not address the scope of those solicitation limitations.[9]

CONCLUSION

Civilian employees and officers in the executive branch would not violate 18 U.S.C. § 603, as amended, simply by making a contribution to a President's authorized re-election campaign committee, without more.

DAWN JOHNSEN
Deputy Assistant Attorney General
Office of Legal Counsel

[7] An exception to these prohibitions is made for certain employees "the duties and responsibilities of whose position[s] continue outside normal duty hours and while away from the normal duty post," and who are either (i) "employee[s] paid from an appropriation for the Executive Office of the President" or (ii) "employee[s] appointed by the President, by and with the advice and consent of the Senate, whose position[s] [are] located within the United States, who determine[] policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." 5 U.S.C. § 7324(b)(2). Such employees "may engage in political activity otherwise prohibited by subsection (a)," 5 U.S.C. § 7324(b)(1), such as political activity on duty, but only "if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." *Id.*

[8] *See* 1995 Dellinger Memo at 7–12 (discussing the meaning of "solicit" in these statutes).

[9] One clarification is worth brief mention, however. Though 18 U.S.C. § 602(a)(4) prohibits the President, as well as other federal employees, from knowingly soliciting political contributions from other federal officers and employees, Congress intended that "[i]n order for a solicitation to be a violation of this section, it must be actually known that the person who is being solicited is a federal employee"; thus, "[m]erely mailing to a list [that] no doubt contain[s] names of federal employees is not a violation of [§ 602]." H.R. Rep. No. 96–422, at 25 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2860, 2885.

Authority of the Secretary of the Treasury to Order the Closing of Certain Streets Located Along the Perimeter of the White House

18 U.S.C. § 3056 grants the Secretary of the Treasury broad authority to take actions that are necessary and proper to protect the President, including the authority to order the closing of certain streets located along the perimeter of the White House.

May 12, 1995

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This is in response to your request for a legal opinion from the Office of Legal Counsel ("OLC") on whether the Secretary of the Treasury ("Secretary") has the authority to order the closing to vehicular traffic of (1) Pennsylvania Avenue between 17th Street and Madison Avenue, (2) State Place, and (3) the segment of South Executive Avenue that connects into State Place in furtherance of his responsibility to protect the President under 18 U.S.C. § 3056. Based on a review of § 3056 and related statutes, their legislative histories, and relevant court and OLC opinions, we conclude that § 3056 grants the Secretary broad authority to take actions that are necessary and proper to protect the President. In light of the recommendations of the White House Security Review and the United States Secret Service's unique expertise and special responsibility in this matter, we agree with your conclusion that § 3056 authorizes the actions contemplated by the Secretary.

I. *Background*

The White House Security Review, which was recently established by former Treasury Secretary Bentsen to examine White House security issues, has determined that "there is no alternative to prohibiting vehicular traffic on Pennsylvania Avenue that would ensure the safety of the President and others in the White House complex from explosive devices carried by vehicles near its boundaries." Request for Legal Opinion from Edward S. Knight, General Counsel, U.S. Department of Treasury, to Walter E. Dellinger, III, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice 1 (May 10, 1995). You have informed this Office that in light of the Secretary's responsibilities to protect the President under § 3056, he is considering ordering the closing to vehicular traffic of portions of three streets that bound the grounds of the White House: (1) Pennsylvania Avenue between 17th Street and Madison Avenue, (2) State Place, and (3) the segment of South Executive Avenue that connects into State Place. *Id.* You have also informed this Office of your view that the conclusion of the

White House Security Review provides sufficient factual support for the Secretary to exercise his authority to close the streets mentioned above. *Id.*

We have been informally advised that in the past, the Secret Service has taken, on a temporary basis, actions similar to those contemplated. These actions have included closing streets and portions of highways to protect the President while traveling, closing parking garages to safeguard him against bomb threats, restricting airspace over the President, and cordoning off areas in hotels in which the President was present.[1] The Secret Service has also, on occasion, temporarily closed certain streets around the perimeter of the White House, including Pennsylvania Avenue.[2]

II. *Legal Analysis*

A. *Statutory Authority*

1. Section 3056

Section 3056 provides, in pertinent part, that:

> [u]nder the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect . . .
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect [and]
> (2) The immediate families of those individuals listed in paragraph (1).

18 U.S.C. § 3056(a)(1)–(2).

In addition to that broadly-stated authority, officers and agents of the Secret Service are authorized, under the direction of the Secretary, to perform certain enumerated functions,[3] and to "perform such other functions and duties as are

[1] We have been advised by the Department of the Treasury that the Secret Service has historically taken these steps pursuant to its authority under 18 U.S.C. §§ 3056 and 1752, and 3 U.S.C. § 202. We have also been informed that the Secret Service generally takes such actions with the assistance of state and local law enforcement officials.

[2] The Department of the Treasury has informed us that East Executive Drive was permanently closed to vehicular traffic by the National Park Service in 1985. According to the Department of the Treasury, when the Park Service closed East Executive Drive, it consulted with the District of Columbia's Department of Transportation but did not file an application for street closing under the District of Columbia's street closing procedures.

[3] Such functions include the ability to:

> (A) execute warrants issued under the laws of the United States;
>
> (B) carry firearms;
>
> (C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony;
>
> (D) offer and pay rewards for services and information leading to the apprehension of persons involved in the violation or potential violation of those provisions of law which the Secret Service is authorized to enforce;

authorized by law." 18 U.S.C. §3056(c)(1)(F). Aside from expressly granting certain powers generally afforded federal law enforcement personnel, the statute does not attempt to enumerate the specific actions the Secret Service may take in fulfilling its responsibility to protect the President.

The legislative history of §3056 also does not include any enumeration of the specific actions the Secretary may take to protect the President. Although the Secret Service has routinely protected the President since the assassination of President McKinley in 1901, *see* S. Rep. No. 82–467, at 2–3 (1951), Congress did not provide explicit formal authority for this role until 1951. *See* Pub. L. No. 82–79, 65 Stat. 121, 122 (1951). Neither the congressional report language nor the floor debates concerning the authorizing legislation elaborate upon the activities and functions Secret Service officials may undertake in protecting the President. Moreover, subsequent amendments to §3056 pertaining to the Secret Service's protection duties merely expanded the group of officials over which the Secret Service has protective responsibilities, without delineating how the protection is to be accomplished.

Although both the language of §3056 and its legislative history are silent as to specific protective acts, the language and legislative history of 18 U.S.C. §1752, which authorizes the Secretary to designate and regulate temporary residences of the President, provide some insight into the scope of the Secret Service's authority under §3056 with respect to the environs of the White House. Section 1752 was apparently intended to provide the Secret Service with authority to provide the same degree of protection for the President outside the vicinity of the White House as Congress believed the Secret Service could exercise, under §3056, within the vicinity of the White House. Section 1752 grants the Secretary the authority to "designate by regulations the buildings and grounds which constitute the temporary residences of the President." 18 U.S.C. §1752(d)(1). It also allows the Secretary "to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President . . . is or will be temporarily visiting." *Id.* §1752(d)(2).

The legislative history of the statute suggests that, when enacting §1752, Congress believed the Secret Service already had similar or greater authority to control access to the environs of the White House. In 1969, Senator Hruska introduced S. 2896, stating that its purpose was "to provide more effective control over unauthorized entry into the temporary residence of the President, and any buildings which are being temporarily used as executive office buildings." 115 Cong. Rec. 25,436 (1969) (statement of Sen. Hruska). The Senate Judiciary Committee report accompanying S. 2896 stated that the bill would "*extend* Federal protection to temporary residences and offices of the President." S. Rep. No. 91–1252, at 6

(E) pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on the Secretary's certificate.

18 U.S.C. §3056(c)(1).

(1970) (emphasis added). The report also mentioned that the bill was "designed to provide a uniform minimum of Federal jurisdiction for Presidential security when the President is on temporary visits," *id.*, noting the testimony of the Director of the Secret Service that "[f]rom a security standpoint, the President is most vulnerable when he is outside the White House complex traveling or residing temporarily in some other section of the country" and "the enactment of . . . [the] legislation is necessary in order to guarantee the safety of the President when he is temporarily absent from the Executive residence." *Id.* at 7. Finally, reflecting the belief that federal law already was adequate to ensure protection of the President within the vicinity of the White House, the report opined that "[a]lthough the Secret Service is charged with protecting the person of the President . . . there is, at the present time, no Federal statute which specifically authorizes them to restrict entry to areas where the President maintains temporary residences or offices." *Id.*

Similar themes were expressed during floor debate on the bill. In describing the problems confronting the Secret Service when protecting the President outside of Washington, Senator McClellan stated:

> Protecting the President . . . is a formidable task for the Secret Service, which is charged with safeguarding the personal life of the President. As difficult as this task is, however, it is rendered even more difficult because the Secret Service's present powers are somewhat limited. Title 18, section 3056 of the United States Code authorizes the Secret Service to protect the life of the President, but does little more. Consequently, the Service must rely upon a patchwork of State laws and local ordinances and local officers to clear areas for security perimeters, to provide for free ingress and egress when the President is visiting, and to protect the President's private homes from trespassers.

116 Cong. Rec. 35,651 (1970) (statement of Sen. McClellan). Moreover, Senator Hruska, speaking in support of the legislation, declared:

> [Under S. 2896, the] Secretary of the Treasury would be authorized to designate by regulations buildings and grounds which are temporary residences of the President and temporary offices of the President and his staff. The Secretary also would be authorized to prescribe regulations for admission to such buildings and grounds and to post or cordon off restricted areas where the President is or will be temporarily visiting . . . . It would be unconscionable not to recognize the obvious fact that the President's vulnerability is maximized when he is traveling or residing temporarily in

> another section of the country. It would be unconscionable not to recognize the obvious fact that the Secret Service does not presently possess adequate Federal authority during these most vulnerable occasions. This body cannot ignore the obvious responsibility and duty it has at this moment to create the needed protection and authority.

116 Cong. Rec. 35,653 (1970) (statement of Sen. Hruska).[4]

It is clear that Congress did not perceive that it was giving the Secretary greater power to protect the President when he was away from the White House than when he was within it. Rather, the language and legislative history of § 1752 reflect a belief that the authority afforded by § 1752 with respect to temporary residences already was available with respect to the President's permanent residence, the White House.

Section 1752 plainly grants the Secretary authority to limit ingress and egress to an area where the President will be visiting to create a security perimeter, even when creating such a perimeter will require the closing of a public street to vehicular traffic. Since congressional action did not reflect any intent to give the Secretary greater authority under § 1752 than exists under § 3056, it would be incongruous for us to conclude that the Secretary has such authority with respect to temporary presidential residences but lacks the authority to limit ingress and egress to an area to create an appropriate security perimeter around the White House.

Turning back to the language of § 3056, we note again that Congress painted the Secret Service's Presidential protection authority with a broad brush. That treatment seems reasonable, given the nature of Presidential protection services. Protecting the President requires a certain amount of flexibility to respond quickly to changing and often potentially dangerous situations. Too tight a rein on the authority of the Secret Service would compromise Presidential security. As we have stated in affirming the authority of the Secret Service, under § 3056, to cordon off the area in the vicinity of the White House as a protective measure in anticipation of large-scale demonstrations, "the Secret Service may not have unlimited powers in protecting the President but its powers are broader than routine public safety measures. The test to be applied, it seems, is whether, given the overwhelming interest in protecting the President and his performance of his duties, the measures taken are reasonable under the circumstances." Memorandum for Honorable Robert E. Jordan, III, General Counsel, Department of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 11 (Nov. 12, 1969).

Relevant case law confirms this broad view. The Supreme Court has recognized that "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in

[4] S. 2896 was passed by the Senate on Oct. 8, 1970, *see* 116 Cong. Rec. 35,654 (1970), and incorporated into the Omnibus Crime Control Act of 1970, Pub. L. No. 91–644, tit. V, § 18, 84 Stat. 1880, 1891 (1971).

protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Watts v. United States*, 394 U.S. 705, 707 (1969). *See also White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1528 (D.C. Cir. 1984) ("At stake is not merely the safety of one man, but also the ability of the executive branch to function in an orderly fashion and the capacity of the United States to respond to threats and crises affecting the entire free world"). Accordingly, courts have construed the Secretary's authority under § 3056 broadly, even in the face of constitutional challenges. In fact, the only limitation the courts have recognized on the Secretary's authority has been the Constitution. Where, for example, first amendment rights have been implicated, courts have balanced the Secret Service's interest in protecting the President against the first amendment rights of those burdened by such actions.[5]

Even in the first amendment context, however, courts have been careful to allow the Secret Service latitude in acting to protect the President. In a decision concerning the Secret Service's denial of a White House press pass to a journalist, the D.C. Circuit required the Secret Service to publish the standards it uses to determine White House press pass eligibility. In delineating the requirements imposed on the Secret Service, however, it agreed with the Secret Service that the first amendment did not require "detailed articulation of narrow and specific standards or precise identification of all the factors which may be taken into account in applying [the] standard." *Sherrill*, 569 F.2d at 130. The court stated that "[i]t is enough that the Secret Service be guided solely by the principle of whether the applicant presents a potential source of . . . danger to the President and/or his immediate family so serious as to justify his exclusion." *Id.* (citation omitted). Arguing that this more flexible approach was appropriate given the mission of the Secret Service, the court declared that "[t]his standard is sufficiently circumspect so as to allow the Secret Service, exercising expert judgment which frequently must be subjective in nature, considerable leeway in denying press passes for security reasons." *Id.* The court also indicated its belief that courts should be "appropriately deferential to the Secret Service's determination of what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family." *Id.*

Courts have allowed the Secret Service even more latitude outside of the first amendment context. In *Scherer v. Brennan*, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967), the court found within the scope of the Secret Service's duties to protect the President the barring of a federally-licensed firearms dealer

[5] *See A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1117–18 (D.C. Cir. 1969). *See also Sherrill v. Knight*, 569 F.2d 124, 128 n.14 (citing *A Quaker Action Group*, 421 F.2d at 1117 ("[t]he congressional grants of authority to the Secret Service to protect the President . . . and to control access to temporary presidential residences . . . cannot be said to authorize procedures or actions violative of the Constitution . . . . [W]e cannot agree with the Government's argument that mere mention of the President's safety must be allowed to trump any First Amendment issue")).

from his own home and his constant surveillance even though he had voiced no direct threat to the President. The appellant argued that this invasion of privacy was illegal under the Supreme Court's analysis in *Camara v. San Francisco*, 387 U.S. 523 (1967) (holding that the fourth amendment requires a warrant for inspection of private premises by health inspectors unless the occupant consents thereto). In rejecting appellant's argument, the court stated, "Here, the need to protect the President of the United States from possible physical harm would justify measures that might not be considered appropriate in routine health inspections." *Scherer*, 379 F.2d at 612.

2. Section 202

In addition to the broad authority to protect the President granted in § 3056, 3 U.S.C. § 202 grants the "United States Secret Service Uniformed Division" authority to perform duties prescribed by the Secretary to protect the "White House in the District of Columbia" and "any building in which Presidential offices are located." This provision makes clear that the Secretary has authority to direct not only such action as is necessary to protect the person of the President but also the White House itself and the Old Executive Office Building, which is also bounded by the designated streets.

The language and legislative history of §§ 3056 and 1752, the authority granted in § 202, the court decisions, and former opinions of this Office suggest that while the Secretary's authority to protect the President may not be unlimited, the Secretary may take such actions as are consistent with the Constitution, not prohibited by statute, and reasonable under the circumstances for the protection of the President in the performance of his duties. We perceive no constitutional impediment to the closing of the designated streets. Consequently, given the conclusions of the White House Security Review with respect to the vulnerability of the White House, the Secretary would appear to have the authority to expand the security perimeter of the White House by closing the designated streets if the Secretary concludes that such action is reasonably necessary to protect the President. We now turn to consideration of whether any other statutes prohibit or limit such action.

B. *Other Relevant Statutes*

Other congressional grants of authority that could arguably apply to the streets at issue do not diminish the Secretary's authority to close them to vehicular traffic. We will discuss each such congressional grant of authority in turn.

1. District of Columbia Street Closing Authority

The District of Columbia government has exercised the power to close streets and transfer title within the District of Columbia since 1932, when Congress,

pursuant to its plenary powers over the District of Columbia,[6] granted it such authority. *See Techworld Dev. Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 111 (D.D.C. 1986) (citing S. Rep. No. 72–688, at 3 (1932)). When Congress passed the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified at D.C. Code Ann. §§ 1–211 to –299) ("Home Rule Act"), it delegated to the present District of Columbia government all powers that had been granted to the previous government, *see* D.C. Code Ann. § 1–227(a), including the power to close streets.

D.C. Code Ann. §§ 7–421 to –428 authorize the District of Columbia City Council ("D.C. Council") to close streets within the District of Columbia. The street closing process established by the D.C. Council requires referral of street closing applications to the National Capital Planning Commission for review and recommendation, to the Advisory Neighborhood Commissions affected, and to abutting property owners. *See* D.C. Code Ann. at § 7–422.

We do not believe D.C. Code Ann. §§ 7–421 to –428 or the Home Rule Act prevent the Secretary from closing the streets at issue. First, in passing the Home Rule Act, Congress provided that the D.C. Council shall have no authority to "[e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." *Id.* at § 1–233(a)(3). Rejecting the United States' assertion that the D.C. Council's act of closing a government-owned street in Northwest Washington violated this provision, the court in *Techworld* stated:

> [T]he limitation of § 1–233 is included to ensure that the local government does not encroach on matters of national concern. It withholds authority over property used by the United States in connection with federal governmental functions, and over property of national significance. The Council may not concern itself with the Lincoln Memorial, or the White House, or with the United States Courthouse. The closing of a small street in Northwest Washington, however, is precisely the sort of local matter Congress wishes the D.C. Council to manage.

Techworld, 648 F. Supp. at 115. *See also District of Columbia v. Greater Washington Cent. Labor Council, AFL–CIO*, 442 A.2d 110, 116 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983) (quoting legislative history of the Home Rule Act: "The functions reserved to the federal level would be those related to federal operations in the District and to property held and used by the Federal Government for conduct of its administrative, judicial, and legislative operations; and for the monuments pertaining to the nation's past"). *See also id.* at 116 n.1 (quoting

[6] *See* U.S. Const. art. I, § 8, cl. 17.

Hearings on Self-Determination for the District of Columbia, pt. 2, 93d Cong. 52 (1973) (statement of John Nevius, former Chairman of the Council) ("For the purposes of identifying these Federal functions, we are speaking basically of three things: First, the function regarding Federal buildings and properties; second, the conduct of Federal business . . . and third, the function of international relations and matters concerning the diplomatic corps")).

Here, unlike the situation in *Techworld*, Congress has delegated by statute to the Secret Service the indisputably federal function of protecting the President. In this context, we believe that D.C. Code Ann. § 1–233(a)(3) establishes that the D.C. Council may not assert its authority where doing so would interfere with the Secret Service's ability to carry out its congressionally-mandated function of protecting the President.

Second, the streets slated for closing are located within the National Capital Service Area, a geographic area comprising many of our national governmental buildings and monuments, the White House, the National Mall and other areas, over which Congress in the Home Rule Act reserved some federal administrative authority. Section 739 of the Home Rule Act (codified at 40 U.S.C. § 136), established the National Capital Service Area. It also established the position of a presidentially-appointed National Capital Service Director within the Executive Office of the President and charged that office with assuring "that there is provided . . . adequate police protection and maintenance of streets and highways" within the National Capital Service Area. 40 U.S.C. § 136(b).

The National Capital Service Area provision was added to the Home Rule Act as a floor amendment. Suggesting that the National Capital Service Area was an area of heightened federal interest within the District of Columbia, the chief sponsor of the amendment, Representative Green, stated that the National Capital Service Director "would have jurisdiction [within the area] over the police department, fire protection, over sanitation, the streets, the roads and the accesses to them." 119 Cong. Rec. 33,611 (1973) (statement of Representative Green). *See also id.* at 33,645 ("the President would appoint a Director of Federal Area Services who would be responsible for police protection, fire protection, sanitation, the streets, and access roads"). While the language and legislative history of the provision do not suggest that the District of Columbia has no jurisdiction over the National Capital Service Area, they do suggest that Congress considered the federal government's interest in areas within the National Capital Service Area to be greater and more important than its interest in areas outside the National Capital Service Area. We believe this reservation of federal governmental interest further supports the Secret Service's authority to take unilateral action in closing

streets within the National Capital Service Area in an effort to protect the President.[7]

2. Administrative Procedure Act

You have also raised the issue of whether the Secretary's action would constitute a "rule" as defined by the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4), *see generally id.* §§ 551–559, thereby triggering the requirement to provide "interested persons" with notice and opportunity to comment as a part of the rulemaking process. We believe that the Secretary could successfully argue that the notice and comment requirements of the APA do not apply because his action in closing the streets at issue to provide protection for the President is not a "rule" within the meaning of § 551(4). Moreover, if the federal government owns the streets in question, any action to close them would be exempt from the APA pursuant to the "public property" exception in § 553(a)(2).

The APA defines "rulemaking" as "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). In defining a "rule", the APA identifies several components: a rule may be "of general or particular applicability"; it must be of "future effect"; and must be "designed to implement, interpret, or prescribe law or policy" or must "describe[] the organization, procedure, or practice requirements of an agency." *Id.* § 551(4).

We do not believe that closing the affected streets in order to protect the President is the sort of action that Congress intended to be subject to the APA's notice and comment process. A decision to close the streets would not be designed to "implement, interpret, or prescribe law or policy" so as to provide guidelines or procedures for parties to follow in the future. To the contrary, the Secretary's action in closing the streets would be an isolated agency action that does not affect or govern subsequent agency acts or decisions. *Daingerfield Island Protective Soc'y v. Babbitt*, 823 F. Supp. 950, 957 (D.D.C. 1993) (National Park Service approval of design for interchange connecting George Washington Memorial Parkway and island in Potomac River was not a "rule" under 5 U.S.C. § 551(4)). The Secretary would be acting in a particular situation based on a unique set of facts, pursuant to a statute authorizing his agency personnel, the Secret Service, to protect the President. We do not believe that this unilateral action executing such a decision is the sort of government action that Congress contemplated in defining a "rule" for purposes of the APA.[8]

[7] We are aware of only one District of Columbia court decision discussing the National Capital Service Area. The limited analysis presented in that opinion supports our view that the federal government exercises greater administrative authority over areas within the National Capital Service Area than it exercises with respect to other areas within the District of Columbia. In rejecting a claim that Congress had not delegated to the District of Columbia the authority to tax personal property within the National Capital Service Area, the court in *Itel Corp. v. District of Columbia*, 448 A.2d 261, 267 n.10 (D.C.), *cert. denied*, 459 U.S. 1087 (1982), stated, "this part of the Home Rule Act serves to add some federal bureaucracy to the existing D.C. bureaucracy in order to ensure adequate services, not to authorize the provision of services by the District."

[8] Even if a court were to find that the Secretary's action constituted a "rule" under § 551(4), the Secretary could invoke the "good cause" exception provided under 5 U.S.C. § 553(b)(3)(B). Under that section, the requirements

Moreover, even if the Secretary's contemplated action did constitute a "rule" under the APA, the APA provides an exception to its requirements for "[any] matter relating to agency management or personnel or to *public property*, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (emphasis added). The "public property" exception has been interpreted to exempt from APA coverage rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States, including rules relating to the sale or management of such property. *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984); *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1253 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); *City of Santa Clara v. Andrus*, 572 F.2d 660, 673–74 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978). *See also* United States Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 27 (1947). Accordingly, if the streets sought to be closed to vehicular traffic are owned by the federal government, we believe that any action taken to close those streets would be exempt from the APA under § 553(a)(2).

3. National Historic Preservation Act

We do not believe that the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 to 470w–6, and the regulations promulgated pursuant to it, 36 C.F.R. §§ 800.1–.15 (1995), prohibit the Secretary from taking prompt action with respect to closing to vehicular traffic the contemplated streets. Section 106 of the NHPA provides that "prior to the approval of the expenditure of any Federal funds" on an "undertaking," the head of a federal agency must "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. It further provides that the agency head shall afford the Advisory Council on Historic Preservation ("Advisory Council") a "reasonable opportunity" to comment on the effect that such undertaking will have on a historic site. *Id.* Although consultation with the Advisory Council must be had "prior to approval of [the] undertaking," 36 C.F.R. § 800.1(a), the agency head is not bound by the Advisory Council's comments or recommendations. *See id.* 36 C.F.R. § 800.6.

The vast majority of the areas that the Secretary contemplates closing, including Pennsylvania Avenue between 17th Street and Madison Avenue, and State Place, appear to be part of the "Lafayette Square Historic District," which is included in the National Register of Historic Places and is therefore one of the sites covered by section 106. National Register of Historic Places Inventory: Nomination Form for Lafayette Square Historic District.

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of notice and opportunity for comment do not apply when the agency for good cause finds that the procedures are "impracticable, unnecessary, or contrary to the public interest." *Id.* We believe that in the instant case the Secretary's basis for invoking the good cause exception would be upheld, as there is a clear public interest in providing the President thorough and prompt protection when necessary to meet security requirements.

Whether the NHPA's consultation process for certain historic sites (section 106 process), 36 C.F.R. §§800.3–.5, is triggered depends on whether the agency's action is an "undertaking" under the NHPA. By regulation, the Advisory Council has defined the term "undertaking" as "any project, activity, or program that can result in changes in the *character or use* of historic properties, if any such historic properties are located in the area of potential effects." *Id. § 800.2(o) (emphasis added).*[9] *Courts have tended to construe the definition broadly. Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 853 (E.D. Va. 1980); *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 676 (D.N.M. 1980), *aff'd. sub nom. National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981). And we cannot deny that the Secretary's contemplated action appears to fit within the definition in § 800.2(o) in that the street closing would make a direct change in the use of the historic area because it will prohibit a significant use currently allowed, that is, vehicular traffic.

Even if the contemplated street closing were considered an "undertaking" pursuant to 16 U.S.C. §470f, however, it is our conclusion that the consultation requirements of the Advisory Council's regulatory scheme do not prohibit the Secretary from taking the necessary and immediate action to protect the President of closing to vehicular traffic the aforementioned streets. The statutory and regulatory framework of the NHPA cannot reasonably be read to require strict compliance with the consultation requirements in the case of an emergency. For example, if a water main breaks in an urban historic area, maintenance crews must be able to promptly remedy the situation even if that entails physical destruction of roads and sidewalks in the historic area and closure to all traffic for an extended period of time; surely Congress would not expect consultation before the maintenance work commenced. Similarly, if a crime is committed in an historic area or in an historic building, law enforcement officials would be able to secure the area if necessary to apprehend the perpetrators, preserve evidence, and take necessary and reasonable steps to ensure the safety of members of the public, even if such measures change the use of the historic site by re-routing traffic, setting up roadblocks, or denying access to buildings and areas. Again, those law enforcement actions could be handled promptly without compliance with the NHPA consultation requirements.

We do not construe the section 106 process to preclude the Secretary, after having "tak[en] into account the effect of the undertaking," from authorizing the undertaking to go forward initially on a provisional basis, with no irreversible effects, and thereafter giving the Advisory Council a reasonable opportunity to comment on it before deciding to put the undertaking on a final and permanent footing. In other words, as we construe the statute and regulation, the "under-

[9] In addition, "[t]he project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106." 36 C.F.R. § 800.2(o).

taking'' that requires prior consultation with the Advisory Council must be one that would effect a permanent change in the character and use of the site.

Common sense dictates that the NHPA could not require the Secretary to comply with the consultation and review procedures of the section 106 process in a manner which would compromise the Service's ability and mission to ensure the safety of the President and others in the White House complex. A contrary result would render the Service's broad authority under 18 U.S.C. § 3056 ineffective; it cannot be that Congress intended that the NHPA could mandate adherence to its procedural requirements when such adherence would directly interfere with the Secret Service's statutory duty to protect the President of the United States.

We believe that if the Secretary, as the exigencies permit, provides the Advisory Council with notice of the Service's protective actions and requests the Advisory Council's comments on the actions, the Secretary will be deemed to have complied with the NHPA's requirement that the agency head afford the Advisory Council a ''reasonable opportunity'' to comment. Of course, whether any given opportunity is reasonable depends on the particular circumstances at issue.

4. National Environmental Policy Act

You have also expressed concern about the possible impact of the National Environmental Policy Act of 1969, Pub. L. No. 91–190, 83 Stat. 852 (1970), as amended (codified at 42 U.S.C. §§ 4321–4370) (''NEPA''), and its related regulations concerning federal agency action, on the Secretary's ability to immediately close the identified streets. Without expressing a view as to whether or to what extent NEPA might apply to the street closings, we note that NEPA's emergency exception is broad enough to permit the Secretary to proceed after brief consultation with the Council on Environmental Quality. Section 1506.11 of title 40, Code of Federal Regulations, provides:

> Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the [NEPA regulations,] . . . the Federal agency taking the action should consult with the [Council on Environmental Quality] about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

We believe that the necessity revealed by the White House Security Review of enhancing the security perimeter around the White House is an ''emergency'' within the meaning of this regulation. Accordingly, we believe that the Secretary may close the designated streets without running afoul of NEPA. If possible, the Secretary should consult with the Council on Environmental Quality concerning alternative arrangements prior to closing the streets at issue.

III. *Conclusion*

For the foregoing reasons, we conclude that the Secretary has authority under § 3056 to close the streets mentioned above to vehicular traffic. In addition, we conclude that the other congressional grants of authority discussed above do not diminish that authority.

RICHARD SHIFFRIN
TERESA WYNN ROSEBOROUGH
Deputy Assistant Attorneys General
Office of Legal Counsel

Bill to Relocate United States Embassy from Tel Aviv to Jerusalem

The provisions of a bill that render the executive branch's ability to obligate appropriated funds conditional upon the construction and opening in Jerusalem of the United States Embassy to Israel invade exclusive presidential authorities in the field of foreign affairs and are unconstitutional.

May 16, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is to provide you with our views on S. 770, 104th Cong. (1995), a bill introduced by Senator Dole and others, "[t]o provide for the relocation of the United States Embassy in Israel to Jerusalem, and for other purposes." The provisions of this bill that render the executive branch's ability to obligate appropriated funds conditional upon the construction and opening in Jerusalem of the United States Embassy to Israel invade exclusive presidential authorities in the field of foreign affairs and are unconstitutional.

The bill states that

> [i]t is the policy of the United States that—
>
> > (1) Jerusalem should be recognized as the capital of the State of Israel;
> > (2) groundbreaking for construction of the United States Embassy in Jerusalem should begin no later than December 31, 1996; and
> > (3) the United States Embassy should be officially open in Jerusalem no later than May 31, 1999.

S. 770, § 3(a).

The bill requires that not more than fifty percent of the funds appropriated to the State Department for FY 1997 for "Acquisition and Maintenance of Buildings Abroad" may be obligated until the Secretary of State determines and reports to Congress that construction has begun on the site of the United States Embassy in Jerusalem. *Id.* § 3(b). Further, not more than fifty percent of the funds appropriated to the State Department for FY 1999 for "Acquisition and Maintenance of Buildings Abroad" may be obligated until the Secretary determines and reports to Congress that the United States Embassy in Jerusalem has officially opened. *Id.* § 3(c).

Of the funds appropriated for FY 1995 for the State Department and related agencies, not less than $5,000,000 "shall be made available until expended" for costs associated with relocating the United States Embassy in Israel to Jerusalem.

Id. § 4. Of the funds authorized to be appropriated in FY 1996 and FY 1997 for the State Department for "Acquisition and Maintenance of Buildings Abroad," not less than $25,000,000 (in FY 1996) and $75,000,000 (in FY 1997) "shall be made available until expended" for costs associated with, respectively, the relocation of the United States Embassy to Jerusalem, and the construction and relocation of the Embassy. *Id.* § 5(a), (b).

The Secretary is required to report to Congress not later than thirty days after enactment "detailing the Department of State's plan to implement this Act." *Id.* § 6. Beginning on January 1, 1996, and every six months thereafter, the Secretary is to report to Congress "on the progress made toward opening the United States Embassy in Jerusalem." *Id.* § 7.

It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States. This authority flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, *id.* art. II, § 2, cl. 1. It also derives from the President's more specific powers to "make Treaties," *id.* art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," *id.*; and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. The Supreme Court has repeatedly recognized the President's authority with respect to the conduct of diplomatic relations. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the 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) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *see also Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), *cert. denied*, 503 U.S. 959 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."). Accordingly, we have affirmed that the Constitution "authorize[s] the President to determine the form and manner in which the United States will maintain relations with foreign nations." *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992).

Furthermore, the President's recognition power is exclusive. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987) ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign

government."). It is well established, furthermore, that this power is not limited to the bare act of according diplomatic recognition to a particular government, but encompasses as well the authority to take such actions as are necessary to make the power of recognition an effective tool of United States foreign policy. *United States v. Pink*, 315 U.S. 203, 229 (1942) (The authority to recognize governments "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.").

The proposed bill would severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations. The bill seeks to effectuate the policy objectives that "Jerusalem should be recognized as the capital of the State of Israel" and that "the United States Embassy should be officially open in Jerusalem no later than May 31, 1999." To those ends, it would prohibit the executive branch from obligating more than a fixed percentage of the funds appropriated to the State Department for "Acquisition and Maintenance of Buildings Abroad" in FY 1997 until the Secretary determines and reports to Congress that construction has begun on the site of the United States Embassy in Jerusalem. It would also prohibit the executive branch from obligating more than a fixed percentage of the funds appropriated for the same purpose for FY 1999 until the Secretary determines and reports to Congress that the United States Embassy in Jerusalem has "officially opened."

By thus conditioning the executive branch's ability to obligate appropriated funds, the bill seeks to compel the President to build and to open a United States Embassy to Israel at a site of extraordinary international concern and sensitivity. We believe that Congress cannot constitutionally constrain the President in such a manner.

In general, because the venue at which diplomatic relations occur is itself often diplomatically significant, Congress may not impose on the President its own foreign policy judgments as to the particular sites at which the United States' diplomatic relations are to take place. More specifically, Congress cannot trammel the President's constitutional authority to conduct the Nation's foreign affairs and to recognize foreign governments by directing the relocation of an embassy. This is particularly true where, as here, the location of the embassy is not only of great significance in establishing the United States' relationship with a single country, but may well also determine our relations with an entire region of the world. Finally, to the extent that S. 770 is intended to affect recognition policy with respect to Jerusalem, it is inconsistent with the exclusivity of the President's recognition power.

Our conclusions are not novel. With respect to the Foreign Relations Authorization Act, FY 1994 & 1995, Pub. L. No. 103–236, § 221, 108 Stat. 382, 421 (1994), which included provisions purporting to require the establishment of an office in Lhasa, Tibet, the President stated that he would "implement them to the extent

consistent with [his] constitutional responsibilities." 1 *Pub. Papers of William J. Clinton* 807, 808 (1994). The Reagan Administration objected in 1984 to a bill to compel the relocation of the United States Embassy from Tel Aviv to Jerusalem, on the grounds that the decision was "so closely connected with the President's exclusive constitutional power and responsibility to recognize, and to conduct ongoing relations with, foreign governments as to, in our view, be beyond the proper scope of legislative action." Letter for Dante B. Fascell, Chairman, Committee on Foreign Affairs, United States House of Representatives, from George P. Shultz, Secretary of State at 2 (Feb. 13, 1984). Again, in 1987, President Reagan stated that he would construe certain provisions of the Foreign Relations Authorization Act, FY 1988 & 1989, including those that forbade "the closing of any consulates," in a manner that would avoid unconstitutional interference with the President's authority with respect to diplomacy. 2 *Pub. Papers of Ronald Reagan* 1541, 1542 (1987). Indeed, as long ago as 1876, President Grant declared in a signing statement that he would construe legislation in such a way as to avoid "implying a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government," because if Congress sought to do so, it would "invade the constitutional rights of the Executive." 7 *Messages and Papers of the Presidents* 377, 378 (James D. Richardson ed., 1898).

Finally, it does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional. *See United States v. Butler*, 297 U.S. 1, 74 (1936); 16 Op. O.L.C. at 28–29 ("As we have said on several prior occasions, Congress may not use its power over appropriation of public funds 'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.'") (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990)) (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261–62 (1989)).

For the above reasons, we believe that the bill's provisions conditioning appropriated funds on the building and opening of a United States Embassy in Jerusalem are unconstitutional.

WALTER DELLINGER
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Office of Legal Counsel

Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund

31 U.S.C. § 1321 and its accompanying Department of Justice regulations do not impose a fiduciary obligation on the Bureau of Prisons to expend Commissary Fund moneys only in accordance with the terms of the Commissary Fund trust.

May 22, 1995

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

You have asked whether the Office of Legal Counsel continues to adhere to the analysis of the "Commissary fund, Federal prisons" ("Commissary Fund") contained in the Memorandum for Norman Carlson, Director, Bureau of Prisons, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Disposition of Income From Prison Vending Machines Under the Randolph-Sheppard Act* (Mar. 25, 1986) ("Randolph-Sheppard Memorandum"). *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Frank W. Hunger, Assistant Attorney General, Civil Division, *Re: Revision of Previous Request for Informal Legal Opinion Concerning the Limitations on Expenditures from the Bureau of Prisons Commissary Fund* at 2 (Apr. 13, 1995).

The Randolph-Sheppard Memorandum states that because the Commissary Fund is classified as a "trust" account under 31 U.S.C. § 1321(a)(22), the Bureau of Prisons ("BOP") has the power to expend funds in the account only in a fiduciary capacity. Randolph-Sheppard Memorandum at 4. Applying general principles of trust law, it concludes that income from prison vending machines which would otherwise accrue to the Commissary Fund is not subject to the income-sharing provisions of section 7 of the Randolph-Sheppard Act. *See* Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93–516, sec. 206, § 7, 88 Stat. 1622, 1627 (codified as amended at 20 U.S.C. § 107d–3).

Because the Randolph-Sheppard Memorandum mischaracterizes the Commissary Fund as a common law trust and suggests that, as trustee, the BOP has a fiduciary obligation to federal prison inmates to expend Commissary Fund income in accordance with the terms of the trust, *see* Randolph-Sheppard Memorandum at 4, 10, we disavow those aspects of the opinion which analyze the Commissary Fund under general trust law principles. Instead, for the reasons stated below, we conclude that 31 U.S.C. § 1321 and its accompanying Department of Justice ("DOJ") regulations do not impose a fiduciary obligation on the BOP to expend Commissary Fund moneys only in accordance with the terms of the Commissary Fund.

Although we recognize that the trust fund analysis contained in our Randolph-Sheppard Memorandum was based to some degree on our interpretation of a memorandum attachment to a Letter for Honorable Elmer B. Staats, Comptroller General of the United States, General Accounting Office, From Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Set-Offs Against Prisoners' Trust Funds* (Aug. 23, 1968) ("Prisoners' Trust Fund Memorandum"), we nonetheless reaffirm the analysis presented in the Prisoners' Trust Fund Memorandum. However, we limit the memorandum's applicability solely to those "trust funds" established under 31 U.S.C. § 1321 that *do* impose fiduciary obligations on the United States.

This memorandum does not question the Randolph-Sheppard Memorandum's conclusion that the income-sharing provisions of section 7 of the Randolph-Sheppard Act do not apply to income from prison vending machines which would otherwise accrue to the Commissary Fund, only the reasoning by which the conclusion was reached.

I. BACKGROUND

DOJ established the prison commissary system in 1930 to sell to prison inmates articles not regularly provided by federal prisons, such as toothpaste, soap, stamps, arts and crafts, newspapers and magazines. Department of Justice Circular No. 2126, ¶¶9–11 (Aug. 1, 1930). At the same time, it established the Commissary Fund in order to finance the purchase of the articles to be sold in the commissaries, pay the salaries of commissary employees, and retain certain commissary system profits in a capital fund for the future operation of the commissaries. *Id.* ¶¶9, 14, 15, 18.

In 1930, DOJ also established an Inmate Trust Fund at each federal prison, wherein inmates were permitted to deposit money brought into the prison upon arrival, money sent to them while in prison and money earned while incarcerated. *Id.* ¶¶2–4. The Inmate Trust Fund was intended to operate in conjunction with the commissary. When purchasing articles from the commissaries, inmates were required to have their Inmate Trust Fund accounts debited in the amount of such articles.

In addition, DOJ created a "Welfare Fund" in 1930, wherein "a portion of the [commissary] profits" could, upon "written order of the Warden" and with the "approval of the Director, Bureau of Prisons," be credited and disbursed "for any purpose accruing to the benefit of the inmate body, as a whole, such as amusements, education, library, or general welfare work." *Id.* ¶¶17–19.

DOJ adopted rules pertaining to the management, use and operation of these activities and functions in the Circular establishing them. These rules afforded the BOP wide-ranging authority to promote its peneological and administrative interests. *See, e.g., id.* ¶23 ("The Warden or Superintendent of an institution may

deny or limit any inmate as to the privilege of purchasing from the 'Institutional Commissary.' ''); *id.* ¶10 (''Only those articles which from time to time shall be authorized by the Director, Bureau of Prisons, may be procured through the 'Institutional Commissary' for the use of inmates.''); *id.* ¶11 (''An approved list of newspapers, books and magazines, for distribution through the 'Institutional Commissary,' shall be issued from time to time by the Warden or Superintendent of the institution.''). The rules also stressed that ''[n]o inmate shall be entitled to . . . earnings derived through operation of the 'Institutional Commissary.' '' *Id.* ¶21.

New rules, promulgated in 1932, regarding the Commissary Fund and related accounts and functions, *see* Department of Justice Circular No. 2244 (Jan. 1, 1932) (''Circular No. 2244''), continued to vest the BOP with wide-ranging authority. The operating expenses and employee salaries associated with the commissaries continued to be financed through the Commissary Fund. *Id.* ¶¶19, 34. The BOP retained authority to determine the articles sold in the commissaries, *id.* ¶23, the reading materials available for distribution through the commissaries, *id.* ¶25, and the inmates permitted to exercise commissary privileges. *Id.* ¶21. Moreover, the BOP retained the authority to determine whether and how much of the profits from commissary operations would be distributed to the Welfare Fund to be disbursed for the benefit of the inmate population as a whole. *Id.* ¶¶16, 41.

The amended rules continued to deny inmates any entitlement to commissary earnings. *Id.* ¶22. In addition, the separate account for inmates' personal funds was also retained, although it was renamed the ''Prisoners' Trust Fund.'' *Id.* ¶¶1, 2, 5. Further, the amended rules provided for the deposit of the Commissary Fund and Prisoners' Trust Fund in the United States Treasury. *Id.* ¶12.[1]

Congress first recognized the existence of the Commissary Fund in its fiscal year 1933 Department of Justice appropriation. In response to a request from Attorney General William D. Mitchell, Congress authorized DOJ to retain and use proceeds from the operation of the commissaries to pay commissary employees' salaries. *See* Act of July 1, 1932, ch. 361, 47 Stat. 475, 493.[2]

[1] Although the BOP occasionally updates its interpretation of Circular No. 2244, the purpose of the Prisoners' Trust Fund and Commissary Fund ''remains essentially the same as when created: . . . To maintain inmates' monies . . . while they are incarcerated'' and ''[t]o provide inmates the privilege of obtaining merchandise not provided by the [BOP] or of a different quality.'' Federal Bureau of Prisons, U.S. Department of Justice, Trust Fund Management Manual, Program Statement 4500.3, ch. 4501 (1989).

[2] In requesting such authority, Attorney General Mitchell explained that the new commissary system, and the authority to pay the salaries of commissary employees through it, ''reduces the possibilities for contraband, assists in the control of the purchase of extra articles by prisoners, and . . . will save the Government a substantial sum of money.'' Letter for Hon. William B. Oliver, Chairman, Subcommittee on Appropriations, from William D. Mitchell, Attorney General at 1 (Jan. 27, 1932), *reprinted in Department of Justice Appropriation Bill for 1933: Hearing before the Subcomm. on the Departments of State, Justice, Commerce, and Labor Appropriation of the House Comm. on Appropriations*, 72d Cong. 484 (1932) (''1932 Hearings''). Similarly, referring to the personal funds of inmates located in their individual trust accounts, a BOP statement accompanying the Attorney General's statement declared that ''[t]he establishment of so-called commissaries is not solely for the purpose of supplying prisoners with special articles not furnished by the Government. It is rather an incident to the adoption of measures for perfecting the control and management of money owned by prisoners but in the custody of prison officials.''

Continued

In 1934, as part of the Permanent Appropriation Repeal Act, Congress classified the Commissary Fund and the Prisoners' Trust Fund as "trust funds" and provided that "[a]ll moneys accruing to these funds are hereby appropriated, and shall be disbursed in compliance with the terms of the trust." *See* Permanent Appropriation Repeal Act, ch. 756, § 20(a), 48 Stat. 1224, 1233 (1934) (originally codified at 31 U.S.C. § 725s(a) (1934)). The statutory language pertaining to the Commissary Fund and Prisoners' Trust Fund has remained essentially unchanged since 1934. Today the funds are listed as "trust funds" at 31 U.S.C. § 1321(a)(22) and (a)(21).[3] Pursuant to 31 U.S.C. § 1321(b)(1), moneys "received by the United States Government as trustee shall be deposited in an appropriate trust fund account in the Treasury. . . . [A]mounts accruing to these funds. . . are appropriated to be disbursed in compliance with the terms of the trust."[4]

II. LEGAL ANALYSIS

At common law, "[a] trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property *for the benefit of another person, which arises as a result of a manifestation of an intention to create it.*" Restatement (Second) of Trusts § 2 (1959) (emphasis added).[5] "No trust is created unless the settlor manifests an intention to impose enforceable duties." *Id.* § 25. Moreover, as sovereign, the United States has the capacity to act as a common law trustee. *See* 2 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 95 (4th ed. 1987).

Supreme Court precedent informs our decision to recede from our previous observation that 31 U.S.C. § 1321 creates a fiduciary relationship between the United States, as trustee, and inmates with respect to the management and operation of the Commissary Fund. While we are not aware of any court decisions discussing whether 31 U.S.C. § 1321, or a predecessor provision in the United

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1932 Hearings at 484–85. The statement provided further that "[c]ommissaries were . . . established as a means to insure the safe and economical procurement and distribution of special articles which by custom prisoners have always been permitted to procure through payment from their personal funds." *Id.* at 485. In addition, the statement argued that the commissary system "[m]inimizes [the] possibility of introduction of contrabands such as dope, liquor, weapons, etc." *Id.*

[3] The Commissary Fund is listed as "Commissary funds, Federal prisons." The Prisoners' Trust Fund is listed as "Funds of Federal Prisoners."

[4] In 1952, Congress authorized the Attorney General to make small loans from the Commissary Fund to deserving inmates upon their release from prison and accept gifts or bequests of money for credit to the Commissary Fund. *See* Act of May 15, 1952, ch. 289, 66 Stat. 72 (originally codified at 18 U.S.C. § 4284 (1956)). However, the provision giving the Attorney General the authority to make small loans to released inmates was repealed prospectively in 1984. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, § 218(a)(3), 98 Stat. 1976, 2027 (1984). The repeal was effective November 1, 1986.

[5] "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. . . . Fiduciary relations include not only the relation of trustee and beneficiary, but also, among others, those of guardian and ward, agent and principal, attorney and client. . . . The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. The duties of a trustee are more intensive than the duties of some other fiduciaries." *Id.* § 2 cmt. b.

States Code, imposes fiduciary obligations on the United States with respect to "trust funds," it must be noted that 31 U.S.C. § 1321 currently classifies as "trust funds" ninety-one different funds located in the United States Treasury. These funds range from moneys that are identifiable to particular persons (e.g., "Money and effects of deceased patients," Public Health Service, 31 U.S.C. § 1321(a)(30)) to moneys simply dedicated to a particular public purpose (e.g., "Library of Congress trust fund, investment account," 31 U.S.C. § 1321(a)(9); "Violent Crime Reduction Trust Fund," 31 U.S.C. § 1321(a)(91)). The wide-ranging diversity of the Treasury "trust funds" and the lack of identifiable beneficiaries of a number of them suggests that, in enacting the statute, Congress did not intend for the United States to be held to the same duties and obligations as a private, common law trustee with respect to all such Treasury accounts.

In the absence of federal court decisions interpreting 31 U.S.C. § 1321, we must look to interpretations of other statutes to glean the factors which distinguish statutory trusts that impose fiduciary obligations on the United States from those that do not. Several sovereign immunity decisions provide guidance. In *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), Quinault Indian allottees of land held "in trust" by the United States sought damages against the United States under the Tucker Act, 28 U.S.C. § 1491, and the Indian Claims Compensation Act, 28 U.S.C. § 1505, for breach of trust and mismanagement of timber resources found on the land. The threshold question resolved by the Supreme Court in *Mitchell I* was whether the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–358), creates a fiduciary obligation on the part of the United States to manage the timber resources properly, the violation of which could subject the United States to suit.[6] After noting that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" *Mitchell I*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)), the Supreme Court concluded that the trust language of the General Allotment Act does not impose any fiduciary management duties on the United States or render it answerable for breach thereof, but merely prevents alienation of the allotted lands and immunizes them from taxation. *Id.* at 544.

Although the General Allotment Act expressly required the United States to "hold the land . . . in trust for the sole use and benefit" of the allottee, *Mitchell I*, 445 U.S. at 541 (quoting the General Allotment Act § 5, 24 Stat. at 389 (codified

[6] Section 5 of the General Allotment Act stated:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

Mitchell I, 445 U S at 541 (quoting the General Allotment Act § 5, 24 Stat. at 389 (codified as amended at 25 U.S.C. § 348)). Congress extended the period during which the United States was to hold the allotted land indefinitely in the Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 984 (codified as amended at 25 U.S.C. § 462).

as amended at 25 U.S.C. §348)), the Supreme Court, referring to the language and legislative history of the statute as a whole, concluded that "the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* at 542. As the basis for its conclusion, the Supreme Court noted that the General Allotment Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* The Supreme Court also opined that Congress included the "in trust" language in the statute "not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *Id.* at 544. Finally, the Supreme Court declared that "events surrounding and following the passage of the General Allotment Act indicate that the Act should not be read as authorizing, much less requiring, the Government to manage timber resources *for the benefit of Indian allottees.*" *Id.* at 545 (emphasis added).

In *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"), the Supreme Court once again considered whether the United States had assumed fiduciary obligations, as trustee, to Quinault Indians as to the management of timber on their allotted lands. In *Mitchell II*, it held that the Tucker Act waives sovereign immunity for claims of breach of fiduciary duty where specific statutes or regulations give rise to the fiduciary duty in question. *Id.* at 218. The Supreme Court reviewed several congressional statutes and government regulations affecting the management of Indian lands. "In contrast to the bare trust created by the General Allotment Act," which was found in Mitchell I not to have imposed fiduciary obligations upon the United States, it held that the statutes and regulations before it "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. Accordingly, the Supreme Court concluded that the statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.*

In support of its holding, the Supreme Court stressed Congress's and the Department of Interior's long-standing involvement in the management of Indian timber lands. It declared that Congress, as demonstrated by its successive legislative efforts to improve the management of Indian timber lands, desired to ensure that such lands were as productive as possible for Indians. *See id.* at 219–223. The Supreme Court also stated that "[t]he language of [the] statutory and regulatory provisions directly supports the existence of a fiduciary relationship," noting that one of the examined acts "expressly mandates that sales of timber from Indian trust lands be based upon the [Interior] Secretary's consideration of the 'needs and best interests of the Indian owner and his heirs' and that proceeds from such sales be paid to owners 'or disposed of for their benefit.'" *Id.* at 224 (quoting

25 U.S.C. § 406(a)). The Supreme Court provided further that "even in its earliest regulations, the Government recognized its duties in 'managing the Indian forests so as *to obtain the greatest revenue for the Indians* consistent with a proper protection and improvement of the forests.' " *Id.* (emphasis added) (quoting U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)).[7]

Lower courts applying *Mitchell I* and *Mitchell II* have refrained from recognizing the existence of fiduciary obligations on the part of the United States where congressional statutes and governmental regulations, by their own terms, do not expressly subject the United States to suit for breach of fiduciary duties, unambiguously provide that the United States has assumed fiduciary duties, or commit the United States to acting in a comprehensive fashion in the best interest or on behalf of trust beneficiaries. *See, e.g., Han v. United States Dep't of Justice*, 45 F.3d 333, 337 (9th Cir. 1995) (refusing to require the United States to file a breach of trust action against the state of Hawaii under section 5(f) of the Hawaii Admission Act, Pub. L. No. 86–3, 73 Stat. 4, 6 (1959), on account of the fact that the Hawaii Admission Act " 'does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of' " lands that had been allotted by the United States for agricultural and homestead use) (quoting *Mitchell I*, 445 U.S. at 542); *National Ass'n of Counties v. Baker*, 842 F.2d 369, 375–76 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (citation omitted) (concluding that the Revenue Sharing Act, Pub. L. No. 97–258, 96 Stat. 877, 1010 (1982), though establishing a trust fund and naming the Treasury Secretary as trustee of the trust fund, created only a limited trust relationship similar to the relationship found in *Mitchell I*: "*In Mitchell I*[,] the Supreme Court concluded that the General Allotment Act does not confer a right to recover damages against the United States. In *Mitchell II*, the Supreme Court discussed Mitchell I and placed great significance on the fact that the 'trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof'. . . . We do not think that when Congress created [the State and Local Government Fiscal Assistance] Trust Fund and made the Secretary trustee, Congress did so with the intent that the trustee would be subject to money damages for breach of fiduciary duties. Rather, Congress created the Trust Fund in order to ensure constant funding for the Revenue Sharing Programs. Indeed, there is no indication in the Revenue Sharing Act or its legislative history that the Secretary owes any common law fiduciary obligations to Trust Fund recipients."); *Hohri*, 782 F.2d at 244 (distinguishing non-statutory commit-

[7] The Supreme Court also stated that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." *Id.* at 225. However, like the District of Columbia Circuit, "[w]e do not read this alternative holding . . . as articulating a broad rule in favor of finding fiduciary relationships by implication whenever the government assumes pervasive control over a group's property. Read in context, the Court created only a narrow exception — for Indian tribes — to the requirement that the government must expressly state its intent to manage the would-be beneficiaries' property as a trustee." *Hohri v. United States*, 782 F.2d 227, 244 n.39 (D.C. Cir.), *vacated and remanded on other grounds*, 482 U.S. 64 (1987).

ments by the United States to act for the benefit of Japanese-American evacuees during World War II from a "comprehensive obligation to provide for the 'best interests' of the evacuees"); *see also Short v. United States*, 719 F.2d 1133, 1134–36 (Fed. Cir. 1983) (affirming the jurisdiction of the Court of Claims and the Claims Court over an action for breach of fiduciary duties against the United States by Indians where the Indian lands at issue were, like the lands in *Mitchell II*, subject to the comprehensive control of the Government for the benefit of Indians), *cert. denied*, 467 U.S. 1256 (1984).

Applying the standards forged in *Mitchell I*, *Mitchell II* and their progeny, we conclude that 31 U.S.C. § 1321 does not impose fiduciary obligations on the BOP to expend Commissary Fund moneys only in accordance with the terms of the trust. As stated above, 31 U.S.C. § 1321 and its predecessor statutes provide that the Commissary Fund is a "trust fund." However, under the cases discussed above, the mere inclusion of the term "trust" in a federal statute is insufficient to impose fiduciary obligations on the United States as trustee. *See Mitchell I*, 445 U.S. at 540–46. The statute also refers to the United States as "trustee" of the "trust funds." Similarly, under the cited precedent, identification of the United States as trustee in a statute, without more, is insufficient to impose common law fiduciary duties. *See* National Ass'n of Counties, 842 F.2d at 375–76.

The legislative history of 31 U.S.C. § 1321 does not support a conclusion that Congress intended to impose fiduciary obligations on the United States with respect to the Commissary Fund. As noted above, the language of 31 U.S.C. § 1321 originated in section 20(a) of the Permanent Appropriation Repeal Act. The general purpose of that act was to give Congress greater control over the appropriations process by abolishing many permanent appropriations.[8] However, section 20(a) carved out an exception from the general purpose of the act for certain funds located in the Treasury (i.e., "trust funds") that, in Congress's view, did not belong to the United States.

Congress enacted section 20(a) to prevent the Comptroller General from exercising unfettered control over the withdrawal of "trust fund" moneys from the Treasury. By permanently appropriating moneys accruing to Treasury "trust funds," Congress ensured that the Comptroller General would no longer be able to exercise such control. According to the House of Representatives committee report accompanying the act:

[8] According to the House of Representatives committee report accompanying the act:

> [P]ermanent appropriations are a vicious usurpation and invasion of the rights of sitting Congresses . . . . [T]hey complicate bookkeeping in the Office of the Treasurer . . . make auditing in the Comptroller General's Office difficult; conceal from Congress many avenues of receipts and expenditures (which in itself is an invitation to extravagance) and, for lack of proper annual disclosure, make the work of the appropriations subcommittees conjectural and uncertain.

H.R. Rep. No. 73-1414, at 2 (1934).

> The committee is unanimous in its approbation of the course being followed by the Comptroller General in requiring that moneys, held and administered by Government officers, be deposited into the Treasury, where proper account and audit may be made of all disbursements, but it cannot follow any line of reasoning that will allow the Comptroller General, without specific authority, to permit the withdrawal of moneys so deposited in the Treasury without the express appropriation thereof by Congress. The constitutional provision touching on this matter is unambiguous and direct. Once moneys are covered into the Treasury, regardless of the nomenclature that may be applied to the account in which they are deposited, they are bound by the constitutional inhibition that "No money shall be drawn from the Treasury but in consequence of appropriations made by law."

H.R. Rep. No. 73–1414, at 12.

Congress understood that retaining some permanent appropriations was inconsistent with the overriding purpose of the Permanent Appropriation Repeal Act. It justified this deviation, however, by distinguishing "trust funds" from funds that belong to the United States:

> In order to close the question as to the right of the Comptroller General to approve withdrawals of trust-fund moneys without actual appropriation thereof by Congress, language has been inserted in this section appropriating the moneys in the trust funds listed in this section as well as in trust funds of similar character established in the future. While this is in fact a permanent appropriation in itself, it appears to be the most effective way of meeting the problem, and is entirely justifiable on the ground that the moneys are not *Government* moneys, and in no way enter into the fiscal program of the Government, and follows the policy heretofore employed as to all trust funds.

Id. [9]

Like the legislative history of the General Allotment Act discussed in *Mitchell I* and the legislative history of the Revenue Sharing Act discussed in *National*

[9] That Congress considered "trust fund" moneys different from moneys accruing to the United States in its capacity as sovereign is borne out by a discussion of receipt classification in the same committee report.

> As a primary thesis, there are, essentially, but two forms of government receipts, (1) those accruing to the Government, in its sovereign capacity, as a result of [the] law, and (2) those accruing to the Government as a trustee of moneys belonging to individuals, either in consequence of law or as a result of the factual relationship existing between the Government and such individuals. Thus, in the instance of the former, the moneys belong to the Government; in the case of the latter, they belong to the individual.

Id. at 3.

Ass'n of Counties, section 20(a)'s legislative history reveals that it was enacted for a purpose other than imposing fiduciary obligations on the United States. The fact that Congress distinguished between Treasury "trust funds" and funds truly belonging to the United States in the section's legislative history does not demonstrate Congress's unambiguous desire to subject the United States to suit for breach of fiduciary obligations.[10] Accordingly, the legislative history of 31 U.S.C. § 1321 does not support the position that the statute imposes fiduciary obligations on the BOP with respect to the funds it classifies as "trust funds."[11]

Finally, the terms of the Commissary Fund, as set forth by DOJ in Circular No. 2244, also do not support the imposition of fiduciary obligations. Far from imposing fiduciary duties on the BOP, the provisions of Circular No. 2244 which establish and set forth the operating rules pertaining to the Commissary Fund merely create a mechanism through which inmates may secure items not generally available through the prisons. *See, e.g.*, Circular No. 2244, ¶19 ("For the procurement of articles not regularly issued as a part of the institutional administration there is hereby authorized the establishment of an 'Institutional Commissary' through which all articles shall be procured and charged to the fund entitled 'Commissary Fund, Federal Prisons, Trust Fund.'"). Nowhere in Circular No. 2244 is it suggested that the BOP is subject to suit for breach of fiduciary duties. Like-

[10] Congress has enacted laws pertaining to the Commissary Fund twice since enactment of the Permanent Appropriation Repeal Act. As stated in note 4, *supra*, in 1952 it authorized the Attorney General to make small loans to released inmates from the Commissary Fund and accept gifts or bequests of money on behalf of the Commissary Fund. In 1984, it repealed the Attorney General's authority to make small loans from the Commissary Fund. When Congress enacted legislation relating to the Commissary Fund in 1952, the committee report accompanying the legislation in the House of Representatives stated:

> [The Commissary Fund] obtains its revenue through the sale of tobacco, candy, handkerchiefs, inexpensive watches, and other small items, at a small margin of profit, from the inmates of the various Federal institutions. Ordinarily these profits are used for purposes which benefit the inmate body as a whole, such as amusements, libraries, and general welfare.

H.R. Rep. No. 82-1662, at 2 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1424, 1424-25. The report's description of the Commissary Fund is consistent with the language of Circular No. 2244, and demonstrates that Congress has never altered the original relationship established between the BOP and inmates with respect to the Commissary Fund.

[11] While the statutory language and legislative history of 31 U.S.C. § 1321 do not unambiguously demonstrate that Congress intended the United States to assume fiduciary obligations as to the management and operation of the "trust funds," they do suggest that Congress intended that moneys accruing to these "trust funds" be permanently appropriated, and therefore, generally subject to laws pertaining to congressional appropriations. *See Soboleski v. Commissioner*, 88 T.C. 1024, 1034 (1987) ("With limited exceptions not here applicable, all amounts credited to all of the U.S. Treasury trust funds . . . are appropriated funds."), *aff'd*, 842 F.2d 1292 (4th Cir. 1988). In fact, the Comptroller General has reasoned that amounts located within Treasury "trust funds" are appropriated funds and, therefore, subject to its jurisdiction. *See* 58 Comp. Gen. 81, 86-87 (1978) (concluding that the General Accounting Office has the authority to review the propriety of contract awards made under the Department of Defense's Foreign Military Sales Program, in part, because funds in the Foreign Military Sales Trust Fund, a "trust fund" established under a predecessor provision to 31 U.S.C. § 1321, were appropriated funds); *see also* Letter for Sidney R. Yates, Chairman, Subcommittee on the Department of the Interior and Related Agencies, House Committee on Appropriations, from Milton J. Socolar, Comptroller General of the United States, General Accounting Office, 1985 WL 53671, at 2 (Dec. 12, 1985) ("Like a number of other Federal entities, the [United States Holocaust Memorial] Council expends both appropriated funds and donated funds to accomplish its purposes. As a general rule, expenditures from both sources would be regarded as appropriated fund expenditures and would be subject to all statutes governing such expenditures. *See, e.g.*, . . . 31 U.S.C. § 1321(a)."). Accordingly, as with any federal agency expending appropriated funds, the BOP may apply Commissary Fund moneys "only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); *see also* 1 United States General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law 4-2 (2d ed. 1991)

wise, nowhere in Circular No. 2244 is it unambiguously provided that the BOP has assumed fiduciary duties.

As discussed above, Circular No. 2244 makes clear that the BOP wields comprehensive authority over the management and operation of the commissaries and Commissary Fund. However, unlike the statutes and executive department regulations which were found to impose fiduciary obligations on the United States and define the contours of the United States' fiduciary responsibilities in *Mitchell II*, Circular No. 2244 does not mandate that the BOP act in the best interest of or for the benefit of inmates when operating the commissaries or administering the Commissary Fund.[12] As stated above, Circular No. 2244 also provides that "[n]o inmate shall be entitled to any portion of the earnings derived through operation of the 'Institutional Commissary'." *Id.* ¶22. Further, unlike the relationship held to be suggestive of a fiduciary relationship between the United States and Quinault Indians in *Mitchell II*, nothing in the history of the BOP's relationship with inmates concerning the Commissary Fund suggests the creation of a fiduciary relationship.

Based on our examination of 31 U.S.C. §1321, its legislative history and Circular No. 2244, we conclude that the arrangement between the United States, inmates, and the Commissary Fund which we analyzed in the Randolph-Sheppard Memorandum as a common law trust does not, in fact, satisfy the requirements for a common law trust involving the United States as trustee set forth in *Mitchell I*, *Mitchell II*, and their progeny. Although the Commissary Fund was established to allow inmates the opportunity to purchase goods not ordinarily provided by federal prisons and moneys accruing to the Commissary Fund Treasury account do not belong to the United States in the same manner as miscellaneous receipts, nothing in Circular No. 2244 suggests that inmates have a property right in moneys accruing to the Commissary Fund or that the BOP is under a fiduciary obligation to the inmates as to the management and operation of the Commissary Fund.

Although we have established that 31 U.S.C. §1321 and the rules set forth in Circular No. 2244 pertaining to the Commissary Fund do not impose fiduciary obligations on the BOP with respect to the Commissary Fund, we believe that 31 U.S.C. §1321 and the rules set forth in Circular No. 2244 pertaining to the

[12] Instead of requiring the BOP to channel all or a portion of the profits from commissary operations into the Welfare Fund to be disbursed for the benefit of the inmate body as a whole, Circular No. 2244 merely affords the BOP the discretion to do so. *See* Circular No. 2244, §41. It would be permissible under the rules for the BOP to channel all the profits from the operation of the commissaries back into the Commissary Fund for the future operation of the commissaries, and disburse no funds for the benefit of the inmate population as a whole. *See id.* §16. Similarly, Circular No. 2244 provides:

> The Warden or Superintendent at each institution may in his discretion authorize the selection by the inmates of a representative committee of . . . inmates who shall together with the Warden and the commissary clerk constitute an advisory committee who may make suggestions and recommendations to the end that the scheme herein outlined shall be conducted in the best interests of the institution and its inmates.

Id. §20. Like the provision governing distribution of commissary profits for the welfare of the inmates, this provision is styled not as a mandate or an obligation, but merely as an option to the supervisor of each prison for seeking advice from the inmates on ways to improve the operation of the commissaries and Commissary Fund.

Prisoners' Trust Fund do impose fiduciary obligations on the BOP with respect to moneys contained in inmates' Prisoners' Trust Fund accounts. We base our conclusions on distinctions between the two "trust funds."

First, the moneys in inmates' Prisoners' Trust Fund accounts are truly personal funds. As stated above, each inmate's Prisoners' Trust Fund account contains money he or she brought into prison, received from a person outside the prison, or earned while in prison.[13] Accordingly, Circular No. 2244 establishes an elaborate accounting scheme to ensure that funds in inmates' Prisoners' Trust Fund accounts are properly credited, *see id.* ¶¶4–7,[14] and debited, *see id.* ¶¶8–10.

Second, unlike provisions of Circular No. 2244 pertaining to the commissaries and Commissary Fund, provisions pertaining to the Prisoners' Trust Fund require the BOP to act in the best interest of individual inmates in managing their Prisoners' Trust Fund accounts. Circular No. 2244 limits the amount of money that can be withdrawn monthly from inmates' Prisoners' Trust Fund accounts. However, it also provides that a prison warden may authorize larger monthly withdrawals for restitution or reparation of damages, payment of fines, remittance to a dependent in dire circumstances, books, tools or materials used for educational or vocational purposes, and payments to lawyers if the Warden deems it "necessary or for the best interest of an inmate and is satisfied that no abuse would result therefrom." *Id.* ¶8. Circular No. 2244 also provides that "[i]n no event shall any transfer from one inmate's account to that of another be permitted." *Id.* ¶9. Moreover, the Circular states that while food and clothing will no longer be accepted at federal prisons for use of inmates, "money may be received and placed to the credit of the individual inmates in the 'Prisoners' Trust Fund,' *to be used for their benefit* in accordance with rules and regulations herein provided." *Id.* ¶18 (emphasis added).

Third, the BOP has historically recognized fiduciary obligations with respect to inmates' Prisoners' Trust Fund accounts, generally refusing "to allow attachment or levy on the prisoners' trust funds as inconsistent with the provisions of the trust." Prisoners' Trust Fund Memorandum at 5. In affirming the BOP's understanding that it may not attach inmates' Prisoners' Trust Fund moneys to satisfy claims by the United States, this Office has stated that "[a] withdrawal

[13] Circular No. 2244 provides that "[a]ny inmate . . . may place a reasonable sum of money in the hands of the Warden or Superintendent of the institution, for credit to the inmate's personal account." *Id.* §2. Circular No. 2244 provides further that "[a]ny person may send a reasonable amount by check, money order, or cash, to be placed to the credit of an inmate." *Id.* §3. Moreover, Circular No. 2244 requires that an inmate's Prisoners' Trust Fund account be credited with any moneys earned by the inmate while employed in the prison. *Id.* §6.

[14] For example, paragraph 7 of Circular No. 2244 provides:

> A receipt shall be furnished for all funds received for deposit in the "Prisoners, (sic) Trust Fund" from whatever source derived. Such receipts shall be prepared by the Accounting Section upon forms furnished for such purpose. The receipts shall go to the prisoners' fund accounting section for posting to the prisoners' personal accounts after which they will be sent to the inmates.

Similarly, paragraph 37 of Circular No. 2244 provides that "[e]ach month the Accounting Section shall prepare statements for the Director, Bureau of Prisons, Warden or Superintendent of the Institution and for the inmates who have been credited with money in the Prisoners' Trust Fund, in such manner and form as prescribed."

of [Prisoners' Trust Fund moneys] without the inmate's consent . . . would seem to constitute a breach of the terms of the trust." *Id.* at 11.

