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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

THEIR OFFICIAL DUTIES

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FOREWORD

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The Attorney General is responsible, "from time to time," to "cause to be edited, and printed in the Government Printing Office [Government Publishing Office], such of his opinions as he considers valuable for preservation in volumes." 28 U.S.C. § 521. The Official Opinions of the Attorneys General of the United States comprise volumes 1–43 and include opinions of the Attorney General issued through 1982. The Attorney General has also directed OLC to publish those of its opinions considered appropriate for publication on an annual basis, for the convenience of the Executive, Legislative, and Judicial Branches and of the professional bar and general public. These OLC publications now also include the opinions signed by the Attorney General. The first 33 published volumes of the OLC series covered the years 1977 through 2009. The present volume 34 covers 2010.

As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Golden, Richard Hughes, Marchelle Moore, Natalie Palmer, Joanna Ranelli, Dyone Mitchell, and Lawan Robinson—in shepherding the opinions of the Office from memorandum form to online publication to final production in these bound volumes.

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Census Confidentiality and the PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 does not require the Secretary of Commerce to disclose census information to federal law enforcement or national security officers where such disclosure would otherwise be prohibited by the Census Act.

January 4, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

You have asked whether the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("PATRIOT Act"), as amended, may require the Secretary of Commerce to disclose census information to federal law enforcement or national security officers where such disclosure would otherwise be prohibited by the Census Act, 13 U.S.C. §§ 8, 9, 214 (2006). We have identified no provisions of the PATRIOT Act that would compel the Secretary to disclose such protected information.[1]

I.

To help promote the public cooperation on which an accurate census largely depends, federal census statutes have long provided assurances of confidentiality to respondents. *See generally Baldrige v. Shapiro*, 455 U.S. 345, 354, 356–59 (1982). This Office has described the current Census Act confidentiality provisions as "the most recent codification of a statutory confidentiality requirement that dates back more than a century and that bars the disclosure of covered census information by census

[1] We solicited views from the Federal Bureau of Investigation ("FBI") and the Criminal, National Security, and Civil Rights Divisions of the Department of Justice. The Criminal Division, upon review, offered no views. The FBI and the Civil Rights Division concurred with the Department of Commerce in the view that no provisions of the PATRIOT Act override the Census Act's protections for covered census information possessed by the Commerce Department. The National Security Division disagreed, contending that section 215 of the PATRIOT Act, as amended, may allow for a court order to compel the Secretary to disclose furnished census information. We address this provision and the National Security Division's views in greater detail below.

officials." *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, __ Op. O.L.C. Supp. __, at *1 (May 18, 1999) ("IIRIRA Opinion"). The Census Act provides:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, except as provided in section 8 or 16 or chapter 10 of this title or section 210 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 or section 2(f) of the Census of Agriculture Act of 1997—
>
> (1) use the information furnished under the provisions of this title [the Census Act] for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

13 U.S.C. § 9(a).

The cross-referenced statutes in section 9(a) presently provide exceptions only for disclosure of transcripts or reports containing information furnished by a respondent when requested by that respondent (or his or her heir, successor, or authorized agent), *see* 13 U.S.C. § 8(a); certain "tabulations and other statistical materials" that the Secretary may produce for private parties or government agencies, provided that the disclosed materials do not reveal "the information reported by, or on behalf of, any particular respondent," *id.* § 8(b); certain address information that may be disclosed to local government census liaisons under section 16 of the Census Act, *id.* § 16; certain business data and information on business enterprises that may be shared with the Bureau of Economic Analysis and the Bureau of Labor Statistics under sections 401 and 402 of the Census Act, *id.* §§ 401, 402; certain disclosures to the Census Monitoring Board permitted by section 210 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998,

Pub. L. No. 105-119, 111 Stat. 2471, 2487 (1997); and certain disclosures to the Department of Agriculture permitted by the Census of Agriculture Act of 1997, Pub. L. No. 105-113, §§ 2(f), 4(a)(1), 111 Stat. 2274–76, for the purpose of facilitating the agriculture census. In addition, section 9(b) of the Census Act exempts certain information relating to the census of governments from section 9(a)'s confidentiality protections, *see* 13 U.S.C. § 9(b), and certain other provisions outside the Census Act expressly address the confidentiality of covered census information under section 9. *See, e.g.*, 42 U.S.C. § 11608 (2006) (establishing procedures with respect to information protected by section 9 for purposes of implementing an international convention); 42 U.S.C. § 6274 (2006) (specifically permitting disclosure of certain information "without regard to" section 9); 44 U.S.C. § 2108(b) (2006) (regulating release of certain historic census records in the custody of the Archivist of the United States).

Reinforcing the confidentiality protections of section 9, section 8(c) of the Census Act provides that "[i]n no case shall information furnished under this section"—which, as noted, authorizes the Secretary to furnish statistical tabulations of census data that "do not disclose the information reported by, or on behalf of, any particular respondent," as well as census transcripts and reports when requested by the respondent (or the respondent's heir, successor, or authorized agent)—"be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title." 13 U.S.C. § 8(c); *see also* 15 C.F.R. § 80.5 (2009) (noting this statutory prohibition). Under section 214 of the Census Act, violations of section 9 by any census employee, staff member, or local liaison are subject to criminal punishment. *See* 13 U.S.C. § 214.

Enacted into law after the September 11, 2001 attacks, the PATRIOT Act made extensive changes to existing statutes governing investigations related to terrorism, intelligence, and national security. Although some PATRIOT Act provisions were subject to a statutory sunset, Congress reauthorized provisions of the original PATRIOT Act, with amendments, in the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 ("Reauthorization Act"). The PATRIOT Act, as amended, authorized a number of new or modified

forms of surveillance, information-gathering, and information-sharing for federal law enforcement and national security officers.[2]

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[2] You identified for our review PATRIOT Act provisions establishing the following surveillance and information-gathering powers for certain federal officers: authority to obtain so-called "roving" wiretaps under foreign intelligence surveillance provisions, 50 U.S.C. § 1805(c)(2)(B) (2006) (containing language originating in PATRIOT Act § 206); authority to conduct surveillance of certain agents of foreign powers for longer periods than previously authorized, 50 U.S.C.A. § 1805(d) (West Supp. 2009) (containing language originating in PATRIOT Act § 207); authority for certain warrant-based seizures of voicemail messages, 18 U.S.C. §§ 2510(14), 2703(a)–(b) (including provisions originating in PATRIOT Act § 209); authority to seek court orders for production of "tangible things" relevant to certain terrorism and intelligence investigations, 50 U.S.C.A. § 1861 (West 2003 & Supp. 2009) (including provisions originating in PATRIOT Act § 215); revised standards for obtaining certain electronic surveillance warrants, 50 U.S.C.A. §§ 1804(a)(6)(B), 1823(a)(6)(B) (West 2003 & Supp. 2009) (containing language originating in PATRIOT Act § 218); and authority to seek court orders compelling production of certain educational records possessed by educational agencies and institutions for use in certain terrorism-related investigations and prosecutions, 20 U.S.C. § 1232g(j) (2006) (originating in PATRIOT Act § 507). You also identified one provision regarding information-sharing within the federal government, section 508, which authorized the Attorney General or a designee above a specified rank to apply for an ex parte court order to obtain certain confidential educational reports, records, and information possessed by the Department of Education for use in certain terrorism-related investigations and prosecutions. 20 U.S.C. § 9573(e) (2006) (containing language originating in PATRIOT Act § 508).

We have independently identified and reviewed several other information-sharing provisions of the PATRIOT Act (as amended), including provisions permitting disclosure within the federal government of certain intelligence-related grand jury matters, Fed. R. Crim. P. 6(e)(3)(D) (containing language originating in PATRIOT Act § 203(a)); provisions permitting sharing within the federal government of certain intelligence-related information contained in certain electronic intercepts, 18 U.S.C. § 2517(6) (2006) (originating in PATRIOT Act § 203(b)); provisions permitting sharing within the federal government of certain intelligence-related information "obtained as part of a criminal investigation," 50 U.S.C.A. § 403-5d (West 2003 & Supp. 2009) (containing language originating in PATRIOT Act § 203(d)); provisions authorizing the Secretary of the Treasury to share certain financial records and reports with other agencies, 12 U.S.C. §§ 3412(a), 3420(a)(2) (2006), 31 U.S.C. § 5319 (2006) (containing provisions originating in PATRIOT Act § 358); provisions requiring an entity in the Treasury Department to analyze, disseminate, and provide access to certain information relating to financial crimes, 31 U.S.C. § 310 (2006) (containing provisions originating in PATRIOT Act § 361); provisions requiring the Attorney General and FBI Director to provide the State Department and Immigration and Naturalization Service with access, for visa-related purposes, to criminal history record information in certain files, 8 U.S.C. § 1105(b) (2006) (originating in PATRIOT Act § 403(a)); provisions encouraging dissemination of

The PATRIOT Act includes certain express exceptions to otherwise applicable confidentiality provisions. Section 508 of the PATRIOT Act provided for authorized applications by certain high-ranking Justice Department officials for an ex parte court order requiring production of certain educational records—possessed by the Department of Education and otherwise subject to statutory confidentiality requirements—for use in certain terrorism-related investigations and prosecutions. PATRIOT Act § 508 (repealed by Pub. L. No. 107-279, §§ 401(a)(6), 403(1), 116 Stat. 1940, 1983, 1985 (2002)); 20 U.S.C. § 9573(e) (2006) (recodifying similar authorization). This provision authorized court orders "requiring" the Secretary of Education to permit the Attorney General or his designee to "collect" and "retain, disseminate, and use" these records for official purposes related to covered investigations and prosecutions, "[n]otwithstanding" statutory disclosure prohibitions that would otherwise apply to those specific records. PATRIOT Act § 508; 20 U.S.C. § 9573(e). In addition, among numerous other changes, the PATRIOT Act amended applicable laws to permit wider sharing of certain evidence collected by grand juries, *see* Fed. R. Crim. P. 6(e)(3)(D), and broader disclosure within the government, "[n]otwithstanding any other provision of law," of certain intelligence-related information obtained as part of a criminal investigation. 50 U.S.C.A. § 403-5d (West 2003 & Supp. 2009); *see also supra* note 2. None of the PATRIOT Act's provisions expressly references the Census Act or its confidentiality protections.

You have asked whether any of the information-gathering or information-sharing provisions of the PATRIOT Act, as amended, may override the confidentiality requirements of the Census Act so as to require the Commerce Secretary to disclose otherwise covered census information to federal law enforcement or national security officials. Our understanding from you is that you are not asking us to address what effect, if any, the Census Act confidentiality provisions have on census-related infor-

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information collected under certain statutory provisions "so it may be used efficiently and effectively for national intelligence purposes," 50 U.S.C. § 403-1(f)(6) (2006) (containing language originating in PATRIOT Act § 901); and provisions generally requiring "expeditious[]" disclosure to intelligence officials, pursuant to established guidelines, of foreign intelligence acquired by federal law enforcement officers "in the course of a criminal investigation," 50 U.S.C. § 403-5b (2006) (containing language originating in PATRIOT Act § 905).

mation or communications that could possibly be obtained through surveillance, interception, or other means apart from a direct request to the Commerce Department. Nor are you asking us to address the effect, if any, of PATRIOT Act provisions on the confidentiality under the Census Act of census information possessed not by the Commerce Department, but by third parties, such as those furnishing census information. We have reviewed the PATRIOT Act provisions that you have identified, and we have also conducted an independent review of the statute. With one exception, we conclude that none of the provisions appears on its face to require the Secretary of Commerce to disclose census information otherwise subject to the confidentiality protection mandated by the Census Act. We therefore do not discuss the entirety of the PATRIOT Act in detail and instead turn to the one provision that, in our judgment, warrants further analysis.

In section 215 of the PATRIOT Act, Congress amended provisions of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C.A. §§ 1801–1885c (West 2003 & Supp. 2009), that previously authorized court orders to obtain records from specified types of businesses, *see* 50 U.S.C. § 1862 (2000), to permit orders for production of "any tangible things" for use in certain terrorism and intelligence investigations, *see* 50 U.S.C.A. § 1861(a)(1) (West 2003 & Supp. 2009). As amended by the Reauthorization Act and two other statutes, *see* Reauthorization Act § 106; USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, §§ 3–4, 120 Stat. 278, 278–81; Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314(a)(6), 115 Stat. 1394, 1402, section 215 now provides:

> Subject to paragraph (3) [which requires especially high-level approval within the FBI for certain categories of records], the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is

> not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

50 U.S.C.A. § 1861(a)(1).[3]

II.

Section 215, by its plain terms, provides the FBI with broad authority to obtain "tangible things (including books, records, papers, documents, and other items)" for use in certain terrorism and intelligence investigations.[4] And, as a general matter, the PATRIOT Act and its legislative history suggest an intention on the part of Congress to provide the federal government with substantial new powers to combat terrorism and protect national security. *See, e.g.*, H.R. Rep. No. 109-174, at 7 (2005) (conference report on Reauthorization Act describing PATRIOT Act as intended "[t]o better equip Federal law enforcement and the intelligence community with the resources necessary to confront . . . modern threats"); H.R. Rep. No. 107-236, pt. 1, at 41 (2001) (committee report on predecessor bill to the PATRIOT Act describing legislation as "provid[ing] enhanced investigative tools and improv[ing] information sharing for the law enforcement and intelligence communities to combat terrorism and terrorist-related crimes").

There is, however, a long history of congressional enactments providing broad confidentiality protection to census information. The Supreme

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[3] The Reauthorization Act provided that the FISA provisions amended by section 215 would revert to their pre-PATRIOT Act form on December 31, 2009, but would remain in effect "[w]ith respect to any particular foreign intelligence investigation that began before the date on which [these] provisions . . . cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect." *See* Reauthorization Act § 102(b). Congress recently postponed the December 31, 2009 sunset in the Reauthorization Act until February 28, 2010. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 1004(a), 123 Stat. 3409, 3470. Legislation pending in Congress would further reauthorize section 215 with certain amendments. *See, e.g.*, S. 1692, 111th Cong. (as reported by the S. Comm. on the Judiciary, Oct. 13, 2009).

[4] For purposes of this opinion, we assume without deciding that, even though section 215 is not expressly cast as an intragovernmental information-sharing provision, section 215 orders may require "production" of "tangible things" not only from parties outside the federal government, but also from agencies within it.

Court has construed sections 8 and 9 of the Census Act to "embody explicit congressional intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals," *Baldrige*, 455 U.S. at 361, and lower courts have likewise deemed it "'abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality,'" *Carey v. Klutznick*, 653 F.2d 732, 739 (2d Cir. 1981) (quoting *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981)); *see also United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568, 569–70, 572 (S.D.N.Y. 1958) (holding that "the purpose to protect the privacy of the information furnished to the Government is so clear and the public policy underlying the purpose so compelling that absent a clear Congressional grant, there is no basis upon which to direct the Department of Commerce to make available to the Department of Justice or to any person the reports here sought"). Moreover, Congress, far from disavowing this judicial construction, has amended the Census Act several times—including through the addition of further express exceptions to section 9—without limiting or repealing the courts' expansive interpretation of the Act's prohibition (absent a clear exception) on disclosure of covered census information possessed by the Commerce Department.[5]

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[5] *See, e.g.*, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2471, 2487 (1997); Census of Agriculture Act of 1997, Pub. L. No. 105-113, §§ 2(f), 4(a)(1), 111 Stat. 2274–76; Census Address List Improvement Act of 1994, Pub. L. No. 103-430, § 2(b), 108 Stat. 4393, 4394; Foreign Direct Investment and International Financial Data Improvements Act of 1990, Pub. L. No. 101-533, § 5(b)(2), 104 Stat. 2344, 2348; Pub. L. No. 87-813, 76 Stat. 922 (1962). Indeed, the legislative history of census-related enactments includes repeated acknowledgments of a strong statutory policy of census confidentiality. *See, e.g.*, S. Rep. No. 105-141, at 4 (1997) (describing express exception added to section 9 as "grant[ing] the Secretary of Commerce the authority to provide information [covered by that section] to the Secretary of Agriculture"); H.R. Rep. No. 105-296, at 4 (1997) (same); S. Rep. No. 93-1183, at 70 (1974) (committee report on federal privacy legislation describing census statutes as "prohibit[ing] publication of data gathered by the [Census] Bureau in identifiable form and strictly govern[ing] confidentiality"); H.R. Rep. No. 93-1416, at 12 (1974) (committee report on federal privacy legislation describing the "[l]aws relating to the Bureau of the Census" as "very strict, limiting access to such records only to Census employees"); S. Rep. No. 87-2218, at 1 (1962) (noting that "[o]riginal reports filed with the Bureau of the Census are confidential" under census statutes); H.R. Rep. No. 60-960, at 23 (1908) (describing predecessor to section 9 as intended to provide "a more effective guaranty than heretofore of the confidential character of the returns as

The question, therefore, is whether the broad but general language in section 215 should be construed to override the well-established confidentiality protections set forth in the Census Act, even though section 215 contains no express and specific statement indicating an intention to do so. Of course, strictly speaking, the plain text of section 215 could be read to conflict with the confidentiality provision of the Census Act, as the phrase "any tangible things" could be construed to encompass census records. Nonetheless, we think section 215 is better read not to have this significant consequence, and prior executive branch precedent addressing when and whether a subsequent statute should be construed to cut back on the confidentiality of census records supports that conclusion.

Indeed, for more than sixty years, the Executive Branch has consistently employed a strong presumption that statutes affecting access to information in general should not be construed to overcome the specific protections afforded to covered census information by the Census Act. In a 1944 Attorney General opinion, for example, we concluded that a statute generally requiring transfer of records to the National Archives did not remove statutory confidentiality protections applicable to census records. *Confidential Treatment of Census Records*, 40 Op. Att'y Gen. 326, 328. The statute at issue there provided that "'[a]ll archives or records belonging to the Government of the United States (legislative, executive, judicial, and other) shall be under the charge and superintendence of the Archivist to th[e] extent" of, among other things, permitting the Archivist "to make regulations for the arrangement, custody, use, and withdrawal of material deposited in the National Archives Building.'" *Id.* at 327 (quoting Act of June 19, 1934, ch. 668, § 3, 48 Stat. 1122, 1122). The statute further provided that "'[a]ll Acts or parts of Acts relating to the charge and superintendency, custody, preservation, and disposition of official papers and documents of executive departments and other governmental

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needed in many cases and desirable in all to enlist that public confidence without which census inquiries must fail"); *see also* Proclamation No. 1898 (Nov. 22, 1929) (Pres. Hoover) ("No person can be harmed in any way by furnishing the information required [by the census]. The Census has nothing to do . . . with the enforcement of any national, state, or local law or ordinance."); *see generally Baldrige*, 455 U.S. at 356–58 (reviewing history of census statutes and concluding that the history "reveals a congressional intent to protect the confidentiality of census information by prohibiting disclosure of raw census data reported by or on behalf of individuals").

agencies inconsistent with the provisions of this Act are hereby repealed.'" *Id.* (quoting Act of June 19, 1934, ch. 668, § 11, 48 Stat. 1122, 1124). The Acting Attorney General concluded that census records could be transferred to the custody of the Archivist under these provisions. However, even in the face of language expressly repealing "[a]ll" inconsistent federal statutes, the Acting Attorney General determined that the Archivist lacked the discretion—otherwise provided as part of the authorizing statute creating the Office of the Archivist—to allow for the dissemination and use of the transferred census records. Census records transferred to the custody of the Archivist remained subject to confidentiality statutes specific to census information, as "[i]t would require very clear language in a general statute relating to the custody of records to justify attributing to the Congress an intention to depart from" the policy of census confidentiality. *Id.* at 328.[6]

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[6] In 1950, Congress amended the statutes governing the National Archives of the United States to provide, among other things, that

> [w]henever any records the use of which is subject to statutory limitations and restrictions are . . . transferred [to the National Archives], permissive and restrictive statutory provisions with respect to the examination and use of such records applicable to the head of the agency from which the records were transferred or to employees of that agency shall thereafter likewise be applicable to the Adminstrator [of General Services, who oversaw the National Archives under the statute], the Archivist, and to the employees of the General Services Administration.

Federal Records Act of 1950, Pub. L. No. 81-754, sec. 6(d), § 507(b), 64 Stat. 578, 583, 587; *see also* Pub. L. No. 90-620, 82 Stat. 1238, 1288 (1968) (codifying similar provision at 44 U.S.C. § 2104). The amended statute provided, however, that such statutory restrictions would remain in effect for fifty years unless the Administrator extended the restrictions for a further period. *See* Federal Records Act § 507(b); *see also* Pub. L. No. 90-620, 82 Stat. at 1288 (codifying similar provision at 44 U.S.C. § 2104). In 1973, this Office advised that the "plain language" and "history" of these provisions expressly governing agency records "constitute[d]" the "very clear language" required to supersede census confidentiality under the 1944 Attorney General opinion, and thus that the Archivist had authority under the statute to disclose census records after fifty years notwithstanding a 1952 agreement between the Census Bureau and the Archivist that barred disclosure of census records for seventy-two years. *See* Memorandum for William G. Casselman II, General Counsel, General Services Administration, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, at 7, 8 (June 14, 1973).

In further amendments to these statutes in 1978, Congress generally shortened to thirty years the period during which statutorily protected documents must remain confidential, but also provided specifically that "any release" of "census and survey records of the

The expectation that Congress would not cut back on the confidentiality of census records without doing so in a very clear manner has governed executive branch interpretation in subsequent decades. For example, the Acting Attorney General concluded in 1962 that section 9's confidentiality protections applied to certain surveys then authorized by the Census Act but exempt from Census Act provisions penalizing false responses and failures to respond (and thus considered "voluntary"). *Confidentiality of "Voluntary" Reports Under the Census Laws*, 42 Op. Att'y Gen. 151, 151–52. Although pre-1954 census statutes had expressly provided that such surveys were subject to statutory confidentiality provisions and the 1954 census statute (which included section 9(a) in substantially similar form to the Census Act today) included no such express cross-reference, the Acting Attorney General observed that "a change in the law so far-reaching as to deprive voluntary reports of their confidential nature certainly would have been pointed out and explained in" the legislative history. *Id.* at 155. Indeed, the Acting Attorney General found "no uncertainty" in the language of section 9. *Id.* Noting that section 9 included other express exceptions but otherwise applied to all information furnished "under this title," the Acting Attorney General concluded that "[i]f Congress had sought to exempt the replies to voluntary surveys from the operation of 13 U.S.C. 9(a), it certainly would have done so expressly." *Id.*

Finally, in a more recent opinion, this Office determined that a statute plainly intended to enhance the ability of government officials to share immigration status information with immigration authorities did not

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Bureau of the Census containing data identifying individuals enumerated in population censuses" would be governed by the 1952 agreement and any amendments to that agreement "now or hereafter entered into between the Director of the Bureau of the Census and the Archivist of the United States." Pub. L. No. 95-416, 92 Stat. 915 (1978) (amending 44 U.S.C. § 2104); *see also* 44 U.S.C. § 2108 (2006) (codifying similar provisions). Consistent with Congress's longstanding policy of census confidentiality, the House Committee on Government Operations explained the need for a specific protection for census records by noting that "[t]he committee believes that the right of American citizens to assert a right of privacy over information provided in census questionnaires far outweighs the general public's right to have access to that information during the lifetime of the individual citizen." H.R. Rep. No. 95-1522, at 3 (1978); *see also* S. Rep. No. 95-710, at 2 (1978) (explaining that this provision "addresses the issue of premature release of census records information").

override the Census Act's protections for covered census information possessed by the Commerce Department. IIRIRA Opinion. The statute at issue prohibited any federal, state, or local government entity or official from restricting any government entity or official from "sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *Id.* at *4 (quoting 8 U.S.C.A. § 1373(a) (West 1999)). Although the opinion rested primarily on a reading of the statute that construed the restrictions on "government entities" as not encompassing Congress's enactment of census confidentiality provisions, *see id*. at *6, this Office, in support of this conclusion, reiterated that "[i]n light of the federal government's longstanding commitment to confidentiality in this area, there is every reason to expect that Congress would have spoken with particular clarity if it had intended to cut back on the scope of 13 U.S.C. § 9(a) in enacting" a new statute. *Id.* at *11. We thus concluded that "the absence of a reference in either statute to the other suggests that the text of 13 U.S.C. § 9(a) should be construed to mean just what it says, and that [the immigration statute] should be understood to have left in place the confidentiality requirement that 13 U.S.C. § 9(a) establishes." *Id.* at 8–9 (footnote omitted).

In light of this consistent precedent, we would construe section 215 to override the preexisting Census Act protections for covered census information possessed by the Commerce Department only if the evidence of congressional intention compelled such a conclusion. Here, however, the evidence does not compel such a conclusion.

Section 215 makes no reference to the census or the Census Act. And although Congress has amended section 9 of the Census Act on several occasions to establish exceptions, it has not added an express exception for section 215 orders in the wake of that provision's enactment. Nor is there language in section 215 like that contained in the statute addressed in the 1944 Attorney General opinion concerning the Archivist's role as custodian of governmental records. There, the statute expressly stated that the authority of the Archivist to take custody of records extended to all records "belonging to the Government of the United States (legislative, executive, judicial, and other)" and for purposes of carrying out that authority, "all" inconsistent federal statutes were repealed. *Confidential Treatment of Census Records*, 40 Op. Att'y Gen. at 327. By contrast,

section 215 not only does not expressly encompass "all" governmental records (it simply permits orders requiring production of "tangible things" in general), it also includes no express repeal of any federal statute prohibiting disclosure of such information. Similarly, section 215 contains no language like that identified in this Office's 1999 opinion on the relationship between the immigration disclosure provision and the Census Act's confidentiality provisions, in which we noted the absence of express language such as "notwithstanding any provision of law . . . [this provision provides for the disclosure of information] without restriction" that could indicate an intention to override the longstanding statutory protections for census information possessed by the Department of Commerce. IIRIRA Opinion at *5.

The PATRIOT Act does include a severability clause requiring that PATRIOT Act provisions be given "maximum effect" if deemed invalid or unenforceable in part or as applied, but this provision does not indicate congressional "intent that [section 215] be construed broadly to give it maximum effect," as the National Security Division has suggested to us in its views. The full text of this provision states:

> Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this Act and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

PATRIOT Act § 2 (reprinted at 18 U.S.C. § 1 note (2006)). By its plain terms, this provision applies only when PATRIOT Act provisions are "*held* to be invalid or unenforceable" in whole or in part (emphasis added); it does not otherwise establish any special rule of construction for the PATRIOT Act or manifest an intention to repeal, absent judicial invalidation, any provision of prior law. *See also, e.g.*, 147 Cong. Rec. 20,685 (2001) (section-by-section analysis of PATRIOT Act conference report included in the record by Sen. Leahy describing this provision as "provid[ing] that any portion of this Act found to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be

construed to give it the maximum effect permitted by law and that any portion found invalid or unenforceable in its entirety shall be severable from the rest of the Act").

Given the established interpretive approach to repeal of the Census Act's confidentiality provisions, the absence of any express repeal language in section 215 is significant, especially because other sections of the PATRIOT Act expressly revise statutory restrictions on certain other categories of confidential information.

Section 508 provides a striking comparison. Much like section 215, this provision authorized applications by certain high-ranking Justice Department officials for an ex parte court order requiring production of certain information (specifically, certain educational records possessed by the Department of Education) for use in certain terrorism-related investigations. PATRIOT Act § 508 (repealed by Pub. L. No. 107-279, §§ 401(a)(6), 403(1), 116 Stat. 1940, 1983, 1985 (2002)); 20 U.S.C. § 9573(e) (recodifying similar authorization). But in contrast to section 215, which simply authorizes orders for "production" of tangible things in general, section 508 expressly established a mechanism for information-sharing between federal agencies, and expressly repealed applicable confidentiality statutes, using precisely the sort of language—"notwithstanding [other specified provisions]," PATRIOT Act § 508; 20 U.S.C. § 9573(e)—that we suggested in our IIRIRA opinion would indicate congressional intent to repeal confidentiality protections of the Census Act, IIRIRA Opinion at *5; *see* PATRIOT Act § 508; 20 U.S.C. § 9573(e). Moreover, at least one other PATRIOT Act provision likewise applies "[n]otwithstanding" other specified provisions of law. *See* PATRIOT Act § 507 (codified at 20 U.S.C. § 1232g(j) (2006)) (authorizing court orders to obtain certain records from educational institutions or agencies "[n]otwithstanding subsections (a) through (i) of this section or any provision of State law"). And, as noted, the PATRIOT Act explicitly modified certain other confidentiality protections, such as grand jury secrecy, to permit wider sharing of certain categories of sensitive information within the federal government. *See, e.g.*, PATRIOT Act § 203(a)(1) (similar provision now codified at Fed. R. Crim. P. 6(e)) (permitting disclosure of certain intelligence-related grand jury matters); *id.* § 203(d) (including language codified at 50 U.S.C.A. § 403-5d (West 2003 & Supp. 2009)) (permitting sharing of certain information obtained

as part of a criminal investigation). Section 508 and such other provisions explicitly modifying restrictions on information-sharing or disclosure show at the very least that Congress was aware of specific federal confidentiality provisions and could have drafted explicit authority to overcome Census Act prohibitions on information-sharing had it wished to do so.[7]

Our conclusion is further reinforced by prior Office precedent construing generally applicable information-sharing statutes. In these instances, we applied a similarly strong presumption of confidentiality in concluding that such measures did not override more specific confidentiality protections, even though as a matter of plain text the terms of the purportedly overriding statute could have been construed to be inconsistent with the confidentiality provisions at issue, just as is arguably the case here.

In *GAO Access to Trade Secret Information*, 12 Op. O.L.C. 181, 182 (1988) ("*GAO Access*"), for example, we considered whether the Food and Drug Administration ("FDA") could provide trade secret information to the Comptroller General. The potentially overriding statute required "[e]ach agency" to "give the Comptroller General information the Comptroller requires about the duties, powers, activities, organization, and financial transactions of the agency," *id.* (quoting 31 U.S.C. § 716(a) (1982)). A separate statute, however, barred the FDA from "revealing, other than to the Secretary [of Health and Human Services] or officers or employees of [the Department of Health and Human Services], or to the courts when relevant in any judicial proceeding under [other provisions of the same statute], any information acquired under [specified sections of that statute] concerning any method or process which as a trade secret is entitled to protection." *Id.* at 181 (quoting 21 U.S.C. § 331(j) (1982)). At the outset, we observed that the FDA trade secrets statute was "clear on its face" and "expressly provides that trade secret information may not be disclosed outside [the Department of Health and Human Services] with one exception: such information may be disclosed to a court in a judicial proceeding under the [statute]." *Id.* We then observed that a prior Attorney General opinion concluded, based in part on longstanding Executive

[7] We do not consider here whether and to what extent section 215 orders may also reach educational records (whether or not subject to production under section 508) or any other confidential information not protected by the Census Act.

Branch interpretation, that the FDA trade secrets statute did not allow for an implied exception for disclosure of covered information to Congress. *Id.* at 181–82 (discussing *Federal Food, Drug & Cosmetic Act—Prohibition on Disclosure of Trade Secret Information to a Congressional Committee*, 43 Op. Att'y Gen. 116 (1978)). Accordingly, we concluded that the statute generally requiring disclosure of information to the Comptroller General did not supersede the statute specifically protecting the confidentiality of trade secrets. *Id.* at 182. "Since [the trade secrets statute] is a specific statute directly addressing one executive branch agency's handling of trade secret information, while [the Comptroller General statute] is a general statute addressed to all kinds of information in possession of the executive branch, [the trade secrets statute] controls in the absence of congressional intent to the contrary." *Id.* at 182–83.

Similarly, in *Disclosure of Confidential Business Records Obtained Under the National Traffic and Motor Vehicle Safety Act*, 4B Op. O.L.C. 735 (1980) ("*Business Records*"), we considered whether provisions in the Federal Reports Act, 44 U.S.C. § 3508 (1976), dealing with "the general matter of the intragovernmental exchange of information," 4B Op. O.L.C. at 736, were applicable to confidential information and trade secrets protected by the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C. 1401 (1976). The Safety Act subjected the mandatory reporting of certain safety-related information to confidentiality guarantees by providing that officers and employees of the safety agency could not "publish[], divulge[], disclose[], or make[] known" such information "in any manner or to any extent not authorized by law." 4B Op. O.L.C. at 735–36 & nn.1–2. In concluding that the general provisions of the Federal Reports Act did not override the specific protections of the Safety Act, *id.* at 738, we analogized the Safety Act reports to census records, observing that confidentiality served the purposes of the statute because Safety Act respondents, like census respondents, may "fear, possibly even more [than disclosure to the public or competitors], the disclosure of [reported] information to regulatory or law-enforcing agencies," *id.* at 737. Thus, we observed, it "may be anticipated that firms will be less willing to submit correct and complete information under the Safety Act if they must expect that this information will be shared with [federal regulatory] agencies." *Id.* at 737–38.

Much like the trade secrets statute addressed in our *GAO Access* opinion, section 9 of the Census Act "expressly" protects covered census information from disclosure and has long been understood to bar the dissemination by the Commerce Department of such information outside the Commerce Department except when authorized by a clear statutory exception. 12 Op. O.L.C. at 181. Moreover, much as the trade secrets statute at issue in our *GAO Access* opinion specifically addressed "one executive branch agency's handling of" a specific category of information, while the Comptroller General statute broadly covered "all kinds of information in possession of the executive branch" that would be useful for particular investigations, *id.* at 182–83, so, too, here the Census Act's protections are specific to a very narrow subset of records—covered census information—relative to the broad category of "tangible things" covered by section 215. Likewise, the compliance concerns our *Business Records* opinion relied upon in concluding that disclosure "would be contrary to the statutory intent and contrary to the purposes [the statute] was designed to achieve" seem equally applicable—as the *Business Records* opinion itself recognized—to census information protected by the Census Act. 4B Op. O.L.C. at 738.

In concluding that section 215 does not override the relevant census provisions, we do not mean to suggest that section 215 may not be read to repeal any federal statute that protects the confidentiality of information. Our analysis is limited strictly to the case of census information in the possession of the Commerce Department, in light of the strong presumption against repeal of those confidentiality protections that has long been applied to that category of information. Indeed, we note that we have identified nothing in the legislative history of section 215 indicating any intent on the part of Congress to touch upon protected census information, even though other types of sensitive information encompassed by the terms of section 215 were specifically addressed and identified as potentially covered by the provision.

For example, in the Reauthorization Act Congress amended section 215 to require especially high-level approval within the FBI for applications relating to certain categories of records—specifically, "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person." 50 U.S.C.A.

§ 1861(a)(3). The Reauthorization Act conference report describes these protections as applying to "certain sensitive categories of records." H.R. Rep. No. 109-333, at 91 (2005) (Conf. Rep.). Notably, however, the report does not mention census records, even though the long history of statutory confidentiality protections for census records possessed by the Commerce Department suggests that Congress would also have considered such records "sensitive" had it had them in mind as being subject to disclosure under section 215.

Similarly, in debates regarding the original PATRIOT Act, there is no mention of census records, even though various other types of records are mentioned. In particular, Senator Feingold unsuccessfully offered a floor amendment that would have limited section 215's scope to records held by a "business" and expressly prevented disclosure under section 215 of records "protected by any Federal or State law governing access to the records for intelligence or law enforcement purposes." 147 Cong. Rec. 19530–31 (2001). Although supporters of Senator Feingold's amendment raised concerns that section 215 could require the disclosure of other forms of sensitive personal information, they did not mention census information in their floor statements, much less suggest that without the proposed amendment section 215 would repeal Census Act confidentiality protections. *See, e.g.*, *id.* (statement of Sen. Feingold) (expressing concern that without the amendment "all *business* records can be compelled to be produced [under section 215], including those containing sensitive personal information such as medical records from hospitals or doctors, or educational records, or records of what books someone has taken out of the library") (emphasis added); *id.* at 19,532 (statement of Sen. Cantwell) ("this legislation could circumvent or supersede Federal and State privacy laws that protect student records, library records, and health records not previously admissible under FISA"). And in a floor statement opposing this amendment, Senator Hatch likewise made no reference to the Census Act (or indeed any other specific federal confidentiality statute). He simply observed that the amendment would "allow[] a host of state-law provisions to stand in the way of national security needs" and "condition the issuance of the court order [under section 215] on a myriad of federal and state-law provisions," thus "making investigations to protect against international terrorism more difficult than investigations of certain domestic criminal violations." *Id*. at 19,532. The silence as to the statutory

protections for the confidentiality of census information is significant, as we think it fair to say here what the Acting Attorney General said with respect to the confidentiality of voluntary census records in his 1962 opinion—that "a change in the law so far-reaching as to deprive voluntary reports of their confidential nature certainly would have been pointed out and explained in" the legislative history. *Confidentiality of "Voluntary" Reports*, 42 Op. Att'y Gen. at 155.

* * * * *

We therefore conclude that section 215 should not be construed to repeal otherwise applicable Census Act protections for covered census information such that they could require their disclosure by the Department of Commerce. Because no other PATRIOT Act provision that you have identified, nor any such provision that we have separately reviewed, would appear to have that effect, we agree that the PATRIOT Act, as amended, does not alter the confidentiality protections in sections 8, 9, and 214 of the Census Act in a manner that could require the Secretary of Commerce to disclose such information.

JEANNIE S. RHEE
Deputy Assistant Attorney General
Office of Legal Counsel

Use of "Unanticipated Needs" Funds to Pay the Security-Related Hotel Expenses of a Supreme Court Nominee

Payment of expenses related to Judge Sotomayor's hotel stays in Washington, D.C. during the period between her nomination to the Supreme Court and the conclusion of her confirmation hearings falls within the President's discretion under 3 U.S.C. § 108.

January 15, 2010

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY COUNSEL TO THE PRESIDENT

This memorandum memorializes advice we previously provided regarding whether the White House could pay certain expenses related to the Supreme Court nomination of then-Judge Sonia Sotomayor out of funds appropriated "to enable the President, in his discretion, to meet unanticipated needs for the furtherance of the national interest." 3 U.S.C. § 108(a) (2006). These expenses related to the Judge's hotel stays in Washington, D.C. during the period between her nomination and the conclusion of her confirmation hearings. We understand that, during this period, the Judge met with White House personnel whose official duties included assisting with her confirmation. We further understand that the specific amount of the expenses was driven in part by the need for Judge Sotomayor to stay at a hotel at which her security could be ensured. As we understand it, the United States Marshals Service ("USMS"), based on information obtained shortly after Judge Sotomayor's nomination, determined that Judge Sotomayor required the protection of a security detail, and specifically requested that she stay at a hotel with appropriately configured entrances. On the facts presented to us, we think that payment of these expenses falls within the President's discretion under 3 U.S.C. § 108.

On its face, section 108 confers broad authority on the President to use designated funds, "in his discretion, to meet unanticipated needs for the furtherance of the national interest." *Id.* Section 108 expressly provides that the President may exercise this discretionary authority "without regard to any provision of law . . . regulating expenditures of Government funds." *Id.* And, consistent with section 108, the appropriations bill for the fiscal year during which the expenses at issue here were incurred

appropriated one million dollars "[f]or expenses necessary to enable the President to meet unanticipated needs, in furtherance of the national interest, security, or defense which may arise at home or abroad during the current fiscal year, as authorized by 3 U.S.C. 108, . . . to remain available until September 30, 2010." Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 643 (2009). The only requirements imposed by this language are that the need for which funds are spent be "unanticipated," and that the spending of those funds further the "national interest, security, or defense."

In the years before section 108's enactment in 1978, individual appropriations acts sometimes provided funds to permit the President to respond to unanticipated needs. In earlier years, these funds were appropriated to meet needs arising from "emergencies." In the years closer to 1978, however, Congress made broader appropriations for needs that were simply "unanticipated."[1] When section 108 was enacted in November of

[1] In particular, the appropriations acts for fiscal years 1972, 1973, and 1974 included an appropriation of one million dollars for an "Emergency Fund for the President" for "expenses necessary to enable the President . . . to provide in his discretion for emergencies affecting the national interest, security, or defense which may arise at home or abroad during the current fiscal year." Treasury, Postal Service, and General Government Appropriation Act, 1972, Pub. L. No. 92-49, tit. III, 85 Stat. 108, 111 (1971); *see also* Treasury, Postal Service, and General Government Appropriation Act, 1973, Pub. L. No. 92-351, tit. III, 86 Stat. 471, 475 (1972); Treasury, Postal Service, and General Government Appropriation Act, 1974, Pub. L. No. 93-143, tit. III, 87 Stat. 510, 514 (1973). The appropriation for fiscal year 1975, similarly, included an appropriation of $500,000 for "Unanticipated Personnel Needs" for "expenses necessary to enable the President to meet unanticipated personnel needs, for emergencies affecting the national interest, security, or defense which may arise at home or abroad during the current fiscal year." Treasury, Postal Service, and General Government Appropriation Act, 1975, Pub. L. No. 93-381, tit. III, 88 Stat. 613, 617 (1974).

The appropriations acts for fiscal years 1976 through 1979, in contrast, omitted mention of "emergencies," and included an appropriation for "Unanticipated Needs" for "expenses necessary to enable the President to meet unanticipated needs, in furtherance of the national interest, security, or defense which may arise at home or abroad during the current fiscal year." Treasury, Postal Service, and General Government Appropriation Act, 1976, Pub. L. No. 94-91, tit. III, 89 Stat. 441, 445 (1975); *see also* Treasury, Postal Service, and General Government Appropriation Act, 1977, Pub. L. No. 94-363, tit. III, 90 Stat. 963, 968 (1976); Treasury, Postal Service, and General Government Appropriation Act, 1978, Pub. L. No. 95-81, tit. III, 91 Stat. 341, 346 (1977); Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, tit. III, 92 Stat. 1001, 1006 (1978). The House report accompanying one of these acts indicated

1978, it borrowed this broader language from the appropriations acts that immediately preceded it, and provided funds for unanticipated needs generally, without any restriction to "emergencies." The House and Senate reports accompanying section 108 noted that it "continues the authority provided by recent appropriations acts for a fund to enable the President, in his discretion, to meet unanticipated needs 'for furtherance of the national interest, security, or defense,'" without mentioning any restriction to emergencies. H.R. Rep. No. 95-979, at 10 (1978); S. Rep. No. 95-868, at 11 (1978). And the practice under section 108 in the decades since its enactment confirms that its scope is not restricted to emergencies. Previous administrations, moreover, have likewise declined to construe the term "national interest" as a narrow category restricted to matters closely connected with national security or defense, and instead interpreted it as an independent, broad category that gives the President the flexibility needed to exercise his official functions when faced with new problems that arise after the appropriations process for a given year has been completed.

Thus, according to a summary of Executive Office records provided by your office, section 108 appropriations, for example, have been used to fund advisory commissions in the Executive Branch, such as the Native Hawaiians Study Commission and the Council on Wage and Price Stability, that were charged with missions apparently unrelated to national security or defense. *See* Executive Office of the President, Unanticipated Needs History at 1 (FY 1972–present) ("Unanticipated Needs History"); *see also* Budget of the United States Government, Fiscal Year 1984, app. at I-D3; Budget of the United States Government, Fiscal Year 1982 ("Budget FY 1982"), app. at I-D4. Other uses of section 108 funds have included unspecified expenditures for the White House Office, the Iran-contra hearings, the U.S. Secret Service, Geneva Mission security for the Office of the U.S. Trade Representative, presidential foundation expenses for the funerals of Presidents Reagan and Ford, White House Office

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that the purpose of the appropriation was to provide "a resource that the President can effectively use to solve problems that occur after the appropriation process has been completed." H.R. Rep. No. 95-378, at 25 (1977). The report went on to observe that "[t]he appropriation of funds is a time consuming process and the President ought to have some degree of flexibility to handle unforeseen emergencies," *id*., although—as noted—the terms of the act were broad and not limited to "emergencies."

expenses for President Ford's funeral, and an Office of Administration e-mail restoration initiative. *See* Unanticipated Needs History at 1–3; *see also* Budget FY 1982, app. at I-D4; Budget of the United States Government, Fiscal Year 1989, app. at I-D1; Letter for Susan M. Collins, Chairwoman, Senate Committee on Homeland Security, from John Straub, Special Assistant to the President, encl. (Mar. 20, 2006) (Unanticipated Needs Account); Letter for Harry Reid, Senate Majority Leader, from Alan R. Swendiman, Special Assistant to the President, encl. (Nov. 23, 2007) (Unanticipated Needs Account); Letter for Harry Reid, Senate Majority Leader, from Sandra K. Evans, Special Assistant to the President, encl. (Nov. 4, 2008) (Unanticipated Needs Account). These expenditures have been reported to Congress on a yearly basis and Congress, far from viewing them as inappropriate, has continued to appropriate funds for unanticipated needs virtually every year.[2] Finally, and even more directly, this Office has previously suggested that the President's discretion under section 108 may include the authority to pay travel expenses incurred by persons who are not employees of the government but who are traveling for purposes related to the duties of the President. *See* Memorandum for Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Use of Department of Justice Vehicles* at 13 n.12 (Jan. 23, 1984) (explaining that, "[u]nlike the Attorney General, the President has several possible sources of appropriated funds from which a nonemployee traveling for official purposes of the Presidency might be paid expenses," and citing section 108).

In light of section 108's broad language and this prior practice and precedent, we believe use of "unanticipated needs" funds to pay for the expenses at issue here would be permissible. The timing of Justice David Souter's resignation announcement may fairly be described as "unanticipated," giving rise to the associated costs of ensuring that the nominee who had been named to replace him would be readily available to the White House personnel who are officially responsible for assisting with

[2] Based on the information you provided, the only year in which Congress did not appropriate section 108 funds was in fiscal year 1997, when the one million dollars requested for unanticipated needs were diverted to fund conferences on model state drug laws through the Office of National Drug Control Policy. *See* Unanticipated Needs History at 3 n.1.

the confirmation process. Moreover, the particular expenses at issue here may also be characterized as "unanticipated," given that the USMS unexpectedly received information about the President's nominee that caused it to determine that she required the protection of a security detail, and to request that she stay at a hotel with appropriate security features. And we think it is in furtherance of the national interest to protect the security of a Supreme Court nominee prior to confirmation and swearing in, as well as to ensure that the President's advisors may effectively and efficiently assist him in carrying out his constitutional authority to appoint a nominee to the Supreme Court to fill a vacancy in that body. (We also understand that the cost of housing Judge Sotomayor in Washington during the confirmation process was significantly less than the expected cost of moving the White House preparation team to New York to meet with Judge Sotomayor there.) We therefore conclude that Judge Sotomayor's expenses may properly be paid with funds appropriated under section 108.

JEANNIE S. RHEE
Deputy Assistant Attorney General
Office of Legal Counsel

Legal Effect of Federal Judge's Order as Hearing Officer Under Court's Employment Dispute Resolution Plan

The Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, who was acting in an administrative capacity under the Court's employment dispute resolution plan when he issued an order to the Office of Personnel Management, lacked the authority to direct OPM in its administration of the Federal Employees Health Benefits Program. Accordingly, OPM is not legally required to comply with the directives in the order.

January 20, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

On November 19, 2009, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, acting as a hearing officer under the circuit's employment dispute resolution ("EDR") plan, issued an order ("November 19, 2009 Order") that, among other things, purported to direct the Office of Personnel Management ("OPM") to take or refrain from taking certain actions with respect to a circuit employee's efforts to enroll her same-sex spouse in the Federal Employees Health Benefits Program ("FEHBP"). *See In re Golinski*, 587 F.3d 956, 963–64 (9th Cir. 2009). You have asked whether OPM, which was not a party to the underlying EDR proceeding, must comply with those directives. This memorandum memorializes and further explains the prior advice our Office provided to you on this question. *See* E-mail for Elaine Kaplan, General Counsel, Office of Personnel Management, from David Barron, Acting Assistant Attorney General, Office of Legal Counsel (Dec. 16, 2009, 17:37 EST). As we advised, Chief Judge Kozinski, who was acting in an administrative capacity under the EDR plan when he issued the November 19, 2009 Order, lacked the authority to direct OPM in its administration of the FEHBP. Accordingly, OPM is not legally required to comply with the directives in the November 19, 2009 Order.[1]

[1] In a separate memorandum, we address whether OPM has the legal authority to direct the circuit employee's health insurance carrier not to enroll her same-sex spouse in the FEHBP and, if so, whether federal law nonetheless affords OPM the discretion to permit the enrollment to proceed. *See Authority of OPM to Direct FEHB Program Carrier Not to Enroll Individual Deemed Eligible by Employing Agency*, 34 Op. O.L.C. 51 (2010).

I.

In 1998, the Judicial Council of the Ninth Circuit approved an EDR plan that grants circuit employees certain substantive rights and sets out a procedure for the enforcement of those rights. *See* U.S. Court of Appeals for the Ninth Circuit, Employment Dispute Resolution Plan (rev. ed. 2000) ("Ninth Circuit EDR Plan"). The plan prohibits, among other things, "[d]iscrimination against employees based on . . . sex . . . and sexual orientation," and it also incorporates the rights and protections afforded under the Ninth Circuit Equal Employment Opportunity ("EEO") plan. *Id.* at 2. In addition, the plan sets forth a detailed administrative process for the resolution of employment disputes involving circuit employees. *See id.* at 1 ("Claims arising under this Plan or the EEO Plan shall be treated in accordance with the procedures set forth in this Plan."). An employee who wishes to press a grievance must first participate in mandatory counseling and mediation. *Id.* at 5–7. If the grievance still remains unresolved, the employee may file a formal written complaint with the chief judge of the relevant court. *Id.* at 7. The respondent identified in the complaint must in all cases be "the employing office that would be responsible for redressing, correcting or abating the violations(s) alleged in the complaint." *Id.* For complaints that are not frivolous, the chief judge or his designee must hold a hearing on the merits and "may provide for such discovery and investigation as is necessary." *Id.* at 8. In the event that the presiding officer finds a violation of a substantive right protected by the plan, he may award "a necessary and appropriate remedy," including placement of the aggrieved individual in a particular position of employment, reinstatement of the individual to a position previously occupied, and relief under the Back Pay Act, 5 U.S.C. § 5596 (2006). Ninth Circuit EDR Plan at 9–10. "A party or individual" dissatisfied with the final decision may petition the Judicial Council of the Ninth Circuit for review. *Id.* at 9.

Karen Golinski, a staff attorney for the Ninth Circuit Court of Appeals, filed a complaint under this plan alleging that she had been the victim of discrimination based on sex and sexual orientation in violation of both the EDR plan itself and the incorporated EEO plan. *See Golinski*, 587 F.3d 901, 902 (9th Cir. 2009). Specifically, Ms. Golinski challenged the refusal of the Director of the Administrative Office of the United States Courts

("AOUSC") to certify that Ms. Golinski's same-sex spouse was a family member entitled to benefits under her FEHBP plan. *See id*. The first order issued in this dispute, on January 13, 2009 ("January 13, 2009 Order"), explained that the Director refused certification because he thought it barred as a result of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 (2006), which requires federal agencies to construe any use of the word "spouse" in a federal statute to mean "a person of the opposite sex who is a husband or a wife." *Id.*; *see Golinski*, 587 F.3d at 902. In the Director's view, the statute governing the FEHBP, the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901–8914 (2006), when read in light of DOMA, did not permit OPM to contract with an insurance carrier for a health benefits plan covering an employee's same-sex spouse. *See Golinski*, 587 F.3d at 902; *see also* 5 U.S.C. §§ 8901(5), 8903(1), 8905(a). This conclusion was consistent with OPM's prior guidance to agencies that, as a consequence of DOMA, "same-sex marriages cannot be recognized for benefit entitlement purposes under . . . [the FEHBP]." OPM, Benefits Administration Letter No. 96-111, at 3 (Nov. 15, 1996) ("1996 Benefits Administration Letter").

The January 13, 2009 Order disagreed with the Director's conclusion. The Order construed the FEHBA, even as effectively amended by DOMA, to permit OPM to contract for health benefits for the same-sex spouses of government employees. *See Golinski*, 587 F.3d at 902–04. The Order further concluded that the denial of health insurance to Ms. Golinski's spouse violated the Ninth Circuit EEO plan (and, presumably, the Ninth Circuit EDR Plan as well). *See id.* at 903. To remedy the violation, the Order directed the Director to submit Ms. Golinski's health benefits election form "to the appropriate health insurance carrier," and further directed that "future health benefit forms are also to be processed without regard to the sex of a listed spouse." *Id.* at 904.