III. CONCLUSION

For the foregoing reasons, we disavow that portion of our Randolph-Sheppard Memorandum which concludes that the BOP has a fiduciary obligation to inmates to expend Commissary Fund moneys only in a manner consistent with the terms of the Commissary Fund trust. In contrast, we conclude that the BOP is not under a fiduciary obligation to inmates concerning the management and operation of the Commissary Fund. In addition, we reaffirm the analysis contained in our Prisoners' Trust Fund Memorandum, but restrict the memorandum's application to statutory trusts, like the Prisoners' Trust Fund, which impose fiduciary obligations on the United States.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Waiver of Claims for Damages Arising Out of Cooperative Space Activity

Congress has not authorized the National Aeronautics and Space Administration to waive subrogated claims on behalf of federal agencies against foreign States for damages arising out of cooperative space activity. An amendment to the Space Act would be necessary to grant NASA such authority.

The President may waive claims, including subrogated claims, against foreign governments, in exchange for a reciprocal waiver from the foreign government. The President may delegate this authority to an agency head.

The weight of authority supports the President's power to waive state claims against a foreign government.

June 7, 1995

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

This memorandum responds to your request for our opinion concerning a legal matter under discussion between the Department of State and the National Aeronautics and Space Administration ("NASA"). NASA has been negotiating executive agreements with Japan and certain other foreign States under which the United States and those States would agree to waive all claims, including subrogated claims, against the other for damages arising out of cooperative space activity. You have asked whether NASA is authorized to waive subrogated claims on behalf of other federal agencies, and if not, how a government-wide waiver could be implemented. In addition, you have asked whether the federal government may waive claims for damages to which state governments may be subrogated.

We have concluded that Congress has not authorized NASA to waive such claims on behalf of other federal agencies. An amendment to the Space Act would be necessary to grant NASA this authority. At your request, we have considered a number of alternative sources of authorization for waiver of subrogated claims. While the full scope of the President's authority in this regard is unclear, we have concluded that the President may waive claims, including subrogated claims, against foreign governments, in exchange for a reciprocal waiver from the foreign government, and he may delegate that authority to an agency head.

I. *Background*

According to your submission, in mid-November 1994, NASA requested authority from the Department of State to negotiate an executive agreement with Japan establishing a mutual waiver of liability, including a waiver of subrogated claims, in connection with joint activities for the exploration of space. Article 3(2)(a) of the draft agreement provides that "[e]ach Party agrees to a cross-waiver

of liability pursuant to which each Party waives all claims" against the other Party and its employees as well as "related entities" and their employees for damage to property or persons. A "party" is defined in relevant part as the governments of Japan and the United States, their agencies, and institutions established by law for space development. "Related entities" are defined so as to extend the waiver to contractors and subcontractors (including suppliers), users and customers, and their contractors and subcontractors. The cross-waiver applies to any claim for damages regardless of the legal basis of the claim, including tort and contract. Article 3(2)(d) sets forth a number of exceptions to the waiver:

> Notwithstanding other provisions of this Article, this cross-waiver of liability shall not be applicable to . . . claims made by a natural person, his/her estate, survivors, or subrogees for injury or death of such natural persons [, except where the subrogee is a Party].

Agreement Between the Government of the United States of America Concerning Cross-Waiver of Liability for Cooperation in the Exploration and Use of Space for Peaceful Purposes (Draft), Article 3(2)(d) (Jan. 13, 1995) (brackets in original). Thus, under the draft agreement, the U.S. Government and its agencies would waive all claims, including subrogated claims, against the Japanese government, "related entities," and employees.

As you identified in your submission, there are a number of federal statutes that may create rights in the United States to recover from responsible third parties the amount the United States pays an injured employee in benefits or treatment, including the Medical Care Recovery Act, 42 U.S.C. §2651, the Social Security Act, 42 U.S.C. §1395y(b)(2)(B)(iii), and the Federal Employees' Compensation Act, 5 U.S.C. §8131. We were advised that it would be very difficult to identify definitively all sources of subrogated claims.

NASA submitted a response setting forth the basis for its position that it possesses both express and implied statutory authority to enter into broad cross-waivers of liability in its space activities, including waivers of other federal agencies' subrogated claims.[1] The National Aeronautics and Space Act of 1958, (codified as amended at 42 U.S.C. §§2451–2484) ("Space Act"), establishes NASA and defines its functions and the scope of its authority. In its written submission, NASA interprets section 203 of the Space Act as vesting NASA with authority to waive subrogated claims of other federal agencies. According to NASA, subsequent passage of section 308 of the Space Act, an "Insurance and Indemnification Provision," ratified this authority. Finally, NASA argues, a provision of the

[1] Based upon a subsequent meeting with attorneys from NASA and the Department of State, we understand that NASA does not claim authority to waive nonsubrogated claims of other federal agencies, apart from its practice of obtaining express waivers of claims for damages where the other agencies are entering into agreements with NASA for joint activity. Further, NASA does not presently purport to waive any claims of the 50 states and the District of Columbia.

Commercial Space Launch Act ("CSLA") expressly granting the Secretary of Transportation authority to waive certain claims of the United States and its agencies, 49 U.S.C. § 70112, supports NASA's interpretation of its authority. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Edward A. Frankle, General Counsel, NASA (Feb. 7, 1995) ("NASA Submission").

In this memorandum, we first analyze the possible sources of express and implied statutory authority for NASA to waive subrogated claims of other federal agencies. We next discuss alternative basis for waiver of federal claims. Finally, we examine sources of authority to waive states' claims.

II. *Express Statutory Authority*

We do not read the Space Act to confer expressly upon NASA the authority to waive subrogated claims on behalf of other federal agencies.

NASA relies upon section 203 of the Space Act, 42 U.S.C. § 2473, which outlines the functions of NASA, to argue that Congress authorized NASA to enter into executive agreements with foreign governments on any terms it deems appropriate. NASA states that Congress "sought to create and foster a unique agency" and that due to its "distinctive mandate, the agency has been provided with concomitantly distinctive authorities" including authority "to acquire properties and enter into 'contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of its work and *on such terms as it may deem appropriate.*' " NASA Submission at 2, 3 (quoting 42 U.S.C. § 2473(c)(5)). *See also* NASA Submission at 12, 23. The most natural reading of this passage is that Congress was directing NASA, when it went about its business, to do so according to its best judgment, not that Congress was conferring plenary authority upon NASA to take any and all actions, even those that affected the interests of other governmental entities. Moreover, reading the statute in its entirety makes clear that Congress did not confer the discretion that NASA claims. Section 203(c)(5) provides that NASA may enter into

> contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, *with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution.*

42 U.S.C. §2473(c)(5) (emphasis added). Thus, Congress's broad grant to NASA of discretion to enter into agreements "on such terms as it may deem appropriate" does not extend to agreements with foreign governments.[2]

Nor does any other provision of the Space Act confer such authority. Only one provision concerns international agreements. Section 205, 42 U.S.C. §2475, provides that NASA,

> under the foreign policy guidance of the President, may engage in a program of international cooperation in work done pursuant to this chapter, and in the peaceful application of the results thereof, pursuant to agreements made by the President with the advice and consent of the Senate.

Nothing in the text of section 205 itself, an OLC legal opinion interpreting the scope of NASA's authority to engage in international cooperative activity,[3] or the President's signing statement suggests that section 205 should be interpreted as conferring upon NASA the authority to enter into executive agreements containing government-wide waivers of claims. There are as yet no reported decisions interpreting section 205.

Finally, Congress amended the Space Act to authorize NASA to provide third party liability insurance to users of NASA's space vehicles and to indemnify users for third party liability in excess of the insurance coverage. Section 308, 42 U.S.C. §2458b.[4] As discussed below, NASA argues that, in enacting the insurance-

[2] This Office previously had noted that there is "some evidence" in the legislative history that another subsection, 42 U.S.C. §2473(b)(6)(1958), which authorizes NASA to cooperate with other government and public and private agencies, was intended to include foreign governments. Letter for Leonard C. Meeker, Legal Adviser, Department of State, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 3 n.1 (Apr. 29, 1969). Our review of that House Report (which accompanied the original 1958 Space Act) found no similar evidence in relation to §2473(c)(5). H.R. Rep. No. 85–1770 (1958).

[3] Although section 205 only expressly authorizes NASA to engage in international programs pursuant to the terms of treaties entered into by the President, then-Assistant Attorney General Rehnquist concluded that international cooperation in space activity could be carried out pursuant to other forms of international agreements. (The issue before this Office was whether NASA had authority to provide launch services to a foreign government for a domestic communications satellite system and whether it could do so independently of COMSAT.) In reaching this conclusion, this Office relied upon President Eisenhower's signing statement in which he declared that he did not construe section 205 as prescribing the only permissible form of international cooperation, because "[t]o construe the section otherwise would raise substantial constitutional questions." Letter for Leonard C. Meeker, Legal Adviser, Department of State, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 3–4 (Apr. 29, 1969).

[4] 42 U.S.C. §2458b provides in relevant part:

(a) Authorization

The Administration is authorized on such terms and to the extent it may deem appropriate to provide liability insurance for any user of a space vehicle to compensate all or a portion of claims by third parties for death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operations or recovery of the space vehicle. Appropriations available to the Administration may be used to acquire such insurance, but such appropriations shall be reimbursed to the maximum extent practicable by the users under reimbursement policies established pursuant to section 2473(c) of this title.

(b) Indemnification

Under such regulations in conformity with this section as the Administrator shall prescribe taking into account the availability, cost and terms of liability insurance, any agreement between the Administration

Continued

indemnification system, Congress implicitly approved NASA's practice of entering into cross-waivers of subrogated claims on behalf of other federal agencies. We do not understand NASA to take the position that section 308 itself expressly authorizes NASA to waive such claims, nor can the statute be read to do so.

III. *Implied Statutory Authority*

We understand NASA's principal argument to be that Congress implicitly authorized NASA to waive subrogated claims on behalf of all federal agencies. First, according to NASA, the legislative history of section 308 of the Space Act (the insurance and indemnification amendment) and 49 U.S.C. § 70112 (the insurance provision of the CSLA) demonstrate that Congress was aware of and approved of NASA's longstanding practice of entering into government-wide cross-waivers of subrogated claims. Second, NASA argues, the insurance-indemnification regime Congress adopted in section 308 of the Space Act can function effectively only if there are government-wide cross-waivers of subrogated claims. However, neither argument for implied congressional authorization is supported by adequate evidence.

A. *Legislative History*

As a threshold matter, we note that reliance upon legislative history in interpreting a statute is vulnerable to challenge where the statute is unambiguous. *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). There is no ambiguity in the Space Act regarding NASA's authority to waive subrogated claims on behalf of the U.S. Government. Granted, there is no express prohibition against NASA taking such action, but where an action as exceptional as waiving the claims of other agencies is concerned, silence should ordinarily not be interpreted as ambiguity or authorization. *Cf.* CSLA, 49 U.S.C. § 70112(b)(2) (expressly authorizing the Secretary of Transportation to enter into reciprocal cross-waivers on behalf of the United States and certain agencies).

Moreover, NASA overstates the evidence contained in the legislative history. NASA asserts that it had a long history of consistent practice of entering into government-wide cross-waivers of subrogated claims, of which Congress was aware and which it took into account — and thereby implicitly authorized — in

and a user of a space vehicle may provide that the United States will indemnify the user against claims (including reasonable expenses of litigation or settlement) by third parties for death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operations or recovery of the space vehicle, but only to the extent that such claims are not compensated by liability insurance of the user: *Provided*, That such indemnification may be limited to claims resulting from other than the actual negligence or willful misconduct of the user.

amending the Space Act to grant NASA authority to insure and indemnify users of its space vehicles and in adopting the waiver provisions of the CSLA.

Our review of the legislative history and the executive agreements executed by NASA fails to support NASA's position in two respects. First, it appears that NASA's practice has not been uniform. NASA began to execute cross-waivers of liability during the 1970's as it undertook projects with multiple parties. According to NASA, although the cross-waiver provisions evolved over time and contained minor variations, NASA had an "open and widely-endorsed seventeen-year practice of requiring the use of broad no-fault, no-subrogation inter-party waivers of liability in its space launch activities." NASA Submission at 1. NASA has provided a number of examples of the cross-waiver provisions. A review of these agreements indicates that the scope of the waiver varies. Most provisions broadly and generally waive "claims"; at least one excludes claims subrogated to the government from the scope of the waiver. More important, there is also variability in the scope of the parties bound by the waiver.[5] In most cases, the agreement waives claims of only *NASA*, not those of other federal agencies; in others, there is ambiguity as to the scope of the parties bound by the waiver.[6]

Second, the legislative history is inconclusive. NASA emphasizes that it explained its broad and consistent cross-waiver practice to Congress in seeking indemnification authority. According to NASA, Congress relied upon NASA's practice of entering into cross-waivers in adopting section 308 of the Space Act (granting NASA indemnification and insurance authority) and in subsequently granting the Secretary of Transportation authority to waive claims under the

[5] Evaluating the scope of the waiver actually raises two distinct issues: whether the waiver encompasses claims of other federal agencies as well as NASA, and whether the waiver encompasses subrogated as well as nonsubrogated claims. The Department of State submitted the narrow question whether NASA has authority to waive subrogated claims of other federal agencies, and it suggests that a general waiver of claims does not necessarily encompass a waiver of subrogated claims. Similarly, NASA has focused on demonstrating that it had a long-standing practice of executing broad waivers that included waivers of subrogated claims. Although we confine our opinion to the question presented to us — whether NASA has authority to waive subrogated claims of other agencies — in our view, the issue is not whether NASA has authority to waive subrogated (as opposed to nonsubrogated) claims, but whether it has authority to waive claims, of whatever sort, of another agency. We are aware of no principle that would distinguish between subrogated and nonsubrogated claims for the purpose of analyzing waiver authority. And we are aware of no basis for interpreting a waiver of "all claims" as not including subrogated claims.

[6] A number of agreements provide that "the parties agree to a no-fault, no-subrogation inter-party waiver of liability." In most agreements that we reviewed, "parties" is defined for the purpose of the relevant section as "NASA and the User." However, in some agreements "parties" is not a defined term, and the preambles state that the agreements are entered into by "the United States of America represented by the National Aeronautics and Space Administration." Arguably then, the "party" agreeing to waive the claim is the U.S. Government. This interpretation is undercut by the fact that the provisions continue to read "[t]hus, if NASA's property, while involved in STS Operations, is damaged by the User or another user, NASA agrees to be responsible for that Damage and agrees not to bring a claim against or sue any user." *See, e.g., Agreement for Exchange of Services Between the United States of America Represented by the National Aeronautics and Space Administration and Messerschmitt - Bolkow - Blohm GMBH* (June 12, 1981). We have identified only two cooperative space agreements that unequivocally waive claims on a government-wide basis. One was executed by the President, the other by the Secretary of State. *Agreement Between the United States of America and Ukraine on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes* (Nov. 22, 1994); *Agreement Among the Government of the United States of America, Government of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station* (Sept. 29, 1988).

CSLA. However, review of congressional reports and hearings reveals that virtually all references to waiver of claims were to *NASA* waiving *its* claims or were silent as to the scope of the parties bound by the waiver.

NASA quotes from the Senate Report that accompanied the 1980 NASA Authorization Act (which authorized the insurance-indemnification system). NASA Submission at 12 n.18. However, the Senate Report refers to waivers by NASA of its claims. In discussing the indemnification provision, the Senate and House reports state that, because of the reciprocal waiver, indemnification

> would not normally include persons who contract with NASA for launch services, since NASA expects to include in its launch agreements a provision under which the person procuring launch services agrees that he will not make a claim (and that he will hold NASA and other users harmless) for damage to his property or employees caused by NASA, other users or any other person involved. . . . In turn, NASA and other users would promise not to bring a claim against the user for damage to their property or employees.[7]

Similarly, the General Counsel for NASA, S. Neil Hosenball, testified before the House that

> With respect to inter-party liability, i.e., liability between the users and NASA, NASA has under existing authority adopted a no-fault, no-subrogation approach where NASA and each user agree not to bring a claim against the other or any other user for damage to its property or injury or death to its employees.[8]

NASA also cites to hearings unrelated to section 308 as evidence of congressional authorization. For example, NASA states that it informed Congress during the Space Shuttle Hearings "that the proposed Shuttle 'no-fault, no-subrogation cross-waiver was a continuation of the ELV practice.' " NASA Submission at 9 n.15. However, the quoted material does not appear at or surrounding the section of hearings cited by NASA.[9] Of perhaps greater significance, a written statement submitted by NASA's General Counsel explains in regard to cross-waivers:

> At this point, I would draw a distinction between what we refer to as "third-party" liability—which involves potential liability for

[7] S. Rep. No. 96–207, at 47 (1979), *reprinted in* 1979 U.S.C.C.A.N. 829, 831. H.R. Rep. No. 96–52, at 225 (1979).

[8] *1980 NASA Authorization: Hearings on H.R. 1756 Before the Subcomm. on Space Science and Applications of the House Comm. on Science and Technology*, 96th Cong., pt. 4, at 1943 (1979) (statement of S. Neil Hosenball, General Counsel, NASA, with attached memorandum for the record).

[9] *Space Shuttle Operational Planning, Policy and Legal Issues: Hearings Before the Subcomm. on Space Science and Applications of the House Comm. on Science and Technology*, 96th Cong. 110 (1979).

> damage to property or injury to persons not involved in the Shuttle use — and "interparty liability" — that is, potential property damage and bodily injury to those flying aboard the Shuttle. With respect to "interparty" liability, we have adopted a no-fault approach where each party is responsible for insuring (or self-insuring) its own property or employees. Thus, if a user damages the Shuttle in some way, we agree not to press a claim or sue the user. Similarly, if NASA or a user were to damage another user's payload, the "damaged" user would not sue NASA or the other user.

We located only one reference to a government-wide waiver of claims. NASA submitted a written statement to a Senate subcommittee, which states that:

> All Users of the STS and the U.S. Government will agree not to make a claim or bring a legal action against each other for negligent or other acts resulting in injury or death of employees or damage or loss to property at the launch or landing site or during flight. . . .
>
> The U.S. Government will agree to waive its right of action against STS Users for their negligent or other acts resulting in injury or death to U.S. Government employees or damage to the Orbiter, the STS system or other U.S. Government property at the launch or landing site or during flight.[10]

Clearly, on its face and considered in isolation, this indicates that NASA was purporting to waive claims on behalf of the U.S. Government. When considered in context, however, it can be accorded little, if any, weight. First, this testimony was provided in the form of written answers to questions submitted in order to expedite the proceedings; there is no way to know by whom the written answers were ever considered. Second, NASA makes clear that its described policy regarding liability issues was "tentative," "undergoing review in NASA," and subject to review and comment by potential users. A tentative policy statement submitted in writing to a subcommittee of Congress cannot be interpreted as congressional ratification of that policy; otherwise any statement submitted to any one of the numerous congressional subcommittees would constitute ratification of the submission absent explicit rejection by Congress. *See McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931) ("[I]ndividual expressions" made to Committees of Congress or in discussions on the floor of the Senate, "are without

[10] *NASA Authorization for Fiscal Year 1979: Hearings on S. 2527 Before the Subcomm. on Science, Technology, and Space of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., pt. 1, at 131, 132 (1978) ("NASA Authorization FY 1979").

weight in the interpretation of a statute."); *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (refusing to "accord any significance" to comments made at hearings that were not made by Members of Congress and were not included in the Official House and Senate Reports).[11] Finally, this single reference to a government-wide waiver must be balanced against the numerous references to a waiver by NASA of *its* claims.[12]

The legislative history of the CSLA also is not as clear as NASA represents. In its submission, NASA states that "in authorizing the Secretary of Transportation to waive all claims on behalf of the U.S. Government, the Congress observed that such broad inter-party waivers of liability 'are a standard element in all [NASA] launch contracts.' " NASA Submission at 21. In fact, this reference to the standard element in NASA contracts was made in connection with[12]

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[11] In its submission, NASA continues to draw from this written subcommittee testimony as follows:

> More specifically, however, NASA went on to address the very issue of subrogation for the Administration in this context by declaring that:
>
> > [T]his risk of liability to the User is lessened by the fact that the U.S. Government is frequently subrogated to the rights of an injured Government employee under the [Federal Employees Compensation Act] (5 U.S.C. 8131–8132). . . . This will tend to lessen the frequency of actions brought by an injured Government employee. [citation omitted]
>
> The cross-waiver was to be an inter-party waiver and, therefore, did not purport to reach the claims of individual persons, whether military, civil servant or contractor employees. All individuals were treated as third parties rather than second parties. What would be waived, as the quote makes clear, would be subrogated claims of the Government after it had paid for compensation to an employee for Shuttle work-related injuries.

NASA Submission at 10 & n.16. The sentence that NASA deleted from its quotation, together with the surrounding material, however, supports a different interpretation. The section in its entirety states:

> STS Users would continue to be exposed to a risk of liability if a NASA employee was injured or damaged or if a NASA contractor or one of its employees was injured or damaged and recovery was sought by the NASA employee, NASA contractor or NASA contractor employee.
>
> This risk of liability to the User is lessened by the fact that the U.S. Government is frequently subrogated to the rights of an injured Government employee under the Federal act providing for compensation to Government employees for work injuries. Under this Act, the United States may be entitled to 80% of the amount recovered from the negligent User (5 U.S.C. 8131–8132). This will tend to lessen the frequency of actions brought by an injured Government employee.

NASA Authorization FY 1979 at 132.

When read in its entirety, it is clear that the section addresses Shuttle users' continued exposure to third-party claims from employees and other natural persons. The reference to subrogation is by way of explaining that the frequency of such suits would tend to be reduced by the fact that the person would retain only 20% of any recovery. This passage does not inform one way or the other whether it was contemplated that the government would pursue or waive any claims it may have.

[12] In addition to those discussed above, *see also* H.R. Rep. No. 96–52, at 225 ("Indemnification would only be applicable to claims of third parties who are defined in subsection 308(a)(f)(3) . . . . It is envisaged that a third party would not normally include persons who contract with NASA for launch services, since NASA expects to include in its launch agreements a provision under which the person procuring launch services agrees that he will not make a claim . . . for damage . . . . In turn, NASA and other users would promise not to bring a claim against the user for damage to their property or employees."); S. Rep. No. 96–207, at 47 (same), reprinted in 1979 U.S.C.C.A.N. at 831; *International Space Activities, 1979: Hearings Before the Subcomm. on Space Science and Applications of the House Comm. on Science and Technology*, 96th Cong. 22 (1979) ("The U.S. Government would not be responsible for damage to another country's materials processing of scientific equipment on the Shuttle or during other space transportation system operations. We will include a cross-waiver provision in each Shuttle Launch Services Agreement whereby both NASA and the user, including foreign countries, agree to a no-fault, no-subrogation waiver of liability under which NASA and the user will be solely responsible for any damage to its own property involved in such operations."); *see also* Gerald J. Mossinghoff, *Managing Tort Liability Risks in the Era of the Space Shuttle*, 7 J. Space L. 121, 124 (1979) ("NASA has under existing authority adopted a no-fault, no-subrogation approach whereby NASA and each user agree not to bring a claim against the other or any other user for damage.").

subparagraph (c), which requires so-called flow-down clauses binding users and contractors to the waiver. Two paragraphs later, the report addresses the subparagraph that authorizes the Secretary of Transportation to enter into government-wide waivers; the report makes no reference to NASA's practices. S. Rep. No. 100–593, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5525, 5538. Again, where there is reference to the scope of the parties bound by the reciprocal waiver of claims, it is to NASA's waiver of its claims.[13]

NASA further states that the Department of Justice previously had reviewed and approved the waiver authority NASA now asserts. Even if this were so, it would not, of course, validate an otherwise invalid practice. According to NASA, in reviewing the proposed insurance-indemnification amendment, the Department of Justice "raised no objection to the waiver of U.S. Government claims based on its understanding of the planned broad no-fault, no-subrogation cross-waiver." NASA Submission at 11. The Department of Justice letter to which NASA refers, however, states that the department's conclusion was based on a memorandum prepared by NASA;[14] that memorandum refers only to waivers of claims that NASA may have:

> With respect to inter-party liability, i.e., liability between the users and NASA, NASA is able under present authority to adopt a no-fault, no-subrogation approach where NASA and each user agree not to bring a claim against the other or any other user for damage to its property or injury or death to its employees.[15]

Finally, NASA argues that its practice of waiving "claims" generally should be broadly construed to include subrogated claims, and further points to its references in congressional submissions to its waiver of subrogated claims to argue that, since there is no vehicle by which NASA can become a subrogee, its waiver

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[13] *H.R. 3765, The Commercial Space Launch Act Amendments: Hearings Before the Subcomm. on Space Science and Applications of the House Comm. on Science, Space, and Technology*, 100th Cong. 12 (1988) ("NASA's standard launch services agreement, or LSA, evolved over a long period of time . . . . Perhaps the area which has been the most controversial and difficult to work out is the sharing of liability risks between NASA and its customers. . . . With regard to damage to persons and property, NASA decided that, in order to facilitate the use of the Space Shuttle and to simplify the allocation of risks, a cross-waiver policy would be put in place as a standard LSA provision. Under this policy, NASA and all Shuttle users agree to a no-fault, no-subrogation, inter-party waiver of liability . . . .")

[14] Letter for the Honorable James T. McIntyre, Jr., Director, Office of Management and Budget, from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs (Dec. 1978) (Attachment 8 to NASA Submission).

[15] NASA Memorandum for the Record, "Proposed Section 308 of the National Aeronautics and Space Act of 1958: 'Indemnification and Insurance'" (Dec. 5, 1978).

NASA also refers to a 1987 letter from NASA to OLC, in which NASA refers to OLC's review of "a proposed Space Station inter-party waiver clause." In its current submission, NASA states that the agreements of interest to OLC "each included an express waiver of subrogated claims." NASA cites as a typical example an agreement containing a provision whereby "'[T]he Parties hereto agree to a no-fault, no subrogation, inter-party waiver of liability.'" The attachment to which NASA refers does not appear to contain the quoted agreement. Thus we are unable to determine whether the waiver was restricted to NASA or whether NASA was purporting to waive claims on behalf of other agencies. NASA Submission at 24–25, Attachment 23 (Letter for John P. Giraudo, Attorney-Advisor, Office of Legal Counsel, from Edward A. Frankle, Deputy General Counsel, NASA.)

of subrogated claims must be understood as a waiver of other agencies' claims. Even assuming the truth of the factual predicate — that NASA could never be a subrogee — we do not find this dispositive. First, the vast majority of the discussion in Congress did not refer specifically to subrogated claims. Second, even assuming that Congress was aware that the waivers encompassed subrogated claims, in light of the fact that NASA and the other party to the agreement "flowed down" the waiver to users and contractors, any reference to subrogated claims could be understood as applying to insurers of the users and contractors.[16] Finally, and most important, this connection is simply too attenuated and subtle to constitute the basis for finding congressional authorization for such an exceptional act as one agency waiving claims of other agencies.

B. *Logic of Insurance-Indemnification System*

NASA argues that, in amending the Space Act to authorize NASA to provide insurance and indemnification, Congress must be interpreted as having either ratified or granted NASA authority to execute government-wide cross-waivers of subrogated claims because the effectiveness of the insurance-indemnification regime depended upon such waivers. Section 308 of the Space Act authorizes NASA to provide liability insurance for users of a space vehicle to compensate them for claims by third parties. (In practice, with the aid of NASA, users were able to obtain such third-party liability insurance from private insurers.) In addition, Congress authorized NASA to indemnify users for third-party loss above the amount of the insurance.[17]

Thus, according to NASA, the scheme consisted of three parts: the existing inter-party cross-waiver of claims; insurance covering third-party liability — which NASA states could only be obtained at a reasonable rate because it had removed the largest class of claims, those between the parties; and U.S. indemnification of catastrophic loss above that covered by insurance — which NASA states could be justified in light of the broad cross-waiver. NASA argues that the indemnification authority is "inextricably linked to the cross-waiver described to the Congress and implemented in accordance with policies and procedures established under the agency's broad discretionary authorities provided in . . . 42 U.S.C. § 2473(c)." NASA Submission at 12.

As we understand the three-part regime, however, the government-wide cross-waiver of subrogated claims, however sensible, is not "inextricably linked" with the insurance-indemnification regime adopted in section 308. Under the terms of

[16] *See* NASA Authorization FY 1979 at 132. ("This risk of liability [to the User for damage to property or employees of the United States] may also be mitigated by action taken as a result of a NASA study now under way on the feasibility of including a provision in NASA's contracts that would require NASA contractors to obtain insurance without the right of subrogation, which would provide insurance payable to themselves and their employees for damage and injury caused by other Users in the course of STS operations.").

[17] *See supra* note 4.

at least the draft agreement with Japan and the Intergovernmental Agreement among the United States, Member States of the European Space Agency, Japan, and Canada,[18] the cross-waivers do not extend to extinguish claims brought by "natural persons." And at least under the terms of the Medical Care Recovery Act and the application of FECA, the U.S. Government would recover only the amount it had expended in providing medical or other support to the injured person. Thus, unless the injured person assigned his or her entire cause of action to the U.S. Government, in many, if not most cases, the amount recovered by the United States in pursuing subrogated claims is likely to be quite limited in comparison to that potentially obtained by the individual. Since, as NASA explains, the cross-waiver does not purport to reach the claims of individual persons and all individuals would be treated as third parties, it is difficult to see that waiver of *inter*-party claims would affect *third* party insurance rates or indemnification costs. Moreover, as NASA emphasizes, NASA contractually extinguishes the bulk of nonsubrogated claims of other federal agencies that are either users or contractors by executing mutual waivers of claims and "flowing-down" the waiver to subcontractors and customers. Finally, according to NASA, the real financial exposure was to the risk that the launch vehicle and other payloads would be destroyed. This is precisely the exposure that is eliminated by the waivers among and between the users and NASA. And this presumably is what made the insurance premium affordable.

Even if we are incorrect in our assumptions regarding the actual operation of the insurance-indemnification regime, the link between enactment of section 308 of the Space Act and the waiver authority NASA claims — that insurance premiums and indemnification would be more affordable — is not sufficiently direct or express to constitute congressional authorization.

Finally, NASA argues that the waiver provision contained in the CSLA is based upon and must be read to reaffirm NASA's government-wide cross-waivers of subrogated claims. (As stated above, the CSLA expressly authorizes the Secretary of Transportation to enter into reciprocal waivers "for the Government, executive agencies of the Government involved in launch services, and contractors and subcontractors involved in launch services." 49 U.S.C. § 70112(b)(2).) Rather, if anything, the CSLA waiver provision undercuts NASA's argument that the Space Act provides the necessary authorization; the waiver provision of the CSLA demonstrates what Congress does when it wishes to authorize government-wide waivers. Moreover, the waiver authority contained in the CSLA is more narrow than that asserted by NASA under the Space Act; it extends only to those agencies involved in launch services. On its face, it would not apply to agencies that are

[18] *Agreement Among the Government of the United States of America, Government of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station* (Sept. 29, 1988).

subrogated to claims or that have direct claims to reimbursement by virtue of providing care or resources to injured persons.

IV. *President's Constitutional Authority*

We have concluded that the President may enter into international agreements providing for the waiver of subrogated claims of federal agencies in return for a reciprocal waiver from the other State. This conclusion, however, is subject to the following challenges and limitations.

The President's authority to enter into international agreements containing such a waiver derives principally from his constitutional authority to conduct foreign affairs. The Constitution has long been interpreted to grant the President plenary authority to represent the interests of the United States in dealings with foreign States, subject only to limits specifically set forth in the Constitution or to such statutory limitations that the Constitution permits Congress to impose by exercise of its enumerated powers.[19] As part of this authority, the President may enter into "sole" executive agreements — international agreements based on the President's own constitutional powers.[20]

Although the President's authority to enter into sole executive agreements is well established, the precise limitations that may exist on the proper scope of those agreements is far from settled. As one commentator has noted, "[c]onstitutional issues and controversies have swirled about executive agreements concluded by the President wholly on his own authority. . . . Periodically, Sen-

[19] Memorandum for the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* (Dec. 17, 1986); Letter for the Honorable David L. Boren, Chairman, Senate Select Committee on Intelligence, United States Senate, from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs (Nov. 13, 1987). *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (Power of the President as "the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress.")

In *Curtiss-Wright*, the Court drew a distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the United States. Waiving claims of, for example, the Departments of Labor or Health and Human Services to recover expenses incurred in providing resources to injured workers implicates domestic as well as foreign affairs. However, as a leading commentator notes in discussing limits to treaty-making power, "[m]atters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern." Louis Henkin, *Foreign Affairs and the Constitution* 153 (1972) (quoting Restatement of the Law of United States Foreign Relations § 117(1)). Moreover, to the degree domestic interests are implicated, they arise in areas in which the President possesses considerable authority, as discussed below.

[20] *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Restatement (Third) of The Foreign Relations Law of the United States § 303(4) (1987) ("Restatement") ("Subject to [the prohibitions or limitations in the Constitution applicable to the exercise of authority by the United States] the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."); *see also* State Department Procedures on Treaties and Other International Agreements, Circular 175 (Oct. 25, 1974) ("Circular 175"), *reprinted in* 1 *United States Foreign Relations Law: Documents and Sources* 201 (Michael J. Glennon & Thomas M. Franck eds., 1980).

We note that government-wide waivers of subrogated claims could be implemented through treaties or congressional-executive agreements. We focus here on sole executive agreements, based on our understanding that NASA and the State Department seek advice on the availability of alternatives to congressional authorization.

ators (in particular) have objected to some agreements, and the Bricker Amendment sought to curtail or regulate them, but the power to make them remains as vast and its constitutional foundations and limits as uncertain as ever." [21]

The leading cases on sole executive agreements support — though not unequivocally — the President's authority to enter into agreements disposing of government claims. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Court upheld the validity of the Litvinov Assignment, by which, through exchange of diplomatic correspondence, the Soviet Union assigned to the United States its claims against U.S. nationals. The Litvinov Assignment was part of an overall settlement of claims between the Soviet Union, the United States, and their nationals, undertaken to clear the way for United States recognition of the Soviet government.

The *Belmont* and *Pink* opinions establish the President's broad authority to enter into sole executive agreements that deal with international claims. However, the Litvinov Assignment was executed pursuant to the President's recognition of the Soviet Union, and the opinions rely in part on that fact. Accordingly, it could be argued that they support only the limited proposition that the President may enter into sole executive agreements that accompany the exercise of his core power to recognize foreign governments. We reject this narrow reading. The opinions impose no such restriction, but rather, find authority for the Assignment in the President's authority as "sole organ" of the federal government in the field of international relations.[22] Even so, *Belmont* and *Pink* are not dispositive because, although the Litvinov Assignment anticipated an overall settlement of claims between the two governments, the Assignment itself appears only to have involved the assignment of Soviet claims to the United States — not the release by the United States of its claims.

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[21] Henkin, *Foreign Affairs and the Constitution* at 177 (footnotes omitted). *See also* Restatement §303, reporters' note 11 ("Efforts to define the constitutional limits on the President's authority to make sole executive agreements . . . have been resisted by the Executive Branch and have not gained wide acceptance in Congress."); Peter M. Shane & Harold H. Bruff, *The Law of Presidential Power* 543 (1988) (noting the lack of any "principled line" to identify the limit of constitutional sole executive agreements: "The Supreme Court has not yet held any executive agreement ultra vires for lack of Senate consent, nor has it given other guidelines that might define the President's power to act alone. Members of the Senate have periodically charged presidential usurpation, but have not articulated plausible limits to presidential power. . . . Presidential practice, too, has not reflected any principle of limitation.").

[22] *See* Department of State Legal Adviser's Reply to Senate Office of Legislative Counsel Memorandum on Certain Middle East Agreements (Oct. 6, 1975), *reprinted in* 1 *United States Foreign Relations Law: Documents and Sources* 295 (Michael J. Glennon & Thomas M. Franck eds., 1980) (rejecting the argument that *Belmont* and *Pink* should be narrowly interpreted as only authorizing agreements pursuant to recognition of foreign states); Henkin, *Foreign Affairs and the Constitution* at 178–79 ("Sutherland in fact seemed to find authority for the Litvinov Agreement not in the President's exclusive control of recognition policy but in his authority as 'sole organ,' his 'foreign affairs power' which supports not only recognition but much if not most other foreign policy.").

At the same time, Professor Henkin rejects a fully expansive reading. "There have indeed been suggestions, claiming support in *Belmont*, that the President is constitutionally free to make any agreement on any matter involving our relations with another country. . . . As a matter of constitutional construction, however, that view is unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution. One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, but neither Justice Sutherland nor any one else has told us which are which." *Id.* at 179.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld the President's authority to suspend individuals' claims pursuant to an executive order that, among other things, established the U.S.-Iran Claims Tribunal. In addition to relying upon the "general tenor" of the International Emergency Economic Powers Act, the Hostage Act, and the International Claims Settlement Act[23] (which the Court found implicitly to authorize the challenged executive action), the Court emphasized the U.S. Government's longstanding practice of exercising its sovereign authority to settle claims of its nationals against foreign governments and noted that those settlements frequently occur through executive agreements.[24]

If the President has authority to dispose of claims of individuals in furtherance of U.S. foreign policy objectives, it would seem reasonable to conclude that he must have authority to waive claims of federal agencies. *Dames & Moore*, however, did not so squarely raise separation of power concerns. Here, arguably, the President would be encroaching on Congress's control over the federal fisc by declining to recover monies otherwise subject to claim by the United States.[25] Although this argument is not without force, we are not persuaded by it in its current context, and we conclude that there would be no impermissible encroachment upon congressional authority. First, this is not an instance of the executive branch bestowing a unilateral gift. The waivers are mutual. The United States is getting what it gives. More important, the President's action must be considered against the backdrop of the statutes governing NASA and its operations. By enacting the insurance-indemnification scheme, Congress expressed its intent to commit very substantial resources to support NASA's activities. In contrast to the indemnification system of the CSLA, which caps the government's indemnification at a certain amount, Congress granted NASA unlimited indemnification authority. In addition, Congress endorsed a program of international cooperation, placed NASA under the foreign policy guidance of the President, and granted the President the authority to enter into international agreements to promote inter-

[23] 50 U.S.C. § 1701; 22 U.S.C. § 1732; 22 U.S.C. §§ 1621–1645, respectively.

[24] *See also Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (Hand, J.) ("The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and [has] been exercised by the foreign offices of all civilized nations."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255 (1988) (noting the great deference accorded to presidential authority by the model of statutory analysis adopted in *Dames & Moore*).

[25] For example, the Constitution dictates that only Congress can appropriate money. U.S. Const. art. 1, § 9, cl. 7. And courts have suggested that the President may not act alone to dispose of property under Article IV. *See Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). We do not find these restrictions dispositive because appropriations are not properly equated with waivers of claims, and the property referenced in Article IV of the Constitution does not appear to encompass inchoate claims for damages. *Id.* at 1059 (reviewing debates of Constitutional Convention and state ratifying conventions to demonstrate that the property clause was intended to delineate the role played by the central government in the disposition of Western lands).

national cooperation.[26] Finally, Congress has at least implicitly approved of the long-standing practice of NASA and other federal agencies that are using NASA's services waiving their own claims for damages, which likely represents the greatest risk of financial exposure to the United States.[27]

Taken together, we believe that this statutory framework supports the conclusion that the President would not encroach upon congressional authority by entering into a mutual waiver of claims with a foreign State. Moreover, waiving claims for damages coincides with two other sources of Presidential power: the President's prosecutorial discretion and his authority as chief administrator of the executive branch.[28] Conceptually, a waiver operates similarly to a decision not to pursue a certain class of claims—an executive decision that is generally within the prerogative of the President.[29]

We further conclude that the President may delegate this authority to an appropriate agency head. The President is generally authorized under 3 U.S.C. § 301 to delegate to heads of executive agencies "any function which is vested in the President by law." This Office has interpreted § 301 as conferring a very broad grant of delegation authority. However, the legislative history indicates that § 301 was intended only to authorize the delegation of functions vested in the President by statute.[30]

[26] 42 U.S.C. § 2475. Although the statute refers only to treaties, President Eisenhower and this Office interpreted the statute as authorizing other forms of international executive agreements. *See supra* note 3.

[27] *See supra* note 12.

[28] *See Myers v. United States*, 272 U.S. 52 (1926); *Heckler v. Chaney*, 470 U.S. 821 (1985); *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 491–92 (1831) ("Upon the whole, I consider the district attorney as under the control and direction of the President . . . and that it is within the legitimate power of the President to direct him to institute or to discontinue a pending suit . . . ."); Shane & Bruff, *The Law of Presidential Power* at 327 (quoting Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 44 (1987) ("The President retains the constitutional power to direct the officer to take particular actions within his or her discretion or to refrain from acting when the officer has discretion not to act.").

[29] We note that, like treaties, an executive agreement authorizing the waiver of claims would be superseded by subsequent contrary congressional action. Furthermore, unlike treaties, a sole executive agreement may not be effective in the face of prior inconsistent legislation. Thus, if there is an extant statute requiring an agency to bring suit to recover certain costs, an executive agreement to the contrary may have no effect. According to Henkin, the Supreme Court has expressly declined to consider this issue. Henkin, *Foreign Affairs and the Constitution* at 186. *See United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (holding that an executive agreement will not be given effect as against an earlier act of Congress), *aff'd*, 348 U.S. 296 (1955); Circular 175 at 205 ("The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority."); Restatement § 303 cmt. j (status of sole executive agreements in relation to earlier congressional legislation has not been authoritatively determined); Oliver J. Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. Air L. & Com. 436, 444 (1950) ("[W]hile a treaty, if self-executing, can supersede a prior inconsistent statute, it is very doubtful whether an executive agreement, in the absence of appropriate legislation, will be given similar effect."); *see also* Memorandum for the Honorable David Stockman, Director, Office of Management and Budget, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Executive Order on Federal Regulation* at 3 (Feb. 12, 1981) ("[T]he President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." (footnote omitted)).

[30] The House Report of the precursor statute to § 301 states that "it should be understood that the functions, as set out in this bill, refer to those vested in the President by statutory authority, rather than those reposing in the President by virtue of his authority under the Constitution of the United States." H.R. Rep. No. 81-1139, at

Continued

The scope and source of the President's authority to delegate responsibility conferred upon him by the Constitution is less clear. We have recognized that the President possesses "inherent" authority to delegate, and that this is not restricted to delegation of duties conferred by statute.[31] In *Myers v. United States*, 272 U.S. 52, 117 (1926), the Court declared the general principle sustaining the delegation by the President of the exercise of his executive authority:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.

We have endorsed the statement of the exception to this general rule expressed by one commentator that

> Where . . . from the nature of the case, or by express constitutional or statutory declaration, the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else.[32]

Thus, this Office has concluded that the President may not delegate his authority to undertake specific functions that are expressly vested in him by the Constitution, such as to grant a pardon, or to transmit and proclaim the ratification of a treaty.[33] And we have suggested that there may be greater limits on his delegation authority in the area of foreign affairs. For instance, we have advised that it would be "safer" to conclude that the President may not delegate his authority to terminate international trade agreements, and to carry out certain duties relating to military assistance, defense programs, and foreign aid. This limitation is based on the view that these were "basic decisions relating to international relations and involve[d] far-reaching policy considerations."[34] The waivers at issue here, in contrast, do not implicate, at least in their individual application, far-reaching

2 (1949). In addition, there are numerous references to the need to provide for delegation of *statutory* duties in other legislative history. S. Rep. No. 81– 1867, (1950), *reprinted in* 1950 U.S.C.C.A.N. 2931.

[31] "In none of the Reports of the Congress [concerning 3 U.S.C. §§ 301–303] is there any definition of the inherent right of the President to delegate the performance of functions vested in him, but both Reports, as well as the Act, recognize that the President has such an inherent right" to the extent "reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of government." Memorandum from Office of Legal Counsel, *Re: President's Authority to Delegate Functions* at 3 (Jan. 24, 1980) ("Generally, it may be said that the inherent rights or implied powers of the President are all those vast powers which are reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of government.").

[32] Memorandum, *Re: President's Authority to Delegate Functions* (Jan. 24, 1980) (quoting Willoughby, *Constitution*, Vol. II, p. 1160).

[33] Memorandum from the Office of Legal Counsel, *Re: Delegation of Presidential Functions*, (Sept. 1, 1955).

[34] *Id.* at 7.

policy considerations. The President would exercise his individual judgment that mutual, government-wide waivers under these particular circumstances are in the public interest; he would delegate merely the application of that judgment to particular agreements. Accordingly, we conclude that the President may delegate his authority to enter into mutual waivers of claims for damages that arise pursuant to cooperative space activity.

V. *Authority to Waive States' Claims*

You have also asked us to advise whether the federal government could bind the fifty states and the District of Columbia to a waiver of state claims. NASA correctly notes that under the terms of its agreements, it does not purport to waive states' claims. However, when federal states enter into international agreements, they are generally viewed as binding their constituent units as well as the central government.[35] Moreover, absent an express agreement to the contrary, the central government generally is responsible for the failure of the constituent units to fulfil their legal obligations.[36]

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[35] Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Conrad K. Harper, Legal Adviser, Department of State (May 5, 1995).

[36] Ivan Bernier, *International Legal Aspects of Federalism 88* (1973) (As a matter of international law, "there can be no doubt that a federal state is responsible for the conduct of its member states."). According to the Restatement, federal states sometimes have sought special provisions in international agreements to take account of restrictions upon the power of the central government to deal with certain matters by international agreement. "Some proposed 'federal-state clauses' would permit a federal state to leave implementation to its constituent units, incurring no violation of international obligation if implementation fails. Even without a special provision, a federal state may leave implementation of its international obligations to its constituent units, but the central government remains responsible if the obligation is not fulfilled." Restatement § 302, reporters' note 4.

We note that the State Department construed the "flow-down" clause of the Intergovernmental Agreement Among the United States, Member States of the European Space Agency, Japan, and Canada (which obligates each signatory to extend the cross-waiver of liability to its own related entities) as follows:

> Each Partner may decide how it intends to implement this obligation, for example, by including the cross-waiver in its contracts with related entities, by enacting legislation, or by any other appropriate means. However, if a Partner had reason to believe that the cross-waiver would not be enforceable under its laws, that Partner should take reasonable steps to enforce the cross-waiver by alternative means, such as by legislation. The Partner's obligation under this paragraph is to take the necessary and appropriate steps to achieve the result; however, it is not an obligation to guarantee the result. Thus, it was recognized that, under extraordinary circumstances, a Partner's domestic court might not enforce the cross-waiver, and that Partner would not be responsible for the resulting liability on the theory that it had breached an obligation. At the same time, a Partner could be expected to take certain steps to minimize the likelihood of such cases.

Memorandum of Law from Alan J. Kreczko, Deputy Legal Adviser, Department of State, *Re: Circular 175: Request for Authority to Conclude an Intergovernmental Agreement with Member States of the European Space Agency, Japan, and Canada and Implementing Memoranda of Understanding Between NASA and the European Space Agency, Canada's Ministry of State for Science and Technology, and the Government of Japan on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station* at 15–16.

It is not clear from the State Department's memorandum what the basis was for its interpretation and conclusion (e.g., a subsequently deleted provision) and whether the interpretation applied to the cross-waiver generally or only the "flow-down" obligation. If it did not apply to the cross-waivers between the various governments, and absent any other provision, then if a U.S. state successfully brought suit against Japan for damages sustained from activities undertaken pursuant to the agreement between the United States and Japan, Japan might have a claim against the United States for indemnification.

It is a fundamental principle of our constitutional law that our foreign affairs are governed by the federal government and that the state governments may not interfere.[37] Moreover, sole executive agreements that purport to create legal obligations, like statutes and treaties, are "the supreme Law of the Land" for purposes of the Supremacy Clause, U.S. Const. art. VI, cl. 2, and thus bind the states.[38] Accordingly, it would seem that there would be no question but that the federal government could, in pursuance of its foreign policy objectives, prohibit states from bringing certain claims against foreign countries. Yet, as Professor Henkin notes, despite many such "light, flat statements" that U.S. foreign relations are strictly national, they "are not in fact wholly insulated from the States."[39] Not surprisingly, the scope of state authority in this regard is not well defined.

The Supreme Court has upheld limitations imposed on the states by the federal government in matters concerning foreign affairs. In both *Belmont* and *Pink*, the Court held that the Litvinov Assignment—a sole executive agreement—would prevail over any inconsistent state policy.[40] In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court held that Oregon inheritance law that required probate courts to inquire into the type of government in particular foreign countries before

[37] *See e.g., Belmont*, 301 U.S. at 331 ("[C]omplete 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." (citations omitted)); *Pink*, 315 U.S. at 232 ("If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."); Laurence H. Tribe, *American Constitutional Law* §4–6, at 230 (2d ed. 1988) (noting 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").

[38] Restatement §1, reporters' note 5 ("There are no clear cases, but principle would support the view that the federal government can preempt and exclude the States not only by statute but by treaty or other international agreement, and even by executive acts that are within the President's constitutional authority."); Restatement §115, reporters' note 5 ("A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law."); Memorandum for Conrad Harper, Legal Adviser, Department of State, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Enforceability of Penalty-Related Assurances Provided to Foreign Nations in Connection with Extradition Requests* (Nov. 18, 1993) (noting that sole executive agreements, valid under the President's own constitutional powers, preempt inconsistent state laws).

[39] Henkin, *Foreign Affairs and the Constitution* at 228.

[40] *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). Again, it could be argued that *Belmont* and *Pink* are distinguishable because they involved the President's exclusive constitutional power to recognize foreign governments and to normalize diplomatic relations. But, again, the language of both opinions has been read to sanction a broader scope of federal power. As Professor Henkin has written:

> [I]t has been suggested that the doctrine of the Belmont case gives supremacy over state law only to executive agreements intimately related to the President's power of recognition, and that even such agreements will supersede only state public policy not formal state laws. Neither of these limitations was expressed—or implied—in *Belmont*, or in the *Pink* case decided five years later by a reconstituted Supreme Court. While *Pink* makes much of the relation of the Litvinov Assignment to the recognition of the Soviet Government, the language and the reasoning of both cases would apply as well to any executive agreement and to any state law.

Henkin, *Foreign Affairs and the Constitution* at 185. *See also* Department of State Legal Adviser's Reply to Senate Office of Legislative Counsel Memorandum on Certain Middle East Agreements (Oct. 6, 1975), *reprinted in* 1 *United States Foreign Relations Law: Documents and Sources* 295, 303–04 (Michael J. Glennon & Thomas M. Franck eds., 1980).

permitting citizens of those countries to inherit property from Oregon residents was an invalid intrusion into the field of foreign affairs. *See also Missouri v. Holland*, 252 U.S. 416 (1920) (upholding, against state's tenth amendment challenge, federal statute that executed a treaty protecting migratory birds).

We are aware of no cases upholding state challenges to federal international agreements on the ground of impermissible interference with state sovereignty.[41] There is, however, dicta suggesting hypothetical constitutional limitations on the federal government's ability to enter into international agreements that override state law. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 486 (1984) ("[I]t is questionable whether the Federal Government could guarantee a New York forum by treaty without violating constitutional principles of federalism and separation of powers."), *cert. denied*, 469 U.S. 1108 (1985).

It could perhaps be argued that the states' right at issue here — the ability to bring claims to recover monies due the state — is a core state prerogative and more like the hypothetical examples of impermissible encroachments on the states than, for instance, the state policy against giving effect to confiscations of assets situated in the state and the inheritance laws at issue in *Belmont*, *Pink*, and *Zschernig*. However, this seems strained as compared to the federal government's undisputed authority to maintain friendly relations with foreign governments, which, arguably, could be compromised by suits filed by states. We believe the weight of authority supports the President's power to waive states' claims against a foreign government.

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Deputy Assistant Attorney General
Office of Legal Counsel

[41] It is generally accepted that the Tenth Amendment does not apply to impose limits on the subject matter of international agreements. *Missouri v. Holland*, 252 U.S. at 434 (federal treaty power is not checked by any "invisible radiation from the general terms of the Tenth Amendment"); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power[s] to the National Government and the Tenth Amendment is no barrier."); Restatement §302 cmt. d ("[T]he Tenth Amendment . . . does not limit the power to make treaties or other agreements.").

Effects of a Presidential Pardon

A full and unconditional presidential pardon precludes the exercise of the authority to deport a convicted alien under 8 U.S.C. § 1251(a)(2).

A full and unconditional presidential pardon removes a state firearm disability arising as a result of a conviction of a federal crime.

A full and unconditional presidential pardon extends to the remission of restitution ordered by a court pursuant to 18 U.S.C. § 3551(b)-(c) as a "sanction" authorized in addition to imprisonment, probation, or a fine until such time as the restitution award is paid to the victim.

June 19, 1995

MEMORANDUM FOR THE PARDON ATTORNEY

This memorandum responds to your request for our opinion concerning whether a full and unconditional presidential pardon precludes the exercise of the authority to deport a convicted alien under 8 U.S.C. § 1251(a)(2),* removes a state firearm disability arising as a result of conviction of a federal crime, or extends to the remission of court-ordered criminal restitution not yet received by the victim of the pardoned offender. We answer all three questions in the affirmative.

I.

A.

Your first question requires us to examine the effect of a presidential pardon on the deportability of an alien on the ground that he or she has been convicted of certain crimes. Section 1251(a) of title 8 describes the classes of aliens who "shall, upon order of the Attorney General, be deported." The various criminal convictions that make an alien deportable are set forth in subsections (A)-(D) of § 1251(a)(2). Subsection 1251(a)(2)(A)(iv) waives the application of subsection (A) (involving crimes of "moral turpitude" and "aggravated felonies") for any offender who "has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." The statute is silent, however, as to the effect of such a pardon on the convictions listed in subsections (B)-(D), which include offenses involving controlled substances, firearms, and miscellaneous crimes.

The Immigration and Naturalization Service takes the position that a pardon only removes the authority to deport an alien whose conviction falls within sub-

*Editor's note: At the time this memorandum was issued, section 1251 of title 8, United States Code, codified section 241 of title II of the Immigration and Naturalization Act ("INA"). Subsequently, on September 30, 1996, that section was redesignated as section 237 of the INA, and was thereafter recodified as 8 U.S.C. § 1227. *See* Pub. L. No. 104-208, § 305(a)(2), 110 Stat. 3009, 3009-598 (1996).

section (A). Although the statute only addresses the effect of a pardon with respect to crimes involving moral turpitude and aggravated felonies, that conclusion does not end the analysis of this issue, because congressional legislation cannot define or limit the effect of a presidential pardon. As Acting Attorney General John W. Davis opined in a similar context:

> The fact that by the act of August 22, 1912, Congress expressly recognized the right of the President to remit such penalties "where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interest" can not affect the power of the President, which exists independently of legislative recognition, to remit such penalties by pardon, whether the offense [was] committed in time of peace or in time of war.

Naval Service—Desertion—Pardon, 31 Op. Att'y Gen. 225, 232 (1918); *see also Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) ("This power of the President [i.e., the pardon power] is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."). Thus, the question raised by your request is not a matter of statutory interpretation, but instead entails consideration of the scope of the President's pardon authority under the Constitution.

Article II, section 2 of the Constitution authorizes the President "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" (the "Pardon Clause"). In *Ex Parte Garland*, the Supreme Court summarized the reach of a presidential pardon as follows:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents . . . the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Garland, 71 U.S. at 380–81. This broad interpretation of the effect of a pardon was affirmed in *Knote v. United States*, 95 U.S. 149 (1877), in which the court stated:

> A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.

Id. at 153.

A presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction, provided that no rights have vested in a third party as a consequence of the judgment. In *Boyd v. United States*, 142 U.S. 450 (1892), for example, the defense objected to the testimony of a witness who had been convicted of larceny. In response, the prosecution presented a full and unconditional pardon issued by President Harrison. The Court held that the pardon restored the competency of the witness to testify. "The disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect." *Id.* at 453–54.

This conclusion is supported by the English common law from which the framers drew their understanding of the scope of the power being granted the Chief Executive. The Pardon Clause of the Constitution was derived from the pardon power held by the King of England at the adoption of the Constitution. Accordingly, the Supreme Court has repeatedly looked to English cases for guidance in interpreting the effect of a pardon. *See, e.g., Schick v. Reed*, 419 U.S. 256, 262–63 (1974); *Ex Parte Wells*, 59 U.S. (18 How.) 307, 310–11 (1855). At common law it was well settled that a pardon by the king removed not only the punishment that flowed from the offense, but also "all the legal disabilities consequent on the crime." 7 Matthew Bacon, *A New Abridgment of the Law* 416 (1852); *see, e.g., Cuddington v. Wilkins*, 80 Eng. Rep. 231, 232 (K.B. 1614) ("[T]he King's pardon doth not only clear the offence it self, but all the dependencies, penalties, and disabilities incident unto it.").

Based on the foregoing analysis, we believe that a deportation order authorized by § 1251(a)(2) is a consequence of a conviction that is precluded by a full and unconditional presidential pardon. Section 1251(a)(2) does not render a person deportable based on the conduct in which he or she engaged. Rather, this provision establishes an additional penalty that attaches solely because of the conviction. Thus, a person who engaged in the conduct prohibited by the relevant criminal statutes but was never convicted of the crime would not be deportable on the basis of this provision; the authority to deport hinges completely on the fact of conviction. Therefore, a presidential pardon would preclude the imposition of the penalty.

We have considered the possible argument that deportation pursuant to § 1251(a)(2) is not precluded by a pardon because the statute does not impose a penalty or disability based on an offense but rather only implements a decision regarding conduct Congress has deemed inconsistent with the qualifications aliens must have to remain in the country. Although in interpreting the pardon power the Supreme Court has never expressly adopted a distinction between penalties that a pardon can remove and qualifications that a pardon does not affect, the Attorneys General and lower courts have invoked it.

For example, in 1898, Attorney General Griggs was asked to consider the effect of a presidential pardon on the administration of a statute that prohibited the reenlistment of any soldier "'whose service during his last preceding term of enlistment ha[d] not been honest and faithful.'" *Army—Enlistment—Pardonk*, 22 Op. Att'y Gen. 36, 37 (1898) (quoting Act of Aug. 1, 1894, ch. 179, § 2, 28 Stat. 215, 216). The soldier in question had been discharged after being convicted of desertion from military service. Subsequently, he was pardoned by the President and sought reenlistment. Because Congress may prescribe qualifications and conditions for military service, Attorney General Griggs sought to determine whether the statute in question set such a qualification or attempted to impose additional disabilities on the offender because of the conviction. He concluded that application of the statute to a pardoned soldier was permissible because it did not seek to prevent reenlistment because of the commission of a criminal offense. Rather, he found that the statute's prohibition related to "previous conduct in service and affect[ed] the personal rather than the criminal character of the applicant." *Id.* at 39. Where a statute "is properly to be regarded as a rule relating to qualification[s] for office," a later opinion concluded, and "does not impose a penalty as such on individual offenders . . . the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon." 31 Op. Att'y Gen. at 230; *accord Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Army*, 39 Op. Att'y Gen. 132 (1938). In contrast, "where a statute although purporting to prescribe qualifications for office has no real relation to that end but is obviously intended to inflict punishment for a past act," a presidential pardon will abate that punishment. 31 Op. Att'y Gen. at 229.[1]

[1] The decision of the Supreme Court in *Garland* illustrates this distinction. In *Garland*, at issue was an act of Congress that attempted to exclude from the practice of law all persons who had participated in the Rebellion. The Court determined that this exclusion was a punishment for the offense of treason. In other words, the Court concluded that, despite Congress's attempt to present its Act as setting qualifications for a profession, it was actually an attempt to exact additional punishment for an offense. The Court held that the Act could not be applied to *Garland* because the President's pardon prohibited the plaintiff from being punished for the offense of treason. To hold that he could be punished under this new law would subvert the President's clemency power. As the Court stated, "[i]f such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency." *Garland*, 71 U.S. at 381; *see also United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Accordingly, any punishment Congress attempted to prescribe for guilt for the offense was not applicable to the plaintiff.

Professor Samuel Williston drew essentially the same distinction in an early and seminal article, reasoning that:

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

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915). In recent decades, several federal courts of appeals have endorsed Williston's view. *See, e.g., United States v. Noonan*, 906 F.2d 952, 958–59 (3d Cir. 1990); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975).

It is clear that deportation based on § 1251(a)(2) operates solely on the basis of the conviction of crime and therefore falls within the type of consequence that is removed by a pardon under the Williston distinction. The provision creates a "disqualification[ ] which would not follow from the commission of the crime without conviction." 28 Harv. L. Rev. at 653. A person who engaged in the conduct prohibited by the relevant criminal statutes but was never convicted of the crime would not be deportable on the basis of this provision. Rather, § 1251(a)(2) excludes only those aliens who have been convicted. As such, its application to a pardoned alien is impermissible.[2]

B.

You have asked us to address specifically whether a pardon removes only the consequences of a conviction or whether it also removes the consequences of an offense even where there has not yet been a conviction. Throughout the Nation's history, Presidents have asserted the power to issue pardons prior to conviction, and the consistent view of the Attorneys General has been that such pardons have as full an effect as pardons issued after conviction. *See, e.g., Pardoning Power of the President*, 6 Op. Att'y Gen. 20 (1853); *Pardons*, 1 Op. Att'y Gen. 341 (1820). Indeed, in two of the best-known exercises of the pardon power (President

[2] It might also be argued that because deportation is not punishment, it is not precluded by a presidential pardon. This argument has been suggested in dicta in two court opinions. *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.) *cert. denied*, 395 U.S. 908 (1969); *United States ex rel. Brazier v. Commissioner of Immigration*, 5 F.2d 162 (2d Cir. 1924); In each instance, the court relied on the Supreme Court's statement in *Mahler v. Eby*, 264 U.S. 32, 39 (1924), that deportation "is not punishment" for purposes of the Ex Post Facto Clause of the Constitution (art. I, § 9), to suggest that a presidential pardon does not preclude deportation. *Kwai Chiu Yuen*, 406 F.2d at 502; *Brazier*, 5 F.2d at 164. We disagree with this argument because we believe that a presidential pardon removes all adverse consequences of conviction that can be viewed as punishments, penalties, or disabilities that attach by reason of the conviction, regardless of whether they are viewed as "punishment" for purposes of invoking other constitutional provisions.

Andrew Johnson's offer of pardons to persons involved in secession but willing to take an oath of loyalty, and President Jimmy Carter's pardon of persons who avoided military service during the Vietnam War), the vast majority of those pardoned had not been convicted of any crime.

The language of the Court's opinion in *Garland* is instructive on this issue:

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

Garland, 71 U.S. at 380 (emphasis added). We understand this passage to mean that a pardon removes or prevents the attachment of all consequences that are based on guilt for the offense. In the great majority of cases, a pardon comes after a conviction; thus, there has already been a finding of guilt in the criminal justice process. It is important to understand, however, that the pardon is for the *guilt* for an offense, not just the *conviction* of the offense. Thus, a pardon for an offense that is issued prior to a conviction has the same effect as one that is issued after a conviction. Any consequences that would have attached had there been a conviction are precluded.[3]

The foregoing analysis does not mean that a pardoned person cannot be held accountable for the conduct underlying the offense by a governmental entity seeking to determine suitability for a position of confidence or trust, adherence to a code of conduct, or eligibility for a benefit. In *Garland* the Court stated that a pardon makes "the offender . . . as innocent as if he had never committed the *offense*." *Id.* (emphasis added). We do not interpret this to mean that the pardon creates the fiction that the *conduct* never took place. Rather, a pardon represents the Executive's determination that the offender should not be penalized or punished for the offense. There may be instances where an individual's conduct constitutes not only a federal offense, but also a violation of a separate code of conduct or ethics that the individual is obligated to comply with by virtue of

[3] Consequences that attach simply by reason of an *indictment* for an offense generally are not precluded by a pardon. Although the consequence is identified with reference to an offense, it generally is not based on guilt for the offense. For example, in *In re North*, 62 F.3d 1434 (D.C. Cir. 1994), the court considered the application to a pardoned individual of the provision of the Independent Counsel Act, 28 U.S.C. §§591–599, that authorizes the payment of attorneys' fees to any person who is investigated by an Independent Counsel, *see* 28 U.S.C. §593(f)(1). The petitioner claimed that, by virtue of a presidential pardon, he was entitled to be reimbursed for attorneys' fees since those fees would have been paid by the government had he not been *indicted* for the offense. In concluding that the pardon did not restore his right to attorneys' fees, the court relied on the rule enunciated in *Knote*, 95 U.S. at 154: the President's exercise of the pardon power is subject to the constitutional requirement that money may not be withdrawn from the Treasury in the absence of a congressional appropriation. The court could also have reached the same conclusion by the reasoning we suggest here. The petitioner would not have been entitled to reimbursement of his attorneys' fees even if he had been found not guilty of the offense at trial. The pardon, therefore, had no effect on his entitlement to payment of attorneys' fees because the refusal to pay attorneys' fees was not a consequence of his guilt for the offense.

his or her professional license. Discipline associated with the breach of the conditions of a professional license, where the disciplinary action is not triggered merely by the fact of commission or conviction of a federal offense, generally would not be barred by a pardon.

For example, an attorney charged with a criminal offense for which he or she is later pardoned by the President would be relieved of all consequences that attached solely by reason of his commission of the offense. However, the pardon would not necessarily prevent a local or state bar from disciplining the attorney, if it independently determined that the underlying conduct, or some portion of it, violated one of its canons of ethics. In those instances, the bar would not have based its decision to disbar or sanction the attorney on the fact that the attorney had violated the criminal laws of the United States, but rather would have conducted an inquiry into the conduct and determined that an ethical violation had occurred. Several state courts have taken this approach when considering the effect of a gubernatorial pardon on state disbarment proceedings. *See e.g., In re Bozarth*, 63 P.2d 726 (Okla. 1936); In re Lavine, 41 P.2d. 161 (Cal. 1935); *Nelson v. Commonwealth*, 109 S.W. 337 (Ky. 1908).

II.

Your second question requires us to determine whether a full and unconditional pardon removes firearms disabilities imposed by a state as a result of a conviction of a federal crime. The materials submitted with your opinion request suggest that the typical disability statute makes it an offense for a person convicted of a state or federal offense to own, possess, or have custody or control of a firearm.[5] *See* Office of the Pardon Att'y, U.S. Dept. of Justice, Civil Disabilities of Convicted Felons: A State-By-State Survey (1992).

Our conclusion in section I that a presidential pardon removes all punishments, penalties, and disabilities that attach solely by reason of a federal offense necessarily requires the conclusion that a pardon removes state firearms disabilities based solely on a federal offense, so long as we can answer affirmatively the question whether the President's pardon power extends beyond federal consequences to include consequences imposed by a state. This question was addressed by the Supreme Court in *Carlesi v. New York*, 233 U.S. 51 (1914). In *Carlesi*, the Court was asked to determine whether the fact that the plaintiff had received a presidential pardon for a federal offense prevented a state from treating the plaintiff as a "second offender" for the purposes of punishment for a subsequent state offense. Writing for a unanimous Court, Chief Justice White stated:

[5] For example, a Colorado statute provides that any person convicted under the laws of a state, or of the United States, of certain crimes within the past ten years or within ten years of release from confinement, may not possess, use or carry on his person a firearm or other weapon prohibited by the firearms laws. Colo. Rev. Stat. Ann. § 18–12–108.

> It may not be questioned that the States are without right directly or indirectly to restrict the National Government in the execution of its legitimate powers. It is therefore to be conceded that if the act of the State in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the State would be void because destroying or circumscribing the effect of the pardon granted under the Constitution and [the] laws of the United States.

Id. at 57. Ultimately, the Court concluded that the state was not seeking to impose additional punishment for the pardoned offense, but rather had made the conduct underlying that offense an aggravating circumstance for purposes of determining the punishment for the second offense. *See id.* at 59. However, it is clear from the above-quoted passage that if the Court had determined that the state was attempting to punish or penalize the offender for the pardoned offense, the state's action would have been a violation of the Constitution. At least one federal court of appeals has expressly adopted this position. In *Bjerkan*, the Seventh Circuit, relying on the Court's dicta in *Carlesi*, held that "a presidential pardon restores state as well as federal civil rights." 529 F.2d at 129. The court stated that once a federal offense has been pardoned, any "attempted punishment [by a state] would constitute a restriction on the legitimate, constitutional power of the President to pardon an offense against the United States and would be void as circumscribing and nullifying that power." *Id.* at 128.

The conclusion that a presidential pardon relieves a federal offender of state firearms disabilities that attach solely by reason of a federal conviction is supported by federal supremacy principles based on the Supremacy Clause of the Constitution. U.S. Const. art. VI, cl. 2. The Pardon Clause gives the President exclusive jurisdiction in the issuance of pardons and reprieves for offenses against the United States. *See Schick*, 419 U.S. at 266–67. Accordingly, the Supreme Court has held repeatedly that Congress may not act in any manner that would limit the full legal effect of a presidential pardon. *See, e.g., Klein*, 80 U.S. at 148; *Garland*, 71 U.S. at 380. The same conclusion is required with respect to acts of a state that would limit or destroy the effect of a presidential pardon. When the President issues a pardon pursuant to this constitutional authorization, the pardon preempts any inconsistent state laws, regulations, or actions. In its sphere — offenses against the United States — the President's pardon power "must be supreme. It cannot be hindered by the operation of the subordinate governments. The pardon power would be ineffective if it could only restore a convict's federal civil rights." *Bjerkan*, 526 F.2d at 129; *see also Harbert v. Deukmejian*,

173 Cal. Rptr. 89 (Cal. Ct. App. 1981) (state firearm disability does not apply to a person who has received a full and unconditional presidential pardon).[5]

III.

Your third question concerns whether a full and unconditional presidential pardon extends to the remission of restitution ordered by a court pursuant to 18 U.S.C. §3551(b)-(c) as a "sanction" authorized in addition to imprisonment, probation, or a fine.[6] This question, to our knowledge, has not been decided by any court, but we conclude, based upon existing precedent, that a pardon does reach such restitution where the victim has not yet received the restitution award, provided the pardon does not contain an express limitation to the contrary.[7]

Although a pardon is a full forgiveness of punishment, there is a limitation on this power. As the Supreme Court explained in *Osborn v. United States*, 91 U.S. 474, 477 (1875):

> If in the proceedings to establish [the offender's] culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the government have vested, those rights cannot be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds.