In compliance with the January 13, 2009 Order, the AOUSC submitted Ms. Golinski's election form to her health insurance plan, the Blue Cross and Blue Shield Service Benefit Plan ("Blue Cross Plan"). *See Golinski*, 587 F.3d at 958. Subsequently, OPM sent a letter to the AOUSC describing federal statutory requirements and the 1996 Benefits Administration Letter, and explaining that "[o]fficials of agencies participating in the Federal benefits programs administered by OPM must follow the guidance provided in [OPM's benefits administration letters]." Letter for

Nancy E. Ward, Deputy Assistant Director, Office of Human Resources, Administrative Office of the United States Courts, from Lorraine E. Dettman, Assistant Director, Insurance Services Programs, Office of Personnel Management at 1 (Feb. 20, 2009) ("AOUSC Letter"); *see also Golinski*, 587 F.3d at 958. The AOUSC Letter further explained that OPM had advised the Blue Cross Plan and another health plan that they could not accept enrollment forms submitted by the AOUSC for coverage barred by federal law. *See* AOUSC Letter at 2. OPM also sent a letter to the Blue Cross and Blue Shield Association, the carrier for the Blue Cross Plan, advising it that federal law barred the Plan from accepting Ms. Golinski's election form. *See* Letter for Stephen W. Gammarino, Senior Vice President, National Programs, Blue Cross and Blue Shield Association, from Shirley R. Patterson, Chief Insurance Contracting Officer, Office of Insurance Services Programs, Office of Personnel Management (Feb. 23, 2009) ("Blue Cross Letter"); *see also Golinski*, 587 F.3d at 958. Following these actions, Ms. Golinski sought further relief from Chief Judge Kozinski.

The November 19, 2009 Order concluded that OPM had "thwart[ed] the relief . . . ordered [in the January 13, 2009 Order]," *Golinski*, 587 F.3d at 958, and that Ms. Golinski was entitled to, *inter alia*, prospective relief that would enable her spouse to enroll in her FEHBP plan, *see id.* at 960–61. The November 19, 2009 Order expressed the view that an EDR hearing officer's "authority to order such relief is clear under the language of the EDR plan" and was intended by Congress. *Id.* at 961. In addition, asserting that "OPM's actions implicate . . . the autonomy and independence of the Judiciary as a co-equal branch of government," *id.*, the Order declared that "an EDR tribunal's reasonable interpretation of a law applied to judicial employees must displace, for purposes of those employees, any contrary interpretation by an agency or officer of the Executive," *id.* at 963. The Order went on to direct the AOUSC to resubmit within 30 days Ms. Golinski's election form to the Blue Cross Plan and to reiterate that the AOUSC was to process benefit forms "without regard to the sex of the listed spouse." *Id.* The Order also directed OPM to "rescind" within 30 days its "guidance or directive" explaining to the Blue Cross Plan "and any other plan" that "Ms. Golinski's wife is not eligible to be enrolled as her spouse under the terms of the [FEHBP] because of her sex or sexual orientation, and that the plans would violate their contracts with OPM by

enrolling Ms. Golinski's wife as a beneficiary." *Id.* Finally, the Order directed OPM "to cease at once its interference with the jurisdiction of this tribunal" and, specifically, not to "advise [the Blue Cross Plan] that providing coverage for Ms. Golinski's wife violates DOMA or any other federal law" and not to "interfere in any way with the delivery of health benefits to Ms. Golinski's wife on the basis of her sex or sexual orientation." *Id.* at 963–64.[2]

On December 17, 2009, the Blue Cross and Blue Shield Association filed a petition for review of the November 19, 2009 Order with the Judicial Council of the Ninth Circuit, arguing that "the Judicial Council has no jurisdiction over [the Association] under the EDR Plan" and that, in any event, Chief Judge Kozinski's conclusion that the FEHBA permits enrollment of same-sex spouses was incorrect. *See* Petition for Review for Blue Cross and Blue Shield Association at 1, 9, *In re Golinski*, No. 09-80173 (9th Cir. Dec. 17, 2009). On December 22, 2009, Chief Judge Kozinski issued a third order in this matter, stating that the time for appealing his prior orders had expired; that OPM and the AOUSC had not appealed; and that, accordingly, his orders were "final and preclusive on all issues decided therein as to [the AOUSC and OPM]." *Golinski*, No. 09-80173, at 1.

II.

In order to determine whether OPM is bound by the directives in the November 19, 2009 Order, we first must determine the nature of Chief Judge Kozinski's authority in issuing that Order. There is no doubt that federal judges exercising judicial power in resolving cases or controversies pursuant to Article III of the Constitution can issue directives to executive branch agencies.[3] But not all actions by federal judges are of

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[2] The November 19, 2009 Order also directed the Blue Cross Plan to "enroll Ms. Golinski's wife within 30 days of receipt of the appropriate forms from the [AOUSC], without regard to her sex or sexual orientation," and ordered certain retrospective relief for Ms. Golinski, including relief under the Back Pay Act, 5 U.S.C. § 5596. *Golinski*, 587 F.3d at 963–64.

[3] *See* U.S. Const. art. III, § 1 ("The 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."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)

this kind, and it is our view that, in presiding over the Golinski matter, Chief Judge Kozinski was acting in an administrative capacity.[4] Accordingly, when he issued the November 19, 2009 Order, Chief Judge Kozinski was not exercising the Article III authority to resolve a case or controversy, and thus cannot rely on that authority in purporting to direct OPM.

The background to the administrative process established by the Ninth Circuit EDR Plan makes clear why this is so. For much of the nation's history, the Executive Branch was responsible for the administration of the federal courts. *See* Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 Mercer L. Rev. 835, 854–55 (1995). In 1939, however, Congress enacted legislation transferring the authority to administer the courts from the Department of Justice to the newly created AOUSC, which would operate under the direction and supervision of the forerunner to the Judicial Conference of the United States. *See* Pub. L. No. 76-299, § 304(1), 53 Stat. 1223, 1223; 28 U.S.C. § 604 (2006); *see also* H.R. Rep. No. 76-702, at 4 (1939) ("The bill places the responsibility for judicial admin-

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(in resolving "cases" and "controversies," it is the federal courts' "duty . . . to say what the law is"); *United States v. McHugh*, 528 F.3d 538, 540 (7th Cir. 2008) ("[T]he 'judicial Power of the United States' is a power to make binding decisions, not to make suggestions that the Executive Branch may accept or reject." (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792))).

[4] *See Mistretta v. United States*, 488 U.S. 361, 404 (1989) (power wielded by judges serving on U.S. Sentencing Commission "is not judicial power; it is administrative power derived from the enabling legislation"); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47–48 (1852) (statute authorizing federal district judges to adjust claims made against the United States, subject to approval of the Secretary of the Treasury, conferred power that was "not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States"); *see also Mistretta*, 488 U.S. at 388 (observing that circuit judicial councils, the Judicial Conference of the United States, the Rules Advisory Committees, and the AOUSC, "some of which [entities] are comprised of judges, . . . do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing [through administration and rulemaking] for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary"); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 n.7 (1970) (characterizing circuit judicial councils as "administrative bodies"); *cf. Forrester v. White*, 484 U.S. 219, 228 (1988) ("Administrative decisions, even though they may be essential to the very functioning of the courts," are not "judicial acts" for purposes of determining judicial immunity from suit).

istration where it belongs—with the judiciary[.]"). That legislation also created the circuit judicial councils, charging them with taking action on reports submitted by the Director of the AOUSC. *See* Pub. L. No. 76-299, § 306, 53 Stat. at 1224; *see also* 28 U.S.C. § 332(d)(1) (2006) ("Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."). With some adjustments, this statutory regime has remained in place to the present day.

In 1978, Congress enacted the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111, which creates "an integrated scheme of administrative and judicial review" "for evaluating adverse personnel actions against federal employees." *United States v. Fausto*, 484 U.S. 439, 443, 445 (1988) (internal quotation marks and brackets omitted). The CSRA, however, affords no review rights to members of the "excepted service"—a category that at present includes all employees of the Judiciary and Congress. *See Dotson v. Griesa*, 398 F.3d 156, 163–65, 173 n.10 (2d Cir. 2005); *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999); *Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998). Indeed, when the CSRA was enacted, those two branches managed their workplaces unconstrained by a number of statutes and other legal authorities applicable to private sector and executive branch employees. In 1980, the Judicial Conference partially filled this gap by developing a model EEO plan and requiring federal courts to adopt EEO plans of their own. *See Dotson*, 398 F.3d at 172. These EEO plans put into more concrete form the prior judicial policy of "'follow[ing] the equal employment opportunity principles applicable to private sector and government employers.'" *Id.* (quoting Report of the Judicial Conference of the United States, *Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995*, at 6 (1996) ("CAA Report")).

In 1995, Congress enacted the Congressional Accountability Act ("CAA"), which extended to congressional employees the protections of various workplace laws applicable to other public and private sector employees. *See* 2 U.S.C. § 1302(a) (2006). The Executive Branch has no enforcement authority under the CAA, *see id.* § 1361(f)(3); instead, the Act vests such authority in an Office of Compliance ("OOC") established within the legislative branch, *see id.* § 1381. Congressional employees with grievances arising under the CAA must first complete counseling

and mediation; following that, they may initiate proceedings with the OOC (or file a civil action in federal district court) and then seek judicial review of final OOC decisions. *See id.* §§ 1401–1408.

As the Second Circuit has explained, Congress considered bringing judicial employees within the ambit of the CAA, but ultimately did not do so. *See Dotson*, 398 F.3d at 173. "Instead, Congress required the Judicial Conference to prepare a report 'on the application to the judicial branch' of the labor laws in question, including 'any recommendations the Judicial Conference may have for legislation to provide to employees of the judicial branch the rights, protections, and procedures under the [labor] laws, including administrative and judicial relief, that are comparable to those available to employees of the legislative branch under [the CAA].'" *Id.* (quoting 2 U.S.C. § 1434 (2006)). The report submitted by the Judicial Conference concluded that no legislation was "necessary []or advisable in order to provide judicial branch employees with protections comparable to those provided to legislative branch employees under the CAA." CAA Report at 2. The report justified this recommendation by pointing to the Judiciary's "internal governance system," which it described as "a necessary corollary to judicial independence." *Id.* at 4. The report also discussed supplementing the Judiciary's existing administrative apparatus with a new "dispute resolution process" that would "expand upon existing judicial branch procedures by enhancing the hearing process and providing for appeal of the hearing officer's decision." *Id.* at 7. Reflecting the administrative nature of the proposed process, the report likened it to the procedures that "Congress has adopted in establishing the Office of Compliance." *Id.*

In 1997, the Judicial Conference issued a model EDR plan, which substituted a new set of complaint procedures for those in the model EEO plan but otherwise left much of the substance of that prior plan intact. *See Dotson*, 398 F.3d at 175. The model EDR plan instructed "each court [to] adopt and implement a plan based [on the model]," Judicial Conference of the United States, Model Employment Dispute Resolution Plan at 1 (Mar. 1997), and the Judicial Council of the Ninth Circuit did so the following year.

Consistent with the recommendations in the Judicial Conference's report, Congress did not enact any legislation providing for administrative

or judicial review of adverse employment decisions involving judicial employees. *See Dotson*, 398 F.3d at 175. The Second Circuit has described "Congress's decision to exclude judicial branch employees from the administrative and judicial review procedures of the CSRA, and from subsequent legislation such as the CAA," as "a conscious and rational choice made and maintained over the years in light of both a proper regard for judicial independence and recognition of the judiciary's own comprehensive review procedures for adverse employment actions, including review by judicial officers." *Id.* at 176.

Thus, as its history shows, the Ninth Circuit EDR Plan creates an administrative process—akin to the CAA process, albeit without express statutory authorization—designed to handle personnel-related matters within the Judicial Branch. The federal courts themselves have characterized their EDR processes in this way. For example, the Second Circuit has described the EDR process as "administrative review within the judiciary." *Id.*[5] And in the November 19, 2009 Order, Chief Judge Kozinski similarly acknowledged that the EDR plan is "part of the tradition of decentralized administration and local management of the federal courts." *Golinski*, 587 F.3d at 958 n.1.

III.

We conclude that the directives in the November 19, 2009 Order do not legally bind OPM because Chief Judge Kozinski, acting in an administrative capacity under the Ninth Circuit EDR Plan, lacked legal authority to direct OPM in its administration of the FEHBP. We assume—as is stressed throughout the November 19, 2009 Order and suggested above—that federal courts have a legal basis for establishing an administrative process for the resolution of employment disputes involving judicial employees. *See Golinski*, 587 F.3d at 961–63; *supra* pp. 30–33. Such

[5] Although the Second Circuit in *Dotson* noted a "long history of *judicial review* within the courts' EEO plans," 398 F.3d at 176 n.14 (emphasis added), we believe that the court's use of the term "judicial review" was intended only to point out that internal, administrative review within the judiciary will often be overseen by officials who are, in fact, federal judges. *See id.* ("Indeed the judiciary is unique among the branches of government in being able to provide for itself some review of its *administrative* employment decisions by a judicial officer." (emphasis added)).

authority may be implicit in various statutory sources, *see, e.g.*, 28 U.S.C. § 332(d)(1) (establishing judicial councils); *id.* §§ 41–49 (establishing federal courts of appeals), or it may be incident to the federal courts' inherent Article III power "to provide themselves with appropriate instruments required for the performance of their duties."[6] But we have been unable to identify any support—whether in the Constitution, the U.S. Code, the Code of Federal Regulations, or the case law—for the specific proposition that the federal courts have the authority to establish an internal administrative dispute resolution process that can direct OPM's administration of the FEHBP. Rather, the relevant legal materials support the contrary conclusion.

A.

The November 19, 2009 Order suggests that Congress has statutorily empowered the federal courts to establish EDR tribunals that can direct OPM in its administration of the FEHBP. *See Golinski*, 587 F.3d at 961 ("Ordering enrollment is proper and within my jurisdiction because Congress intended this tribunal to be the sole forum for adjudicating complaints of workplace discrimination by employees of the Judiciary. With that responsibility must come power equal to the task."). We respectfully disagree.

In determining whether Congress has delegated certain authority to an administrative actor, the general rule is that the delegation must be either "explicit" or "*fairly* . . . implied" by a statute. *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 666 n.6 (D.C. Cir. 1994) (en banc); *see also Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973) ("The extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background."). The November 19, 2009 Order does not identify, and we are unaware of, any statute that explicitly empowers a judicial officer presiding over an EDR hearing to control OPM's

[6] *Ex parte Peterson*, 253 U.S. 300, 312 (1920); *see also* CAA Report at 4 ("The judiciary's internal governance system is a necessary corollary to judicial independence."); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 742 (2001) ("Any Anglo-American 'court,' to be worthy of that name, must have the ability to . . . regulate its internal administrative affairs[.]").

administration of the FEHBP. Nor, in our view, is there anything in those statutes potentially relevant to the service of judicial officers in that capacity that can be "fairly" read to authorize the exercise of such control over OPM. It is true that 28 U.S.C. § 332 empowers the judicial council of each circuit to "make all necessary and appropriate orders for the effective and expeditious administration of justice *within* its circuit." 28 U.S.C. § 332(d)(1) (emphasis added). But there is no basis for concluding that the councils' authority to issue orders for internal administration also encompasses the issuance of orders empowering EDR hearing officers to direct executive branch agencies. Indeed, there are affirmative indications that Congress did not intend for judicial officers serving in an administrative role to be able to exercise such directive authority, at least with respect to OPM's administration of the FEHBP.

To begin with, the FEHBA contains no suggestion that the federal courts, as employing agencies operating in an administrative capacity, are to have directive authority over OPM. The FEHBA specifically entrusts OPM with administering the FEHBP. *See Transitional Learning Cmty. at Galveston, Inc. v. OPM*, 220 F.3d 427, 429 (5th Cir. 2000); *Kobleur v. Group Hospitalization & Med. Servs., Inc.*, 954 F.2d 705, 709 (11th Cir. 1992). In particular, the FEHBA authorizes OPM to negotiate and contract with private insurance carriers to offer health benefits plans to federal employees—including judicial employees—and other eligible individuals, *see* 5 U.S.C. §§ 2104, 2105, 8901, 8902(a), 8903 (2006), and to determine if carriers are contractually obliged to pay benefits to enrollees for particular services, *see id.* § 8902(j). The FEHBA also authorizes OPM to "prescribe regulations necessary to carry out" the Act, *id.* § 8913(a), which regulations may specify the "time at which and the manner and conditions under which an employee is eligible to enroll in an approved health benefits plan," *id.* § 8913(b). Finally, the FEHBA specifically vests jurisdiction to review claims challenging OPM's administration of the FEHBP in the U.S. district courts and the U.S. Court of Federal Claims, which have concurrent jurisdiction "of a civil action or claim against the United States founded on [the Act]." *Id.* § 8912. There is no provision of the FEHBA expressly granting any administrative entity—including one within the Judicial Branch—a role in reviewing any actions taken by OPM in administering the FEHBP—including actions taken with respect to enrollment. *Cf. Rosano v. Dep't of the Navy*, 699 F.2d 1315,

1319 (Fed. Cir. 1983) (stating that the Navy, as the employing agency, "had no power to change" "FEHB[P] options[] determined by OPM"); *In re Levenson,* 587 F.3d 925, 934 (9th Cir. 2009) (observing that FEHBA vests authority to enter into health insurance contracts for federal employees "in a single executive agency, OPM" and that it would not be appropriate to issue an order directing the Office of the Federal Public Defender for the Central District of California ("FPD") "to enter into separate contracts [for its employees] with private insurers" because "[n]o statute or regulation authorizes the FPD to enter into [such contracts] or to bind the United States to any such contract").

Consistent with our reading of the FEHBA, nothing in OPM's regulations implementing the Act indicates that OPM delegated to employing agencies the authority to direct OPM in its administration of the FEHBP. It is true that regulations promulgated by OPM give an employee's "employing office" the authority to make initial enrollment determinations and also require the employing agency to make an internal reconsideration process available to an employee denied coverage by his employing office. *See* 5 C.F.R. § 890.104 (2009). The regulations further provide that "[a]fter reconsideration, the [employing] agency . . . must issue a final decision," *id.* § 890.104(e), and make that final decision subject to judicial review, *see id.* § 890.107(a). Thus, at least to some extent, OPM appears to have delegated to the relevant employing agencies the authority to make initial enrollment decisions; to reconsider those decisions; and to render them final, subject to judicial review. *Cf. id.* § 890.103(b) ("OPM may order correction of an administrative error upon a showing satisfactory to OPM that it would be against equity and good conscience not to do so.").[7] But nothing in the regulations may be read to suggest that an employing agency can, in internally reconsidering an enrollment denial, issue a directive to OPM that binds it with respect to that enrollment, including by preventing OPM from taking actions otherwise authorized by statute.

[7] We do not address here whether the relevant statutory authorities justify construing this delegation to extend to employing entities within the Judicial Branch. *See Authority of OPM to Direct FEHB Program Carrier Not to Enroll Individual*, 34 Op. O.L.C. at 56 n.3.

Notwithstanding the terms of the FEHBA, the November 19, 2009 Order suggests that the statutory authority to issue directives to OPM is implicit in Congress's decision to make "the Judiciary's EDR tribunals . . . the only forum where judicial employees may seek redress for unlawful personnel actions." *Golinski*, 587 F.3d at 961; *see also id.* ("If a judicial employee suffers an unjustified personnel action, such as being fired on account of race, sex or religion, the only remedy possible would come from an EDR tribunal. Our EDR tribunals must therefore have the authority to grant full relief, including reinstatement (or other prospective relief) and back pay."). We do not believe, however, that the recognition of such implicit authority is warranted. Not only does the FEHBA itself contain no indication that such authority exists, but it also would be at odds with the Act's framework for OPM administration of the FEHBP, which is subject to expressly authorized judicial review. In particular, as noted, *see supra* p. 35, Congress has established the federal district courts and the Court of Federal Claims as the proper venues for challenging OPM's administration of the FEHBP. *See* 5 U.S.C. § 8912; *see also Nat'l Treasury Employees Union v. Campbell*, 589 F.2d 669, 674 (D.C. Cir. 1978) (section 8912 "is . . . a broad consent to all suits brought to enforce rights and obligations created by the [FEHBA]"). Thus, although the November 19, 2009 Order contends that "judicial employees who are victims of discrimination . . . have no remedy at all" other than through the EDR process, *Golinski*, 587 F.3d at 961, in fact the federal courts are available to review challenges to OPM's actions relating to enrollment. That specific provision for judicial review indicates that Congress did not contemplate that the federal courts' internal administrative dispute resolution processes would also provide a means of reviewing—and then countermanding by issuance of a binding directive—OPM's enrollment-related actions.

Moreover, the fact that Congress *has* expressly authorized at least one remedy—back pay—that judicial officers acting in an administrative capacity may make available to judicial employees subjected to adverse employment actions further suggests that Congress did not also intend such officers to be able to issue an order to OPM directing enrollment in an FEHBP plan. Specifically, the Back Pay Act provides that an employee

> who, on the basis of . . . an administrative determination . . . is found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee . . . is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred . . . .

5 U.S.C. § 5596(b)(1). The Back Pay Act does not define in detail the nature of the "authority" that must make the findings justifying relief, other than specifying that it must be "appropriate." The Act does, however, expressly include judicial employees within its ambit. *See id.* § 5596(a)(2); 28 U.S.C. § 610 (2006). Accordingly, the process established by the Ninth Circuit EDR Plan, which identifies relief under the Back Pay Act as one of the remedies available to successful complainants, may well qualify as an "appropriate authority." *See* Ninth Circuit EDR Plan at 10; *see also In re Levenson*, 587 F.3d at 935. But whether it does or not, the Back Pay Act at least demonstrates that Congress knows how to authorize particular remedies for judicial employees subjected to discriminatory treatment and to grant the Judicial Branch a means of remedying such wrongs. That Congress has not taken similarly explicit steps to empower the federal courts to establish administrative processes that can bind OPM in the administration of the FEHBP suggests strongly that Congress did not intend to implicitly authorize them to do so.

The November 19, 2009 Order also invokes two other potential sources of statutory authority for the directives to OPM. First, it suggests that an EDR hearing officer's power to direct OPM is implicit in the express statutory authority of the Merits System Protection Board ("MSPB") to bind executive branch agencies in parallel situations involving executive branch employees. *See Golinski*, 587 F.3d at 961 n.4 (noting that had the January 13, 2009 Order "come from the MSPB, there would have been no question that it would have had to be obeyed," and positing that because "[o]ur EDR tribunals take the place of the MSPB for judicial employees, . . . it makes sense that Congress gave our EDR tribunals powers coexten-

sive with those of the MSPB" (citing 5 U.S.C. § 1204(a)(2) (2006)). Second, the November 19, 2009 Order suggests that the Administrative Office of the United States Courts Personnel Act of 1990 ("AOUSC Personnel Act"), Pub. L. No. 101-474, 104 Stat. 1097, which transferred control over the AOUSC's personnel matters from the Executive Branch to a personnel system within the AOUSC, may constitute implicit congressional recognition of the Judiciary's authority to exercise the same powers as the MSPB. *See Golinski*, 587 F.3d at 962 n.6. In our view, however, neither the MSPB's express statutory authority to issue binding orders nor the AOUSC Personnel Act may fairly be read to confer the authority that is at issue in this matter.

With respect to the MSPB, it is not even clear that the Board may review a challenge to OPM's enrollment decisions under the FEHBA. The MSPB's jurisdiction is restricted to actions made "appealable to the Board under any law, rule, or regulation," 5 U.S.C. § 7701(a) (2006), and there does not appear to be any legal authorization for the appeal of OPM enrollment decisions to the Board, *see* 5 C.F.R. 1201.3 (2009) (enumerating actions that may be appealed to the MSPB); *see also Rosano*, 699 F.2d at 1318–20 (MSPB lacks jurisdiction to review challenge to OPM decision to approve or not approve health plan); *Oppenheim v. OPM*, 51 M.S.P.R. 255, 257 (1991) (OPM's "decisions concerning its administration of health benefits are not reviewable by the [MSPB]"); *Lee v. OPM*, 32 M.S.P.R. 149, 152 (1987) (same). In any event, there is no support for the assumption that the MSPB and an EDR hearing officer have "coextensive" statutory authority over executive branch agencies, *Golinski*, 587 F.3d at 961 n.4. Congress expressly granted the MSPB "special power" to compel such agencies to comply with its orders and decisions. *Kerr v. Nat'l Endowment for the Arts*, 726 F.2d 730, 732 (Fed. Cir. 1984); *see* 5 U.S.C. § 1204(a)(2) ("The [MSPB] shall . . . order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order."); *cf.* 42 U.S.C. § 2000e-16(b) (2006) (providing that "[t]he head of each . . . department, agency, or unit shall comply with . . . rules, regulations, orders, and instructions" issued by the Equal Employment Opportunity Commission). By contrast, there is no equivalent provision authorizing the establishment of judicial EDR processes that can do the same. In accord with basic principles of statu-

tory construction, *see Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*."), the absence of such a provision indicates that the potential functional similarity between the MSPB and a federal court's EDR process does not itself justify the inference that Congress intended for them to have the same enforcement powers. Thus, whether or not it would "make[] sense" for the Ninth Circuit EDR process to be able to bind executive branch agencies in the same manner as the MSPB can, *Golinski*, 587 F.3d at 961 n.4, Congress has not acted to make it so. *See Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934) ("The question of policy—whether different terms should have been imposed—is not for us. We may not add to the conditions set up by Congress any more than we can subtract from them.").

The AOUSC Personnel Act also fails to provide a legal basis for the directives to OPM. In the first place, that Act by its terms addresses solely personnel matters within the AOUSC and thus does not speak to such matters within the federal courts generally. Moreover, the text of the AOUSC Personnel Act contains no language expressly conferring on the AOUSC the authority to issue directives to OPM in its administration of the FEHBP, and none may be fairly implied. Indeed, the House Committee Report makes clear that the Act affects neither the entitlement of the AOUSC's employees to health benefits under the FEHBP nor OPM's responsibility for hearing those employees' administrative appeals of its decisions under the FEHBA. *See* H.R. Rep. No. 101-770, pt. 1, at 6 (1990) ("Being subject to the retirement and insurance plans administered by [OPM], employees of the [AOUSC] will continue to appeal adverse rulings on these matters to [OPM]").

The November 19, 2009 Order notes that section 3(g) of the AOUSC Personnel Act, § 3(g), 104 Stat. 1099, empowers the AOUSC to exercise, with respect to employees or applicants for employment in the AOUSC, "any authority granted" to the MSPB under "any law prohibiting" certain enumerated forms of "discrimination in Federal employment." 28 U.S.C. § 602 note (2006). But this provision does not grant even the AOUSC the authority to direct OPM as the November 19, 2009 Order purports to do. The Order is clear that the directives to OPM are for the purpose of enforcing the non-discrimination protections set forth in the Ninth Circuit's own internal EDR and EEO plans, not any federal anti-discrimination

statute. *See Golinski*, 587 F.3d at 963 ("This court's non-discrimination plan requires that Ms. Golinski be afforded [FEHBP coverage for her spouse]"). Accordingly, even if the MSPB could direct OPM's actions with respect to enrollment in the FEHBP—which, as noted above, is not at all clear, *see supra* p. 39—we would not read section 3(g) as authorizing the AOUSC to do likewise when it is enforcing only an internal judicial rule and not a federal statute that actually grants such power to the MSPB.[8]

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[8] The Ninth Circuit EDR Plan itself is consistent with our view that there is no statutory authority for the directives to OPM contained in the November 19, 2009 Order and that those directives are therefore without legal force. Although the November 19, 2009 Order characterized the EDR plan as "clear[ly]" authorizing the issuance of legal directives to OPM, *Golinski*, 587 F.3d at 961, the plan by its terms provides that only judicial actors may be named as respondents in grievance proceedings, *see* Ninth Circuit EDR Plan at 7 ("The respondent in all complaints shall be the employing office that would be responsible for redressing, correcting or abating the violations(s) alleged in the complaint"), thus suggesting that the plan does not anticipate the issuance of binding orders to outside actors. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (as a general matter, "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"); 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 3033 (3d ed. 1997) ("Ordinarily a judgment only may be enforced against a party.") ("Wright, Miller & Marcus"). In addition, while the plan provides that hearing officers "may order a necessary and appropriate remedy," including one "prospectively insuring compliance with the rights protected by this Plan," Ninth Circuit EDR Plan at 9, the only remedies listed as available to successful complainants apply solely within the Judicial Branch. For example, available remedies include placement of an employee in a position previously denied or in a comparable alternative position, prospective promotion to a position, priority consideration for a future promotion or position, granting of family and medical leave, and payment of back pay. *See id.* at 9–10. Finally, the EDR plan states that it "provide[s] rights and protections to Ninth Circuit employees comparable to those provided to legislative branch employees under the CAA," Ninth Circuit EDR Plan at 1, and the CAA plainly establishes an internal process for the resolution of disputes between congressional employees and their employing offices concerning the application of enumerated, generally applicable workplace statutes. *See Johnson v. Office of the Architect of the Capitol*, No. 99-AC-326, 2003 WL 25795028, at *2 (C.A.O.C. 2003) (CAA was "promulgated to ensure that *employing offices in Congress and its instrumentalities* are accountable for actions taken in contravention of statutes made applicable by the Act" (emphasis added)). There is no suggestion in the CAA that the OOC's enforcement functions under that Act include the power to direct executive action—a power that would be quite anomalous in any event since the Executive Branch has no authority under the Act to enforce the incorporated workplace statutes with respect to congressional employees, *see*

B.

Were the EDR process within the Executive Branch, we could end our inquiry with the conclusion that a judge presiding over that process lacks statutory authority to issue orders directing OPM in its administration of the FEHBP. It is well-settled that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) ("[The Civil Aeronautics Board] is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do."); 5 U.S.C. § 558(b) (2006) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.").[9] Given that the EDR process is a creation of the

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2 U.S.C. § 1361(f)(3). *See also Eastham v. U.S. Capitol Police Bd.*, No. 06-CP-41, 2008 WL 5476087, at *5 (C.A.O.C. 2008) (OOC Board "has no mandate or plenary authority under the CAA to remedy abuses or police the integrity of the [Federal Employees' Compensation Act] process"). Thus, although it is true that the directives to OPM contained in the November 19, 2009 Order do not constitute a type of remedy expressly foreclosed by the plan, s*ee* Ninth Circuit EDR Plan at 10 (identifying payment of attorney's fees and payment of compensatory and punitive damages as "[r]emedies *not* legally available"), the availability of such an externally directed remedy would appear at odds with the entire structure of the plan, including those remedies that it does expressly make available.

[9] This Office has noted a possible argument that, because "Congress is presumed to have made its statutory scheme effective," "agencies *may* possess *some* inherent power to impose sanctions designed to protect the integrity of their proceedings[,] . . . even against federal agencies." *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24, 32 (2003). Whatever the merits of this argument, it is of no relevance here because the authority of an EDR hearing officer to direct OPM would extend well beyond the type of "authority to promulgate an internal disciplinary rule" that some courts have recognized as inherently possessed (presumably, because implicitly delegated by statute) by administrative bodies. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 7 (D.C. Cir. 2000); *see, e.g.*, *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (upholding SEC rule providing for Commission to suspend and disbar attorneys who appear before it "as a necessary adjunct to the Commission's power to protect the integrity of its administrative procedures and the public in general"); *cf. Am. Bus. Ass'n*, 231 F.3d at 7 (any inherent authority possessed by administrative agencies

Judicial Branch, however, we must address a possible constitutional basis for the directives to OPM contained in the November 19, 2009 Order.

Pointing to OPM's actions in this matter—specifically, its advice to the Blue Cross and Blue Shield Association that federal law barred the Blue Cross Plan from accepting Ms. Golinski's election form, *see Golinski*, 587 F.3d at 958—the November 19, 2009 Order asserts that OPM "may not disregard a coordinate branch's construction of the laws that apply to its employees," and "must henceforth respect the Judiciary's interpretation of the laws applicable to judicial employees." *Id.* at 961. "Any other result," the Order contends, "would prevent the Judiciary from 'accomplishing its constitutionally assigned functions' by seriously undermining [its] autonomy over personnel matters." *Id.* (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977); citation omitted); *see also id.* ("Barring us from determining, within reasonable bounds, the rights and duties of our personnel under the laws providing for their employment would make us a handmaiden of the Executive." (internal quotation marks omitted)). On this basis, the Order suggests that the Constitution grants judges serving as EDR hearing officers the inherent authority to issue orders that bind executive branch agencies in their administration of statutes that confer benefits on judicial employees. *See Golinski*, 587 F.3d at 963 (invoking "the Judiciary's inherent authority to resolve workplace complaints without interference by the Executive"); *id.* at 962 n.6 (discussing federal courts' "authority, part statutory and part inherent, to control matters that touch on the operation of the courts").

Particularly given that the statutory context strongly indicates that Congress has both declined to empower EDR hearing officers generally in this manner and charged OPM specifically with administering the FEHBA, we conclude that there is no inherent constitutional power supporting the directives issued to OPM in this matter. Even assuming that federal courts possess inherent authority under Article III, independent of any statute, to create an administrative process for the resolution of judicial employment disputes, such inherent authority to establish mecha-

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does not extend to "modifying regulated parties' primary conduct"). Indeed, the argument based on an agency's inherent authority to protect the integrity of its proceedings is particularly inapt in this case because OPM was not even a party to Ms. Golinski's EDR hearing, and thus not part of the "proceeding" over which Chief Judge Kozinski presided.

nisms for internal enforcement of employment rules does not imply the much more significant authority to act with binding force against an executive branch agency that has been statutorily charged with the administration of a federal benefits program.

The Supreme Court has explained that inherent powers are those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quotation marks and citation omitted); *see also United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."). As the Supreme Court has explained, "[p]rinciples of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it." *Degen v. United States*, 517 U.S. 820, 824 (1996) (internal citations omitted); *see also Chambers*, 501 U.S. at 44 (directing that "inherent powers must be exercised with restraint and discretion"). Consistent with this admonition, the Court has identified a limited number of areas in which federal courts possess inherent powers, *see generally* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 738 (2001), none of which powers are comparable to the one claimed here.

It is true that Article III courts possess the inherent "ability to punish disobedience to *judicial* orders." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) (emphasis added). But that authority—"essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches," *id.* at 796–97—says nothing about the authority of federal judges to compel compliance with their *administrative* orders. "Courts of justice" must "be vested, by their very creation, with power to impose . . . submission to their lawful mandates." *Chambers*, 501 U.S. at 43. But we are not aware of any support for the proposition that federal judges presiding over an administrative process for the Judicial Branch—not a judicial proceeding to resolve a case or controversy—must have this power as well, particularly when the entity to which the order is directed is not a party to that administrative process, *cf. Hansberry*, 311 U.S. at 40; Wright, Miller & Marcus § 3033; *supra* note 9.

In fact, we have identified no precedent for the proposition that the Constitution vests federal courts with the inherent authority to establish an administrative process pursuant to which a judge can direct an executive branch agency in these circumstances. Indeed, as the historical discussion above demonstrates, *see supra* Part II, the Executive Branch governed all judicial administration until 1939, and was in charge of personnel matters for some judicial employees—those within the AOUSC—until enactment of the AOUSC Personnel Act in 1990. *See Dotson*, 398 F.3d at 171 & nn.6, 7. And, as previously discussed, *see supra* pp. 40–41, even in granting the AOUSC control over its own personnel matters in most respects, Congress decided to leave OPM in charge of administering a number of retirement and insurance programs, including the FEHBP, with respect to the AOUSC's employees. *See* H.R. Rep. No. 101-770, pt. 1, at 6. Thus, there is no longstanding tradition of the federal courts exercising complete independence in the administration of judicial employees generally, let alone in the administration of their federal benefits.

Admittedly, there is some support in the CAA Report submitted by the Judicial Conference and the legislative history of the AOUSC Personnel Act for the proposition that certain kinds of Executive Branch interference with a personnel issue that is strictly internal to the Judicial Branch—in other words, that concerns solely the relationship between the Judiciary and its employees—might raise separation of powers concerns. *See* CAA Report at 15 ("The judicial branch needs internal enforcement [of workplace laws]" "due to separation of powers concerns"); H.R. Rep. No. 101-770, pt. 1, at 5 ("While it may be convenient to have the personnel system of [the AOUSC] covered by the personnel management network of the executive branch, it is contrary to the doctrine of separation of powers."); *see also* CAA Report at 4 ("[T]he judicial branch must have control over its employee and workplace management in order to ensure both the independence, and the appearance of independence, of its decisions."). The enrollment of Ms. Golinski's spouse in the FEHBP, however, is not such a purely internal judicial matter. Not only is OPM responsible generally for administering the FEHBP, which is open to employees in all three branches, but it also contracts with the private insurance carriers that operate the program and administers the funds—held in the U.S.

Treasury—used to reimburse those carriers for benefit payments. *See* 5 U.S.C. §§ 8901, 8902, 8903, 8909.

Consistent with this judgment, we note that even in the years since the Judiciary has been managing its own internal personnel matters, it has not laid claim to the kind of directive authority at issue here. Thus, while "administrative review within the judiciary plainly has a long history, which has been well known to Congress," *Dotson*, 398 F.3d at 176, the directives in the November 19, 2009 Order appear to be without precedent. The *sui generis* nature of these directives supports the conclusion that the power claimed is not "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962); *see generally Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252–57 (1891) (surveying practice of common law courts in concluding that federal courts do not possess inherent authority to order medical examinations of plaintiffs).

The absence of historical support for the proposition that the directives to OPM in the November 19, 2009 Order are constitutionally based is not surprising. The Supreme Court has adopted a functional approach to separation of powers disputes, rejecting "the notion that the three Branches must be entirely separate and distinct," *Mistretta*, 488 U.S. at 380, and emphasizing instead that the Constitution "'enjoins upon its branches separateness but interdependence, autonomy but reciprocity,'" *id.* at 381 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)). Thus, there is nothing necessarily anomalous about the benefits received by one branch's employees being to some extent dependent on another branch's interpretation of the laws. *See id.* (explaining that the separation of powers does not require a "hermetic division among the Branches"). Indeed, the Court has been clear that "even quite burdensome interactions" "between the Judicial Branch and the Executive" do not "necessarily rise to the level of [unconstitutionality]." *Clinton v. Jones*, 520 U.S. 681, 702 (1997).

To be sure, "'the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties,'" *Jones*, 520 U.S. at 701 (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)), and in resolving disputes involving alleged encroachments upon

the Judiciary, the Court specifically has identified the danger of another branch "'impermissibly threaten[ing] the institutional integrity of the Judicial Branch,'" *Mistretta*, 488 U.S. at 383 (quoting *Commodity Futures Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). In our view, however, no such threat is present here. OPM's actions relating to the attempted enrollment of Ms. Golinski's spouse simply do not "destroy [the Judicial Branch's] autonomy," *Golinski*, 587 F.3d at 962, or otherwise seriously undermine its institutional integrity or its ability to perform its duties.[10] Prior precedent of this Office addressing the permissibility of executive enforcement of federal legislation with respect to the Judiciary comports with this conclusion. *See, e.g.*, *Enforcement of INA Employer Sanctions Provisions Against Federal Government Entities*, 24 Op O.L.C. 33, 37 (2000) (concluding that separation of powers does not bar enforcement by the Immigration and Naturalization Service of certain employer verification requirements against a judicial employer); Memorandum for Theodore M. Cooperstein, Counsel to the Deputy Attorney General, from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: FBI Investigative Authority* at 2 (June 7, 2004) ("[T]here is no general separation-of-powers problem with the FBI exercising the Executive's authority to enforce the laws by investigating possible violations of the law that may involve the property, activities or employees of the legislative or judicial branches.").

The relevant Supreme Court precedents do not specify with complete precision those functions that are so central to the autonomy of the Judicial Branch that they must be immune from interference by the other branches, but it has marked some helpful guideposts. Most fundamentally, as the Court has explained, "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches

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[10] The November 19, 2009 Order presents some hypothetical examples of Executive Branch action. *See Golinski*, 587 F.3d at 962. Since those situations have not come to pass, we do not consider them in undertaking our separation of powers analysis of OPM's conduct with respect to Ms. Golinski's attempted enrollment of her spouse. *See Schor*, 478 U.S. at 852 (declining to endorse an absolute, separation of powers based prohibition on congressional action "out of fear of where some hypothetical 'slippery slope' may deposit us"); *see also Mistretta*, 488 U.S. at 411 n.32 (declining to address "hypothetical constitutional question").

of government." *United States v. Will*, 449 U.S. 200, 217–18 (1980). Thus, the coordinate branches may not interfere with the "total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler*, 398 U.S. at 84. Certain specific constitutional provisions help to preserve the necessary judicial independence: in particular, the good Behavior Clause "guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment," and the Compensation Clause "guarantees Art. III judges a fixed and irreducible compensation for their services." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); U.S. Const. art. III, § 1. The Court also has recognized several further constitutional protections afforded the Judiciary. Congress may not "vest review of the decisions of Article III courts in officials of the Executive Branch" or "command[] the federal courts to reopen final judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). In addition, Congress may not "authorize the adjudication of Article III business in a non-Article III tribunal" in a way that "impermissibly threatens the institutional integrity of the Judicial Branch." *Schor*, 478 U.S. at 851; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." (citing *N. Pipeline Constr. Co.*, 458 U.S. at 84, 90–92 (plurality, concurring, and dissenting opinions))).

OPM's actions in this matter are not at all comparable, however, to the types of intrusions that the Court has deemed to transgress the separation of powers. Unlike in those cases, there is no connection here between the allegedly intrusive action—OPM's enforcement of the federal statutory bar on the enrollment of same-sex spouses of judicial employees in the FEHBP—and either the judicial decisionmaking process or any of the related activities that reside at the core of federal judicial power.[11] Some

[11] *See Enforcement of INA Employer Sanctions Provisions*, 24 Op O.L.C. at 37 (even though Executive Branch enforcement of immigration laws with respect to judicial employer "would impose some administrative burdens upon its subject[,] . . . such burdens would certainly not be so demanding as to interfere with the judiciary's proper

potential employees may decline to work for the Judiciary—and some current judicial employees may depart for the private sector—because of the unavailability of federal health benefits for same-sex spouses. But this outcome hardly establishes that the Executive Branch violates Article III when, in administering a government-wide benefits program such as the FEHBP, it acts to prevent the attempted enrollment of a judicial employee based on generally applicable statutory limits on the availability of benefits. *Cf. O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939) (in concluding that Compensation Clause does not forbid subjecting federal judges to a generally applicable income tax, observing that "[t]o subject [federal judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering"); *United States v. Hatter*, 532 U.S. 557, 571 (2001) ("There is no good reason why a judge should not share the tax burdens borne by all citizens."). The application of statutorily prescribed limits on federal employee benefits of any kind may have this same consequence, and yet it cannot be the case that separation of powers principles completely disable the Executive Branch from applying any such limits to judicial employees. Indeed, as the Supreme Court held in *Will*, the Compensation Clause does not even "erect an absolute ban on all legislation that conceivably could have an adverse effect on the compensation of judges." 449 U.S. at 227; *see also id.* at 227 n.31 ("[T]he Compensation Clause does not forbid everything that might adversely affect judges."). If the Compensation Clause, which is an express constitutional limit, does not render the compensation of *judges* inviolable, then *a fortiori* general separation of powers principles do not afford the Judiciary absolute protection from action by the Executive Branch to enforce a statute that has some effect on the benefits received by judicial *employees*.

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execution of its constitutional obligations"); *cf. Mistretta*, 488 U.S. at 410 (dismissing notion that the President's power to appoint federal judges to the U.S. Sentencing Commission and to remove Commission members for good cause threatens judicial independence or "prevent[s] the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies").

Given all of these considerations, we are unconvinced that OPM's actions threaten the integrity of the Judicial Branch, particularly when compared with other alleged encroachments on that branch that the courts have upheld against separation of powers challenge.[12]

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Acting Assistant Attorney General
Office of Legal Counsel

[12] *See Mistretta*, 488 U.S. at 408–11 (upholding President's authority to appoint and remove members of U.S. Sentencing Commission, including federal judges); *Morrison v. Olson*, 487 U.S. 654, 683 (1988) (powers and duties of Judicial Branch with respect to independent counsel under Ethics in Government Act, including authority to terminate counsel's office, did not threaten institutional integrity of Judicial Branch); *see also United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984) (rejecting the claim that the Constitution confers on federal judges absolute immunity from federal criminal prosecution); *United States v. Hastings*, 681 F.2d 706, 711 (11th Cir. 1982) (same); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (same); *cf. Will*, 449 U.S. at 228–29 (Compensation Clause does not prevent Congress from refusing to apply previously enacted formula for increasing judicial salaries so long as increase has not taken effect as part of the compensation that is "due and payable").

Authority of OPM to Direct Health Insurer Not to Enroll Individual Deemed Eligible by Employing Agency

Under both the regulations it has issued for administering the Federal Employees Health Benefits Act and its contract with the insurance carrier, the Office of Personnel Management has authority to direct a carrier not to enroll an individual in a health plan if OPM disagrees with the employing agency's determination that the enrollment is permissible under federal law.

In the circumstances presented here, the law does not allow OPM to exercise its general administrative discretion in a manner that would permit such an enrollment to proceed.

January 20, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

This memorandum elaborates upon legal advice our Office previously provided to you orally and by e-mail concerning the authority of the Office of Personnel Management ("OPM") to direct the Blue Cross and Blue Shield Association ("BC/BS") not to enroll a federal employee's same-sex spouse in a federal health benefits plan, in a situation where the relevant employing agency has determined that the spouse is eligible to enroll. We previously advised both that OPM possesses the authority to direct non-enrollment and that, in the circumstances presented here, the law does not allow OPM to exercise its general administrative discretion in a manner that would permit such an enrollment to proceed. We reach this conclusion based on our understanding of the Federal Employees Health Benefits Program ("FEHBP") and of basic principles of administrative and government contracting law, although we acknowledge that there is no express provision of the Federal Employees Health Benefits Act ("FEHBA")—the statute governing the FEHBP—or OPM's organic statute that precisely addresses a situation like this or that expressly imposes a duty upon OPM to countermand an employing agency's enrollment determination when OPM believes that determination to be inconsistent with the statutory bounds established by the FEHBA. Because this issue arises in a highly unusual and complex procedural posture, we begin by setting forth in some detail the factual background that informs our understanding of the questions you have posed and the answers that we provide. We then explain why we believe that OPM has the

authority to direct non-enrollment here, as well as why we believe the law does not allow OPM to permit the enrollment to proceed in these circumstances.

I.

In 2008, Karen Golinski, a staff attorney for the U.S. Court of Appeals for the Ninth Circuit, applied for benefits for her same-sex spouse under the FEHBP. Under the regulatory scheme established for administering the FEHBP, the Administrative Office of the United States Courts ("AOUSC"), as Ms. Golinski's employing agency, deemed Ms. Golinski's spouse ineligible to receive benefits. Accordingly, the AOUSC refused to submit Ms. Golinski's health benefits election form to her insurance carrier, BC/BS. In response, Ms. Golinski filed a complaint under the Ninth Circuit's Employee Dispute Resolution ("EDR") plan, which establishes the Ninth Circuit's internal procedure for resolving employee disputes. In that complaint, she alleged that the AOUSC's failure to submit her form violated the Ninth Circuit's EDR plan and its Equal Employment Opportunity ("EEO") plan because it amounted to discrimination on the basis of sex and sexual orientation. *See In re Golinski*, 587 F.3d 901, 902 (9th Cir. 2009).

The Chief Judge of the Ninth Circuit, Alex Kozinski, sitting as the hearing officer administering the EDR plan, agreed with Ms. Golinski's complaint. He concluded that the FEHBA permitted employing agencies to enroll same-sex spouses notwithstanding the Defense of Marriage Act ("DOMA") and thus that denying health insurance to Ms. Golinski's spouse violated the prohibitions against discrimination in the Ninth Circuit's EDR and EEO plans. He ordered the Director of the AOUSC to submit Ms. Golinski's health benefits election form "to the appropriate health insurance carrier." *Id.* at 904.

In response to the Chief Judge's order, OPM, by letter dated February 20, 2009, advised the AOUSC that "[p]lans in the FEHBP may not provide coverage for domestic partners, or legally married partners of the same sex, even though recognized by state law." Letter for Nancy E. Ward, Deputy Assistant Director, Office of Human Resources, Administrative Office of the United States Courts, from Lorraine E. Dettman, Assistant Director, Office of Insurance Services Programs, Office of

Personnel Management (Feb. 20, 2009) ("Dettman Letter"). The letter referenced prior guidance from OPM on that same point. *See* Office of Personnel Management, Benefits Administration Letter No. 96-111, at 3 (Nov. 15, 1996) ("[DOMA] clarifies that same-sex marriages cannot be recognized for benefit entitlement purposes under . . . FEHB[.]"). The letter further advised that OPM had informed BC/BS that it "may not accept the enrollment forms submitted by your agency to provide coverage that is not allowed under Federal law." Dettman Letter; *see also* Letter for Stephen W. Gammarino, Senior Vice President, National Programs, Blue Cross Blue Shield, from Shirley R. Patterson, Chief Insurance Contracting Officer, Office of Insurance Services Programs, Office of Personnel Management (Feb. 23, 2009) ("Under [the FEHBA and DOMA], Ms. Golinski may not provide coverage for her same-sex spouse, even though the marriage may be recognized by state law. Therefore, we are advising you that you may not accept the enrollment form submitted by the Administrative Office of the United States Courts to provide coverage that is not allowed under Federal law.").

In response to OPM's letter to the AOUSC, its advice to BC/BS not to permit the enrollment, and the fact that the carrier had not actually enrolled Ms. Golinski's spouse following the Chief Judge's initial order, the Chief Judge issued a new order dated November 19, 2009. In that order, the Chief Judge reiterated Ms. Golinski's entitlement to relief and ordered the AOUSC to resubmit her health benefits election form to BC/BS. He further concluded that OPM's actions in issuing guidance or otherwise directing the carrier not to enroll Ms. Golinski's spouse violated separation of powers principles; he directed OPM to "rescind" its "guidance or directive" instructing BC/BS that Ms. Golinski's wife was not eligible to enroll; and he instructed OPM to refrain from "interefer[ing] in any way with the delivery of health benefits to Ms. Golinski's wife on the basis of her sex or sexual orientation." *In re Golinski*, 587 F.3d 956, 963–64 (9th Cir. 2009) ("November 19, 2009 Order").[1]

[1] On December 17, 2009, BC/BS filed a petition for review of the November 19, 2009 Order with the Ninth Circuit Judicial Council, arguing that "the Judicial Council has no jurisdiction over BC/BSA under the EDR Plan" and that the Chief Judge's conclusion that the FEHBA allows enrollment of same-sex spouses was incorrect in any event. *See* Petition for Review for Blue Cross and Blue Shield Association at 1, 9, *In re Golinski*, No. 09-80173 (9th Cir. Dec. 17, 2009). On December 22, 2009, Chief Judge Kozinski

In light of this order, you asked whether, assuming the AOUSC resubmits Ms. Golinski's health benefits form to BC/BS, OPM may again direct or otherwise advise BC/BS not to enroll her spouse in the health benefits plan, such as by affirming its prior statements to that effect in some manner. You also asked whether, assuming OPM wishes to permit the enrollment to proceed now that Chief Judge Kozinski has issued his most recent order, it may rescind its prior guidance and advise BC/BS that enrollment would be permissible.

In answering these questions, we do not believe the November 19, 2009 Order from Judge Kozinski materially affects OPM's legal authorities or obligations with respect to the enrollment at issue. As we previously advised you, that order could not bind OPM because it was issued in an administrative capacity under the EDR plan. *See* E-mail for Elaine Kaplan, General Counsel, Office of Personnel Management, from David Barron, Acting Assistant Attorney General, Office of Legal Counsel (Dec. 16, 2009, 5:37 PM EST).* As a result, we do not believe OPM is required to comply with the Order's directives. OPM's legal authorities and obligations, if any, arise from the FEHBA, OPM's organic statute, the relevant regulations OPM has issued, and its contract with BC/BS, and it is to these legal sources that we look for guidance.[2]

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issued a new order, noting that the time for filing appeals of his prior orders had expired and concluding that his "prior orders in this matter are therefore final and preclusive on all issues decided therein as to others who could have, but did not appeal, such as the Office of Personnel Management . . . and the Administrative Office of the United States Courts." *In re Golinski*, No. 09-80173, at 1 (9th Cir. Dec. 22, 2009).

* Editor's Note: On the same day that it issued this memorandum opinion, the Office issued a separate opinion memorializing the advice in the December 16, 2009 e-mail. *See Legal Effect of Federal Judge's Order as Hearing Officer Under Court's Employment Dispute Resolution Plan*, 34 Op. O.L.C. 25 (2010).

[2] We note that, on June 17, 2009, President Obama issued a presidential memorandum in which he required the heads of certain executive departments and agencies to extend various benefits to same-sex domestic partners, and the heads of other executive departments and agencies to determine what additional measures could be taken "to provide benefits to the same-sex domestic partners of Federal Government employees." Memorandum for the Heads of Executive Departments and Agencies (June 17, 2009), https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri. That memorandum does not affect our analysis because, as it made clear, it did not purport to alter existing statutory limitations on agencies' authority. *See id*. ("Executive departments and

II.