See also Knote, 95 U.S. at 153–55; *Garland*, 71 U.S. at 381; *cf. Hodges v. Snyder*, 261 U.S. 600, 603 (1923) (holding that the private rights of a party that have been vested by the judgment of a court cannot be taken away by subsequent legislation); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) (same). Thus, whether the restitution order is remitted by the pardon depends on whether the order creates a vested right for the victim.

[5] An 1856 opinion of Attorney General Cushing concludes that a presidential pardon does not extend to legal or political disabilities imposed by one of the states. *Pardons*, 7 Op. Att'y Gen. 760 (1856). However, we decline to follow that opinion because we disagree with the approach it takes on a number of issues. First of all, without any discussion of the scope of the pardon power, the opinion simply accepts the petitioner's assumption that a presidential pardon does not by itself remove a disability imposed by a state on the basis of a federal conviction. More fundamentally, the opinion is inconsistent with the subsequent Supreme Court opinion in *Carlesi*, modern concepts of federalism, and our analysis of the effect of a presidential pardon.

[6] Subsections (b) and (c) of §3551 permit a "[s]anction authorized by [18 U.S.C. §] 3556." Section 3556, in turn, permits a sentence requiring "the defendant [to] make restitution to any victim of the offense in accordance with the provisions of . . . [18 U.S.C. §§] 3663 and 3664." The latter sections impose an elaborate set of procedural and substantive requirements upon the sentencing court concerning the imposition of restitution. Thus, 18 U.S.C. §3551(b)-(c) effectively incorporate by reference the requirements of 18 U.S.C. §§3663 and 3664.

[7] Clearly, the President may grant a pardon on the condition that the offender pay any court-ordered restitution imposed before the pardon was issued. However, the President must expressly state any limitation or condition that he wishes to impose because a pardon is presumed to reach all punishment resulting from an offense. Indeed, even when a limitation is expressly stated, any ambiguity must be construed in favor of the beneficiary of the pardon. *See Knote*, 95 U.S. at 151.

A vested right is one the conferral of which is complete and consummated. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). With respect to rights affected by a presidential pardon, the Court has stated:

> Where . . . property condemned, or its proceeds, have not . . . vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus [vested] when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other.

Knote, 95 U.S. at 154. Thus, we do not believe that restitution orders issued pursuant to 18 U.S.C. §3551(b)-(c) create vested rights in victims until the victims actually receive the award. Prior to that time, the victim does not exercise the complete control over the property required for a right to be vested.

Although 18 U.S.C. §3663(h) provides victims with civil remedies to collect restitution, it does not make restitution a civil judgment that a court may not revoke. To the contrary, a restitution order results from a criminal proceeding that adjudicates guilt and it is issued as part of the offender's sentence. Its character is undeniably penal rather than compensatory. As the Court reasoned in *Kelly v. Robinson*, 479 U.S. 36 (1986):

> Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Id. at 52. Thus, the Eleventh Circuit has held that a victim does not have Article III standing to challenge the revocation of a restitution order. *United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993). Other courts have relied on similar reasoning to deny alleged victims standing to challenge the terms of a restitution order under both the Constitution and 18 U.S.C. §§3663–3664. *See United States v. Kelley*, 997 F.2d 806 (10th Cir. 1993); *United States v. Grundhoefer*, 916 F.2d 788 (2d Cir. 1990).

Based on these decisions, it is clear that a victim does not have complete control over a restitution award prior to receiving it. Rather, he or she is allowed to collect

only pursuant to the terms set forth by the court. Thus, no rights or interests vest in the victim upon the issuance of a restitution order. Because a pardon eliminates all penalties that do not create vested rights in a third party, we conclude that a full and unconditional presidential pardon has the effect of remitting court-ordered criminal restitution that has not yet been received by the victim.

Of course, as should already be clear from the foregoing discussion, the pardon cannot remit a restitution award that the victim has received. Once the victim takes possession, the Executive no longer has control over the award. As the Court stated in Knote, "if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way." 95 U.S. at 154. Therefore, any restitution awards that have been received by the victim prior to the granting of the pardon are not recoverable by the offender.

IV.

For the foregoing reasons, we conclude that a full and unconditional pardon precludes the exercise of the authority to deport a person pursuant to 8 U.S.C. § 1251(a)(2), removes firearms disabilities imposed by a state solely by reason of a federal conviction, and remits restitution awarded pursuant to 18 U.S.C. § 3551(b)-(c) where the victim has not yet received the award. We note, however, that the President can leave undisturbed any of these consequences by expressly stating that their continued existence is a condition of the pardon.

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Legal Guidance on the Implications of the Supreme Court's Decision in *Adarand Constructors, Inc. v. Peña*

This memorandum sets forth preliminary legal guidance on the implications of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, which held that "strict scrutiny" is the standard that governs judicial review of the constitutionality of federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking. The memorandum is not intended to serve as a definitive statement of what *Adarand* means for any particular affirmative action program; rather, it is intended to provide a general overview of the Court's decision and the application of the strict scrutiny standard in the context of affirmative action.

June 28, 1995

MEMORANDUM OPINION TO GENERAL COUNSELS

This memorandum sets forth preliminary legal guidance on the implications of the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), which held that federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking are subject to strict judicial scrutiny. The memorandum is not intended to serve as a definitive statement of what *Adarand* means for any particular affirmative action program. Nor does it consider the prudential and policy questions relevant to responding to *Adarand*. Rather, it is intended to provide a general overview of the Court's decision and the new standard for assessing the constitutionality of federal affirmative action programs.

Our conclusions can be briefly summarized. *Adarand* made applicable to federal affirmative action programs the same standard of review, strict scrutiny, that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), applied to state and local affirmative action measures — with the important caveat that, in this area, Congress may be entitled to greater deference than state and local governments. Although *Adarand* itself involved contracting, its holding is not confined to that context; rather, it is clear that strict scrutiny will now be applied by the courts in reviewing the federal government's use of race-based criteria in health, education, hiring, and other programs as well.

The Supreme Court in *Adarand* was careful to dispel any suggestion that it was implicitly holding unconstitutional all federal affirmative action measures employing racial or ethnic classifications. A majority of the Justices rejected the proposition that "strict scrutiny" of affirmative action measures means "strict in theory, fatal in fact," and agreed that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" may justify the use of race-based remedial measures in certain circumstances. 515 U.S. at 237. *See id.* at 268 (Souter, J., dissenting); *id.* at 273 (Ginsburg, J., dissenting). Only two Justices advocated positions that approach a complete ban on affirmative action.

The Court's decision leaves many questions open—including the constitutionality of the very program at issue in the case. The Court did not discuss in detail the two requirements of strict scrutiny: the governmental interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest. As a consequence, our analysis of *Adarand*'s effects on federal action must be based on *Croson* and the lower court decisions applying strict scrutiny to state and local programs. It is unclear, however, what differences will emerge in the application of strict scrutiny to affirmative action by the national government; in particular, the Court expressly left open the question of what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination against racial and ethnic minority groups. Unlike state and local governments, Congress may be able to rely on national findings of discrimination to justify remedial racial and ethnic classifications; it may not have to base such measures on evidence of discrimination in every geographic locale or sector of the economy that is affected. On the other hand, as with state and local governments under *Croson*, Congress may not predicate race-based remedial measures on generalized, historical societal discrimination.

Two additional questions merit mention at the outset. First, the Court has not resolved whether a governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action *before* it takes such action. A number of courts of appeals have considered this question in reviewing state and local affirmative action plans after *Croson*, and all have concluded that governments may rely on "post-enactment" evidence—that is, evidence that the government did not consider when adopting the measure, but that reflects evidence of discrimination providing support for the government's determination that remedial action was warranted at the time of adoption. Those courts have said that the government must have had some evidence of discrimination when instituting an affirmative action measure, but that it need not marshal all the supporting evidence at that time. Second, while *Adarand* makes clear that remedying past discrimination will in some circumstances constitute a compelling interest sufficient to justify race-based measures, the Court did not address the constitutionality of programs aimed at advancing nonremedial objectives—such as promoting diversity and inclusion. For example, under Justice Powell's controlling opinion in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), increasing the racial and ethnic diversity of the student body at a university constitutes a compelling interest, because it enriches the academic experience on campus. Under strict scrutiny, it is uncertain whether and in what settings diversity is a permissible goal of affirmative action beyond the higher education context. To the extent that affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the achievement of diversity itself.

Our discussion in this memorandum proceeds in four steps. In Section I, we analyze the facts and holding of *Adarand* itself, the scope of what the Court did decide, and the questions it left unanswered. Section II addresses the strict scrutiny standards as applied to state and local programs in *Croson* and subsequent lower court decisions; we consider the details of both the compelling interest and the narrow tailoring requirements *Croson* mandated. In Section III, we turn to the difficult question of how precisely the *Croson* standards should apply to federal programs, with a focus on the degree of deference courts may give to congressional determinations that affirmative action is warranted. Finally, in an appendix, we sketch out a series of questions that should be considered in analyzing the validity under *Adarand* of federal affirmative action programs that employ race or ethnicity as a criterion. The appendix is intended to guide agencies as they begin that process.

I. *The Adarand Case*

A. *Facts*

Adarand involved a constitutional challenge to a Department of Transportation ("DOT") program that compensates persons who receive prime government contracts if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide goal for participation of such concerns at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act further provides that members of designated racial and ethnic minority groups are presumed to be socially disadvantaged. *Id.* § 637(a)(5), § 637(d)(2),(3); 13 C.F.R. § 124.105(b)(1).[1] The presumption is rebuttable. 13 C.F.R. §§ 124.111(c)-(d), 124.601–124.609.[2]

In *Adarand*, a nonminority firm submitted the low bid on a DOT subcontract. However, the prime contractor awarded the subcontract to a minority-owned firm that was presumed to be socially disadvantaged; thus, the prime contractor received additional compensation from DOT. 515 U.S. at 205. The nonminority firm sued DOT, arguing that it was denied the subcontract because of a racial classification, in violation of the equal protection component of the Fifth Amend-

[1] The following groups are entitled to the presumption: African American; Hispanic; Asian Pacific; Subcontinent Asian; and Native American. *See Adarand*, 515 U.S. at 205. This list of eligible groups parallels that of many federal affirmative action programs.

[2] DOT also uses the subcontractor compensation mechanism in implementing the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100–17, § 106(c)(1), 101 Stat. 145, and its successor, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102–240, § 1003(b), 105 Stat. 1919–22. Both laws provide that "not less than 10 percent" of funds appropriated thereunder "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA and ISTEA adopt the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions. *Adarand*, 515 U.S. at 208.

ment's Due Process Clause. The district court granted summary judgment for DOT. The Court of Appeals for the Tenth Circuit affirmed, holding that DOT's race-based action satisfied the requirements of "intermediate scrutiny," which it determined was the applicable standard of review under the Supreme Court's rulings in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *See Adarand*, 515 U.S. at 210.

B. *The Holding*

By a five-four vote, in an opinion written by Justice O'Connor, the Supreme Court held in *Adarand* that strict scrutiny is now the standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decisionmaking. The Court made clear that this standard applies to programs that are mandated by Congress, as well as those undertaken by government agencies on their own accord. 515 U.S. at 227. The Court overruled *Metro Broadcasting* to the extent that it had prescribed a more lenient standard of review for federal affirmative action measures. *Id.*[3]

Under strict scrutiny, a racial or ethnic classification must serve a "compelling interest" and must be "narrowly tailored" to serve that interest. *Id.*[4] This is the same standard of review that, under the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), applies to affirmative action measures adopted by state and local governments. It is also the same standard of review that applies to government classifications that facially discriminate against minorities. *Adarand*, 515 U.S. at 221–24.

In a portion of her opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, Justice O'Connor sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' " when it comes to affirmative action. *Id.* at 237 (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment)). While that familiar maxim doubtless remains true with respect to classifications that, on their face, single out racial and ethnic minorities for invidious treatment,[5] Justice O'Connor's opinion declared that the federal government may have a compelling interest to act on the basis of race to overcome the "persistence of both the practice and lingering effects of racial discrimination against minority groups in this country." *Id.* In this respect, Justice O'Connor's opinion in *Adarand* tracks her majority opinion in *Croson*. There, too, the Court

[3] Justice O'Connor (along with three other Justices) had dissented in *Metro Broadcasting* and urged the adoption of strict scrutiny as the standard of review for federal affirmative action measures.

[4] A classification reviewed under intermediate scrutiny need only (i) serve an "important" governmental interest and (ii) be "substantially related" to the achievement of that objective. *Metro Broad.*, 497 U.S. at 564–65.

[5] *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (racial and ethnic classifications that single out minorities for disfavored treatment are in almost all circumstances "irrelevant to any constitutionally acceptable legislative purpose") (internal quotations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies" state law that prohibited interracial marriages).

declined to interpret the Constitution as imposing a flat ban on affirmative action by state and local governments. 488 U.S. at 509–11.

Two members of the *Adarand* majority, Justices Scalia and Thomas, wrote separate concurring opinions in which they took a more stringent position. Consistent with his concurring opinion in *Croson*, Justice Scalia would have adopted a near-absolute constitutional bar to affirmative action. Taking issue with Justice O'Connor's proposition that racial classifications may be employed in certain circumstances to remedy discrimination against minorities, Justice Scalia stated that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make-up' for past racial discrimination in the opposite direction." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).[6] According to Justice Scalia, "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual . . . ." *Id.* The compensation of victims of specific instances of discrimination through "make-whole" relief, which Justice Scalia accepts as legitimate, is not affirmative action, as that term is generally understood. Affirmative action is a group-based remedy: where a group has been subject to discrimination, individual members of the group can benefit from the remedy, even if they have not proved that they have been discriminated against personally.[7] Justice O'Connor's treatment of affirmative action in *Adarand* is consistent with this understanding.

Although Justice Thomas joined the portion of Justice O'Connor's opinion holding that the government's interest in redressing the effects of discrimination can be sufficiently compelling to warrant the use of remedial racial and ethnic classifications, he apparently agrees with Justice Scalia's rejection of the group-based approach to remedying discrimination. Justice Thomas stated that the "government may not make distinctions on the basis of race," and that it is "irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

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[6] In his *Croson* concurrence, Justice Scalia said that he believes that "there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." 488 U.S. at 524 (Scalia, J., concurring in the judgment). For Justice Scalia, "[t]his distinction explains [the Supreme Court's] school desegregation cases, in which [it has] made plain that States and localities sometimes have an obligation to adopt race-conscious remedies." *Id.* The school desegregation cases are generally not thought of as affirmative action cases, however. Outside of that context, Justice Scalia indicated that he believes that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that our Constitution is color-blind." *Id.* at 521.

[7] *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–78 (1986) (plurality opinion), *id.* at 287 (O'Connor, J., concurring).

The four dissenting Justices in *Adarand* (Justices Stevens, Souter, Ginsburg, and Breyer)[8] would have reaffirmed the intermediate scrutiny standard of review for congressionally authorized affirmative action measures established in *Metro Broadcasting*, and would have sustained the DOT program on the basis of *Fullilove*, where the Court upheld federal legislation requiring grantees to use at least ten percent of certain grants for public works projects to procure goods and services from minority businesses. Justices Stevens and Souter argued that the DOT program was more narrowly tailored than the legislation upheld in *Fullilove*. *Adarand*, 515 U.S. at 259–64 (Stevens, J., dissenting); *id.* at 266–67 (Souter. J., dissenting). All four dissenters stressed that there is a constitutional distinction between racial and ethnic classifications that are designed to aid minorities and classifications that discriminate against them. As Justice Stevens put it, there is a difference between a "No Trespassing" sign and a "welcome mat." *Id.* at 245 (Stevens, J., dissenting). *See id.* ("[a]n attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a [race-based] subsidy that enables a relatively small group of [minorities] to enter that market"); *see also id.* at 270 (Souter, J., dissenting); *id.* at 275–76 (Ginsburg, J., dissenting). For the dissenters, Justice O'Connor's declaration that strict scrutiny of affirmative action programs is not "fatal in fact" signified a "common understanding" among a majority of the Court that those differences do exist, and that affirmative action may be entirely proper in some cases. *Id.* at 271, 275 (Ginsburg, J., dissenting). In Justice Ginsburg's words, the "divisions" among the Justices in *Adarand* "should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." *Id.* at 273. The dissenters also emphasized that there is a "significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality." *Id.* at 249 (Stevens, J., dissenting); *id.* at 264 (Souter, J., dissenting). They stressed that unlike state and local governments, Congress enjoys express constitutional power to remedy discrimination against minorities; therefore, it has more latitude to engage in affirmative action than do state and local governments. *Id.* at 255 (Stevens, J., dissenting). Justice Souter noted that the majority opinion did not necessarily imply a contrary view. *Id.* at 268–69 (Souter, J., dissenting).

Thus, there were at most two votes in *Adarand* (Justices Scalia and Thomas) for anything that approaches a blanket prohibition on race-conscious affirmative action. Seven justices confirmed that federal affirmative action programs that use

[8] Justice Stevens wrote a dissenting opinion that was joined by Justice Ginsburg. Justice Souter wrote a dissenting opinion that was joined by Justices Ginsburg and Breyer. And Justice Ginsburg wrote a dissenting opinion that was joined by Justice Breyer.

race or ethnicity as a decisional factor can be legally sustained under certain circumstances.

C. *Scope of Adarand*

Although *Adarand* involved government contracting, it is clear from the Supreme Court's decision that the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking.[9] Thus, the impact of the decision is not confined to contracting, but will reach race-based affirmative action in health and education programs, and in federal employment.[10] Furthermore, *Adarand* was not a "quota" case: its standards will apply to any classification that makes race or ethnicity a basis for decisionmaking.[11] Mere outreach and recruitment efforts, however, typically should not be subject to the *Adarand* standards. Indeed, post-*Croson* cases indicate that such efforts are considered race-neutral means of increasing minority opportunity.[12] In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, *Adarand* ordinarily would be inapplicable.[13]

Adarand does not require strict scrutiny review for programs benefitting Native Americans as members of federally recognized Indian tribes. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court applied rational basis review

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[9] By voluntary affirmative action, we mean racial or ethnic classifications that the federal government adopts on its own initiative, through legislation, regulations, or internal agency procedures. This should be contrasted with affirmative action that is undertaken pursuant to a court-ordered remedial directive in a race discrimination lawsuit against the government, or pursuant to a court-approved consent decree settling such a suit. Prior to *Croson*, the Supreme Court had not definitely resolved the standard of review for court-ordered or court-approved affirmative action. *See United States v. Paradise*, 480 U.S. 149 (1987) (court order); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (consent decree) The Court has not revisited the issue since *Croson* was decided. Lower courts have applied strict scrutiny to affirmative action measures in consent decrees. *See, e.g., Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991) (Breyer, J.) *cert. denied*, 504 U.S. 913 (1992).

[10] Title VII of the 1964 Civil Rights Act is the principal federal employment discrimination statute. The federal government is subject to its strictures. *See* 42 U.S.C. §2000e–17. The Supreme Court has held that the Title VII restrictions on affirmative action in the workplace are somewhat more lenient than the constitutional limitations. *See Johnson v. Transportation Agency*, 480 U.S. 616, 627–28 n.6 (1987). *But see id.* at 649 (O'Connor, J., concurring in the judgment) (expressing view that Title VII standards for affirmative action should be "no different" from constitutional standards).

[11] We do not believe that *Adarand* calls into question federal assistance to historically-black colleges and universities.

[12] *See, e.g., Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557–58 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 908 (1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

[13] Outreach and recruitment efforts conceivably could be viewed as race-based decisionmaking of the type subject to *Adarand* if such efforts work to create a "minorities-only" pool of applicants or bidders, or if they are so focused on minorities that nonminorities are placed at a significant competitive disadvantage with respect to access to contracts, grants, or jobs.

to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is "political rather than racial in nature," because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. *See id.* at 553 n.24.

Adarand did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decision-making. Indeed, the Supreme Court has never resolved the matter.[14] However, both before and after *Croson*, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women.[15] The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on *Croson*, it held that gender-based affirmative action measures are subject to strict scrutiny.[16] That holding has been criticized by other courts of appeals, which have correctly pointed out that *Croson* does not speak to the appropriate standard of review for such measures.[17]

D. *Open Questions on Remand*

Adarand did not determine the constitutionality of any particular federal affirmative action program. In fact, the Supreme Court did not determine the validity of the federal legislation, regulations, or program at issue in *Adarand* itself. Instead, the Court remanded the case to the Tenth Circuit for a determination of whether the measures satisfy strict scrutiny.

Adarand left open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments. This is a theme that some of the Justices had explored in prior cases. For example, in a portion of her *Croson* opinion joined by Chief Justice Rehnquist and Justice White, Justice O'Connor wrote that Congress may have more latitude than state and local governments in utilizing affirmative action. And in his concurrence in *Fullilove*, Justice Powell, applying strict scrutiny, upheld a congressionally mandated program, and in so doing, said that he was mindful that Congress possesses broad powers to remedy discrimination nationwide. In any event, in *Adarand*, the Court said that it did not have

[14] The lone gender-based affirmative action case that the Supreme Court has decided is *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). But *Johnson* only involved a Title VII challenge to the use of gender classifications—no constitutional claim was brought. *Id.* at 620 n.2. And as indicated above (*see supra* note 10), the Court in *Johnson* held that the Title VII parameters of affirmative action are not coextensive with those of the Constitution.

[15] *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579–80 (11th Cir. 1994); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1009–10 (3d Cir. 1993); *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992) (Thomas, J.); *Coral Constr. Co. v. King County*, 941 F.2d at 930–31; *Associated Gen. Contractors v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

[16] *See Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989); *see also Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994).

[17] *See, e.g., Seibels*, 31 F.3d at 1580.

to resolve whether and to what extent courts should pay special deference to Congress in evaluating federal affirmative action programs under strict scrutiny.

Aside from articulating the components of the strict scrutiny standard, the Court's decision in *Adarand* provides little explanation of how the standard should be applied. For more guidance, one needs to look to *Croson* and lower court decisions applying it. That exercise is important because *Adarand* basically extends the *Croson* rules of affirmative action to the federal level — with the caveat that application of those rules might be somewhat less stringent where affirmative action is undertaken pursuant to congressional mandate.

II. *The Croson Standards*

In *Croson*, the Supreme Court considered a constitutional challenge to a Richmond, Virginia ordinance that required prime contractors who received city contracts to subcontract at least thirty percent of the dollar amount of those contracts to businesses owned and controlled by members of specified racial and ethnic minority groups — commonly known as minority business enterprises ("MBEs"). The asserted purpose of Richmond's ordinance was to remedy discrimination against minorities in the local construction industry.

Croson marked the first time that a majority of the Supreme Court held that race-based affirmative action measures are subject to strict scrutiny.[18] Justice O'Connor's opinion in *Croson*[19] said that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." 488 U.S. at 493 (plurality opinion). *See also id.* at 520 (Scalia, J., concurring in the judgment) ("[S]trict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is 'remedial' or 'benign.'"). In short, the compelling interest inquiry centers on "ends" and asks *why* the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring inquiry focuses on "means" and asks *how* the government is seeking to meet the objective of the racial or ethnic classification.

Applying strict scrutiny, the Court held that (a) the Richmond MBE program did not serve a "compelling interest" because it was predicated on insufficient

[18] *Croson* was decided by a six-three vote. Five of the Justices in the majority (Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy) concluded that strict scrutiny was the applicable standard of review. Justice Stevens concurred in part and concurred in the judgment, but consistent with his long-standing views, declined to "engag[e] in a debate over the proper standard of review to apply in affirmative-action litigation." 488 U.S. at 514 (Stevens, concurring in part and concurring in the judgment).

[19] Justice O'Connor's opinion was for a majority of the Court in some parts, and for a plurality in others.

evidence of discrimination in the local construction industry, and (b) it was not "narrowly tailored" to the achievement of the city's remedial objective.

A. *Compelling Governmental Interest*

1. *Remedial Objectives*

Justice O'Connor's opinion in *Croson* stated that remedying the identified effects of past discrimination may constitute a compelling interest that can support the use by a governmental institution of a racial or ethnic classification. This discrimination could fall into two categories. First, the government can seek to remedy the effects of its own discrimination. Second, the government can seek to remedy the effects of discrimination committed by private actors within its jurisdiction, where the government becomes a "passive participant" in that conduct, and thus helps to perpetuate a system of exclusion. 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). In either category, the remedy may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that has ceased. *See Adarand*, 515 U.S. at 269 (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

Croson requires the government to identify with precision the discrimination to be remedied. The fact and legacy of general, historical societal discrimination is an insufficient predicate for affirmative action: "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." 488 U.S. at 499. *See id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."). Similarly, "amorphous" claims of discrimination in certain sectors and industries are inadequate. *Id.* at 499 ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). Such claims "provide[ ] no guidance for [the government] to determine the precise scope of the injury it seeks to remedy," and would have "no logical stopping point." *Id.* at 498 (internal quotations omitted). The Court indicated that its requirement that the government identify with specificity the effects of past discrimination anchors remedial affirmative action measures in the present. It declared that "[i]n the absence of particularized findings" of discrimination, racial and ethnic classifica-

tions could be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* (internal quotations omitted).

The Court in *Croson* did not require a judicial determination of discrimination in order for a state or local government to adopt remedial racial or ethnic classifications. Rather, relying on Justice Powell's plurality opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), the Court said that the government must have a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). The Court then suggested that this evidence should approach "a prima facie case of a constitutional or statutory violation" of the rights of minorities. 488 U.S. at 500.[20] Notably, the Court said that significant statistical disparities between the level of minority participation in a particular field and the percentage of qualified minorities in the applicable pool could permit an inference of discrimination that would support the use of racial and ethnic classifications intended to correct those disparities. *Id.* at 507. *See id.* at 501 ("There is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.") (internal quotations omitted). But the Court said that a mere underrepresentation of minorities in a particular sector or industry when compared to general population statistics is an insufficient predicate for affirmative action. *Id.* ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who may possess the necessary qualifications) may have little probative value.") (internal quotations omitted).

Applying its "strong basis in evidence" test, the Court held that the statistics on which Richmond based its MBE program were not probative of discrimination in contracting by the city or local contractors, but at best reflected evidence of general societal discrimination. Richmond had relied on limited testimonial evidence of discrimination, supplemented by statistical evidence regarding: (i) the disparity between the number of prime contracts awarded by the city to minorities during the years 1978–1983 (less than one percent) and the city's minority population (fifty percent), and (ii) the extremely low number of MBEs that were members of local contractors' trade associations. The Court found that this evidence was insufficient. It said that more probative evidence would have compared, on the one hand, the number of qualified MBEs in the local labor market with, on the other hand, the number of city contracts awarded to MBEs and the number of MBEs in the local contractors' associations.

[20] Lower courts have consistently said that *Croson* requires remedial affirmative action measures to be supported by a "strong basis in evidence" that such action is warranted. *See, e.g., Peightal*, 26 F.3d at 1553; *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir 1994), *cert. denied*, 514 U.S. 1004 (1995); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir.), *cert. denied*, 502 U.S. 1059 (1991). Some courts have said that this evidence should rise to the level of prima facie case of discrimination against minorities. *See, e.g., O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Stuart*, 951 F.2d at 450; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir.), *cert denied*, 498 U.S. 983 (1990).

In *Adarand*, Justice O'Connor's opinion noted that "racial discrimination against minority groups in this country is an unfortunate reality," and as an example, it pointed to the "pervasive, systematic, and obstinate discriminatory conduct" that underpinned the court-ordered affirmative action measures that were upheld *in United States v. Paradise*, 480 U.S. 149 (1987). *Adarand*, 515 U.S. at 237 (internal quotations omitted).[21] Her opinion did not say, however, that only overwhelming evidence of the sort at issue in *Paradise* can justify affirmative action. Again, *Croson* indicates that what is required is a "strong basis in evidence" to support the government's conclusion that race-based remedial action is warranted, and that such evidence need only approach a prima facie showing of discrimination against minorities. 488 U.S. at 500. The factual predicate in *Paradise* plainly exceeded a prima facie showing. Post-*Croson* lower court decisions support the conclusion that the requisite factual predicate for race-based remedial action does not have to rise to the level of discrimination in *Paradise*.

The Court in *Croson* left open the question whether a government may introduce statistical evidence showing that the pool of qualified minorities would have been larger "but for" the discrimination that is to be remedied. Post-*Croson* lower court decisions have indicated that such evidence can be probative of discrimination.[22]

Croson also did not discuss the weight to be given to anecdotal evidence of discrimination that a government gathers through complaints filed with it by minorities or through testimony in public hearings. Richmond had relied on such evidence as additional support for its MBE plan, but the Court discounted it. Post-*Croson* lower court cases, however, have said that anecdotal evidence can buttress statistical proof of discrimination.[23]

In addition, *Croson* did not discuss which party has the ultimate burden of persuasion as to the constitutionality of an affirmative action program when it is challenged in court. Prior to *Croson*, the Supreme Court had spelled out the following evidentiary rule: while the entity defending a remedial affirmative action measure bears the initial burden of production to show that the measures are supported by "a strong basis in evidence," the "ultimate burden" of proof rests

[21] The measures at issue in *Paradise* were intended to remedy discrimination by the Alabama Department of Public Safety, which had not hired a black trooper at any rank for four decades, 480 U.S. at 168 (plurality opinion), and then when blacks finally entered the department, had consistently refused to promote blacks to the upper ranks. *Id.* at 169–71.

[22] *See, e.g., Contractors Ass'n*, 6 F.3d at 1008; *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992); *cf. Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (government had evidence that an "old boy network" in the local construction industry had precluded minority businesses from breaking into the mainstream of "qualified" public contractors), *cert. denied*, 503 U.S. 985 (1992).

[23] *See, e.g., Contractors Ass'n*, 6 F.3d at 1002–03 (while anecdotal evidence of discrimination alone rarely will satisfy the *Croson* requirements, it can place important gloss on statistical evidence of discrimination); *Coral Constr. Co.*, 941 F.2d at 919 ("[t]he combination of convincing anecdotal and statistical evidence is potent;" anecdotal evidence can bring "cold numbers to life"); *Cone Corp.* 908 F.2d at 916 (testimonial evidence adduced by county in developing MBE program, combined with gross statistical disparities in minority participation in public contracting, provided "more than enough evidence on the question of prior discrimination and need for racial classification").

upon those challenging the measure to demonstrate that it is unconstitutional. *Wygant*, 476 U.S. at 277–78 (plurality opinion).[24] Lower courts consistently have said that nothing in *Croson* disturbs this evidentiary rule.[25]

Finally, and perhaps most significantly, *Croson* did not resolve whether a government must have sufficient evidence of discrimination at hand *before* it adopts a racial classification, or whether "post-hoc" evidence of discrimination may be used to justify the classification at a later date — for example, when it is challenged in litigation. The Court did say that governments must "identify [past] discrimination with some specificity before they may use race-conscious relief." 488 U.S. at 504. However, every court of appeals to consider the question has allowed governments to use "post-enactment" evidence to justify affirmative action — that is, evidence that the government did not consider when adopting a race-based remedial measure, but that nevertheless reflects evidence of discrimination providing support for the determination that remedial action was warranted at the time of adoption.[26] Those courts have interpreted *Croson* as requiring that a government have *some* evidence of discrimination prior to embarking on remedial race-conscious action, but not that it marshal all such evidence at that time.[27]

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[24] *See also Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (when the government "introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the [government] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [challengers] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored' ").

[25] *See, e.g., Concrete Works*, 36 F.3d at 1521–22; *Contractors Ass'n*, 6 F.3d at 1005; *Cone Corp.*, 908 F.2d at 916.

[26] *See Concrete Works*, 36 F.3d at 1521; *Contractors Ass'n*, 6 F.3d at 1004), *Coral Constr. Co.*, 941 F.2d at 920. As the Second Circuit put it when permitting a state government to rely on post-enactment evidence to defend a race-based contracting measure, "[t]he law is plain that the constitutional sufficiency of . . . proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment." *Harrison & Burrowes Bridge Constr. Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992).

[27] *See Concrete Works*, 36 F.3d at 1521 ("Absent any preenactment evidence of discrimination, a municipality would be unable to satisfy *Croson*. However, we do not read *Croson*'s evidentiary requirement as foreclosing the consideration of post-enactment evidence."); *Coral Constr. Co.*, 941 F.2d at 920 (requirement that municipality have "some evidence" of discrimination before engaging in race-conscious action "does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Rather, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the [program]."). One court has observed that the "risk of insincerity associated with post-enactment evidence . . . is minimized" where the evidence "consists essentially of an evaluation and re-ordering of [the] pre-enactment evidence" on which a government expressly relied in formulating its program. *Contractors Ass'n*, 6 F.3d at 1004. Application of the post-enactment evidence rule in that case essentially gave the government a period of transition in which to build an evidentiary foundation for an affirmative action program that was adopted before *Croson*, and thus without reference to the *Croson* requirements. In *Coral Construction*, the Ninth Circuit permitted the government to introduce post-enactment evidence to provide further factual support for a program that had been adopted *after Croson*, with the *Croson* standards in mind. *See Coral Constr. Co.*, 941 F.2d at 914–15, 919–20.

2. *Nonremedial Objectives*

Because Richmond defended its MBE program on remedial grounds, the Court in *Croson* did not explicitly address if and when affirmative action may be adopted for "nonremedial" objectives, such as promoting racial diversity and inclusion. The same is true of the majority opinion in *Adarand*, since the program at issue in that case also is said to be remedial. In his *Adarand* dissent, Justice Stevens said that the majority's silence on the question does not foreclose the use of affirmative action to serve nonremedial ends. 515 U.S. at 258 (Stevens, J., dissenting). Thus, in the wake of *Croson* and *Adarand*, there are substantial questions as to whether and in what settings nonremedial objectives can constitute a compelling interest.[28]

To date, there has never been a majority opinion for the Supreme Court that addresses the question. The closest the Court has come in that regard is Justice Powell's separate opinion in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), which said that a university has a compelling interest in taking the race of applicants into account in its admissions process in order to foster greater diversity among the student body.[29] According to Justice Powell, this would bring a wider range of perspectives to the campus, and in turn, would contribute to a more robust exchange of ideas — which Justice Powell said was the central mission of higher education and in keeping with the time-honored First Amendment value in academic freedom. *See id.* at 311–14.[30] Since *Bakke*, Justice Stevens has been the most forceful advocate on the Court for nonremedial affirmative action measures. He has consistently argued that affirmative action makes just as much sense when it promotes an interest in creating a more inclusive and diverse society for today and the future, as when it serves an interest in remedying past wrongs. *See Adarand*, 515 U.S. at 257 (Stevens, J., dissenting); *Croson*, 488 U.S. at 511–12 & n.1 (Stevens, J., concurring); Johnson, 480 U.S. at 646–47 (Stevens, J., concurring); *Wygant*, 476 U.S. at 313–15 (Stevens, J., dissenting). As a circuit judge in a case involving an ostensibly remedial affirmative action measure, Justice Ginsburg announced her agreement with Justice Stevens' position "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified." *O'Donnell Constr. Co.*, 963 F.2d at 429 (Ginsburg, J., concurring) (citing Justice Stevens' concurrence in *Croson*, 488 U.S. at 511).

In *Metro Broadcasting*, the majority relied on *Bakke* and Justice Stevens' vision of affirmative action to uphold FCC affirmative action programs in the licensing of broadcasters on nonremedial grounds; the Court said that diversification of

[28] Given the nation's history of discrimination, virtually all affirmative action can be considered remedial in a broad sense. But as *Croson* makes plain, that history, on its own, cannot properly form the basis of a remedial affirmative action measure under strict scrutiny.

[29] Although Justice Powell wrote for himself in *Bakke*, his opinion was the controlling one in the case.

[30] Although it apparently has not been tested to any significant degree in the courts, Justice Powell's thesis may carry over to the selection of university faculty: the greater the racial and ethnic diversity of the professors, the greater the array of perspectives to which the students would be exposed.

ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation's radio and television airwaves. 497 U.S. at 567–68. The Court reached that conclusion under intermediate scrutiny, however, and thus did not hold that the governmental interest in seeking diversity in broadcasting is "compelling." *Adarand* did not overrule the result in *Metro Broadcasting*—a point not lost on Justice Stevens. *See Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The majority today overrules *Metro Broad.* only insofar as it" is inconsistent with the holding that federal affirmative action measures are subject to strict scrutiny. "The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case . . . .").

On the other hand, portions of Justice O'Connor's opinion in *Croson* and her dissenting opinion in *Metro Broadcasting* appear to cast doubt on the validity of nonremedial affirmative action programs. In one passage in her opinion in *Croson*, Justice O'Connor stated that affirmative action must be "strictly reserved for the remedial setting." 488 U.S. at 493 (plurality opinion). Echoing that theme in her dissenting opinion (joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) in *Metro Broadcasting*, Justice O'Connor urged the adoption of strict scrutiny for federal affirmative action measures, and asserted that under that standard, only one interest has been "recognized" as compelling enough to justify racial classifications: "remedying the effects of racial discrimination." 497 U.S. at 612. Justice Kennedy's separate dissent in *Metro Broadcasting* was also quite dismissive of non-remedial justifications for affirmative action; he criticized the majority opinion for "allow[ing] the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination"). *Id.* at 632 (Kennedy, J., dissenting).

Nowhere in her *Croson* and *Metro Broadcasting* opinions did Justice O'Connor expressly disavow Justice Powell's opinion in *Bakke*. Accordingly, lower courts have assumed that Justice O'Connor did not intend to discard *Bakke*.[31] That proposition is supported by Justice O'Connor's own concurring opinion in *Wygant*, in which she expressed approval of Justice Powell's view that fostering racial and ethnic diversity in higher education is a compelling interest. 476 U.S. at 286. Furthermore, in *Wygant*, Justice O'Connor said that there might be governmental

[31] *See Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 353–54 (D.C. Cir. 1989), *aff'd sub. nom. Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Winter Park*, 873 F.2d at 357 (Williams, J., concurring in part and dissenting in part); *Shurberg Broad., Inc. v. FCC*, 876 F.2d 902, 942 (D.C. Cir. 1989) (Wald, C.J., dissenting), *aff'd sub. nom. Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990). In *Davis v. Halpern*, 768 F. Supp. 968 (S.D.N.Y. 1991), the court reviewed the law of affirmative action in the wake of *Croson* and *Metro Broadcasting*, and, citing Justice Powell's opinion in *Bakke*, said that a university has a compelling interest in seeking to increase the diversity of its student body. *Id.* at 981. *See also United States v. Board of Educ. Township of Piscataway*, 832 F. Supp. 836, 847–48 (D.N.J. 1993) (under constitutional standards for affirmative action, diversity in higher education is a compelling governmental interest) (citing *Bakke* and *Croson*).

interests other than remedying discrimination and promoting diversity in higher education that might be sufficiently compelling to support affirmative action. *Id.* For example, Justice O'Connor left open the possibility that promoting racial diversity among the faculty at primary and secondary schools could count as a compelling interest. *Id.* at 288 n*. In his *Wygant* dissent, Justice Stevens argued that this is a permissible basis for affirmative action. *Id.* at 313–15 (Stevens, J., dissenting).

On the assumption that *Bakke* remains the law, it is clear that to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself.[32] As *Bakke* teaches, in higher education, that asserted goal is the enrichment of the academic experience. And according to the majority in *Metro Broadcasting*, the asserted independent goal that justifies diversifying the owners of broadcast licenses is adding variety to the perspectives that are communicated in radio and television. That same kind of analysis must be applied to efforts to promote racial and ethnic diversity in other settings.

For instance, diversification of the ranks in a law enforcement agency arguably serves vital public safety and operational needs, and thus enhances the agency's ability to carry out its functions effectively. *See Wygant*, 476 U.S. at 314 (Stevens, J., dissenting) ("[I]n law enforcement . . . in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites."); *Paradise*, 480 U.S. at 167 n.18 (plurality opinion) (noting argument that race-conscious hiring can "restore[] community trust in the fairness of law enforcement and facilitate[] effective police service by encouraging citizen cooperation").[33] It is more difficult to identify any independent goal that may be attained by diversifying the racial mix of public contractors. Justice Stevens concurred in the judgment in *Croson* on precisely that ground. Citing his own *Wygant* dissent, Justice Stevens contrasted the "educational benefits to the entire student body" that he said could be achieved through faculty diversity with the minimal societal benefits (other than remedying past discrimination, a predicate that he said was not supported by the evidence in *Croson*) that would flow from a diversification of the contractors with whom a municipality does business. *See Croson*, 488 U.S. at 512–13 (Stevens, J., concurring in part and concurring in the judgment). Furthermore, the Court has stated that the desire to develop a

[32] The Court has consistently rejected "racial balancing" as a goal of affirmative action. *See Croson*, 488 U.S. at 507; *Johnson*, 480 U.S. at 639; *Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 475 (1986) (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

[33] *See also Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) ("The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.").

growing class of successful minority entrepreneurs to serve as "role models" in the minority community is not, on its own, a valid basis for a racial or ethnic classification. *See Croson*, 488 U.S. at 497 (citing *Wygant*, 476 U.S. at 276 (plurality opinion)); *see also Wygant*, 476 U.S. at 288 n* (O'Connor, J., concurring).

Diversification of the health services profession was one of the stated predicates of the racial and ethnic classifications in the medical school admissions program at issue in *Bakke*. The asserted independent goal was "improving the delivery of health-care services to communities currently underserved." *Bakke*, 438 U.S. at 310. Justice Powell said that "[i]t may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." *Id.* The problem in *Bakke*, however, was that there was "virtually no evidence" that the preference for minority applicants was "either needed or geared to promote that goal." *Id.*[34]

Assuming that some nonremedial objectives remain a legitimate basis for affirmative action after *Adarand*, there is a question of the nature of the showing that may be necessary to support racial and ethnic classifications that are premised on such objectives. In higher education, the link between the diversity of the student body and the diversity of viewpoints on the campus does not readily lend itself to empirical proof. Justice Powell did not require any such evidence in *Bakke*. He said that the strong First Amendment protection of academic freedom that allows "a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312. A university is thus due some discretion to conclude that a student "with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id.* at 314.

It could be said that this thesis is rooted in a racial stereotype, one that presumes that members of racial and ethnic minority groups have a "minority perspective" to convey. As Justice O'Connor stated in *Croson*, a driving force behind strict scrutiny is to ensure that racial and ethnic classifications are not motivated by "stereotype." *Croson*, 488 U.S. at 493 (plurality opinion). There are sound arguments to support the contention that seeking diversity in higher education rests on valid assumptions. The thesis does not presume that all individuals of a particular race or ethnic background think and act alike. Rather, it is premised on what seems to be a common sense proposition that in the aggregate, increasing the diversity of the student body is bound to make a difference in the array of perspectives communicated at a university. *See Metro Broad.*, 497 U.S. at 579 ("The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every

[34] Aside from the proffered justification in *Bakke*, the government may have other reasons for seeking to increase the number of minority health professionals.

case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on average, to the robust exchange of ideas.") (internal quotations omitted). Nonetheless, after *Croson* and *Adarand*, a court might demand some proof of a nexus between the diversification of the student body and the diversity of viewpoints expressed on the campus.[35] Likewise, a court may demand a factual predicate to support the proposition that greater diversity in a law enforcement agency will serve the operational needs of the agency and improve its performance,[36] or that minority health care professionals are more likely to work in medically underserved communities.[37]

B. *Narrow Tailoring Test*

In addition to advancing a compelling goal, any governmental use of race must also be "narrowly tailored." There appear to be two underlying purposes of the narrow tailoring test: first, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking; and, second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable. As it has been applied by the courts, the factors that typically make up the "narrow tailoring" test are as follows: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (iii) the manner in which is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the program. In *Adarand*, the Supreme Court referred to its previous affirmative action decisions for guidance on what the narrow tailoring test entails. It specifically mentioned that when the Tenth Circuit reviewed the DOT program at issue in *Adarand* under intermediate scrutiny, it had not addressed race-neutral alternatives or the duration of the program.

Before describing each of the components, three general points about the narrow tailoring test deserve mention. First, it is probably not the case that an affirmative action measure has to satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

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[35] Justice Powell cited literature on this subject in support of his opinion in *Bakke*. *See* 438 U.S. at 312–13 n.48, 315 n.50.

[36] *See Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 215 (4th Cir. 1993) (although the use of racial classifications to foster diversity of police department could be a constitutionally permissible objective, city failed to show a link between effective law enforcement and greater diversity in the department's ranks).

[37] *See Bakke*, 438 U.S. at 311 (opinion of Powell, J.) (noting lack of empirical data to support medical school's claim that minority doctors will be more likely to practice in a disadvantaged community).

Second, all of the factors are not relevant in every case. For example, the objective of the program may determine the applicability or weight to be given a factor. The factors may play out differently where a program is nonremedial.

Third, the narrow tailoring test should not necessarily be viewed in isolation from the compelling interest test. To be sure, the inquiries are distinct: as indicated above, the compelling interest inquiry focuses on the ends of an affirmative action measure, whereas the narrow tailoring inquiry focuses on the means. However, as a practical matter, there may be an interplay between the two. There is some hint of this in *Croson*. In several places, the Court said that the weak predicate of discrimination on which Richmond acted could not justify the adoption of a rigid racial quota—which suggests that if Richmond had opted for some more flexible measure the Court might have been less demanding when reviewing the evidence of discrimination. By the same token, the more compelling the interest, perhaps less narrow tailoring is required. For example, in *Sheet Metal Workers*, and *Paradise*, the Supreme Court upheld what on their face appear to be rather rigid classifications to remedy egregious and persistent discrimination.

However, it bears emphasizing that the Supreme Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests. It is also far from clear that the Court in *Croson* would have found that a more flexible MBE program, supported by the generalized evidence of discrimination on which Richmond relied, could withstand strict scrutiny. In addition, the membership of the Court has changed dramatically in the years since *Sheet Metal Workers* and *Paradise*. Both cases were decided by five-four margins, and only one member of the majority (Justice Stevens) remains. And while Justice O'Connor agreed with the majority in *Sheet Metal Workers* and *Paradise* that ample evidence of deeply entrenched discrimination gave rise to a very weighty interest in race-based action, she dissented on the ground that the particular remedies selected were too rigid.

1. *Race-Neutral Alternatives*

In *Croson*, the Supreme Court said that the Richmond MBE program was not "narrowly tailored," in part because the city apparently had not considered race-neutral means to increase minority participation in contracting before adopting its race-based measure. The Court reasoned that because minority businesses tend to be smaller and less-established, providing race-neutral financial and technical assistance to small and/or new firms and relaxing bonding requirements might achieve the desired remedial results in public contracting—increasing opportunities for minority businesses. 488 U.S. at 507, 510. Justice Scalia suggested an even more aggressive idea: "adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have a racially dis-

proportionate impact, but they are not based on race." *Id.* at 526 (Scalia, J., concurring). As such, they would not be subjected to strict scrutiny.

The Court in *Croson* did not specify the extent to which governments must consider race-neutral measures before resorting to race-conscious action. It would seem that the government need not first exhaust race-neutral alternatives, but only give them serious attention.[38] This principle would comport with the purposes of ensuring that race-based remedies are used only when, after careful consideration, a government has concluded that less intrusive means would not work. It also comports with Justice Powell's view that in the remedial setting, the government need not use the "least restrictive means" where they would not accomplish the desired ends as well. *See Fullilove*, 448 U.S. at 508 (Powell, J., concurring); *see also Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Justice Powell) (narrow tailoring requirement ensures that "less restrictive means" are used when they would promote the objectives of a racial classification "about as well") (internal quotations omitted).[39]

This approach gives the government a measure of discretion in determining whether its objectives could be accomplished through some other avenue. In addition, under this approach, the government may not be obliged to consider race-neutral alternatives every time that it adopts a race-conscious measure in a particular field. In some situations, the government may be permitted to draw upon a previous consideration of race-neutral alternatives that it undertook prior to adopting some earlier race-based measure.[40] In the absence of prior experience, however, a government should consider race-neutral alternatives at the time it adopts a racial or ethnic classification. More fundamentally, even where race-neutral alternatives were considered, a court might second-guess the government if the court believes that an effective race-neutral alternative is readily available and hence should have been tried. *See Metro Broadcasting*, 497 U.S. at 625 (O'Connor, J., dissenting) (FCC affirmative action programs are not narrowly tailored, in part, because "the FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, and it has employed race-conscious means before adopting readily available race-neutral, alternative means"); *Paradise*, 480 U.S. at 199–200 (O'Connor, J., dissenting) (district court's race-based remedial order was not narrowly tailored because the court "had available several alternatives" that would have achieved the objectives in a less intrusive manner).[41]

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[38] *See Coral Constr. Co.*, 941 F.2d at 923 ("[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.").

[39] *Cf. Billish*, 989 F.2d at 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

[40] *See Contractors Ass'n*, 6 F.3d at 1009 n.18.

[41] *See also Seibels*, 31 F.3d at 1571 (city should have implemented race-neutral alternative of establishing non-discriminatory selection procedures in police and fire departments instead of adopting race-based procedures; "continued use of discriminatory tests . . . compounded the very evil that [race-based measures] were designed to eliminate"); *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (remanding to lower court, in part, because

2. *Scope of Program/Administrative Waivers*

Justice O'Connor's opinion for the Court in *Croson* criticized the scope of Richmond's thirty percent minority subcontracting requirement, calling it a "rigid numerical quota" that did not permit consideration, through some form of administrative waiver mechanism, of whether particular individuals benefiting from the ordinance had suffered from the effects of the discrimination that the city was seeking to remedy. 488 U.S. at 508. At first blush, this criticism of the Richmond plan may appear to conflict with previous Court decisions, joined by Justice O'Connor, that held that race-based remedial measures need not be limited to persons who were the victims of discrimination. (*See supra* pp. 174–75.) Upon closer reading, however, *Croson* should not be interpreted as introducing a "victims-only" requirement through the narrow tailoring test.[42] The Court's rejection in *Adarand* of Justice Scalia's position that compensation is due only to individuals who have been discriminated against personally provides further confirmation that *Croson* did not impose any such requirement.

The Court's focus in *Croson* on individualized consideration of persons seeking the benefit of a racial classification appears to have been animated by three separate concerns about the scope of the Richmond plan. First, the Court indicated that in order for a remedial affirmative action program to be narrowly tailored, its beneficiaries must be members of groups that were the victims of discrimination. The Court faulted the Richmond plan because it was intended to remedy discrimination against African-American contractors, but included among its beneficiaries Hispanics, Asian-Americans, Native-Americans, Eskimos, and Aleuts—groups for which Richmond had proffered "*absolutely no evidence of past discrimination.*" *Id.* at 506. Therefore, the Court said, even if the Richmond MBE program was " 'narrowly tailored' to compensate African-American contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?" *Id.*[43] Second, the Court said that the Richmond plan was not even narrowly tailored to remedy discrimination against black contractors because "a successful black entrepreneur . . . from anywhere in the country" could reap its benefits.

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evidence suggested that the city should have used obvious set of race-neutral alternatives before resorting to race-conscious measures).

[42] Most lower courts have not construed *Croson* in that fashion. *See, e.g., Billish*, 962 F.2d at 1292–94, *rev'd on other grounds*, 989 F.2d 890 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 908 (1993); *Coral Constr. Co.*, 941 F.2d at 925–26 n.15; *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990). *But see Winter Park Communications, Inc.*, 873 F.2d at 367–68 (Williams, J., concurring in part and dissenting in part) (interpreting *Croson* as requiring that racial classifications be limited "to victims of prior discrimination"); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349, 1362 (E.D. Pa. 1989) (MBE program not narrowly tailored, in part, because it "containe[d] no provision to identify those who were victims of past discrimination and to limit the program's benefits to them").

[43] *See O'Donnell Constr. Co.*, 963 F.2d at 427 (MBE program was not narrowly tailored because of "random inclusion of racial groups for which there was no evidence of past discrimination").

Id. at 508. That is, the geographic scope of the plan was not sufficiently tailored.[44] Third, the Court contrasted the "rigidity" of the Richmond plan with the flexible waiver mechanism in the ten percent minority participation requirement that was upheld in *Fullilove*. As the Court in *Croson* described it, the requirement in *Fullilove* could be waived where a minority business charged a "higher price [that] was not attributable to the effects of past discrimination." *Id. See Fullilove*, 448 U.S. at 488 (plurality opinion). The theory is that where a business is struggling to overcome discrimination, it may not have the capacity to submit a competitive bid. That an effective waiver provision allows for "individualized consideration" of a particular minority contractor's bid does not mean that the contractor has to be a "victim" of a specific instance of discrimination. It does mean that if the contractor is wealthy and has entered the mainstream of contractors in the community, a high bid might not be traceable to the discrimination that a racial or ethnic classification is seeking to redress. Instead, such a bid might reflect an effort to exploit the classification.[45]

3. *Manner in Which Race is Used*

The Court's attack on the "rigidity" of the Richmond ordinance also implicates another common refrain in affirmative action jurisprudence: the manner in which race is used is an integral part of the narrow tailoring requirement. The clearest statement of the Court's somewhat mixed messages in this area is that programs that make race or ethnicity a requirement of eligibility for particular positions or benefits are less likely to survive constitutional challenge than programs that merely use race or ethnicity as one factor to be considered under a program open to all races and ethnic groups.[46]

Two types of racial classifications are subject to criticism as being too rigid. First and most obvious is an affirmative action program in which a specific number of positions are set aside for minorities. The prime example is the medical school admissions program that the Court invalidated in *Bakke*. Justice Powell's

[44] *Compare Coalition for Econ. Equity*, 950 F.2d at 1418 (MBE program intended to remedy discrimination against minorities in county construction industry was narrowly tailored, in part, because scope of beneficiaries was limited to minorities within the county) *with Podberesky v. Kirwan*, 38 F.3d 147, 159 (4th Cir.) (scholarship program intended to remedy discrimination against African-Americans in Maryland was not narrowly tailored, in part, because African-Americans from outside Maryland were eligible for the program), *cert. denied*, 514 U.S. 1128 (1995).

[45] *See Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 425 (7th Cir.) (noting that administrative waiver mechanism enabled state to exclude from scope of beneficiaries of affirmative action plan in public contracting "two wealthy black football players" who apparently could compete effectively outside the plan), *cert. denied*, 500 U.S. 954 (1991); *Concrete Gen. Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 381 (D. Md. 1991) (MBE program not narrowly tailored, in part, because it had "no provision to 'graduate' from the program those contracting firms which have demonstrated the ability to effectively compete with non-MBE's in a competitive bidding process"); *see also Shurberg Broad., Inc. v. FCC*, 876 F.2d at 916 (opinion of Silberman, J.) ("There must be some opportunity to exclude those individuals for whom affirmative action is just another business opportunity.").

[46] The factor that we labeled above as "scope of beneficiaries/administrative waivers" is sometimes considered by courts under the heading of "flexibility," along with a consideration of the manner in which race is used. For the sake of clarity we have divided them into two separate components of the narrow tailoring test.

pivotal opinion in the case turned squarely on the fact that the program reserved sixteen percent of the slots at the medical school for members of racial and ethnic minority groups. Another example of this type of classification is the program upheld in *Fullilove*. It provides that, except where the Secretary of Commerce determines otherwise, at least ten percent of the amount of federal grants for certain public works projects must be expended by grantees to purchase goods or services from minority-owned businesses. 42 U.S.C. § 6705(f)(2).

The second type of classification that is vulnerable to attack on flexibility grounds is a program in which race or ethnicity is the sole or primary factor in determining eligibility. One example is the FCC's "distress sale" program, which allows a broadcaster whose qualifications have been called into question to transfer his or her license prior to an FCC revocation hearing, provided the transferee is a minority-owned business.[47] Another example of affirmative action programs in which race or ethnicity is a requirement of eligibility are college scholarships that are reserved for minorities.[48]

Under both types of classifications, persons not within the designated categories are rendered ineligible for certain benefits or positions.[49] Justice Powell's opinion in *Bakke* rested on the fact that the admissions program at issue was a quota that saved places for minorities solely on the basis of their race.[50] As Justice Powell put it, such a program

> tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

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[47] The distress sale program was upheld under intermediate scrutiny in *Metro Broadcasting*.

[48] There is a plausible distinction between college scholarships that are reserved for minorities and admissions quotas that reserve places at a college for minorities. In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir 1994), *cert. denied*, 514 U.S. 1128 (1995), the Fourth Circuit held that a college scholarship program for African Americans was unconstitutional under *Croson*. The Fourth Circuit's decision, however, did not equate the scholarship program with the admissions quota struck down in *Bakke*, and it did not turn on the fact that race was a requirement of eligibility for the program.

[49] The statutes and regulations under which DOT has established the contracting program at issue in *Adarand* are different. Racial and ethnic classifications are used in the form of a presumption that members of minority groups are "socially disadvantaged." However, that presumption is rebuttable, and members of nonminority groups are eligible for the program "on the basis of clear and convincing evidence" that they are socially disadvantaged. *Adarand*, 515 U.S. at 207. *See id.* at 259–61 (Stevens, J., dissenting) (arguing that the relevant statutes and regulations in *Adarand* are better tailored than the *Fullilove* legislation, because they "do[ ] not make race the sole criterion of eligibility for participation in the program." Members of racial and ethnic are presumed to be disadvantaged, but the presumption is rebuttable, and even if it does not get the presumption, "a small business may qualify [for the program] by showing that it is both socially and economically disadvantaged").

[50] *Bakke* is the only Supreme Court affirmative action case that ultimately turned on the "quota" issue. In *Croson*, the Court referred disparagingly to the thirty percent minority subcontracting requirement at issue in the case as a "quota," but that was not in itself the basis for the Court's decision.

438 U.S. at 319. Justice Powell contrasted admissions programs that require decisions based "*solely*" on race and ethnicity, *id.* at 315, with programs in which race or ethnic background is simply one factor among many in the admissions decision. Justice Powell said that in the latter type of program, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317. In Justice Powell's view, such programs are sufficiently flexible to meet the narrow tailoring requirement.

This line of reasoning also resonates in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). There, the Supreme Court upheld an affirmative action plan under which a state government agency considered the gender of applicants[51] as one factor in making certain promotion decisions. The Court noted that the plan "set[] aside no positions for women," but simply established goals for female representation that were not "construed" by the agency as "quotas." *Id.* at 638. The Court further observed that the plan "merely authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.* The Court stressed that in the promotion decision in question, "sex . . . was but one of numerous factors [that were taken] into account." *Id.* The agency's plan "thus resemble[d]" the type of admissions program "approvingly noted by Justice Powell" in *Bakke*: it "requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." *Id. See also id.* at 656–57 (O'Connor, J., concurring in judgment) (agency's promotion decision was not made "solely on the basis of sex;" rather, "sex was simply used as a 'plus factor' ").

Finally, *Croson* itself touches on the point. The Court said that in the absence of a waiver mechanism that permitted individualized consideration of persons seeking a share of city contracts pursuant to the requirement that thirty percent of the dollar value of prime contracts go to minority subcontractors, the Richmond plan was "problematic from an equal protection standpoint because [it made] the color of an applicant's skin the sole relevant consideration." 488 U.S. at 508.

4. Comparison of Numerical Target to Relevant Market

Where an affirmative action program is justified on remedial grounds, the Court has looked at the size of any numerical goal and its comparison to the relevant labor market or industry. This factor involves choosing the appropriate measure of comparison. In *Croson*, Richmond defended its thirty percent minority subcontracting requirement on the premise that it was halfway between .067 percent—the percentage of city contracts awarded to African-Americans during the years

[51] Although *Johnson* was a Title VII gender classification case, its reasoning as to the distinction between quotas and goals is instructive with respect to the constitutional analysis of racial and ethnic classifications.

1978–1983 — and fifty percent — the African-American population of Richmond. The Court in *Croson* demanded a more meaningful statistical comparison and much greater mathematical precision. It held that numerical figures used in a racial preference must bear a relationship to the pool of qualified minorities. Thus, in the Court's view, the thirty percent minority subcontracting requirement was not narrowly tailored, because it was tied to the African-American population of Richmond, and as such, rested on the assumption that minorities will choose a particular trade "in lockstep proportion to their representation in the local population." 488 U.S. at 507.[52]

5. *Duration and Periodic Review*

Under *Croson*, affirmative action represents a "temporary" deviation from "the norm of equal treatment of all racial and ethnic groups." *Croson*, 488 U.S. at 510. A particular measure therefore should last only as long as it is needed. *See Fullilove*, 448 U.S. at 513 (Powell, J., concurring). Given this imperative, a racial or ethnic classification is more likely to pass the narrow tailoring test if it has a definite end-date,[53] or is subject to meaningful periodic review that enables the government to ascertain the continued need for the measure. The Supreme Court has said that a set end-date is less important where a program does not establish specific numerical targets for minority participation. *Johnson*, 480 U.S. at 640. However, it remains important for such a program to undergo periodic review. *See id.* at 639–40.

Simply put, a racial or ethnic classification that was justified at the point of its adoption may no longer be required at some future point. If the classification is subject to reexamination from time to time, the government can react to changed circumstances by fine-tuning the classification, or discontinuing it if warranted. *See Fullilove*, 448 U.S. at 489 (plurality opinion); *see also Metro Broadcasting*, 497 U.S. at 594; *Sheet Metal Workers*, 478 U.S. at 478 (plurality opinion); *id.* at 487–88 (Powell, J., concurring).

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[52] *Compare Aiken*, 37 F.3d at 1165 (remanding to lower court, in part, because race-based promotion goals in consent decree were tied to "undifferentiated" labor force statistics; instructing district court on remand to determine whether racial composition of city labor force "differs materially from that of the qualified labor pool for the positions" in question) *with Edwards v. City of Houston*, 37 F.3d 1097, 1114 (5th Cir. 1994) (race-based promotion goals in city police department were narrowly tailored, in part, because the goals were tied to the number of minorities with the skills for the positions in question), *reh'g granted*, 49 F.3d 1048 (5th Cir. 1995).

[53] *See Paradise*, 480 U.S. at 178 (plurality opinion) (race-based promotion requirement was narrowly tailored, in part, because it was "ephemeral," and would "endure[] only until" non-discriminatory promotion procedures were implemented); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring) (race-based hiring goal was narrowly tailored, in part, because it "was not imposed as a permanent requirement, but [was] of limited duration"); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring) (race-based classification in public works legislation was narrowly tailored, in part, because it was "not a permanent part of federal contracting requirements"); *O'Donnell Constr. Co.*, 963 F.2d at 428 (ordinance setting aside a percentage of city contracts for minority businesses was not narrowly tailored, in part, because it contained no "sunset provision" and no "end [was] in sight").

6. *Burden*

Affirmative action necessarily imposes a degree of burden on persons who do not belong to the groups that are favored by a racial or ethnic classification. The Supreme Court has said, however, that some burdens are acceptable, even when visited upon individuals who are not personally responsible for the particular problem that the classification seeks to address. *See Wygant*, 476 U.S. at 280–81 (plurality opinion) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."). This was implicitly reaffirmed in *Croson* and *Adarand*: in both cases, the Court "recognize[d] that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be,"[54] but declined to hold that the imposition of that burden pursuant to an affirmative action measure is automatically unconstitutional.

In some situations, however, the burden imposed by an affirmative action program may be too high. As a general principle, a racial or ethnic classification crosses that threshold when it "unsettle[s] . . . legitimate, firmly rooted expectation[s],"[55] or imposes the "entire burden . . . on particular individuals."[56] Applying that principle in an employment case where seniority differences between minority and nonminority employees were involved, a plurality of the Court in *Wygant* stated that race-based layoffs may impose a more substantial burden than race-based hiring and promotion goals, because "denial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant*, 476 U.S. at 282–83; *see also id.* at 294 (White, J., concurring). In a subsequent case, however, Justice Powell warned that "it is too simplistic to conclude that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue." *Sheet Metal Workers*, 478 U.S. at 488 n.3 (Powell, J., concurring).

In the contracting area, a racial or ethnic classification would upset settled expectations if it impaired an existing contract that had been awarded to a person who is not included in the classification. This apparently occurs rarely, if at all, in the federal government. A more salient inquiry therefore focuses on the scale of the exclusionary effect of a contracting program. For example, in *Fullilove*, Justice Powell thought it salient that the contracting requirement at issue in the case reserved for minorities a very small amount of total funds for construction work in the nation (less than one percent), leaving nonminorities able to compete for the vast remainder. For Justice Powell, this rendered the effect of the program

[54] *Adarand*, 515 U.S. at 230 (citing *Croson*).

[55] *Johnson*, 480 U.S. at 638.

[56] *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

"limited and so widely dispersed that its use is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515. In some instances, conversely, the exclusionary effect of racial classifications in contracting may be considered too large. For example, the lower court in *Croson* held that Richmond's thirty percent minority subcontracting requirement imposed an impermissible burden because it placed nonminorities at a great "competitive disadvantage." *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1361 (4th Cir. 1987). Similarly, an affirmative action program that effectively shut nonminority firms out of certain markets or particular industries might establish an impermissible burden. For example, the dissenters in *Metro Broadcasting* felt that the FCC's distress sale unduly burdened nonminorities because it "created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside . . . . For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity." 497 U.S. at 630 (O'Connor, J., dissenting). The dissenters also dismissed the majority's contention that the impact of distress sales on nonminorities was minuscule, given the small number of stations transferred through those means. The dissenters said that "[i]t is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate." *Id.*

C. *The Post-Croson Landscape at the State and Local Level*

Croson has not resulted in the end of affirmative action at the state and local level. There is no doubt, however, that *Croson*, in tightening the constitutional parameters, has diminished the incidence of such programs, at least in contracting and procurement. The post-*Croson* experience of governments that continue to operate affirmative action programs in that area is instructive.[57] Many governments reevaluated their MBE programs in light of *Croson*, and modified them to comport with the applicable standards. Typically, the centerpiece of a government's efforts has been a "disparity study," conducted by outside experts, to analyze patterns and practices in the local construction industry. The purpose of a disparity study is to determine whether there is evidence of discrimination against minorities in the local construction industry that would justify the use of remedial racial and ethnic classifications in contracting and procurement. Some studies also address the efficacy of race-neutral alternatives. In addition to obtaining a disparity

[57] A comprehensive review of voluntary affirmative action in public employment at the state and local level after *Croson* is beyond the scope of this memorandum. We note that a number of the programs have involved remedial racial and ethnic classifications in connection with hiring and promotion decisions in police and fire departments. Some of the programs have been upheld, and others struck down. *Compare Peightal*, (upholding race-based hiring goal in county fire department under *Croson*) *with Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990) (striking down race-based hiring goal in city police department under *Croson* and *Wygant*).

study, some governments have held public hearings in which they have received evidence about the workings of the local construction industry.

Post-*Croson* affirmative action programs in contracting and procurement tend to employ flexible numerical goals and/or bidding preferences in which race or ethnicity is a "plus" factor in the allocation decision, rather than a hard set-aside of the sort at issue in *Croson*. It appears that many of the post-*Croson* contracting and procurement programs that rest on disparity studies have not been challenged in court.[58] At least one of the programs was sustained in litigation.[59] Another was struck down as inconsistent with the *Croson* standards.[60] Challenges to other programs were not resolved on summary judgment, and were remanded for further fact finding.[61] Contracting and procurement programs that were not changed after *Croson* have met with a mixed reception in the courts.[62]

III. *Application of the Croson Standards at the Federal Level*

In essence, *Adarand* federalizes *Croson*, with one important caveat: Congress may be entitled to some deference when it acts on the basis of race or ethnicity to remedy the effects of discrimination. The Court in *Adarand* hinted that at least where a federal affirmative action program is congressionally mandated, the *Croson* standards might apply somewhat more loosely. The Court concluded that it need not resolve whether and to what extent the judiciary should pay special deference to Congress in this area. The Court did, however, cite the opinions of various Justices in *Fullilove*, *Croson*, and *Metro Broadcasting* concerning the significance of Congress' express constitutional power to enforce the antidiscrimination guarantees of the Thirteenth and Fourteenth Amendments — under Section 2 of the former and Section 5 of the latter — and the extent to which courts should defer to exercises of that authority that entail the use of racial and ethnic classifications to remedy discrimination. *See* 515 U.S. at 230–31. Some of those opinions

[58] That has been true in Richmond. It is our understanding that the city conducted a post-*Croson* disparity study and enacted a new MBE program that establishes a bidding preference of "20 points" for prime contractors who pledge to meet a goal of subcontracting sixteen percent of the dollar value of a city contract to MBEs. The program works at the "prequalification" stage, when the city is determining its pool of eligible bidders on a project. Once the pool is selected, the low bidder is awarded the contract.

[59] *See Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992).

[60] *Associated Gen. Contractors v. City of New Haven*, 791 F. Supp. 941 (D. Conn. 1992), *vacated on mootness grounds*, 41 F.3d 62 (2d Cir. 1994).

[61] *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Concrete Works v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). The courts in these two cases commented favorably on aspects of the programs at issue and the disparity studies by which they are justified.