We begin by examining OPM's authority to direct a carrier not to enroll an individual in a health plan—or, at least, to affirm its prior non-enrollment directive or guidance—in the event that OPM disagrees with a federal employing agency's determination that the enrollment is permissible under federal law. There are two potential sources of such authority: OPM's own regulations for administering the benefits program, issued pursuant to the FEHBA, and its contract with the carrier (here BC/BS). We consider each of these potential sources of authority in turn.

We note at the outset that OPM has already advised as to BC/BS's legal authority to enroll in this case, as reflected in the letter OPM issued to BC/BS following Chief Judge Kozinski's initial order. Moreover, as we have previously advised, Chief Judge Kozinski's subsequent November 19, 2009 Order is not binding on OPM because it was issued by the Chief Judge in his administrative capacity. Accordingly, there has been no intervening event that would appear to strip OPM of the authority it previously exercised in this case to prevent the enrollment from proceeding. Nonetheless, if the AOUSC resubmits Ms. Golinski's enrollment form and the carrier again asks OPM how it should respond, OPM may face anew the question whether it possesses the authority to direct or otherwise advise that the enrollment may not occur (even if such action were only to take the form of an affirmation of OPM's prior directive or guidance). Accordingly, we now address OPM's power to so advise or direct. As we explain further below, OPM possesses the authority to issue a directive (or affirm its previous directive or guidance) under both the regulations it has issued for administering the FEHBA and its contract with BC/BS, which, among other things, incorporates regulations governing federal contract law.

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agencies . . . may only provide benefits . . . if they have legal authorization to do so. My Administration is not authorized by Federal law to extend a number of available Federal benefits to the same-sex partners of Federal employees."); *see also id.* (providing that recommendations for the extension of benefits should be "consistent with existing law").

A.

We begin by considering OPM's authority to take action to prevent enrollment under its own regulations. Acting under the authority granted by the FEHBA, OPM has entered into contracts with various health insurers, including BC/BS, to provide health care to federal employees and other persons covered by the FEHBA. Rather than retaining all authority to supervise implementation of these contracts, OPM has delegated to the employing offices of agencies participating in the FEHBP the authority to make both initial and final enrollment eligibility determinations. *See* 5 C.F.R. § 890.104 (2009).[3] The regulations expressly reserve to OPM, however, the discretion to "order correction of an administrative error upon a showing satisfactory to OPM that it would be against equity and good conscience not to do so." *Id.* § 890.103(b).

At the time these regulations were promulgated, OPM explained that "an administrative error occurs when *an employing office misapplies the law or regulations*, misinforms employees, or fails to inform employees when required to do so." 59 Fed. Reg. 66434, 66434 (Dec. 27, 1994) (emphasis added). Thus, "administrative error" includes clear statutory error. Admittedly, the purpose of the regulation, at least in significant part, was to provide OPM with a means of correcting errors by employing agencies that were *adverse* to the employee: in its *Federal Register* notice promulgating the relevant regulations, OPM explained that "administrative error" included "any mistake on the part of the employing office that directly results in the loss of a benefit or opportunity to an employee." *Id.* Here, of course, OPM would be confronted with the opposite circumstance because a determination by the employing agency that the employee's same-sex spouse is eligible for enrollment would constitute clear

[3] We note that in delegating authority to make final enrollment determinations for the Judicial Branch to the AOUSC, OPM apparently relied on its general rulemaking authority under the FEHBA. *See* 5 U.S.C. § 8913(a) (2006) ("The Office of Personnel Management may prescribe regulations necessary to carry out this chapter."); *id.* § 8913(b) ("The regulations of the Office may prescribe the time at which and the manner and conditions under which an employee is eligible to enroll in an approved health benefits plan[.]"). We express no view on whether this rulemaking authority permits such a delegation, because even if the AOUSC did not have validly delegated authority to make a final judgment on enrollment, OPM would nonetheless maintain the authority to issue a non-enrollment directive, or otherwise correct AOUSC's decision.

statutory error *favorable* to the employee. Thus, the issue is whether the OPM regulation in question would authorize OPM to "order correction of an administrative error" that would *benefit* the employee.

OPM has informed us that, notwithstanding its focus on adverse impacts on employees in the *Federal Register* discussion of "administrative error," it has in practice applied this regulation to correct errors even when the mistake would have benefitted the employee. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Elaine D. Kaplan, General Counsel, Office of Personnel Management, *Re: Request for Second OLC Opinion Regarding* In re Golinski*, No. 09-80173 (9th Cir. Nov. 19, 2009)*, at 6 (Dec. 8, 2009) ("Kaplan Memo") ("According to program staff, OPM has, in the past, occasionally requested that agencies correct enrollment errors that it believes are contrary to law, whether those errors are harmful or beneficial to the employee."). As you have explained, although "[t]he language of the regulation, and its history . . . , might suggest that OPM's authority to correct administrative errors was designed to protect employees from harm," in practice "OPM has not limited its correction of administrative errors to this narrow context." *Id.*

In our view, OPM may reasonably interpret its regulation to confer the authority to correct a clear statutory error by the employing agency, even if that error would be to the employee's benefit. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"). The plain text of the regulation itself is not limited to correction of errors that harm employees. And in defining an "administrative error" to "include" actions that are adverse to employees, the statement in the *Federal Register* does not foreclose circumstances in which an administrative error subject to correction could also include final action by an employing agency that favors the employee. Similarly, although the regulation's reference to "equity and good conscience" connotes the provision of relief to an employee who has suffered harm from an employing agency's adverse ac-

tion, 5 C.F.R. § 890.103(b); *see also* 59 Fed. Reg. at 66435 ("[W]ithout the authority to order a correction, OPM could not overrule an agency reconsideration decision that is obviously in disregard of law and regulations *and* is unfair to the employee." (emphasis added)), it does not compel the conclusion that OPM's discretion under the regulation is limited to providing such relief. Rather, OPM could reasonably construe the regulation, including the phrase "equity and good conscience," to permit it to intervene to stop an employing agency from making an enrollment decision that would be clearly unlawful under the FEHBA, as a matter of its equitable authority to ensure that the legal limits of the benefits program are respected. Thus, we believe the regulations provide a legal basis for OPM to correct an erroneous enrollment decision made by an employing agency.[4]

B.

Independent of OPM's corrective authority under the regulations described above, OPM also possesses authority to direct non-enrollment under its contract with BC/BS. It is our understanding that OPM concurs in this construction of the authority the contract confers upon the agency. Kaplan Memo at 7 ("As applied to the Golinski matter, it is our view that OPM had the contractual authority to intervene as it did last February to prevent Ms. Golinski's enrollment form from being processed by BC/BS.").

The contract provides that a person's eligibility for coverage shall be determined by OPM's regulations. But the contract also independently provides that "[t]he applicable provisions of . . . chapter 89 of title 5, United States Code"—i.e., the FEHBA—"constitute a part of this contract as if fully set forth herein." Federal Employees Health Benefits Program Standard Contract for Fee-for-Service Carriers § 1.4(a) (2009) ("BC/BS Contract"). In the event that there is a conflict between the regulations and the FEHBA, moreover, the contract provides that "[a]ny inconsist-

[4] We do not address the precise means by which such a correction should be made, and in particular whether the corrective action should take the form of an order superseding the employing agency's final determination, an order directing the employing agency not to submit enrollment forms despite its final determination to the contrary, or a directive to the carrier not to carry out the enrollment.

ency . . . shall be resolved by giving precedence in the following descending order: The Act, the regulations in part 890, title 5, Code of Federal Regulations, the regulations in chapters 1 and 16, title 48, Code of Federal Regulations, and this contract." *Id.* § 1.3. Thus, under the contract's own terms, even if an enrolling agency has determined that a same-sex spouse is eligible for coverage, the statutory prohibition on the carrier's providing coverage to same-sex spouses prevails over the employing agency's determination (which is made pursuant to regulation).

To be sure, the contract does not require the carrier to engage in an independent evaluation of the statutory eligibility of every individual whose enrollment forms are forwarded by an employing agency. The contract does provide, however, that the carrier is subject to OPM's discretion in making enrollment decisions. For example, the contract provides that a carrier's decision regarding a person's eligibility for coverage is "determined in accordance with regulations *or directions of OPM given pursuant to chapter 89, title 5, United States Code*." *Id.* § 2.1(a)(2) (emphasis added). The contract also expressly incorporates chapters one and sixteen of the Federal Acquisition Regulations System ("FAR"), *see id.* § 1.4(a), which provide (in the general provisions located in chapter one) that "[c]ontracting officers are responsible for . . . ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships," 48 C.F.R. § 1.602-2. The regulations specifically relating to health plan contracts (located in chapter sixteen of the FAR) also make clear that OPM can issue directives to carriers, providing that carriers "must perform the contract in accordance with prudent business practices," including "[t]imely compliance with OPM instructions and directives." *Id.* § 1609.7001(b)(1). A carrier's failure to comply with OPM instructions can provide cause for OPM to "withdraw[] . . . approval of the health benefits carrier and terminat[e] . . . the carrier's contract." *Id.* § 1609.7001(b); *see also id.* § 1609.7001(a) (requiring "[t]he carrier of an approved health benefits plan" to "meet the requirements of chapter 89 of title 5, United States Code" and providing that its failure to do so can provide cause for termination of the contract); *see also* 5 C.F.R. § 890.204 (2009) ("The Director may withdraw approval of a health benefits plan or carrier if the standards at § 890.201 of this part and 48 CFR subpart 1609.70 are not met."); *Bridges v. Blue Cross & Blue Shield Ass'n*, 935 F. Supp. 37, 42 (D.D.C. 1996) ("OPM also has the

power to penalize or debar carriers who violate the terms of their contracts with the OPM."). Consistent with these authorities, the contract itself requires the carrier to retain records so OPM can assess the carrier's compliance with the contract. *See* BC/BS Contract § 3.8 ("the Carrier will retain and make available all records applicable to a contract term that support the annual statement of operations"); *see also* 48 C.F.R. § 1652.204-70 (requiring inclusion of section 3.8 in all FEHBP contracts); *id.* § 1609.7001(a)(4) ("[The carrier] must permit representatives of OPM and of the General Accounting Office to audit and examine its records and accounts which pertain, directly or indirectly, to the plan at such reasonable times and places as may be designated by OPM or the General Accounting Office."); *Bridges*, 935 F. Supp. at 43 ("[c]arriers must also submit to audits by the OPM").[5]

In light of these contractual provisions, and in accord with OPM's own view of its contractual authority, we conclude that OPM has authority under the contract to direct BC/BS not to enroll an individual who is ineligible under the FEHBA.

III.

That OPM possesses the authority to direct the carrier not to enroll a person whom OPM determines is ineligible for coverage does not resolve how OPM should respond to an employing agency's determination that such person *is* eligible for enrollment. You have explained that OPM

[5] The contract also obligates the carrier to "notify the Contracting Officer of any Significant Event within ten (10) working days after the Carrier becomes aware of it." BC/BS Contract § 1.10(a). The contract defines a "Significant Event" to include, among other things, "any occurrence or anticipated occurrence that might reasonably be expected to have a material effect upon the Carrier's ability to meet its obligations under this contract, including, but not limited to . . . [a]ny significant changes in policies and procedures or interpretations of the contract or brochure which would affect the benefits available under the contract or the costs charged to the contract." *Id.* § 1.10(a)(11). Although this provision might be read to encompass only changes in the particular selection of benefits available to persons enrolled in the plan, it could also be read to cover a situation where the statute by its terms renders ineligible for benefits a class of persons whom the employing agency has deemed eligible. The contract provides that, upon learning of a Significant Event, "OPM may institute action, in proportion to the seriousness of the event, to protect the interests of Members, including . . . [d]irecting the Carrier to take corrective action." *Id.* § 1.10(b)(1).

believes its authority to correct an administrative error by the employing agency regarding eligibility is "discretionary and not mandatory" because "[t]he regulations contemplate that the correction of 'administrative errors' by OPM will be ordered only where OPM concludes that it would be against equity and good conscience not to do so." Kaplan Memo at 7 (quoting 5 C.F.R. § 890.103(b)). On that basis, OPM concludes that it "could reasonably find that equity and good conscience do not require it to intervene in any new enrollment action that may be triggered by [Chief] Judge Kozinski's Order" because (1) OPM has an interest in "affording comity to [Chief] Judge Kozinski's opinion," (2) enrolling Ms. Golinski's spouse would have a "negligible impact . . . on the FEHBP both as a matter of its cost and precedential effect," and (3) OPM has an interest in avoiding litigation. *Id.* Furthermore, you have informed us that OPM believes its contract with BC/BS does not limit the discretion that it retains under section 890.103(b) to permit an enrollment to proceed—even if OPM believes such enrollment to be in contravention of the FEHBA's eligibility limitations. *Id.* at 7. For the reasons set forth below, we disagree, and conclude instead that OPM does not have the authority to permit the enrollment to proceed in the circumstances at issue here.

A.

In evaluating OPM's discretion to permit the enrollment of a same-sex spouse of an FEHBP member to proceed, we start with the assumption that OPM does not have a general obligation to ensure that all enrollment decisions employing agencies make comply with the FEHBA, at least insofar as such a duty would impose on OPM the onerous obligation of reviewing each and every enrollment determination before it is implemented. The statutory and administrative framework that governs the FEHBP plainly does not contemplate such direct, *ex ante* OPM supervision of all enrollment decisions. At the same time, however, the absence of an obligation on OPM to assess the eligibility of each enrollee *sua sponte* does not mean that OPM retains the discretion to knowingly permit an unlawful enrollment to proceed when it has been specifically informed of the enrollment before it occurs and could easily take action to prevent it from occurring. Still less does the absence of such a general duty mean that OPM may take affirmative steps intended to permit such an enrollment to proceed that otherwise would not.

In the particular factual circumstances at issue here, although there is no express statutory provision that resolves the scope of OPM's obligation in a clear manner, we believe that the law is best read not to allow OPM to permit the enrollment to proceed. The employing agency's eligibility decision would be in clear violation of the FEHBA (as OPM acknowledges), and it would appear that to prevent the enrollment from proceeding OPM need only affirm its prior directive or guidance when asked by the carrier whether it should carry out the enrollment. By contrast, to permit the enrollment to proceed, OPM would have to take action, contrary to its prior guidance, intended to assure the carrier that it may accept an enrollment that OPM has determined to be unlawful. In our view, the relevant statutory, regulatory, and contractual provisions cannot be read, in light of more general administrative law principles, to permit OPM to exercise its administrative discretion in such a manner.

We base our conclusion on our interpretation of the FEHBA, as informed by the general obligation of agencies to respect the limits of their authority under their authorizing statutes. Under the terms of the FEHBA, OPM does not have the authority to extend benefits to persons who are not authorized to receive benefits under the statute, including the same-sex spouses of federal employees. Specifically, the FEHBA authorizes OPM to "contract for or approve . . . [o]ne Government-wide plan . . . under which payment is made by a carrier under contracts with physicians, hospitals, or other providers of health services for benefits . . . given to employees . . . [and] members of their families." 5 U.S.C. § 8903(1) (2006). The FEHBA expressly defines "member of family" to mean "the spouse of an employee or annuitant and an unmarried dependent child under 22 years of age." *Id.* § 8901(5). DOMA, in turn, provides that the term "spouse" refers "only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2006). Consistent with these provisions, OPM has taken the position that "[p]lans in the FEHB may not provide coverage for domestic partners, or legally married partners of the same sex, even though recognized by state law," Dettman Letter; *see also* Benefits Administration Letter No. 96-111, at 3 ("[DOMA] clarifies that same-sex marriages cannot be recognized for benefit entitlement purposes under . . . FEHB[.]"), and OPM has advised us that this remains its position, Kaplan Memo at 3 ("OPM has concluded that it is prohibited by law from providing FEHBP benefits to same-sex spouses.").

The fact that OPM holds this view is significant for purposes of determining the scope of its authority to permit the enrollment of a same-sex spouse in these circumstances. It means that this is not a case in which OPM, in permitting the enrollment to proceed, could be understood to be merely deferring to an employing agency's reasonable construction of an ambiguous statutory term. Rather, by taking steps intended to permit the enrollment of a same-sex spouse to proceed, OPM would be taking steps to permit—rather than protect against—an enrollment that OPM believes to be unlawful under the clear terms of the statute it administers. Such action would appear to be inconsistent with the basic principle that an agency may not act beyond its statutory authority. *See* 1 General Accounting Office, *Principles of Federal Appropriations Law* 3-16 (3d ed. 2004) ("GAO Redbook") (explaining that "[i]t is a fundamental proposition that agency regulations are bound by the limits of the agency's statutory and organic authority"); *Dow Chemical Co. v. EPA*, 605 F.2d 673, 681 (3d Cir. 1979) (agencies may not "extend their statutory authority beyond that delegated to them by Congress"); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("It is 'central to the real meaning of "the rule of law," [and] not particularly controversial' that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so. Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them." (internal citation omitted)); *Aluminerie Becancour, Inc. v. United States*, 28 Ct. Int'l Trade 2060, 2066 (2004) (the authority of federal agencies to contract "is necessarily constrained by the statutes under which the agency operates, by regulations, and by applicable case law"). It would also appear to be inconsistent with OPM's more specific obligation to "act in a manner consistent with the underlying purposes" of the FEHBA. *Nat'l Fed'n of Fed. Emps. v. Devine*, 679 F.2d 907, 912 (D.C. Cir. 1981).

Indeed, in accord with this general principle, courts have recognized that agencies have no general authority to waive statutory restrictions that Congress has imposed in establishing a benefits program. As the Eighth Circuit has explained, a federal agency "cannot extend benefits by regulation to a class of persons not included within the authorizing statute," and "[t]o the extent . . . regulations can be read to confer benefits not authorized by the Act's statutory provisions, they are beyond the agencies' delegated powers." *Harris v. Lynn*, 555 F.2d 1357, 1359 (8th Cir. 1977);

see Schoemakers v. OPM, 180 F.3d 1377, 1382 (Fed. Cir. 1999) ("Neither courts nor administrative agencies . . . have the authority to waive requirements . . . that Congress has imposed as a condition to the payment of federal money."); *Crown v. U.S. R.R. Retirement Bd.*, 811 F.2d 1017, 1021 (7th Cir. 1987) ("A congressional mandate to pay statutory benefits . . . leaves no discretion in the agencies and courts but to limit the payment of benefits to those entitled to them." (quotations omitted)).

To be sure, OPM has in this case delegated authority to the AOUSC to make enrollment decisions for judicial employees, and we recognize that this delegation means that OPM's role in allowing the enrollment is somewhat less affirmative than it would be had it not made the delegation. But for the following reasons, this delegation of the authority to make eligibility determinations does not fundamentally alter our analysis.

As a preliminary matter, OPM did not delegate all of its discretion. It delegated to employing offices the responsibility to make enrollment decisions, 5 C.F.R. § 890.104, but it retained the responsibility to "contract for or approve" health benefit plans that meet the statutory requirements, 5 U.S.C. § 8903, and it also retained the authority to correct "administrative errors" made by employing offices, 5 C.F.R. § 890.103(b). Even if OPM's regulations do not themselves impose a duty on OPM to exercise its administrative authority in a manner that would prevent the enrollment from proceeding here, we do not believe those regulations may fairly be read to relieve OPM of any such implicit statutory duty it may otherwise have. So far as we are aware, OPM has never before viewed these regulations as an affirmative obstacle to OPM's attempt to correct an unlawful enrollment by an employing office. Indeed, on the basis of that retained discretionary authority, OPM has advised the carrier previously that it may not proceed with the enrollment.

More importantly, we do not believe that OPM may justify acting in a manner that would facilitate the enrollment here on the ground that it is merely permitting a carrier to implement a decision made by the employing office and not by OPM. A federal agency cannot, as a general rule, evade responsibility for its statutory obligations by delegating them to another agency. *See Conoco, Inc. v. Skinner*, 781 F. Supp. 298, 309 (D. Del. 1991) ("The Secretary cannot escape ultimate responsibility under these statutes by merely delegating responsibility to an inferior agency."); *cf. Campbell v. Galeno Chem. Co.*, 281 U.S. 599, 610 (1930)

("We cannot see that the Commissioner, under the guise of legislation, may do in gross what he had no power to do in detail." (internal quotation marks omitted)). To put it slightly differently, OPM could not validly promulgate a regulation that purported to allow same-sex spouses to enroll in benefit plans under the FEHBA, and we have found no support for the view that it could bring about this result by delegating enrollment decisions to another agency. *See Vierra v. Rubin*, 915 F.2d 1372, 1378 (9th Cir. 1990) ("[W]hen the Secretary delegates to a state's discretion the definition of an important statutory term, the states' authority to define the term can not [sic] exceed the authority given the Secretary by Congress in the first place. . . . The Secretary may thus delegate definitional responsibilities to the states *only to the extent* that the state's determinations are also consistent with the AFDC program generally. . . . The Secretary's delegation to Hawaii of the good cause definition is invalid to the extent that it allows Hawaii to exceed the scope of the Secretary's initial authority to formulate the definition.").

These general principles of administrative law seem particularly applicable here. There is no provision in the FEHBA itself that directly or clearly confers upon OPM the unusual authority effectively to waive a statutory limitation on eligibility requirements established by federal law. And there is no indication that OPM is generally understood to have such authority.[6] Other provisions in the FEHBA make clear that

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[6] Indeed, Congress was previously encouraged to adopt an express waiver provision in a closely related context. Specifically, the FEHBA authorizes OPM to enter into contracts for group-practice prepayment plans. *See* 5 U.S.C. § 8903(4)(A). Under a prior version of the law, any such group practice was required by statute to "include physicians representing at least three major medical specialties who receive all or a substantial part of their professional income from the prepaid funds." *Id.* (1982). During 1983 hearings on amendments to the FEHBA, the then-president of an association of group-practice prepayment plans advocated for the "possibility of a waiver of the requirement that three specialties be []represented in HMO physician groups." *Federal Employees Health Benefits Reform Act of 1983: Hearing Before the Subcomm. on Comp. & Emp. Benefits of the H. Comm. on Post Office & Civil Serv.*, 98th Cong. 277 (1983) (statement of Dr. Donald F. Schaller, President, Group Health Association of America, Inc.); *see also Oversight on Federal Employees Health Benefits Program: Hearing Before the Subcomm. on Compensation & Employee Benefits of the H. Comm. on Post Office & Civil Serv.*, 99th Cong. 142 (1985) (advocating "[e]limination of the requirement that a comprehensive plan have three major medical specialties represented within its medical group" and arguing that "OPM should have the authority to determine whether a plan will be able to

Congress knew how to grant OPM discretion to waive eligibility limitations when it wanted to do so. For example, the FEHBA contains at least one express provision regarding waiver of statutorily defined eligibility requirements, and it is quite limited. Section 8905 of title 5 provides that an annuitant "who at the time he becomes an annuitant was enrolled in a health benefits plan . . . may continue his enrollment" if certain statutory conditions are met. The section also expressly provides that OPM "may, in its sole discretion, waive the requirements of this subsection in the case of an individual who fails to satisfy such requirements if [OPM] determines that, due to exceptional circumstances, it would be against equity and good conscience not to allow such individual to be enrolled as an annuitant in a health benefits plan." 5 U.S.C. § 8905(b). This waiver authority was one of a group of amendments made to the FEHBA in 1986. *See* Federal Employees Benefits Improvement Act of 1996, Pub. L. No. 99-251, 100 Stat. 14; *see also* 132 Cong. Rec. 1343 (Feb. 3, 1986) (noting that the proposed legislation would "[g]rant authority to the Office of Personnel Management [OPM] to waive certain eligibility requirements for annuitants to participate in the FEHBP"). The limited nature of this waiver authority reinforces the conclusion that OPM lacks the authority to permit the enrollment here to proceed, now that it has been made aware of it and has acted previously to prevent it on the ground that it was inconsistent with the FEHBA.

In sum, although we have not identified precedent that clearly requires OPM to take affirmative action to prevent it from being brought into violation of its governing statute in the situation at issue here, we believe the duty not to knowingly allow such a violation to take place follows from the FEHBA. That conclusion rests on several considerations: the FEHBA's limited express waiver provision, its plain limitations on OPM's authority to contract with a carrier to provide benefits to same-sex spouses of employees, and the more general principles of administrative

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provide its benefits to the prospective members"). Congress subsequently responded not by granting OPM waiver authority but instead by amending section 8903, so that, under the terms of the statute, group-practice prepayment plans no longer must include three specialists. *See* 5 U.S.C. § 8903(4)(A) ("The group shall include at least 3 physicians who receive all or a substantial part of their professional income from the prepaid funds and who represent 1 or more medical specialties appropriate and necessary for the population proposed to be served by the plan.").

law regarding an agency's obligation to comply with statutory requirements. We think the duty is particularly evident here where it would not be difficult for OPM to ensure that the unlawful enrollment does not occur: OPM is aware of the pending enrollment, has already been asked once whether such an enrollment would be permissible, and can prevent the violation simply by issuing a directive (or letting stand its prior statements on the issue). Thus, this is not a case where the agency would have to expend considerable resources to prevent an unlawful enrollment from occurring.

B.

Against this conclusion, OPM argues that it has discretion in this situation for either of two reasons. First, citing *Heckler v. Chaney*, 470 U.S. 821 (1985), OPM invokes the general principle that an agency has discretion to decide whether to seek to redress a violation of a statute it is charged with enforcing, and argues that its reasons for declining to enforce eligibility limitations here are akin to those found appropriate in *Heckler* itself. *See* E-mail for Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Dec. 11, 2009, 1:11 PM EST). Second, OPM suggests that, in the past, it has exercised discretionary authority to refrain from correcting an enrollment that it believes to violate the Act's eligibility restrictions but that benefits an employee. These exercises of discretion, it claims, support its contention that the statutory framework it administers does not impose a mandatory duty to prevent enrollment in this case. *See* E-mail for David Barron, Acting Assistant Attorney General, and Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Dec. 11, 2009, 3:07 PM EST). We find these arguments unpersuasive.