[62] We are aware of at least one such program that survived a motion for summary judgment and apparently is still in effect today. *See Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990). Others have been invalidated. *See, e.g., O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Contractors' Assoc. v. City of Philadelphia*, 893 F.Supp. 419 (E.D. Pa. 1995); *Arrow Office Supply Co. v. City of Detroit*, 826 F. Supp. 1072 (E.D. Mich. 1993); *F. Buddie Constr. Co. v. City of Elyria*, 773 F. Supp. 1018 (N.D. Ohio 1991); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349 (E.D. Pa. 1989).

indicate that even under strict scrutiny, Congress does not have to make findings of discrimination with the same degree of precision as a state or local government, and that Congress may be entitled to some latitude with respect to its selection of the means to the end of remedying discrimination.[63]

In *Fullilove*, Justice Powell's concurring opinion said that, even under strict scrutiny, "[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." *Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring). It was therefore of paramount importance to Justice Powell that the racial and ethnic classification in *Fullilove* was prescribed by Congress, which, Justice Powell admonished, "properly may—and indeed must—address directly the problems of discrimination in our society." *Id.* at 499. Justice Powell emphasized that Congress has "the unique constitutional power" to take such action under the enforcement clauses of the Thirteenth and Fourteenth Amendments. *Id.* at 500. *See id.* at 483 (plurality opinion) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees."). Justice Powell observed that when Congress uses those powers, it can paint with a broad brush, and can devise national remedies for the national problem of racial and ethnic discrimination. *Id.* at 502–03 (Powell, J., concurring). Furthermore, Justice Powell said that through repeated investigation of that problem, Congress has developed familiarity with the nature and effects of discrimination: "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.* at 503. Because Congress need not redocument the fact and history of discrimination each time it contemplates adopting a new remedial measure, the findings that supported the *Fullilove* legislation were not

[63] Section 1 of the Fourteenth Amendment prohibits states and municipalities from denying persons the equal protection of the laws. Section 5 gives Congress the power to enforce that prohibition. Because Section 1 of the Fourteenth Amendment only applies to states and municipalities, *see United States v. Guest*, 383 U.S. 745, 755 (1966), it is uncertain whether Congress may act under Section 5 of that amendment to remedy discrimination by purely private actors. *See Adarand*, 515 U.S. at 254 n.10 (Stevens, J., dissenting) ("Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of §5's applicability to pure regulation of private individuals."); *Metro Broad.*, 497 U.S. at 605 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials."). Nevertheless, remedial legislation adopted under Section 5 of the Fourteenth Amendment does not necessarily have to act on the states directly. Indeed, when Congress seeks to remedy discrimination by private parties, it may be indirectly remedying discrimination of the states; for in some cases, private discrimination was tolerated or expressly sanctioned by the states. Private discrimination, moreover, often can be remedied under the enforcement provisions of the Thirteenth Amendment. Section 1 of that amendment prohibits slavery and involuntary servitude. Section 2 gives Congress the power to enforce that prohibition by passing remedial legislation designed to eliminate "the badges and incidents of slavery in the United States." *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 439 (1968). The Supreme Court has held that such legislation may be directed at remedying the discrimination of private actors, as well as that of the states. *Id.* at 438. *See also Runyon v. McCrary*, 427 U.S. 160, 179 (1976). In *Fullilove*, the plurality opinion concluded that the Commerce Clause provided an additional source of power under which Congress could adopt race-based legislation intended to remedy the discriminatory conduct of private actors. *See Fullilove*, 448 U.S. at 475 (plurality opinion).

restricted to the actual findings that Congress made when it enacted that measure. Rather, the record included "the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." *Id.* A court reviewing a race-based remedial act of Congress therefore "properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against [minorities]." *Id.* Finally, Justice Powell gave similar deference to Congress when it came to applying the narrow tailoring test. He said that in deciding how best to combat discrimination in the country, the "Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a . . . measure of discretion to choose a suitable remedy." *Id.* at 508.

Justice O'Connor's opinion in *Croson* is very much in the same vein. She too commented that Congress possesses "unique remedial powers . . . under § 5 of the Fourteenth Amendment." *Croson*, 488 U.S. at 488 (plurality opinion) (citing *Fullilove*, 448 U.S. at 483 (plurality opinion)). By contrast, state and local governments have "no specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," but rather are subject to its "explicit constraints." *Id.* at 490 (plurality opinion). Therefore, in Justice O'Connor's view, state and local governments "must identify discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.* at 504. Congress, on the other hand, can make, and "has made national findings that there has been societal discrimination in a host of fields." *Id.* It may therefore "identify and redress the effects of society-wide discrimination" through the use of racial and ethnic classifications that would be impermissible if adopted by a state or local government. *Id.* at 490 (plurality opinion).[64] Justice O'Connor cited her *Croson* opinion and reiterated these general points about the powers of Congress in her *Metro Broadcasting* dissent. *See* 497 U.S. at 605 (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its unique remedial powers . . . under § 5 of the Fourteenth Amendment.") (internal quotations omitted).

It would be imprudent, however, to read too much into Justice Powell's opinion in *Fullilove* and Justice O'Connor's opinion in *Croson*. They do not, for example, support the proposition that Congress may simply assert that because there has been general societal discrimination in this country, legislative classifications based on race or ethnicity are a necessary remedy. The more probable construction of those opinions is that Congress must have some particularized evidence about the existence and effects of discrimination in the sectors and industries for which it prescribes racial or ethnic classifications. For example, Congress established the *Fullilove* racial and ethnic classification to remedy what the Court saw as the well-documented effects of discrimination in one industry—construction—

[64] Justices Kennedy and Scalia declined to join that part of Justice O'Connor's opinion in *Croson* that drew a distinction between the respective powers of Congress and state or local governments in the area of affirmative action.

that had hindered the ability of minorities to gain access to public contracting opportunities. *See Fullilove*, 448 U.S. at 505–06 (Powell, J., concurring); *see also id.* at 473 (plurality opinion).

Based on this reading of *Croson* and *Fullilove*, the endorsement in *Adarand* of strict scrutiny of federal affirmative action programs does not mean that Congress must find discrimination in every jurisdiction or industry affected by such a measure (although it is unclear whether, as a matter of narrow tailoring, the scope of a classification should be narrowed to exclude regions and trades that have not been affected by the discrimination that is to be remedied). State and local governments must identify discrimination with some precision within their jurisdictions; Congress's jurisdiction is the nation as a whole. But after *Adarand*, Congress *is* subject to the *Croson* "strong basis in evidence" standard. Under that standard, the general history of racial discrimination in the nation would not be a sufficient predicate for a remedial racial or ethnic classification. In addition, evidence of discrimination in one sector or industry is not always probative of discrimination in other sectors and industries. For example, a history of lending discrimination against minorities arguably cannot serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy; application of the narrow tailoring test would suggest that if lending discrimination is the problem being addressed, then the government should tackle it directly.[65]

Furthermore, under the new standard, Congress probably does not have to hold a hearing or draft a report each time it adopts a remedial racial or ethnic classification. But where such a classification rests on a previous law or series of laws, those earlier measures must be supported by sufficient evidence of the effects of discrimination. And if the findings in the older laws are stale, Congress or the pertinent agency may have to demonstrate the continued relevance of those findings; this would satisfy the element of the narrow tailoring test that looks to the duration of classifications and whether they are subject to reevaluation. Where the record is sparse, Congress or the relevant agency may have to develop it. That endeavor may involve the commissioning of disparity studies of the type that state and local governments around the country undertook after *Croson* to demonstrate that remedial racial and ethnic classifications in public contracting are warranted. Together, the myriad state and local studies may provide an important source of evidence supporting the use by the federal government of national remedial measures in certain sectors of the economy.

Whatever deference a court might accord to federal remedial legislation after *Adarand*, it is undecided whether the same degree of deference would be accorded to nonremedial legislation. In *Metro Broadcasting*, the majority gave substantial

[65] Patterns and practices of bank lending to minorities, may, however, reflect a significant "secondary effect" of discrimination in particular sectors and industries, *i.e.*, because of that discrimination, minorities cannot accumulate the necessary capital and achieve the community standing necessary to qualify for loans.

deference to congressional judgments regarding the need for diversity in broadcasting and the linkage between the race of a broadcaster and programming output. *Metro Broad.*, 497 U.S. at 566, 572–73, 591 n.43. The dissenters did not do so, precisely because the classifications were nonremedial and hence, in their view, did not implicate Congress' powers under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. *Id.* at 605, 628–29 (O'Connor, J., dissenting).

Finally, many existing federal affirmative action programs are not specifically mandated by Congress. Courts are unlikely to accord federal agencies acting without a congressional mandate the same degree of deference accorded judgments made by Congress itself. Agencies do not have the "institutional competence" and explicit "constitutional authority" that Congress possesses. *Adarand*, 515 U.S. at 253 (Stevens, J., dissenting).[66] Although some existing agency programs were not expressly mandated in the first instance in legislation, they may nonetheless be viewed by a court as having been mandated by Congress through subsequent congressional action. For example, in *Metro Broadcasting*, the programs at issue were established by the FCC on its own; Congress's role was limited to FCC oversight hearings and the passage of an appropriations rider that precluded the FCC from using any funds to reconsider or cancel its programs. 497 U.S. at 572–79. The majority concluded that this record converted the FCC programs into measures that had been "specifically approved — indeed, mandated by Congress." *Id.* at 563.

Under strict scrutiny, it is uncertain what level of congressional involvement is necessary before a court will review an agency's program with deference. What may be required is evidence that Congress plainly has brought its own judgment to bear on the matter. *Cf. Adarand*, 515 U.S. at 252 (Stevens, J., dissenting) ("An additional reason for giving greater deference to the National Legislature than to a local law-making body is that federal affirmative-action programs represent *the will of our entire Nation's elected representatives* . . . .") (emphasis added); *id.* at 255 (Stevens, J., dissenting) ("*Congressional deliberations* about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.") (emphasis added).

IV. *Conclusion*

Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to

[66] *See Milwaukee County Pavers Ass'n*, 710 F. Supp. at 1540 n.3 (noting that for purposes of judicial review of affirmative action measures, there is a distinction between congressionally mandated measures and those that are "independently established" by a federal agency), *aff'd*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991); *cf. Bakke*, 438 U.S. at 309 (opinion of Powell, J.) (public universities, like many "isolated segments of our vast governmental structure are not competent to make [findings of national discrimination], at least in the absence of legislative mandates and legislatively determined criteria").

such an evaluation. The information gathered by many agencies in connection with the President's recent review of federal affirmative action programs should prove helpful in this regard. In addition, appended to this memo is a nonexhaustive checklist of questions that provides initial guidance as to what should be considered in that review process. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any given program.

WALTER DELLINGER
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Appendix: Questions to Guide Review of Affirmative Action Programs

I. *Authority*

Is the use of racial or ethnic criteria as a basis for decisionmaking mandated by legislation? If not mandated, is it expressly authorized by legislation? If there is no express authorization, has there been any indication of congressional approval of an agency's action in the form of appropriations riders or oversight hearings? These questions are important, because Congress may be entitled to some measure of deference when it decides that racial and ethnic classifications are necessary.

If there is no explicit legislative mandate, authorization, or approval, is the program premised on an agency rule or regulation that implements a statute that, on its face, is race-neutral? For example, some statutes require agencies to give preferences to "disadvantaged" individuals, but do not establish a presumption that members of racial groups are disadvantaged. Such a statute is race-neutral. Other statutes, like those at issue in *Adarand*, require agencies to give preferences to "disadvantaged" individuals, but establish a rebuttable presumption that members of racial groups are disadvantaged. Such a statute is race-conscious, because it authorizes agencies to use racial criteria in decisionmaking.

II. *Purpose*

What is the objective of the program? Is it intended to remedy discrimination, to foster racial diversity in a particular sector or industry, or to achieve some other purpose? Is it possible to discern the purpose from the face, the relevant statute or legislation? If not, does the record underlying the relevant legislation or regulation shed any light on the purpose of the program?

A. *Factual Predicate: Remedial Programs*

If the program is intended to serve remedial objectives, what is the underlying factual predicate of discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in a particular sector or industry, or a statistical underrepresentation of minorities in a sector or industry? Without more, these are impermissible bases for affirmative action. If the discrimination to be remedied is more particularized, then the program may satisfy *Adarand*. In assessing the nature of the factual predicate of discrimination, the following factors should be taken into account:

1. Source. Where can the evidence be found? Is it contained in findings set forth in a relevant statute or legislative history (committee reports and

hearings)? Is evidence contained in findings that an agency has made on its own in connection with a rulemaking process or in the promulgation of guidelines? Do the findings expressly or implicitly rest on findings made in connection with a previous, related program (or series of programs)?

2. Type. What is the nature of the evidence? Is it statistical or documentary? Are the statistics based on minority underrepresentation in a particular sector or industry compared to the general minority population? Or are the statistics more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the sector or industry or seek to explain what that number would look like "but for" the exclusionary effects of discrimination? Does the evidence seek to explain the secondary effects of discrimination — for example, how the inability of minorities to break into certain industries due to historic practices of exclusion has hindered their ability to acquire the requisite capital and financing? Similarly, where health and education programs are at issue, is there evidence on how discrimination has hampered minority opportunity in those fields, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical and documentary evidence, is there testimonial or anecdotal evidence of discrimination in the record underlying the program — for example, accounts of the experiences of minorities and nonminorities in a particular field or industry?

3. Scope. Are the findings purported to be national in character and dimension? Or do they reflect evidence of discrimination in certain regions or geographical areas?

4. "Authorship". If Congress or an agency relied on reports and testimony of others in making findings, who is the "author" of that information? The Census Bureau? The General Accounting Office? Business and trade associations? Academic experts? Economists? (There is no necessary hierarchy in assessing authorship, but the identity of the author may affect the credibility of the findings.)

5. Timing. Since the adoption of the program, have additional findings of discrimination been assembled by Congress or the agency that could serve to justify the need for the program when it was adopted? If not, can such evidence be readily assembled now? These questions go to whether "post-enactment" evidence can be marshaled to support the conclusion that remedial action was warranted when the program was first adopted.

B. *Factual Predicate: Nonremedial Programs*

Adarand does not directly address whether and to what extent nonremedial objectives for affirmative action may constitute a compelling governmental

interest. At a minimum, to the extent that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship, and timing of underlying findings should be assessed, just as for remedial programs.

III. *Narrow Tailoring*

A. *Race-Neutral Alternatives*

Did Congress or the agency consider race-neutral means to achieve the ends of the program at the time it was adopted? Race-neutral alternatives might include preferences based on wealth, income, education, family, geography. In the commercial setting, another such alternative is a preference for new, emerging businesses. Were any of these alternatives actually tried and exhausted? What was the nature and extent of the deliberation over any race-neutral alternatives — for example, congressional debate? agency rulemaking? Was there a judgment that race-neutral alternatives would not be as efficacious as race-conscious measures? Did Congress or the agency rely on previous consideration and rejection of race-neutral alternatives in connection with a prior, related race-conscious measure (or series of measures)?

B. *Continued Need*

How long has the program been in existence? Even if there was a compelling justification at the time of adoption, that may not be the case today. Thus, an agency must determine whether there is a continued need for the program. In that regard, does the program have an end date? Has the end date been moved back? Is the program subject to periodic oversight? What is the nature of that oversight — does Congress play a role through hearings/reports, or does the agency conduct the review or oversight on its own? Has the program ever been adjusted or modified in light of a periodic review? What were the results of the most recent review and oversight conducted by either Congress or the agency? Is there evidence of what might result if the racial classification were discontinued? For example, is there evidence of the current level of minority participation in government contracting where racial criteria are not used (which may speak to whether discrimination can be remedied without a preference)?

C. *Pool of Beneficiaries*

Are the benefits of the program spread relatively equally among minority individuals or businesses? Is there information on whether the same individuals or businesses tend to reap most of the benefits, and if so, whether those beneficiaries have overcome discrimination? If the program is intended to remedy discrimination against minorities, does it include among its beneficiaries subgroups that may not have been discriminated against? Is there a procedure for tailoring the pool of beneficiaries to exclude such subgroups? Is there a mechanism for evaluating whether the program is needed for segments within a larger industry that have been the locus of discrimination?

D. *Manner in Which Race is Used*

Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such facial requirement, does the program operate that way in practice? Or is race just one of several factors—a "plus"—used in decisionmaking? Could the objectives of a program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

E. *Burden*

What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification that the program establishes? Does the program displace those persons from existing positions/contracts? Does it upset any settled expectations that they have? Even if that is not the case, the burden may be impermissible where the exclusionary impact is too great. What is the exclusionary impact in terms of size and dimension? What is the dollar value of the contracts/grants/positions in question? Does the exclusionary impact of the program fall upon a particular group or class of individuals or sectors, or is it more diffuse? What is the extent of other opportunities outside the program? Are persons who are not eligible for the preference put at a significant competitive disadvantage as a result of the program?

Constitutional Limitations on Federal Government Participation in Binding Arbitration

The Appointments Clause does not prohibit the federal government from submitting to binding arbitration.

Nor does any other constitutional provision or doctrine impose a general prohibition against the federal government entering into binding arbitration, although the Constitution does impose substantial limits on the authority of the federal government to enter into binding arbitration in specific cases.

September 7, 1995

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

You have asked for our opinion as to whether the Constitution in any way limits the authority of the federal government to submit to binding arbitration.[1] Specifically, you have asked us to explain and expand on advice we issued on September 19, 1994, in which we confirmed our earlier oral advice that "the Office of Legal Counsel no longer takes the view that the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, bars the United States from entering into binding arbitration." Memorandum for David Cohen, Director, Commercial Litigation Branch, Civil Division, from Dawn Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Binding Arbitration* (Sept. 19, 1994).[2] Below, we reiterate this conclusion and, pursuant to your request, set forth the reasoning by which we reached it. In addition, we consider, again pursuant to your request, the various other constitutional provisions that may be implicated when the federal government enters into binding arbitration. We conclude that none absolutely bars the federal government from taking such action. We should point out, however, that Exec. Order No. 12778 remains in effect. *See Civil Justice Reform*, 56 Fed.

[1] Several components of the Department of Justice have submitted comments on the subject of binding arbitration. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Carol DiBattiste, Director, Executive Office for United States Attorneys, *Re: Binding Arbitration Involving the Federal Government as a Party* (Mar. 1, 1995) ("EOUSA memorandum"); Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Frank W. Hunger, Assistant Attorney General, Civil Division, *Re: Constitutionality of Binding Arbitration Involving the Federal Government as a Party* (Feb. 28, 1995) ("Civil Division memorandum"); Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, *Re: Binding Arbitration Involving the Federal Government as a Party* (Feb. 24, 1995) ("ENRD memorandum").

[2] The Office of Legal Counsel has never issued an opinion on the matter. Then Assistant Attorney General for the Office of Legal Counsel William Barr, however, testified that the Appointments Clause would prohibit the government from entering into binding arbitration unless arbitrators were appointed by one of the methods described in that Clause, which they typically are not. *See Administrative Dispute Resolution Act of 1989: Hearing Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 101st Cong. 86 (1989) (statement of Assistant Attorney General William P. Barr); *Administrative Dispute Resolution Act: Hearings on H.R. 2497 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 101st Cong. 38 (1990) (statement of Assistant Attorney General William P. Barr). In addition, the Civil Division has issued a manual entitled *Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts* (1992). That manual asserted that "[t]he Government cannot enter into agreements to participate in 'binding' arbitration." *Id.* at 4. The legal basis cited for this assertion was the Appointments Clause. *Id.* at 4 & n.8.

Reg. 55,195 (1991). That order forbids litigation counsel for federal agencies from seeking or agreeing to enter into binding arbitration. *Id.* § 1(c)(3). Therefore, while a constitutionally valid statute may compel litigation counsel to enter into binding arbitration, litigation counsel may not voluntarily agree to binding arbitration.[3]

I. Background

Neither term in the phrase "binding arbitration" bears a settled meaning. First, "arbitration" may be a very different exercise in different contexts and cases because there are no universally applicable rules of practice, procedure, or evidence governing the conducting of arbitration. In addition, there is no standard as to whether arbitration is to be conducted by a single arbitrator or by a panel of arbitrators or as to the method for selecting the individuals who serve in that capacity.[4] Moreover, arbitration may be voluntary — in that both parties have agreed to resolve their dispute by this method — or compulsory — in that some other requirement such as a statute compels the parties to resolve their dispute by this method. Second, it is not at all clear what exactly is meant by referring to an arbitration as "binding." We take this to mean that judicial review of the arbitral decision is narrowly limited, as opposed to non-binding arbitration in which each party remains free to disregard any arbitral ruling. The limitation on judicial review could take numerous forms. It may mean that there is to be no review of an arbitral decision. Alternatively, it may mean that an arbitral decision is reviewable only under a very limited standard, such as fraud by the arbitrator(s) or arbitrary and capricious decision making. Because of this indeterminacy, it is

[3] The President's power is at its lowest ebb where the President issues an executive order that is contrary to other law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For this reason, we doubt that Exec. Order No. 12778 is meant to forbid entering into binding arbitration where there is a statutory or other legal obligation to do so. So, for instance, if the Federal Arbitration Act, 9 U.S.C. §§ 1–6 were to require the enforcement of a contractual binding arbitration provision, we would not interpret Exec. Order No. 12778 as attempting to override this statute.

Because your request focuses on the constitutional issues that might arise in connection with binding arbitration, we do not regard it as necessary to determine whether, setting aside Exec. Order No. 12778, the executive is authorized to enter into binding arbitration as part of a contract. Nevertheless, we point out that the President and the executive branch have broad authority to negotiate for or agree to contractual terms that they view as advancing the federal government's various interests. In a given case, this authority may stem from the Constitution, the specific statute authorizing the President or an executive branch official to enter into a contract, or from a broader statutory authorization. *See generally* 40 U.S.C. § 486; *Authority to Issue Executive Order on Government Procurement*, 19 Op. O.L.C. 90 (1995).

Another threshold inquiry is whether there is a basis for bringing a claim against the government. The United States is immune from suit except where it consents to be sued. *See, e.g., United States v. Lee*, 106 U.S. 196 (1882); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821). The waiver of sovereign immunity must be express. *See, e.g., Department of Energy v. Ohio*, 503 U.S. 607 (1992). Moreover, only Congress may waive sovereign immunity; the executive may not waive this immunity, such as through consenting to binding arbitration. *See United States v. Shaw*, 309 U.S. 495, 501 (1940). The three most significant statutory waivers of sovereign immunity are the Administrative Procedures Act, 5 U.S.C. § 702, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, and the Tucker Act, 28 U.S.C. §§ 1346(a), 1491. Whether any claim is encompassed within one of these or any other express waiver of sovereign immunity depends upon the specific claim asserted.

[4] Typically, arbitrators either are professional arbitrators or possess some expertise in the subject matter of the specific arbitration wherein they act. Throughout this memorandum, we assume that they are selected to arbitrate particular disputes on a case-by-case basis in the manner of independent contractors.

not possible to draw many specific conclusions. We are able, however, to offer generalizations and guidance pertaining to participation by the federal government in the various forms that binding arbitration may take.

II. The Appointments Clause

A. Whether Arbitrators Are Officers of the United States

To understand why the assertion that the Appointments Clause prohibits the government from entering into binding arbitration is not well-founded, it is necessary first to examine the requirements of the Appointments Clause itself. The Appointments Clause provides that

> [the President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but 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.

U.S. Const. art. II, § 2, cl. 2. The Appointments Clause sets forth the exclusive mechanisms by which an officer of the United States may be appointed. *See Buckley v. Valeo*, 424 U.S. 1, 124–37 (1976) (per curiam). The first issue to be resolved is, who is an "officer" within the meaning of the Constitution and therefore must be appointed by one of the methods set out in the Appointments Clause?

Not everyone who performs duties for the federal government is an officer within the meaning of the Appointments Clause. The requirements of the Appointments Clause apply only where an individual is appointed to an "office" within the federal government. From the early days of the Republic, the concepts of "office" and "officer" have been understood to embrace the ideas of "tenure, duration, emolument, and duties." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867). Because *Hartwell* has long been taken as the leading statement of the constitutional meaning of "officer,"[5] that statement is worth repeating in full:

[5] In an opinion discussing an Appointments Clause issue, Attorney General Robert F. Kennedy referred to *Hartwell* as providing the "classical definition pertaining to an officer." *Communications Satellite Corporation*, 42 Op. Att'y Gen. 165, 169 (1962). *Hartwell* itself cited several earlier opinions, including *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), *see Hartwell*, 73 U.S. at 393 n.†, and in turn has been cited by numerous subsequent Supreme Court decisions, including *United States v. Germaine*, 99 U.S. 508, 511–12 (1878), and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in *Buckley*, 424 U.S. at 125–26 & n.162.

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
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> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.
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> A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying those who must be appointed as constitutional officers, and in some cases it is not entirely clear which criteria the court considered essential to its decision. Nevertheless, we believe that from the earliest reported decisions onward, the constitutional requirement has involved at least three necessary components. The Appointments Clause is implicated only if there is created or an individual is appointed to (1) a position of employment (2) within the federal government (3) that is vested with significant authority pursuant to the laws of the United States.

1. A Position of Employment: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." *Maurice*, 26 F. Cas. at 1214. Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as that of independent contractor. In *Hartwell*, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as to the suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The Court also addressed the distinction between employees and persons whose relationship to the government takes some other form in *Germaine*. There, the Court considered whether a surgeon appointed by the Commissioner of Pensions "'to examine applicants for pension, where [the Commissioner] shall deem an examination . . . necessary,'" *Germaine*, 99 U.S. at 508 (quoting Rev. Stat. § 4777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. *Id.* at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government," *id.* at 510, and, applying *Hartwell*, concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." *Id.* at 512. The surgeon, therefore, was not an officer of the United States. *Id.*[6]

2. *Appointment to a Position within the Federal Government.* In addition, *Hartwell* and the other major decisions defining "Officers of the United States" all reflect the historical understanding that the Appointments Clause speaks only to positions within the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors. In *Hartwell* the Court stated that "[a]n office is a public station, or employment, conferred by the appointment of government." 73 U.S. at 393. In holding that the Appointments Clause applied in that case, the Court stressed that "[t]he employment of the defendant was in the public service of the United States." *Id.; see also Germaine*, 99 U.S. at 510 (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the government about to be established under the Constitution"). This means that the delegation of federal authority to state officials can present no Appointments Clause difficulties, because the individuals serve as state officials rather than as federal officials.[7] It is a conceptual mistake to argue that federal

[6] *Germaine* clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "head of Department," with the authority to appoint officers. *Id.* at 511.

[7] The framers appear to have envisioned that state officials would enforce federal law. For example, Madison wrote,

> eventual collection [of certain Federal taxes] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable that in other instances, . . . the officers of the States will be clothed with the correspondent authority of the Union.

laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office.[8] Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion.[9] An analogous point applies to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem.[10]

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally-derived authority by state officials,[11] the District of Columbia City Council,[12] *qui tam* relators under the False Claims Act,[13] and plaintiffs under the citizen suit provisions of the Clean

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The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). The framers also seem to have acted upon this understanding. The first Judiciary Act, enacted by the first Congress, required state magistrates and justices of the peace to arrest and detain any criminal offender under the laws of the United States. Ch. XX, §33, 1 Stat. 73, 91 (1789). This statute, in immaterially modified form, remains in effect. 18 U.S.C. §3041. At least two courts have interpreted this statute to authorize state and local law enforcement officers to arrest an individual who violates federal law. *See United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *Whitlock v. Boyer*, 77 Ariz. 334, 271 P.2d 484 (1954).

As discussed below, the delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and general separation of powers principles. *Compare Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479, 1486–89 (D. Or. 1994) (appeal pending) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor) with *United States v Ferry County*, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine).

[8] This should be distinguished from the case where a federal statute creates a federal office—such as membership on a federal commission that wields significant authority—and requires that a particular state officer occupy that office. In this instance, Congress has actually created a federal office and sought to fill it, which is the prototype of an Appointments Clause violation.

[9] *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive or administrative authority over federal activity"), *cert. denied*, 479 U.S. 1059 (1987).

[10] One might also view delegations to private individuals as raising the same considerations as suggested by the distinction drawn earlier between appointee and independent contractor—so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal responsibilities.

[11] *See, e.g., Seattle Master Builders*, 786 F.2d at 1364–66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of Congress, but that fact is not significant for Appointments Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." *Id.* at 1365. The Supreme Court's decision in *New York v. United States*, 505 U.S. 144 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reinforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so *as state officials*, by the decision and under the ultimate authority of the state.

[12] *See Techworld Dev. Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 115–17 (D.D.C. 1986). Though the court did not fully develop the point, we believe that the District of Columbia stands on a special footing. Congress's plenary authority to legislate for the District entails authority to establish a municipal government for the District, the officers of which are municipal rather than federal officers to whom the Appointments Clause simply does not apply.

[13] We believe that *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757–59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), *cert. denied*, 510 U.S. 1140 (1994), reached the correct result but

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Water Act.[14] The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States.[15]

3. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," *Maurice*, 26 F. Cas. at 1214, points to a third distinction as well — although not one that was at issue in *Maurice* itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed in *Buckley*:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine*, [means] that any appointee exercising *significant authority* pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause].

424 U.S. at 125–26 (emphasis added).[16] In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

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through an incorrect line of analysis. *See id.* at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better Appointments Clause analysis, in our view, is that of the court in *United States ex rel. Burch v. Piqua Eng'g, Inc.*, 803 F. Supp. 115, 120 (S.D. Ohio 1992), which held that "because *qui tam* [relators] are not officers of the United States, the FCA does not violate the Appointments Clause." We disapprove the Appointments Clause analysis and conclusion of an earlier memorandum of this Office, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207 (1989) (arguing that the qui tam provisions violate the Appointments Clause).

[14] Here, the court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. *See Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987) (*Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

[15] At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. *See, e.g.*, Alexander Hamilton, *The Defence* No. 37 (Jan. 6, 1796), *reprinted in* 20 *The Papers of Alexander Hamilton* 13, 20 (Harold C. Syrett ed., 1974):

> As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are *arbitrators* between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it" and the foreign nation(s) involved and that members are not constitutional officers. *Office—Compensation*, 22 Op. Att'y Gen. 184, 186 (1898); *see generally Dames & Moore v. Regan*, 453 U.S. 654 (1981); Harold H. Bruff, *Can Buckley Clear Customs?*, 49 Wash. & Lee L. Rev. 1309 (1992); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of the Binational Arbitral Review under the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1455 (1992); William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 Wash. & Lee L. Rev. 1315 (1992); Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1299 (1992).

[16] *See Appointments in the Department of Commerce and Labor*, 29 Op. Att'y Gen. 116, 118–19, 122–23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and confirmed by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the

The distinction between constitutional officers and other employees is a long-standing one. *See, e.g., Burnap v. United States*, 252 U.S. 512, 516–19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); *Second Deputy Comptroller of the Currency—Appointment*, 26 Op. Att'y Gen. at 628 (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. *See Germaine*, 99 U.S. at 509.[17]

The Supreme Court relied on the officer/employee distinction in *Freytag v. Commissioner*, 501 U.S. 868 (1991). In *Freytag*, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges.[18] *Id.* at 881. The Court put some weight on the fact that the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute;[19] the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. *Id.* at 882.

Bureau of Standards were employees rather than officers), *Second Deputy Comptroller of the Currency—Appointment*, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer).

We hasten to note that the exercise of significant authority alone is not a sufficient condition to characterizing a position as an office within the meaning of the Appointments Clause. To be considered a position that must be filled in conformance with the Appointments Clause, the position must also be one of employment within the federal government. For a discussion of this point, *see infra* section II.B.

[17] The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and confirmed by the Senate and understood to be "Officers of the United States" in the constitutional sense; in *Weiss v. United States*, 510 U.S. 163, 171 (1994), the Supreme Court recently indicated its agreement with that understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with significant governmental authority but does not restrict the status to such officials. This apparently was the nineteenth-century view. *See, e.g., United States v. Perkins*, 116 U.S. 483, 484 (1886) (cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employe[e]s"). (2) Certain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. *Cf. Buckley*, 424 U.S. at 126 (postmasters first class and clerks of district courts are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat—and, indeed, is in theory a potential commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

[18] In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render *final* decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances, "inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. *Id.* at 882.

[19] The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. *See* U.S. Const. art. II, §2, cl. 2 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

In contrast, as this Office has concluded, the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202–03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Because employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," *Buckley*, 424 U.S. at 131.[20] Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause.[21] *Id.* at 126.

To recapitulate, one who occupies a *position of employment within the federal government* that carries *significant authority* pursuant to the laws of the United States is required to be an officer of the United States, and therefore to be appointed pursuant to the Appointments Clause. Each one of the italicized terms signifies an independent condition, all three of which must be met in order for the position to be subject to the requirements of the Appointments Clause. We now turn to consideration of whether arbitrators occupy a position of employment in the federal government and exercise significant federal authority.

4. Arbitrators. It seems beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government. However, arbitrators retained for purposes of resolving a single case do not satisfy the remaining necessary conditions. They are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation. Hence, their service does not bear the hallmarks of a constitutional office—tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.

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[20] That an employee may not exercise *independent* discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In *Steele v. United States* (No. 2), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," *id.*, who is an officer in the constitutional sense.

[21] *See Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe[e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause).

Auffmordt compels this conclusion. That case involved a statute that entitled an importer who was dissatisfied with the government's valuation of dutiable goods to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the government and the importer, 157 U.S. at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause. In describing the merchant appraiser, the Court said:

> He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. . . . He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure, duration, continuing emolument, or continuous duties . . . . Therefore, he is not an 'officer,' within the meaning of the clause.

Id. at 326–27. Not only does *Auffmordt* compel our conclusion, the contrary position — that an independent contractor or non-federal employee who exercises significant governmental authority must be appointed pursuant to the Appointments Clause — would be inconsistent with the *Germaine* and *Hartwell* cases discussed above.[22]

Our conclusion is consistent with the Supreme Court's classification of the independent counsel as an inferior officer in *Morrison v. Olson*, 487 U.S. 654 (1988). There the Court observed that "[i]t is clear that appellant is an 'officer' of the United States, not an 'employee.'" *Id.* at 671 n.12. Significantly, the lone authority the Court cited for this proposition was "*Buckley*, 424 U.S. at 126, and n. 162." *Id.* At the page cited, the *Buckley* Court quoted and reaffirmed *Germaine*, and in the footnote cited the Court reaffirmed both *Germaine* and *Auffmordt*. *Buckley*, 424 U.S. at 126 & n.162. This coupled with *Morrison*'s express approval of *Germaine*, 487 U.S. at 670, strongly counsel against interpreting *Morrison* to have scuttled the *Auffmordt* and *Germaine* definition of office, which treats tenure, duration, emoluments, and continuing duties as necessary conditions.

[22] ENRD reads *Auffmordt* and *Germaine* as limited to "judgments of experts on areas within their expertise, as opposed to policy or legal judgments." ENRD memorandum at 3. Apparently, ENRD's position is that the negative inference from the Appointments Clause is to be drawn except where an expert acts within the scope of his or her expertise. In other words, the Appointments Clause prohibits any private actor from exercising significant authority, unless the private actor is an expert who exercises significant authority within the scope of his or her expertise. While there may be strong policy reasons for wishing to restrict *Auffmordt* and *Germaine* in this way, there is no basis in the Constitution for doing so. The text of the Appointments Clause makes no reference to, let alone an exception for, expert action. Furthermore, there is nothing in the *Auffmordt* or *Germaine* opinions themselves that supports narrowing them in this way.

We believe that the factors that make it "clear" that an independent counsel is an officer of the United States demonstrate that an arbitrator is not. The office of independent counsel is created by statute. *See* 28 U.S.C. §§ 591–599. The independent counsel's compensation is fixed specifically by statute at the rate set forth at 5 U.S.C. § 5315 for level IV of the Senior Executive Service. *Id.* § 594(b). All of the others listed as receiving this compensation are in the full-time employment of the federal government and, insofar as we are aware, are in fact officers within the meaning of the Appointments Clause. *See* 5 U.S.C. § 5315 (setting compensation for, inter alia, assistant attorneys general). The independent counsel's operating and overhead expenses are fixed[23] by statute and appropriation. 28 U.S.C. § 594(c) (fixing compensation of attorneys employed by an independent counsel); *id.* § 594(l) (providing for administrative support, office space, and travel expenses). Significantly, Congress is the exclusive source of funding for any operations undertaken by the independent counsel. In this way, Congress takes some part in providing an ongoing definition to the office of independent counsel and may exercise some degree of influence over the independent counsel. Indeed, as the Court noted, Congress expressly retained oversight authority with respect to the activities of independent counsels and provided for submission of reports by independent counsels to congressional oversight committees. *Morrison*, 487 U.S. at 664–65. In addition, the independent counsel occupies a position that is formally within the federal government. That position is, according to the Supreme Court, within the executive branch chain of command to at least some extent and subject to oversight and control by the President and guidance of the Attorney General. *Id.* at 685–92; 28 U.S.C. § 594(e). The independent counsel also may request and receive the assistance of the Department of Justice. *Id.* § 594(d). The independent counsel thus clearly occupies a position of employment within the federal government. In fact, this point was so clear that Congress went out of its way expressly to provide that the position of independent counsel would be "separate from and independent of the Department of Justice" for certain purposes. *Id.* § 594(i).

Arbitrators share none of these material qualities. The position of arbitrator is not created by a congressional enactment. Arbitrators set their own fee and charge the client parties, including but not limited to the government, that fee. No appropriation is made specifically to support the operations or expenses of arbitrators.[24] As a result, an arbitrator's compensation even for a case involving the government is not limited to the fee paid by the government and an arbitrator remains free to turn to other sources for funding of his or her operations and expenses, subject

[23] By use of the term "fixed," we mean to distinguish this scheme—in which Congress sets the independent counsel's salary and overhead—from one in which an arbitrator's fee and overhead are determined by the arbitrator and passed on to the federal government, even though the government may ultimately pay them from a specific appropriation.

[24] Of course, any fee that the government pays must ultimately come from appropriated funds. Nevertheless, the fee is paid to an arbitrator not in the manner of an employee of the government but rather as a non-government actor who provides services to the government.

of course to conflict of interest and ethical limitations. In addition, arbitrators are not subject to congressional oversight or to presidential control.

Finally, the statute creating the office of independent counsel also defines the procedures by which the office may be terminated. Morrison, 487 U.S. at 664. Arbitrators, by contrast, serve until the matter they are retained to resolve is completed; there is no statutory process for termination of their "office." This vividly demonstrates that while there is an office underlying the position of independent counsel, there is no similar office underlying one who acts as an arbitrator; there is no process for terminating the office of an arbitrator because there is no office to terminate.

This is not to say that it is impossible for a binding arbitration mechanism to run afoul of the Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. *See Freytag*, 501 U.S. at 880–82. Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators whom it provided with all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause.

B. The Appointments Clause as a Bar against Delegations to Private Actors

We do not understand there to be any dispute that arbitrators are private rather than government actors. *See Davey, supra*, at 1318 ("no one would argue that [arbitrators] are" officers of the United States). Instead, the position that the Appointments Clause prohibits the government from entering into binding arbitration rests on a negative inference drawn from the Appointments Clause — specifically, that only officers of the United States appointed pursuant to the Appointments Clause may exercise significant federal authority. *See, e.g.*, Civil Division, U.S. Dep't of Justice, *Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts* 4 n.8 (1992) ("Under the Appointments Clause, [significant governmental] duties may be performed only by 'Officers of the United States,' appointed in the constitutionally prescribed manner." (citation omitted)). This negative inference lacks textual support and is contrary to the consistent interpretations of the Clause by the Supreme Court.

By its own terms, the Appointments Clause addresses only the permissible methods by which officers may be appointed. The term officer has been defined to mean one who occupies a position of employment within the federal government that carries significant authority pursuant to the laws of the United States. The Appointments Clause's text says nothing about whether or what limits exist on the government's power to devolve authority on private or other non-federal actors.

Instead, what limits exist on the ability to delegate governmental authority to private actors are encompassed within the non-delegation doctrine.[25] The very existence of the non-delegation doctrine strongly suggests that looking to the Appointments Clause for limits on the federal government's ability to delegate authority to non-federal actors is a misguided enterprise. If the Appointments Clause prohibited all delegations of significant federal governmental authority to non-federal actors, there would be no need for a separate non-delegation doctrine in that context. While some of the most notable controversies under the non-delegation doctrine have involved delegations from the federal legislature to the federal executive, *see, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), the doctrine has by no means been limited to this context. The Supreme Court and the lower federal courts have reviewed the delegation of significant federal governmental authority to non-federal actors under the non-delegation doctrine. Moreover, the courts, including the Supreme Court, have upheld such delegations without even hinting that the Appointments Clause might be implicated. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding delegation to private arbitrators); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding delegation of regulatory authority to private industry group); *Kentucky Horseman's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406 (6th Cir. 1994) (upholding delegation of regulatory authority to a state and to private industry group); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (upholding delegation of authority under Clean Air Act to Indian tribe); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979) (upholding delegation of adjudicative authority to private industry group); *Crain v. First Nat'l Bank*, 324 F.2d 532, 537 (9th Cir. 1963) ("While Congress cannot delegate to private corporations or anyone else the power to enact laws, it may employ them in an administrative capacity to carry them into effect."); *cert. denied*, 454 U.S. 108 (1981); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir.) (upholding delegation of adjudicative authority to private industry group), *cert. denied*, 344 U.S. 855 (1952).[26]

The Supreme Court's interpretations of the Appointments Clause actually refute the negative inference that is sometimes asserted. The Court's decision in *Auffmordt* is especially compelling. There, the Court held that because the mer-

[25] The application of the non-delegation doctrine to binding arbitration is discussed more fully *infra* at section V.C.

[26] It is theoretically possible that the courts have upheld these delegations because the parties challenging them have repeatedly failed to raise the Appointments Clause. *Compare White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983) (upholding residency requirement for public works project against dormant Commerce Clause challenge) *with United Bldg. and Constr. Trades v. Camden*, 465 U.S. 208 (1984) (striking down residency requirement for public works projects as violation of Privileges and Immunities Clause). We would be reluctant to place the numerous delegations so upheld on such a capricious footing absent a clear indication in the Court's Appointments Clause jurisprudence. While not all non-delegation litigants have raised Appointments Clause challenges, some have and, as we detailed in the preceding section, those challenges consistently have been rejected.

chant appraiser—who stands formally and functionally in the same position as an arbitrator in a binding arbitration involving the federal government—was a private actor, the Appointments Clause did not apply and so upheld the statutory delegation of arbitral authority to the merchant appraiser. In other words, *Auffmordt* held that the Appointments Clause does not prohibit delegating significant federal authority to private actors. The Court employed the same reasoning to reject the Appointments Clause challenges in *Germaine* and *Hartwell.*

The argument asserting the negative inference from the Appointments Clause relies on *Buckley.* We believe, however, that under its best reading *Buckley* reflects and endorses our view that the Appointments Clause simply does not apply to non-federal actors, and that the negative inference argument misreads the opinion. First, *Buckley* cites both *Germaine* and *Auffmordt* approvingly. *See* 424 U.S. at 125–26 & n.162. Second, in several of its statements of the definition of "officers," *Buckley,* sometimes citing *Germaine* explicitly, says that the term applies to *appointees* or *appointed officials* who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. *See, e.g., id.* at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws.").

It is true that, at other points in its opinion, the *Buckley* Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. *See id.* at 141. However, we think such a reading of *Buckley* is unwarranted. So understood, *Buckley* must be taken to have overruled, *sub silentio, Germaine* and *Auffmordt*—cases upon which it expressly relies in its analysis, *see id.* at 125–26 & n.162—and its repeated quotation of the *Germaine* definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. Not only does such a reading render *Buckley* internally inconsistent, it fails to explain the Supreme Court's continuing and unqualified citations to and reliance upon *Germaine. See Freytag,* 501 U.S. at 881; *Morrison,* 487 U.S. at 672.

The apparently unlimited language of some passages in *Buckley* has a simpler explanation: there was no question that the officials at issue in *Buckley* held positions of "employment" under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court.[27] The post-*Buckley* Supreme Court

[27] The weight of scholarship that has considered the interplay of *Buckley* with *Hartwell, Germaine,* and *Auffmordt* accords with our approach. As one commentator has asserted:

> The *Buckley* Court's entire analysis is predicated upon its construction of the appointments clause in the context of its 'cognate' separation-of-powers provisions. The decision, as in *Germaine* and the other appointments clause cases, was concerned with determining the status of an individual who was employed by the United States. The Court's definition thus was employed to distinguish between classes of federal employees; it was not used to distinguish between federal and nonfederal employees. Since the two questions differ radically, it is hardly surprising that a standard helpful in resolving one leads to absurd results when applied to the other.

Continued

has often assessed the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted at the existence of an Appointments Clause issue. It is especially telling that two of these decisions have involved forms of binding arbitration. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); *Schweiker v. McClure*, 456 U.S. 188 (1982) (upholding submission of dispute to binding, unreviewable determination by a single arbiter who is a private actor); *see also FERC v. Mississippi*, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); *Lake Carriers' Ass'n v. Kelley*, 456 U.S. 985 (1982) (mem.), *aff'g* 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel) (upholding statute that granted states authority to ban sewage emissions from all vessels); *Train v. National Resources Defense Council, Inc.*, 421 U.S. 60 (1975) (construing provision of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined, national air quality standards).[28] The Supreme Court's decision in *Buckley*, we conclude, did not modify the long-settled principle that a person who is not an officer under *Hartwell* need not be appointed pursuant to the Appointments Clause.

Prior writings of this Office have read *Buckley* more broadly as standing for the proposition disavowed here — that is, that all persons exercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four instances in which our disagreement with this understanding of *Buckley* would cause us to reach a different conclusion on the Appointments Clause question presented. *See Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990,"* 14 Op. O.L.C. 154, 155 (1990) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise

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Dale D. Goble, *The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council*, 1 J. Envtl. L. & Litig. 11, 53 (1986); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 72–73 n.26 (1990) (whether one who exercises governmental authority is an officer is determined by looking to the factors set out in *Hartwell*, *Germaine*, and *Auffmordt*).

[28] It is sometimes asserted that the Supreme Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), adopted the negative inference from the Appointments Clause. We see no basis for this proposition. That case simply did not involve the Appointments Clause. While the Court makes a passing reference to the Appointments Clause, *id.* at 722–23, we can find no passage in which the Court even appears to contemplate construing the Appointments Clause. The question in *Bowsher* pertained to the limits on the authority that the Comptroller General could exercise. The Comptroller General is appointed by the President and confirmed by the Senate, *see* 31 U.S.C. § 703. This method of appointment conforms to the letter of the Appointments Clause. *See* U.S. Const. art. II, § 2, cl. 2. We cannot conceive of a reasonable reading of *Bowsher* as either explicitly or implicitly affirming — or, for that matter, rejecting — the negative inference from the Appointments Clause.

"significant authority" violates Appointments Clause); *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 222 (1989) (provisions of False Claims Act authorizing qui tam suits by private parties violate Appointments Clause because qui tam relators exercise "significant governmental power"); *Representation of the United States Sentencing Commission in Litigation*, 12 Op. O.L.C. 18, 26–28 (1988) (private party acting as counsel for United States agency must be appointed pursuant to Appointments Clause); *Proposed Legislation to Establish the National Indian Gaming Commission*, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). We now disavow the Appointments Clause holdings of those precedents. To the extent that our reading of *Buckley* is inconsistent with the Appointments Clause reasoning of other prior precedents of this office, that reasoning is superseded. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 248–49 (1989). We do not disavow these precedents lightly. These more recent citations, however, are inconsistent and in some cases irreconcilable with prior opinions of the Attorneys General. Moreover, the Supreme Court has not overruled but has reaffirmed *Auffmordt*, *Hartwell*, and *Germaine*, and we are bound to follow them.

III. The Take Care Clause

It has been suggested that the Take Care Clause prohibits the federal government from entering into binding arbitration, because that clause requires all power exercised by the executive branch to be exercised in a manner that the President judges to be "faithful." This approach forbids the President's judgment from being subordinated to the judgment of an arbitrator. This suggestion misconstrues the Take Care Clause. The Constitution establishes that "[t]he executive power shall be vested in a President of the United States of America," U.S. Const. art. II, § 1, cl. 1; and that the President "shall take Care that the Laws be faithfully executed," *id.* art. II, § 3. The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes. *See, e.g., INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609–13 (1838); *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980) (opinion of Attorney General Civiletti) ("The President has no 'dispensing power.' "). *See generally* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 869–74 (1994).

The Supreme Court's decision in *Kendall* is illuminating. A dispute between the postmaster general and several contractors had arisen. Congress passed a law directing the Solicitor of the Department of the Treasury to resolve the dispute

and requiring the postmaster general to pay whatever sum the Solicitor determined was due. The postmaster general refused to comply with the Solicitor's decision, arguing that he "was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed." 37 U.S. at 612. The Court emphatically rejected this argument.[29] Instead the Court ruled that the Congress had waived sovereign immunity and submitted to whatever resolution the Solicitor ordered. "The terms of the submission was a matter resting entirely in the discretion of congress; and if they thought proper to vest such a power in *any one*, and especially as the arbitrator was an officer of the government, it did not rest with the postmaster general to control congress, or the solicitor, in that affair." *Id.* at 611 (emphasis added). Thus, *Kendall* stands for the proposition that the Executive must comply with the terms of valid statutes and that if a statute requires the Executive to submit to binding arbitration, the Executive must do so.

The Take Care Clause itself has no bearing on the question of whether the Constitution permits the federal government to enter into binding arbitration; in this context, it simply requires the President to "take Care" that whatever valid legal requirements might exist are followed.[30] It is necessary to consider the application of this principle in three situations. First, where a statute or other law operates to require the government to submit to binding arbitration, the government must submit. *Kendall*, 37 U.S. at 611. Second, where a statute or other law forbids submission to binding arbitration, such as where it expressly vests discretion in a particular government officer, submission to binding arbitration is forbidden. *See Establishment of a Labor Relations System for Employees of the Federal Labor Relations Authority*, 4B Op. O.L.C. 709, 715–16 (1980).[31] Finally, where the statutes and other laws are silent, the Take Care Clause simply has nothing to say about whether the government may submit to binding arbitration.

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[29] "This is a doctrine that cannot receive the sanction of this court. . . . To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.*

[30] In the above-cited opinion, Attorney General Civiletti did not ignore his power, and indeed obligation, to decline to enforce or decline to defend an unconstitutional statute, especially one violating the Constitution's separation of legislative and executive powers. *See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. at 56 (in such a situation, the Attorney General "would be untrue to his office if he were to do otherwise"); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 199 (1994) ("there are circumstances in which a President may appropriately decline to enforce a statute that he views as unconstitutional").

[31] Where a statute vests final decisionmaking authority in an executive branch official, that official must make the decision and may not—absent congressional authorization—delegate that authority to another official or to a private actor such as an arbitrator. *See id.* This case must be distinguished from the situation where the final decision of an executive official is subject to judicial review. Here, the official must make the decision in the first instance. If a challenge is subsequently brought, then absent some specific statutory bar or other legal impediment, there is nothing in the Take Care Clause that would prohibit such an official from opting for binding arbitration rather than adjudication before an Article III court. Currently, Exec. Order No. 12778 imposes an absolute prohibition on opting for binding arbitration where litigation counsel is not otherwise compelled to submit to it.

IV. Other Article II Issues

In addition to recognizing the mandatory nature of the processes — such as the Appointments Clause — that the Constitution expressly ordains, the Supreme Court's decisions have identified broader structural principles that separate and limit the powers of the three branches of government. One important principle is that Congress may not vest itself, its members, or its agents with "'either executive power or judicial power,'" *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citation omitted), and that Congress therefore may not intervene in the decision making necessary to execute the law. *Bowsher*, 478 U.S. at 733–34; *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *aff'd on other grounds*, 513 U.S. 88 (1994).

"The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher*, 478 U.S. at 715, 726. Therefore, any scheme whereby Congress — whether itself or through one of its committees, members, or agents — appoints, retains removal authority over, or otherwise exercises any type of continuing authority over an arbitrator[32] violates the constitutional anti-aggrandizement principle. This principle extends to non-voting members. *NRA Political Victory Fund*, 6 F.3d at 827. Consequently, we do not believe that Congress could make one of its members or agents an *ex officio* non-voting member of an arbitral panel. *Id.*

Legislation that is consistent with the Constitution's express procedures and with the *Bowsher* principle may nonetheless affect the constitutional separation of powers by invading the constitutional roles of the executive or judicial branches. "[I]n determining whether [such an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); *cf. CFTC v. Schor*, 478 U.S. 833, 856–57 (1986) ("the separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch"). An affirmative answer to the question of whether Congress has prevented the executive or judiciary from accomplishing its functions, furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443.

[32] *Buckley* and *NRA Political Victory Fund* establish that Congress violates the anti-aggrandizement principle if it retains control over any member of a nonlegislative body, even though a single member cannot alone take any dispositive action. Thus, in the arbitration setting, it would not matter for purposes of separation of powers analysis that Congress exercises control over only a single member of, for example, a three-member arbitral panel. Such an arrangement would violate the anti-aggrandizement principle.

In the context of binding arbitration, concerns under this general separation of powers principle would arise if an arbitral panel were given authority that is constitutionally committed to the executive. For example, the Supreme Court has held that the President must retain at least some ability to control the exercise of federal criminal prosecutorial power. *See Morrison v. Olson*, 487 U.S. 654 (1988). Thus, we believe the general separation of powers principle would stand as a bar to vesting an arbitration panel with unreviewable authority to direct or control the prosecution or conduct of federal litigation by the executive branch's attorneys.

Where, on the other hand, a *dispute* over the exercise of executive authority is submitted to binding arbitration, the general separation of powers principle has little force. The principle prohibits incursions that "prevent[] the Executive Branch from accomplishing its *constitutionally assigned* functions." *Nixon*, 433 U.S. at 443 (emphasis added), *quoted in Morrison v. Olson*, 487 U.S. 654, 695 (1988). The Constitution does not, however, assign to the executive branch exclusive responsibility for resolving disputes over the exercise of its authority. The very language of Article III providing for federal court jurisdiction over disputes involving "the United States" demonstrates that the Constitution does not require that the authority to resolve such disputes over executive action be vested in the executive branch itself. Resolution of such disputes by private arbitrators, therefore, does not in itself disturb the separation of powers that the Constitution ordains.

In addition, the Constitution's text and structure grant the President a number of powers that are not, as such, subject to the general separation of powers principle; examples include the commander in chief and foreign affairs powers. The President may not be bound to the decision of an arbitrator in the exercise of these constitutional powers, whether by statute or by purported agreement of the President. Congress may not, for example, require the President to exercise the President's pardon power pursuant to the dictates of an arbitrator. *See generally United States v. Klein*, 80 U.S. 128, 148 (1871); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

V. Article III

Article III of the Constitution, which establishes the federal judicial branch, places at least some limitations on the ability of the federal government to submit to binding arbitration. Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This "judicial power" does not refer to all federal adjudications, however. *See, e.g., Freytag*, 501 U.S. at 909 (Scalia, J., concurring) ("there is nothing 'inherently judicial' about 'adjudication' "). The Supreme Court has long wrestled with the mandatory scope of the Article III vesting clause — that is, what federal adjudica-

tions must be committed to an Article III tribunal.[33] It is clear, however, that Article III prohibits at least some matters from being submitted to binding arbitration.

Early on, the Supreme Court settled on a general approach for resolving questions regarding Article III's scope:

> we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). In its generalities, this statement remains an accurate description of the Court's approach to Article III: there are three categories of determinations—those that must be submitted to an Article III tribunal, those that may be submitted to such a tribunal, and those that may not be submitted to such a tribunal.

The statement in *Murray's Lessee*, however, has been taken further to establish a so-called public rights doctrine. Under that doctrine, all federal adjudication would be required to be conducted in an Article III forum except adjudication involving a public right.[34] Public rights adjudication could presumably take whatever form Congress prescribed. Use of this doctrine reached its highwater mark in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), which defined public rights as "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments' " and private rights as " 'the liability of one individual to another under the law as defined.' " *Id.* at 67–68, 69–70 (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932)); *see Thomas*, 473 U.S. at 585 (characterizing *Northern Pipeline*).

More recently the Court has eschewed the public rights doctrine as set forth in *Northern Pipeline*. The Court no longer accepts either the proposition that all federal adjudications of private disputes must be submitted to an Article III tri-

[33] Congress may, however, have power to decline to provide for any federal adjudication of some matters. *See generally* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). If Congress has such a power, one notable exception would be the Supreme Court's original jurisdiction, which we do not believe that Congress could eliminate. *See* U.S. Const. art. III, § 2, cl. 2.

[34] The general rule did not apply to courts for the territories or the District of Columbia, which arguably perform federal adjudication, or to the courts martial. *Northern Pipeline Constr. Co.*, 458 U.S. at 64–70.

bunal or that Article III has no force in cases between the government and an individual. *Thomas*, 473 U.S. at 585–86. The Supreme Court dismissed the public rights doctrine approach[35] as formalistic and admonished that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Id.* at 587 (construing *Crowell v. Benson*, 285 U.S. 22 (1932)). The Court has thus directed that "the constitutionality of a given delegation of adjudicative functions to a non-Article III body . . . be assessed by reference to the purposes underlying the requirements of Article III." *Schor*, 478 U.S. at 847. The Court has identified two such purposes: the first is to fulfill a separation of powers interest — protecting the role of an independent judiciary — while the second is to protect an individual right — the right to have claims decided by judges who are free of domination by other branches. *Id.* at 848.[36] Under the separation of powers rubric, the Court has resisted adopting a formalistic approach in favor of one that looks to the actual effects on the constitutional role of the Article III judiciary. The most significant factor is whether the adjudication involves a subject matter that is part of or closely intertwined with a public regulatory scheme. We consider the implications of the purposes of Article III first in the context of a statute that mandates binding arbitration and then in the context of consensual submission to binding arbitration.[37]

A. Statutorily Mandated Binding Arbitration

1. Separation of Powers. The separation of powers purpose served by Article III, Section 1 was explained in *Schor*: that vesting clause "safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emascu-

[35] While the Court has abandoned the public rights *doctrine*, it occasionally uses the term "public rights" as a shorthand reference to matters that need not be vested in an Article III tribunal, particularly in the context of the Seventh Amendment. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Schor*, 478 U.S. at 853 ("this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights").

[36] For the purposes of this inquiry, Article III also defines the scope of another individual right, the Seventh Amendment right to a jury trial. If an adjudication may be vested in a non-Article III tribunal, the Seventh Amendment does not prohibit non-jury fact-finding:

> [I]f [an] action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.

Granfinanciera, 492 U.S. at 63–64.

[37] The ENRD memorandum refers to a third category — court-ordered binding arbitration. We believe that a court may order binding arbitration only if it is specifically authorized to do so. When Congress expressly commits jurisdiction to resolve cases of a particular type to the Article III judiciary, the Article III judiciary may not rewrite the jurisdictional statute to provide for final resolution by some other agent — any more than the executive may refuse to carry out a valid statutory duty. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *In re United States*, 816 F.2d 1083 (6th Cir. 1987). If a statute grants a court authority to order binding arbitration, the scheme is properly analyzed as an example of statutorily mandated binding arbitration. *See, e.g.*, 28 U.S.C. §§651–658 (authorizing federal district courts to refer matters to arbitration), 28 U.S.C. §§631, 636 (authorizing appointment of and establishing powers of United States Magistrate Judges).

lating' constitutional courts and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.' " *Id.* at 850 (quoting, respectively, *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting), and *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)). In reviewing assertions that a particular delegation to a non-Article III tribunal violates Article III, the Court applies a general separation of powers principle; that is, the Court looks to whether the practical effect of a delegation outside Article III is to undermine "the constitutionally assigned role of the federal judiciary." *Schor*, 478 U.S. at 851; *see Thomas*, 473 U.S. at 590 (looking to whether a delegation outside Article III "threatens the independent role of the Judiciary in our constitutional scheme").

It is not possible to draw a broad conclusion regarding the validity of statutory schemes that mandate binding arbitration, except to observe that some conceivable schemes would not violate Article III while other schemes could. *See Thomas*, 473 U.S. at 594. The Court has listed three factors that it will examine to determine whether a particular adjudication by a non-Article III tribunal, such as an arbitration panel, impermissibly undermines the constitutional role of the judiciary. The Court looks first to the extent to which essential attributes of judicial power are reserved to Article III courts and the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested in Article III courts; second to the origin and importance of the right to be adjudicated; and third to the concerns that drove Congress to place adjudication outside Article III. *Schor*, 478 U.S. at 851.

The first factor focuses on whether the subject matter entrusted to the non-Article III tribunal is restricted to a "particularized area of [the] law" or instead is relatively broad-ranging. *Id.* at 852. The more broad-ranging the tribunal's authority, the greater the likelihood of an Article III conflict. Where a tribunal has a particularized jurisdiction, however, granting the tribunal authority to entertain additional matters in the nature of counterclaims is unlikely to yield an impermissibly broad jurisdiction. Broadening the scope to reach pendant and ancillary claims would raise serious concerns. *Id.* Also relevant is the range of remedies that the tribunal is empowered to issue. The closer that range approximates the full range that might be issued by an Article III tribunal, the more suspect the non-Article III tribunal appears. Most significantly, this factor requires examination of the standard under which the determination of an arbitration panel is reviewable. *Id.* at 853. In *Thomas* the statute that mandated binding arbitration permitted judicial review only for "fraud, misconduct, or misrepresentation." 473 U.S. at 592. The Court held that this limited review "preserves the 'appropriate exercise of the judicial function' " because it "protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law." *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 54 (1932)).

The second factor is the nature and importance of the right to be adjudicated by the non-Article III tribunal. First and foremost, the Supreme Court has stated that any attempt by Congress or the Executive to vest the final adjudication of questions of constitutional law outside Article III courts[38] would raise serious constitutional concerns, *see Thomas*, 473 U.S. at 592, although we acknowledge that the Court has never resolved this question. In any event, this is not to say that constitutional claims may not ever be submitted to arbitration as an initial matter. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Rather, the serious constitutional concerns that the Court has raised are avoided only if matters of constitutional law must ultimately be subject to judicial review even if the matter may not have initially been submitted to an Article III tribunal.[39] To avoid ruling unnecessarily on the difficult constitutional question, the Supreme Court has required that Congress's intent to preclude judicial review of constitutional claims be clear before the Court will entertain the validity of such preclusion. *See, e.g., Webster v. Doe*, 486 U.S. 592 (1988); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974). Without such clear congressional intent, a statute that simply purports to prohibit judicial review will not prohibit judicial review of constitutional questions.[40]

In addition to constitutional issues, there are other rights the Court views as being "at the 'core' of matters normally reserved to Article III courts." *Schor*, 478 U.S. at 853. This category was set forth as far back as *Murray's Lessee* and includes "suit[s] at common law, or in equity, or admiralty," *Murray's Lessee*, 59 U.S. at 284, as well as claims of a "state-law character," *see Northern Pipeline*, 458 U.S. at 100. Because these matters historically have been perceived to lie at the core of Article III, attempts to withdraw them from "judicial cognizance" are subject to "searching" scrutiny. *Schor*, 478 U.S. at 854. The Court, however, has rejected the contention that Article III works a blanket proscription on entrusting the resolution of such matters to non-Article III tribunals. *See id.* at 853 (separation of powers principles do not support "accord[ing] the state law character of a claim talismanic power in Article III inquiries"). Instead, we are to examine the specific adjudication vested outside Article III, focusing on whether "Congress has . . . attempted to withdraw from judicial cognizance" the deter-

[38] Of course, some constitutional issues may arise that are not justiciable by an Article III court. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979). This does not mean that no government actor will make a determination based on constitutional interpretation as to how to proceed. We would not, however, regard this as an "adjudication."

[39] We do not mean to indicate that a party may never waive a constitutional claim or be barred from asserting a constitutional claim for procedural reasons such as failure to exhaust a statutory remedy, including submission to arbitration.

[40] The Supreme Court has held questions relating only to "the interpretation or application of a particular provision of [a] statute to a particular set of facts" are not themselves constitutional questions and that Congress may bar judicial review of such claims. *See Robison*, 415 U.S. at 367. The courts have been vigilant in rejecting attempts by litigants to characterize as constitutional claims, especially under the Due Process Clause, what are in fact challenges to "the interpretation or application of a particular provision of [a] statute to a particular set of facts." *Id.; see, e.g., Sugrue v. Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994) (holding claimants cannot obtain judicial review of "benefits determinations merely because those challenges are cloaked in constitutional terms"), *cert. denied*, 515 U.S. 1102 (1995).

mination of these core claims. *Id.* at 854. Here, we will look to the scope of the non-Article III tribunal's jurisdiction over core Article III claims, the extent to which the scope of that jurisdiction is tailored to "valid and specific legislative necessities," and the extent to which determinations made by the non-Article III tribunal are subject to Article III review. *Id.* at 855.

On the other hand, when Congress creates rights outside Article III's core, most of the matters that arise in connection with these rights can be "conclusively determined by the Executive and Legislative Branches." *Thomas*, 473 U.S. at 569, 589. The prototype of such non-core matters are rights created by statute as part of or intertwined with a complicated regulatory scheme. *See Schor*, 478 U.S. at 853–54; *Thomas*, 473 U.S. at 589–90. Where this is the case, "the danger of [Congress or the executive] encroaching on the judicial powers is reduced." *Id.* at 589. Statutes mandating binding arbitration to resolve disputes that arise in connection with these rights are unlikely to contravene Article III. That is not to say that such schemes cannot run afoul of Article III. *But see* Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee through Crowell to Schor*, 35 Buff. L. Rev. 765, 792, 842 n.360 (1986). While the Supreme Court has observed that the threat of encroachment is "reduced," in such circumstances, it has rejected the contention that Article III has no force in these cases. *See Thomas*, 473 U.S. at 589.

The third factor, the purpose underlying the departure from Article III adjudication, has little independent force. That factor looks to whether Congress has attempted to "emasculate" the judiciary by enacting a particular binding arbitration requirement. Thus, Article III prohibits Congress from "creat[ing] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control." *Schor*, 478 U.S. at 855. Absent such a purpose, however, this factor alone would not limit Congress's authority to enact a mandatory binding arbitration scheme. *See Thomas*, 473 U.S. at 590; *Crowell*, 285 U.S. at 46.

The factors listed above should not be considered in isolation from one another. *See, e.g., Thomas*, 473 U.S. at 592 (holding limit on judicial review permissible "in the circumstances" of that statutory scheme). For instance, the limited review upheld in *Thomas* applied to adjudication of a right that was "closely integrated into a public regulatory scheme." *Id.* at 594. If the right at issue had been closer to the core with which Article III is particularly concerned, such limited review might not have been approved. All of this is by way of demonstration that Article III does not draw bright lines and so does not permit more specific guidance than we have set forth. Whether a particular statutory scheme impermissibly

undermines the constitutional role of the judiciary can only be determined by reviewing the facts and context of each such scheme.[41]

2. Individual Rights. Article III also safeguards the right of litigants to have claims decided by "judges who are free from potential domination by other branches of government." *Schor*, 478 U.S. at 848. It is doubtful that the government possesses this individual right.[42] Even if it does, this individual right may be waived. *See id.* at 850–51; *Thomas*, 473 U.S. at 592–93. Where Congress enacts a statute that requires the government to submit to binding arbitration, that statute — as in the context of sovereign immunity — acts as a waiver of whatever right the government might have to litigate in an Article III tribunal. The extent to which private litigants may be statutorily compelled to submit to binding arbitration is beyond the scope of the present inquiry.[43]

B. Consensual Binding Arbitration

Where there is no statute requiring parties to enter into binding arbitration, the parties may nevertheless agree to do so. The same may be said of the government when it is a party. Absent a statute to the contrary and assuming the availability of authority to effect any remedy that might result from the arbitration, we perceive no broad constitutional prohibition on the government entering into binding arbitration. Such arrangements, however, are still technically subject to scrutiny for conformity to the purposes underlying Article III. *See Schor*, 478 U.S. at 850–51 (separation of powers violation may occur even though parties have consented). It is difficult to *see* how the executive — litigating on behalf of the government — impermissibly undermines the role of the judicial branch by agreeing to resolve a particular dispute through binding arbitration. *See Thomas*, 473 U.S. at 591 (danger of encroachment is at a minimum where parties consent to arbitration).[44] As to Article III's purpose of safeguarding the individual right to independent adjudication, it is sufficient, where the parties consent, if the agreement preserves Article III review of constitutional issues and permits an Article III tribunal to

[41] As the Supreme Court instructed in *Schor*, "due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." 478 U.S. at 857.

[42] Governmental interests are generally viewed under the heading of separation of powers. The assertion that Congress impermissibly invades the executive by compelling the executive to submit to binding arbitration, for example, is in essence an argument that Congress has violated the separation of powers. We assessed these arguments in sections III and IV.

[43] We note that in *Thomas*, the Court seemed to indicate that private parties could be required to submit to binding arbitration as long as the arbitration process satisfied the requirements of due process. 473 U.S. at 592–93. The Court had no occasion to define the specific requirements of due process in the binding arbitration context because the parties had waived their due process objections. In addition, a requirement that private parties submit to binding arbitration could not be imposed in such a way as to work an unconstitutional condition. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 212–14; *see also Thomas*, 473 U.S. at 596 n.1 (Brennan, J., concurring).

[44] If, however, the executive branch were to adopt and pursue a policy of entering into binding arbitration in a systematic manner designed to undermine the judiciary's constitutional role, a serious constitutional question would arise.

review the arbitrators' determinations for fraud, misconduct, or misrepresentation. *Id.* at 592. Such agreements should also describe the scope and nature of the remedy that may be imposed and care should be taken to insure that statutory authority exists to effect the potential remedy.

C. The Non-Delegation Doctrine

The previous discussion demonstrates that, at least in some instances, a non-Article III tribunal may conduct federal adjudication. It might still be contended that the constitutional non-delegation doctrine prohibits federal arbitral power from being vested in private actors. The Supreme Court's decisions in *Auffmordt* and *Kendall*, however, strongly implied that there is no per se proscription on placing arbitral authority in private actors. We view the Supreme Court's opinion in *Thomas* as finally rejecting the argument that the Constitution prohibits the delegation of adjudicative authority in a private party. In *Thomas* the Court found no particular relevance in the fact that the adjudication was to be performed by "civilian arbitrators, selected by agreement of the parties" as long as the circumstances do not indicate that this mechanism would "diminish the likelihood of impartial decisionmaking, free from political influence." 473 U.S. at 590. As with all delegations, there must be standards to guide the determination of the recipient of the delegated adjudicative authority, but this is not an exacting requirement. *See id.* at 593; *see generally Yakus v. United States*, 321 U.S. 414 (1944). As long as these two criteria—impartiality and discernable standards—are present, the non-delegation doctrine does not represent a blanket prohibition of final and binding resolution of a dispute by private actors.