In *Heckler v. Chaney*, the plaintiffs alleged that the use of certain drugs in capital punishment was an "unapproved use of an approved drug" that violated the prohibition on misbranding in the Federal Food, Drug, and Cosmetic Act. On this basis, the plaintiffs challenged the failure of the Food and Drug Administration ("FDA") to initiate an enforcement proceeding. *See* 470 U.S. at 823–24 & n.1 (citing 21 U.S.C. § 352(f)). The Court rejected their challenge, concluding that the FDA had the discretion

not to prosecute alleged violations of the Act, noting that the "recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* at 831. As the Court explained, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," such as the best use of agency resources and whether the agency is likely to prevail if it acts. *Id.*

There are certain provisions of the FEHBA that authorize OPM to enforce restrictions governing third-party conduct. *See, e.g.*, 5 U.S.C. § 8902a(d) (2006) ("Whenever [OPM] determines [that a provider engaged in various kinds of fraud] . . . [OPM] may . . . impose a civil monetary penalty of not more than $10,000 for any item or service involved."). And we do not doubt that in enforcing these provisions, OPM is entitled to substantial discretion in determining when it makes sense, given the agency's interests and resources, to take enforcement action. Here, however, OPM has not been charged with enforcing restrictions governing third-party conduct, but rather has itself been given the authority to confer benefits on a limited class of people. That an agency is allowed the discretion to determine when to exercise its authority to enforce laws that place obligations on third parties does not mean that the agency is free to ignore obligations and limitations Congress has specifically imposed on the agency itself in distributing benefits only to eligible persons. *Cf. Welch Foods, Inc. v. Borough of North East*, No. 98-246 Erie, 2001 U.S. Dist. LEXIS 3287, at *23 (W.D. Pa. Feb. 6, 2001) (concluding that the EPA did not have a "nondiscretionary duty to enforce each and every violation of the section" because "the language plainly imposes an obligation on the Borough *but not on EPA*" (emphasis added)).

Heckler itself acknowledged that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." 470 U.S. at 833; *see also* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 683 (1985) ("the *Chaney* decision, in keeping with the general direction of lower court cases over the past decade, made clear that judicial review of agency inaction is available when the agency's enforcement decision violates statutory [constraints]"). Indeed, even in the context of benefits

coverage, where the FEHBA grants OPM "broad discretionary authority to negotiate and contract for the benefits to be offered by health carriers," OPM must still "act in a manner consistent with the underlying purposes of the Act." *Nat'l Fed'n of Fed. Emps.*, 679 F.2d at 912; *see also Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572, 1575 (11th Cir. 1985) ("The grant of authority given OPM to approve benefit plans is very broad. The OPM must act in a manner consistent with the goals and policies of FEHBA." (citation omitted)); *Doe v. Devine*, 703 F.2d 1319, 1326 n.30 (D.C. Cir. 1983) (Ginsburg, J.) (noting that section 8904's requirement that government-wide contracts include coverage for "catastrophic" illnesses is a "specific mandate," and that although "[c]atastrophic" is not defined in the Act, the requirement is nevertheless "'law,' capable of judicial construction consistent with FEHBA's goals, structure, and legislative history"); *Am. Fed'n of Gov't Emps. v. Devine*, 525 F. Supp. 250, 252 (D.D.C. 1981) ("While the Director has discretion to administer the FEHB in an efficient and effective way, the scope of his discretion is limited by the language of the statute and by the purposes for which it was enacted."); *cf. Nat'l Treas. Emps. Union v. Campbell*, 589 F.2d 669, 678 (D.C. Cir. 1978) ("Rather, [OPM's predecessor's] discretion under the Health Benefits Act, though broad, is bounded by Section 8902(i); and it is to the courts that the task of policing the boundary falls."); *GHS HMO, Inc. v. United States*, 76 Fed. Cl. 339, 360–61 (2007) ("Although the court agrees with the defendant that Congress has provided OPM with broad authority to administer the FEHBP, as the agency deems necessary, it is not limitless authority. . . . [T]his court should not sustain the agency's interpretation of the Final Year Regulation, as applied to the contracts at issue, if it is inconsistent with the statute, the FEHBA."). Here, where the FEHBA expressly mandates that OPM only enter into contracts with health benefit plans that provide benefits to certain specified groups, *Heckler* does not authorize OPM to disregard Congress's express legislative direction and take action to permit the enrollment of a broader class of individuals.

In arguing otherwise, OPM identifies what might be thought of as "factors peculiarly within its expertise," and suggests that that these factors show that its decision to permit enrollment is discretionary—just as certain factors identified in *Heckler* supported the Court's conclusion that the enforcement authority of the Department of Health and Human Services was discretionary, and not mandatory, in that case. *See Heckler*, 470 U.S.

at 831–32. In our view, however, these special considerations do not warrant recognition of an implicit exception to OPM's general statutory obligations under the FEHBA in these circumstances.

Specifically, OPM cites inter-branch comity concerns in explaining why it believes it may permit this enrollment to proceed. OPM explains that this case involves a Judicial Branch employee and an order issued by a federal judge, albeit in the course of an administrative action. *See* Kaplan Memo at 7. As we have noted, however, the order at issue here was issued by a federal judge acting as an administrative officer of the courts in this setting, and as a result is not binding on OPM. Moreover, this enrollment request would ultimately come from the employing agency, the AOUSC, just as enrollment requests come from other employing agencies, including those in the Executive Branch. Certainly nothing in the FEHBA indicates that OPM's legal obligations under the statute are different with respect to determinations that the Judiciary makes as an employing agency as compared to determinations that an Executive Branch agency makes as an employing agency. We note that our conclusion in this regard is supported by the potentially broad consequences of a contrary construction of OPM's statutory authority. If comity concerns sufficed to allow OPM knowingly to permit an unlawful enrollment to proceed, then presumably OPM would be entitled to allow other enrollment decisions by the Judiciary, acting as an employing agency, that were similarly in contravention of the FEHBA's eligibility limitations. Yet there is no indication in the FEHBA that Congress intended to permit OPM to effectively retain the power to waive all FEHBA eligibility limitations as applied to judicial branch employees.

We are also aware that OPM, by declining to act, may advance its interest in avoiding litigation. We do not think, however, that the interest in avoiding litigation can provide a basis for construing the FEHBA to allow OPM to permit the enrollment here to occur. An agency administering a benefits program risks litigation whenever it complies with a statutory limitation on eligibility, because such action necessarily means that a person has been denied enrollment in a federal program, thus giving rise to a potential case or controversy. But precisely for that reason, the desire to avoid litigation does not support the conclusion that the agency possesses the authority to waive a statutory restriction on eligibility. Indeed, if Ms. Golinski were to sue to seek her spouse's enrollment, OPM would be without authority to enter into a binding settlement agreement that

provided health benefits to her spouse, precisely because it has no authority to confer such benefits under the FEHBA. *See Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 136 (1999) ("Congress may place limits on the scope of the Attorney General's settlement power through the general laws that govern the conduct of the agencies on behalf of which the Attorney General purports to settle.").

Finally, OPM points to past administrative practice to support its view that it possesses the discretion to act in a manner that would permit the enrollment to proceed. *See* E-mail for David Barron, Acting Assistant Attorney General, and Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Dec. 11, 2009, 3:07 PM EST); E-mail for Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Dec. 11, 2009, 1:11 PM EST). In fact, however, its past practice appears to support the opposite conclusion.

OPM relies in particular on a practice under the Federal Employees Group Life Insurance program of not seeking repayment of premiums that were paid for individuals who were later determined to be ineligible to receive benefits. *See* E-mail for Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Dec. 11, 2009, 1:11 PM EST). But there appears to be express statutory authority that, subject to certain defined limitations, gives federal agencies the general discretion to "waive[] in whole or in part" claims to recoup "erroneous payment of pay or allowances" where collecting the erroneous payments "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584 (2006); *see also* Memorandum for Ellen Tunstall, Chief, Insurance Planning and Evaluation Division, Office of Insurance Programs, from James S. Green, Associate General Counsel, Office of Personnel Management, *Re: FEGLI-LET STANDS* at 5 (June 6, 1997).[7] In contrast, we know of no similarly general statutory authority

[7] Health premiums paid under the FEHBP are apparently covered by this provision. *See, e.g.*, *Matter of Alfred H. Varga*, B-260909, 1996 WL 725730, at *4 (Comp. Gen. 1996) ("This Office has consistently held that the total amount of the employee's debt due the United States includes both the amount the employee received directly and other

that would allow an agency to permit enrollment of persons in government-sponsored health plans who are statutorily ineligible to enroll. Instead, with respect to the FEHBA, we have identified only a limited statutory waiver provision, discussed above, that is inapplicable here, and no other waiver provision that would be applicable. The practice cited by OPM therefore does not imply the existence of the discretion it asserts. Further, the practice OPM cites concerns claims for recoupment of erroneously paid premiums, not a decision to permit a statutorily ineligible person to enroll where OPM becomes aware of the pending enrollment in advance. OPM has advised us that when it discovers that an ineligible person is enrolled, it has uniformly terminated that person's coverage going forward. OPM is aware of no instance in which it has knowingly permitted an ineligible person to remain enrolled.[8]

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

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amounts disbursed on his behalf for such items as medicare, health benefits, savings account, life insurance, retirement, and federal and state tax withholdings.").

[8] OPM advises that it has, on occasion, declined to require carriers to seek recoupment of benefits payments made for individuals who were later determined to have been erroneously enrolled. *See generally* BC/BS Contract § 2.3(g) (providing normal procedures for recoupment of erroneous payments). But, as discussed above, OPM's statutory obligation is limited to the requirement that it contract with providers that, as a matter of course, only provide benefits to certain defined classes of individuals. Thus, if OPM discovers that a carrier has erroneously enrolled and paid benefits to an individual who is statutorily ineligible, it may be obliged to ensure that the individual's enrollment is terminated, even if it is not obliged to try to undo the past consequences of the violation. Relatedly, we do not think this case is comparable to OPM's example of an appropriate exercise of discretion with regard to the enrollment of an otherwise ineligible person; that is, when an individual who was previously enrolled needs a grace period in which to obtain alternate health insurance after it is determined that he or she is not eligible for continued enrollment. We do not believe enrolling for an indefinite period a person who has never been enrolled is the equivalent of allowing a person who was previously enrolled to retain his or her insurance for a short, defined period of time. The former approves of the enrollment of someone who is statutorily ineligible in a way that the latter does not. Moreover, in the latter case, there are arguably individual reliance interests at stake. That is evidently not the case here, and it is significant to our conclusion that in this case the question of OPM's legal obligations to prevent an unlawful enrollment arises at the pre-enrollment stage.

Department of Justice Views on the Proposed Constitution Drafted by the Fifth Constitutional Convention of the U.S. Virgin Islands

The following memorandum opinion was initially drafted in the Office of Legal Counsel at the request of the Assistant Attorney General for Legislative Affairs. It analyzes several features of the proposed constitution of the U.S. Virgin Islands. The President attached a copy of this memorandum to his letter transmitting the proposed constitution to Congress, along with his comments, under Public Law 94-584.

Because it was difficult to discern a legitimate governmental purpose that would be rationally advanced by provisions conferring legal advantages on certain groups defined by place and timing of birth, timing of residency, or ancestry, the memorandum opinion recommended that those provisions be removed from the proposed constitution.

The memorandum opinion concluded that the ten- and fifteen-year residence requirements for governors, lieutenant governors, and judges of the U.S. Virgin Islands raise constitutional concerns and recommended that consideration be given to shortening the duration of these requirements.

The memorandum opinion further concluded that the provision concerning territorial waters and marine resources appeared to be inconsistent with governing federal law and recommended that it be revised to remove any inconsistency and to make clear its recognition of Congress's plenary control over these matters.

February 23, 2010

MEMORANDUM OPINION FOR THE
OFFICE OF MANAGEMENT AND BUDGET

This responds to the Office of Management and Budget's request for the views of the Department of Justice on the proposed constitution recently adopted by a constitutional convention in the U.S. Virgin Islands ("USVI") and submitted to the President by the Governor of the USVI.[1] Below we provide our analysis of several features of the proposed constitution that we believe warrant comment: (1) the absence of an express recognition of United States sovereignty and the supremacy of federal law; (2) provisions for a special election on the USVI's territorial status; (3) provisions conferring legal advantages on certain groups defined by

[1] *See* Letter for Barack H. Obama, President of the United States, from John P. de Jongh, Jr., Governor of the U.S. Virgin Islands (Dec. 31, 2009).

place and timing of birth, timing of residency, or ancestry; (4) residence requirements for certain offices; (5) provisions guaranteeing legislative representation of certain geographic areas; (6) provisions addressing territorial waters and marine resources; (7) imprecise language in certain provisions of the proposed constitution's bill of rights; (8) the possible need to repeal certain federal laws if the proposed USVI constitution is adopted; and (9) the effect of congressional action or inaction on the proposed constitution.

Because we find it difficult to discern a legitimate governmental purpose that would be rationally advanced by the provisions conferring legal advantages on certain groups defined by place and timing of birth, timing of residency, or ancestry, we recommend that those provisions be removed from the proposed constitution. *See infra* Part II.C. We conclude that the ten- and fifteen-year residence requirements for USVI governors, lieutenant governors, and judges raise constitutional concerns, and we recommend that consideration be given to shortening the duration of these requirements. *See infra* Part II.D. As explained below, the provision concerning territorial waters and marine resources appears to be inconsistent with governing federal law. We recommend that it be revised to remove any inconsistency and to make clear its recognition of Congress's plenary control over these matters. *See infra* Part II.F.

I. Background

The USVI is an unincorporated territory acquired by the United States from Denmark in 1917. *See* 48 U.S.C. § 1541(a) (2006); *Convention Between the United States and Denmark for Cession of the Danish West Indies*, 39 Stat. 1706 (1916); *see generally* Isaac Dookhan, *A History of the Virgin Islands of the United States* 258–62 (1994). The USVI's government is established under the Organic Act of 1936, as amended, 48 U.S.C. §§ 1405–1406m (2006), and the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541–1645 (2006). *See also* 48 U.S.C. §§ 1392–1397 (2006). A 1976 act of Congress, however, permits the USVI to propose a constitution for the local government of the Islands. *See* Pub. L. No. 94-584, 90 Stat. 2899 (as amended by Pub. L. No. 96-597, § 501, 94 Stat. 3477, 3479 (1980), codified as note following table of contents of 48 U.S.C. ch. 12 (2006)) ("Enabling Act")).

Under the 1976 Enabling Act, the USVI's legislature may "call [a] constitutional convention[] to draft, within the existing territorial-Federal relationship, [a] constitution[] for the local self-government of the people of the Virgin Islands." *Id.* § 2(a). The proposed constitution must: (1) "recognize, and be consistent with, the sovereignty of the United States over the Virgin Islands . . . and the supremacy of the provisions of the Constitution, treaties, and laws of the United States applicable to the Virgin Islands," including provisions of the Organic Act and Revised Organic Act that "do not relate to local self-government"; (2) "provide for a republican form of government, consisting of three branches: executive, legislative, and judicial"; (3) "contain a bill of rights"; (4) "deal with the subject matter of" provisions of the Organic Act and Revised Organic Act that "relate to local self-government"; and (5) provide for a system of local courts consistent with the Revised Organic Act. *Id.* § 2(b).

The Enabling Act requires the Governor of the Virgin Islands to submit a proposed constitution to the President. *See id*. § 4 ("Such constitutions shall be submitted to the President of the United States by the Governor[] of the Virgin Islands[.]"). The President "shall transmit such constitution together with his comments to the Congress" within sixty days of receipt. *Id.* § 5. Congress may approve, amend, or modify the constitution by joint resolution, but the constitution "shall be deemed to have been approved" if Congress takes no action within "sixty legislative days (not interrupted by an adjournment sine die of the Congress) after its submission by the President." *Id.* Any constitution approved by Congress takes effect only if then approved by referendum in the USVI. *Id.*

A constitutional convention in the USVI proposed a constitution under the Enabling Act in 1978. The President transmitted this constitution to Congress with comments recommending certain changes. *See Message from the President of the United States Transmitting the Proposed Constitution for the Virgin Islands, Pursuant to Section 5 of Public Law 94-584*, H.R. Doc. No. 95-385 (1978). The constitution was then deemed approved under the Enabling Act because Congress took no action, but the USVI voters rejected it in a referendum. *See Department of Justice Views on the Constitution Adopted by the Constitutional Convention of the Virgin Islands*, 4B Op. O.L.C. 759, 760 n.1 (1980) ("*DOJ Views*"); S. Rep. No. 97-66, at 2 (1981). Another constitution was proposed in 1980. The President transmitted this constitution, too, providing comments and recommending changes based in part on a memorandum from

the Department of Justice. *See Message from the President of the United States Transmitting a Proposed Constitution for the Virgin Islands, Pursuant to Section 5 of Public Law 94-584*, H.R. Doc. No. 96-375 (1980); *DOJ Views*, 4B Op. O.L.C. at 759. The USVI constitutional convention reconvened and proposed amendments to the constitution in response to Administration concerns, and Congress approved a modified version of the constitution by joint resolution. *See* Pub. L. No. 97-21, 95 Stat. 105 (1981); S. Rep. No. 97-66, at 2; H.R. Rep. No. 97-25, at 2 (1981); *Fourth Constitution of the Virgin Islands: Hearing Before the Senate Committee on Energy and Natural Resources*, 97th Cong. 173, 181 (1981) ("Hearing on Fourth USVI Constitution"); *Statement on Signing a Bill to Approve a Constitution for the United States Virgin Islands* (July 10, 1981), 1 Pub. Papers of Pres. Ronald Reagan 617 (1981) ("Statement on Signing"). The USVI electorate, however, again rejected the constitution. *See DOJ Views*, 4B Op. O.L.C. at 759.

A constitutional convention in the USVI adopted the present proposed constitution at the end of May 2009, and the Governor of the USVI submitted it to the President on December 31, 2009. *See* Letter for Barack H. Obama, President of the United States, from John P. de Jongh, Jr., Governor, U.S. Virgin Islands (Dec. 31, 2009). The Governor also forwarded a legal opinion on the draft constitution prepared by the Attorney General of the USVI. *See* Letter for John P. de Jongh, Jr., Governor, U.S. Virgin Islands, from Vincent F. Frazer, Attorney General, U.S. Virgin Islands (June 8, 2009) ("USVI AG Op."). Both the Governor and the Attorney General expressed concerns that the proposed constitution was inconsistent with the Enabling Act and the U.S. Constitution.

II. Discussion

A. Recognition of U.S. Sovereignty and the Supremacy of Federal Law

The Enabling Act requires any proposed constitution for the USVI to "recognize" and "be consistent with" U.S. sovereignty and the supremacy of the applicable provisions of the Constitution, treaties, and laws of the United States. Enabling Act § 2(b)(1). The current proposed constitution, like the one initially proposed in 1980, does not include an express statement directly satisfying this requirement. Indeed, one provision of the

current constitution states, without any reference to the U.S. Constitution or federal law, that "[t]his Constitution shall be the supreme law of the Virgin Islands," Constitution of the Virgin Islands of the United States, Fifth Constitutional Convention art. II, § 5 (June 1, 2009) ("Proposed Const."), and in several places the proposed constitution refers to the USVI's "sovereignty" or "right of self-determination." *E.g.*, *id.* pmbl. ¶ 6; *id*. art. XII, § 2. Particularly in light of these provisions, we think it would be preferable if Congress revised—or urged a reconvened constitutional convention to revise—the proposed constitution to include a more express recognition of U.S. sovereignty and especially of the supremacy of federal law, as Congress did in considering the 1980 proposed constitution. Even in its current form, though, we conclude, as the Department did in reviewing the 1980 proposed constitution, that a number of provisions in the present proposed constitution considered together bring it into substantial compliance with the Enabling Act's requirement that the proposed constitution recognize U.S. sovereignty and the supremacy of federal law. *See DOJ Views*, 4B Op. O.L.C. at 760–61.

Because the Department's analysis of the 1980 proposed constitution informs our analysis of the current proposed constitution, we begin by describing the Department's 1980 analysis and the development of that earlier proposed constitution in some detail. The 1980 proposed constitution, like the constitution proposed now, included no express statement of federal sovereignty and supremacy. And that earlier proposed constitution described "[t]his Constitution and laws of the Virgin Islands enacted under it" as "the supreme law of the Virgin Islands." H.R. Doc. No. 96-375, at 7. The Justice Department nonetheless concluded that the 1980 proposed constitution was in "substantial compliance" with section 2(b)(1) of the Enabling Act because other provisions effectively acknowledged United States sovereignty and the supremacy of federal law. *DOJ Views*, 4B Op. O.L.C. at 760–61. As the Department explained, the 1980 proposed constitution's preamble included a statement "declar[ing] that the Virgin Islands assume 'the responsibilities of self-government in political union with the United States.'" *Id.* at 760 (quoting H.R. Doc. No. 96-375, at 1). In prior testimony regarding a proposed constitution for the territory of Guam, a Justice Department witness had observed that "[n]early 200 years of political history have established that political union with the United States necessarily carries with it the recognition of the sovereignty of the United States and the supremacy of its laws," and

that a statement in the preamble of the Guam constitution referring to "political union" with the United States was therefore "sufficient to overcome any contention that the explicit or tacit approval of the constitution by Congress would have the effect of relinquishing the sovereignty of the United States over Guam and the supremacy of Federal laws." *Constitution of Guam: Hearing Before the Senate Committee on Energy and Natural Resources*, 95th Cong. 64 (1978) (statement of Herman Marcuse, Attorney-Adviser, Office of Legal Counsel, Dep't of Justice). By the same token, the Department concluded that the reference to "political union" in the 1980 USVI proposed constitution sufficiently recognized federal sovereignty and supremacy to satisfy the Enabling Act. *DOJ Views*, 4B Op. O.L.C. at 761. The Department further observed that a draft official analysis of the 1980 proposed constitution interpreted its preamble as recognizing U.S. sovereignty and that the proposed 1980 USVI constitution elsewhere limited the legislative power of the USVI government to "subjects . . . consistent with . . . the Constitution and laws of the United States applicable to the Virgin Islands." *Id.* at 760; *see also* Hearing on Fourth USVI Constitution at 58 (reproducing draft official analysis); H.R. Doc. No. 96-375, at 7.

In accordance with the Justice Department's conclusions, the President stated in his message transmitting the 1980 proposed constitution to Congress that "[t]he document implicitly recognizes the sovereignty of the United States and the supremacy of United States law over locally-enacted legislation, and is, therefore, in substantial compliance with the pertinent provision of the Enabling Act that established the procedure for the drafting of a constitution for the Virgin Islands." H.R. Doc. No. 96-375, at iii.

Discussions in Congress led to a suggestion that an additional reference to U.S. sovereignty and federal supremacy be added. *See* Hearing on Fourth USVI Constitution at 173, 194. The USVI constitutional convention then proposed and Congress adopted an additional clause qualifying the draft constitution's statement that the USVI constitution and laws enacted under it constituted the "supreme law of the Virgin Islands" so as to assert such supremacy only "[t]o the extent not inconsistent with the Constitution and laws of the United States." S. Rep. No. 97-66, at 4; H.R. Rep. No. 97-25, at 2, 11; Pub. L. No. 97-21, 95 Stat. at 109.

The current proposed USVI constitution appears no less compliant with section 2(b)(1) of the Enabling Act than the constitution originally proposed in 1980, if not also the revised version of that constitution ultimately approved by Congress. Much as the preamble of the 1980 constitution described the USVI as "assuming the responsibilities of self-government in political union with the United States," H.R. Doc. No. 96-375, at 1, the preamble of the current proposed constitution declares that the USVI is "assuming the responsibilities of self-government *as an unincorporated territory of the United States*." Proposed Const. pmbl. ¶ 1 (emphasis added). The term "unincorporated territory of the United States," like the term "political union," carries a well-established meaning signifying recognition of the supremacy of the United States government. *Territorial Court of the Virgin Islands v. Richards*, 673 F. Supp. 152, 157 (D.V.I. 1987) (identifying the USVI as an "unincorporated territory" and describing Congress's authority over the territory as "plenary"), *aff'd*, 847 F.2d 108, 112 (3d Cir. 1988); *Harris v. Boreham*, 233 F.2d 110, 113–14 (3d Cir. 1956) (describing Congress's "sovereignty" over "unincorporated territories, such as the Virgin Islands"); S. Rep. No. 97-66, at 4 (report on the 1980 constitution describing the USVI as "an unincorporated territory of the United States subject to the plenary authority of the Congress"). Indeed, the Constitution itself prescribes that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations" with respect to United States territories. U.S. Const. art. IV, § 3, cl. 2. The current proposed constitution's acknowledgment of the USVI's status as an "unincorporated territory of the United States" thus implies recognition of the United States' sovereignty over the USVI.

Furthermore, the current proposed constitution also recognizes congressional authority over the USVI by describing the 1917 treaty between the United States and Denmark as "confirm[ing]" that Congress may "determine[]" the "civil rights and political status of the inhabitants" of the USVI, Proposed Const. pmbl. ¶ 3; it limits the legislative power of the USVI to "subjects of legislation consistent with . . . the Constitution and laws of the United States," just as the 1980 proposed constitution did, *id.* art. V, § 1; H.R. Doc. No. 96-375, at 7; and in certain other provisions it acknowledges the applicability of federal law, *e.g.*, Proposed Const. art. IV, § 4 (prohibiting any "political or religious test" for public office "other than an oath or affirmation to support the Constitution and laws of the Virgin Islands, and the Constitution and laws of the United States");

id. art. VII, § 2 (providing that decisions of the USVI Supreme Court "on questions arising under this Constitution and the laws of the Virgin Islands shall be final, except as Federal law may provide for review of such decisions by courts of the United States"); *id.* art. VII, § 3 (requiring rules in USVI courts to be consistent with the United States Constitution and federal laws). It is true that the current proposed constitution also states that it "shall be the supreme law of the Virgin Islands." *Id.* art. II, § 5. But while, as noted above, Congress revised the similar supremacy provision in the 1980 proposed constitution to declare that "[t]his Constitution and laws of the Virgin Islands enacted under it shall be the supreme law of the Virgin Islands" only "[t]o the extent not inconsistent with the Constitution and laws of the United States," Pub. L. No. 97-21, 95 Stat. at 109; *see also* Hearing on Fourth USVI Constitution at 173, 194; S. Rep. No. 97-66, at 4; H.R. Rep. No. 97-25, at 2, 11, the President and the Department of Justice deemed the 1980 proposed constitution in "substantial compliance" with the Enabling Act even without this change. Moreover, the original supremacy provision in the 1980 proposed constitution was arguably less consistent with United States sovereignty and federal supremacy than the current provision. The supremacy clause of the 1980 proposed constitution appeared in a provision addressing legislative powers and asserted the supremacy not only of the proposed constitution, but also of "laws of the Virgin Islands enacted under it." H.R. Doc. No. 96-375, at 7. In contrast, the supremacy provision of the current proposed constitution appears in a stand-alone section and refers only to the USVI constitution. Proposed Const. art. II, § 5. It may therefore be reasonably understood to indicate only that the USVI constitution is "the supreme law of the Virgin Islands" in the sense of superseding other USVI laws but not federal law. *Cf.* Maine Const. art. X, § 6 (referring to the Maine constitution as "the supreme law of the State"); Iowa Const. art. XII, § 1 ("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void.").