VI. Due Process

The Due Process Clause, U.S. Const. amend. V, does not prohibit the final resolution of claims, including claims involving the government, through binding arbitration. For instance, claims for reimbursement through Part B of the Medicare program, 42 U.S.C. §§ 1395j to 1395w–4, are subject to the final and unreviewable determination of a hearing officer who is hired by the insurance carrier with which the federal government contracts for administration of the program. *See United States v. Erika, Inc.* 456 U.S. 201 (1982). The Supreme Court rejected the contention "that due process requires an additional administrative or judicial review by a Government rather than a carrier-appointed hearing officer." *Schweiker*, 456 U.S. at 198 (1982). The Due Process Clause does not establish bright-line requirements or prohibitions; rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Whether an arbitrator with authority to issue a final, binding decision may be a private actor or must be a government official, or whether any other facet of an arbitration proceeding is consistent with the Due Process Clause, is determined by reference to three relevant factors. Those factors are: the private interest that will be affected by the official action; the risk of erroneous deprivation through the procedures used and the probable value of additional or substitute safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Schweiker*, 456 U.S. at 198–200; *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The precise requirements of these factors will vary depending on the facts and circumstances of each specific arbitration. While they may in some instance combine to require that a final, binding decision be vested in a government official, Schweiker stands for the proposition that the Due Process Clause does not per se prohibit vesting such a decision in a private actor.

VII. Conclusion

We reaffirm our conclusion that the Appointments Clause does not prohibit the federal government from submitting to binding arbitration. In addition, we do not view any other constitutional provision or doctrine as imposing a general prohibition against the federal government entering into binding arbitration. Nevertheless, we do recognize that the Constitution imposes substantial limits on the authority of the federal government to enter into binding arbitration in specific cases.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Authority to Employ the Services of White House Office Employees During an Appropriations Lapse

The Antideficiency Act permits the White House Office to employ personnel during an appropriations lapse for functions that are excepted from the Act's general prohibition: functions relating to emergencies involving an imminent threat to the safety of human life or protection of property; other functions as to which express statutory authority to incur obligations in advance of appropriations has been granted; those functions for which such authority arises by necessary implication; and certain functions necessary to the discharge of the President's constitutional duties and powers. Such personnel may not be paid, however, until appropriations are enacted.

The President may use his authority under 3 U.S.C. § 105 to create and fill nonsalaried positions in the White House Office during an appropriations lapse, but nonsalaried employees cannot receive an obligation of payment for the services they perform in that capacity.

White House Office employees appointed under 3 U.S.C. § 105 may waive their compensation, and if they do so, their services may be accepted during an appropriations lapse.

September 13, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked us to survey the authority available to the White House office to employ the services of White House employees during a lapse in appropriations. As you know, no salaries can be paid to any government employee, including those in the White House office, without an appropriation; so no White House employee could receive salary or other compensation payments during such a lapse. The Antideficiency Act further prevents federal officials from incurring financial obligations, such as the obligation to pay salaries, in advance of appropriations except as authorized by law. 31 U.S.C. § 1341. The Antideficiency Act and the organic statutes providing for the White House office and staff create three different authorizations under which certain White House employees may continue to work during a lapse in appropriations.

1. Excepted Functions. The Antideficiency Act permits the White House to employ personnel who perform functions that are excepted from the Antideficiency Act's general prohibition. The Act itself expressly excepts from its coverage functions relating to emergencies involving an imminent threat to the safety of human life or protection of property. It also acknowledges that there may be authorization provided by other law. We identified three categories of such authorizations in our August 16, 1995, memorandum for Office of Management and Budget Director Alice Rivlin: those functions as to which express statutory authority to incur obligations in advance of appropriations has been granted; those functions for which such authority arises by necessary implication; and certain functions necessary to the discharge of the President's constitutional duties and powers. Memorandum for Alice Rivlin, Director, Office of Management and

Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Operations in the Event of a Lapse in Appropriations* (Aug. 16, 1995). These three categories are discussed more fully in the August memorandum as well as in a 1981 opinion by Attorney General Benjamin Civiletti. *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 43 Op. Att'y Gen. 293 (1981).

To reiterate, employees who perform excepted functions may not be paid until appropriations are enacted. Because, however, the Antideficiency Act permits incurring obligations in advance of appropriations and "*employ[ing]* personal services" 31 U.S.C. § 1342 for excepted functions, the appropriate White House administrative official may obligate the federal government to pay the salaries of employees who perform such functions in advance of the enactment of appropriations.

2. Nonsalaried Positions. The President has statutory authority to "appoint and fix the pay of . . . such number of . . . employees as he may determine to be appropriate." 3 U.S.C. § 105(a)(2)(D). It is our understanding that most White House office employees are appointed under this or a similarly formulated authority. *See, e.g.*, 3 U.S.C. § 107 (domestic policy staff). This office has consistently taken the position that the quoted portion of § 105 authorizes the President to create nonsalaried positions in the White House office. *See, e.g., The White House Office—Acceptance of Voluntary Service*, 2 Op. O.L.C. 322 (1978). We have also concluded that the Antideficiency Act's prohibition on acceptance of voluntary services "does not prohibit a person from serving without compensation in a position that is otherwise permitted by law to be nonsalaried." Id. at 322 (internal quotations omitted).

The President may use this authority to create and fill nonsalaried positions in the White House office during an appropriations lapse. By definition, the President does not incur an obligation on behalf of the federal government where he employs the services of persons in nonsalaried positions—there is no obligation to pay those who hold such positions. Then, § 1341 is not violated.

The President may appoint White House office employees who have been furloughed from their salaried positions to work in newly created, nonsalaried positions. This office has previously opined that White House employees may simultaneously occupy two different positions within the White House office, one salaried and one nonsalaried, as long as the two positions are compatible. The positions will typically be compatible as long as one is not subordinate to the other. *See* Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Dual Office of Executive Secretary of National Security Council and Special Assistant* [to the President] (Mar. 1, 1988).

Unlike those employees who perform excepted functions, employees who occupy nonsalaried positions cannot receive an obligation for payment for the services they perform in that capacity. If, however, Congress enacts the form of "lookback" appropriation that it has in recent years—one that pays the salary of furloughed employees for the period when they were on furlough status—White House office employees who were furloughed from their salaried position during the period of appropriations lapse could be paid for the salaried position on the same basis as other furloughed employees even though they held a nonsalaried position during the period of lapse.

3. Waiver of Salary. As to positions for which compensation is fixed by law—that is, where a statute establishes either a fixed salary or a minimum salary for a position—the holder may not waive the salary in whole or in part. On the other hand, it is the position of the Comptroller General that compensation may be waived where the compensation is not fixed by law. Those positions on the White House office staff that are appointed pursuant to § 105 do not bear compensation that is fixed by law, as § 105 only sets forth maximum salaries.

Under the Comptroller General's approach, then, White House employees appointed under § 105 may waive their compensation. If they do so, their services may be accepted because doing so would not create any obligation to compensate them, let alone an obligation in advance of appropriations. By virtue of having waived any claim to compensation, however, it is highly unlikely that such White House employees would receive compensation even if a lookback appropriation is eventually enacted.

We have urged if the President decides to appoint employees to nonsalaried positions, "that papers relating to the appointment or employment of [such] persons . . . expressly provide that they will serve will serve without compensation." 2 Op. O.L.C. at 323. Similarly, any employee who voluntarily waives his or her salary or compensation should do so in writing.

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Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service

If the Treasury Department has declared its election to purchase a proposed U.S. Postal Service bond issue pursuant to 39 U.S.C. § 2006(a) prior to the proposed date of issuance and is pursuing good-faith negotiations towards such purchase as of such date, the USPS is not free to proceed with issuance of the bonds to other purchasers solely because Treasury has not completed purchase of the bonds within a 15-day period following USPS' initial notice of the proposed issue.

If, in the above circumstances, Treasury and the USPS are unable to negotiate mutually agreeable terms for purchase by Treasury within a commercially reasonable period of time following USPS' proposed date for the issuance of its bonds, then the USPS may proceed with the issuance of such bonds to other purchasers.

Treasury is not authorized to dictate or control the terms of the USPS offering, but it must be afforded a reasonable opportunity to reach mutually agreeable terms with the USPS when the original terms proposed by the USPS are unacceptable. That reasonable opportunity is not rigidly limited by the 15-day period for declaring an election to purchase.

October 10, 1995

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

I. Background and Summary

This memorandum responds to the U.S. Postal Service's ("USPS") request that this Office reconsider and rescind an opinion issued on January 19, 1993,[1] in which we responded to the Department of the Treasury's ("Treasury") request for an opinion regarding the statutory relationship between the USPS and Treasury with respect to USPS financing initiatives. In the 1993 opinion, we concluded that (1) under 39 U.S.C. § 2006(a), Treasury's failure to purchase a USPS bond issue prior to the scheduled date of sale on the market proposed by USPS does not relieve USPS of further obligation to negotiate with the Treasury towards agreeable terms of sale, or permit USPS to proceed with the market sale as originally scheduled, as long as Treasury has duly declared its "election" to purchase and continues to negotiate in good faith towards the purchase; and (2) the transfer of the proceeds of a bond offering by the USPS to a trustee for the purpose of having the trustee employ those proceeds to make and use investments to dis-

[1] *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. O.L.C. 6 (1993) ("1993 opinion").

charge outstanding USPS debt would require the prior approval of the Treasury under the provisions of 39 U.S.C. § 2003.

In response to arguments and representations made by USPS, and after giving written notice to Treasury, this Office has undertaken a reconsideration of its 1993 opinion.[2] We now reaffirm the conclusions reached in that opinion, with the following clarification. We conclude that, although Treasury's declared election to purchase a USPS offering may require USPS to negotiate with Treasury towards agreeable terms of sale even beyond the originally scheduled market offering date, USPS is not required to postpone the market sale indefinitely if Treasury has not purchased the offering after that date has passed. Rather, USPS is only obligated to negotiate with Treasury in good faith for a *commercially reasonable period of time*, under the circumstances presented by the proposed transaction, before proceeding with the sale.

II. Analysis

The original opinion addressed two distinct issues, and both were resolved in favor of the position advocated by Treasury.

On the first issue, we conclude that this Office was correct in opining that, under 39 U.S.C. § 2003(c)-(d), Treasury's approval was required as a precondition to USPS placing the proceeds of its proposed bond offering with a trustee who would invest the proceeds in securities and use the investment return to discharge outstanding USPS debt. We find no basis for changing or revising the original opinion's analysis of this issue, and we hereby readopt and reaffirm that analysis.

However, there appears to be some basis for clarifying one particular aspect of that portion of the opinion interpreting Treasury's purchase rights under 39 U.S.C. § 2006(a). Specifically, our 1993 opinion suggested that the negotiations that could be invoked by Treasury's "election" to purchase the USPS bond offering were not subject to any time limitation, even when Treasury has not effected a purchase of the offering by the date originally scheduled by USPS for sale on the market. We now conclude that if such negotiations are conducted in good faith by USPS, yet are not concluded within a commercially reasonable period of time following the initially proposed offering date, USPS may proceed with the proposed offering notwithstanding Treasury's unconsummated election to purchase.

[2] Our reconsideration of the original opinion in this matter was initiated by a request from the USPS. The request was originally set forth in a letter dated May 4, 1993, from Mary S. Elcano, Vice President and General Counsel of the U.S. Postal Service, to Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel. By letter dated March 17, 1995, the USPS has consented to be bound by the final opinion to be issued by this Office in this matter. On the basis of that consent, we are proceeding with our reconsideration of the 1993 opinion.

A. *Treasury Restraints on USPS Authority to Invest or Deposit Funds*

The first and easier issue concerns the restraints on the authority of USPS to invest or deposit moneys of the Postal Service Fund ("Fund") set forth in 39 U.S.C. § 2003. Section 2003(c) provides that if USPS determines there are Fund moneys "in excess of current needs," such funds may be invested in Government securities by and through the Secretary of the Treasury and, subject to the Secretary's prior approval, such excess funds may also be invested in non-Government securities. Section 2003(d) separately provides that the Secretary of the Treasury must pre-approve any "deposits" of Fund moneys in a Federal Reserve bank, a depository for public funds, or in "such other places" as the USPS and the Secretary "may mutually agree."

USPS proposed to place the proceeds of its bond refinancing with a trustee, who would then invest the funds in government securities (it is not disputed that the refinancing proceeds would constitute part of the Fund). The trustee would then use the principal and interest of those government securities to redeem approximately $2.6 billion in outstanding USPS debt (i.e., the debt being refinanced). Treasury contended that USPS could not place the bond proceeds with the trustee without Treasury's prior approval—which apparently would not be forthcoming—under the above-quoted provisions of 39 U.S.C. § 2003. USPS contends that neither § 2003(c) nor (d) applied to this proposed "in substance defeasance," on the theory that the investments made under the trustee arrangement would not constitute true investments because they were only an alternative mechanism for the repayment of debt; and on the further theory that placement of the funds with the trustee did not constitute a "deposit" within the meaning of 39 U.S.C. § 2003(d).

USPS' renewed argument that the statutory requirement for Treasury's handling or approval of Fund investments is inapplicable to these arrangements is unpersuasive and is adequately addressed in the original OLC opinion. The trustee's investment of the Fund moneys in government securities is clearly an investment for purposes of § 2003(c)'s restrictions, notwithstanding the participation of the trustee as an intermediary. *See Postal Reorganization Act—Investment of Excess Funds of the Postal Service*, 43 Op. Att'y Gen. 45, 47 (1977).[3] This investment arrangement is therefore subject to the requirements of 39 U.S.C. § 2003(c).

The additional argument that the initial "placement" of funds with a trustee is not a "deposit" within the meaning of § 2003(d), and therefore not subject to approval by Treasury, is also unconvincing. In this regard, we reject the USPS

[3] In his 1977 opinion construing the investment and deposit restrictions of 39 U.S.C. § 2003, the Attorney General emphasized that "the limitations in § 2003 are limitations on any general powers [of the USPS] insofar as they apply to the Fund." 43 Op. Att'y Gen. at 47. He further stated that "the authority to purchase Government Obligations, carefully described and carefully circumscribed in § 2003(c), is to the exclusion of any other authority in this regard." *Id.*

contention that the placement of funds with the trustee was not a deposit within the meaning of that section because the funds were not subject to free withdrawal by USPS as depositor. There is nothing in § 2003(d) that requires or indicates such a narrow interpretation of the term "deposit." Rather, that subsection broadly encompasses the deposit of Fund moneys not only in Federal Reserve banks or in "depositories for public funds," but also "in such other places and in such manner as the Postal Service and the Secretary may mutually agree." That expansive description demonstrates that § 2003(d) was intended to apply to virtually any disposition of Fund moneys, not merely to conventional bank-type deposits.

This conclusion is consistent with the broad interpretation of Treasury's authority under § 2003(d) reflected in the Attorney General's opinion in 1977, resolving a comparable dispute between Treasury and the Postal Service. In confirming that § 2003(d) imposed limitations on the general powers of the USPS in making dispositions of the Fund, the Attorney General stated:

> Thus, for example, § 2003(d), which authorizes the Postal Service to deposit moneys in the Fund in bank accounts with the approval of the Secretary, restricts any implicit authority to open accounts which the Service might otherwise have under the general provisions of the Postal Reorganization Act; *and it could not reasonably be argued that in addition to deposits made under this authority the Service might make Fund deposits anywhere else, without the Secretary's approval.*

43 Op. Att'y Gen. at 47 (emphasis added). The Attorney General's 1977 opinion reenforces our view that the purposely restrictive provisions of § 2003(d) should not be circumvented by an unduly narrow interpretation of the verb "deposit."

B. *Treasury Restraints on USPS Right to Sell Bonds*

The second issue is whether the USPS was entitled to proceed with a proposed market offering of USPS bonds when Treasury, within the 15-day pre-offering notice period required by 39 U.S.C. § 2006(a), had invoked (but not actually *exercised*) its right to purchase that offering. That section provides (emphasis added):

> At least 15 days before selling any issue of obligations under section 2005 of this title, the Postal Service shall advise the Secretary of the Treasury of the amount, proposed date of sale, maturities, terms and conditions, and expected maximum rates of interest of the proposed issue in appropriate detail and shall consult with him or his designee thereon. *The Secretary may elect to purchase such obligations under such terms, including rates of interest, as*

> *he and the Postal Service may agree*, but at a rate of yield no less than the prevailing yield on outstanding marketable Treasury securities of comparable maturity, as determined by the Secretary. *If the Secretary does not purchase such obligations, the Postal Service may proceed to issue and sell them to a party or parties other than the Secretary* upon notice to the Secretary and upon consultation as to the date of issuance, maximum rates of interest, and other terms and conditions.

USPS argues that even if Treasury has declared its "election" to purchase the offering, and negotiations to reach an agreement on terms have been undertaken, the only way Treasury can prevent USPS from proceeding on schedule with the proposed market offering is by completing the *actual purchase* of the offering (and not through mere continuation of good-faith negotiations) before expiration of the 15-day advance notice period. In contrast, Treasury has contended that it has an "absolute right of first refusal" with respect to the proposed offering and, once it has given notice of its "election" to purchase within the 15-day period, USPS is barred from proceeding with a market sale of the bonds and must continue to pursue negotiations with Treasury — if necessary, beyond the initially proposed offering date.

Our original opinion (1) rejected the USPS argument that nothing less than actual purchase of the offering by Treasury could prevent USPS from proceeding with the scheduled offering; (2) determined that the statute does not require Treasury to have agreed on terms with USPS *before* exercising its election to purchase and enables Treasury to require USPS to bargain exclusively with Treasury even beyond the date originally proposed for the offering; and (3) indicated that "[t]here is no limit on the negotiation period" that is implicitly required by the statute once Treasury has stated that it "elect[s] to purchase" the offering. 17 Op. O.L.C. at 7, 9–11.

We reaffirm conclusions (1) and (2) and again reject the USPS argument that Treasury's priority purchase right under 39 U.S.C. § 2006(a) automatically expires if Treasury's election to purchase does not result in the completion of negotiations and consummation of the purchase by the proposed sale date.

On this point, we have again considered USPS' contentions that certain legislative history underlying the Federal Financing Bank Act of 1973, Pub. L. No. 93–224, 87 Stat. 937 (1973) ("FFBA") confirms the USPS argument that Treasury must complete (as opposed to merely initiating) the purchase of a proposed USPS debt offering within 15 days after receiving first notice of the offering, or waive all purchase rights. In particular, USPS cites language from committee reports on the FFBA stating that "the Secretary of the Treasury may purchase all Postal Service obligations if he does so within the time period prescribed in 39 U.S.C. 2006(a)." H.R. Rep. No. 93–299, at 5 (1973), *reprinted in* 1973 U.S.C.C.A.N.

3153, 3157 ("PRA House Report"). Although this argument is not without force, we do not find it sufficiently persuasive to alter our conclusion on this point.

First, observations in committee reports concerning the FFBA simply do not provide persuasive legislative history for purposes of the Postal Reorganization Act, Pub. L. No. 91–375, 84 Stat. 719 (1970) ("PRA"). The FFBA was enacted three years after the PRA and concerned a more comprehensive range of federal agency financing issues. It is well-settled that the pronouncements of a subsequent Congress do not constitute reliable evidence of the intent or understandings of a prior Congress. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960). We are not persuaded that this sound general principle should be disregarded in interpreting the PRA.

Second, the committee report on the FFBA was not concerned with the discrete issue raised here — whether Treasury must merely initiate, or actually effectuate, the purchase of a USPS offering within the 15-day initial notice period — as opposed to the broader question of whether the USPS would retain "independent financing authority" after enactment of the FFBA. The segments of the FFBA committee reports in question were intended to provide broad assurance that the FFBA would not unduly impair USPS' existing financing authority under the PRA, and thus presented a broad interpretation of that authority. These post-enactment descriptions of § 2006(a) simply cannot be equated with a contemporaneous and authoritative explication of the section's provisions by the Congress that enacted it.

Third, the excerpts from the FFBA legislative history themselves contain an element of ambiguity on the matter in dispute. Although the segment quoted above would support the USPS contentions, it is followed by the following additional statement:

> However, if the [Federal Financing] Bank or the Secretary [of the Treasury] did not *act to take up* a proposed Postal borrowing within the prescribed time limit [provided in 39 U.S.C. 2006(a)], the Postal Service could, on its own initiative, borrow in the private market under its independent Postal Reorganization Act authority.

PRA House Report at 5, *reprinted in* 1973 U.S.C.C.A.N. at 3157–58 (emphasis added). Treasury's declaration of an election to purchase can certainly be viewed as "act[ing] to take up" the proposed obligations, even when the purchase has not been fully consummated. That phrase connotes the initiation of the purchasing process. Consequently, even the FFBA committee report highlighted by USPS does not unambiguously support its interpretation of § 2006(a).

Finally, and most importantly, the text of § 2006(a) strongly indicates that its drafters contemplated that Treasury would sometimes find it necessary to negotiate

modified terms to govern the proposed issue *after* Treasury has declared its election to purchase. Thus, the section specifically provides:

> The Secretary may elect to purchase such obligations *under such terms, including rates of interest, as he and the Postal Service may agree*, but at a rate of yield no less than the prevailing yield on outstanding marketable Treasury securities of comparable maturity, as determined by the Secretary.

39 U.S.C. § 2006(a) (emphasis added). If the section required Treasury to *consummate* its purchase option within 15 days after initial notice, USPS could easily frustrate the statute's provision for purchase by Treasury at *negotiated* terms that may sometimes differ from those originally proposed by USPS. It could do so by simply refusing to budge in any respect from its original terms during the 15-day period following initial notice. We do not believe that Congress intended to circumscribe Treasury's purchase options to that degree in enacting § 2006(a).

However, we modify our prior opinion insofar as it indicates that Treasury may delay the USPS offering *indefinitely* with unlimited negotiations once it has stated its election to purchase. We conclude that such negotiations cannot be prolonged beyond USPS' scheduled market offering date to such an extent as to impair substantially USPS' capacity to consummate the proposed offering in a timely fashion; rather, Treasury's option to purchase must be consummated within a commercially reasonable period of time.

Enabling Treasury to force an indefinite delay in a proposed USPS bond offering — even when it has not bound itself to purchase the offering on the terms proposed by USPS or on any other specified terms by the scheduled date of sale — appears inconsistent with the statute's intent to provide USPS with a significant degree of business freedom and to prevent Treasury from exercising a blanket veto over USPS financial offering proposals. Thus, the House Report on the PRA emphasized that Treasury's authority under § 2006(a) did not extend to preventing USPS from borrowing and did not include "any inappropriate power . . . to control the scale of Postal Service operations." H.R. Rep. No. 91–1104, at 21 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3669 ("House Report").

In other commercial contexts, courts have established that a purchase option or right of first refusal[4] (which was Treasury's description of the rights granted to it under the statute) must be exercised within a "commercially reasonable" period of time. *E.g., Barco Urban Renewal Corp. v. Housing Auth. of Atlantic City*, 674 F.2d 1001, 1007 (3d Cir. 1982) ("in these circumstances the right of first refusal lasts for a commercially reasonable time"); *West Texas Transmission,*

[4] In a portion of our 1993 opinion, we used the term "right of first refusal" as a shorthand label for one of the three possible readings that might be applied to Treasury's purchase rights under § 2006(a). 17 Op. O.L.C. at 9. Here, we use the term in its general commercial sense rather than in the narrower sense in which we employed it in the 1993 opinion to describe a particular interpretation of § 2006(a).

L.P. v. Enron Corp., 907 F.2d 1554, 1562 (5th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991); *Brauer v. Hobbs*, 391 N.W.2d 482, 486 (Mich. Ct. App. 1986). In the absence of contrary language in the statute, this well-established commercial principle provides a relevant consideration in construing the purchase rights incorporated in § 2006(a).

We do not think the statute was intended to enable Treasury to prevent USPS from proceeding with a proposed bond offering by requiring USPS to submit to an indefinite and unlimited period of negotiations. Such power would constitute the kind of "inappropriate power in the Treasury to control the scale of Postal Service operations" that was foresworn in the legislative history. *See* House Report at 21, *reprinted in* 1970 U.S.C.C.A.N. at 3669.

If Treasury's ability to delay the proposed USPS offering date for purposes of negotiating agreeable purchase terms is limited to a commercially reasonable period, however, it would not be inordinate or inappropriate.[5] Although we cannot project a specific period or time-range that would be "reasonable" for the varying circumstances that USPS might confront in the future, we believe that a delay of such length as to substantially alter the circumstances which established the premises of the originally proposed offering would generally be considered unreasonable. Generally accepted custom and practice in the government securities sector would provide an appropriate point of reference for determining commercially reasonable timeframes in this context.

In summary, our conclusions regarding Treasury's purchase rights under 39 U.S.C. § 2006(a) are as follows:

1. If Treasury has declared its election to purchase the proposed issue before the proposed sale date, and Treasury is still pursuing good-faith negotiations towards mutually agreeable terms, the USPS is not free to proceed with a sale on the market merely because Treasury has not completed the purchase within the 15-day period following initial notice of the proposed sale.

2. Treasury may not frustrate USPS' right to sell the obligations elsewhere *for an indefinite period* by declining to purchase at the originally proposed terms when good-faith negotiations have failed to produce mutually agreeable alternative terms. If Treasury and USPS are unable to negotiate mutually agreeable terms within a commercially reasonable period of time following the originally proposed sale date, USPS may proceed to sell to another purchaser.

3. Treasury is not authorized to dictate or control the terms of the USPS offering, but it must be afforded a reasonable opportunity to reach mutually agreeable terms with USPS when the original terms proposed by USPS are unaccept-

[5] This interpretation is consistent with then Under Secretary of the Treasury Paul Volcker's testimony during the Senate hearings on the PRA, where he stated that the provisions in question would give the Secretary the authority "to supervise the timing of the financing and the terms of any financing by the postal authority, but he can never put himself in a position where he is preventing the postal authority from obtaining what financing they think is necessary." *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong. 311 (1969).

able. That reasonable opportunity is not rigidly limited by the 15-day period for declaring an election to purchase.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

The Food and Drug Administration's Discretion to Approve Methods of Detection and to Define the Term "No Residue" Pursuant to the Federal Food, Drug, and Cosmetic Act

The Food and Drug Administration has the discretionary authority under the DES proviso to the Delaney Clause of the Federal Food, Drug, and Cosmetic Act to prohibit the use of an additive in animal feed if the FDA concludes that there is no method that can "reliably measure and confirm" whether the additive contains residues of carcinogenic concern at or above the "no residue" level.

Where the FDA has already approved a method for detecting the presence of residues of carcinogenic concern, the DES proviso does not require the FDA to revise its regulations to adopt the "best available" such method.

The FDA lacks the discretion to determine that an edible tissue contains "no residue" when a method of detection reveals the presence of residues of carcinogenic concern that is below the "no significant risk" level.

October 13, 1995

MEMORANDUM OPINION FOR THE ASSISTANT ADMINISTRATOR AND GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY
AND THE
GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

This memorandum responds to the Environmental Protection Agency's ("EPA") and the Food and Drug Administration's ("FDA") request for our opinion regarding the FDA's regulations implementing what is known as the "DES proviso" to the Delaney Clause of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§301-393 (the "Act").[1] Both agencies have certain responsibilities under the Act, which establishes federal regulatory authority over the safety of food additives, human and animal drugs, certain pesticides, and cosmetics.

I. Background

The Act requires that a food additive (including additives to animal feed) be found to be "safe" before the FDA authorizes its use. The Delaney Clause prohibits such a finding of safety with respect to a substance found to induce cancer in man or animal. The DES proviso carves out an exception to the Delaney Clause, allowing cancer-inducing agents to be added to animal feed if the FDA finds that the additive will not harm the animals, and that no residue of the additive will

[1] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jean C. Nelson, General Counsel, Environmental Protection Agency, and Harriet S. Rabb, General Counsel, Department of Health and Human Services (Dec. 8, 1994).

be found in any edible portion of the animal after slaughter or in any food from the animal. The presence of residue is to be determined by "methods of examination prescribed or approved by the Secretary by regulations." *Id.* § 348(c).[2]

The proviso was enacted in 1962 to allow substances such as the animal drug diethylstilbestrol, abbreviated as DES, to be used in appropriate situations. Pub. L. No. 87–781, § 104(f), 76 Stat. 780, 785 (1962). Under the Delaney Clause without the proviso, new applications for the use of drugs like DES, a carcinogen, would ordinarily have been kept from the market. However, because drugs like DES, when used properly, pass quickly out of the treated animal's system, may leave no detectable residue in edible tissue, and do not harm the animal, Congress permitted the use of such substances. *See Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 979 (D.C. Cir. 1974).

Over the years since the DES proviso was enacted, the FDA has implemented its terms through a series of regulatory decisions. Its current regulations, which embody the sensitivity of method ("SOM") approach, contain several discrete elements. The central feature of the regulations is the FDA's operational definition of the statutory term "no residue." Under the definition, the FDA determines a level of residue for any given food additive that will be considered to satisfy the "no residue" finding required under the proviso. This "no residue" level is calculated in several steps. *See* 21 C.F.R. § 500.84(c) (1995). First, the FDA determines a maximum level of concentration of any "residue of carcinogenic concern" from the additive in question that poses no significant increase in the risk of cancer to people (the "no significant risk" level). *Id.* § 500.84(c)(1). Next, the FDA evaluates the different foods through which a human might consume some of the additive and estimates the amount of such foods that are consumed in the human diet. Based on these estimates of food intake, the FDA then des-

[2] The Delaney Clause with the DES proviso states:

(1) The Secretary shall —

(A) by order establish a regulation . . . prescribing, with respect to one or more proposed uses of the food additive involved, the conditions under which such additive may be safely used. . . .

. . . . .

(3) No such regulation shall issue if a fair evaluation of the data before the Secretary —

(A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: *Provided*, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g) of this section) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal; . . . .

21 U.S.C. § 348(c). The Delaney Clause with the DES proviso quoted above is similar to the provisions in 21 U.S.C. § 360b(d)(1)(I), which governs the approval of new animal drugs, and 21 U.S.C. § 379e(b)(5)(B), which governs the approval of color additives.

ignates a level of concentration for each edible tissue in which the additive might be found such that the "no significant risk" level for the total diet is not exceeded. *Id.* § 500.84(c)(2). So long as concentrations in an edible tissue are below the maximum level of concentration for that tissue, the FDA considers the edible tissue to contain "no residue." *Id.* [3]

The FDA requires the sponsor of any additive seeking relief under the DES proviso to submit a "regulatory method" of detection that can "reliably measure and confirm" the presence of any residue of carcinogenic concern equal to or above the "no residue" level for that compound. *Id.* §§ 500.86, 500.88. However, the FDA does not necessarily require a sponsor to employ the most sensitive detection method available.

The EPA and the FDA (collectively "the agencies") have posed three separate questions with respect to the FDA's current approach to implementing the DES proviso. The first two raise issues concerning the FDA's discretion to approve a method of detection, the results of which will be accepted by the FDA for purposes of the proviso. The third question concerns the FDA's discretion to define "no residue" as set forth above. Specifically, we address the following questions: (1) whether the FDA has the discretion to refuse to permit the use of an additive in animal feed if it finds that there is no method that can "reliably measure and confirm" the presence of residues of carcinogenic concern at and above the "no residue" level for such residues; (2) whether the FDA must revise its regulations to adopt more sensitive methods when they become available once it has approved a method of detection; and (3) whether the FDA has the discretion to determine that an edible tissue contains "no residue" when a method of detection reveals the presence of residues of carcinogenic concern that is below the "no significant risk" level. We discuss our answers to each of these questions below.

II. The FDA's Discretion to Approve Methods of Detection

A. Must the FDA Approve a Method of Detection?

The DES proviso authorizes the use of a cancer-inducing additive in animal feed if the FDA finds "that no residue of the additive will be found (by methods of examination prescribed or approved by the [FDA] by regulations . . .) in any edible portion of such animal." 21 U.S.C. § 348(c)(3)(A)(ii). The agencies have

[3] As explained by the FDA:

> [T]he [SOM] procedures provide for a quantitative estimation of the risk of cancer presented by the residues of a carcinogenic compound proposed for use in food-producing animals. "No residue" remains in food products when conditions of use, including any required preslaughter withdrawal period or milk discard time, ensure that the concentration of the residue of carcinogenic concern in the total diet of people will not exceed the concentration that has been determined to present an insignificant risk.

52 Fed. Reg. 49,572 (1987). Thus, the SOM regulations base a "no residue" finding on a determination that the additive creates "no significant risk."

asked whether the FDA may use a method's inability to detect residues at the FDA's "no significant risk" level (that is, the method's sensitivity) as a basis for not approving that method, where the approval of at least one method is necessary in order for an additive itself to be approved. This phrasing of the issue suggests two questions that can usefully be separated.

The first is whether the proviso contemplates that at least one method of detection be approved by the FDA; in other words, whether the FDA lacks the discretion to decide that at present no satisfactory method exists with respect to a specific additive. If the proviso were read to require the approval of at least one method, notwithstanding its lack of sufficient sensitivity, this would be equivalent to reading the proviso as imposing a nondiscretionary duty on the FDA to approve some method.[4] The proviso contains no language explicitly imposing such a duty on the FDA. Finding one would require inferring it from elsewhere in the statute, either because of express language found elsewhere or because of the structure of the statute as a whole. In fact, however, far from undermining the initial view that the FDA is under no such duty, the rest of the statutory scheme reinforces this conclusion.

The Delaney Clause and its DES proviso are subparts of the comprehensive statutory scheme under which the FDA approves proposed uses of food additives. *See* 21 U.S.C. § 348(c)(3). Under this scheme the FDA may *not* issue a regulation approving the use of any food additive if "a fair evaluation of the data before the [FDA] fails to establish that the proposed use of the food additive . . . will be safe." 21 U.S.C. § 348(c)(3). The statute, in other words, requires that safety is not to be presumed, but rather must rest on an affirmative showing of the predicate facts necessary to support such a conclusion.[5]

Before the sponsor of a cancer-inducing additive is even put to the task of proving safety, however, that additive must satisfy the DES proviso, because if it does not satisfy the proviso, the Delaney Clause will apply to it, and the Delaney Clause imposes a required finding of "not safe" with respect to cancer-inducing additives. As a necessary condition for satisfying the proviso, the FDA has stated that a food additive must not be present in an edible tissue in concentrations above the "no significant risk" level for that tissue. *See* 21 C.F.R. § 500.84. This means

[4] On occasion, the FDA will withdraw its marketing approval of animal drugs, which are also governed by the Delaney Clause and the DES proviso, because, among other reasons, there is no approved method of detection and, hence, no means to demonstrate that the proviso is satisfied. In the sole instance we found of this position being raised in litigation, the court affirmed the FDA's action without reaching the propriety of the FDA's basing its determination on the absence of any approved method of detection. *See Rhone-Poulenc, Inc. v. FDA*, 636 F.2d 750, 752 n.2 (D.C. Cir. 1980).

[5] That the statute generally requires an affirmative showing of safety—the absence of evidence of risk of harm is insufficient to satisfy the statute—is reinforced by placing the burden of proving safety on the sponsor. As one court summarized the matter: "[I]f the substance is deemed a food additive, it is presumed to be unsafe . . . ." *United States v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039*, 984 F.2d 814, 816 (7th Cir. 1993). "The thrust of the [Food Additives Amendment Act of 1958] was to put upon processors rather than the government the burden of proving that a newly discovered substance added to food is safe if used within specified quantities." *Id.* at 819.

that a finding of "no significant risk" is also a necessary predicate to FDA's potential ultimate conclusion that the additive is "safe."

It would be odd for Congress to have written a statute whose basic requirement is that the predicate facts for a finding of safety must be affirmatively established by the sponsor of any additive, and subsequently to have amended that statute by inserting a new subpart in which the requirement of an affirmative showing was eliminated, without any indication in the text that such a fundamental change was intended. Yet, just such an odd outcome would result here if the FDA were compelled to approve an insufficiently sensitive method. The requirement that safety be proven, not presumed, was at the very heart of the legislative changes codified in the Food Additives Amendment Act of 1958, of which §348(c)(3) is a key provision. *See, e.g., Two Plastic Drums, More or Less*, 984 F.2d at 816–19. However, if the FDA were required to apply the proviso based solely on results from a method inadequate to confirm "no significant risk," the FDA would be in the position of presuming a predicate fact — the absence of significant risk — that it considered necessary to its ultimate safety determination. There is absolutely no evidence in either the statutory text or the legislative history that such a reversal was intended, and by far the more natural reading of the statute is that the same requirement of an affirmative showing applies throughout.

In sum, the DES proviso does not impose an obligation on the FDA to approve at least one method. To the contrary, the FDA has discretion to refuse to permit the use of unsatisfactory detection methods.

The analysis to this point has assumed that it is within the FDA's discretion to use levels of risk as one determinant in implementing the method selection portion of the DES proviso. This issue presents the second question we must explicitly examine: acknowledging that the FDA has discretion to reject a detection method for some reason, is the method's inability to detect no significant risk levels one of the permissible reasons for the exercise of that discretion? This question arises because an agency's exercise of discretion will not be sustained if the agency considers factors that are either impermissible or irrelevant under the statute under which the agency is acting. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (The question is "whether the decision was based on a consideration of the relevant factors.").

As an initial matter, a method's ability to detect the "no significant risk" level seems to be a permissible reason for exercising discretion under a statute that requires an affirmative showing of safety, because a finding that an additive does not pose a significant risk is directly relevant to a determination of safety. *See, e.g., Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (" '[S]afe' is not the equivalent of 'risk free.'. . . [A] workplace can

hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm.''). As plausible as this conclusion appears, two court of appeals decisions interpreting the Delaney Clause may cast doubt on it and cause us to consider a possible counter argument. *See Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992), *cert. denied*, 507 U.S. 950 (1993); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Both *Public Citizen* and *Les* hold that the fact that an additive produces extremely low levels of risk (de minimis levels) does not provide the FDA or the EPA with a basis for refusing to ban a cancer-inducing additive under the Delaney Clause. The courts reach this result by concluding that Congress precluded taking risk levels into account in reaching that decision under the Delaney Clause. *Les*, 968 F.2d at 989 (''Thus, the legislative history supports the conclusion that Congress intended to ban all carcinogenic food additives, regardless of amount or significance of risk, as the only safe alternative.''); *accord Public Citizen*, 831 F.2d at 1122.

In *Public Citizen*, the court did not conclude that the FDA completely lacked discretion in implementing the Delaney Clause. Specifically, it confirmed that the FDA did indeed have discretion to determine whether a color additive was cancer-inducing in the first place. 831 F.2d at 1112. The government sought to use the existence of this discretion to support its argument that the FDA had discretion to approve carcinogens that posed merely a de minimis risk by claiming that the FDA's decision could be justified as an exercise of the FDA's admitted discretion to make that prior determination. The court rejected that argument, concluding that there was nothing in the record that could support the exercise of such discretion in this instance, where studies done under accepted agency protocols had produced results that the agency had routinely found supported a finding of carcinogenicity. *Id.* at 1122. In particular, the court held that the FDA could not use the fact that risk was de minimis as the basis for a finding that the substance does not induce cancer.

> Congress did not intend the FDA to be able to take a finding that a substance causes only trivial risk in humans and work back from that to a finding that the substance does not ''induce cancer in . . . animals.'' This is simply the basic question—is the operation of the clause automatic once the FDA makes a finding of carcinogenicity in animals?—in a new guise.

Id. at 1121 (alteration in original).

A broad reading of *Public Citizen* might suggest that levels of risk associated with a substance may not inform *any* discretionary judgments made under the Delaney Clause, because Congress did not intend the FDA to be able to take a finding about the relative risk of a substance and ''work back'' from that to answer any question under the Clause where it could admittedly exercise discre-

tion. We believe this reasoning is unsound as applied to the FDA's using risk as a factor in selecting detection methods under the DES proviso, on two grounds.

First, both *Public Citizen* and *Les* were concerned with situations in which the agencies sought to *approve* the use of substances by escaping from the categorical ban on the Delaney Clause, even though the necessary conditions for triggering the Clause had been found to be present. Once those conditions have been found, both courts held, the operation of the Clause is automatic. Using a "no significant risk" benchmark as a basis for *rejecting* detection methods does not present such a situation, because the absence of a detection method does not provide an escape hatch to the Clause. Rather, it presents the opposite situation: if the DES proviso does not apply, then the Delaney Clause will. Thus, the FDA is not "working back" from a finding of "no significant risk" to a discretionary judgment that stops the automatic bar of the Delaney Clause from taking effect. Instead, accept the results of a detection method means that the automatic ban of the Delaney Clause will apply. As a consequence, the logic of *Public Citizen's* limitation on the use of risk as a factor upon which to base a discretionary judgment does not apply to this particular situation.

The second reason we believe the no-discretion argument based on *Public Citizen* and *Les* is unsound is more fundamental. The DES proviso and the Delaney Clause are separate provisions, and there is no a priori reason to believe that the limitations on factors permitted to influence the exercise of specific discretionary authority under the Clause should also govern the exercise of discretion under the proviso. In fact, the respective legislative histories of the two provisions exhibit significant differences that tend to reinforce the conclusion that the FDA can take the sensitivity of a method into account in deciding whether to approve that method. [6]

The text of the DES proviso and the structure of the statute support the conclusion that the FDA has discretion to employ a method's sensitivity as a criterion in method selection. The statute supports that view by granting the FDA the discretion to prescribe and approve methods of detection. 21 U.S.C. § 348(c)(3)(A). However, it is completely silent on explicit criteria the FDA may employ in the exercise of this discretion. When Congress has failed to speak directly to the precise question at issue, the implementing agency's interpretation

[6] Before highlighting those differences, we note that our methodology is the same as that used by the court in *Public Citizen*. Like that court, we begin with the statutory text and structure, and then look to the legislative history to see whether it supports or undermines our preliminary conclusion. In *Public Citizen*'s case, the court first concluded that the best reading of the Delaney Clause was that the Clause did not permit a de minimis exception to its otherwise categorical, or automatic, ban on cancer-inducing additives. *Public Citizen*, 831 F.2d at 1113. This result, seemingly so contrary to common sense in the case of trivial risks, might have been resisted by the court were it not for the very strong and consistent legislative history of the Delaney Clause, which supported the view that Congress indeed intended the "zero tolerance" result for carcinogenic compounds that the Clause announces on its face. In discussing the color additives version of the Delaney Clause, Judge Williams concluded that "[t]he House committee gave considerable attention to the degree of discretion permitted under the provision. The discussion points powerfully against any *de minimis* exception, and is not contradicted either by consideration on the House floor or by a post-enactment colloquy in the Senate." *Id.; accord Les*, 968 F.2d at 989. "[T]his is perhaps as strong as [legislative history] is likely to get." *Public Citizen*, 831 F.2d at 1117.

will be sustained as long as it is reasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984). We believe that the use of significant risk levels as a criterion for exercising that discretion is reasonable in light of the statute's basic requirement of an affirmative showing of "safety." *See* discussion *supra* pp. 250–51. Accordingly, the FDA's use of levels of risk as a screening criteria for method approval should be sustained as a "reasonable interpretation" of the statute.

The statute's silence on this issue means that the Congress has not spoken in statutory language to this question. That Congress intended to leave this issue to the discretion of the FDA is reinforced by an examination of the pertinent legislative history. The history of the DES proviso displays considerable equivocation on the criteria the FDA should employ in implementing the discretionary portions of the statute. On the one hand, some of the legislative history asserts that the "basic principle" of the Delaney Clause itself — its zero tolerance position with respect to carcinogens — would be unaffected by the passage of the proviso. A principal piece of evidence of this view is a letter from Secretary Ribicoff to the chairman of the House Committee on Interstate and Foreign Commerce in 1962, the year the food additives version of the proviso was enacted.[7] The Secretary's section-by-section analysis of the proviso stated:

> Section 302(a) would correct a needless and unintentional inequity in the application of the food-additive anticancer proviso[8] (sec. 409(c)(3) of the basic act) to additives for animal feed, while preserving in its full vigor the consumer protection now afforded by that provision. The basic principle of the anticancer provision, which would remain unimpaired, is that no tolerance for the addition of carcinogenic chemicals to food shall be granted in any amount . . . .

Letter for Hon. Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, from Abe Ribicoff, Secretary, Department of Health, Education, and Welfare (July 21, 1962), *reprinted in Drug Industry Act of 1962: Hearings on H.R. 11581 Before the House Committee on Interstate and Foreign Commerce*, 87th Cong. 49 (1962), *reprinted in* 21 Leg. Hist. at 227.

[7] The DES proviso was first suggested by the Department of Health, Education and Welfare ("HEW") in 1960. HEW drafted the pertinent provisions of the language that were eventually enacted in 1962, and transmitted its proposal to this same House Committee via another letter from then Secretary Flemming to the chairman, expressing HEW's views on how the proviso would operate. Letter for Hon. Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, from Arthur S. Flemming, Secretary, Department of Health, Education, and Welfare (May 13, 1960) ("Flemming Letter"), *reprinted in* H.R. Rep. No. 86–1761, at 88–89 (1960), *reprinted in* 16 Legislative History of the Federal Food, Drug, and Cosmetic Act and Its Amendments at 757–58 (1979) ("Leg. Hist."). Under these circumstances, the views of the executive branch with respect to language it requested and initially drafted are significant sources of statutory meaning.

[8] Secretary Ribicoff refers to the "Delaney proviso" or the "anticancer proviso" where subsequent usage refers to the "Delaney Clause." Secretary Flemming, Ribicoff's predecessor, employs the same terminology.

On the other hand, the proviso has an operational structure that is undeniably different from that of the Clause, such that it would be impossible for the zero tolerance principle of the Clause to be completely unaffected, and some elements of the legislative history reflect an awareness of that fact. A long-time student and expert on the Act and the Delaney Clause, Professor Richard Merrill, has succinctly stated the difference: "By contrast with the Delaney Clause itself, the DES proviso makes the *detection* of residues in edible animal tissues, rather than the addition of the compound to animals or their feed, the critical inquiry." Richard A. Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171, 233 (1978). In other words, the proviso contemplates that a compound will be approved as long as an approved method detects no residue, even though this does not affirmatively mean that no residue was present at all. In fact, there might be a residue remaining, one at a level of concentration below the sensitivity of the approved method. Consequently, because the operation of the proviso is linked to detection, and because methods of detection are limited in their sensitivity, the inclusion of the proviso could not literally leave the "basic principle" of the Clause unimpaired.

Elements of the legislative history demonstrate an awareness that the operation of the proviso would not guarantee that a zero tolerance policy would be carried out with full vigor. A principal piece of evidence plainly pointing out the inconsistency between the proviso and the Delaney Clause is Representative Leonor Sullivan's floor statement when the proviso was being considered in 1962, shortly before actual passage. Representative Sullivan, who introduced another bill on food and drug safety, H.R. 1235, conveyed her doubts about any weakening of the Delaney Clause whatsoever based on her belief that new testing methods would disclose residues that could not be detected in 1962:

> However, I have strong doubts, I must admit, over the retreat on the Delaney anticancer clause on feed additives, as contained in H.R. 11582, particularly in view of the Government's experience several years ago with hormone-treated chickens. It cost us $10 million to remove from the market the fowl treated with a drug considered safe for the purpose — after it was learned that there were residues of the cancer-inducing substance in the skin of the chickens. Too often for complacency, new testing methods disclose the existence of harmful residues which had not shown up in earlier tests, but by then the damage is done.

Drug Industry Act of 1962: Hearings on H.R. 11581 Before the House Committee on Interstate and Foreign Commerce, 87th Cong. 98 (1962) (Statement of Rep. Sullivan), *reprinted in* 21 Leg. Hist. at 276. In order to forestall such weakening,

Representative Sullivan introduced an amendment to eliminate the DES proviso, so as to protect consumers from undetectable levels of carcinogenic residues. 108 Cong. Rec. 21,077 (1962) (Statement of Rep. Sullivan), *reprinted in* 23 Leg. Hist. at 29. Her amendment was defeated.[9]

Representative Sullivan's statement recounts an actual historical example of subsequent improvements in testing sensitivity that revealed a residue where none had been detected earlier. No member of Congress disputed the factual accuracy of her description of the proviso's operation, although several rose to comment on her statement. *See* 108 Cong. Rec. at 21,079–83, *reprinted in* 23 Leg. Hist. at 31–35. This sequence reveals very clearly the tension between the proviso and the original Delaney Clause: in all likelihood the proviso would permit the presence of physical residues of carcinogenic compounds, because testing methods would not be sensitive enough to detect them, while the Clause advocates a zero tolerance approach to the presence of *any* residue.

Finally, the tension between the idea that the proviso would preserve the "basic principle" of the Clause and the idea that detection methods would most likely become more sensitive over time, so that a failure to detect residue with any given method could not be taken to show the complete absence of the compound, is evident in the major statement of the administration's understanding of the proviso, Secretary Flemming's letter of May 13, 1960, which transmitted the language of the proviso to the House committee considering the Color Additives Amendments.

> There is, however, one respect in which the anticancer proviso has proved to be needlessly stringent as applied to the use of additives in animal feed. For example, in the case of various animals raised for food production, certain drugs are used in animal feed which will leave no residue in the animal after slaughter or in any food product (such as milk or eggs) obtained from the living animal, and which are therefore perfectly safe for man. If this is demonstrated with respect to any particular additive intended for animal feed, and the additive will not adversely affect the animal itself during its expected or intended life cycle, we can see no reason for not permitting such a use of an additive which could be highly useful and beneficial in the raising of animals for food. . . .
>
> We therefore have included in the enclosed draft bill an amendment to permit use of an additive animal feed under the above-mentioned conditions.
>
> It may aid public understanding of the Delaney proviso and allay unnecessary apprehension regarding it, to touch here on the pro-

[9] The amendment failed by voice vote. 108 Cong. Rec. at 21,081, *reprinted in* 23 Leg. Hist. at 33. Her amendment to eliminate the DES proviso permitting carcinogenic color additives in animal feed was also rejected. *Id.* at 21,083, *reprinted in* 23 Leg. Hist. at 35.

viso's operation where its application, under present law and the proposed modification, depends on whether a residue of the chemical additive involved is left in the edible tissue or other food products of an animal. This question may arise in two types of case. In the first, a veterinary drug is directly administered—by injection, implantation, or otherwise—to the animal, instead of being mixed with its feed. In that event, the Delaney proviso can have application only if a residue of the added drug occurs in food products (such as milk or eggs) of the living animal or in some edible portion or product of the animal after slaughter. In the second type of case, the drug is mixed with feed consumed by the animal. In that event, it is necessarily a food additive (since animal feed is food within the meaning of the act), but it will nevertheless be taken out of the Delaney proviso's application by the above-proposed amendment even if it is cancer inciting (at particular feeding levels) in test animals, provided that it satisfies the above-mentioned requirements as to the absence of adverse effect on the animals for which the feed is intended and as to the absence of any residue in the food products or edible portions of the animal.

In both these instances, where the question of the possibility of a residue is crucial, it is desirable that industry laboratory technicians, and enforcement officers have a common understanding with the Food and Drug Administration as to the methods of assay that will be recognized by us, and on which we want to rely, in resolving the question of residue. We have, therefore, in the proposed amendment to the Delaney proviso (and likewise in the proposed modification of the anticancer clause of H.R. 7624) provided that, under the amendment, the assay methods applicable in determining whether there will be a residue shall be those prescribed or approved by us by regulations. This will give reasonable certainty in that regard, although, of course, such regulations may from time to time be changed as new scientific developments demonstrate a need for change. It should be clearly understood that the industry still would have the responsibility of developing adequate analytical methods for detecting residues and furnishing them to the Government with a petition for approval of an additive.

During the hearings on color additives legislation, some witnesses expressed a concern because of their fear that the Department intends to press a never-ending search for more and more delicate methods of analysis, so that it may, without regard to scientific reason, rescind permissions granted earlier for use of various

> additives judged to leave no residues in food. This fear is not justified.
>
> The Department applies sound scientific judgment and the rule of reason in determining the sensitivity and precision required in an analytical procedure used to detect residues of added chemicals—even before an additive is approved. And when it has been determined that a given degree of sensitivity and precision is appropriate, based upon sound scientific facts, it has no intention of requiring change in the analytical procedure until new scientific developments clearly demonstrate the need.

Flemming Letter, *reprinted in* H.R. Rep. No. 86–1761, at 88–89, *reprinted in* 16 Leg. Hist. at 757–58.

Secretary Flemming's letter contains some passages that point in the same direction as the section-by-section analysis of Secretary Ribicoff quoted above, namely toward the idea that the proviso is entirely consistent with the Clause. Its claim, for instance, that the proviso would apply to chemicals that leave "no residue" in edible tissue, might be read to adopt the zero tolerance position of the Clause, as might the claim that the Clause is "needlessly" stringent in case to which the proviso would apply. However, in the last three paragraphs quoted above, the Secretary also acknowledges that the application of the proviso would depend upon sensitivity of the method. The portions responding to concerns expressed in the hearing make this point clear.

The sole basis upon which "a never-ending search for more and more delicate methods of analysis, so that [the FDA] may, without regard to scientific reason, rescind permissions granted earlier for use of various additives judged to leave no residues in food," Flemming Letter, *reprinted in* H.R. Rep. No. 86–1761, at 89, *reprinted in* 16 Leg. Hist. at 758, could be a concern to the industry is if it were possible to grant permissions on the basis of methods not sensitive enough to guarantee literally no residue, such that it was then conceivable that more sensitive methods might later be developed that could detect a residue. That is precisely the scenario painted later on the House floor by Representative Sullivan, in the passage quoted earlier. *See supra* p. 255. As was also the case with respect to Representative Sullivan's concerns, the Secretary's response is not that this scenario is strictly impossible—which it would be if the proviso only operated in situations where literally no residue remained. Instead, he assures the Committee that the FDA will exercise "sound scientific judgment and the rule of reason in determining the sensitivity and precision required in an analytical procedure used to detect residues of added chemicals—even before an additive is approved. And when it has been determined that a given degree of sensitivity and precision is appropriate, based upon sound scientific facts, [the FDA] has no intention of

requiring change in the analytical procedure until new scientific developments clearly demonstrate the need." *Id.*

In sum, by permitting approvals to be based on detection methods that cannot confirm that no additions of the compound to edible tissue will occur, the proviso articulates a different principle from the one animating the Delaney Clause. Significant pieces of legislative history confirm an awareness by Congress that the proviso would operate in a manner significantly different from the Clause, although other pieces of that history suggest the opposite. The amendments offered by Representative Sullivan to prevent the weakening of the Clause seem to have put the choice of continuing a strict zero tolerance approach or not squarely to the Congress, and Congress voted to adopt the proviso in the form proposed by the administration. [10]

The court in *Public Citizen* based its conclusion that risk could not enter into the FDA's determination of whether a compound "induces cancer" on its concern that to do so would permit the consideration of a factor that the Delaney Clause prohibits the FDA from taking into account in the ultimate decision whether to ban the substance. For the most part, it based its conclusion that risk could not be taken into account in that ultimate decision on a consistent and strong legislative history rejecting the use of risk as a factor. The court's concern that risk might work its way back into the agency's judgment so as to undermine Congress's prohibition does not apply here, because rejecting methods on the basis of risk does not have that effect. *See* discussion *supra* p. 253. Even if this decision did have that effect, the legislative history of the proviso fails to support the conclusion that Congress meant the same zero tolerance policy of the Clause to be fully applicable in implementing the proviso. As a whole, the legislative history amply confirms what the statute suggests on its face: Congress has not clearly spoken to the question whether the FDA could take risk into account in selecting methods of detection, thus permitting the FDA to adopt a reasonable interpretation of the relevant criteria. [11]

In retrospect, it is not possible to conclude with confidence why Congress failed to specify the precise criteria that the FDA ought to employ in selecting detection methods. *Chevron* identifies a number of possible reasons that an agency may be given discretion to interpret a statute:

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[10] *See supra* note 9.

[11] To the extent the legislative history speaks at all to what might cabin the exercise of discretion in selecting methods of testing, it is only suggestive. Secretary Flemming's letter speaks of using "sound scientific judgment and the rule of reason in determining the sensitivity and precision required." H.R. Rep. No. 86–1761, at 89, *reprinted in* 16 Leg. Hist. at 758. These concepts are nowhere further defined in the subsequent discussions of the proviso, which are not numerous in a legislative history dominated by more contentious issues. If anything, they suggest that levels of risk might well be a consideration in the decision to require more sensitive methods, because the need for greater sensitivity, which might be indicated by the significance of the risks involved, would seem to be one of the most obvious factors triggering a "rule of reason" decision to seek more sensitive methods, if not the most obvious factor.

> Congress [may have] intended to accommodate [competing] interests, but did not do so itself on the level of specificity [necessary to resolve the precise question being litigated]. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

Chevron, 467 U.S. at 865. In light of the language of the statute, the structure of the statute, and the legislative history of the proviso, we conclude that one of these three conditions obtained here — probably the first or the second, although "for judicial purposes, it matters not which of these occurred." *Id.* Whatever the reason may have been, the result is that the FDA's "reasonable interpretation" of its authority — that method sensitivity down to the level of significant risk can be used as a criterion in method selection — is within its discretion to adopt.

B. Must the FDA Adopt the Most Sensitive Method of Detection?

The agencies' second question is whether the FDA must revise its regulations to adopt more sensitive methods when they become available once it has adopted a method that detects the residue. Essentially, this question asks whether the proviso requires the FDA to revise its regulations to adopt the "best available" detection methods for a compound, or whether it has discretion to continue to accept results from less sensitive methods. At one time in the FDA's implementation of the proviso, the agency did take the position that it generally should adopt the best available detection methods.[12] While that interpretation may be one permissible interpretation of the proviso, the narrow question we must resolve is whether the statute compels that course of action. We conclude the answer to this question is also no.

The proviso itself is completely silent with respect to what criteria the FDA must employ in deciding whether to approve a method of detection. It is also completely silent as to any affirmative obligation on the FDA to revisit or revise approved methods. Any case in favor of a "best available" obligation, therefore, must rely heavily on the zero tolerance principle for carcinogens under the Delaney Clause itself, coupled with those portions of the legislative history of the proviso that assert that the proviso maintains this "basic principle" of the

[12] For a history of the FDA's approach to implementing the proviso up to that time, *see* Chemical Compounds in Food-Producing Animals, Criteria and Procedures for Evaluating Assays for Carcinogenic Residues in Edible Products of Animals, 42 Fed. Reg. 10,412 (1977).

Clause. Under this theory, if the method of detection approved by the FDA could not detect residues at levels achievable by the best available methods, and such levels were in fact detected by a more sensitive method, then failing to adopt the best available method as the required method under the proviso seems tantamount to approving a tolerance for the compound. [13] Flemming Letter, *reprinted in* H.R. Rep. No. 86–1761, at 89, *reprinted in* 16 Leg. Hist. at 758.

As we have already discussed, however, the proviso itself does not contain any language from which an affirmative obligation to use best available methods could be derived. The plain language of the proviso stands in tension with the basic principle of the Clause, and the legislative history of the proviso in several places reflects an awareness that the proviso depends upon detection in its operation. In fact, some of the legislative history suggests the FDA intended from the beginning *not* to adopt best available methods, at least under some circumstances, and that Congress acquiesced in that understanding. First, the history acknowledges that an approach depending on detection will most likely result in approved uses of compounds where in fact residues are present in food. *See, e.g.*, Representative Sullivan's statement, *supra* p. 255. Second, Secretary Flemming's influential May 13, 1960 letter seeks explicitly to quell industry concerns that the FDA will engage in a "never-ending search" for more sensitive methods, without regard to scientific reason. The Secretary's rejoinder that HEW will not engage in such a search plainly argues against a requirement to always adopt best available detection methods. To repeat, Secretary Flemming wrote:

> The Department applies sound scientific judgment and the rule of reason in determining the sensitivity and precision required in an analytical procedure used to detect residues of added chemicals—even before an additive is approved. And when it has been determined that a given degree of sensitivity and precision is appropriate, based upon sound scientific facts, it has no intention of requiring

[13] The House Committee that first received Secretary Flemming's request for enacting the DES proviso reported the Secretary's views on whether the Delaney Clause itself permitted the FDA to establish tolerances for carcinogens. The committee report quotes him as stating:

> Whenever a sound scientific basis is developed for the establishment of tolerances for carcinogens, we will request the Congress to give us that authority. We believe, however, that the issue is so important that the elected representatives of the people should have the opportunity of examining the evidence and determining whether or not the authority should be granted.
>
> . . . .
>
> This, I believe, is as far as our discretion should go in the light of present scientific knowledge. We have no basis for asking Congress to give us discretion to establish a safe tolerance for a substance which definitely has been shown to produce cancer when added to the diet of test animals. We simply have no basis on which such discretion could be exercised because no one can tell us with any assurance at all how to establish a safe dose of any cancer-producing substance.

H.R. Rep. No. 86–1761, at 12–13, (quoting Statement by Hon. Arthur S. Flemming, Secretary of HEW, before the House Committee on Interstate and Foreign Commerce, January 26, 1960), *reprinted in* 16 Leg. Hist. at 681–82.

> change in the analytical procedure until new scientific developments clearly demonstrate the need.

Flemming Letter, *reprinted in* H.R. Rep. No. 86–1761, at 89, *reprinted in* 16 Leg. Hist. at 758. In the last sentence of this quotation, the Secretary contemplates a situation in which a more sensitive method is available, but not needed, by acknowledging as possible a situation in which the agency could change to more sensitive methods and yet refrains from doing so. Such a situation is possible only if a superior method were available. This passage, in short, suggests that the FDA must have *some* discretion to decline to adopt the best available method.

Once again, however, the statute itself provides no guidance at all on what factors the FDA may consider in exercising such discretion, and the legislative history provides only suggestive guidance. While "sound scientific judgment and the rule of reason" is not further defined, the level of risk already capable of being detected is certainly one plausible factor that might bear on the FDA's assessment of whether "new scientific developments clearly demonstrate the need." This is because, as just discussed, the Secretary's letter contemplates the case in which a more sensitive method is available, yet determined by the agency not to be needed. Of all the considerations that might support a conclusion that a better test is not "needed," as opposed, say, to being too expensive, or too time-consuming, the consideration that current tests are adequate to detect significant risk is perhaps the most straightforward and appropriate. This interpretation, thus, ties the FDA's discretion in method selection directly to some appraisal of the need to detect low levels of risk, and the significant risk level is certainly a reasonable benchmark for assessing adequacy.

Thus, the Secretary's letter defines two points that are important for our purposes. As the FDA contemplated the operation of the proviso, it would (1) sometimes refrain from requiring the best available detection method; and (2) base its decision on method approval on undefined "sound scientific judgment and the rule of reason," which might well incorporate considerations of the risks associated with the compound. While turning these points into statutory commands probably makes too much of Secretary Flemming's letter, it and the other pieces of legislative history acknowledging that the proviso's operation is linked to detection do refute arguments that such a reading is precluded by the statute. The history is simply too contradictory to support that result.

In this section of our opinion, however, the narrow question under review is whether the statute compels the FDA to push beyond currently approved methods to require more sensitive methods when they become available. As to this question, we are confident the answer is no.

III. Definition of "No Residue"

Under the SOM regulations, the FDA accepts a finding of some residue as satisfying the statutory requirement of "no residue," if the level of residue detected poses no significant risk of increased cancer to people. In other words, it considers the detected presence of small amounts of residue as satisfying the statutory requirement of no residue. The final question the agencies have presented is whether this construction is permissible under the statute. While the first two questions dealt with the FDA's discretion to approve methods of detection, this one deals with the FDA's possible discretion in interpreting the statutory requirement that the FDA find "no residue" by means of whatever methods of detection the FDA has chosen. The question of what action may be taken when the method prescribed or approved by the Secretary by regulations detects a residue demands a different answer.

Once again, we start with the statute. If Congress has "directly spoken to the precise question at issue" in the statute, that instruction must be followed. *Chevron*, 467 U.S. at 842–44; *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, the first canon of construction is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In this instance, Congress has clearly spoken. The DES proviso states that the Delaney Clause will not apply "if the Secretary finds . . . that no residue of the additive will be found (under methods of examination prescribed or approved by the Secretary by regulations)." 21 U.S.C. §348(c)(3)(A). The interpretation of this language seems straightforward and unambiguous. Giving "no residue" its ordinary meaning, the detected presence of any residue by an approved method would be incompatible with a finding of "no residue," and thus would preclude a finding that the proviso applies.

Investigation of the legislative history substantiates this reading of the statute. Previous inquiries into the legislative history of the proviso supported the conclusion that the FDA enjoys considerable discretion to select methods of detection. That conclusion was initially based on a reading of the statute itself, and subsequently reinforced by the findings that Congress's deliberations reflected no single clear view either on precisely how the proviso was consistent with the zero tolerance principle of the Delaney Clause or on the criteria the FDA should use in selecting such methods of detection. As to the question at issue here, the legislative history also reinforces the initial reading of the statute, but this time by revealing a consistent record. There is nothing in that record to suggest that a finding of "no residue" could be based upon the detected presence of residue, however insignificant, and the most pertinent items in the record on this issue in fact support the plain reading of the statute.

Consider first Secretary Flemming's May 13, 1960 letter initially proposing the proviso's language, which states in part:

> There is, however, one respect in which the anticancer proviso has proved to be needlessly stringent as applied to the use of additives in animal feed. For example, in the case of various animals raised for food production, certain drugs are used in animal feed which will leave no residue in the animal after slaughter or in any food product (such as milk or eggs) obtained from the living animal, and which are therefore perfectly safe for man.

Flemming Letter, *reprinted in* H.R. Rep. No. 86–1761, at 88, *reprinted in* 16 Leg. Hist. at 757. It is impossible to read the Secretary's reference to "no residue" as implying that the administration was proposing a statutory revision that would knowingly permit some residue to remain in food products. This is the same letter, after all, that endorses the Delaney Clause's standard of zero tolerance as the only acceptable public health policy with respect to carcinogens. [14] The letter only proposes a proviso that would operate when the Clause was "needlessly stringent"; that is, the proviso will apply in situations where a compound had been added to animal feed — and came within the scope of the food additive statute's Delaney Clause for that reason — but left "no residue" in food to be composed by humans. The operating supposition of the Delaney Clause, endorsed by Secretary Flemming, is that no exposure, no matter how small, to a known carcinogen was then considered "safe." On that supposition, the only residue that could be considered "perfectly safe" for humans, where the Clause's application would be "needlessly stringent," would be zero residue.

That this was Secretary's Flemming's view, and Congress's understanding of it, is reinforced by the Secretary's earlier statement:

> We have no basis for asking Congress to give us discretion to establish a safe tolerance for a substance which definitely has been shown to produce cancer when added to the diet of test animals. We simply have no basis on which such discretion could be exercised because no one can tell us with any assurance at all how to establish a safe dose of any cancer-producing substance.

H.R. Rep. No. 86–1761, at 13 (quoting Statement by Hon. Arthur S. Flemming, Secretary of HEW, before the Committee on Interstate and Foreign Commerce, Jan. 26, 1960), *reprinted in* 16 Leg. Hist. at 682. Having proof of the presence of a residue but nonetheless exempting a compound from the Delaney Clause's

[14] *Id.* ("[T]he principle of the [Delaney Clause] reflects, basically, the current state of scientific knowledge, and we would therefore, except [as applied to situations governed by the proposed DES proviso] feel constrained to apply the same principle even in the absence of [the Delaney Clause].").

prohibition, as the SOM's construction of "no residue" does, seems indistinguishable from treating that level of residue as a safe tolerance — precisely the result that Secretary Flemming denies in his statement to the Committee. Likewise, Secretary Ribicoff's assertion that "no tolerance for the addition of carcinogenic chemicals to food shall be granted in any amount," seems to require the conclusion that permitting a detected residue of a carcinogenic chemical to be present in food to be consumed by humans would not be permitted. Letter for Hon. Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, from Abe Ribicoff, Secretary, Department of Health, Education, and Welfare (July 21, 1962), *reprinted in* Drug Industry Act of 1962: Hearings on H.R. 11581 Before the House Committee on Interstate and Foreign Commerce, 87th Cong. 49 (1962), *reprinted in* 21 Leg. Hist. at 227.

There is nothing in the legislative history to suggest that Congress meant to authorize carcinogenic residue to be detected by the FDA and yet to have the proviso operate to exempt that compound from the Delaney Clause's prohibition. We believe that the statutory language of "no residue . . . will be found (under methods of examination prescribed or approved by the Secretary by regulations)," 21 U.S.C. §348(c)(3)(A), means that whatever approved method of detection is used must return a negative finding in order for the proviso to operate. Congress may not have been of one mind in realizing that reliance on detection could well result in actual, but undetected, residues in cancer-inducing additives being approved, but the case of actual, *undetected*, residues is quite distinguishable from the case of actual, *detected* ones. The legislative history consistently supports the conclusion that Congress did not intend for any additive for which a residue was actually detected to have the benefit of the DES proviso. The statute being clear, the FDA has no discretion to deviate from it.

It may be argued that the meaning of "no residue" is not clear, because the clearest literal meaning of "no residue" would preclude the FDA from ever employing the proviso once one acknowledges the considered scientific view that one can never be sure that not even a single molecule of a compound remains in edible tissue. Because it is doubtful that Congress meant "no residue" to be given a meaning that would render the proviso nugatory, the argument would run, what Congress meant by the term is ambiguous, and hence the door is open for the FDA to exercise a reasonable discretion in interpreting it.

As already discussed, we agree that the legislative history displays equivocation on how the proviso was meant to operate, that there are inconsistences in statements concerning its ultimate effect, and that the FDA enjoys some interpretive discretion as a result. In determining the scope of that discretion, however, one must keep in mind the particular discretionary judgment at issue. Here the "precise question at issue" is whether the FDA may treat a detected presence of residue as "no residue" within the meaning of the proviso. As to that precise question, the foregoing argument does not change the analysis. Had Congress insisted

upon an affirmative showing of "no residue," the current scientific understanding would indeed render the proviso a dead letter. That, however, is not the proviso Congress drafted. Instead, the proviso relies upon an affirmative showing that *an approved method of detection* finds "no residue," and that finding can still be made consistent with the belief that a yet more sensitive method might show a physical residue where the approved method does not.

In this regard, our analysis finds the proviso to be structurally similar to the Delaney Clause as interpreted by Judge Williams in *Public Citizen*. Both provisions contain some administrative discretion, but they also both contain some "automatic" elements. To paraphrase Judge Williams, our conclusion is that the proviso requires that if A [an approved method of detection detects the presence of any residue], then B [the proviso is not applicable]. *See Public Citizen*, 831 F.2d at 1112. There is language permitting administrative discretion, but it relates only to the selection of detection methods. [15] Once any residue is detected by an approved method, the compound cannot be listed, because the proviso does not apply, and hence the Delaney Clause itself does.

IV. *Conclusion*

Under the DES proviso, the FDA may choose to disapprove methods of detection because they are not sufficiently sensitive to detect the presence of an additive at the "no significant risk" level. Further, the FDA need not revise its regulatory approval of a method simply because a more sensitive method of detection may be available. However, it is a necessary condition to the application of the DES proviso that an FDA approved method of detection return a finding that no residue has been detected. The FDA may not accept a finding that residue is present, but below the "no significant risk" level, as satisfying the statutory requirement of "no residue."

CHRISTOPHER SCHROEDER
Deputy Assistant Attorney General
Office of Legal Counsel

[15] Of course, the exercise of the FDA's discretion in selecting a method of detection might result in an approved method failing to detect residues that more sensitive methods could detect. The practical consequences of a finding of no residue by such a less sensitive method might well be indistinguishable from the consequences of following the FDA's current SOM approach, if the less sensitive method were sensitive down to the level of no significant risk, but no further. Indeed, by giving the Secretary discretion in method selection, Congress may well have contemplated that the risk associated with a compound might be a factor in the Secretary's exercise of that discretion. *See* discussion *supra* pp. 261–62. Insofar as the FDA's approach takes no significant risk levels into account, it can be seen as one plausible methodology for accomplishing the purposes of the DES proviso, at least on one possible reading of those purposes.

Nevertheless, the Supreme Court has been quite clear in recent years that where Congress's statutory command is unambiguous as to the precise question at issue, *Chevron*, 467 U.S. at 842, that command must be followed. *E.g., Connecticut Nat'l Bank*, 503 U.S. at 254. The proviso structures the FDA's decision making in a particular way, and the fact that an alternative decision making structure might produce a similar ultimate decision does not justify failing to follow the proviso's instructions.

Constitutionality of Awarding Historic Preservation Grants to Religious Properties

A court applying current precedent is most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause of the Constitution.

October 31, 1995

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF THE INTERIOR

At your request, we have reviewed your office's draft opinion regarding the permissibility under the Establishment Clause of awarding government historic preservation grants to churches and other religious properties.[1] In particular, and as we discussed earlier, we have considered whether the Supreme Court's recent decision in *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), directly addresses the particular question you have raised.

As discussed below, the *Rosenberger* decision, which deals with a form of government aid to religion significantly different from that at issue here, does not control the case you have presented. Accordingly, we have no occasion here to fully analyze the *Rosenberger* decision, nor to predict how it might apply in other contexts. Rather, our analysis is guided by Supreme Court case law developed prior to *Rosenberger*. We conclude that a reviewing court, applying current precedent, likely would hold that making historic preservation grants to churches and other pervasively sectarian properties is inconsistent with the Establishment Clause.

1. *Background*

Our understanding of the program in question, based primarily on the materials you have provided us, is as follows. Organizations are eligible for historic preservation grants, funded by the federal government and awarded directly by the states, if they are listed on the National Register. Listing on the National Register, in turn, depends on satisfaction of fairly detailed criteria measuring "significance in American history, architecture, archeology, engineering, and culture," including "integrity of location, design, setting, materials, workmanship, feeling, and association." *See* 36 C.F.R. § 60.4 (1995). A religious property qualifies for listing if it "deriv[es] primary significance from architectural or artistic distinction or historical importance." *Id.* Listing on the National Register is only a threshold condition of grant assistance; the states apparently make their own

[1] Draft Memorandum for Roger F. Kennedy, Director, National Park Service, from John D. Leshy, Solicitor, *Re: Historic Preservation Grants for Religious Properties* ("Draft Memo").

"determination[s] of needs and project worthiness in selecting projects to be funded from the many applications submitted." [2]

At least since 1981, grants have not been made available to active churches or houses of worship under the program.[3] Both the Reagan and the Bush Administrations took the position that direct financial support of active churches would be inappropriate in light of Establishment Clause concerns.[4] The question you have raised is whether that policy may be reversed. Specifically, you have asked whether historic preservation grants may be awarded directly to religious organizations for the preservation of buildings currently used for religious purposes such as worship and education.[5] Directly at issue appear to be grants for the preservation of active churches or, perhaps, of other religious facilities that would be considered "pervasively sectarian" under the Supreme Court's jurisprudence.[6]

2. *Analysis*

As your draft opinion recognizes, a series of Supreme Court cases decided prior to *Rosenberger* calls into considerable question any effort by the government to provide monetary assistance directly to pervasively sectarian institutions.[7] Because your draft opinion itself discusses this line of authority, we limit ourselves to a brief description of the two-part rule that has emerged to govern direct financial support of religious institutions.

First, though the government may include religious institutions that are not pervasively sectarian in neutral programs providing financial assistance, it must ensure that government grants are not used to fund "specifically religious activity" and are instead channeled exclusively to secular functions. As you note, the Supreme Court has applied this principle quite stringently in a line of closely analogous cases involving school construction and repair grants. In those cases, the Court upheld grants to non-pervasively sectarian religious schools only when the program in question expressly excluded from funding "any facility used or to be used for sectarian instruction or as a place for religious worship." *Tilton v. Richardson*, 403 U.S. 672, 675 (1971) (approving provision of federal construction grants to colleges and universities with religious affiliations).[8]

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[2] Memorandum for Director, Heritage Conservation and Recreation Service, from Associate Solicitor, Conservation and Wildlife, *Re: Historic Preservation Grants for Renovation of Church Properties* at 1 (Mar. 6, 1979).

[3] Draft Memo at 1; Letter for the Honorable James G. Watt, Secretary of the Interior, from Frederick N. Khedouri, Associate Director, Office of Management and Budget (Dec. 14, 1981) ("Khedouri Letter").

[4] The Reagan Administration appears to have rested its position on a policy decision made in "the context of the legal issues surrounding church-state affairs." *See* Khedouri Letter at 1. The Bush Administration relied more expressly on the conclusion that direct grants to active churches would be unlawful under Supreme Court case law construing the Establishment Clause. *See* Letter for the Honorable Peter H. Kostmayer, House of Representatives, from Robert E. Grady, Associate Director, Office of Management and Budget (Mar. 28, 1991).

[5] Draft Memo at 2.

[6] *Id.* at 6 (assuming that most if not all potential grantees would be deemed "pervasively sectarian").

[7] *Id.* at 5.

[8] *See also Hunt v. McNair*, 413 U.S. 734, 736 (1973) (upholding state-financed construction of college and university facilities, subject to same restriction); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 740–41 (1976)

That the Court conceives of this restriction on use of public funds as both essential and rather sweeping is illustrated by the *Tilton* case, holding that the expiration of a restriction after twenty years violates the Establishment Clause: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.* at 683. The Court made the same point in *Nyquist*, invalidating maintenance and repair grants to nonpublic schools in part because they lacked "appropriate restrictions": "Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities." 413 U.S. at 774. Importantly, the prohibition on public funding of facilities used for religious activity applies even where the government's purpose in funding those facilities is concededly secular and "entirely appropriate for governmental action." *Tilton*, 403 U.S. at 678–79; *see Nyquist*, 413 U.S. at 773–74.

The second part of the rule qualifies the first: with or without restrictions, the government may not provide monetary aid directly to "pervasively sectarian" institutions, defined as institutions in which "religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743. The outer boundaries of the "pervasively sectarian" category are not well-defined, *see Bowen v. Kendrick*, 487 U.S. 589, 631 (1988) (Blackmun, J., dissenting), and the Supreme Court has used it most often — though not exclusively[9] — in connection with educational institutions. Nevertheless, we have no doubt that you are correct in assuming that most if not all active houses of worship would fall within this category.[10] Indeed, the notion that religion plays something less than a vital and pervasive role in an active church's mission might appear inconsistent with a proper respect for religious institutions as well as with common sense.

As the Court has explained, the reason for the prohibition on direct monetary grants to pervasively sectarian institutions is the unacceptable risk that where secular and religious functions are "inextricably intertwined," government aid, though designated for a secular purpose, will in fact advance the institution's religious mission. *Meek v. Pittenger*, 421 U.S. 349, 365–66 (1975) (invalidating provision to pervasively sectarian schools of instructional material "earmarked for secular purposes"); *Kendrick*, 487 U.S. at 610. Again, it is immaterial to this part of the Court's analysis that provision of assistance would serve a legitimate

(upholding provision of noncategorical state grants to private colleges and universities, where grants may not be used for "sectarian purposes"); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 774 (1973) (invalidating state maintenance and repair grants for nonpublic elementary and secondary schools in part because they lack restrictions on use for religious purposes).

[9] At issue in *Bowen* were a broad range of social services organizations with religious affiliations. The Court concluded that the Establishment Clause prohibited those organizations that were "pervasively sectarian" from receiving federal grants under the Adolescent Family Life Act, 42 U.S.C. §§3007–3007–10. 487 U.S. at 620–21.

[10] Draft Memo at 6.

secular purpose, *see Meek*, 421 U.S. at 363; *Kendrick*, 487 U.S. at 602; what is critical is that the assistance also would have the effect of advancing religion because of the pervasively sectarian character of the recipients. *Meek*, 421 U.S. at 363. And even if it were possible, as a theoretical matter, to channel government funds exclusively to secular functions in such institutions, the degree and kind of governmental monitoring necessary to ensure compliance with the requisite funding restrictions would itself raise Establishment Clause problems. *Kendrick*, 487 U.S. at 616–17.

We think that these concerns would be implicated squarely were the government to provide churches and other pervasively sectarian facilities with historic preservation grants. The draft opinion suggests that such grants might be permissible if restricted to the preservation of "secular elements" of otherwise religious buildings — that is, if government assistance were used only for such purposes as exterior renovation, roof repair, and replacement of structurally necessary internal components.[11] What underlies the Court's decisions in this area, however, is an understanding that in the context of pervasively sectarian facilities, "secular elements" simply cannot be identified and separated from the overall religious mission. Indeed, renovation of active churches and other houses of worship appears to be a case in point. Though a structural element like a roof can be characterized as "secular" rather than "sectarian" in most contexts, the distinction cannot be maintained in any meaningful sense when the roof is a component part of an active church.

Moreover, even if such a distinction could be defended in the abstract, efforts by the government to identify those elements of a house of worship that do not have "direct religious import" [12] could well involve the kind of "monitoring for the subtle or overt presence of religious matter" prohibited by the Establishment Clause. *See Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989). It is our understanding that even the most basic structural features of a church may carry symbolic religious import.[13] Determining whether that is the case in any given instance may require an inquiry into religious doctrine or belief that would impermissibly entangle the government in religious affairs. *See id.* at 696–97 ("[R]equiring the Government to distinguish between 'secular' and 'religious' benefits or services [provided by Church of Scientology auditing sessions] may be fraught with the sort of entanglement that the Constitution forbids.' "). In short,

[11] *Id.* at 3, 7.

[12] *Id.* at 3.

[13] "Besides individual ornaments and architectural features, the [church] structure, taken as a whole, can be a symbol of the entire religion:

> 'The visible church building was both a symbol and model for the invisible or "spiritual" church. . . . The church was considered to be a tangible expression of a host of images and ideas expressed in the Bible. It was the body of Christ, a city of refuge, the New Jerusalem, God's presence among men.' "

Thomas Pak, Note, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 Colum. L. Rev. 1813, 1841 (1991) (quoting Paul Clowney, & Tessa Clowney, Exploring Churches 65 (1982)).

we do not think that it is feasible, in theory or practice, to differentiate between religious and secular elements of active houses of worship.

This is, we note, the conclusion reached in a different context by the Washington Supreme Court in *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (en banc). In holding that the Free Exercise Clause prohibited application of a landmark ordinance to restrict a church's ability to alter its exterior, the court relied in part on the inextricable link between the church's structure and its religious message: the "church building itself 'is an expression of Christian belief and message' and . . . conveying religious beliefs is part of the building's function. . . . The relationship between theological doctrine and architectural design is well recognized." *Id.* at 182. The court went on to reject an attempted separation of religious from secular elements, finding that the ordinance's exception for "alterations necessitated by changes in liturgy" was unworkably vague: "Would a wider door to permit access by handicapped parishioners comprise a liturgical change? Although . . . widening the door does not relate directly to the rites or procedures of worship in the church, it does facilitate the ability of disabled persons to participate in religious services and activities." *Id.* at 184 (quoting prior decision in *First Covenant Church v. City of Seattle*, 787 P.2d 1352, 1360 (Wash. 1990) (en banc)). Though we take no position on the ultimate decision in *First Covenant*,[14] we do think that the court's reasoning on this issue is persuasive.

There is one additional feature of the historic preservation grant program that bears emphasis here. In recent cases upholding the provision of certain benefits to religious groups or for religious expression, it has been important to the Court that the benefit in question is generally available to all interested parties, on a religion-neutral and near-automatic basis. *See Rosenberger*, 515 U.S. at 840–45 (subsidization of printing costs generally available to all student publications); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 757–59, 763 (1995) (access to public square generally available for all displays); *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (O'Connor, J.) (access to school facilities available to all student clubs, with students free to organize additional clubs). Provision of benefits to religious groups or expression in this context, the Court has reasoned, is most unlikely to reflect or convey any endorsement of or preference for religion. *Id.; see Pinette*, 515 U.S. at 763–66. Historic preservation grants, by contrast, do not appear to be generally available in the same sense. Properties, including religious properties, qualify for initial listing on the Historic Register only if they meet subjective criteria pertaining to architectural and artistic distinction and historical importance. Once listed, prop-

[14] We note that at least one other court has upheld against a Free Exercise Clause challenge the application of a landmark restriction to prevent a church from erecting a commercial office tower on its property. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Because the church's claim in that case centered on lost revenue rather than on structural integrity, the court did not address the issues analyzed in First Covenant. *See First Covenant*, 840 P.2d at 181 (distinguishing *St. Bartholomew's*).

erties are eligible to compete for grants based on additional measures of "project worthiness" established by the states. Participation by pervasively sectarian institutions in this kind of competitive grant program raises special concerns, absent in cases like *Rosenberger*, *Pinette*, and *Mergens*, that application of necessarily subjective criteria may require or reflect governmental judgments about the relative value of religious enterprises.

We understand that the Second Circuit's decision in *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991), suggests in dicta that the Establishment Clause prohibition on direct funding of pervasively sectarian institutions may admit of exceptions in certain cases. We do not believe it appropriate, however, to rely on that case here. First, as your draft opinion appears to recognize, the portion of *Lamont* at issue is at best in considerable tension, and at worst inconsistent, with governing Supreme Court precedent. Second, even if the standard advanced in *Lamont* could be defended, we are not convinced that it would apply in this context.

The *Lamont* court suggested that it might approve funding of a pervasively sectarian institution if (i) the government had a compelling interest in providing funds; and (ii) the court could assure itself that the grant would not in fact advance religion. 948 F.2d at 842. At issue in *Lamont* was assistance to pervasively sectarian schools abroad, with the stipulation that no government funds be used to "construct buildings or other facilities intended for worship or religious instruction." *Id.* at 828. For present purposes, we will assume with the *Lamont* court that a pervasively sectarian school's religious mission might not be advanced by funding of a separate facility, such as a gym, used only for secular purposes. Whether or not this is so, however, it simply does not follow that the government also may fund the preservation of facilities that *are* "intended for worship or religious instruction" without impermissibly advancing religion. Moreover, we hesitate to assume that a court would find the government's interest in historic preservation sufficiently "compelling" to trigger the *Lamont* analysis in the first instance. Again, we note that the court in *First Covenant* rejected such a claim: "[T]he City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of *First Covenant*'s right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom." 840 P.2d at 185.

Finally, as noted above, the Court's decision in *Rosenberger* does not address the issue posed by your inquiry to us. *Rosenberger* does, however, acknowledge the Establishment Clause principle against "direct money payments to sectarian institutions," citing most of the same cases we discuss here. 515 U.S. at 842. The Court goes on to approve assistance to a student religious publication on the grounds that the principle identified is not implicated: the program in question neither involves the payment of public funds directly to recipients nor includes religious institutions "in the usual sense of that term" among its beneficiaries.

Id. at 842–44. Indeed, the Court places special emphasis on the second factor as it applies to churches, carefully distinguishing the case before it from one involving direct or indirect public aid to a church. *Id.* at 844. *Rosenberger*, to be sure, emphasized the importance of neutrality in upholding governmental programs against Establishment Clause challenge, clarifying that the Establishment Clause does not "justif[y], much less require[], a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.* at 839. Nevertheless, we do not believe that at the present time there is authority for a departure, in the context presented here, from the rule against providing funds directly to churches and other pervasively sectarian institutions.

As you know, the question of government aid to religious institutions is a very difficult one. The lines separating permissible from impermissible assistance are sometimes hard to discern, and, as *Rosenberger* indicates, the Supreme Court's jurisprudence in this area is still developing. We think, however, that a court applying current precedent is most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause.

WALTER DELLINGER
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Office of Legal Counsel

Reassignment of Assistant Secretary of Labor Without Senate Reconfirmation

Where the Secretary of Labor exercises statutory power to reassign the duties of a lawfully confirmed Assistant Secretary of Labor whose duties are not otherwise assigned by statute, reconfirmation of the Assistant Secretary is not legally required.

November 2, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Over the past few days, this Office has considered whether Senate reconfirmation of Anne H. Lewis as an Assistant Secretary of Labor is legally required. The answer to this question is clear: the Senate, having already confirmed Ms. Lewis as an Assistant Secretary of Labor, need not do so again.

Under 29 U.S.C. § 553,

> [t]here are established in the Department of Labor nine offices of Assistant Secretary of Labor, which shall be filled by appointment by the President, by and with the advice and consent of the Senate. Each of the Assistant Secretaries of Labor shall perform such duties as may be prescribed by the Secretary of Labor or required by law.

Congress has provided that "[o]ne of such Assistant Secretaries shall be an Assistant Secretary of Labor for Occupational Safety and Health," *id.*; another, the "Assistant Secretary of Labor for Mine Safety and Health," *id.* § 557a; and a third, the "Assistant Secretary of Labor for Veterans' Employment and Training," *id.* § 553 note. The allocation of duties to the other Assistant Secretaries is not set by statute.

On July 29, 1993, in accordance with the statute, the President nominated Anne H. Lewis to be "an Assistant Secretary of Labor." 139 Cong. Rec. 17,906 (1993). Although some of the references in the Congressional Record to the committee hearings on the nomination characterize the position for which she was nominated as "Assistant Secretary [of Labor] for Public Affairs," *see id.* at D563, the Senate (in accordance with the statute) confirmed her on October 7, 1993, simply as an "Assistant Secretary of Labor." *Id.* at 23,995.

Secretary Reich then exercised his statutory power to assign duties to Ms. Lewis. He first allocated duties to her as Assistant Secretary for Public Affairs. Later, he reassigned her to carry out duties as Assistant Secretary for Policy. When he made this reassignment, Ms. Lewis's name was not sent to the Senate for reconfirmation.

The Secretary acted on the advice of our Office which relied upon a 1976 opinion written by then Assistant Attorney General Antonin Scalia. Memorandum for the Honorable Bobbie Greene Kilberg, Associate Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Reassignment of Department Heads Without Reconfirmation by the Senate* (Apr. 2, 1976). Assistant Attorney General Scalia concluded that although the statute required Senate confirmation before the President could appoint an Assistant Secretary of Labor, it did not require the Senate to approve the assignment or reassignment of duties to Assistant Secretaries, once confirmed. Indeed, the statute did not mandate that the Secretary assign any continuing duties at all to any of the "generic" Assistant Secretaries. Each could have served as a general aide to the Secretary.

The Chair of the Committee on Labor and Human Resources, however, has objected to Secretary Reich's actions and believes that the President is required to submit Ms. Lewis for reconfirmation. On October 10, 1995, the Congressional Research Service issued a legal opinion arguing that the Scalia memorandum is wrong and that the duties of Assistant Secretaries of Labor may not be reassigned without a renewed confirmation by the Senate. Memorandum for the Honorable Nancy L. Kassebaum, Chair, Senate Labor and Human Resources Committee, from Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, *Re: Requirement of Reconfirmation by the Senate When the Executive Seeks to Shift an Officer from One Advice and Consent Position to Another* (Oct. 10, 1995) ("CRS Opinion").

In my view, Assistant Attorney General Scalia's opinion was correct and has been powerfully reinforced by a later decision of the Supreme Court. The relevant statutes, on their face, divide Assistant Secretaries into two classes: those whose duties are assigned by statute and those whose duties are allocated to them by the Secretary. When Congress has desired to attach specific duties to an office of Assistant Secretary, it has done so. Congress has not specified any duties for the Assistant Secretary position to which the President appointed Ms. Lewis. The CRS Opinion, which contests Assistant Attorney General Scalia's view, purportedly rests on "Congress' prerogative over the administrative bureaucracy." CRS Opinion at 3. According to CRS, Congress may provide for execution of the laws by officers of the United States, and "under the Necessary and Proper Clause, it has authority to create offices, determine their location in the governmental structure, the qualifications of officeholders, prescribe their appointments, and generally promulgate the standards for the conduct of the offices." *Id.* at 4 (citations omitted). The CRS Opinion, however, ignores the implications of this (valid) premise. It is *Congress*, not the Senate, that may define offices under the Necessary and Proper Clause. The position of Assistant Secretary is statutory and is not a constitutional office. As the Supreme Court held in *INS v. Chadha*, 462 U.S. 919, 951 (1983), "the legislative power of the Federal Government [must]

be exercised in accord with a single, finely wrought and exhaustively considered, procedure." This procedure entails passage by both houses of Congress and presentment to the President. *Id.* To place specific limitations on the duties performed by Assistant Secretaries of Labor, therefore, Congress would have to amend the current statute, using the constitutionally required procedure. Even if the President had nominated Ms. Lewis to be "Assistant Secretary for Public Affairs" (as he did not), or even if the Senate had voted to confirm Ms. Lewis as "Assistant Secretary for Public Affairs" (as it did not), *Chadha* would refute the argument that the Secretary may not reassign Ms. Lewis to new duties without reconfirmation.

In standing upon the principle that the Senate may not aggrandize itself by effectively redefining offices established by statute, we would be well supported by practice. Congress has provided, for example, that there are to be ten Senate-confirmed Assistant Attorneys General, "who shall assist the Attorney General in the performance of [her] duties." 28 U.S.C. § 506. We have identified ten instances, the earliest in 1936 and the latest in 1988, in which the Attorney General reassigned an Assistant Attorney General from one division to another without reconfirmation. In our Department's history, there is, as far as we know, no contrary case. To be sure, the first head of the Civil Rights Division, W. Wilson White, was nominated for Senate confirmation in 1958, even though he had been serving as an Assistant Attorney General in charge of the Office of Legal Counsel. However, Mr. White first resigned his position as Assistant Attorney General, received a recess appointment, and then went through the process for confirmation. Thus, when the Senate confirmed Mr. White the second time, he did not hold a Senate confirmed position as Assistant Attorney General.

It is more difficult to ascertain the practice at other agencies. Our files suggest that, even apart from actions by the present Administration, reassignments without new confirmations were made in 1974 (Department of Agriculture), 1976 (Department of Labor), and 1984 (Department of Energy). On the other hand, the Executive Clerk has identified four instances where the Senate was asked to reconfirm an official who was being reassigned. In two of these cases, an Assistant Administrator of the Agency for International Development was transferred to a regional desk. Because the statute fixing the pay of Assistant Administrators distinguishes between "Assistant Administrators" and "Regional Assistant Administrators," 5 U.S.C. § 5315, the appointees apparently were moving to offices with different *statutory* definitions, and the reconfirmations thus appear proper. The other two cases seem to have involved reassignments where reconfirmation was unnecessary and perhaps inappropriate. But these two cases can hardly outweigh the decided practice to the contrary.

Ms. Lewis is lawfully serving as a Senate confirmed Assistant Secretary of Labor, performing duties lawfully assigned to her by the Secretary under 29

U.S.C. § 553. Thus, no further action by the Senate is required for her to continue to serve as an Assistant Secretary of Labor.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Authorization of Immigration Emergency Fund Reimbursements

The continuing resolution enacted on September 30, 1995, does not limit or suspend the authority that would otherwise exist for the obligation or expenditure of an Immigration Emergency Fund reimbursement pursuant to section 404(b) of the Immigration and Nationality Act.

The Immigration Emergency Fund may be used to reimburse the State of Florida for its increase in social service and health expenses deriving from the influx of Cuban immigrants resulting from a presidential decision.

November 8, 1995

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

Section 404(b) of the Immigration and Nationality Act ("INA") established the Immigration Emergency Fund ("IEF"). *See* INA § 404(b), 8 U.S.C. § 1101 note. On September 28, 1995, President Clinton determined that an immigration emergency existed within the meaning of section 404(b) and that a $6,000,000 reimbursement should be made available from the IEF to reimburse those who assisted in the enforcement of immigration laws in connection with the repatriation of aliens interdicted en route to the United States and being smuggled by organized international syndicates. As required by section 404(b)(1), the President certified his determination to the Judiciary Committees of the House of Representatives and the Senate on October 3, 1995. On September 28, 1995, the Deputy Attorney General, addressing a separate matter, but also acting pursuant to section 404(b) of the INA, authorized an $18,000,000 reimbursement to the State of Florida.[1] On September 30, 1995, just prior to the October 1, 1995, commencement of the new fiscal year, Pub. L. No. 104–31, 109 Stat. 278 (1995) ("Continuing Resolution") was approved. The Continuing Resolution provides funds and authority to continue various government programs, operations, and activities that would otherwise have experienced a lapse in appropriations and remains in effect until November 13, 1995, at the latest.

You have asked for our opinion on two questions raised by the authorization of these reimbursements. First, you have asked whether they are prohibited from being made under the terms of the Continuing Resolution. Second, you have asked whether the terms of the IEF permit the $18,000,000 reimbursement authorized to Florida. We answer these questions in turn.

[1] Because the Deputy Attorney General authorized the reimbursement pursuant to section 404(b)(2)(A), a presidential determination of emergency and certification to Congress were not required. *See id.* § 404(b)(2)(C) ("[f]or purposes of subparagraph (A), the requirement of paragraph (1) that an immigration emergency be determined shall not apply"). This reimbursement was thus obligated on September 28, 1995, during fiscal year 1995.

I.

The IEF is a "no year fund" — that is, Congress did not limit the appropriations it made to the IEF to a specific fiscal year or set of fiscal years, nor did it establish that the authority granted by section 404(b) would expire. Instead, Congress at irregular intervals appropriates funds to the IEF to "remain available until expended." The Administration did not submit a request for IEF funds in its fiscal year 1996 appropriations request.[2]

The act creating the IEF authorizes reimbursements in two different circumstances. When the President declares an immigration emergency and certifies that determination to the Judiciary Committees of the House and Senate, IEF funds can be used to increase border patrols or other enforcement activities of the Immigration and Naturalization Service ("INS") or to reimburse states and localities in providing assistance requested by the Attorney General. *See* INA § 404(b), 8 U.S.C. § 1101 note. The authorization to use up to $6 million of the IEF to reimburse third countries was made pursuant to this authority.

IEF funds can also be used to reimburse states and localities providing assistance to the Attorney General under certain specified conditions, or under any other circumstance determined by the Attorney General. *Id.* The authorization to use up to $18,000,000 of the IEF to make reimbursements to Florida was issued pursuant to this authority.[3]

As we understand it, there is concern that the Continuing Resolution limits or suspends the authority that would otherwise exist for the obligation or expenditure of these monies pursuant to section 404(b) of the INA. This concern rests on the belief that the Continuing Resolution prohibits all obligations or expenditures except those expressly provided for in the Continuing Resolution itself. This is a misunderstanding of the Continuing Resolution.

Many of the federal government's continuing programs, projects, and activities are funded through one of the thirteen appropriations bills that are enacted annually. Those programs, projects, and activities may only continue after the conclusion of a fiscal year if the relevant appropriations bill has been enacted for the following fiscal year.[4] On the occasions when Congress has failed to enact any or all of these annual appropriations bills by the end of the preceding fiscal year, Congress has typically enacted a continuing resolution to allow those programs that would otherwise lapse to continue until an annual appropriation is

[2] In 1989, Congress appropriated $35,000,000 to the IEF. *See* Pub. L. No. 101–162, tit. II, 103 Stat. 988, 1000 (1989). It did not appropriate money to the IEF again until October 1993, when it appropriated $6,000,000. *See* Pub. L. No. 103–121, tit. I, 107 Stat. 1153, 1161 (1993). Most recently, Congress appropriated $75,000,000 for the IEF in August 1994. *See* Pub. L. No. 103–317, tit. I, 108 Stat. 1724, 1732 (1994).

[3] The Deputy Attorney General is authorized to exercise all of the authority of the Attorney General. *See* 28 C.F.R. § 0.15(a) (1995).

[4] This generally applicable statement is subject to statutory exceptions, most notably those contained in the Antideficiency Act. *See* 31 U.S.C. §§ 1341–1342.

enacted. *See* 2 Office of the General Counsel, United States General Accounting Office, *Principles of Federal Appropriations Law* 8–2 (2d ed. 1992).

Under this usual practice, a continuing resolution does not apply to obligations validly incurred during the preceding fiscal year. The $18,000,000 grant to Florida was validly obligated in fiscal year 1995, and so would not be covered under a standard continuing resolution.[5] There also are programs, projects, and activities — such as the IEF — that are not dependent upon annual appropriations bills for appropriations or authority. Traditionally, continuing resolutions do not apply to these programs, projects, or activities. Of course, Congress could, if it chose, extend the coverage of a continuing resolution to include *all* programs, projects, and activities; however, we find nothing in the Continuing Resolution's text to suggest that Congress altered its usual practice in a way that affects the IEF.

We understand the contention that the current Continuing Resolution limits or suspends the authority and prior authorization otherwise applicable to the IEF to be based on section 107, which provides: "Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution." *Id.* § 107, 109 Stat. at 280. The natural reading of this section is that it contains a term that defines the scope of coverage of the *appropriations made and authority granted* by the Continuing Resolution ("all obligations or expenditures incurred for any program, project, or activity"), as well as a term that defines the duration of the time period during which that scope of coverage applies ("during the period for which funds or authority for such project or activity are available under this joint resolution"). In addition to specifying scope of coverage and duration of coverage for programs, projects or activities for which the Continuing Resolution *does* contain appropriations and authority, however, it has also been suggested that this section applies to programs, projects or activities for which the Continuing Resolution does *not* contain appropriations or authority. In other words, the suggestion is that there is a negative implication to this section that any program, project or activity not affirmatively provided funding or authority by the Continuing Resolution is thereby denied appropriations and authority, notwithstanding any other provisions of law. Perhaps this suggestion rests in part on the belief that the use of the expression "*any* program, project, or activity" within the scope of coverage term extends the applicability of section 107 to all programs, projects or activities of the government.

As we have indicated already, this reading would be inconsistent with the usual practice and understanding of Continuing Resolutions. More importantly, it simply

[5] It is not clear whether the $6,000,000 reimbursement was obligated in fiscal year 1995 or 1996. The IEF requires the President to determine that an immigration emergency exists and to certify that fact to Congress. Because the President did not certify the immigration emergency to Congress until October 3, 1995, it is arguable that the $6,000,000 reimbursement was not obligated until fiscal year 1996. We need not resolve this question because, as we demonstrate *infra*, the Continuing Resolution does not apply to the IEF.

is not possible to read section 107 in a way that supports such a negative implication. Interpreting "any" in the scope of coverage term to encompass "all" government programs, so as to deny appropriations or authority to programs, projects or activities not affirmatively granted funds or authorization by the Continuing Resolution, does not produce the result of withholding authority from such programs. Instead, the duration of coverage of this section with respect to a program for which the Continuing Resolution does *not* appropriate monies or grant authority equals zero, because the "period for which funds or authority for such project or activity *are* available under this joint resolution" is zero. In other words, section 107 would have the effect of covering all obligations or expenditures for such a program for a time period of zero moments—which is tantamount to saying that the section does not cover such a program. Rather than giving the section this self-abnegating reading, it makes far more sense to understand that the limitation to programs affirmatively covered by appropriations or authorities in the Continuing Resolution that is the natural reading of the subject of the section ("[a]ppropriations made and authority granted pursuant to this joint resolution"), and that is expressed in the durational term ("for which funds or authority for such project or activity are available under this joint resolution") also applies to the phrase "any program, project or activity" in the scope of coverage term, so that the entire section is read to apply only to programs, projects or activities that are affirmatively covered by appropriations or authorities in the Continuing Resolution. Nevertheless, the operative result of the section is the same whether "any program, project or activity" is viewed as limited in this way or not: section 107 by its terms does not withdraw appropriations or authorities otherwise provided by law when those programs are not affirmatively covered by the Continuing Resolution.

Accordingly, the authorization of section 404(b) to obligate and expend available IEF appropriations would only be affected by the Continuing Resolution if some express provision of the Continuing Resolution applies to it. None does. The only two sections of the Continuing Resolution that might conceivably cover the obligations from the IEF are sections 101 and 111. Neither of these sections, however, actually does.

The Continuing Resolution provides appropriations and authority for "continuing projects or activities" covered in the appropriations bills listed in section 101. As already indicated, none of these bills authorizes or appropriates for the IEF. The Continuing Resolution also provides authority and appropriations for three categories of ongoing projects or activities in section 111, but none of these categories applies to the IEF. First, it applies "whenever an Act listed in section 101 as passed by both the House and Senate as of October 1, 1995, does not include funding for an ongoing project or activity for which there is a budget request." *Id.* § 111, 109 Stat. at 280. This category is inapplicable, as the Administration made no budget request for the IEF. Second, section 111 applies "when-

ever an Act listed in section 101 has been passed by only the House or only the Senate as of October 1, 1995 and an item funded in fiscal year 1995 is not included in the version passed by the one House." *Id.* This category does not describe the IEF, for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1996, Pub. L. No. 104–134, 110 Stat. 1321, had passed both houses of Congress by October 1, 1995. Finally, section 111 applies "whenever the rate for operations for an ongoing project or activity provided by section 101 for which there is a budget request would result in the project or activity being significantly reduced." Continuing Resolution, § 111, 109 Stat. at 280. This category does not apply to the IEF both because the IEF is not covered by section 101 and because there is no budget request for the IEF. Finally, section 111 provides that "[n]o new contracts or grants shall be awarded in excess of an amount that bears the same ratio to the rate for operations *provided by this section* as the number of days covered by this resolution bears to 366." *Id.* (Emphasis added.) Because the IEF's rate for operations is not provided by section 111 or any other provision of the Continuing Resolution, but rather is provided by section 404(b) of the INA, section 111 does not apply to the IEF.

II.

Your second question relates to an $18,000,000 allocation to Florida for that state's expenses deriving from the influx of Cuban immigrants resulting from the President's decision to "bring into the United States the Cuban population on Guantanamo and to repatriate Cuban migrants apprehended at sea in the future." Memorandum for the Deputy Attorney General, from Amy Jeffress, Special Assistant to the Deputy Attorney General at 1 (Aug. 30, 1995) ("Jeffress Memo"). Specifically, you have asked (a) whether the IEF may be used to offset the increase in social service and health care costs that Florida will bear as a result of the President's decision and (b) if so, whether the allocation may be disbursed prospectively—that is, before Florida actually has incurred the anticipated increased social service and health care expenses. For the reasons set forth below, we believe that the purposes for which the allocation is to be made are permissible under the statute and implementing regulations; however, we do not believe that the payments may be made prospectively.

A.

In 1986, Congress established the IEF to be available in case of a presidentially declared immigration emergency. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99–603 § 113, 100 Stat. 3359, 3383.[6] Congress specifically

[6] Date corrected and citation added by editors.

had in mind the Mariel boatlift. *See, e.g.*, H.R. Rep. No. 99–682(I), at 65 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5649, 5669. In 1990, Congress added a section permitting the Attorney General to use up to $20,000,000 to reimburse states for immigration-related expenses that were not incurred in a presidentially declared immigration emergency. Immigration Act of 1990, Pub. L. No. 101–649, § 705, 104 Stat. 4978, 5087[7] ("[T]he requirement . . . that an immigration emergency be determined shall not apply."). That section allows the Attorney General to reimburse states for their assistance to the Attorney General whenever the number of asylum claims for a calendar quarter exceeds by 1,000 the applications received in the previous quarter; the lives, property, safety, or welfare of the state's residents are endangered; or "in any other circumstances as determined by the Attorney General." INA § 404(b)(2)(A), 8 U.S.C. § 1101 note. Congress thus expressed, and enacted, its intent to grant the Attorney General broad discretion to determine when the IEF should be used to reimburse states. Consistent with this statutory scheme, Congress authorized the Attorney General to promulgate regulations to implement the IEF and to "delineat[e] . . . 'other circumstances.'" *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102–140, § 610(b), 105 Stat. 782, 832 (1991).

Pursuant to this statutory authorization, the Attorney General has issued regulations to govern administration of the IEF and delineate the "other circumstances" in which the IEF will be available to reimburse states. The regulations state, "[o]ther circumstances means a situation that, as determined by the Attorney General, requires the resources of a State or local government to ensure the proper administration of the immigration laws of the United States or to meet urgent demands arising from the presence of aliens in a State or local government's jurisdiction." 28 C.F.R. § 65.81 (1995). The Attorney General promulgated this delineation of "other circumstances" along with an explanatory note in which she observed that costs such as those relating to social services and health care do not typically fall within this delineation. She also made clear, however, that "in limited circumstances" such services could in fact "assist the Attorney General" and so would be reimbursable. 59 Fed. Reg. 30,520, 30,521 (1994).

The Deputy Attorney General, who is authorized to discharge the Attorney General's functions under the IEF, *see* 28 U.S.C. § 510; 28 C.F.R. § 0.15(a), has determined that Florida's request represents one of the limited circumstances in which the regulations and statute allow the IEF to be used to reimburse states for the cost of social services provided to aliens. *See* Executive Summary and Request for Decision (Aug. 30, 1995). The Deputy Attorney General reached her decision after concluding that the costs Florida has borne, and continues to bear, constitute urgent assistance to the Attorney General and the federal government generally

[7] Date and citation corrected by editors. As issued in 1995, the Opinion cited Pub. L. No. 99–603, 100 Stat. 3359 (1986).

in implementing and enforcing federal immigration law. *See id.*; Jeffress Memo at 2–3. We defer to the Deputy Attorney General's determination.

B.

The $18,000,000 allocation is meant to reimburse Florida for a variety of obligations, some of which apparently have not yet been incurred but which are anticipated. The regulations that the Attorney General promulgated to implement the legislation establishing the IEF provide for disbursements in the form of a "reimbursement agreement, grant, or cooperative agreement." 28 C.F.R. §§ 65.84, 65.85 (1995). Generally, we would interpret the term "grant" as encompassing payments for purposes in addition to reimbursements and including prospective payments. Regulations, however, must be interpreted in light of the statutory authority on which they are based, as a regulation may not expand the authority granted by its authorizing statute. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In this instance, the statute establishing the IEF only provides for reimbursements. The statute ordains that, "[f]unds . . . shall be available, by application for the reimbursement of States and localities providing assistance as required by the Attorney General, to States and localities." INA § 404(b)(2)(A), 8 U.S.C. § 1101 note.

The statute thus provides only for "reimbursement." The ordinary meaning of "reimbursement" is a repayment or ex post facto compensation for an obligation already incurred. *See, e.g., Webster's Third New International Dictionary* 1914 (1993) (defining "reimburse" to mean "to pay back (an equivalent for something taken, lost, or expended) to someone"). "Reimbursement," at least in its ordinary usage, does not cover a prospective or advance payment for obligations that have not yet been incurred but which merely are anticipated. Congress, of course, may give any meaning it wishes to the terms it uses in statutes, and if it had indicated that it meant reimbursement to include prospective payments, then such payments would be permissible. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). There is nothing in the statute or in its legislative history, however, that addresses the meaning of reimbursement generally or the specific matter of whether that term might refer to prospective payments. In contrast, there are at least thirty-four[8] statutes that create grants that can be used for either payment "in advance or by way of reimbursement."[9] We take these frequent disjunctive

[8] Corrected by editors. As issued in 1995, the opinion read "at least forty statutes."

[9] *See* 22 U.S.C. § 4025(a); 42 U.S.C. § 254b(d)(4)(B); 42 U.S.C. § 254c(d)(4)(B); 42 U.S.C. § 254f(b)(2)(B); 42 U.S.C. § 286b–8(a); 42 U.S.C. § 287a–2(e)(2); 42 U.S.C. § 291j–10; 42 U.S.C. § 295o(f)(1)(A); 42 U.S.C. § 300e–16(a)(4); 42 U.S.C. § 300j–9(d)(1); 42 U.S.C. § 1394; 42 U.S.C. § 3057m; 42 U.S.C. 5022; 42 U.S.C. § 6082(e); 42 U.S.C. § 6978(a); 42 U.S.C. 7601(c), 42 U.S.C. § 10904(b), 42 U.S.C. § 12651d(b)(2)(B); *see also* 21 U.S.C. § 1177(e); 25 U.S.C. § 450j(b); 25 U.S.C. § 1612(b)(2); 25 U.S.C. § 1656(b); 29 U.S.C. § 1579(c); 38 U.S.C. § 8201(d); 42 U.S.C. § 242a(c); 42 U S.C. § 242m(e)(1); 42 U.S.C. § 626(c); 42 U.S.C. § 1310(a)(3); 42 U.S.C. § 1395b–1(a)(1)(K)(2); 42 U.S.C. § 2000c–5; 42 U.S.C. § 3029(a); 42 U.S.C. § 3037a(b); 42 U.S.C. § 5657(a); 42 U.S.C. § 9832(3).

references to reimbursement, on the one hand, and prospective payments, on the other, as strong evidence that Congress does not ordinarily understand the term "reimbursement" to include prospective payments or payment "in advance." We therefore adhere to the ordinary meaning of "reimbursement," *see Burns v. Alcala*, 420 U.S. 575, 580–81 (1975); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968), and conclude that the IEF may not be used to cover prospective costs. Consequently, we interpret the term "grant" in the regulations as referring only to grants that reimburse states for obligations already incurred.

This conclusion is not at odds with the meaning or usage of the term "grant." There are at least three statutes that establish grant funds that, by their terms, are available exclusively for reimbursements. *See* 10 U.S.C. § 1152(d)(1); 20 U.S.C. § 8004(a); 49 U.S.C. § 31103. The statutes discussed above that provide for either reimbursement or payment in advance also demonstrate that reimbursement is not a payment method that is antithetical to grantmaking. This narrower construction of the term "grant" also finds support in the explanatory material accompanying the regulation, which sets forth that "[t]he rule has been amended to allow the Attorney General to use the grant or cooperative agreement process to provide funding, in addition to negotiating a separate reimbursement agreement. Accordingly, State and local governments may also use standard grant applications." 59 Fed. Reg. at 30,521 (emphasis added). By adding the term "grant" the Attorney General apparently meant to make available an additional process for seeking disbursements from the IEF and to utilize standard forms with which applicants were already familiar. All of this may be accomplished even though grants that are issued from the IEF are available to grantees only for the purpose of reimbursing obligations that grantees have already incurred. This narrower construction of grant, then, does not undermine the stated purposes of the Attorney General in allowing grants to be made from the IEF. This construction of the statutory term "reimbursement" and the regulatory term "grant" does not deny the authority of the Attorney General to commit a certain portion of the IEF for reimbursement to a state before the state has incurred obligations in the full amount. Rather, our construction merely would prohibit full disbursement of the grant amount before the recipient state has incurred obligations in the full amount of the grant.

CHRISTOPHER SCHROEDER
Deputy Assistant Attorney General
Office of Legal Counsel

The Secretary of the Treasury's Authority with Respect to the Civil Service Retirement and Disability Fund

5 U.S.C. § 8348 empowers the Secretary of the Treasury to suspend the investment of additional contributions to the Civil Service Retirement and Disability Fund and redeem prior to maturity CSRDF investment assets in order to avoid exceeding the statutory debt limit.

In exercising his CSRDF redemption authority, the Secretary of the Treasury may, during a "debt issuance suspension period," redeem CSRDF investment assets based on the total amount of civil service retirement and disability benefits authorized to be paid during the period.

The Secretary of the Treasury has discretion to designate the length of a debt issuance suspension period based on factors, identified by the Secretary, that are reasonably relevant to his determination.

The suspension during a debt limit crisis of CSRDF investment and the redemption of CSRDF investment assets would not cause a violation of the public debt limit.

November 10, 1995

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

You have requested advice from this Office on the authority of the Secretary of the Treasury ("Secretary") with respect to the investment assets of the Civil Service Retirement and Disability Fund ("CSRDF" or "Fund") during a debt limit crisis. Specifically, you have asked this Office:

> (1) whether the statute governing the Fund allows the Secretary to suspend the investment of Fund contributions in Treasury-issued, United States debt obligations that are subject to 31 U.S.C. § 3101(b) (the "debt limit") (such debt obligations herein referred to as "obligations of the United States") during a debt limit crisis;
>
> (2) whether the Secretary has the authority to disinvest or redeem Fund investment assets during a debt limit crisis; and
>
> (3) if the Secretary has the authority to disinvest or redeem, the conditions under which such authority may be exercised.

As the discussion below reveals, we conclude, based largely on the express terms of 5 U.S.C. § 8348, that the statute empowers the Secretary to suspend the investment of additional contributions to the CSRDF and redeem prior to maturity Fund investment assets in order to avoid exceeding the debt limit. In addition, we conclude that, in exercising his redemption authority, the Secretary may, during a "debt issuance suspension period," redeem Fund investment assets based on

the total amount of civil service retirement and disability benefits authorized to be paid during the period. Moreover, we conclude that redemptions so executed would free up debt issuance capacity under the debt limit, which could, in turn, be exhausted through the issuance of obligations of the United States to supplement Treasury's general cash account during a debt limit crisis. In addition, we conclude that the Secretary has discretion under the CSRDF statute to designate the length of a debt issuance suspension period, but that this discretion, though broad, is not unlimited. We also conclude that the Secretary has the authority to identify factors, consistent with the statute, that are reasonably relevant to his determination of the length of a debt issuance suspension period. Finally, we believe that the suspension of CSRDF investment and the redemption of CSRDF investment assets during a debt limit crisis as described below would not cause a violation of the statutory debt limit.

I. *Background*

The Secretary is required under the CSRDF statute to accept Fund contributions and pay civil service retirement and disability benefits to qualifying individuals. *See* 5 U.S.C. § 8348(a), (b). Treasury estimates that each month it receives approximately $5 billion in CSRDF contributions and disburses approximately $3.2 billion in benefits. Under present law, the Secretary is required to invest in interest-bearing obligations of the United States monies contributed to the Fund that are not immediately required to pay benefits. *Id.* § 8348(c).

According to Treasury officials with whom we have spoken, when it is not confronted with a debt limit crisis, Treasury typically invests all CSRDF contributions it receives in obligations of the United States and pays civil service retirement and disability benefits, via electronic fund transfer and checks, at the beginning of each month out of its general cash account. In connection with its monthly benefits payments, Treasury reimburses its general cash account by redeeming prior to maturity, Fund investment assets in an amount equal to the total amount of the benefits paid.[1]

You have informed us that Treasury is considering altering this process during the impending debt limit crisis. You have suggested that the Secretary might be prohibited by the debt limit from investing additional CSRDF contributions. In addition, you have informed us that the Secretary might consider accelerating the redemption of an amount of CSRDF investment assets based on a number of

[1] For example, we have been informed by Treasury officials that on August 1, 1995, Treasury paid approximately $3.2 billion in civil service retirement and disability benefits to qualifying individuals from its general cash account. $2.5 billion of those benefits were paid via electronic fund transfer on that date and approximately $700 million were paid with checks. To support the benefits payments made by electronic fund transfer, Treasury redeemed $2.5 billion worth of Fund investment assets on August 1, 1995. On the fourth and fifth business days following August 1, Treasury redeemed investment assets in an amount equal to the benefits paid by check on August 1, thereby affording the Fund the benefit of continued investment earnings during the period between when the benefits checks were issued and when the benefits checks were expected to be presented for payment.

months worth of civil service retirement and disability benefits payments at some point during the debt limit crisis and using the debt issuance capacity gained by the redemption to auction obligations of the United States to the public. You have also informed us that the auction proceeds would be used to augment Treasury's general cash account, so that government obligations, including obligations to pay civil service retirement and disability payments, could be paid during the debt limit crisis.

III. *Legal Discussion*

A. *Statutory Language*

Congress created the CSRDF to support the payment of retirement and disability benefits to certain former employees of the federal government. *See* 5 U.S.C. §§ 8301–8351.[2] When it created the Fund, Congress required the Secretary to accept contributions to the Fund and invest in interest-bearing obligations of the United States portions of the Fund not immediately required to pay civil service retirement and disability benefits. *See* Act of Sept. 6, 1966, Pub. L. No. 89–554, § 8348(b), (c), 80 Stat. 378, 584 (codified at 5 U.S.C. § 8348(b), (c) (Supp. II 1965–1966)).[3]

Obligations of the United States issued to the CSRDF are subject to the debt limit. *See* 5 U.S.C. § 8348(d).[4] Concerned that a failure to increase the debt limit might negatively affect the Fund's financial condition[5] and apparently aware of the overriding public interest in ensuring that a debt limit crisis not trigger default on obligations of the United States,[6] Congress in 1986 established rules under

[2] A federal government employee who is covered by the Civil Service Retirement Act, 5 U.S.C. §§ 8301–8351, must contribute a portion of his or her salary to the CSRDF. *Id.* § 8334.

[3] The provision governing Fund investments requires the Secretary to purchase on behalf of the Fund United States securities with fixed maturities bearing an interest rate "equal to the average market yield . . . borne by all marketable interest-bearing" United States debt obligations with a maturity of four years. 5 U.S.C. § 8348(d).

[4] Article I, Section 8, Clause 2 of the Constitution grants Congress the authority to "borrow [m]oney on the credit of the United States." While Congress has authorized the Secretary to borrow money, it has used the debt limit to restrict that borrowing. The debt limit currently provides:

> The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $4,900,000,000,000, outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

31 U.S.C. § 3101(b).

[5] *See Civil Service Retirement Trust Fund: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 99th Cong. (1985) ("Civil Service Retirement Trust Fund Hearing") (examining the Secretary's decision, during the fall of 1985, not to invest in obligations of the United States approximately $17 billion worth of CSRDF funds and to accelerate the redemption of CSRDF investment assets).

[6] In testimony on Treasury's actions with respect to the CSRDF during the 1985 debt limit crisis, John Niehenke, Deputy Assistant Secretary for Federal Finance, Department of the Treasury, stated, "[t]he debt limit impasse has put us all in a position of facing choices we would rather not face. The Secretary has recently been faced with choosing between defaulting on all U.S. obligations, including beneficiary payments, or advancing the redemption

which the Secretary could, during a debt limit crisis, suspend the investment of Fund contributions and take other related ameliorative actions involving the Fund. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99–509, § 6002(a)–(c), 100 Stat. 1874, 1931–33 (codified at 5 U.S.C. § 8348(j)–(l)) (the "1986 Amendments").

Under the 1986 Amendments, "the Secretary . . . may suspend additional investment of amounts in the Fund if such additional investment could not be made without causing the public debt of the United States to exceed the . . . debt limit." 5 U.S.C. § 8348(j)(1). The 1986 Amendments also provide that "the Secretary . . . may sell or redeem securities, obligations, or other invested assets of the Fund before maturity in order to prevent the public debt of the United States from exceeding the. . . debt limit." *Id.* § 8348(k)(1). The Secretary's redemption authority may be exercised, however, "only during a debt issuance suspension period, and only to the extent necessary to obtain *any amount of funds not exceeding the amount equal to the total amount of the payments authorized to be made from the Fund*" during the debt issuance suspension period. *Id.* § 8348(k)(2) (emphasis added). As defined under the 1986 Amendments, a "debt issuance suspension period" is "any period for which the Secretary . . . determines . . . that the issuance of obligations of the United States may not be made without exceeding the . . . debt limit." *Id.* § 8348(j)(5)(B). The 1986 Amendments also provide that "[a] sale or redemption may be made . . . *even if, before the sale or redemption, there is a sufficient amount in the Fund to ensure that [civil service retirement and disability benefits] payments are made in a timely manner.*" *Id.* § 8348(k)(2) (emphasis added).

Anticipating that the CSRDF might incur financial losses as a result of actions taken by the Secretary during a debt limit crisis, Congress sought to mitigate those losses and ensure that, after the expiration of the debt limit crisis, the Fund would be placed in the financial position it would have been in had the actions taken by the Secretary not occurred. The 1986 Amendments provide that "[a]ny amounts in the Fund which, solely by reason of the . . . debt limit, are not invested shall be invested by the Secretary . . . as soon as such investments can be made without exceeding the . . . debt limit." *Id.* § 8348(j)(2).[7] In addition, after the expiration of a debt issuance suspension period, the Secretary must:

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of trust fund obligations to pay those benefits. He chose the latter course to ensure that millions of Americans would continue to receive their benefits in a timely fashion." Civil Service Retirement Trust Fund Hearing at 12.

[7] This provision raises questions as to when the Secretary is required to invest Fund contributions which, on account of the debt limit, he was unable to invest when initially sent to Treasury. We believe an argument could be made, based on the 1986 Amendments' income restoration provisions and legislative history, that this statutory language merely requires the Secretary to invest the uninvested funds after the expiration of the debt issuance suspension period. We understand, however, that, during any debt issuance suspension period, Treasury will on a daily basis use whatever debt issuance capacity it has available after financing the payment of government obligations that come due on that date, to invest, on a pro rata basis up to the debt limit, as much of the uninvested government trust fund monies as is feasible. This practice will ensure that investments of uninvested CSRDF contributions are made as soon as practicable and will, in effect, reduce the amount of interest income Treasury will have to restore to the CSRDF following expiration of the debt issuance suspension period.

> immediately issue to the Fund obligations [of the United States] . . . bear[ing] such interest rates and maturity dates as are necessary to ensure that, after such obligations are issued, the holdings of the Fund will replicate to the maximum extent practicable the obligations that would then be held by the Fund if the suspension of investment . . . and any redemption or disinvestment . . . during [the debt issuance suspension period] had not occurred.

Id. § 8348(j)(3). The 1986 Amendments also require the Secretary to restore, on the first normal interest payment date after expiration of any debt issuance suspension period, the interest income that was lost to the Fund on account of actions taken by the Secretary.[8]

The 1986 Amendments require the Secretary to notify Congress in writing whenever, by reason of the debt limit, he will no longer be able to invest Fund monies. *Id.* § 8348(*l*)(2). They also compel the Secretary to "report to Congress on the operation and status of the Fund during each debt issuance suspension period for which the Secretary is required to take action" under the statute, within thirty days of the first normal interest payment date occurring after the expiration of the debt issuance suspension period. *Id.* § 8348(*l*)(1). Moreover, the 1986 Amendments mandate that the Secretary send a copy of the report to the Comptroller General. *Id.*

To our knowledge, Treasury has never promulgated regulations pertaining to the statutory provisions discussed above. We are also not aware of any court decisions interpreting the provisions. Accordingly, our interpretation of the 1986 Amendments stems largely from our examination of their statutory language.

The Supreme Court stated in *Blum v. Stenson*, 465 U.S. 886, 896 (1984), "[w]here . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." In this instance, we believe that the relevant statutory language provides clear guidance on several of the questions you have posed. Based on our reading of the statutory language, we conclude that the 1986 Amendments grant the Secretary authority to suspend the investment of Fund contributions when, in his opinion, such investment would result in the

[8] The 1986 Amendments provide:

> On the first normal interest payment date after the expiration of any debt issuance suspension period, the Secretary . . . shall pay to the Fund, from amounts in the general fund of the Treasury of the United States not otherwise appropriated, an amount determined by the Secretary to be equal to the excess of—
>
> (A) the net amount of interest that would have been earned by the Fund during such debt issuance suspension period if—
>
> (i) amounts in the Fund that were not invested during such debt issuance suspension period solely by reason of the public debt limit had been invested, and
>
> (ii) redemptions and disinvestments with respect to the Fund which occurred during such debt issuance suspension period solely by reason of the public debt limit had not occurred, over
>
> (B) the net amount of interest actually earned by the Fund during such debt issuance suspension period.

Id. § 8348(j)(4).

United States exceeding the debt limit. *See* 5 U.S.C. §8348(j)(1). In addition, we conclude that the 1986 Amendments authorize the Secretary to redeem Fund investment assets prior to maturity in order to prevent the United States from exceeding the debt limit. *See id.* §8348(k)(1). We also conclude that, pursuant to his statutory redemption powers, the Secretary may, during a debt issuance suspension period, redeem an amount of Fund investment assets not greater than the total amount of civil service retirement and disability benefits authorized to be paid during the period, even if a sufficient amount of cash exists in the Fund to pay those benefits. *See id.* §8348(k)(2). A necessary corollary to this conclusion is that, when sufficient uninvested cash exists in the CSRDF to pay benefits, the Secretary may use the debt issuance capacity freed up by his redemption of Fund investment assets to increase, through the issuance of obligations of the United States, the amount of cash available in Treasury's general cash account.[9]

While the 1986 Amendments define debt issuance suspension period as "any period for which the Secretary . . . determines . . . that the issuance of obligations of the United States may not be made without exceeding the . . . debt limit," they do not compel the Secretary to establish the debt issuance suspension period as a specific period of time. *See* 5 U.S.C. §8348(j)(5)(B). It is only when the Secretary seeks to exercise his redemption powers that the requirement to identify a specific period of time arises, because, as indicated above, the power of redemption is tied to a computation that requires the debt issuance suspension period to be ascertained. Consequently, the permissible length of the debt issuance suspension period becomes critical to any analysis of the Secretary's redemption authority under the Fund statute.

Although the Secretary would have to declare the debt issuance suspension period as a specific period in order to exercise his redemption powers, the 1986 Amendments do not expressly indicate how he would determine that period or the factors he would be required to take into account in establishing it. As stated above, the only guidance the statute provides is that the debt issuance suspension period must be "any period for which the Secretary . . . determines . . . that the issuance of obligations of the United States may not be made without exceeding the . . . debt limit." *Id.* Moreover, we have discovered nothing in the 1986 Amendments' legislative history that elaborates upon the express terms of the statute.[10]

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[9] Because the debt limit applies only to "outstanding" obligations of the United States, our operating assumption has been that the accounting transaction involved in redeeming prior to maturity Fund investment assets would free up borrowing capacity under the debt limit in an amount equal to the amount of the investment assets redeemed. *See* 31 U.S.C. §3101(b).

[10] The version of the 1986 Amendments that was initially passed by the Senate contained a definition of debt issuance suspension period that was slightly different from the definition ultimately enacted into law. The Senate-passed version defined the period as "any period for which the Secretary . . . determines that the issuance of obligations of the United States *sufficient to orderly conduct the financial operations of the United States* may not be made without exceeding the . . . debt limit." 132 Cong. Rec. 24,944 (1986) (emphasis added). The fact that the definitional language was changed in the conference held between the Senate and the House of Representatives

Continued

Because the statute and its legislative history are silent as to how the Secretary is to determine the debt issuance suspension period, we believe the Secretary has discretion to identify the factors he will rely upon in designating the length of the period. As the Supreme Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843–44 (alteration in original).

In view of the statutory definition of debt issuance suspension period, we believe it would be reasonable for the Secretary to take into account his assessment of whether, and if so when, an increase in the debt limit would be enacted in determining, for purposes of redemption, the length of a debt issuance suspension period.[11] In the absence of an extraordinary infusion of extra cash, a statutory increase in the amount of debt which may be issued under the debt limit would be the only practical way Treasury could legally issue obligations of the United States after the debt limit had been reached.[12]

Although no public notice and comment procedures would have to be used, the Secretary would have to make the assessment based on a factual record. Like most agency fact-finding, the findings he would make to support his assessment would be upheld in court as permissible unless they were found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[13]

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does not compel the conclusion that Congress intended by the modification to narrow the Secretary's discretion in designating the period. Accordingly, we do not believe this fact provides any guidance as to how the Secretary should define the period.

[11] We assume for purposes of this memorandum that, during a debt limit crisis, Treasury would continue its normal practice of financing scheduled principal payments of maturing obligations with additional borrowings. Therefore, the fact that Treasury would, during a debt limit crisis, be regularly retiring obligations of the United States would not, by itself, cause a reduction in the overall amount of debt outstanding subject to the debt limit.

[12] It is true that debt issuance capacity could be freed up by means other than an increase in the debt limit. Debt issuance capacity would become available, for example, upon the redemption of a significant amount of debt subject to the debt limit. But when such debt obligations are held by the public, Treasury must have the cash on hand to redeem them. Since Treasury's cash position will likely be low during a debt limit crisis, early redemptions of debt held by the public would likely be of limited use in freeing up debt issuance capacity. Refinancings as described in footnote 11 could, of course, continue during debt limit crises.

[13] Unlike the Secretary, a court evaluating the Secretary's factual findings would probably have the benefit of hindsight. However, the court would certainly have to take into account, according deference to the Secretary, the situation as it existed at the time the Secretary was required to make his decision. As the Comptroller General

In light of the foregoing discussion, we believe a decision by the Secretary establishing a debt issuance suspension period of a number of months will be consistent with his statutory authority over the CSRDF if, based on the information available to him at the time, he is able reasonably to conclude that an increase in the debt limit will not be enacted during the period. Moreover, in assessing the prospects for an increase in the debt limit, we consider it appropriate for the Secretary to take into account public statements made by congressional leaders and the President concerning their willingness to take the steps necessary to cause an increase in the debt limit, and future events that are more or less likely to affect the positions and actions of Congress and the President.

It could be argued that the term "debt issuance suspension period" cannot properly refer to a specific period of time set by the Secretary based on his reasonable assessment of when, after being prevented on account of the debt limit from issuing obligations of the United States, Treasury will be able to issue those obligations, but must, instead, refer to that length of time that follows the Secretary's initial determination of his inability to issue obligations of the United States during which the conditions that gave rise to that determination remained in effect. Under this alternative interpretation of 5 U.S.C. § 8348(j)(5)(B), the Secretary would not have the direct authority to determine a period of time during which obligations of the United States could not be issued without exceeding the debt limit. Instead, he would simply be able to determine the fact that obligations of the United States could not be issued without exceeding the debt limit. Subsequently, the "debt issuance suspension period" would be ascertained simply as that time period during which the Secretary had made such determinations.

Under this alternative interpretation, the Secretary would have no authority to establish in advance the length of a debt issuance suspension period for purposes of redemption. Accordingly, he would not be able to redeem CSRDF investment assets prior to maturity based on the length of such a period. Instead, he would be limited in his redemption authority merely to redeeming on individual monthly benefits payment dates CSRDF investment assets based on the amount of benefits authorized to be paid on those dates, and nothing more.

While the alternative interpretation of the statutory definition of debt issuance suspension period is plausible, we believe the interpretation we have set forth

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remarked in assessing the legality of the Secretary's actions with respect to the Social Security trust funds during a 1985 debt limit crisis:

> In sum, it appears, on the basis of the information now available, that the Secretary redeemed or failed to invest the Trust Funds' assets in amounts and for periods of time greater than absolutely necessary to pay [S]ocial [S]ecurity benefits. However, this is a judgment reached only with the benefit of hindsight. The Secretary was required to act in a complex and fluid situation, without the benefit of all of the information now available. Further, the Secretary had many other duties to carry out, including managing the government's finances and investing assets of and making payments from other government-managed trust funds. Under all the circumstances involved, we conclude that he did not act unreasonably.

Letter for the Honorable James R. Jones, Chairman, Subcommittee on Social Security, from Charles A. Bowsher, Comptroller General of the United States, app. I, *Legality of Secretary of the Treasury's Management of Social Security Trust Funds During the 1985 Debt Ceiling Crisis* at 9–10 (Dec. 5, 1985).

above is more consistent with the statute's text and structure. First, the verb tense and sentence structure used in the statutory provision defining debt issuance suspension period do not militate against our interpretation, whereas they are somewhat at odds with the alternative proposal. If Congress had meant for the term debt issuance suspension period to take on the limited meaning suggested by the alternative interpretation, it could have drafted its statutory definition much more clearly. For example, instead of its current wording, the term could have been defined as "any period for which the Secretary . . . had determined . . . that the issuance of obligations of the United States could not have been made without exceeding the . . . debt limit."

Second, the structure of the provisions added to the Fund statute in 1986 supports our interpretation more than it supports the alternative. In 1986, Congress mandated that the Fund be made whole for the financial losses it incurs as a result of redemptions conducted during debt issuance suspension periods. *See* 5 U.S.C. § 8348(j)(3), (4). Under the alternative interpretation of § 8348(j)(5)(B), which was enacted at the same time, this make whole provision could never have any operative significance, because there would never be such losses. Under the alternative interpretation, the 1986 Amendments would have limited the Secretary to redeeming, on individual monthly benefits payment dates falling within debt issuance suspension periods, only the amount of Fund investment assets that he was already able to redeem in order to pay the month's benefits under normal circumstances, whether or not the debt limit prevented issuance of new obligations of the United States. Redemptions of this kind in connection with the payment of civil service retirement and disability benefits had been contemplated from the inception of the Fund,[14] and are routinely effected on monthly benefits payment dates under normal circumstances.[15] Consequently, the Fund is not, nor should it be, compensated for the investment assets that are depleted and the interest income that is not realized as a result of such routine action, because such redemptions do not create Fund losses.

On the other hand, if instead of merely mandating that the usual Fund management practices continue during debt limit crises, Congress gave the Secretary the authority to effect redemptions that are not contemplated by the Fund statute under normal circumstances and that could result in temporary financial losses, as our

[14] In testimony concerning Treasury's management of the Fund during the 1985 debt limit crisis, Treasury's former Deputy Assistant Secretary for Federal Finance, John Niehenke, stated:

> The investments [of the CSRDF] are to be made in special obligations of the Treasury at an interest rate set monthly on the basis of a statutory formula. Unlike other trust fund statutes, the civil service fund statute does not explicitly provide for redemption of [F]und investments in order to pay benefits.
>
> However, the statute does appropriate moneys in the [F]und for payment of benefits and administrative expenses. Since benefits cannot be paid unless investments either mature or are redeemed, it is obvious that the Secretary's authority to invest also contemplates redemption.

Civil Service Retirement Trust Fund Hearing at 10.

[15] As stated above, *see supra* pp. 286–87, under normal circumstances, Treasury typically reimburses its general cash account for the payment of monthly civil service retirement and disability benefits by redeeming, prior to maturity, Fund investment assets in an amount equal to those benefits.

interpretation admits as a possibility, then the requirements imposed by the 1986 Amendments to make the Fund whole for redemptions effected during debt issuance suspension periods would not be rendered nugatory.[16]

Mindful that statutes should be construed to give effect, if possible, to every provision, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also Moskal v. United States*, 498 U.S. 103, 109–10 (1990), and cognizant of the Supreme Court's recent admonition that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), we conclude that our interpretation of the statutory definition of debt issuance suspension period is the correct one. We also find support for our interpretation in the fact that, in the 1986 Amendments, Congress chose a verb tense and sentence structure for the statutory definition of debt issuance suspension period that render its meaning, at worst, ambiguous. When confronted with an ambiguous statute, an administrative agency is empowered to give that statute a reasonable interpretation, *Chevron*, 467 U.S. at 843,[17] which we believe our interpretation is. Accordingly, we conclude it is a permissible reading, and indeed the correct reading, of the 1986 Amendments.

B. *Legislative History*

The 1986 Amendments' legislative history does not appear to foreclose the Secretary's use of the CSRDF in the manner described above because statutory language included in early versions of the legislation that would have arguably

[16] One could argue that some temporary financial losses could accrue to the Fund, when compared to normal fund management operations, whenever Treasury redeemed Fund investment assets earlier than it normally would, even if the redemptions were early by only a matter of days. In fact, Treasury engaged in some slightly-earlier-than-normal redemptions of the Social Security trust funds in 1985, and its actions were the subject of congressional inquiry and a Comptroller General's report prior to the enactment of the 1986 Amendments.

Perhaps one of Congress's intentions in enacting the 1986 Amendments was to authorize such slightly-earlier-than-normal redemptions in the future, redemptions that were made only slightly before they normally would have been made to pay benefits, while at the same time ensuring that the CSRDF was in effect indemnified for lost interest and that Fund investments were restored as nearly as practicable in such an event. The statute that was enacted, however, contains no language that cabins the Secretary's discretion to determine a debt issuance suspension period prospectively in such a way that he can only look slightly ahead in time. Instead, it simply states that the Secretary has discretion to redeem an amount of Fund investment assets not exceeding the total amount of benefits authorized to be paid during a debt issuance suspension period, and also the discretion to determine that period.

On the other hand, if the statute is interpreted in such a way that the Secretary lacks the discretion to determine a debt issuance suspension period prospectively, as the alternative interpretation would have it, then even slightly-earlier-than-normal redemptions would be barred, and the make whole provisions of the statute with respect to redemptions would be superfluous, as we have argued in the text.

[17] The Supreme Court stated in *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation Rather, if 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 842–43 (footnotes omitted).

prohibited such activity was significantly changed prior to enactment. Congress enacted the 1986 Amendments as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99–509, 100 Stat. 1874 ("OBRA 1986"), nearly one year after a former Secretary, in response to a prior debt limit crisis, suspended the investment of approximately $17 billion in Fund monies, *see* Civil Service Retirement Trust Fund Hearing at 10, and accelerated the redemption of Fund investment assets, resulting in financial losses. *See id.* at 1, 11.