Accordingly, while we think it would be preferable if Congress revised—or urged a reconvened constitutional convention to revise—the proposed constitution to include a more express recognition of U.S. sovereignty and especially of the supremacy of federal law, as Congress did in considering the 1980 proposed constitution, we believe the proposed constitution is in substantial compliance with section 2(b)(1) of the Enabling Act. *DOJ Views*, 4B Op. O.L.C. at 761.

B. Political Status Elections

In Article XVII, the proposed constitution provides for a "special election," to be held after a year of "Public Education" programs conducted by a "Political Status Advisory Commission," on "the status and federal relations options of: (1) statehood, (2) free association, and (3) Independence." Proposed Const. art. XVII, §§ 1, 2(a). Because Congress in the Enabling Act has authorized conventions to draft a USVI constitution only for "local self-government" "within the existing territorial-Federal relationship," Enabling Act § 2(a); *see also* S. Rep. No. 94-1033, at 4 (1976) (emphasizing that "the constitution [authorized by the Enabling Act] is not a status document and that the issue of local self-government should not be delayed or confused with discussions relating to alterations in existing federal relations"); *id.* at 8 (letter from the Assistant Secretary of the Interior to the same effect), some may question the appropriateness of the inclusion of this provision in the proposed constitution. We do not believe, however, that this provision violates the Enabling Act.

Given Congress's constitutional authority over territories, any change in status for the USVI would require action by Congress. *See* U.S. Const. art. IV, § 3, cl. 2; *see also, e.g.*, *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n.16 (1976); *Simms v. Simms*, 175 U.S. 162, 167–68 (1899); *Talbott v. Silver Bow County*, 139 U.S. 438, 445–46 (1891); *First Nat'l Bank v. Yankton County*, 101 U.S. 129, 132–33 (1879); *Bluebeard's Castle, Inc. v. Gov't of the Virgin Islands*, 321 F.3d 394, 397 (3d Cir. 2003). The special election therefore would not effect any departure from the "existing territorial-Federal relationship." Moreover, the USVI local government has established public education commissions on the USVI's territorial status in the past and in 1993 held a referendum on the subject. We believe such efforts to canvass the electorate on issues of fundamental concern may serve valid purposes of local self-government. *See, e.g.*, 1988 V.I. Sess. Laws 5332; *see generally* H.R. Rep. No. 111-357, at 4 (2009); Stanley K. Laughlin, Jr., *The Law of the United States Territories and Affiliated Jurisdictions* 380 (1995).

C. Classifications Based on Place and Timing of Birth, Timing of Residence, and Ancestry

Several provisions of the proposed constitution give special advantages to "Native Virgin Islanders" and "Ancestral Native Virgin Islanders." These provisions raise serious concerns under the equal protection guarantee of the U.S. Constitution, which has been made applicable to the USVI by the Revised Organic Act.

In Article III, Section 2, the proposed constitution would define "Native Virgin Islander" to mean (1) "a person born in the Virgin Islands after June 28, 1932," the enactment date of a statute generally extending United States citizenship to USVI natives residing in United States territory as of that date who were not citizens or subjects of any foreign country, *see* Act of June 28, 1932, ch. 283, 47 Stat. 336 (now codified at 8 U.S.C. § 1406(a)(4) (2006)); and (2) a "descendant[] of a person born in the Virgin Islands after June 28, 1932." "Ancestral Native Virgin Islander" would be defined as (1) "a person born or domiciled in the Virgin Islands prior to and including June 28, 1932 and not a citizen of a foreign country pursuant to 8 U.S.C. [§] 1406," the statute governing United States citizenship of USVI residents and natives; (2) "descendants" of such individuals; and (3) "descendants of an Ancestral Native Virgin Islander residing outside of the U.S., its territories and possessions between January 17, 1917 and June 28, 1932, not subject to the jurisdiction of the U.S. and who are not a citizens [sic] or a subjects [sic] of any foreign country." Proposed Const. art. III, § 1.[2]

[2] The third prong of this definition appears circular insofar as it defines "Ancestral Native Virgin Islander" in terms of descendants of "Ancestral Native Virgin Islanders" (a category of people already encompassed by the definition's second prong), and it is also grammatically ambiguous with respect to whether the qualifying terms modify the "descendants" or the "Ancestral Native Virgin Islander" from whom they are descended.

We think it clear that these classifications could not be considered tribal within the meaning of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, that is, as falling within the established body of law defining the special relationship between aboriginal peoples of the United States and the federal government. In any event, that Clause empowers Congress, not the government of the Virgin Islands.

1. Property Tax Exemption for Ancestral Native Virgin Islanders

Under the proposed constitution, the USVI legislature would be authorized to impose real property taxes, but "[n]o Real Property tax shall be assessed on the primary residence or undeveloped land of an Ancestral Native Virgin Islander." Proposed Const. art. XI, § 5(g). The property tax exemption for Ancestral Native Virgin Islanders raises serious equal protection concerns. The Equal Protection Clause of the Fourteenth Amendment, which has been extended to the USVI by statute, *see* 48 U.S.C. § 1561 (2006),[3] generally requires only that legislative classifications be rationally related to a legitimate governmental purpose. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). But the proposed constitution does not identify a legitimate governmental purpose that the real property tax exemption for Ancestral Native Virgin Islanders would further, and it is difficult for us to discern a legitimate governmental purpose that the exemption could be said to further.

The definition of Ancestral Native Virgin Islander appears to combine two sub-classes: (i) individuals born or domiciled in the USVI before a certain date and (ii) descendants of such persons. The first sub-class may include many long-time residents of the USVI, but to the extent the real property tax exemption is designed to benefit such long-time residents it raises serious equal protection concerns. The Supreme Court has held that statutes limiting benefits, including property tax exemptions, to citizens residing in a jurisdiction before a specified date are not rationally related to any legitimate governmental purpose. For example, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court held that a New Mexico property tax exemption applicable only to Vietnam War veterans who resided in the state before a certain date violated equal protection by "creat[ing] two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens.'" *Id.* at 623. Explaining that "singling out previous resi-

[3] *See also, e.g.*, *Gov't of the Virgin Islands v. Davis*, 561 F.3d 159, 163–64 n.3 (3d Cir. 2009) (recognizing applicability of the Fifth and Fourteenth Amendment Due Process Clauses to the USVI under the Revised Organic Act); *Hendrickson v. Reg O Co.*, 657 F.2d 9, 13 n.2 (3d Cir. 1981) (same); *Moolenaar v. Todman*, 433 F.2d 359, 359 (3d Cir. 1970) (per curiam) (requiring adherence to "the constitutional requirements of equal protection of the law" in the USVI).

dents for the tax exemption[] [and] reward[ing] only those citizens for their 'past contributions' toward our Nation's military effort in Vietnam" was "not a legitimate state purpose," the Court held that the tax exemption violated the Equal Protection Clause by "creat[ing] fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents.'" *Id.* at 622–23 (quoting *Zobel v. Williams*, 457 U.S. 55, 59 (1982)); *see also, e.g.*, *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 909, 911 (1986) (plurality opinion) (applying heightened scrutiny to invalidate civil service employment preference limited to veterans who lived in the state when they entered the armed forces); *id.* at 913 (Burger, C.J., concurring in judgment) (same under rational basis review); *Bunyan v. Camacho*, 770 F.2d 773, 776 (9th Cir. 1985) (invalidating law enacted by Guam legislature awarding certain retirement credits for higher education degrees to Guam civil servants only if they resided in Guam before pursuing the degree).

Moreover, even as to this sub-class, the real property tax exemption proposed here appears to be even less constitutionally justifiable than benefits for long-time residents. In *Nordlinger v. Hahn*, 505 U.S. 1 (1992), the Supreme Court upheld a California real property valuation system that disfavored newer purchasers (though not necessarily newer or longer-term residents), and the Court recognized as legitimate two governmental interests for such a system: "local neighborhood preservation, continuity, and stability," *id*. at 12, and honoring the reliance interests of long-time property owners, *id.* at 12–13. To the extent that those interests might be offered in defense of tax benefits for long-time residents or property owners, they cannot justify the real property tax exemption for Ancestral Native Virgin Islanders. Neither of those interests appears to be rationally furthered by the first sub-class included in the proposed property tax exemption for Ancestral Native Virgin Islanders because membership in that sub-class is defined neither by length of residence nor even by length of property ownership in the USVI, but simply by having been born or having lived in the USVI many years ago. Thus, for example, an individual born in the USVI on June 28, 1932, who left the Islands the following year and who moved back to the Islands and bought a home there 50 years later (or who simply bought an undeveloped piece of land there 50 years later) would be entitled to immunity from real property taxes even though an individual who had spent his or her whole life in the USVI and had owned the same home there for the past 50 years, but who

had been born there of parents who had arrived in the USVI as immigrants on June 29, 1932, would not be so shielded. How a system permitting this kind of discrimination could be said to further neighborhood stability or reliance interests of long-time property owners is unclear.

The second sub-class benefitted by the real property exemption for Ancestral Native Virgin Islanders also seems difficult to justify as furthering a legitimate governmental interest, for the second sub-class is defined simply by parentage or ancestry. We need not delve into whether this use of "ancestry" in classifying citizens would be deemed "suspect" and thus subject to heightened scrutiny under the Fourteenth Amendment. *See, e.g.*, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 & n.4 (1976) (per curiam) (identifying alienage, race, and ancestry as classifications subject to strict scrutiny). Again, it is unclear to us what legitimate governmental purpose would support favoring so starkly the descendants of individuals born or resident long ago in the USVI regardless of the descendants' own connections (or lack thereof) to the Islands.

Because we find it difficult to discern a legitimate governmental purpose that would be rationally advanced by providing property tax exemptions only for Ancestral Native Virgin Islanders, we would recommend revising the proposed constitution to eliminate Article XI, Section 5(g).

2. Provisions on Voting and Office-Holding Favoring Native Virgin Islanders and Ancestral Native Virgin Islanders

Provisions in the proposed constitution that limit certain offices and the right to vote in certain elections to Native Virgin Islanders and Ancestral Native Virgin Islanders or that guarantee members of those groups the right to participate in certain elections present similar issues. Under the proposed constitution, the positions of Governor and Lieutenant Governor would be open only to members of these groups, Proposed Const. art. VI, § 3(d), as would service on the Political Status Advisory Commission, an eleven-member body composed of four appointed members and seven elected members that would promote awareness of the USVI's political status options and advise the Governor and Legislature on "methods to achieve a full measure of self-government." *Id.* art. XVII, §§ 1(b), 3. The special election on "status and federal relations options" provided for under the proposed constitution would be "reserved for vote by Ancestral

Native and Native Virgin Islanders only, whether residing within or outside the territory." *Id.* art. XVII, § 2. And the proposed constitution would guarantee that "Ancestral and Native Virgin Islanders, including those who reside outside of the Virgin Islands or in the military, shall have the opportunity to vote on" amendments to the USVI constitution. *Id.* art. XVIII, § 7.[4]

The provisions concerning eligibility to vote in certain elections raise equal protection concerns. To the extent one might attempt to justify the limitation on the electorate for the special election on status options as akin to a durational residence requirement, we believe it is too restrictive to be so justified. Although the Supreme Court has upheld a very brief residential limitation on eligibility to vote in one instance based on a state's legitimate interest in "prepar[ing] adequate voter records and protect[ing] its electoral processes from possible frauds," *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding 50-day durational residence requirement), it has held that even a requirement of one year's residence for voting, as opposed to office-holding, violates constitutional equal protection guarantees, *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating state's requirement that voters have resided in the state for one year and the county for three months). Moreover, the classifications here are not based on length of residence, and their effects appear potentially arbitrary. As discussed above, the categories of Ancestral Native Virgin Islanders and Native Virgin Islanders are based simply on place and timing of birth, the fact of having resided in the USVI before a certain date regardless of for how brief a time, or ancestry, regardless of the individual's own connection to the USVI. Thus, they could prohibit, for example, a foreign-born but life-long resident of the USVI from voting on political status, but would permit any qualifying ancestral descendant, including those who have never lived in the USVI, to do so. *Cf. Soto-*

[4] The right to vote on such amendments does not appear to be limited to these groups, as the same provision requires that amendments be submitted "to the electors of the Virgin Islands." Proposed Const. art. XVIII, § 7. Although the term "electors of the Virgin Islands" is undefined, the proposed constitution elsewhere provides that "[e]very citizen of the United States and the Virgin Islands eighteen (18) years of age or older and registered to vote in the Virgin Islands shall have the right to vote." *Id.* art. IV, § 1. The separate provisions establishing special voting rights and opportunities for Ancestral Native Virgin Islanders and Native Virgin Islanders suggest that the term "electors of the Virgin Islands" refers to the broader group of eligible voters.

Lopez, 476 U.S. at 915 (Burger, C.J., concurring in judgment) (discussing "irrationality" of law that "would grant a civil service hiring preference to a serviceman entering the military while a resident of [the state] even if he was a resident only for a day," but that would deny the preference to a veteran "who was a resident of [the state] for over 10 years before applying for a civil service position"); *Dunn*, 405 U.S. at 360 (concluding that the state interest in "knowledgeable" voters did not justify a durational residence requirement for voting because "there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months"); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969) (rejecting, under strict scrutiny, restrictions on franchise for school board elections because "[t]he classifications in [the statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions").

The proposed constitution's guarantee that Native Virgin Islanders and Ancestral Native Virgin Islanders "resid[ing] outside of the Virgin Islands" may vote on amendments to the USVI constitution also raises equal protection concerns. Proposed Const. art. XVIII, § 7. To uphold inclusion of non-resident voters in local government elections against equal protection challenges, courts have required a showing that the non-resident voters have a "substantial interest" in the elections in question. *See, e.g.*, *May v. Town of Mountain Village*, 132 F.3d 576, 583 (10th Cir. 1997) (upholding inclusion of nonresident property owners in town electorate because such voters "have a substantial interest in township elections"); *Bd. of County Comm'rs of Shelby County, Tenn. v. Burson*, 121 F.3d 244, 248–51 (6th Cir. 1997) (deeming participation of city voters in county school board elections irrational and thus impermissible under Fourteenth Amendment where city voters had their own independent school board and lacked a substantial interest in county school board elections); *Hogencamp v. Lee County Bd. of Educ.*, 722 F.2d 720, 722 (11th Cir. 1984) (deeming city taxpayers' contribution of 2.74% of county school board's budget "insufficient by itself to create a substantial interest in the city residents" justifying their participation in county school board elections). Because many non-resident Ancestral Native Virgin Islanders and Native Virgin Islanders may have no connection to the Islands apart

from ancestry, it is unclear whether their inclusion in the electorate for USVI constitutional amendments would satisfy this standard.

Finally, although the residential duration requirements discussed below for Governor and Lieutenant Governor and members of the Political Status Advisory Commission would prevent non-resident individuals who qualify as Native Virgin Islanders or Ancestral Native Virgin Islanders from serving in those offices, it is unclear what legitimate governmental purpose would be advanced by narrowing the subset of longtime residents who could hold those offices to Native Virgin Islanders and Ancestral Native Virgin Islanders.

In the absence of any identified legitimate governmental interest to support such provisions concerning voting and office-holding based on place of birth, residence many decades ago, or ancestry, we would again recommend that these provisions be removed from the proposed constitution.[5]

D. Residence Requirements for Office-Holding

In addition to the birth and ancestry qualifications discussed above, the proposed constitution imposes substantial residence requirements on a number of USVI offices. In particular, the Governor and Lieutenant Governor would be required to have been "domiciliar[ies]" of the USVI for at least fifteen years, ten of which "must immediately precede the date of filing for office," Proposed Const. art. VI, § 3(a); judges and justices of the USVI Supreme Court and lower court to be established under the proposed constitution would be required to have been "domiciled" in the USVI for at least ten years "immediately preceding" the judge or justice's appointment, *id.* art. VII, § 5(b); the Attorney General and Inspector General would need to have resided in the USVI for at least five years, *id.* art. VI, §§ 10(a)(1), 11(a)(2);[6] and the members of the

[5] Because we conclude that the restrictions on voting present clear equal protection concerns under the Fourteenth Amendment, we need not consider whether they may also violate the Fifteenth Amendment's prohibition on denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV; *see also* 48 U.S.C. § 1561 (extending Fifteenth Amendment to USVI).

[6] The proposed constitution appears ambiguous with respect to how this five-year period is determined. It provides: "There shall be an Attorney General, who shall be appointed by the Governor with the advice and consent of the Senate, and at the time of the

Political Status Advisory Commission would be required to have been "domiciliaries" of the USVI for "a minimum of five years," *id.* art. XVII, § 1(b). In addition, the proposed constitution would require that USVI Senators be "domiciled" in their legislative district "for at least one year immediately preceding the first date of filing for office." *Id.* art. V, § 3(c).

These requirements, particularly those requiring more than five years of residence, raise potential equal protection concerns. As explained in the Department of Justice's comments on the proposed 1980 constitution, "[t]he Supreme Court has held that candidates for public office 'do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.'" *DOJ Views*, 4B Op. O.L.C. at 766 (quoting *Turner v. Fouche*, 396 U.S. 346, 362 (1970)). Though noting that the Supreme Court has summarily affirmed three decisions upholding five- to seven-year residence requirements for state senators and governors, *id.* at 767 (citing *Chimento v. Stark*, 353 F. Supp. 1211, 127 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973); *Kanapaux v. Ellisor* (D.S.C. unreported), *aff'd*, 419 U.S. 891 (1974); *Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975)), the Department's memorandum observed that the Supreme Court "has not as yet passed on durational residence requirements for the holding of office," *id.*, and that lower courts have struck down laws imposing residence requirements of five or more years on certain state or local offices, *id.* at 767–68 (collecting cases). The 1980 Justice Department memorandum therefore concluded that while certain five-year residence requirements in the 1980 proposed constitution likely would not "give rise to serious constitutional problems," there was "every reason to question whether the courts [would] uphold" fifteen-year residence requirements for the offices of Governor and Lieutenant Governor under that proposed constitution. *Id.* at 768.

Likewise, the President observed in his message to Congress that the fifteen-year residence requirements in the 1980 constitution "may violate the Federal constitutional prohibition against discriminatory qualifications for public office." H.R. Doc. No. 96-375, at iv. As for Congress, the

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appointment must . . . have resided in the Virgin Islands at least five (5) years next preceding his election." Proposed Const. art. VI, § 10(a)(1). Given that the Attorney General would be appointed rather than elected, the reference to the period "next preceding his election" seems unclear.

legislative history indicates that its approval of the 1980 constitution did not signify any "opinion on the merits of these provisions" and that it too recognized that the fifteen-year "domiciliary qualifications" in that constitution might "be invalidated if they are found to be incompatible with the United States Constitution." H.R. Rep. No. 97-25, at 3; *see also* S. Rep. No. 97-66, at 5.

The case law since 1980 on durational residence requirements for state and local offices generally supports the Department's analysis provided at that time. In *Clements v. Fashing*, 457 U.S. 957 (1982), a plurality of the Supreme Court observed that "the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny'" and that "[d]ecision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions." *Id.* at 963 (plurality opinion) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). *Clements*, however, did not involve durational residence requirements, but rather provisions requiring a waiting period or mandatory resignation before certain current state officeholders could seek new elective offices. *See id.* at 966–71. In another case, a concurring opinion, citing *Chimento*'s approval of a seven-year residence requirement for a state governor, suggested that residence requirements may serve legitimate purposes, but this opinion did not elaborate on how long a period of prior residence may be required. *See Zobel*, 457 U.S. at 70 (Brennan, J., concurring) (observing that "allegiance and attachment may be rationally measured by length of residence . . . and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes").

One court of appeals has concluded, based on the Supreme Court summary affirmances cited in the Department's 1980 memorandum, that at least "some durational residency requirements are constitutional." *City of Akron v. Bell*, 660 F.2d 166, 168 (6th Cir. 1981). This court thus upheld a one-year residence requirement for city council members based on the local government's interest in "knowledgeable candidates." *Id.* at 168–69. In other recent decisions, courts have similarly upheld relatively brief residence requirements for state or local offices, typically applying only rational basis review and deeming such laws adequately justified by the governmental interest in ensuring familiarity with local concerns. *See,*

e.g., *MacDonald v. City of Henderson*, 818 F. Supp. 303, 306 (D. Nev. 1993) (one-year residence requirement for city council); *Hankins v. Hawaii*, 639 F. Supp. 1552, 1556 (D. Haw. 1986) (five-year residence requirement for Hawaii governor under state constitution); *Schiavone v. DeStefano*, 852 A.2d 862, 866–67 (Conn. Sup. Ct. 2001) (five-year residence requirement for city mayor); *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 734 (Tenn. 1991) (one-year residence requirement for municipal civil service boards); *State ex rel. Brown v. Summit County Bd. of Elections*, 545 N.E.2d 1256, 1259–60 (Ohio 1989) (two-year residence requirement for city council); *Langmeyer v. Idaho*, 656 P.2d 114, 118 (Idaho 1982) (five-year residence requirement for appointment to local planning and zoning board); *see also, e.g.*, *Thournir v. Meyer*, 909 F.2d 408, 411 (10th Cir. 1990) (upholding under rational basis review state requirement that unaffiliated candidates have been registered as unaffiliated voters in the state for at least one year before filing for office); *White v. Manchin*, 318 S.E.2d 470, 488, 491 (W. Va. 1984) (applying strict scrutiny based on the fundamental right "to become a candidate for public office" but upholding state constitutional requirement that state senators have resided in their district for at least one year before their election). On the other hand, at least one federal court has recently applied strict scrutiny to invalidate a state requirement that state legislators have resided within their legislative districts for at least one year. *See Robertson v. Bartels*, 150 F. Supp. 2d 691, 696, 699 (D.N.J. 2001) (applying strict scrutiny based on "the combined right of persons to run for public office and the right of voters to vote for candidates of their choice"); *see also, e.g.*, *Peloza v. Freas*, 871 P.2d 687, 691 (Alaska 1994) (applying heightened scrutiny under state constitution and invalidating three-year residence requirement for city council).

Insofar as the territorial status and unique history and geography of the USVI make familiarity with local issues particularly important for office-holders there, the governmental interests supporting durational residence requirements for USVI offices may be particularly strong. *See DOJ Views*, 4B Op. O.L.C. at 768; *see also, e.g.*, *Hankins*, 639 F. Supp. at 1556 (observing that "[t]he State has a strong interest in the assurance that its governor will be a person who understands the conditions of life in Hawaii" and that "[t]his concern has 'particular relevance in a small and comparatively sparsely populated state'" (quoting *Chimento*, 353 F. Supp. at 1215)); *cf. Bell*, 660 F.2d at 168 (noting that "the interests of [a state

or local] governmental unit in knowledgeable candidates and knowledgeable voters may be served by differing lengths of durational residency requirements"). Yet at least some courts might consider the lengthy residence requirements here—particularly the ten- or fifteen-year periods required for USVI judges, governors, and lieutenant governors—unjustified. *Cf. Clements*, 457 U.S. at 963 (plurality opinion) (observing that "[d]ecision in this area of constitutional adjudication is a matter of degree"); *Summit County Bd. of Elections*, 545 N.E.2d at 1260 (upholding two-year residence requirement but deeming it "conceivable that such a requirement may be too long in duration to serve a legitimate state interest").

Accordingly, we would note that these provisions raise constitutional concerns, and we would recommend that consideration be given to shortening the ten- and fifteen-year residence requirements for USVI governors, lieutenant governors, and judges. *Cf.* H.R. Doc. No. 96-375, at iv, 10, 22 (recommending that 1980 proposed constitution be revised to require that the Governor and Lieutenant Governor have been domiciliaries of the USVI for ten years instead of fifteen years, even though provision required only five years of residence immediately preceding the date of taking office).

E. Potentially Unequal Legislative Districts

The proposed constitution defines electoral districts for several USVI offices, including members of the USVI Senate. The Senate, which would serve as the USVI's unicameral legislature, would include between eleven and fifteen members. Proposed Const. art. V, §§ 1, 2(a). Beginning with the first election in 2012, the Senate would consist of (1) six Senators elected "at large" by the Islands as a whole, three of whom must be residents of St. Croix and three of whom must be residents of St. Thomas or St. John; (2) two Senators elected from each of two sub-districts on St. Croix; (3) two elected from each of two sub-districts on St. Thomas; and (4) one elected from St. John. *Id.* art. V, § 2(a)(1). At least once every ten years and within 120 days of the publication of the official census for the Islands, the Senate would be required to appoint a "reapportionment commission," which would develop a plan, to be approved by the USVI Supreme Court, for the reapportionment of "At-Large and sub-district

senate seats that are contiguous and compact areas." *Id.* art. V, § 2(b).[7] Although the proposed constitution provides that the areas in these districts "shall be constituted as to give, as nearly as is practicable, representation in proportion to the census population," the plan also would be required to "provide for at least one Senator from St. John." *Id.* art. V, § 2(b). These provisions, particularly the reservation of a Senate seat for St. John, raise equal protection concerns because they may prove to be at odds with the principle of "one person one vote."

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment requires states to "'make an honest and good faith effort to construct districts [for legislative representatives] as nearly of equal population as is practicable.'" *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339 (N.D. Ga. 2004) (quoting *Reynolds v. Sims*, 377 U.S. 533, 556 (1964)), *aff'd*, *Cox v. Larios*, 542 U.S. 947 (2004). As noted above, this requirement is applicable to the USVI by statute. *See* 48 U.S.C. § 1561; *Moolenaar v. Todman*, 433 F.2d 359, 359 (3d Cir. 1970) (per curiam). Accordingly, insofar as the islands comprising the USVI have (or later develop) populations significantly disproportionate to the number of seats reserved for them in the Senate, the provisions for specified geographic representation may be subject to challenge for violating this "one person one vote" requirement of equal protection.