Legislation allowing the Secretary to suspend the investment of Fund contributions and redeem Fund investment assets during a debt limit crisis was initially introduced in the Senate by Senator Eagleton and others as an amendment to a House-Senate joint resolution increasing the debt limit. *See* 132 Cong. Rec. 18,732 (1986). The Senate passed the amendment by unanimous consent on August 1, 1986. *See id.* at 18,733. As passed by the Senate on August 9, 1986, the joint resolution contained the amendment. *See id.* at 20,377.

According to Senator Eagleton, the purpose of the amendment was "to both modify and clarify the authority of the Secretary . . . in connection with his responsibilities for investing the assets of the [Fund]." *Id.* at 18,732 (statement of Sen. Eagleton). "Specifically," he provided:

> the amendment would allow the Secretary to temporarily suspend additional investment of the [F]und's assets when such investments would otherwise result in the public debt limit being exceeded.
>
> Furthermore, after such a suspension, the Secretary would be required: First, to reimburse the [F]und for any investment lost as a result of the suspension and, second, to invest uninvested assets of the [F]und in a manner which, to the extent practicable, would make the [F]und whole, as though such suspension never occurred.
>
> Moreover, the amendment would allow the Secretary to disinvest assets of the [F]und when the [F]und is holding uninvested assets due to the public debt limit, but only when necessary to ensure timely payment of amounts authorized to be made from the [F]und.

Id.

The provision of the Eagleton amendment clarifying the Secretary's redemption authority during a debt limit crisis provided as follows:

> The Secretary of the Treasury may sell or redeem securities, obligations, or other invested assets of the Fund only for the purpose of enabling the Fund to make payments authorized by the provisions of this subchapter or [provisions concerning benefits payments] or related provisions of law. If the Fund holds any amounts

> which, by reason of the public debt limit, are not invested, the Secretary may nevertheless make such sales and redemptions if, and only to the extent, necessary to ensure that such payments are made in a timely manner.

Id. The sponsors of the Eagleton amendment apparently intended to permit the redemption of Fund investment assets during debt limit crises only for the purpose of ensuring the timely payment of civil service retirement and disability benefits. Noting disapprovingly that the CSRDF had been tapped in the past to ensure that the United States remained solvent during debt limit crises, Senator Gore, a sponsor of the Eagleton amendment, declared that "[b]y treating [contributions to the CSRDF] and the [g]overnment's share of retirement pension costs as usable only for the payment of civil service retirement and disability benefits, the Congress will be restoring the confidence that has undergone severe strain over the past few years." *Id.* at 18,733 (statement of Sen. Gore).

When Senator Gorton included the language of the Eagleton amendment in an amendment to the Senate's version of OBRA 1986, S. 2706, 99th Cong. (1986), no change was made to the text of the redemption provision. *See* 132 Cong. Rec. at 24,900. Speaking in support of the Gorton amendment and describing provisions in it delineating the Secretary's authority to manage CSRDF and Social Security trust funds investments, Senator Heinz said:

> The second provision in the [amendment] protects the Social Security and civil service trust funds from uncontrolled disinvestment in the face of a debt ceiling crisis. As most of us remember, last year's disinvestment, even though it was fully repaid with interest, greatly damaged public confidence in the stability of the trust funds. . . . Under [this amendment], the Treasury can disinvest the trust funds only for the purpose of paying benefits; the borrowed money must be repaid with interest as soon as borrowing authority becomes available; and the Secretary . . . must provide advance notice of any disinvestment decisions. Enactment of this plan will send a message to retirees that the trust funds are not subject to the uncontrolled manipulation that occurred in the past.

Id. at 24,905 (statement of Sen. Heinz).

The Senate passed the Gorton amendment by unanimous consent on September 19, 1986. *See id.* Later that day, the Senate passed S. 2706, as amended. *See id.* at 24,918, 24,944–45. On September 25, 1986, the Senate amended H.R. 5300, 99th Cong. (1986), the version of OBRA 1986 passed by the House of Representatives, by striking the language following the bill's enacting clause and substituting the text of S. 2706, as amended. It then appointed conferees to resolve the dif-

ferences between the House and Senate-passed versions of the bill. *See* 132 Cong. Rec. at 26,151.

The legislative history preceding the conference committee on OBRA 1986 suggests a legislative intention on the part of the Senate to allow the Secretary to redeem Fund investment assets during debt limit crises only to the extent necessary to ensure the timely payment of civil service retirement and disability benefits. We know, however, that the legislative language delineating the Secretary's redemption powers changed significantly during conference with the House of Representatives. *See* H.R. Conf. Rep. No. 99–1012, at 61–62 (1986); 5 U.S.C. § 8348(k).[18] Although the conference report inexplicably failed to acknowledge the language change,[19] a comparison of the respective redemption provisions reveals significant differences in the flexibility they afforded the Secretary. While the Senate provision authorized redemption only as a means to ensure the timely payment of benefits during debt limit crises, the redemption provision drafted by the conference committee and ultimately enacted by Congress contained no such limitation,[20] expressly allowed the Secretary to redeem Fund investment assets prior to maturity in order to avoid exceeding the debt limit, and expressly empowered the Secretary to exercise his redemption powers even where a sufficient amount of money exists in the Fund to ensure that benefits are paid in a timely manner.[21] Although the Senate-passed redemption language prohibited the use of

[18] In addition to effecting a major change in the language of the redemption provision, the conference committee made a minor change in the legislative language setting forth the Secretary's authority to suspend investment of Fund contributions during a debt limit crisis. In place of Senate bill language allowing the Secretary to "suspend additional investment of amounts in the Fund *if necessary to ensure that the public debt of the United States does not exceed the public debt limit,*" 132 Cong. Rec. 24,944 (1986) (emphasis added), the conference report allowed the Secretary to suspend investment of the contributions only "if such additional investment could not be made *without causing the public debt of the United States to exceed the public debt limit.*" H.R. Conf. Rep. No. 99–1012 at 61 (emphasis added). This language change arguably narrowed the Secretary's ability to use his suspension powers as a debt management device.

[19] The conference report on OBRA 1986 merely provided as follows:

> *Senate provision*
>
> Section 1202 of the Senate amendment modifies and clarifies the authority of the Secretary . . . to suspend investment or to disinvest assets of the Civil Service Retirement and Disability Fund. The provision permits the Secretary temporarily to suspend investment of the Fund's assets when such investment would otherwise result in the public debt limit being exceeded. If the Secretary should suspend investment under these conditions, at the end of the suspension period the Secretary is required to make the Fund whole for any earnings lost as a result of the suspension or disinvestment by a combination of special investment and cash payment actions.
>
> *House provision*
>
> The House has no comparable provision.
>
> *Conference agreement*
>
> The Conference agreement contains the Senate language.

H.R. Conf. Rep. No. 99–1012, at 256, *reprinted in* 1986 U.S.C.C.A.N. 3868, 3901.

[20] In fact, as stated above, the redemption provision ultimately enacted allows the Secretary, in effecting redemption, to "obtain any amount of funds not exceeding the amount equal to the total amount of [authorized civil service retirement and disability benefits payments]." 5 U.S.C. § 8348(k)(2). Notably, no limitation is placed on the use of the proceeds from the redemption.

[21] We note that a summary of the conference agreement printed in the Congressional Record did describe the 1986 amendments as follows:

> Allows disinvestment of civil service retirement and disability trust funds to pay benefits when the debt ceiling is approached. Restores the portfolio and repays interest if disinvestment occurs.

redemption for purposes other than ensuring the timely payment of retirement and disability benefits, the redemption provision ultimately enacted by Congress necessarily allows the use of redemption for the additional purpose of freeing up debt issuance capacity under the debt limit.

C. *Debt Limit*

An issue that must be resolved in our analysis is whether the investment suspension and redemption activities contemplated by Treasury would violate the debt limit. An argument could be made that the failure to invest additional Fund contributions and the early redemption of Fund investment assets would create an unauthorized liability from Treasury to the Fund equal to the amount of money and/or investment assets needed to make the Fund whole after such actions. Our operating assumption has been that the Secretary would suspend the investment of Fund contributions only when, on account of the debt limit, obligations of the United States could not be legally issued. Moreover, as stated above, *see supra* note 9, we have also assumed that the accounting transaction involved in redeeming Fund investment assets prior to maturity would free up borrowing capacity under the debt limit in an amount equal to the amount of the investment assets redeemed.

The debt limit, 31 U.S.C. §3101(b), provides:

> The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $4,900,000,000,000, outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

This limit applies to all United States debt obligations issued by Treasury, *see* 31 U.S.C. §§3102–3113, except obligations of the Federal Financing Bank issued to the public with the approval of the Secretary, pursuant to 12 U.S.C. §2288(a). It also includes debt issued by certain other federal agencies and corporations which is guaranteed as to principal and interest by the United States. *See* H.R. Rep. No. 79–246, at 2–3 (1945); S. Rep. No. 79–106, at 2 (1945).

Although Treasury would, more than likely, not be able to make the Fund whole for the Secretary's actions taken during a debt limit crisis until after an increase

132 Cong. Rec. 33,254 (1986). We believe, however, that this description is inconsistent with the express terms of the statute.

in the debt limit, we believe any liability to the Fund created by the Secretary's actions would not constitute an obligation within the terms of § 3101(b). Such a liability would not resemble any of the obligations referred to in § 3101(b) as being subject to the debt limit. Moreover, subsections (j) and (k) of § 8348, the 1986 amendments' investment suspension and redemption provisions, necessarily contemplate these actions and Fund reimbursements following them, even though the CSRDF statute also provides that Fund investments are subject to the debt limit. *See* 5 U.S.C. § 8348(d).

III. *Conclusion*

Based on the foregoing, we conclude that the Secretary has the authority under 5 U.S.C. § 8348 to suspend the investment of Fund contributions and redeem Fund investment assets in order to prevent the public debt of the United States from exceeding the debt limit. We conclude further that, during a debt issuance suspension period, the Secretary may redeem Fund investment assets based on the amount of civil service retirement and disability benefits authorized to be paid during such period, and that redemptions so executed would create room for additional borrowing by Treasury under the debt limit. In addition, we conclude that any decision designating the length of a debt issuance suspension period must be reasonable, taking into account the Secretary's assessment of the period of time it would take for an increase in the debt limit to be enacted. Finally, we believe the investment suspension and redemption activities contemplated by Treasury would not contravene the statutorily prescribed debt limit.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Participation in Congressional Hearings During an Appropriations Lapse

Under the Antideficiency Act, an officer or employee of the Department of Justice may participate in a congressional hearing during a lapse in appropriations for the Department if he or she is a Senate-confirmed officer, if appropriated funds are available for his or her participation, if he or she is subpoenaed, or if there exists other express or necessarily implied authorization to participate in the hearing.

November 16, 1995

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The Department of Justice has been informed that various congressional committees intend to hold hearings at which Department of Justice officials have been requested to testify, during the period in which the Department lacks appropriations to pay for the services of those officials. You have asked under what circumstances Department officials may participate in these hearings.

The Antideficiency Act ("Act") provides that "[a]n officer or employee of the United States Government or of the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). In addition, the Act establishes that "[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. These provisions are enforceable by criminal sanctions and their requirements must be observed. All federal officers and employees must comply with the law, whether they serve in the executive, legislative, or judicial branch. Where the Act applies, it restricts the functions that federal officers and employees may perform during an appropriations lapse to only those functions that are encompassed by one of the exceptions to the Act's general prohibitions. The question thus becomes under what conditions, if any, does participation in congressional hearings constitute an excepted function for employees subject to the Act's restrictions.

Before addressing those exceptions, we note that the Act is not implicated at all by the activities of federal employees for whom no obligation in advance of an appropriation is incurred by employing a particular individual, even when appropriations are currently lacking for that individual. A prominent example is provided by those officers who are appointed by the President with the advice and consent of the Senate. These officers are entitled to their salaries by virtue of the office that they hold and without regard to whether they perform any services during the period of appropriations lapse. *See United States v. Grant*, 237

F.2d 511 (7th Cir. 1956). Therefore, no federal officer or employee incurs an obligation in advance of appropriations when these officers perform services; instead, this obligation arises by virtue of their status and cannot be obviated by placing them on furlough status.[1]

Where the Act does not apply, as in cases like these, officers and employees may participate in congressional hearings, although the participation of Senate-confirmed officers is subject to the significant limitation that support persons to whom the Act does apply may not assist those officers unless these activities are independently justified under the Act's exceptions. You have indicated that you do not intend to make available Senate-confirmed officials of the Department to participate in congressional hearings unless they have adequate and thorough support to ensure full preparation. This effectively means that the exceptions of the Act define the limits of the Department's ability to comply with requests for testimony. We turn, therefore, to address the scope of those exceptions.

There are two major exceptions to the Act. First, there is an exception for functions that relate to " 'emergencies involving the safety of human life or the protection of property.' " 31 U.S.C. § 1342. The Act states that this phrase "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." *Id.* In the highly unusual event that suspension of the Department's participation in a congressional hearing would imminently threaten the safety of human life or the protection of property, the Department may legally participate in the hearing.

The Act also states that governmental functions that are otherwise authorized to be undertaken despite a lack of appropriations may continue during an appropriations lapse. *See* 31 U.S.C. § 1341(a)(1)(B); *id.* § 1342. In the context of the Department's participation in congressional hearings, there are two types of authority that satisfy this "otherwise authorized" exception: express authorization and necessarily implied authorization. *See Authority for the Continuance of*

[1] Similarly, the Act would not forbid a furloughed officer or employee from participating in a congressional hearing if that officer or employee participated in his or her individual capacity. So, for instance, an officer or employee who is nominated for a position that is subject to Senate confirmation may, while on furlough status, participate in his or her own confirmation hearing.

Another analogous situation may arise when a non-Senate confirmed officer or employee reports for work because his or her duties fall within an exception to the Act, but there are intervals during the day when the officer or employee is not engaged in an excepted function. If these intervals are anticipated to be brief, such that the officer or employee could not be dismissed from work and then recalled in time to perform the next excepted function activity, then the employee may remain at work throughout the intervals. During these intervals, officers and employees may perform non-excepted functions, because the need for the officer or employee's availability would justify the Department in keeping the officer or employee in the close vicinity of his or her duty station to await the onset of the excepted function. Consequently, the Department would be obligated to compensate such employees while they are awaiting the excepted function work whether they spend this interval performing the non-excepted function or simply sit idle. During these intervals, then, such officers and employees are akin to Senate-confirmed presidential appointees in that they must be paid for these intervals regardless of whether they perform a non-excepted function, and thus the government incurs no additional obligation by virtue of that work being performed. The non-excepted functions that such officers or employees may perform during these brief intervals between excepted functions include services relating to participation in congressional hearings where participation is not otherwise authorized.

Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 3–5 (1981).

Officers and employees of the Justice Department may participate in congressional hearings that take place during a lapse in appropriations if there is express legal authority to participate despite a lack of appropriations, or an express requirement to do so. We are not aware of any statute that grants the officers and employees of this Department such authority in the case of general requests for congressional testimony. Express authority would exist, however, if Congress or a committee were to issue a subpoena requiring the Department or specific officials to participate in a hearing during an appropriations lapse. Departmental policies with respect to responsibilities to the judicial system provide a precedent: it has long been the Department's position that, during an appropriations lapse, attorneys representing the government are to comply with a court order that they continue with litigation even though the litigation does not fall within an exception to the Act. *See* Memorandum for William P. Tyson, Director, Executive Office for United States Attorneys, from Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, att. at 2 (Mar. 24, 1982) ("Tyson Memorandum"); *see also Rojas v. United States*, 55 F.3d 61 (2d Cir. 1995) (scheduling order imposes a duty on attorney, nonperformance of which can subject attorney to contempt sanctions under 18 U.S.C. § 401(3)). We would follow the same principles with respect to a congressional order that imposes a legal duty. *See* 2 U.S.C. §§ 192, 194 (imposing legal duty to comply with a duly issued legislative summons or subpoena).

The Department's officers and employees may also participate in a hearing despite an appropriations lapse if authority for such participation arises by necessary implication from another specific statutory duty or duties. *See* 5 Op. O.L.C. at 3–5. In the context of congressional hearings, this exception permits the Department to participate where there is express authority or an express and specific appropriation for the hearing itself, and the Department's participation is necessary for the hearing to be effective, even though there is no specific authority or appropriation available for the Department to participate. This exception also operates where there is express authority for a specific Department official to participate — such as might arise from a subpoena — but no express authority for support or assistance of the witness. The Department would regard support and assistance to the otherwise authorized participation as being justified by necessary implication. This approach follows from the well-settled practice with respect to Social Security. *See* 5 Op. O.L.C. at 5 n.7.

We are not aware of any other exceptions to the Act that would permit the Department to participate in congressional hearings during an appropriations lapse. It has from time to time been suggested that the "authorized by law" exception to the Act includes all activities that derive from or relate to a constitutional power, such as the "legislative power." Such a construction would authorize Con-

gress to continue holding hearings during an appropriations lapse and would allow the Department to participate. Such a construction, however, is impermissible because it would necessarily nullify the Antideficiency Act. The Federal Government is a government of limited and expressly enumerated powers. Those powers are denominated in the Constitution, and the Federal Government may only undertake those activities that are constitutionally authorized. *See United States v. Lopez*, 514 U.S. 549 (1995). Consequently, if all constitutionally authorized functions — legislative, executive, and judicial — were excepted, the Act would not apply to any activity of the Federal Government.

We have also considered whether a decision by Congress to go forward with hearings in which Department officers cannot participate would result in a congressional encroachment upon the President's constitutional authority.[2] We conclude that no encroachment would occur. The Supreme Court has repeatedly pronounced that statutes are to be construed to avoid serious constitutional questions, where such a construction is permissible. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932). Attorney General Civiletti recognized in his 1981 opinion that it would "raise grave constitutional questions" if the Act were to be read to prohibit the President from exercising his constitutional powers. 5 Op. O.L.C. at 6. Construing the Act as covering executive branch participation in congressional hearings generally, however, does not raise grave concerns over impermissible congressional encroachment on the Executive's constitutional role.[3] The Constitution grants the President authority to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, §3. Congress does not encroach upon this power by refusing to include the participation of the President or his subordinates in a regular congressional hearing, however unwise and counterproductive such a decision might be. So long as the President retains a means of making legislative recommendations, Congress generally is not obligated to grant the executive a platform at its hearings.[4]

The Antideficiency Act places a substantial limit on the functioning of federal officers and employees generally, including officers and employees of the Department of Justice. These limits extend to participation in congressional hearings con-

[2] We have applied this same analysis in examining the application of the Act to the judicial branch. *See* Tyson Memorandum at 2; *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (striking down congressional encroachment on the judicial branch).

[3] This assertion is made with the exceptions to the Act in mind. We believe that any instances where grave concerns might otherwise be raised would fall within the emergency exception or one of the other exceptions to the Act. We also note that the Act does not raise corresponding encroachment concerns when applied to Congress. Whereas the Attorneys General and the courts appropriately remain vigilant against congressional encroachment, there is no "grave constitutional" obstacle that prevents Congress, through the Act, from deciding to curtail — or to postpone *until appropriations are available — regular legislative, investigative, or oversight hearings*. Moreover, the Act does not prohibit members of Congress by themselves from conducting hearings, because their salaries are paid from permanent appropriations. It is extremely difficult to see how interpreting the Act to preclude Department of Justice officers or employees from participating in those hearings would raise a grave question as to whether Congress has encroached on its own constitutionally-based authority to conduct hearings.

[4] That said, the decision to exclude the President from the deliberations at crucial moments in the legislative process would be relevant in a presidential decision to veto such a bill.

ducted during a period of lapsed appropriations. During such a period, an officer or employee of the Department of Justice may participate in congressional hearings if he or she is a Senate-confirmed officer, if appropriated funds are available for his or her participation, if he or she is subpoenaed, or if the hearing falls within one of the categories set forth above.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Presidential Discretion to Delay Making Determinations Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991

The President is required to make a determination that would trigger sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 if he is presented with sufficient evidence to compel the determination.

The President may delay making a determination that would trigger sanctions under the Act when the delay is necessary to protect intelligence sources or methods used in counter-proliferation activities.

The President may delay making a determination that would trigger sanctions under the Act when no reasonable alternative means exist to protect the life of an intelligence source.

November 16, 1995

MEMORANDUM OPINION FOR THE
SPECIAL ASSISTANT TO THE PRESIDENT AND
LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL

You have asked for our opinion concerning the scope, if any, of the President's discretion to delay making the determinations that are prerequisite to imposing mandatory sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102–182, § 305(b), 105 Stat. 1245, 1250 (the "CBW Act"), codified in part as an amendment to the Export Administration Act. *See* 50 U.S.C. app. § 2410c.[1] We conclude that the CBW Act permits the President to delay making determinations that would trigger sanctions under this section, when the delay is necessary to protect intelligence sources or methods used for acquiring intelligence relating to CBW proliferation.

You have also asked whether the President has any greater ability to delay a determination when the life of an intelligence source would be placed at substantial risk by the imposition of sanctions and no alternative reasonable means exists to exfiltrate or otherwise protect the source. This extreme case creates a conflict with the President's constitutional obligations and various of his statutory duties. In such circumstances, we conclude that the President can delay making a determination to protect the life of the source.

I.

Section 2410c of title 50 appendix reads in part as follows:

[1] Virtually identical provisions were also codified as amendments to the Arms Export Control Act ("AECA"). *See* 22 U.S.C. § 2798. For convenience, the citations herein are only to the Export Administration Act provisions. Our opinion, however, applies equally to both sets of provisions.

> Except as provided in subsection (b)(2), the President shall impose both of the sanctions described in subsection (c) if the President determines that a foreign person, on or after the date of enactment of this section,[2] has knowingly and materially contributed—
>
> > (A) through the export from the United States of any goods or technology that are subject to the jurisdiction of the United States under this Act, . . . or
> >
> > (B) through the export from any other country of any goods or technology that would be, if they were United States goods or technology, subject to the jurisdiction of the United States under this Act . . .
>
> to the efforts by any foreign country, project, or entity described in paragraph (2) to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

50 U.S.C. app. § 2410c(a)(1).[3]

The "foreign countr[ies]" to which subsection (a)(1) refers include any foreign country that the President determines to have used chemical or biological weapons in violation of international law, used lethal chemical or biological weapons against its own nationals, or made substantial preparations to engage in either of those two activities; any foreign country whose government is determined to have repeatedly supported acts of international terrorism; or any other foreign country, project, or entity designated by the President. *Id.* § 2410c(a)(2).

Once a determination has been made, both procurement and import sanctions are liable to be imposed. *Id.* § 2410c(c)(2). Congress "urges" the President, before imposing sanctions, to engage in consultations "immediately" with the foreign government with primary jurisdiction over the person subject to the sanctions. *Id.* § 2410c(b)(1). In order to pursue such consultations, the President may delay imposing sanctions for up to 90 days. *Id.* § 2410c(b)(2). Following these consultations, the President "shall" impose sanctions unless he determines and certifies to Congress that the government has taken "specific and effective actions" to end the involvement of the subject person in the sanctionable activities. *Id.* A further delay of up to 90 days is authorized if the President determines and cer-

[2] The effective date of the statute was October 28, 1991.

[3] The comparable provision of the AECA is virtually identical, except for the addition of a third basis for the President's determination. Under AECA, the imposition of sanctions can also be based on a determination that a foreign person contributed to a foreign country's use or acquisition of chemical or biological weapons "through any other transaction not subject to sanctions pursuant to the Export Administration Act of 1979." 22 U.S.C. § 2798(a)(1)(C).

tifies to Congress that the foreign government is "in the process" of taking the appropriate actions. *Id.*

The President is authorized not to apply or maintain sanctions in certain specified circumstances. *Id.* § 2410c(c)(2). Thus, the President is not required to impose sanctions in certain cases of procurement of defense articles or defense services (e.g., those articles or services that the President determines are "essential to the national security under defense coproduction agreements"). *Id.* Any sanction that is imposed shall apply for at least 12 months, and shall cease only upon a determination by the President, and certification to Congress, that reliable information indicates that the foreign person under sanction has ceased to aid and abet the activities described in subsection (a)(1). *Id.* § 2410c(d). Twelve months after imposing sanctions, the President may also waive further application of the sanctions, if he determines and certifies to Congress that such a waiver is "important to the national security interests of the United States." *Id.* § 2410c(e)(1).

We believe that § 2410c permits the President to delay making a determination that would trigger sanctions. The statute permits a delay, however, only when a delay is necessary to advance the policy of the statute by protecting intelligence sources or methods used in counterproliferation activities.

We begin by considering whether § 2410c *requires* the President to make a determination leading to the imposition of sanctions when presented with appropriate facts, or merely grants him the *discretion* to make or to decline to make such a determination in those circumstances. We conclude that § 2410 does impose a mandate that requires the President to make a determination when presented with the appropriate facts. We then consider whether § 2410c permits the President to delay making a determination required by the statute. We first review the text and structure of § 2410c and related statutes. Finding that evidence inconclusive, we turn to the legislative history and administrative construction of the statute. Our review of that history establishes that the President has some discretion to delay making the statutory determinations, if such a delay is necessary to protect intelligence sources or methods used in detecting or preventing CBW proliferation.

II.

Our first question is whether § 2410c *requires* the President to make a determination that a foreign person has "knowingly and materially contributed" to prohibited CBW efforts if his subordinates present him with evidence that establishes that such a state of affairs exists, or whether the President has the discretion to make or decline to make that determination in those circumstances. We believe that the statute requires the President to make the determination.

It is often the case that "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of

such time to the decision of an Executive." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928). When it delegates the power, and prescribes the duty, to make such determinations, the President may be considered "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 411. We believe that § 2410c casts the President in such a role, and requires him to make a determination if the facts available to him establish that the conditions described in the statute exist.[4]

The language and purpose of the CBW Act demonstrate that the President has a *duty* to make determinations, not merely the *discretion* to do so. Section 2410c(a)(1) states that the President "*shall* impose" the specified sanctions "if [he] determines" that the predicate facts exist (emphasis added). As discussed at length in Part IV below, the legislative history confirms that this language mandates that sanctions be imposed (once the appropriate determinations are made).[5] We have advised the National Security Council ("NSC") that similar language in a closely related export control statute gave the President very limited, if any, discretion to delay or withhold making the predicate determination. *See* Memorandum to Files from Paul P. Colborn, Acting Deputy Assistant Attorney General and Jacques deLisle, Attorney-Adviser, Office of Legal Counsel, *Re: Presidential Discretion to Make "Determinations" Concerning Foreign Countries* (July 22, 1993) (the "July 1993 Memo").

In the July 1993 Memo, we construed the missile technology control provisions of the Export Administration Act ("EAA"), 50 U.S.C. app. § 2410b(b), which state that the President "shall impose" sanctions "if the President determines" that a foreign person is engaged in the activities covered by the statute. We advised that "[r]eading the arguably indeterminate phrases 'if the President determines' and 'if the President has made a determination' as doing no more than authorizing a discretionary determination would nearly make a nullity of Congress's apparently mandatory 'shall impose' language later in the section." July 1993 Memo at 3–4. Similarly here, it would defeat Congress's fundamental intent of ensuring that sanctions are imposed on foreign persons who are determined to be CBW Act proliferators,[6] if the President could simply refuse to make

[4] *Cf. Field v. Clark*, 143 U.S. 649, 692–93 (1892); *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 793–94 (Fed. Cir. 1984) (construing statutes to mandate, not merely to authorize, presidential determinations of fact).

[5] In brief, the legislative record shows that, in 1990, President Bush pocket-vetoed a precursor of the present CBW Act, H.R. 4653, 101st Cong. (1990), on the ground that it left him with insufficient discretion to delay or withhold sanctions. State Department officials in testimony before Congress emphasized the President's concerns with a regime of mandatory sanctions. Congress, however, was plainly unpersuaded that the President should have discretion to withhold sanctions on foreign persons (i.e., companies) found to be CBW proliferators. At least three Senators responded to President Bush's pocket veto of H.R. 4653 by firmly rejecting the notion that "automatic" sanctions were potentially harmful. The final bill that passed Congress, H.R. 1415, 102d Cong. (1991), embodied the Senators', rather than the President's, policy preferences: it included provisions for mandatory sanctions. A successor bill enacted soon thereafter, H.R. 1724, 102d Cong. (1991), which is now codified in relevant part as the CBW Act, also mandated sanctions if the appropriate determinations were made.

[6] As further discussed below, § 2410c permits the President to engage in consultations with the foreign country having jurisdiction over the proliferator, before the sanctions must come into effect. This provision qualifies, but does not negate, the mandatory nature of the sanctions.

sanction-triggering determinations at all. Accordingly, we believe that the President has a duty to make the determinations specified in the statute if he is presented with sufficient evidence to compel that conclusion.[7]

III.

We next consider whether, notwithstanding that it imposes a mandatory duty on the President to make the determination described in that section when presented with appropriate facts, §2410c nonetheless affords the President with discretion to *delay* making the determination when the delay is necessary to protect intelligence sources or methods used in counterproliferation. In this Part, we analyze the text and structure of the statute and related provisions, and find that, without more, such analysis cannot decide the issue. In Parts IV and V, we review the legislative and administrative history. We conclude that §2410c does provide such discretion, subject to the constraints explicated in Part VI.

A.

Section 2410c delegates to the President the power (and imposes the duty) to make the determination that a foreign person has "knowingly and materially" contributed through exports to a proscribed country's CBW efforts and to sanction the foreign person for that conduct. Because the President possesses varied and substantial constitutional powers in his own right in the field of foreign affairs,[8] congressional delegations of power to the President to act in that area are understood to give him unusually wide-ranging powers.[9] Moreover, the special institutional capabilities of the executive branch — including its ability to respond

[7] In construing the missile technology control statute at issue in the July 1993 Memo, we noted that the presence of a broad waiver provision in that statute confirmed our view that the statute contained a mandate rather than a grant of discretion. The CBW Act we construe here lacks a correspondingly broad waiver provision. While such a provision would certainly support our analysis, we find that in light of the text of the CBW Act and the persuasive evidence of congressional intent, the lack of a waiver provision does not affect our conclusion that the President, with limited exceptions, is required to make the determination prescribed under the CBW Act when presented with appropriate facts.

[8] *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (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 n.18 (1976) ("[T]he 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."); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). Relatedly, the President possesses significant constitutional powers to safeguard sensitive national security information. *See, e.g., Webster v. Doe*, 486 U.S. 592, 605–06 (1988) (O'Connor, J., concurring in part and dissenting in part); *Department of the Navy v. Egan*, 484 U.S. at 527; *Haig v. Agee*, 453 U.S. at 307–08; *New York Times Co. v. United States*, 403 U.S. 713, 728–29 (1971) (Stewart, J., joined by White, J., concurring); *Hill v. Department of Air Force*, 844 F.2d 1407, 1411 (10th Cir.), *cert. denied*, 488 U.S. 825 (1988). He also possesses some measure of inherent power with respect to foreign commerce, *see Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994); *see also Diversion of Water From Niagara River*, 30 Op. Att'y Gen. 217, 221–22 (1913) (opining that in absence of legislation, the President may determine the conditions of the importation of electrical power from Canada).

[9] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 & n.2 (1952) (Jackson, J., concurring).

flexibly to unforeseen contingencies and its access to sensitive information[10]—have provided practical reasons for Congress to confer broad delegations of power over the conduct of foreign affairs to the President. "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).[11] Thus, "[b]oth Congress and the courts have traditionally sought to avoid restricting the Executive unduly in matters affecting foreign relations because of the need for flexibility in this area and the fact that the Constitution entrusts the external affairs of the Nation primarily to the Executive." *Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries*, 42 Op. Att'y Gen. 229, 237–38 (1963). In light of these considerations, we would not presume that, in delegating power under §2410c, Congress has sought to limit the President's otherwise broad discretion, absent clear evidence of such a congressional intent.[12]

The reasoning that supports the inference that Congress typically accords the President broad discretion when it authorizes him to act in the field of foreign affairs is equally applicable to the issue of timing. The "changeable and explosive nature of contemporary international relations," *Zemel v. Rusk*, 381 U.S. at 17, renders it difficult and sometimes impossible for Congress to gauge in advance the immediate consequences of actions that it permits or requires the President to take. In general, moreover, the authority "to consider the foreign affairs rami-

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[10] *See Chicago & Southern Air Lines, Inc.*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *see also* Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1292 (1988).

[11] *Accord Haig v. Agee*, 453 U.S. at 292, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (Mikva, J.), *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 110 (2d Cir.) (Friendly, J.), *cert. denied*, 385 U.S. 898 (1966).

Relying on such reasons, the Ninth Circuit has upheld, against a nondelegation challenge, the authority of the executive branch to punish the unlicensed export of goods under the EAA, despite the preclusion of judicial review of administrative action.

> The fact that the EAA involves matters of foreign policy and national security also counsels in favor of upholding the Act's preclusion of judicial review. . . . Permitting Congress broadly to delegate decisions about controlled exports to an agency makes sense; it would be impossible for Congress to revise the [Commodity Control List] quickly enough to respond to the fast-paced developments in the foreign policy arena. . . . [T]he Supreme Court has consistently emphasized that broad delegations are appropriate in the foreign policy arena. . . .

United States v. Bozarov, 974 F.2d 1037, 1044 (9th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *see also Duracell, Inc. v. U.S. Int'l Trade Comm'n*, 778 F.2d 1578, 1582 & n.13 (Fed. Cir. 1985).

[12] *See Presidential Authority to Adjust Ferroalloy Imports Under §232(b) of the Trade Expansion Act of 1962*, 6 Op. O.L.C. 557, 562 (1982) (A statutory requirement that the President, after receiving a Report from the Secretary of Commerce that imports of materials into United States threatened national security, either adjust imports or reject the Secretary's findings, allowed the President to defer decision by "retain[ing] the Report for further consideration," because "[n]o time frame constrains the President.").

fications of a particular mode of [statutory] enforcement and to suspend implementation [of the statute] to avoid a confrontation," is, "[i]n the absence of a statutory mandate or express prohibition," to "be found in the inherent and well recognized powers of the executive branch." *Olegario v. United States*, 629 F.2d 204, 226 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). A rule of construction that accords the President reasonable discretion over timing, in the absence of evidence of contrary legislative intent, is thus most consistent with the ordinary relationship between the President and Congress in foreign affairs.

Furthermore, as a general rule of administrative law, an agency may be under a statutory mandate to perform a certain act, and yet retain some discretion over the timing of the performance of that act: the rule is that it must proceed in a reasonably timely manner. Furthermore, an agency may be operating under a statutory provision that regulates the timing of its performance, and yet not be wholly devoid of statutory discretion to delay the performance beyond the statutory deadline.[13] A nondiscretionary duty of timeliness ordinarily exists only when the statute "'categorically mandat[es]' that all specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (quoting *NRDC v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974)). "[I]t is highly improbable that a deadline will ever be nondiscretionary, i.e. clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework." *Id.* at 791.

To be sure, if "the statutory language itself contain[ed] [a] direction to the [President] automatically and regardless of the circumstances" to make the determination upon a certain event, *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986), then the President might well be unable to delay making the determination.[14] Assuming, however, that Congress chose not to dictate the timing of the determinations that trigger sanctions, then § 2410c could be construed to permit the President some discretion in the timing of a determination, at least in certain cases.

In light of these general considerations—that delegations of foreign policy powers to the President must be construed broadly, and that in the absence of a specific duty to make determinations within a fixed time-frame, the President has discretion to delay a determination for a reasonable period—we would not, absent countervailing reasons, read § 2410c to impose a duty on the President

[13] *See, e.g., Cutler v. Hayes*, 818 F.2d 879, 896–98 (D.C. Cir. 1987); *Presidential Authority to Extend Deadline for Submission of an Emergency Board Report Under the Railway Labor Act*, 14 Op. O.L.C. 57, 59–60 (1990) (discussing interpretation of current statutory timeliness requirements).

[14] The statute at issue in *Japan Whaling Association* required the Secretary of Commerce to "periodically monitor the activities of foreign nationals that may affect [international fishery conservation programs]," *id.* at 226 (alteration in original) (quoting 22 U.S.C. § 1978(a)(3)(A)), "promptly investigate any activity by foreign nationals that . . . may be cause for certification [that a foreign country's actions had diminished the effectiveness of an international whaling convention]," *id.* (quoting 22 U.S.C. § 1978(a)(3)(B)), and "promptly conclude; and reach a decision with respect to; [that] investigation." *Id.* (alteration in original) (quoting 22 U.S.C. § 1978(a)(3)(C)). The Court had no difficulty in concluding that this language required the Secretary to make a certification decision promptly. *Id.* at 232.

to act other than in a reasonably timely manner. But the analysis cannot end there. The text of § 2410c and related statutes, coupled with the legislative history, clearly imply that there are some constraints on the President's discretion to delay making a determination. We begin by reviewing the textual and structural arguments for the view that § 2410c in fact gives the President little or no discretion to delay making determinations.

B.

First, as we have already noted, § 2410c(a)(1) clearly imposes a duty: it states that the President "*shall* impose" the specified sanctions "if [he] determines" that the predicate facts exist (emphasis added). "Shall" here undoubtedly expresses a mandate.[15] The duty to impose sanctions after a determination has been made suggests that there are limits on the President's authority to postpone making the determination, once the facts relevant to the determination are before him.

Second, the remainder of § 2410c confirms that Congress did seek to limit, in fact rather sharply, the President's discretion over the timing of his determinations. The section expresses the sense of Congress that the President, after making a determination, "immediately" consult with the foreign country that has jurisdiction over the proliferator, and authorizes a 90-day delay in imposing sanctions to permit consultations with that country to go forward. A further 90-day delay is permitted upon an appropriate certification to Congress that the consultations are going forward. The fact that consultations are to occur "immediately" after the determination, and that there can be delays in imposing sanctions for up to 180 post-determination days to allow the consultations to proceed, suggests that Congress intended to accommodate, structure and delimit the President's ability to conduct diplomacy and to take account of foreign policy concerns before being bound to impose sanctions. Outside that statutory framework, however, it appears that discretion to withhold sanctions — and to postpone making the determinations that triggered them — was to be limited or non-existent. Given the breadth of Congress's power over foreign commerce, such limitations on the President's discretion are not on their face invalid.

Third, in 1991, Congress codified CBW sanctions not only in the provisions at issue in title 50 appendix, but also in title 22.[16] Thus, § 2410c is in pari materia with the title 22 provisions. The latter provisions deal both with foreign governments and foreign persons. As noted earlier, the provisions of § 2798 of title 22,

[15] *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 (1995); *id.* at 438–39 (Souter, J., dissenting). The legislative history (reviewed more fully in Part III below) underscores the nondiscretionary nature of the sanctions that the language of § 2410c conveys.

[16] Indeed, the relevant provisions in title 22, like those in title 50 appendix, were enacted as part of the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102–138, § 505, 105 Stat. 647, 724 ("FRA"), and superseded by virtually identical provisions in the CBW, Pub. L. No. 102–182, § 305(b), 105 Stat. at 1250. These two 1991 enactments are discussed further in Part IV below.

dealing with foreign persons, are virtually identical to the provisions of § 2410c of title 50 appendix.[17] Section 5604(a)(1) of title 22,[18] which deals with the conduct of foreign *governments*, sets a specific, 60-day time limit for making presidential determinations after "persuasive information" becomes available to the executive branch that a foreign government is or has engaged in prescribed CBW uses.[19] Nothing nearly so stringent was written into § 2410c, inviting the inference that the President is less time-constrained in making determinations under that section. On the other hand, 22 U.S.C. § 5605(d) authorizes the waiver of most of the sanctions imposed under that section if the President certifies to Congress that such waiver "is essential to the national security interests of the United States." *Id.* § 5605(d)(1)(A)(i). No such waiver authority is given in the case of foreign person sanctions under title 50 appendix.[20] Thus, in the companion statutes to § 2410c, Congress limited the President's discretion over the timing of sanction-triggering determinations much more closely and explicitly, but also gave the President far broader power to waive sanctions. Overall, it appears to us, the President has broader discretion under the title 22 CBW provisions than under those in title 50 appendix. This outcome, we believe, reflects Congress's judgment that the President's constitutional foreign policy prerogatives are more deeply implicated, and so must be left less closely regulated, when *country* sanctions, rather than *foreign person* sanctions, are to be applied.

C.

The textual and structural analysis of § 2410c and related statutes is inconclusive. On the one hand, there are strong arguments that the President is not *wholly* without discretion to delay making such determinations: the rule of statutory construction relating to delegations of foreign policy power, coupled with the absence of a detailed time-frame in § 2410c for making determinations, and the general rule that administering agencies are allowed reasonable delays in such matters, suggest that the President's discretion is by no means non-existent. On the other hand, there are also strong arguments for concluding that the statute leaves the President with little or no discretion to delay making § 2410c determinations.

[17] *See supra* notes 1, 3.

[18] This section originated as section 506 of the FRA, Pub. L. No. 102–138, 105 Stat. at 730, and was replaced by section 306 of the CBW, Pub. L. No. 102–182, 105 Stat. at 1252.

[19] The suggested dichotomy between foreign persons and foreign governments may operate imprecisely when the actions of foreign parastatal entities are at issue. Whether either or both sanctions' regimes should be invoked in response to the conduct of such entities will depend on the particular facts and circumstances of each case.

[20] Section 2410c does not, in terms, include any "waiver" authority until after sanctions have been applied for at least 12 months. *Implicit* waiver authority may be found in § 2410c(c)(2), entitled "Exceptions," which states that the President "shall not be required to apply or maintain" sanctions if certain conditions hold.

Given the uncertainty that remains after this examination of the statutory text and structure, we turn in the next Part to a consideration of the legislative and administrative history of § 2410c.

IV.

Section 2410c codifies section 305 of the CBW, 105 Stat. at 1247. It is virtually identical to a statute adopted very shortly before by the same Congress, the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102–138, § 505(a), 105 Stat. at 724.[21] Section 309(a) of Pub. L. No. 102–182 repealed the earlier version. *See* CBW, 105 Stat. at 1258.

Both Congress and the Bush Administration had desired the adoption of CBW nonproliferation legislation even before 1991, but differed sharply over particular proposals. In 1990, Congress passed H.R. 4653, title IV of which (the Omnibus Export Amendments Act of 1990), was substantially the same as both current § 2410c and that section's immediate (but short-lived) precursor, title V of Pub. L. No. 102–138.[22] President Bush pocket-vetoed H.R. 4653.[23] In his memorandum of disapproval of November 16, 1990, President Bush declared his support for the "principal goals" of H.R. 4653, but objected to provisions that, in his judgment, "unduly interfere[d] with the President's constitutional responsibilities for carrying out foreign policy."[24] He identified as "[t]he major flaw" in H.R. 4653 "not the requirement of sanctions, but the rigid way in which they are imposed."[25] In lieu of signing H.R. 4653, President Bush issued an executive

[21] Although there were minor differences, Pub. L. No. 102–138 closely resembled the successor statute, Pub. L. No. 102–182. *See Statement on Signing Legislation on Trade and Unemployment Benefits*, 2 Pub. Papers of George Bush 1543, 1544 (Dec. 4, 1991) ("This Act is virtually identical to Title V of Public Law 102–138, which I signed into law on October 28, 1991. The only significant difference is the addition of import sanctions to the list of sanctions that are to be imposed and corresponding additions to the Presidential waiver provisions."); 137 Cong. Rec. 35,408 (1991) (remarks of Rep. McCurdy) ("[T]he conference report on H.R. 1724 contains virtually all of the provisions on chemical and biological weapons proliferations found in the conference report on H.R. 1415, the State Department authorization for fiscal years 1992 and 1993.").

[22] Section 423(a) of H.R. 4653, as enrolled and presented to the President, was virtually identical to § 2410c. Section 423(a) differed from what is now current law only in two minor respects. First, it did not provide that among the foreign countries, projects, or entities whose CBW efforts it was sanctionable to assist were those designated by the President, as under § 2410c(a)(2)(C). Second, it did not authorize an additional 90-day delay period for consultation with the foreign government of jurisdiction before sanctions had to be imposed, as in § 2410c(b)(2).

[23] *See* H.R. Conf. Rep. No. 102–238, at 154 (1990), *reprinted in* 1991 U.S.C.C.A.N. 439, 496.

[24] *Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990*, 2 Pub. Papers of George Bush 1619 (Nov. 16, 1990).

[25] *Id.* The State Department had expressed objections to nondiscretionary sanctions early in the Bush Administration, during hearings in 1989 before the House Foreign Affairs Committee. *See Chemical Weapons Proliferation: Hearing and Markup of H.R. 3033 Before the House Comm. on Foreign Affairs and its Subcomms. on Arms Control, International Security and Science, and on International Economic Policy and Trade*, 101st Cong. 18 (1989) (colloquy between Chairman Dante Fascell and Assistant Secretary of State H. Allen Holmes). The State Department repeated its objections in a letter from Secretary of State James Baker to Senator Jesse Helms, relating to the Senate CBW bill, S. 195, 101st Cong. (1989). *See* Letter for Senator Jesse Helms from James D. Baker, Secretary of State (Oct. 16, 1990), *reprinted in* 136 Cong. Rec. 35,688 (1990).

In response, Senator Helms defended the Senate bill's provisions (which resemble later-enacted law) for nondiscretionary sanctions against foreign corporate CBW proliferators. He argued that "the Senate version is very tightly

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order, Executive Order No. 12735,[26] that directed the imposition of the sanctions contained in H.R. 4653, and that implemented new chemical and biological weapon export controls.[27]

Early the following year, during the debate on S. 320, 102d Cong. (1991) the "Omnibus Export Administration Act of 1991," several Senators criticized President Bush's pocket-veto of H.R. 4653. Senator Riegle, for example, disagreed with President Bush's position in the pocket-veto message "that imposing nonwaivable sanctions on companies that knowingly and materially assist in the development of chemical or biological weapons for use by countries that use them in violation of international law is unjustifiable." 137 Cong. Rec. 3777 (1991). He stated that "[w]e simply must take a tough stand if we are to rid the world of the threat of such weapons." *Id.*[28]

Later in 1991, Congress adopted H.R. 1415 which, as noted, was in all relevant respects the same as both the earlier, pocket-vetoed bill, H.R. 4653, and current § 2410c. President Bush signed H.R. 1415 into law as Pub. L. No. 102–138 on October 28, 1991. President Bush issued a signing statement on that occasion.[29] As to the chemical and biological weapons provision in the legislation, the President stated:

> Title V, Chemical and Biological Weapons (CBW), raises concerns with respect to both the President's control over negotiations with foreign governments and the possible disclosure of sensitive information. Title V's provisions establish sanctions against foreign companies and countries involved in the spread or use of chemical and biological weapons. Title V demonstrates that the Congress endorses my goal of stemming dangerous CBW proliferation. *In*

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drawn so that it applies sanctions only to violators who meet specific norms. I cannot imagine why my good friend, the Secretary, or the President, would ever want the flexibility to exempt a corporation that is guilty of proliferation of chemical and biological weapons and technology." 136 Cong. Rec. at 35,690. Senator Helms also explained, in a manner that sheds some light on the existing statute, the procedure for making presidential determinations: "[u]nder both the House and Senate bills, before sanctions can be imposed upon a foreign company, the President must first determine that the company had knowingly and either materially or substantially assisted the chemical or biological weapons program of Iraq or certain other outlaw nations. This is not an easy standard, and whether a company has met this standard is left to the discretion and judgment of the President." *Id.* at 35,689.

[26] *See* Exec. Order No. 12735, 3 C.F.R. 313 (1991) *reprinted in* 50 U.S C § 1701 note (1994).

[27] As President Bush characterized it, Exec. Order No. 12735 "sets forth a clear set of stringent sanctions, while encouraging negotiations with our friends and allies. It imposes an economic penalty on companies that contribute to the spread of these weapons and on countries that actually use such weapons or are making preparations to do so. At the same time, it allows the President necessary flexibility in implementing these sanctions and penalties." 2 Pub. Papers of George Bush at 1619–20 (Nov. 16, 1990).

[28] Senator Helms and Senator Heinz also criticized the pocket veto. *See* 137 Cong. Rec. at 3780 (1991) (remarks of Sen. Helms); *id.* at 3781 (remarks of Sen. Heinz). An Administration witness before the Senate Foreign Relations Committee in May, 1991, reiterated the Administration's constitutional and foreign policy objections to specific mandatory sanctions. *See Status of 1990 Bilateral Chemical Weapons Agreement and Multilateral Negotiation on Chemical Weapons Ban: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. 19 (1991) (remarks of Ambassador Ronald F. Lehman, Director, U.S. Arms Control and Disarmament Agency). Nonetheless, the President did ultimately sign a bill that provided only limited waiver authority.

[29] *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993*, 2 Pub. Papers of George Bush 1344 (Oct. 28, 1991).

> *signing this Act, it is my understanding, as reflected in the legislative history, that title V gives me the flexibility to protect intelligence sources and methods essential to the acquisition of intelligence about CBW proliferation. In part, such flexibility is available because title V does not dictate the timing of determinations that would lead to sanctions against foreign persons.*[30]

The legislative history to which President Bush referred appears to be a colloquy of October 8, 1991, between Representatives McCurdy and Berman.[31] Representative McCurdy was, at the time, Chair of the House Permanent Select Committee on Intelligence; Representative Berman was Chair of the Subcommittee on International Operations of the House Committee on Foreign Affairs. Because of its importance, the colloquy must be quoted at some length:

> Mr. McCURDY . . . I would like to clarify the provisions in H.R. 1415 that amend the Export Administration Act and the Arms Export Control Act to provide for sanctions against foreign companies involved in the development or production of chemical and biological weapons. These provisions mandate sanctions once the President makes a determination that a foreign person has "knowingly and materially" contributed to the efforts by any foreign country to develop or use biological or chemical weapons.
>
> I strongly endorse this effort to sanction foreign companies involved in the proliferation of chemical and biological weapons. I rise to clarify one point concerning the Presidential determinations called for in these provisions. It has come to my attention that, in rare circumstances, a premature determination might inhibit the flow of information which is necessary to the full imposition of sanctions against all violators. It seems to me that the President should be allowed to delay such a determination where it is necessary to protect intelligence sources and methods which are being

[30] *Id.* at 1345 (emphasis added).

[31] We note also that Congress had been advised in 1989, when considering earlier legislative proposals to sanction CBW proliferation, of the need to protect intelligence methods and sources. Testifying before the Senate Foreign Relations Committee, the Director of the Central Intelligence Agency, William Webster, answered a question from Senator Helms by saying, in part:

> I think we have to find a way of using our intelligence, protecting our sources and our methods, so that we continue to collect intelligence, but to form a basis on which those laws [c]an be triggered, if they are passed.
>
> I do not mean to be too obscure in what I am saying. You can develop sanctions, but the proof of the sanctions will depend upon some form of evidence, and some of the intelligence that we have is not readily convertible into evidence.

Chemical and Biological Weapons Threat: The Urgent Need for Remedies: Hearings Before the Senate Comm. on Foreign Relations, 101st Cong. 45 (1989).

used to acquire further, possibly more important, information on CBW proliferation.

Is it your understanding that the protection of intelligence sources or methods for the stated purpose may be a factor in deciding on the timing of a Presidential determination that a foreign person is contributing to CBW proliferation?

Mr. BERMAN . . . [I]t is my understanding that the President, in rare circumstances, could delay a determination that a foreign person has knowingly and materially contributed to CBW proliferation if such a delay is necessary to protect intelligence sources or methods essential to the acquisition of further intelligence about CBW proliferation. Such a delay would be appropriate, for example, where the United States is using the sensitive intelligence sources or methods to gather information on other CBW proliferators, or where additional time is needed to develop nonsensitive information that could be used to explain publicly the imposition of sanctions. However, such a delay should not be indefinite, because the ultimate purpose of these provisions is to sanction those foreign persons that we know to be knowingly and materially involved in CBW proliferation. Moreover, the delay should only be for the purpose of furthering our policy of sanctioning those proliferators. A delayed determination would not be justified to further any other policy.

137 Cong. Rec. 25,841 (1991).

Very shortly afterward, Congress enacted substantially the same chemical and biological weapons provision by passing H.R. 1724 (signed into law as Pub. L. No. 102–182 on December 4, 1991). On November 26, 1991, after the submission of the Conference Report on that legislation to the House of Representatives, Representative McCurdy inserted into the record the entirety of his October 8, 1991, colloquy with Representative Berman, to clarify that the President would have the same authority under H.R. 1724 to protect intelligence sources or methods that he had under Pub. L. No. 102–138. *See* 137 Cong. Rec. 35,408 (1991).

President Bush signed H.R. 1724 on December 4, 1991. In his signing statement, he pointed out that "[t]his Act is virtually identical to Title V of Public Law 102–138, which I signed into law on October 28, 1991," and affirmed that "[t]he observations regarding Title V of Public Law 102–138 that I made upon signing that bill into law are equally applicable to the Act I am signing today." [32]

[32] 2 Pub. Papers of George Bush at 1544 (Dec. 4, 1991).

We believe that this legislative and administrative history establishes that Congress intended to give the President discretion to delay, temporarily, the making of § 2410c determinations, when such a delay is necessary to protect intelligence sources or methods used to further CBW nonproliferation activities.

When the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 was enacted into law as part of the Foreign Relations Authorization Act, the President's signing statement pointedly construed the statute, in light of its legislative history, to give him "the flexibility to protect intelligence sources and methods essential to the acquisition of intelligence about CBW proliferation." [33] Only a few weeks after the President had published this administrative construction, Congress enacted a virtually identical statute as part of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102–182. On signing the latter Act, the President reiterated the construction he had placed upon its immediate precursor.[34] Although Congress had the opportunity to override or modify the President's construction, it chose instead to enact a virtually identical measure.

The President's October 28, 1991, construction of § 2410c is, under the particular circumstances of this case, authoritative. Congress was undoubtedly aware of this interpretation, which was prominently set forth in the President's signing statement of that date. Moreover, the October 8, 1991, colloquy between Representative McCurdy and Representative Berman, and the republication of that colloquy by Representative McCurdy on November 26, 1991, establish that Congress acted in the belief that the President would retain some measure of discretion to delay making the statutory determinations. In our judgment, Congress's decision to enact the CBW provision of Pub. L. No. 102–182 in November 1991, without in any way disturbing the interpretation set out by the President and by Representatives McCurdy and Berman in October 1991, constitutes a ratification of that interpretation.[35]

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[33] 2 Pub. Papers of George Bush at 1345 (Oct. 28, 1991).

[34] 2 Pub. Papers of George Bush at 1543–44 (Dec. 4, 1991).

[35] *See, e.g., North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 567–68, 570–71 (1976).

Moreover, even apart from the earlier legislative and executive branch pronouncements, the President's December 9, 1991, signing statement would be entitled to some weight in construing § 2410c. "The President, after all, has a part in the legislative process, too, except as to bills passed over his veto, and his intent must be considered relevant to determining the meaning of a law in close cases." *United States v. Tharp*, 892 F.2d 691, 695 (8th Cir. 1989) (Arnold, J.). *See generally The Legal Significance of Presidential Signing Statements* 17 Op. O.L.C. 131 (1993). Reliance on a presidential signing statement may be particularly appropriate when (as here) the executive branch has played a significant role in developing the legislation. *See, e.g., United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989); *cf. Miller v. Youakim*, 440 U.S. 125, 144 (1979). As a general matter, of course, the contemporaneous construction of a statute by the administering officials — in this case, the President — is to be accorded substantial deference. *See, e.g., Power Reactor Dev. Co. v. International Union of Elec., Radio and Mach. Workers*, 367 U.S. 396, 408 (1961).

V.

We are mindful of the fact that not all of the legislative history of § 2410c supports our conclusion. We understand that the CIA made several attempts through informal communications with the House and Senate Foreign Affairs Committees to include a waiver provision or other mechanism for protecting intelligence sources and methods in the bill. These efforts ultimately were unsuccessful.

Though we give due weight to the fact that Congress was aware of the issue, the House Foreign Affairs Committee's failure or refusal to include in H.R. 1415 (or, for that matter, in the successor bill, H.R. 1724) the specific language that the CIA requested does not, in our view, undercut the claim that the President may temporarily delay making a determination to protect counterproliferation sources or methods. As the courts have said, any inferences based on congressional silence of this kind are highly problematic. "The advocacy of legislation by an administrative agency — and even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable, guide to statutory construction." *American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 418 (1967); *see also Rastelli v. Warden, Metro. Correctional Ctr.*, 782 F.2d 17, 24 n.3 (2d Cir. 1986). Moreover, the evidence indicates that Congress did not reject the CIA's *concept*, even if it did not write the CIA's *language* into the bill.[36] The McCurdy-Berman colloquy reflects Congress's intent in passing H.R. 1415, and we are aware of nothing in the record that contradicts it. Beyond that, the enactment of H.R. 1724 *after* Representatives McCurdy and Berman had clarified the President's authority to protect counterproliferation sources or methods and *after* President Bush's October 28 signing statement had affirmed that he had such authority demonstrates clearly, in our view, that Congress accepted such an interpretation as correct.

VI.

Although we have concluded that the President has some discretion to delay a determination under § 2410c(a)(1), we emphasize that this discretion is not unlimited. In our judgment, the legislative history and administrative construction of the CBW Act, reviewed above, make clear that, except in extreme circumstances as discussed below, the President may delay making a § 2410c determination only for the purpose of advancing the counterproliferation policy of the statute (and not, e.g., for other foreign policy or intelligence-related reasons). More specifically, again with the exception noted below, we think that any delay is permissible only if the delay is necessary to protect intelligence sources or methods used in counterproliferation activities. These limitations are reflected both

[36] We note that neither House of Congress voted on and rejected the proposed language.

in President Bush's signing statement and in the colloquy between Representatives McCurdy and Berman, which apparently informed President Bush's interpretation of the statute.[37]

VII.

We have also been asked to consider whether the President can delay making a sanctions determination when no reasonable alternative means exist to protect the life of an intelligence source. We conclude that he can.

We believe that the President has the right, and indeed the duty, to protect the life of an intelligence source in such circumstances. This responsibility is rooted both in statutory law and in the President's constitutional authority to protect national security.[38] The President's obligations towards any intelligence source whose life would be at risk in this case if a determination were made are thus in direct conflict with the President's obligations under the CBW Act not to delay making a determination indefinitely, once the evidence establishes that a violation has taken place. Faced with such unavoidably conflicting obligations, we believe that the President may reasonably and lawfully conclude that the obligation to preserve the life of the source should prevail.

As a constitutional matter, the President, as Commander in Chief, has the inherent authority to employ sources for gathering intelligence needed to protect the national security of the United States.[39] The Executive's authority to gather intelligence information, and the related authority to protect the sources and methods used in gathering it,[40] were codified in the National Security Act of 1947, ch. 343, 61 Stat. 495 (codified as amended at 50 U.S.C. §§ 401–441d) ("NSA"). The NSA established the CIA and prescribed its responsibilities. In its current form, the statute declares that "the Director of Central Intelligence shall be responsible for providing national intelligence . . . to the President" and to other high-ranking civilian and military officers in the executive branch. 50 U.S.C. § 403–3(a)(1)(A), (B). Furthermore, the Director "shall . . . protect intelligence

[37] The colloquy is quoted in full *supra* pp. 16–17.

[38] In situations in which the lives of American citizens are in peril, indeed, the Supreme Court has suggested that the President has a constitutional duty to rescue them. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872). Under the so-called Hostages Act, 22 U.S.C. § 1732, the President also has a statutory duty in some circumstances to rescue American citizens held abroad. *See Worthy v. Herter*, 270 F.2d 905, 910 (D.C. Cir.) *cert. denied*, 361 U.S. 918 (1959).

[39] *See Totten v. United States*, 92 U.S. 105, 106 (1876) (The President "was undoubtedly authorized during the [Civil] war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy."), *Warrantless Foreign Intelligence Surveillance—Use of Television—Beepers*, 2 Op. O.L.C. 14, 15 (1978) (The President has the "constitutional power to gather foreign intelligence.").

[40] *See New York Times Co. v. United States*, 403 U.S. 713, 729–30 (1971) (Stewart, J., joined by White, J., concurring) (It is the executive branch's "constitutional duty" to "protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.").

sources and methods from unauthorized disclosure." *Id.* § 403–3(c)(6). The Director is specifically charged to

> provide overall direction for the collection of national intelligence through human sources by elements of the intelligence community authorized to undertake such collection and, in coordination with other agencies of the Government which are authorized to undertake such collection, ensure that . . . *the risks to the United States and those involved in such collection are minimized.*

Id. § 403–3(d)(2) (emphasis added).[41]

In *CIA v. Sims*, 471 U.S. 159 (1985), a case decided before the National Security Act was amended to include the language quoted immediately above, the Supreme Court considered the nature and scope of the Agency's responsibilities to protect its intelligence sources. *Sims* was an action under the Freedom of Information Act ("FOIA") to compel the Agency to disclose the names of individual researchers who had worked on an Agency-funded project. In declining to make such disclosure, the Agency relied on section 102(d)(3) of the NSA, a precursor of current 50 U.S.C. § 403–3(c)(6). That section, formerly codified as 50 U.S.C. § 403(d)(3), provided that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." NSA, § 102(d)(3), 61 Stat. at 498. The Court held that the Director was indeed authorized to withhold the identities of the researchers from disclosure under FOIA. *Sims*, 471 U.S. at 177.

In reaching that conclusion, the Court repeatedly emphasized the breadth of the Agency's power and responsibility to protect the identities of its sources. It stated that:

> Congress chartered the Agency with the responsibility of coordinating intelligence activities relating to national security. In order to carry out its mission, the Agency was expressly entrusted with protecting the heart of all intelligence operations—"sources and methods."

Id. at 167 (footnote omitted).

> Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure.

[41] The duties and powers of the Director under the National Security Act are generally subject to the control of the President and exercised under the President's authority as Chief Executive. *See generally* Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J 541, 595–96 (1994).

Id. at 168–69.

> Congress entrusted this Agency with sweeping power to protect its "intelligence sources and methods."

Id. at 169.

> Section 102(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. . . . [T]he Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

Id.

> The "statutory mandate" of § 102(d)(3) is clear: Congress gave the Director wide-ranging authority to "protec[t] intelligence sources and methods from unauthorized disclosure."

Id. at 177 (alteration in original).

The Court also found substantial support in the legislative and administrative history of the Act for its view that the Director had "broad power to protect the secrecy and integrity of the intelligence process," because "without such protections the Agency would be virtually impotent." *Id.* at 170. It stated:

> Congress was . . . well aware of the importance of secrecy in the intelligence field. Both General Vandenberg and Allen Dulles testified about the grim consequences facing intelligence sources whose identities became known. Moreover, Dulles explained that even American citizens who freely supply intelligence information "close up like a clam" unless they can hold the Government "responsible to keep the complete security of the information they turn over. . . ."
>
> Against this background highlighting the requirements of effective intelligence operations, Congress expressly made the Director of Central Intelligence responsible for "protecting intelligence sources and methods from unauthorized disclosure." This language stemmed from President Truman's Directive of January 22, 1946, 11 Fed. Reg. 1337, in which he established the National Intelligence Authority and the Central Intelligence Group, the Agency's prede-

> cessors. . . . The fact that the mandate of § 102(d)(3) derives from this Presidential Directive reinforces our reading of the legislative history that Congress gave the Agency broad power to control the disclosure of intelligence sources.

Id. at 172–73 (citation omitted).

Finally, in rejecting the court of appeals' position that the Agency's authority to protect sources applied only to sources who provided information unobtainable without a guarantee of confidentiality, the Court underscored the "harsh realities" of intelligence-gathering and the "dangerous consequences" of a more permissive disclosure rule. *Id.* at 174.

> This forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509, n.3 (1980) (per curiam). *See Haig v. Agee*, 453 U.S. 280, 307 (1981). If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.

Id. at 175.

As stated above, the National Security Act has been amended since *Sims* was decided. The Intelligence Organization Act of 1992, Pub. L. No. 102–496, §§ 701–706, 106 Stat. 3180, 3188, added a new section 103 to the National Security Act. *Id.* sec. 705(a), § 103, 106 Stat. at 3190. New section 103(c)(6) of the NSA, *see* 50 U.S.C. § 403–3(c)(6), states that the Director "shall . . . protect intelligence sources and methods from unauthorized disclosure." Former, section 102(d)(3), *see* 50 U.S.C. § 403, the provision construed in *Sims*, had stated in virtually identical terms that the Director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The language of the current statute, if anything, demonstrates even more clearly that the Director has an affirmative *obligation* to protect sources: it states that the Director "shall" protect such sources, not that he only "shall be responsible" for their protection.[42] Thus,

[42] Moreover, the legislative history of the 1992 provision reveals that Congress was aware of the *Sims* decision and, while not expressly ratifying it, also did not intend to disturb it. In explaining the current provision, the House Conference Report stated that

> the conferees wish to make clear that by including within the responsibilities of the Director of Central Intelligence the responsibility to protect intelligence sources and methods from unauthorized disclosure,

we believe that the duty to protect intelligence sources is at least as stringent under the current statute as it was under its predecessor.[43]

Moreover, the Intelligence Organization Act altered the National Security Act in another important and relevant respect. Under section 103(d)(2) of the National Security Act, as amended in 1992, *see* 50 U.S.C. § 403–3(d)(2), the Director is required to "ensure that . . . the risks to . . . those involved in such [intelligence] collection are minimized." This new language, which had no counterpart in the prior version of the National Security Act, heightens the Director's protective responsibilities towards the "human sources," *id.*, who are engaged in intelligence-gathering on the Agency's behalf.

Under the National Security Act, then, the President has an obligation to protect any intelligence source whose life would be endangered if the President determined that the foreign firm that employed the source had engaged in unlawful CBW proliferation. The President's statutory responsibilities under the two statutes are therefore in conflict in the particular circumstances of this case.

In general, if the President's legal obligations appear to conflict, we believe that his overriding duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, cl. 3, requires him to attempt to discover some reasonable means by which the conflict could be resolved and both duties discharged. In considering the possibly conflicting obligations imposed by the two statutes at issue here, due weight must be given to the fact that Congress was aware of the executive branch's concern that strict compliance with the terms of the CBW Act might compromise the protection of intelligence sources in some circumstances, yet failed to afford the President explicit authority to delay a determination or waive sanctions if necessary to protect intelligence sources and methods except to the extent necessary to continue to gather intelligence related to the proliferation activities sanctioned under the Act. That Congress afforded only a limited exception for the protection of intelligence sources and methods obligates the President to make determinations even when there is some risk that intelligence sources and methods will be compromised, and to take other reasonable measures to protect intelligence sources and methods from disclosure.

We are informed that in some circumstances, however, if the President can secure the life of the intelligence source at all, he can do so only by means that would expose the lives and safety of American personnel to substantial risk. We do not believe that the President's duty of rescue requires him to make such extraordinary efforts.[44] Short of taking such action, however, we understand that

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the conferees take no position with respect to the interpretation of similar language in existing law in *CIA v. Sims*, 471 U.S. 159 (1985).

H.R. Conf. Rep. No. 102–963, at 88 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2605, 2614.

[43] We note that the Supreme Court considered even the prior section to be a "mandate." *Sims*, 471 U.S. at 177.

[44] When a statute imposes a duty, it "authorizes by implication all reasonable and necessary means to effectuate the duty." *Supremacy Clause (Art. VI, cl. 2)—Central Intelligence Agency—Polygraph Examinations of Employee of CIA Contracts*, 2 Op. O.L.C. 426, 427 (1978). The President could properly conclude that the risks to the lives

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the President can protect the life of the source by forbearing to make the determination, otherwise required by the CBW Act, that the source's employer is subject to sanctions. There is no evidence that Congress considered the possibility of this extreme dilemma when it passed the CBW Act. In these highly unusual circumstances, we believe that the President has the legal discretion to defer making the CBW Act determination, for so long as such a deferral is necessary to protect the life of the source.

Conclusion

The President may delay making CBW Act determinations if a delay is necessary to protect intelligence sources or methods needed to acquire intelligence relating to CBW proliferation. He may also delay making such a determination when no other reasonable means exists for protecting the life of an intelligence source.[45]

Application of these legal standards to particular intelligence-gathering operations may prove to be difficult or complex, and will undoubtedly require careful assessments of the specific facts in each case. Please let us know if further advice from our Office on particular applications would be helpful.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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of the Government agents or military personnel who would be used in a rescue attempt would make such a course of action unreasonable. *See Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y 1860) (No. 4186) (Nelson, J., sitting as Circuit Justice) (Whether the President had a duty to protect American citizens whose lives and property were threatened in a foreign tumult "was a public political question . . . which belonged to the executive to determine.").

[45] We do not mean to exclude the possibility that the President may be legally able to delay making a determination in other circumstances that have not yet been presented to us for consideration.

Proposed Deployment of United States Armed Forces into Bosnia

The President, acting without specific statutory authorization, may lawfully introduce United States ground troops into Bosnia in order to assist the North Atlantic Treaty Organization to ensure compliance with a peace agreement.

November 30, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is to provide you with our analysis of whether the President, acting without specific statutory authorization, lawfully may introduce United States ground troops into Bosnia and Herzegovina ("Bosnia") to help the North Atlantic Treaty Organization ("NATO") ensure compliance with the recently negotiated peace agreement. We believe that the President may act unilaterally in the circumstances here.

I. Background

The United States has a large stake in helping to secure the Bosnian peace agreement. The United States has a firm commitment to the principle that the security and stability of Europe are of fundamental interest to the United States. As the President stated, if the negotiations fail and the war resumes, there is a very real risk that it could spread beyond Bosnia, and involve Europe's new democracies as well as our NATO allies.

Although the involvement of the United Nations in the Bosnian conflict can be traced back to at least 1991, the United Nations first deployed the United Nations Protection Force ("UNPROFOR") in the former Yugoslavia in April 1992. Most of the troops in UNPROFOR have been provided by nations allied with the United States under the NATO Treaty. In addition to operations involving ground forces, the Security Council, in Resolutions 781 and 786 (October 9 and November 10, 1992), established a ban on unauthorized military flights over Bosnia. In Security Council Resolution 816 (March 31, 1993), the Security Council authorized Member States and regional organizations to take "all necessary measures" to ensure compliance with the no-fly zone. The NATO allies agreed to undertake that enforcement. In Security Council Resolutions 836 and 844 (June 4 and 18, 1993), the Security Council authorized Member States and regional organizations (including NATO) to help protect UNPROFOR. In response to attacks on Sarajevo, NATO also agreed, on February 9, 1994, to accept the Secretary General's request to begin air operations, in coordination with

UNPROFOR, against military positions determined to be involved in attacks on civilian targets in Sarajevo.

Working with its NATO allies, the United States has played an important role in the United Nations' dispute-settlement efforts and in UNPROFOR's Bosnian operations. It contributed combat-equipped fighter aircraft and other resources to NATO's enforcement of the Security Council's no-fly ban. It also provided military assets to implement NATO's February 9, 1994, decision to attack military targets near Sarajevo. On occasion, United States military forces, under the auspices of NATO, have engaged in combat in support of UNPROFOR. On February 28, 1994, United States aircraft on air patrol for NATO engaged Serb aircraft violating the no-fly ban, destroyed three of them, and downed a fourth. On April 10–11, 1994, United States combat-equipped aircraft engaged Bosnian-Serb aircraft and gunners in defense of UNPROFOR personnel who had come under attack in Gorazde. On November 21, 1994, NATO conducted airstrikes involving thirty-nine United States and allied aircraft in response to Serb air attacks that had threatened 1,200 UNPROFOR troops in Bihac. The President reported each of these incidents by formal letters to Congress.

In a radio address of February 19, 1994, the President outlined the support the United States had given as of that time to the United Nations' effort in the former Yugoslavia:

> We have participated in the enforcement of economic sanctions against Serbia. We initiated airdrops of food and medicine and participated in the Sarajevo airlift, a massive effort, running longer than the Berlin airlift, which has relieved starvation and suffering for tens of thousands of Bosnians. Together with our NATO allies, we began enforcement of a no-fly zone to stop the parties from spreading the war with aircraft.
>
> We have warned Serbia against increasing its repression of the Albanian ethnic minority in Kosovo. We have contributed 300 American troops to the United Nations force that is helping to ensure that the war does not spread to the former Yugoslav Republic of Macedonia, which lies between Bosnia and Greece. And we have worked with our allies to ensure that NATO is prepared to help solve this crisis.

1 Pub. Papers of William J. Clinton 284 (1994).

More recently, after the Bosnian Serbs assaulted Srebenica and Zepa, which the United Nations had designated as safe areas, the United States organized an agreement with our NATO allies to take decisive military measures against any further attacks on safe areas. When the Bosnian Serbs later shelled a marketplace in Sarajevo, American pilots took part in a NATO bombing campaign designed to prevent the repetition of such offenses and ensure the withdrawal of heavy

weapons from around Sarajevo. Throughout this period, the President has informed Congress of the United States' involvement in supporting the UNPROFOR, including the episodes of combat that have occurred. [1]

In the past few months, the United States initiated an intensive diplomatic effort that produced a peace agreement among the warring parties in Bosnia. The United States had earlier assisted those parties in reaching a cease-fire. The peace agreement itself came out of negotiations that took place on American soil, under the guidance of the Department of State. The United Nations Security Council has indicated its support of the agreement. The parties to the agreement have made clear that their confidence in the strength of the accord depends on the presence of an international military force that would maintain the cease-fire and the separation of forces. It is anticipated that the United States would contribute 20,000 ground troops to the force and that our NATO allies, as well as such non-NATO countries as Russia, would provide twice that number. [2]

The President has determined that, without this substantial contingent of United States troops, the NATO force is unlikely to be able to prevent renewed fighting in Bosnia. The President bases this conclusion on (among other things) the representations of the parties and in particular of the Bosnians. A failure to carry out the terms of the peace accord, in the President's judgment, would injure America's national interests, as well as once again consigning the Bosnians to violence and atrocities of a sort not seen in Europe since the end of the Second World War. *See, e.g.*, Letter for Honorable Newt Gingrich, Speaker of the House of Representatives, from President William J. Clinton (Nov. 13, 1995) ("November 13 Letter"). The precise level of risk to United States troops is, of course, impossible to specify. As the President has stated, "America's role will not be about fighting a war. It will be about helping the people of Bosnia to secure their own peace agreement." The risk of casualties cannot be dismissed; "[t]here may be accidents in the field or incidents with people who have not given up their hatred." 2 Pub. Papers of William J. Clinton 1784, 1786 (1995). However, because of the size of the Implementation Force ("IFOR") and its rules of engagement, as well as the high quality of United States and NATO troops, training, and equipment, we would have created conditions that would offer the minimum possible risks to our soldiers.

[1] Congress has from time to time enacted legislation (or expressed its sense) on the United States' policy and role in the Bosnian conflict. *See, e.g.*, Department of Defense Appropriations Act, FY 1995, Pub. L. No. 103–335, §8100, 108 Stat. 2599, 2643 (1994) (sense of Congress that none of funds appropriated under Act be available to deploy United States Armed Forces to participate in Bosnian peace settlement); National Defense Authorization Act, FY 1995, Pub. L. No. 103–337, §1404, 108 Stat. 2663, 2910 (1994) (sense of Congress that President terminate arms embargo against Bosnia if certain conditions obtain); Foreign Operations, Export Financing, and Related Programs Appropriations Act, FY 1995, Pub. L. No. 103–306, §546, 108 Stat. 1608, 1641 (1994) (same); Foreign Relations Authorization Act, FY 1994 & 1995, Pub. L. No. 103–236, §520(c), 108 Stat. 382, 472 (1994) (President should provide military assistance to Bosnia if that nation requests it under Article 51 of United Nations Charter).

[2] Additional United States forces would also be deployed to areas outside Bosnia to support the ground troops inside the country.

II. Legal Analysis

In 1980, we noted that

> [t]he power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President's general power as a matter of historical practice. Examples of such actions in the past include the use of the Navy to "open up" Japan, and President Johnson's introduction of the armed forces into the Dominican Republic in 1965 to forestall revolution.

Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980). Today, American soldiers are deployed at many places around the world. Although these forces are not presently engaged in ongoing hostilities, in some instances they deal with conditions of appreciable danger. Indeed, continuously for the last forty years, American forces have been deployed under such conditions. The United States, for example, has maintained large military forces in Europe. At times, these troops have faced a genuine risk of war, as during the Berlin Airlift. More recently, they have been subjected to attacks by terrorists. On the other side of the globe, American forces are deployed (for example) in South Korea, and even after the end of the Korean War, North Korean forces have sometimes assaulted American soldiers.

The proposed deployment to Bosnia, therefore, is no innovation. As Commander in Chief, the President exercises "the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (Robert H. Jackson, Att'y Gen.). Nevertheless, some have questioned the President's authority to order the deployment. We first explain why the President has authority under the Constitution to order the deployment. We then review the War Powers Resolution and suggest that it should be read as reflecting Congress's understanding that the President, even absent specific statutory authorization, may deploy military forces abroad and may, in some circumstances, order them into situations in which conflict may arise.

A. *The Declaration of War Clause*

The Constitution vests in Congress the power "[t]o declare War." U.S. Const. art. I, § 8, cl. 11.[3] The scope and limits of that power are not well defined by

[3] The Declaration of War Clause is not the only constitutional text relevant to either Congress's or the President's war powers. As Justice Robert Jackson pointed out, "out of seventeen specific paragraphs of congressional power [in article I, § 8], eight of them are devoted in whole or in part to specification of powers connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). The President also has inherent war powers as Chief Executive. U.S. Const. art. II, § 1, cl. 1, as Commander in Chief, *id.* § 2, cl. 1, and under other clauses.

constitutional text, case law, or statute. Rather, the relationship of Congress's power to declare war and the President's authority as Commander in Chief and Chief Executive has been clarified by 200 years of practice. *See* Harold H. Koh, *The National Security Constitution* 70–71 (1990) (historical precedent serves as "quasi-constitutional custom" in foreign affairs). In ruling on constitutional questions involving foreign relations, the Supreme Court has often shown itself willing to rely on the evolved practice and custom of the political branches. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Haig v. Agee*, 453 U.S. 280, 292–93 (1981).

Historical practice supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not "wars" in either the common meaning or the constitutional sense. As the Supreme Court observed in 1990, "[t]he United States frequently employs Armed Forces outside this country — over 200 times in our history — for the protection of American citizens or national security." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). In at least 125 instances, the President acted without express authorization from Congress. *See* Leonard C. Meeker, Legal Adviser, Dept. of State, *The Legality of United States Participation in the Defense of Viet-nam*, 54 Dep't St. Bull. 474, 484–85 (1966); *see also Authority of the President to Repel the Attack in Korea*, 23 Dep't St. Bull. 173 (1950).[4] In reliance on this historical practice and understanding, our Office recently took the position that the President had the inherent authority to deploy up to 20,000 troops into Haiti on the invitation of that country's legitimate government. We argued that "[i]n 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." *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 179 (1994) ("OLC Haiti Letter").[5]

[4] This understanding of Executive power has early antecedents. "[B]oth Secretary [of War] Knox and [President] Washington himself seemed to think this [Commander in Chief] authority extended to offensive operations undertaken in retaliation for Indian atrocities." David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. Chi. L. Rev. 775, 816 (1994). On the other hand, Washington also wrote in 1793 that "no offensive expedition of importance can be undertaken [against the Creek Indians] until after [Congress] shall have deliberated upon the subject, and authorized such a measure." 33 *The Writings of George Washington* 73 (John C. Fitzpatrick ed., 1940).

[5] In fact, past Administrations have made, and acted upon, far broader claims of unilateral Executive authority to order troops into hostile situations than underlay the deployment in Haiti, either as it actually occurred or as it was planned before the military leadership agreed to leave peacefully. For example, President Bush ordered United States troops into Panama in December, 1989, for the purpose (among others) of overthrowing the régime of General Manuel Noriega. President Bush consulted with congressional leaders, but did not seek or receive Congress's authorization. *See* 2 Pub. Papers of George Bush 1722–23 (1990). The boldest claim of Executive authority to wage war without congressional authorization was made at the time of the Korean War — a conflict that ultimately lasted for three years and caused over 142,000 American casualties. Such sweeping claims of inherent Executive authority

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In deciding whether the proposed deployment of ground troops into Bosnia would amount to a "war" in the constitutional sense, considerable weight should be given to the consensual nature and protective purposes of the operation. The deployment is intended to be a limited mission that will ensure stability while the peace agreement is put into effect. Because the mission is in support of an agreement that the warring parties have reached and is at the invitation of those parties, it is reasonably possible that little or no resistance to the deployment will occur. The operation does not aim at the conquest or occupation of territory nor even, as did the planned Haitian intervention, at imposing through military means a change in the character of a political régime. Although combat conceivably may occur during the course of the operation, it is not likely that the United States will find itself involved in extensive or sustained hostilities. Moreover, as the President has made clear, the Allies agree that if there were a total breakdown in compliance, IFOR would be withdrawn.

We believe that the President has ample authority to undertake the planned operation. As noted above, the President as Commander in Chief has "the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." 40 Op. Att'y Gen. at 62; *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"). His "authority has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting American lives or property *or American interests.*" 40 Op. Att'y Gen. at 62 (emphasis added).

The American interests at stake here are clear. The United States has worked closely and intimately with its NATO partners for several years in attempting to carry out United Nations peacekeeping efforts in Bosnia and other parts of the former Yugoslavia.[6] United States military activities in the air and at sea have complemented the UNPROFOR's peacekeeping efforts on the ground. Indeed, the United States has already engaged in combat on several occasions in UNPROFOR's defense. The proposed deployment of a NATO force to implement the peace agreement would be consistent with the pattern of inter-allied cooperation and assistance that has been established over recent years. It would serve significant national security interests, by preserving peace in the region and

have been sharply criticized. *See* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 140 Cong. Rec. 19,811–16 (1994); *cf. Holtzman v. Schlesinger*, 414 U.S. 1304, 1311–12 (1973) (Marshall, J., sitting as Circuit Justice); *but see* Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 Va. J. Int'l L. 903, 949–59 (1994). It is unnecessary to consider such broad assertions in the present case.

[6] It should also be noted that Congress has expressed its sense that "old threats to the security of the United States and its allies in the North Atlantic Treaty Organization having greatly diminished, and new, more diverse challenges having arisen (*including ethno-religious conflict in Central and Eastern Europe . . .*), NATO's mission must be redefined so that it may respond to such challenges to its members' security even when those challenges emanate from beyond the geographic boundaries of its members' territories." National Defense Authorization Act. FY 1994, Pub. L. No. 103–160, § 1411(b), 107 Stat. 1547, 1827 (1993) (emphasis added).

forestalling the threat of a wider conflict. As the President stated in his November 13 Letter, "[t]his Administration, and that of previous Democratic and Republican Presidents, have been firmly committed to the principle that the security and stability of Europe is of fundamental interest to the United States." November 13 Letter at 1. If the war in the former Yugoslavia resumes, "there is a very real risk that it could spread beyond Bosnia, and involve Europe's new democracies as well as our NATO allies." *Id.* Furthermore, as we explained in concluding that President Bush had authority to deploy United States forces in Somalia, "maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest." *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 11 (1992). This argument applies equally to a NATO operation that carries out a peace agreement supported by the United Nations. Indeed, there is here the additional consideration that "[f]or almost 50 years, the [NATO] Alliance has been the anchor of America's and Europe's common security," and "[i]f we do not do our part in a NATO mission, we would weaken the Alliance and jeopardize American leadership in Europe." November 13 Letter at 2. Accordingly, in these circumstances, the President would have legal authority to order the deployment, in order to further important national interests.

Several circumstances of the proposed deployment have led some to take a different view of this question. Unlike the Haitian intervention, this operation arguably is not a case where "the risk of sustained military conflict [is] negligible." OLC Haiti Letter, 18 Op. O.L.C. at 173, 176. With the exception of the limited commitment of ground troops to Macedonia, the United States' previous military involvement in the Yugoslav theater has been undertaken only by its naval or aerial forces. The deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention: it raises the risk that the United States will incur (and inflict) casualties. Disengagement of ground forces can be far more difficult than the withdrawal of forces deployed for air strikes or naval interdictions. Because of the difficulties of disengaging ground forces from situations of conflict, and the attendant risk that hostilities will escalate, arguably there is a greater need for approval at the outset for the commitment of such troops to such situations; otherwise, Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed.

Nevertheless, we do not believe that these arguments against the President's unilateral authority to deploy forces into Bosnia are persuasive. The deployment would be in aid of a peace agreement that will be guaranteed by NATO and the United Nations Security Council. The parties to the agreement already are in substantial, though perhaps not total, compliance with an earlier cease-fire agreement, and have invited the deployment of NATO forces and guaranteed their

safety. To send United States forces to the region, in these circumstances, does not constitute "war" in any sense of the word.[7] Historical practice reinforces the most natural reading of the constitutional language: at the least, the President may deploy United States forces here without express authorization to protect the national interests, even if the deployment is not without some risk.

B. *The War Powers Resolution*

The War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555 (1973) ("the WPR" or "the Resolution"), codified at 50 U.S.C. §§ 1541–1548, is intended "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." 50 U.S.C. § 1541(a). To carry out that goal, the Resolution provides that the President is to report to Congress when United States forces are introduced (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," (2) "into the territory, airspace or waters of a foreign nation, while equipped for combat" (except for certain specified operations), or (3) "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." *Id.* § 1543. After a report about the introduction of forces into imminent or actual hostilities, the Resolution would require the President to withdraw those forces within sixty days (or ninety days if military necessity requires), unless Congress has authorized continued operations.

The Resolution necessarily presupposes the President's authority, even in the absence of express authorization by Congress, to deploy troops in circumstances such as those here. Where (as here) the President would be ordering United States forces into foreign territory while equipped for combat, the Resolution requires a report to Congress. The Resolution thus assumes that the President sometimes may order such deployments without prior statutory authorization. Indeed, although section 8(d)(2) of the Resolution provides that the Resolution shall 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), there is no similar reservation against construing the Resolution to authorize deployments of troops equipped for combat in other situations. At the least, even if the Resolution does not add to the President's authority,

[7] We do not suggest that *any* deployment of United States troops that could be characterized as defensive or protective would not, for that reason alone, amount to "war." At best, the protective purpose of the planned deployment is but one factor tending to show that our intervention would not amount to "war"; it does not, in itself, establish that conclusion.

it takes for granted that he may make deployments in situations where hostilities are not actual or imminent, without purporting to limit the circumstances in which such deployments may be made, *cf. id.* § 1541(c) (listing circumstances for introducing troops into actual or imminent hostilities), and without placing any restriction on the time during which the deployments may continue.

In our view, the Resolution lends support to the broader conclusion that the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances. Although the Resolution asserts that "[t]he constitutional powers of the President as Commander-in-Chief" to introduce armed forces into actual or indicated hostilities are limited to three specific circumstances (*i.e.*, when undertaken pursuant to a declaration of war or specific statutory authorization, or in a national emergency created by an attack on the United States, its territories or its armed forces), *id.* the Resolution also declares that nothing in it "is intended to alter the constitutional authority . . . of the President." *Id.* § 1547(d)(1). The executive branch has traditionally taken the position that the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution.[8] Furthermore, as we have recently argued,

> 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.

OLC Haiti Letter at 175–76.[9]

[8] *See, e.g., Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 274–75 (1984); *War Powers: A Test of Compliance: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong. 90 (1975) (statement of Monroe Leigh, Legal Adviser, Department of State).

[9] We do not understand the Resolution, in itself, to provide statutory authorization for introducing troops into hostilities; section 8(d)(2) of the Resolution itself expressly disclaims any interpretation that it confers such authority. *See* 50 U.S.C. § 1547(d)(2).

Conclusion

We believe that the President has the authority to order the proposed deployment of United States forces in Bosnia, under the circumstances contemplated, without express statutory authorization.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations

Where Congress has provided appropriations for the legislative branch, the Department of Justice may continue to provide testimony at hearings and perform other services related to funded functions of the legislative branch during a lapse in funding for the Department, if the participation of the Department is necessary for the hearing or other funded function to be effective.

Similarly, those functions of the Department of Justice that are necessary to the effective execution of functions by an agency or department of government that has current fiscal year appropriations, such that a suspension of the Department's functions during a lapse in its own appropriations would prevent or significantly damage the execution of those funded functions, may continue during the Department's funding lapse.

December 13, 1995

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

During the recent appropriations lapse we prepared for you a memorandum on the authority of the Department to participate in congressional hearings that were held during an appropriations lapse. *See Participation in Congressional Hearing During an Appropriations Lapse*, 19 Op. O.L.C. 301 (1995). This memorandum is intended to update that earlier memorandum in light of subsequent congressional enactments, particularly the Act providing appropriations for the legislative branch during the current fiscal year.

In his 1981 opinion, Attorney General Civiletti concluded that functions and activities could continue during a funding hiatus when authorization for their continuation was a valid inference from other funding decisions of the Congress. *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5 (1981). Attorney General Civiletti identified as one of the categories of activities that may continue during a lapse those functions that are "authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in" an agency. *Id.* He explained that this category includes unfunded functions that enable other funded functions to be executed. The primary example of this is social security benefits. Attorney General Civiletti opined that, although those who administer the Social Security benefit program are paid out of annual appropriations that could lapse, they could continue to administer Social Security because the benefit itself is paid out of a permanent appropriation. *Id.* at 5 n.7.

In our recent memorandum to you, we applied this principle to Department of Justice participation in congressional hearings:

> The Department's officers and employees may also participate in a hearing despite an appropriations lapse if authority for such participation arises by necessary implication from another specific statutory duty or duties. *See* 5 Op. O.L.C. at 3–5. In the context of congressional hearings, this exception permits the Department to participate where there is express authority or an express and specific appropriation for the hearing itself, and the Department's participation is necessary for the hearing to be effective, even though there is no specific authority or appropriation available for the Department to participate. This exception also operates where there is express authority for a specific Department official to participate — such as might arise from a subpoena — but no express authority for support or assistance of the witness. The Department would regard support and assistance to the otherwise authorized participation as being justified by necessary implication. This approach follows from the well-settled practice with respect to Social Security. *See* 5 Op. O.L.C. at 5 n.7.

19 Op. O.L.C. at 303.

By enacting the legislative branch appropriations bill, the Congress has now decided that the funded activities of the legislative branch for the current year should proceed (and the President has concurred). Should the Department again experience a funding lapse, that specific decision by the Congress to fund its own activities in the context of a funding lapse for other components of government will support an implication similar to the one drawn in the case of Social Security. Accordingly, the Department may continue activities such as providing testimony at hearings if "the Department's participation is necessary for the hearing to be effective." *Id.* The Department would also be authorized to perform other services that bear a similar relation to other funded functions of the legislative branch.

A similar implication can also be supported by the specific decisions that Congress has made to fund other agencies and departments of government so that their functions are to continue during a funding lapse.[1] To the extent that any of the Department's functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department's functions and activitives may continue. Although, as Attorney Gen-

[1] Since the last appropriations lapse, seven fiscal year 1996 appropriations bills have been enacted: Military Construction, Pub. L. No. 104–32, 109 Stat. 283 (1995); Energy and Water, Pub. L. No. 104–46, 109 Stat. 402 (1995); Agriculture, Pub. L. No. 104–37, 109 Stat. 299 (1995); Transportation, Pub. L. No. 104–50, 109 Stat. 436 (1995); Treasury, Postal, Pub. L. No. 104–52, 109 Stat. 468 (1995); Defense, Pub. L. No. 104–61, 109 Stat. 636 (1995); Legislative Branch, Pub. L. No. 104–53, 109 Stat. 514 (1995). Other actions of the Congress may also support such an implication; for example, a multi-year appropriation under circumstances in which Congress was aware that performance of the function or activity would necessarily span fiscal years.

eral Civiletti noted, it could be argued that the failure to appropriate funds for the Department's activities expresses a congressional conclusion that the execution of activities of other agencies that have otherwise been funded should nevertheless either be suspended or significantly damaged by virtue of the lack of funding for the Department, we conclude, consistent with Attorney General Civiletti's treatment of Social Security, that the decision to fund those other activities in this fiscal year "substantially belies this argument," 5 O.L.C. at 5 n.7, and that the view presented here constitutes the better interpretation.

WALTER DELLINGER
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Legislation Denying Citizenship at Birth to Certain Children Born in the United States

A bill that would deny citizenship to children born in the United States to certain classes of alien parents is unconstitutional on its face.

A constitutional amendment to restrict birthright citizenship, although not technically unlawful, would flatly contradict the Nation's constitutional history and constitutional traditions.

December 13, 1995

STATEMENT BEFORE THE SUBCOMMITTEES
ON IMMIGRATION AND CLAIMS
AND
ON THE CONSTITUTION
OF THE HOUSE COMMITTEE ON THE JUDICIARY

Throughout this country's history, the fundamental legal principle governing citizenship has been that birth within the territorial limits of the United States confers United States citizenship. The Constitution itself rests on this principle of the common law.[1] As Justice Noah Swayne wrote in one of the first judicial decisions interpreting the Civil Rights Act of 1866,[2] the word "Citizens 'under our constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress.' We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States."[3] When Justice Swayne wrote these words, the nation was only beginning to recover from a great Civil War sparked in no small part by the Supreme Court's tragically misguided decision in the *Dred Scott* case.[4] That decision sought to modify the founders' rule of citizenship by denying American citizenship to a class of persons born within the United States. In response to *Dred Scott* and to the Civil War, Congress enacted the 1866 Act, and Congress and the States adopted the Fourteenth Amendment in order to place the right to citizenship based on birth within the jurisdiction of the United States beyond question. Any restriction on that right contradicts both the Fourteenth Amendment and the underlying principle that the amendment safeguards.

The several bills and resolutions now before Congress that would deny citizenship to children born in the United States to certain classes of alien parents raise various issues of law and policy. My testimony today will address two points

[1] Indeed, the common law's inclusive rule of citizenship by birth defined "the People" who created the Constitution. "The Constitution itself does not make the citizens; it is, in fact, made by them. It only . . . recognizes such of them as are natural — home-born." *Citizenship*, 10 Op. Att'y Gen. 382, 389 (1862).

[2] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 ("1866 Act").

[3] *United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, J., on circuit) (quoting 2 James Kent, *Commentaries on American Law* 288 n.(a) (11th ed. 1866)).

[4] *Dred Scott v. Sandford*, 60 U.S (19 How.) 393 (1857).

of constitutional law. First, because the rule of citizenship acquired by birth within the United States is the law of the Constitution, it cannot be changed through legislation, but only by amending the Constitution. A bill such as H.R. 1363, 104th Cong. (1995), the "Citizenship Reform Act of 1995," that purports to deny citizenship by birth to persons born within the jurisdiction of this country is unconstitutional on its face. Second, the proposed constitutional amendments on this topic conflict with basic constitutional principles. To adopt such an amendment would not be technically unlawful, but it would flatly contradict our constitutional history and our constitutional traditions. Affirming the citizenship of African-Americans that *Dred Scott* had denied, in 1862 President Lincoln's Attorney General wrote an opinion for the Secretary of the Treasury asserting "[a]s far as I know . . . you and I have no better title to the citizenship which we enjoy than the 'accident of birth'—the fact that we happened to be born in the United States."[5] Today, in 1995, we cannot and should not try to solve the difficult problems illegal immigration poses by denying citizenship to persons whose claim to be recognized as Americans rests on the same constitutional footing as that of any natural-born citizen. Members of both of your Subcommittees have worked vigorously, with the Department of Justice on an evenhanded bipartisan basis, on legislation and oversight to address these problems.

I.

H.R. 1363, the "Citizenship Reform Act of 1995," exemplifies the various legislative proposals before the committees. The stated purpose of the bill is "to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens." Section 3(a) of the bill amends section 301(a) of the Immigration and Nationality Act, which grants U.S. citizenship "at birth" to all persons "born in the United States, and subject to the jurisdiction thereof." Specifically, section 3(a) proposes to define the phrase "subject to the jurisdiction thereof" to include only children born to U.S. citizens or permanent resident aliens.

My office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This legislation is unquestionably unconstitutional. The Fourteenth Amendment declares that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. The unmistakable purpose of this provision was to constitutionalize the existing Anglo-American common law rule of jus soli or citizenship by place of birth and especially to extend it to persons of African descent and their descendants.

[5] 10 Op. Att'y Gen. at 394.

The phrase "subject to the jurisdiction thereof" was meant to reflect the existing common law exception for discrete sets of persons who were deemed subject to a foreign sovereign and immune from U.S. laws, principally children born in the United States of foreign diplomats, with the single additional exception of children of members of Indian tribes. Apart from these extremely limited exceptions, there can be no question that children born in the United States of aliens are subject to the full jurisdiction of the United States. And, as consistently recognized by courts and Attorneys General for over a century, most notably by the Supreme Court in *United States v. Wong Kim Ark*,[6] there is no question that they possess constitutional citizenship under the Fourteenth Amendment.

A.

While the Constitution recognized citizenship of the United States in prescribing the qualifications for President, Senators, and Representatives, it contained no definition of citizenship until the adoption of the Fourteenth Amendment in 1868. Prior to that time, citizenship by birth was regulated by common law. And the common law conferred citizenship upon all persons[7] born within the territory of the United States, whether children of citizens or aliens.[8] The only common law exceptions to this generally applicable rule of jus soli were children born under three circumstances — to foreign diplomats, on foreign ships, and to hostile occupying forces — which, under principles of international law, were deemed not to be within the sovereignty of the territory.[9]

[6] 169 U.S. 649 (1898).

[7] Slaves, shamefully, not being considered persons at all for many legal purposes, were ignored by the common law analysis.

[8] *E.g., Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119 (1804) (presuming that all persons born in the United States were citizens thereof); *McCreery v. Somerville*, 22 U.S. (9 Wheat.) 354 (1824) (in determining title to land in Maryland, Court assumed that children born in the state of an alien were native-born citizens of the United States), *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844) (in holding that child born in New York during temporary stay by alien parents was a citizen of the United States, Court, after thorough examination of law, concluded that it entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen); Letter for Mr. Mason, United States Minister to France, from Mr. Marcy, Secretary of State (June 6, 1854), *in* 2 Francis Wharton, *Digest of the International Law of the United States* 394 (2d ed. 1887) ("In reply to the inquiry which is made by you . . . whether 'the children of foreign parents born in the United States, but brought to the country of which the father is a subject, and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States,' I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship."); *Citizenship of Children Born in the United States of Alien Parents*, 10 Op. Att'y Gen. 328 (1862) (child born in the United States of alien parents who have never been naturalized is, by fact of birth, a native-born citizen of the United States); 10 Op. Att'y Gen. 382 (1862) (reaffirming general principle of citizenship by birth in the United States and rejecting the existence under law of a class of persons intermediate between citizens and aliens); Frederick Van Dyne, *Citizenship of the United States* 6–7 (1904) ("It is beyond doubt that, before the enactment of the civil rights act of 1866 . . . or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.") (citations omitted).

[9] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); 4 Charles Gordon et al., *Immigration Law and Procedure* § 92–03[3] (rev. ed. 1995). *See infra* note 13 for a discussion of the status of tribal Indians.

B.

As the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment makes clear, the definitions of citizenship contained in both were intended to codify the common law and overrule *Dred Scott*'s denial of citizenship to persons of African descent. Thus, with the three limited exceptions already noted and the additional exception of tribal Indians, the Fourteenth Amendment guaranteed citizenship to all persons born in the United States, including children born to aliens.

The Civil Rights Act of 1866 provides that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 1866 Act, § 1, 14 Stat. at 27. During the debates on the Act, the Chair of the House Judiciary Committee stated that the provision defining citizenship is "merely declaratory of what the law now is," and he cited, among other authorities, a quotation from William Rawle, whose constitutional law treatise was one of the most widely respected antebellum works: "Every person born within the United States, its Territories, or districts, whether the parents are citizens or aliens, is a natural-born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity." [10]

The Fourteenth Amendment initially contained no definition of citizenship. Senator Howard of Michigan proposed to insert the definition that became the opening sentence of the Fourteenth Amendment:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.[11]

He explained that this was not meant to include those discrete classes of persons excluded by the common law, "but will include every other class of persons."

The Framers intended the amendment to resolve not only the status of African-Americans and their descendants, but members of other alien groups as well. This is reflected in the exchange between Senators Trumbell and Conness, supporters of the Fourteenth Amendment and the Civil Rights Act, and Senator Cowan, a strong opponent of both. Senator Cowan expressed his reluctance to amend the

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The principal alternative system, jus sanguinis used in most civil law European countries, grants citizenship by descent or blood—that is, according to the citizenship of one's parents. This system obviously could not have operated in the United States at its inception, where, except for American Indians, the inhabitants were citizens of other countries.

[10] Cong. Globe, 39th Cong., Ist Sess. 1115 (1866); *id.* at 1117 (quoting William Rawle, *A View of the Constitution of the United States of America* 80 (1829)).

[11] *Id.* at 2890.

Constitution in such a way as would "tie the[ ] hands" of the Pacific states "so as to prevent them . . . from [later] dealing with [the Chinese] as in their wisdom they see fit." [12] The supporters of the citizenship clause responded by confirming their intent to constitutionalize the U.S. citizenship of children born in the United States to alien parents.

> Senator Cowan . . . . I am really desirous to have a legal definition of 'citizenship of the United States.' What does it mean? . . . Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?
>
> Senator Conness . . . . The proposition before us . . . relates . . . to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.[13]

C.

The constitutional guarantee of citizenship to children born in the United States to alien parents has consistently been recognized by courts, including the Supreme Court, and Attorneys General for over a century. Most notably, in *United States v. Wong Kim Ark*,[14] the Supreme Court held that a child born in San Francisco

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[12] *See, e.g., id.* at 2891.

[13] *Id.* at 2890–91.

A great deal of attention was spent on how (not whether) to exclude unassimilated or tribal Indians. Ultimately, any reference to "excluding Indians not taxed"—the phrase used in the Civil Rights Act of 1866—was omitted as unnecessary, as they were not deemed to be "subject to the jurisdiction" of the United States because of the unique status of Indian tribes within the United States. In *Elk v. Wilkins*, 112 U.S. 94, 99 (1884), the Court construed the "subject to jurisdiction" clause in a case brought by an Indian claiming citizenship who was born a member of a tribe, but who had later taken up residence among the non-Indian citizens of the state. The Court held he was not a United States citizen, because he was not "subject to the jurisdiction" of the United States at the time of his birth. In construing the phrase "subject to the jurisdiction" the Court noted that the Indian tribes, although not, strictly speaking, foreign nations, were alien nations with distinct political communities with which the United States entered into treaties.

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, or ambassadors of other public ministers of foreign nations.

Id. at 102; *see also* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759, 832–41 (1991) (reviewing the legislative history of the citizenship clause to conclude that "subject to jurisdiction" was intended to exclude tribal Indians with separate laws and governments of their own, and thus were, "in modern international law parlance, a separate people"). *Wilkins* cannot be interpreted to mean that children born in the United States of aliens are not "subject to the jurisdiction" of the United States because their parents may owe some allegiance to their own country of birth. Otherwise, dual nationality would be prohibited.

The denial of citizenship to American Indians was later corrected by statute. 8 U.S.C. § 1401(b).

[14] 169 U.S. 649 (1898).

of Chinese parents (who, under the Chinese Exclusion laws then in effect, could never themselves become U.S. citizens) became at the time of his birth in the United States a citizen of the United States, by virtue of the Fourteenth Amendment.

The Court, in a detailed review of the Anglo-American common law of citizenship and the legislative history of the Fourteenth Amendment, established several propositions. First, because the Constitution does not define United States citizenship, it must be interpreted in light of the common law. Under the common law of England, which was adopted by the United States, every child born within the territory of alien parents was a natural-born subject, with the exception of children born of foreign ambassadors, of alien enemies during hostile occupation, and of aliens on a foreign vessel.

Further, "[a]s appears upon the face of the [Fourteenth] Amendment, as well as from the history of the times, [the amendment] was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect." *Wong Kim Ark*, 169 U.S. at 676. Specifically, the Court explained, "[t]he real object . . . in qualifying the words '[a]ll persons born in the United States', by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state—both of which, . . . by the law of England and by our own law, . . . had been recognized exceptions to the fundamental rule of citizenship by birth within the country." *Id.* at 682.

In concluding its review of the relevant law, the Court summarized:

> The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or

> subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.

Id. at 693.

The Court then turned to the status of Chinese persons in the United States under the Constitution and the Chinese Exclusion Acts, which provided for exclusion and expulsion of Chinese persons. After considering the effects of both sources of law, the Court held that *Wong Kim Ark* had become a citizen at birth by virtue of the Fourteenth Amendment, reaffirming the constitutional principle that "[t]he fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship." *Id.* at 703.

The principles set forth in *Wong Kim Ark* cannot be dismissed as having been overtaken by contemporary judicial interpretation or current events. Both the courts and commentators have consistently cited and followed the principles of *Wong Kim Ark*.[15]

I am aware of only one statement of the contrary view that birthright citizenship may be modified by a simple act of legislation. In their 1985 book, Professors Peter Schuck and Rogers Smith argue for a novel "reinterpretation" of the citizenship clause.[16] Briefly, the authors recommend replacing the "ascriptive" approach to citizenship — which determines citizenship by an objective circumstance, such as place of birth or citizenship of parents — with a "consensual" approach — which makes political membership a product of mutual consent by the polity and the individual. The authors argue that the Fourteenth Amendment may be reinterpreted to allow Congress to deny citizenship to children of illegal aliens by legislation (as opposed to constitutional amendment). As support, the authors attempt

[15] *See INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985) (in habeas proceeding brought by deportable aliens, Court noted that respondent had given birth to a child, "who, born in the United States, was a citizen of this country"); *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982) (relying on *Wong Kim Ark's* predominantly geographic interpretation of the "jurisdiction" clause of the Fourteenth Amendment); *Rogers v. Bellei*, 401 U.S. 815, 829–30 (1971) (citizenship clause is " 'declaratory of existing rights, and affirmative of existing law,' so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned"); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 n.10 (1963) (confirming that the citizenship clause "is to be interpreted in light of pre-existing common-law principles governing citizenship"); *Morrison v. California*, 291 U.S. 82, 85 (1934) (noting that although persons of Japanese descent were not eligible to become citizens through naturalization, a person of Japanese descent is a citizen of the United States if he was born within the United States, citing *Wong Kim Ark*); 4 Charles Gordon et al., *Immigration Law and Procedure* § 92.03[2][e] (rev. ed. 1995) (noting that any uncertainty regarding the applicability of the jus soli rule to children born in this country was "finally resolved by the Fourteenth Amendment and the Supreme Court's decision in *U.S. v. Wong Kim Ark*. There is now no doubt that the constitutional rule of universal citizenship for all persons born in the United States is unaffected by the status of their parents, except in minimal situations. Thus American citizenship is acquired by children born in the United States, even though their parents were always aliens, and even if the parents were themselves ineligible to become citizens of the United States. Nor has the acquisition of citizenship been affected by the circumstance that the child's alien parents were in the United States temporarily or even illegally at the time the child was born.") (footnotes omitted).

[16] Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985).

to show that the Framers of the Fourteenth Amendment intended the reference to "subject to the jurisdiction" of the United States to replace the existing ascriptive common law principle with one of express mutual consent. As one reviewer recommends, the authors' proposals "should be relegated to academic debate." [17]

Schuck and Smith are proposing a change in the law, not a plausible reinterpretation of the Constitution. Their theory would require repudiation of the language of the Constitution itself, the clear statements of the Framers' intent, and the universal understanding of 19th and 20th century courts. Indeed, the authors themselves concede that there is no judicial precedent in support of their theory. Moreover, as one review of the book notes on a more philosophical level, "[t]he examples [Schuck and Smith give in support of their consent theory] — the denial of citizenship to Blacks, Indians and Chinese — are all deeply shameful for contemporary Americans. This is not a history to build on." [18]

In short, the text and legislative history of the citizenship clause as well as consistent judicial interpretation make clear that the amendment's purpose was to remove the right of citizenship by birth from transitory political pressures. The Supreme Court noted in *Wong Kim Ark*,[19] "[t]he same congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution." More recently, the Supreme Court noted in *Afroyim v. Rusk*[20] that the framers of the Fourteenth Amendment "wanted to put citizenship beyond the power of any governmental unit to destroy." *See also Rogers v. Bellei*, 401 U.S. at 835 (recognizing that "Congress has no 'power, express or implied, to take away an American citizen's citizenship without his assent,'" where that citizenship is attained by birth). By excluding certain categories of native-born persons from U.S. citizenship, the proposed legislation impermissibly rescinds citizenship rights that are guaranteed to those persons by the citizenship clause of the Fourteenth Amendment. Such a rescission of constitutionally protected rights is beyond Congress's authority.

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[17] Arthur C. Helton, *Citizenship Without Consent*, 19 N.Y.U. J. Int'l L. & Pol. 221, 226 (1986) (book review). For incisive critiques of Schuck and Smith's work, see also, David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 Yale J. Int'l L. 278 (1985) (book review); Gerald L. Neuman, *Back to Dred Scott?*, 24 San Diego L. Rev. 485 (1987) (book review).

[18] David Howarth, *Citizenship Without Consent*, 46 Cambridge L.J. 169, 170 (1987) (book review).

[19] 169 U.S. at 675.

[20] 387 U.S. 253, 263 (1967).

II.

Congress is, of course, constitutionally free to propose, and the states to ratify, any amendment to the Constitution.[21] Such naked power undeniably exists. The Constitution taken as a whole, however, stands for certain enduring principles.[22] When Congress undertakes to tamper through the amendment process with the most basic presuppositions of American constitutionalism, it should do so with exceeding caution and utmost restraint. The proposition that all persons born in the United States and subject to its jurisdiction are citizens at birth is one of those bedrock principles.

Academics may conceive of nation-states in which citizenship would not necessarily extend to those who lack the approval or mutual consent of existing citizens. But the country in question is not some theoretical conception, but our own country with its real experience and its real history. It would be a grave mistake to alter the opening sentence of the Fourteenth Amendment without sober reflection on how it came to be part of our basic constitutional charter.

The constitutional principle with which these proposed amendments would tamper flows from some of the deepest wellsprings of American history. From the earliest days of our nation, with the tragic exception of slaves and tribal Indians, all those who were born on its soil and subject to no foreign power became its citizens. The simple fact of birth here in America was what mattered.

And then came *Dred Scott*. In its most monumentally erroneous decision, the Supreme Court created a monstrous exception to the common law rule that birth on American soil to a free person was sufficient for American citizenship. The Court held that no persons of African descent—including free persons of African descent—and none of their descendants for all time to come could ever be citizens of the United States regardless of their birth in America.

It was in the aftermath of this decision that one of our great political parties was formed. In 1857, in the first of many speeches he was to give on the subject, that party's candidate for President in 1860 denounced *Dred Scott*'s creation of a class of persons born on American soil and yet without rights and condemned to pass their status on to future generations. Abraham Lincoln declared that the defenders of that decision had committed themselves to a principle that contradicted—and that made a "mere wreck—mangled ruin"—of the Declaration of Independence.[23]

Afterwards, the nation plunged into the heart of darkness—a savage and brutal civil war in which hundreds of thousands lost their lives on the battlefield. From those ashes, a nation was reformed. It is no trivial matter that the Fourteenth

[21] The only present exception to this rule is the proviso to Article V of the Constitution that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

[22] *See* Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 Harv. L. Rev. 446, 447 (1983).

[23] Speech at Springfield, Illinois (June 26, 1857), *in* 2 *The Collected Works of Abraham Lincoln* 406 (Roy P. Basler, ed. 1953).

Amendment opens with the principle that some would now change. From our experience with *Dred Scott*, we had learned that our country should never again trust to judges or politicians the power to deprive from a class born on our soil the right of citizenship. We believe that no discretion should be exercised by public officials on this question—there should be no inquiry into whether or not one came from the right caste, or race, or lineage, or bloodline in establishing American citizenship. Other nations may seek more consensual and perhaps more changeable forms of citizenship; for us, for our nation, the simple, objective, bright-line fact of birth on American soil is fundamental.

Since the Civil War, America has thrived as a republic of free and equal citizens. This would no longer be true if we were to amend our Constitution in a way that would create a permanent caste of aliens, generation after generation after generation born in America but never to be among its citizens. To have citizenship in one's own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections. Congress has the power to propose an amendment changing these basic principles. But it should hesitate long before so fundamentally altering our republic.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges

Section 458 of title 28 does not apply to presidential appointments of judges to the federal judiciary.

December 18, 1995

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On April 25, 1995, President Clinton nominated Mr. William A. Fletcher to be a judge on the United States Court of Appeals for the Ninth Circuit. *See* 141 Cong. Rec. 11,243 (1995). While Mr. Fletcher's nomination has been pending before the United States Senate, questions have arisen as to whether his appointment would violate 28 U.S.C. § 458 because Mr. Fletcher's mother, the Honorable Betty B. Fletcher, has served as a judge on the same court since her appointment in 1979. Section 458 of title 28 provides as follows: "No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court."

We have previously opined that 28 U.S.C. § 458 does not apply to presidential appointments of judges to the federal judiciary. *See* Memorandum for Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges* (Mar. 13, 1995). In light of subsequent questions, you have asked whether we adhere to that position. For the reasons that follow, we do.

A

Two bedrock principles of statutory construction guide our analysis. First, "we start, as we must, with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). Second, "the meaning of statutory language, plain or not, depends on context." [1] *Id.* at 145. In this case, the particularly relevant constituents of context upon which statutory meaning depends are the constitutional framework within which all statutes are drafted and enacted, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (stating principle that statutes be read to protect "the usual constitutional balance" of power), the statutory language taken as a whole, *see, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (stating

[1] As Learned Hand explained, "words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their [meaning] from the setting in which they are used." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (quoting *Federbush*); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 n.6 (1988) (same).

the "cardinal rule" that a "statute is to be read as a whole"), and the amendment history of the statute, *see, e.g., Bailey*, 516 U.S. at 144 (taking account of amendment history of 18 U.S.C. § 924(c)(1) to determine the meaning of the word "use"). Based on our review, we conclude that the plain meaning of the statute precludes its application to presidential appointments to the federal judiciary.

We begin, as indicated, with the language of the statute. The current language of § 458 was adopted in 1911,[2] amending a statute originally enacted in 1887.[3] Quoting the language again, § 458 in its current form provides that: "No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." The statute does not by its express terms apply to the President, nor does it expressly name judgeships as one of the offices to which a related person may not be appointed. We believe that the inapplicability of this provision to presidential appointments of federal judges is conclusively established by the text of this provision, the history of its amendment, and the text of the Act of 1911 taken as a whole. We elaborate on these reasons in Parts II and III of this memorandum, which to a considerable degree recapitulate the analysis contained in our earlier memorandum. Before revisiting these points, however, in this part we analyze a feature of the constitutional framework within which statutes must be read that, in our view, also dictates the conclusion that § 458 does not apply to presidential appointments of federal judges, even if the text and its textual history did not conclusively establish the point.

Any argument that § 458 does apply to presidential appointments of federal judges depends entirely upon the fact that, while the statute refers to positions to which related persons may not be appointed, it makes no mention at all of the appointing authority, worded as it is in the passive voice. In this context, however, this silence must lead to just the opposite conclusion, because of the well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). We can refer to this principle as a clear statement rule, one that is very well-established and that dictates the plain meaning of § 458.

Then-Assistant Attorney General William H. Rehnquist articulated this principle without limiting it to cases in which application of the statute would raise a constitutional question, opining that statutes "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Closing of Government Offices in Memory of Former President*

[2] Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat. 1087, 1168 ("Act of 1911").

[3] Act of Mar. 3, 1887, ch. 373, § 7, 24 Stat. 552, 555.

Eisenhower at 3 (Apr. 1, 1969) ("Rehnquist Memorandum"). Even if this unqualified statement of the principle is overly broad, the narrower formulation given above clearly covers § 458, because its application to presidential appointments to the federal judiciary would raise serious constitutional questions regarding the President's authority under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, as we explain below. Therefore, under the precedents of the Supreme Court as well as of the Department of Justice, § 458 may not be read as applying to presidential appointments.

The principle that general statutes must be read as not applying to the President if they do not expressly apply where application would arguably limit the President's constitutional role has two sources. First, it is a long-recognized "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions. *See, e.g., Crowell v. Benson*, 285 U.S. 22 (1932). This canon of statutory construction is a cornerstone of judicial restraint in that it "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The canon is equally applicable to executive branch interpretations. *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731, 732 n.3 (1980).

The second source is the constitutional principle of separation of powers. The fundamental device by which the framers sought to prevent tyranny was the division of power to prevent an excessive accumulation in any single repository. Thus, the Constitution divides power between the federal and the state governments as well as among the federal government's three coordinate and independent branches. *See Gregory*, 501 U.S. at 458. The clear statement rule exists in order to protect "th[is] 'usual constitutional balance' " of power. *See id.* at 460 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))), *Franklin*, 505 U.S. at 801 ("requir[ing] an express statement by Congress before assuming it intended" to subject presidential action to judicial review); *id.* ("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."). Given the central position that the doctrines of federalism and separation of powers occupy in the Constitution's design, this rule also serves to "assure[ ] that the legislature has in fact faced, and intended to bring into issue, the critical matters" of the balance of power among the three branches of the federal government, in the context of separation of powers, and between the federal and state governments, in the context of federalism. *See Gregory*, 501 U.S. at 461; *United States v. Bass*, 404 U.S. 336, 349 (1971).

This clear statement rule has been applied frequently by the Supreme Court as well as the executive branch with respect to statutes that might otherwise be

susceptible of an application that would affect the President's constitutional prerogatives, were one to ignore the constitutional context. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act ("APA"), 5 U.S.C §§ 701–706, authorized "abuse of discretion" review of final actions by the President. The APA authorizes review of final actions by "agencies," which it defines as "each authority of the Government of the United States." 5 U.S.C. § 701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the District of Columbia government — but not the President.

Even though the statute defined agency in a way that could include the President and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court:

> [t]he President is not [expressly] 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.

505 U.S. at 800–01. To amplify, she continued, "[a]s 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 801. If anything, the case for reading the APA provision as applying to the President was stronger than is the case with respect to § 458, because the APA contains a list of express exceptions to its broad coverage and that list does not include the President. One might have contended that the omission of the President from a list of persons excluded is sufficiently clear evidence of a congressional decision to include him within the reach of the APA to alter the otherwise applicable rule of constitutional context. To the contrary, however, the Court affirmed the principle that the inclusion of the President must be express.

In a case that is closely analogous and that involves the President's appointment power, the Supreme Court held that the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, does not apply to the judicial recommendation panels of the American Bar Association because interpreting the statute as applying to them would raise serious constitutional questions relating to the President's constitutional authority to appoint federal judges. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989). The FACA imposes open meeting and reporting requirements on advisory committees, which it defines to be any committee or similar group that is "utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President." 5 U.S.C. app. § 3(2)(c). Two public interest groups, Public Citizen and the Washington Legal Foundation, sought to have FACA applied to the ABA judicial screening committees. The Court unanimously rejected the public interest groups' argument. The majority ruled that while a "straightforward reading," *Public Citizen*, 491 U.S. at 453, of FACA would seem to require its application to the ABA committee, the "cardinal principle" of statutory interpretation that a statute be interpreted to avoid serious constitutional question drove the majority to interpret FACA as not applying to the ABA committee. *Id.* at 465–67. Notably, the majority stated, "[o]ur reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government," and "[t]hat construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable." [4] *Id.* at 466.

A recent Supreme Court case that applied the clear statement rule in protecting the constitutional separation of powers is *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). This case dealt with the extraterritorial application of the Refugee Act.[5] Prior to 1980, the act provided that the Attorney General was "authorized to withhold deportation of any alien *within the United States*" who was a refugee.[6] In 1980, the statute was amended to delete the "within the United States" language and to make it mandatory that the Attorney General not deport the refugee.[7] The petitioners, an organization advocating on behalf of Haitian refugees, plausibly argued that, by deleting "within the United States," Congress plainly meant to give the act extraterritorial application. *See id.* at 170. The Court rejected this argument, holding that "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* at 188.[8]

Sale is but another example of the clear statement principle: Statutes will be read to exclude what they do not explicitly include when the inclusionary reading would involve a possible conflict with the President's unique responsibilities, so as potentially to upset the constitutional balance of powers. The President's constitutional appointment power, expressly assigned to him and him alone in Article II, is similarly a unique responsibility of the President, one that has been recently

[4] The three concurring justices reached the merits and found that application of the FACA would violate the Appointments Clause (as opposed to raising a serious question). 491 U.S. at 482–89 (Kennedy, J., concurring).

[5] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107.

[6] Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 243(h), 66 Stat. 163, 214 (1952) (emphasis added).

[7] Pub. L. No. 96–212, § 203(e), 94 Stat. at 107.

[8] To the same effect, *see American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989).

termed a "central feature" of the President's constitutional role under Article II. *Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring).

In addition to the numerous Supreme Court precedents,[9] this Department has frequently applied the clear statement rule in the context of the separation of powers between the executive and legislative branches. For example, we applied this rule to a closely analogous question. We were asked whether the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 ("ADEA"), prohibits the President from considering the age of judicial candidates when determining whom to nominate for federal judgeships. *See Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388 (1979). We concluded that the ADEA should not be read to apply to the presidential appointment of federal judges:

> The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the few administrative mechanisms through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the [ADEA].

Id. at 389.

In another important instance, Congress sought to apply the criminal contempt of Congress statute against the administrator of the Environmental Protection Agency when she asserted a claim of executive privilege on behalf of the President. That statute has a broad formulation that is similar to the formulation of § 458. Specifically, it applies to "[e]very person who ha[s] been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers." 2 U.S.C. § 192.

[9] The foregoing discussion analyzes only a sample of these precedents. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), is yet another such example. A former executive branch employee brought a variety of claims against former President Nixon arising from the employee's termination. The Court held that the President was immune from suit because Congress had failed to create a cause of action expressly against the President of the United States, stating "[w]e consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749; *see also id.* at 748 & n.27. Other examples include *United States ex rel. French v Weeks*, 259 U.S. 326, 332 (1922), and *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

We concluded that, despite the broad language, the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984). First, we examined the legislative history of the contempt statute and determined that nothing in that history expressed an intent to apply the statute in the context of assertions of executive privilege. *Id.* at 129–32. We then cited the general rule that statutes are to be construed to avoid serious constitutional questions and further elaborated that, "[w]hen a possible conflict with the President's constitutional prerogatives is involved, the courts are even more careful to construe statutes to avoid a constitutional confrontation." *Id.* at 132. We then discussed how application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress. Because Congress had no "compelling need" to create this disruption, "the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of executive privilege." *Id.* at 140.

Then-Assistant Attorney General William Barr opined that the Anti-Lobbying Act, 18 U.S.C. § 1913, does not apply fully against the President. *See Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 304–06 (1989). The Anti-Lobbying Act prohibits any appropriated funds from being "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress." 18 U.S.C. § 1913. The statute provided an exception for communications by executive branch officers and employees if the communication was made pursuant to a request by a member of Congress or was a request to Congress for legislation or appropriations. Assistant Attorney General Barr concluded that applying the Act as broadly as its terms might otherwise allow would raise serious constitutional questions as an infringement of the President's Recommendations Clause power.

It is also the long-standing position of the Department of Justice that 18 U.S.C § 208 does not apply to the President. That statute prohibits any "officer or employee of the executive branch" from "participat[ing] personally and substantially" in any particular matter in which he or she has a personal financial interest. *Id.* In the leading opinion on the matter, then-Deputy Attorney General Laurence Silberman first determined that the legislative history disclosed no intention to cover the President and doing so would raise "[s]ome doubt . . . as to the constitutionality" of the statute, because the effect of applying the statute to the President would be to impose a qualification on his serving as President. *See* Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 2, 5 (Aug. 28, 1974).

In the Rehnquist Memorandum, we considered a statute the text of which is similar to § 458. 5 U.S.C. § 6105 provides that, "[a]n Executive department may not be closed as a mark to the memory of a deceased former official of the United States." Then-Assistant Attorney General William Rehnquist first reviewed the legislative history and determined that there was nothing to indicate that Congress meant to prohibit the President from closing a department as a mark to the memory of a deceased former official and that instead the purpose of the act was to prevent department heads from closing their departments. He then noted the general rule that statutes "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Rehnquist Memorandum at 3.

In summary, there are numerous precedents of the Supreme Court as well as of the Department of Justice [10] holding that a statute that does not by its express terms apply to the President may not be applied to the President if doing so would raise a serious question under the separation of powers.[11] We believe there to be no dispute that such a serious question would be raised were § 458 read to apply to presidential appointments to the federal judiciary. In the next section we amplify on the reasons for that conclusion.

B

Congressional attempts to limit the class of persons from whom the President may appoint the highest officers of the government, including judges, raise serious constitutional concerns. The Appointments Clause provides that the President

[10] Again, the foregoing discussion covers a small sample of the Department's applications of this principle. Other significant examples include: *The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159 (1986); *Inter-Departmental Disclosure of Information Submitted under the Shipping Act of 1984*, 9 Op. O.L.C. 48 (1985); *Removal of Members of the Advisory Council on Historic Preservation*, 6 Op. O.L.C. 180, 185 n.7 (1982).

[11] The clear statement principle we have identified does not apply with respect to a statute that raises no separation of powers questions were it to be applied to the President. So, for instance, the Department of Justice has construed the federal bribery statute as applying to the President even though it does not expressly name the President. Memorandum for Laurence H. Silberman, Deputy Attorney General, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Whether Governor Rockefeller, If Appointed as Vice President, Is Required to Execute a Blind Trust in Order to Avoid Possible Violation of 18 U.S.C. § 208* at 2 (Aug. 20, 1974). 18 U.S.C § 201 establishes that "[w]hoever, being a public official" receives a bribe commits a criminal offense. *Id.* § 201(c)(1)(B). "Public official" is defined as a "Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States . . . in any official function . . . ." *Id.* § 201(a)(1). Application of § 201 raises no separation of powers question, let alone a serious one. The Constitution confers no power in the President to receive bribes; in fact, it specifically forbids any increase in the President's compensation for his service while he is in office, which is what a bribe would function to do. *See* U.S. Const. art. II, § 1, cl. 7. Moreover, the Constitution expressly authorizes Congress to impeach the President for, inter alia, bribery. *Id.* § 4. The Constitution further provides that any party impeached and convicted may "nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." *Id.* art. I, § 3. We also opined that the Federal Advisory Committee Act applies to the Department of Justice Journal Board, because this application raises no separation of powers concerns. *See Application of Federal Advisory Committee Act to Editorial Board of Department of Justice Journal*, 14 Op. O.L.C. 53 (1990).

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . but 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.

U.S. Const. art. II, § 2, cl. 2. Because the Constitution gives the President alone the power to nominate non-inferior officers of the United States, any attempt by Congress to restrict his choice of nominees, otherwise than by the Senate's refusing its consent to a nomination, is questionable under the Constitution. We hasten to add that we do not take a final position on the difficult question of whether, and under what circumstances, Congress has authority to impose a qualification requirement on a constitutional office. It is sufficient for the purposes of this memorandum to demonstrate that applying a restriction such as that contained in § 458 to presidential appointment of federal judges would at a minimum raise a serious constitutional question. This office has not had the occasion to opine on this issue, and we cite previous statements for the sole purpose of demonstrating the difficulty and seriousness of the questions that the issue raises.

As the United States Court of Appeals for the District of Columbia Circuit recently wrote, "Congressional limitations—even the placement of burdens—on the President's appointment power may raise serious constitutional questions. . . . Presidents have often viewed restrictions on their appointment power not to be legally binding." *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (Silberman, J.), *cert. dismissed*, 513 U.S. 88 (1994). To support this conclusion, the court cited, as examples, statements issued by President Bush upon signing various pieces of legislation. *See Statement on Signing the Cranston-Gonzalez National Affordable Housing Act*, 2 Pub. Papers of George Bush 1699, 1701 (Nov. 28, 1990) ("National Affordable Housing Act Statement"); *Statement on Signing the National and Community Service Act of 1990*, 2 Pub. Papers of George Bush 1613, 1614 (Nov. 16, 1990); *Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990*, 2 Pub. Papers of George Bush 1609, 1610 (Nov. 30, 1989). President Bush asserted, for example, that limitations set out in legislation "do[ ] not constrain the President's constitutional authority to appoint officers of the United States, subject only to the advice and consent of the Senate." National Affordable Housing Act Statement at 1701, *quoted in part in NRA Political Victory Fund*, 6 F.3d at 824–25.[12]

[12] The position taken by President Bush was based on the principles set out in Justice Kennedy's concurring opinion in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), joined by Chief Justice Rehnquist and Justice O'Connor. "By its terms," Justice Kennedy wrote, "the [Appointments] Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Id.* at 483. Furthermore, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate

There has been a particular concern about applying qualifications for appointments of Article III judges. In 1979, for example, our Office rejected the argument that the ADEA applied to the President's choice of nominees for judgeships. *Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388 (1979). We there accepted that Congress might impose some qualifications on some constitutional offices, but nevertheless noted that applying the ADEA to judicial nominations would constrain the President's ability to exercise a long-term influence on the development of the law. We concluded that, "because of the gravity of the constitutional questions [a requirement to ignore the age of potential nominees] raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way." *Id.* at 389. As we stressed, "[t]he power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President." *Id.*

The Constitution vests in the President the power to nominate judges and vests in the Senate the power to give, or refuse, its advice and consent to the nominations. Without taking a position on whether, and under what circumstances, Congress has authority to impose qualification requirements on constitutional offices, it is clear that, if a Congress tried to bind future Presidents and future Senates by imposing statutory constraints on eligibility, such legislation would raise serious constitutional questions.

II

The clear statement rule settles the meaning of § 458. Section 458 does not apply to presidential appointments of federal judges. Even without applying this constitutionally based principle, however, analysis of the text of § 458, its predecessor, and the text of the Act of 1911 taken as a whole, establishes the same result. That result is further supported by every available piece of contemporaneous, extra-statutory evidence of the understanding of members of Congress, as well as by a consistent practice of non-application of the statute to the appointment of federal judges. In this part, we discuss the meaning of § 458 as it might be ascertained on the face of the statutes themselves, without reference to the clear statement principle. In the subsequent part, we review the contemporaneous congressional understandings of the statute's meaning. Finally, we review some of the instances in which related persons within the meaning of the statute have been appointed to the federal bench by the President.

As indicated earlier, the present statute appears to have originated as Act of Mar. 3, 1887, ch. 373, § 7, 24 Stat. 552, 555. In its original form, the provision stated that:

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any intrusion by the Legislative Branch." *Id.* at 485. With regard to the highest officers of the government, therefore, the President "has the sole responsibility" for making nominations, *id.* at 487, and Congress may not intrude.

> no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed *by such court or judge* to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.

Id. (emphasis added). In that version, the statute referred specifically to appointments *by the courts or judges*, and could not be understood to encompass presidential appointments as well. In our constitutional scheme, judicial appointments are not made by judges, but rather have always been vested in the President with the advice and consent of the Senate.

The statute was next codified as Act of Aug. 13, 1888, ch. 866, §7, 25 Stat. 433, 437. In that form too, it prohibited only the appointment of any person related to any federal justice or judge within the degree of first cousin "by such court or judge."

This provision was repealed by the Act of Mar. 3, 1911, ch. 231, §297, 36 Stat. 1087, 1168.[13] The language substituted for the repealed provision did not, in terms, refer only to appointment "by such court or judge." Instead, it stated:

> No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court.

Id. §67, 36 Stat. at 1105.

The repeal and re-enactment in 1911 left the description of the offices or duties to which related persons may not be appointed unchanged. It did alter the description of the persons who may not make such appointments. Whereas prior to 1911 only a "court or judge" was prohibited from appointing related persons to such offices or duties, after 1911, the prohibition was simply that no related person could be appointed to such offices or duties. The evident purpose of the change was to remove an obvious loophole. Prior to 1911, the clerk of court, or the chief bailiff, or the chief stenographer, or any other official who worked in a court could appoint relatives of sitting judges to positions on his or her staff, without

[13]The Act of Mar. 3, 1911, was designed to restructure the federal judicial system. As Senator, later Justice, Sutherland explained, the legislation was:

> framed upon the theory that we shall hereafter have but one court of original jurisdiction, instead of two, as we have at present . . . . [W]e have to-day two separate and distinct courts of jurisdiction—a circuit court of the United States and a district court of the United States. Jurisdiction has been conferred upon the district court in a class of cases which might as well have been conferred upon the circuit court and jurisdiction has been conferred upon the circuit court which might as well have been conferred upon the district court . . . . There is absolutely no reason why the circuit court should possess a certain class of jurisdiction rather than that it should be possessed by the district court. The vital thing is to have a court of original jurisdiction for the trial of cases, and then a court of appellate jurisdiction, which may review the decisions of the trial court

46 Cong. Rec. 2137 (1911).

violating the statute. Because such individuals as these might possibly be susceptible to influence by sitting judges, the predecessor statute seemed to permit an evasion of the statute's anti-nepotistical purposes through the expedient of having a non-judge who worked in the court appoint a judge's relative.

Beyond closing this appointment loophole, the statute remained otherwise intact. Because the language of the statute describing the offices or duties to which related persons may not be appointed remained the same, no change was made in the class of offices or duties covered by the statute—a class that at no time included judges.

This conclusion is reinforced by a rule of construction that was written into the Act of 1911 itself, which reads as follows:

> [t]he provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

Id. § 294, 36 Stat. at 1167.

With respect to its description of the offices or duties to which related persons may not be appointed, section 297 of the Act is "substantially the same" as prior law. Nor is any "change of intent . . . clearly manifest" by reason of the linguistic change from the earlier provision. Accordingly, following the rule of construction set forth in the statute itself, we find that it does not vary prior law—judgeships were not in that class prior to 1911, and they are not in that class subsequent to 1911.[14]

[14] We note that our reading does not violate the maxim of statutory construction that words in a statute should not be construed so as to render them meaningless. It is true that the vast majority of the positions to which § 458 applies are "employments" rather than "offices." For a discussion of the difference between an employment and an office, see *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867); *United States v. Germaine*, 99 U.S. 508 (1878); *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice). Nevertheless, the Supreme Court long ago concluded that the clerk of a district court is an officer in the constitutional sense, *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), and has recently reaffirmed that view, *see Morrison v. Olson*, 487 U.S. 654 (1988). This office has traditionally been filled by an appointment "by [a] court[] of law," specifically by the chief judge of the relevant district or circuit. We believe that the provision would continue to apply to appointments to the office of clerk by a federal judge.

We also note that our view avoids a serious question regarding the legality of the recent designation of District Judge Gordon Thompson, Jr., to sit by designation on a panel of the United States Court of Appeals for the Ninth Circuit with his brother, Judge David Thompson. *See* Howard Mintz, *Nepotism Law Threatens Nomination; Mother and Child Reunion on Bench?*, Legal Times, Dec. 11, 1995, at 8. Because we do not believe that § 458 applies to the office of judge, it is our conclusion that Chief Judge J. Clifford Wallace could not have violated § 458 by exercising his authority under 28 U.S.C § 292(a) to designate District Judge Thompson to sit as a Judge on a Ninth Circuit panel with his brother.

III

We have reviewed the legislative debate over the Act of 1911, and have found no evidence that the textual alteration of the earlier statutory language was intended to work any change in the class of offices or duties covered, and certainly none that it was meant to reach presidential appointments to the federal bench. Moreover, contemporaneous and near contemporaneous evidence of Congress's own understanding clearly substantiates that Congress did not intend to extend the scope of the earlier prohibition to include judicial appointments by the President. Section 297 of the Act of Mar. 3, 1911, was to go into effect on January 1, 1912, abolishing the circuit courts and causing the district courts to succeed them, so that clerks would have to be appointed for the district courts. Shortly before the law went into effect, it was pointed out in Congress that these changes "would prevent any man who is related within certain degree by affinity or consanguinity to the district judge from being appointed clerk." 48 Cong. Rec. 309 (1911) (remarks of Rep. Clayton). Thus, even incumbents who had not been appointed to circuit court clerkships by judicial relatives would be ineligible to be appointed to clerkships in the succeeding district courts if it happened that their close relatives sat on those district courts. Several members of Congress objected to that unforeseen and unintended outcome. Legislation was introduced, and eventually adopted, to "grandfather in" such incumbents.[15]

In the course of the House debate on this amendatory measure, several members adverted to the prohibition of the then-recent prior law. Congressman Mann described section 297 as "providing that *the judge of the Federal court* shall not be permitted to appoint his first cousin an officer of the court . . . . It should be the policy of the country to uphold the dignity of the Federal bench, to guard against the possibility of favoritism *on the part of the judges* because of close kinship." 48 Cong. Rec. at 310 (remarks of Rep. Mann) (emphasis added). Similarly, in colloquy, Mr. Hardy asked if the proposed amendment "opposes the appointment of relatives by public officials?", and Mr. Bartlett, referring to section 297, responded that "[t]he original section, I apprehend, had that purpose in view." *Id.* Plainly, then, the members of the House interested in the amendment in the December 1911 debate understood that the March 1911 enactment had only restricted the power of judges to appoint their near kin to positions with their courts. Although these remarks occurred after the enactment of section 297, they were made only a few months after that section had become law, and thus provide useful evidence of what the enacting Congress intended by it.

Later codifications carried forward the language adopted in 1911, with changes not relevant here. *See* Act of June 25, 1948, ch. 646, § 458, 62 Stat. 869, 908;

[15] *See* Act of Dec. 21, 1911, ch. 4, 37 Stat. 46 ("[N]o such person at present holding a position or employment in a circuit court shall be debarred from similar appointment or employment in the district court succeeding to such circuit court jurisdiction.").

H.R. Rep. No. 80–308, at A55 (1947). In light of this legislative history, we see no reason to suppose that Congress ever intended to do more than to make fully effective the original prohibition against nepotistical appointments *by judges*, and that the sole function of the change of 1911 was to close a loophole in the original statutory scheme.

IV

Finally, we note that the consistent practice since the present version of § 458 was enacted in 1911 has been to construe the statute as not applying to presidential appointments. On at least three occasions since 1911, the President has appointed and the Senate has confirmed relatives within the statutory degree of consanguinity to the same court. In 1914, President Woodrow Wilson, just three years after the enactment of § 458 in its present form, appointed Augustus Hand to be a District Judge for the Southern District of New York, even though his first cousin, Learned Hand, had been a District Judge of that court since 1909. In 1927, President Coolidge elevated Judge Augustus Hand to be a Circuit Judge on the United States Court of Appeals for the Second Circuit, even though Judge Learned Hand had been appointed to that court three years earlier. More recently, in 1992, President Bush appointed and the Senate confirmed Judge Morris Arnold to be a Circuit Judge on the United States Court of Appeals for the Eighth Circuit, although his brother, Judge Richard Arnold, was already a member of that body.

In addition, if the practical construction of § 458 by the President and the Senate were to hold that it applies to presidential appointments, there would be a significant question as to the validity of a number of appointments where one relative served on an appeals court while another served on a district court. Specifically, it is not clear whether, for purposes of § 458, a district court is a component of the court of appeals for the circuit in which the district is located. Most recently, Diana Motz was confirmed and appointed to the United States Court of Appeals for the Fourth Circuit in 1994, while her husband, Frederick Motz, was a judge for the District of Maryland.

We are not aware of anyone ever proposing that § 458 applies to presidential appointments of federal judges. In this light, applying § 458 to presidential appointments of federal judges would represent a novel construction of the statute. We do not reject this construction, however, because it is novel. We reject it because it is contrary to the statute's language, structure, and purpose, as well as the consistent practice under that statute from the date of its enactment.

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