The Supreme Court has established a burden-shifting framework for evaluating "one person one vote" claims based on the deviation in population per representative between the most overrepresented and the most underrepresented electoral districts in a jurisdiction, factoring in at-large representatives. *See, e.g.*, *Bd. of Estimate of N.Y. City v. Morris*, 489 U.S. 688, 701–02 & n.9 (1989); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). As a general rule, "an apportionment plan with a maximum population deviation under 10%" constitutes only a "'minor deviation from mathematical equality'" and is "'insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment.'" *Brown*, 462 U.S. at 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)). Districting plans with such deviations may not be "automatically immune from constitutional attack," but they are at least "presumptively constitutional, and the burden lies on the plaintiffs to rebut that presump-

[7] Article V, § 2(b) refers to a plan for "reappointment" rather than "reapportionment." We assume this is a typographical error.

tion." *Larios v. Cox*, 300 F. Supp. 2d at 1340–41; *see also Cox v. Larios*, 542 U.S. at 949 (Stevens, J., concurring) (describing Court's summary affirmance as "properly reject[ing]" the defendants' "invitation" to "creat[e] a safe harbor for population deviations of less than 10 percent"). "A plan with larger disparities in population . . . creates a prima facie case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 842–43; *see also Voinovich v. Quilter*, 507 U.S. 146, 160–62 (1993). Legitimate justifications for a disparity may include preserving the integrity of political subdivisions or recognizing natural or historical boundaries, *see DOJ Views*, 4B Op. O.L.C. at 766 (citing *Reynolds v. Sims*, 377 U.S. 533, 580–81 (1964); *Swann v. Adams*, 385 U.S. 440, 444 (1967)), and the Supreme Court has upheld even a sizeable deviation from population equality in light of "the importance, consistency, and neutrality of the state policies alleged to require the population disparities." *Brown*, 462 U.S. at 848 (Stevens and O'Connor, JJ., concurring). On the other hand, the Court has cautioned that "[e]ven a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds*' mandate of fair and effective representation if the population disparities are excessively high." *Id.* at 845.

The 1980 proposed constitution similarly required a representative from St. John in the USVI Senate. *Id*. art. V, §§ 2, 3, *in* H.R. Doc. No. 96-375, at 7. With respect to this requirement, the Justice Department concluded: "Whether such a [one-person, one-vote] violation would ultimately occur would likely turn on specific facts in existence at the time." *DOJ Views*, 4B Op. O.L.C. at 766. That statement remains true today. But according to the Attorney General of the USVI, data from the 2000 census indicate that the St. John's senate district would involve a deviation of 53% from the ideal of equal representation. USVI AG Op. at 13.

The USVI's island geography and any historic political representation for St. John might help justify the inequalities between districts. *See, e.g.*, *Travis v. King*, 552 F. Supp. 554, 560 (D. Haw. 1982) (concluding "[b]ased on the unique geographic and economic insularity of the four basic island units," that the objective of providing each main island of Hawaii "meaningful representation" in the state legislature was "a rational one"); *Burns v. Gill*, 316 F. Supp. 1285, 1292, 1293, 1299 (D. Haw. 1970) (upholding disparities between electoral districts in Hawaii based on the "conclusion that if [Hawaii's] voters are to have functional representation in their State legislature each basic island unit must be given

meaningful recognition therein"). Indeed, the Revised Organic Act, though permitting reapportionment "as provided by the laws of the Virgin Islands," initially provided for separate representation of St. John in the USVI Senate. 48 U.S.C. § 1571(b); *see generally Moolenaar v. Todman*, 317 F. Supp. 226, 229–30 (D.V.I. 1970) (describing historical enactments regarding representation in USVI Senate), *rev'd*, 433 F.2d 359 (3d Cir. 1970) (per curiam). We understand, however, that at present the USVI legislature does not include a Senator elected solely by St. John voters; the USVI Senate, rather, includes seven Senators from the District of St. Croix and seven from the District of St. Thomas/St. John, plus one Senator elected at large who must be a resident of St. John. *See* Legislative History, Legislature of the Virgin Islands, http://www.legvi.org/LEGVI2008/history.htm (last visited ca. Feb. 2010). Insofar as guaranteed representation for St. John is a departure from current or historic practice, or if disparities are simply too large to be justified by such historic practices, the USVI's senatorial districts under the proposed constitution might be subject to an equal protection challenge. For example, the court in *Travis v. King* rejected a districting plan for the Hawaii state senate with a 43.18% total deviation even though the state invoked the need for separate representation of the state's island units as a justification for the disparity. 552 F. Supp. at 560, 562–63; *see also, e.g.*, *Bd. of Estimate of N.Y. City*, 489 U.S. at 702–03 (concluding that "accommodat[ion] [of] natural and political boundaries as well as local interests" was insufficient to justify a 78% disparity in representation of New York City's five boroughs on a municipal board).

Because any challenge to USVI's Senate districts would be fact-specific, we do not recommend specific changes to the proposed constitution to address these concerns. Indeed, we note that although the Justice Department indicated potential "one person one vote" concerns with respect to the 1980 proposed constitution, *see DOJ Views*, 4B Op. O.L.C. at 766, the President did not communicate such concerns to Congress in his transmittal message, *see* H.R. Doc. No. 96-375, at iii–v. As in the 1980 Justice Department memorandum, however, we would note the potential litigation risk posed by these provisions.

F. Territorial Waters, Marine Resources, and Submerged Lands

Article XII, Section 2, concerning "Preservation of Natural Resources," states:

> The Government shall have the power to manage, control and develop the natural and marine resources comprising of submerged lands, inlets, and cays; to reserve to itself all such rights to internal waters between the individual islands, claim sovereignty over its inter-island waters to the effect that the territorial waters shall extend 12 nautical miles from each island coast up to the international boundaries. This is an alienable right of the people of the Virgin Islands of the U.S. and shall be safeguarded.

Proposed Const. art. XII, § 2.

The intended meaning and effect of this provision are not entirely clear. To the extent that its reference to a claim of "sovereignty" over coastal waters is intended to derogate from the sovereignty of the United States over those waters, it is inconsistent with federal law and should be removed. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) (proclamation of U.S. territorial sea). In addition, by statute, the United States has, subject to certain exceptions, conveyed to the USVI its right, title, and interest in submerged lands and mineral rights in those submerged lands out to three miles. 48 U.S.C. §§ 1705, 1706 (2006); *see also, e.g.*, Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001) (proclamation of Virgin Islands Coral Reef National Monument). Any assertion of USVI control over submerged lands and mineral rights beyond those federal statutory limits would be inconsistent with federal law and should be removed. Federal law also reserves to the United States exclusive management rights over fisheries within the "exclusive economic zone." 16 U.S.C. § 1811(a) (2006). Again, the proposed constitution must be made consistent with this federal statutory mandate. While the final sentence of Article XII, Section 2 acknowledges that the rights it addresses are alienable, we recommend modifying this language to make clearer that these matters are subject to Congress's plenary control.

G. Bill of Rights Provisions

As required by the Enabling Act, the proposed constitution includes a bill of rights. Proposed Const. art. I; Enabling Act § 2(b)(3). Consistent with the supremacy of federal law, we understand these provisions as not purporting to constrain the federal government or federal law but as constraining only the USVI local government that would be established by this constitution and local laws.

In its memorandum on the 1980 proposed constitution, the Department of Justice observed that some provisions of the bill of rights and related sections in that constitution were not "drafted with adequate clarity and precision" and might therefore "result in litigation that could burden or curtail effective local government." *DOJ Views*, 4B Op. O.L.C. at 761. The same could be said of a number of provisions in the current proposed constitution. For example, the current proposed constitution, like its 1980 predecessor, includes protections of unclear scope for the "dignity of the human being," the "right to a reasonable expectation of privacy," and the "right to examine any public document and to observe the deliberation of any agency of government." Proposed Const. art. I, §§ 1, 3, 4. The constitution also prohibits "employment of children" in certain occupations without specifying the maximum age of a "child," *id.* art. I, § 11(e); *see also id.* art. XII, § 1 (indicating that "[t]he Government shall establish laws to govern the employment of children under the age of fifteen"); and it fails to specify whether many of the rights it establishes apply only to government actors or also to intrusions by private parties, *see DOJ Views*, 4B Op. O.L.C. at 761–63.

In 1980, the President declined to recommend changes to address such concerns. He observed:

> I believe there are some provisions in the constitution that will require interpretation by the courts. . . . However, I do not feel it is appropriate for me to question the wisdom of entrusting the interpretation of these provisions to the courts. This is a matter for serious discussion by the people of the Virgin Islands, for this document should truly be one of their own making.

H.R. Doc. No. 96-375, at v. Because the same could be said of unclear provisions in the bill of rights and related sections of the current proposed constitution, we do not address such provisions in detail or recommend

particular changes, but simply note the potential for uncertainty and litigation.

H. Repeal of Organic Statute Provisions

We also note that because federal law is superior to territorial enactments and may preempt contrary provisions of territorial law, Congress may need to repeal certain provisions of the USVI's organic statutes to enable this proposed constitution to operate, assuming it is approved by Congress and the USVI voters. *Cf. DOJ Views*, 4B Op. O.L.C. at 771 (noting that a provision of the 1980 proposed constitution repealing laws, executive orders, and regulations inconsistent with the proposed constitution would be invalid if applied to "matters over which the Federal Government retained jurisdiction"); H.R. Doc. No. 96-375, at v (noting that this transitional provision of the 1980 constitution "could exceed the authority of the Constitutional Convention if it is read to affect Federal law"). Some federal regulations and executive orders may also need to be revised or revoked. The legislative history of the Enabling Act contemplates the submission by the President of a list of provisions requiring repeal "as a part of his comments on the constitution." S. Rep. No. 94-1033, at 4. In 1980 the President, however, did not transmit such a list as part of his comments on the 1980 proposed constitution, but rather "indicated that [he] [would] submit the list in a timely manner to enable the Congress to effect the repeals prior to the effective date of the constitution." S. Rep. No. 97-66, at 4.

I. Effect of Congressional Action or Inaction on the Proposed Constitution

Finally, the Enabling Act, as noted, provides that a proposed USVI constitution "shall be deemed to have been approved" if Congress takes no action on it within sixty legislative days after its submission by the President. Enabling Act § 5. In 1978, Congress took no action on the proposed USVI constitution, which was then submitted to the USVI voters pursuant to the Enabling Act. *See DOJ Views*, 4B Op. O.L.C. at 760 & n.1, 772. In contrast, Congress expressly approved, by joint resolution, a modified version of the 1980 proposed constitution "for submission to the people of the Virgin Islands in accordance with the provisions of" the Enabling Act. Pub. L. No. 97-21, 95 Stat. at 105.

As the Justice Department's 1980 memorandum explained, congressional inaction does not satisfy the constitutional requirements of bicameralism and presentment for valid federal legislation and therefore "cannot have any legal effect, except as . . . the occurrence of a condition which permits the submission of the constitution to the qualified electors of the Virgin Islands." *DOJ Views*, 4B Op. O.L.C. at 772. Such inaction therefore "would not have any curative effect on the defects of the constitution." *Id.* In fact, even formal approval of the proposed constitution need not be construed as federal endorsement of any constitutionally defective or otherwise invalid provisions. Upon signing the joint resolution approving the revised 1980 proposed constitution, President Reagan observed: "This legislation approves referring the constitution to the voters of the Virgin Islands for referendum. It does not represent a Federal endorsement of the constitution's substantive provisions." Statement on Signing at 617. The legislative history indicates that Congress shared the same view. *See* S. Rep. No. 97-66, at 5 (expressing "no opinion on the advisability or merits of any provisions in the proposed constitution"); H.R. Rep. No. 97-25, at 3 (expressing "no opinion on the merits" of certain potentially invalid provisions because the committee "believe[d] that this is a matter to be considered by the voters, or perhaps, at some future time, by the courts").

RONALD WEICH
Assistant Attorney General
Office of Legislative Affairs

Department of Defense Response to Interlocutory Decision of Court of Appeals Regarding Statute Requiring Separation of Homosexual Service Members from Military

Following the interlocutory decision of a court of appeals regarding the statute requiring the separation of certain gay and lesbian service members from the military, the Department of Defense is not legally required to revise its administrative procedures and policies in a manner that might preclude separations within the circuit that would otherwise be mandated by the statute.

The Department of Defense is also not legally prohibited from acquiescing in the decision, although such a policy would appear to lack direct Executive Branch precedent and arguably would be in some tension with the Executive Branch's usual practice of implementing and defending statutes that are subject to constitutional challenge.

March 25, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

You have asked for our views regarding the Department of Defense's implementation of 10 U.S.C. § 654—the statute establishing the government's policy with respect to the separation of gay and lesbian service members from the military—in the wake of the U.S. Court of Appeals for the Ninth Circuit's decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (2008). In particular, you have asked whether *Witt* requires the Department of Defense ("DoD" or the "Department") to revise its administrative procedures and policies governing the application of section 654 "within the Ninth Circuit"[1] so long as that decision remains binding circuit law. You have also asked whether, even if *Witt* does not require this result, the Department may acquiesce in the *Witt* ruling by revising those procedures and policies in a manner that might preclude separations within the Ninth Circuit that would otherwise be mandated by section 654. Our view is that DoD is neither legally required to acquiesce in *Witt* in such a manner nor legally prohibited from doing so.[2] We caution,

[1] Our references in this memorandum to cases "within" the Ninth Circuit are meant to encompass cases in which service members could challenge their separation in federal district courts bound to apply Ninth Circuit precedent.

[2] We note that 28 U.S.C. § 530D requires executive agencies to submit a report to Congress when, among other things, they establish or implement a policy to refrain (i)

however, that such a policy of acquiescence would appear to lack direct Executive Branch precedent and arguably would be in some tension with the Executive Branch's usual practice of implementing and defending statutes that are subject to constitutional challenge. Moreover, to ensure the legal permissibility of any particular policy of acquiescence implemented by DoD, it would be necessary for us to review the precise details of that policy.

I.

In *Witt*, the Ninth Circuit reversed a federal district court's dismissal of a constitutional challenge to section 654 brought by Major Margaret Witt, an Air Force officer who was about to be discharged for violating the statute. Section 654 provides in subsection (a) that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15) (2006). Subsection (b) then provides that "[a] member of the armed forces *shall be separated from the armed forces* under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations." *Id.* § 654(b) (emphasis added). The referenced findings are:

> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
>
> (A) such conduct is a departure from the member's usual and customary behavior;

"from enforcing, applying, or administering" a statutory provision "on the grounds that such provision is unconstitutional" and (ii) "within any judicial jurisdiction," "from adhering to, enforcing, applying, or complying with[] any standing rule of decision" of a federal court of, or superior to, that jurisdiction "respecting the interpretation, construction, or application of the Constitution." 28 U.S.C. § 530D(a)(1)(A)(i), (ii), (e) (2006). We would be happy to assist you in determining whether any particular policy that you might establish regarding section 654 would require a report under these provisions.

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id.

Acting in accord with DoD procedures promulgated pursuant to section 654(b), the Air Force initiated formal separation proceedings against Major Witt in 2004, resulting in her suspension. In 2006, a military review board found that Major Witt had engaged in homosexual acts and had stated that she was a homosexual in violation of section 654. *See Witt*, 527 F.3d at 810. The board therefore recommended that she be honorably discharged from the Air Force Reserve, and in 2007 the separation authority, the Secretary of the Air Force, ordered that she receive such a discharge. *See id.* Major Witt then challenged her suspension and prospective discharge in federal district court on federal constitutional grounds.

The district court rejected Major Witt's claim that section 654 violated her rights under the substantive component of the Due Process Clause of the Fifth Amendment after evaluating that claim under a rational basis standard of review. *Witt v. Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006). Major Witt then appealed to the Ninth Circuit, which vacated and remanded the district court's substantive due process ruling

for further proceedings. *Witt*, 527 F.3d at 809.[3] In its decision, the Ninth Circuit deemed rational basis review inapt in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), and held instead that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819. The court also held that "this heightened scrutiny analysis is as-applied rather than facial," and thus requires a court to "determine not whether [section 654] has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt." *Id.*

Applying a three-part heightened scrutiny test, the *Witt* court observed that the government had advanced "an important governmental interest"—namely, "the management of the military"—to which courts owed deference, but concluded that it was unclear "whether [section 654], as applied to Major Witt, satisfies the second and third factors" of the test. *Id.* at 821. In particular, the court noted that the Air Force's reliance on congressional findings regarding "'unit cohesion' and the like" did "not go to whether the application of [section 654] specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest."[4] *Id.* Accordingly, the court remanded the case "for the district court to develop the record on Major Witt's substantive due process claim," at which point it could be determined whether her separation under section 654, "measured against

[3] The Ninth Circuit also vacated and remanded the district court's dismissal of Major Witt's procedural due process claim and affirmed the district court's dismissal of her equal protection claim. 527 F.3d at 812–13, 821–22. Those claims are not relevant to the subject of your request, and we do not discuss them further.

[4] In a footnote, the court briefly touched on whether the government would be able to satisfy the second and third factors of the heightened scrutiny test, noting Major Witt's allegations that she "was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under [section 654] and [that], even then, it was her suspension pursuant to [section 654], not her homosexuality, that damaged unit cohesion." *Witt*, 527 F.3d at 821 n.11.

the appropriate constitutional standard," was permissible. *Id.* The court did not order the United States to take any action.

Subsequent to its order, the Ninth Circuit denied the government's petition for rehearing en banc, *Witt v. Dep't of the Air Force*, 548 F.3d 1264 (2008), and the Solicitor General then declined to seek Supreme Court review of the panel decision. In a letter to Speaker of the House Nancy Pelosi submitted under section 530D of title 28, U.S. Code, the Attorney General explained the decision not to seek review as based on "the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical litigation considerations." Letter for Nancy Pelosi, Speaker, U.S. House of Representatives, from Eric H. Holder, Jr., Attorney General, *Re: Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (Apr. 22, 2009) ("530D Letter"). Among the "practical considerations" the Attorney General identified in his letter were the desirability of "develop[ing] . . . the factual record on remand" to ensure "a more complete basis" for ultimate Supreme Court review. The letter also noted that DoD's views with respect to seeking immediate Supreme Court review were consistent with those expressed in the letter and that, in particular, DoD had identified similar practical considerations that counseled against seeking such review. Finally, the Attorney General noted that "[t]he government retains all rights to petition the Supreme Court to review a final decision in the case, including every aspect of the Ninth Circuit's ruling, after proceedings on remand are completed." At present, the case is pending before the district court on remand.

II.

The first question we must address is whether, for as long as the *Witt* court's due process framework remains the governing law of the Ninth Circuit, DoD is required to apply that framework in implementing section 654 in cases within the Ninth Circuit. The argument that such "intracircuit acquiescence" is required is rooted in a claim about the separation of powers. One of the leading precedents for such an argument is *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir. 1984), *vacated on other grounds and remanded*, 469 U.S. 1082 (1984). In that case, the Ninth Circuit stated that the refusal of the Social Security Administration ("SSA") to give effect to prior circuit precedent interpreting the statutory

procedures governing the termination of social security benefits "undermine[s] what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law." 725 F.2d at 1497; *see also id.* at 1502 n.10 ("with regard to recipients whose benefits were terminated after [the governing court of appeals decisions] became final the Secretary also violated her constitutional duty to execute the law faithfully"); *id.* at 1503 ("That the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted."); *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091–92 (D.C. Cir. 1992) (citing cases "condemn[ing]" intracircuit nonacquiescence). The Ninth Circuit, however, has not been entirely consistent on this issue, stating in a pre-*Lopez* case (one that *Lopez* did not address) that the Immigration and Naturalization Service ("INS") "could refuse to" acquiesce in a decision of the U.S. Court of Appeals for the Second Circuit—*Lok v. INS*, 548 F.2d 37 (2d Cir. 1977)—"in the Second Circuit and thereby achieve consistency of application," while noting that "to do so would only invite appeal and reversal." *Castillo-Felix v. INS*, 601 F.2d 459, 467 (9th Cir. 1979).

In our view, DoD is not required to acquiesce in the *Witt* decision, notwithstanding that *Witt* will govern any litigation in the Ninth Circuit unless and until that decision is vacated or reversed. As explained below, this conclusion accords with the longstanding position of this Office, and the consistent, publicly declared position of the Executive Branch, that an executive agency may "nonacquiesce" in a court of appeals ruling—a practice whereby the agency, despite an adverse court of appeals decision, continues to act in accordance with its own contrary interpretation of the law with respect to persons who were not parties to the judgment. The Executive Branch's traditional view that nonacquiescence is permissible includes even "intracircuit" nonacquiescence, or nonacquiescence in situations where the adversely affected persons could challenge the administrative decision in a case that would be governed by the law established by the relevant adverse court of appeals decision.[5] Accordingly, we

[5] *See, e.g., Federal Agency Compliance Act: Hearing on H.R. 1544 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Stephen W. Preston, Deputy Assistant Attorney General, Civil Division) ("Preston Testimony"); *see generally* Samuel Estreicher & Richard L.

do not believe that DoD must modify its procedures and policies in order to ensure that section 654 separations of individuals who are within the Ninth Circuit, but who are not parties to the *Witt* judgment, satisfy the heightened standard of review that *Witt* at present requires judges in the Ninth Circuit to apply in reviewing such separations.

A.

In the usual case of intracircuit acquiescence, the circuit court decision at issue concerns the proper interpretation of a federal statute, and the agency acquiesces even though it may remain of the view that its own contrary interpretation of the statute is correct and even though it may fully intend to continue pressing that interpretation in future cases. As a matter of federal practice, executive agencies generally do engage in intracircuit acquiescence in such cases, even when they continue to challenge the adverse precedent in other circuits or await a test case for reconsideration in the circuit of decision. *See* Preston Testimony, *supra* note 5, at 43. Such intracircuit acquiescence often serves interests in comity and sound policy. With respect to the latter, the practice can ensure that private persons are not deprived of the benefits of a court of appeals precedent that would protect them "if they have the fortitude to run an administrative gauntlet" and challenge the Executive's decision in a court that is bound to apply that precedent. *Johnson*, 969 F.2d at 1093; *see also Lopez v. Heckler*, 572 F. Supp. 26, 30 (C.D. Cal. 1983), *stay denied*, 713 F.2d 1432 (9th Cir. 1983), *partial stay granted*, 463 U.S. 1328 (1983) (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983), *dist. court aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir. 1984), *vacated on other grounds and remanded*, 469 U.S. 1082 (1984) (mem.) ("If [a social security] claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced [by the Circuit]. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with

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Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 692–718 (1989) (describing agency practice).

respect to . . . individuals whose resources . . . are . . . relatively limited, such a dual system of law is prejudicial and unfair.").

Notwithstanding the general practice of discretionary agency acquiescence in adverse court of appeals rulings, however, this Office and the Executive Branch have, as noted, long been of the view that an agency is not legally compelled to engage in intracircuit acquiescence. Certainly, such acquiescence is not required by any statute addressing the practice;[6] and, as the Department of Justice ("DOJ") has consistently maintained, it also is not required by the separation of powers.[7]

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[6] In 1984, both the House and Senate passed provisions regulating nonacquiescence by the SSA in their versions of the legislation that became the Social Security Disability Benefits Reform Act, Pub. L. No. 98-460, 98 Stat. 1794 (1984). But the Act as finally enacted did not address the subject and, although the House report and the conference report accompanying the Reform Act examined the practice of nonacquiescence and raised concerns about its propriety, both the House and Senate expressly declined to express definitive views regarding the practice's constitutionality. *See* H.R. Rep. No. 98-1039, at 37–38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3080, 3095–96 (noting that "questions have been raised about the constitutional basis of non-acquiescence," but concluding that "the legal and Constitutional issues raised by non-acquiescence can only be settled by the Supreme Court"); H.R. Rep. No. 98-618, at 25 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3062 (stating that "the issue of the constitutionality of the non-acquiescence policy may be in doubt"); *see also* 130 Cong. Rec. 25,977 (1984) (statement of Senator Dole on behalf of the Senate) ("While some of the conferees have expressed strong reservations regarding [nonacquiescence by the Department of Health and Human Services ('HHS') in administering the Social Security Act], it should be made clear for the record that it is not the position of the Senate that the practice is unconstitutional as exercised by [HHS] or as by any other Federal agency."). In 1998, the House passed a bill that would have generally required agencies to follow controlling circuit precedent, *see* Federal Agency Compliance Act, H.R. 1544, 105th Cong. § 2(a) (as passed by House, Feb. 25, 1998) (providing, with certain exceptions, that "an agency . . . shall, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit"), but the Senate declined to follow suit and no law was enacted. The House report accompanying this bill stated that the framework for agency acquiescence that the bill would create "is consistent with the principle of separation of powers under which it is the courts' constitutional role to interpret the laws governing agency actions," but the report did not declare nonacquiescence unconstitutional. H.R. Rep. No. 105-395, at 7 (1997).

[7] *See Federal Agency Compliance Act: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 106th Cong. 16 (1999) (statement of William B. Schultz, Deputy Assistant Attorney General, Civil

To be sure, unlike the usual case giving rise to acquiescence, the ruling in *Witt* interprets the Constitution. Some commentators have suggested that intracircuit acquiescence in a constitutional ruling by a court of appeals may be constitutionally compelled, even if nonacquiescence in statutory decisions is permissible. *See* Estreicher & Revesz, 98 Yale L.J. at 720 n.214 ("The status of nonacquiescence in a constitutional interpretation presents a much more troubling question"); *see also id.* at 731 n.261 (suggesting that nonacquiescence might be "always improper . . . with agency disagreements over constitutional rulings"). So far as we are aware, however, there is no precedent for an agency announcing a policy of acquiescence in a court of appeals decision declaring a federal statute invalid on constitutional grounds in the precise circumstances present here—i.e., where the United States continues to assert that the statute is constitutional and has reserved its right to continue defending the statute's constitutionality, and where opportunities for subsequent review of the decision at issue are not exhausted. Moreover, the numerous statements setting forth DOJ's view of the permissibility of nonacquiescence have not distinguished between nonacquiescence in statutory rulings and nonacquiescence in constitutional ones. Instead, DOJ's position—that intracircuit nonacquiescence is a constitutionally permissible course of action—has long been cast in more general terms. And that is true as well of the limited Supreme Court case law that bears on the issue.

B.

Although it is true that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is,'" Article III, Section 2 of the Constitution also expressly provides that this authority

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Division) (stating the Department's well-established view that "the doctrine of separation of powers does not bar a federal agency from declining to apply the legal reasoning of a particular court of appeals decision in the agency's further administration of a statutory program outside the context of the particular case in which the court rendered its decision"); *see also* Preston Testimony, *supra* note 5, at 42; Memorandum for James M. Spears, Acting Assistant Attorney General, Office of Legal Policy, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Correspondence with Administrative Law Judges* at 11–14 (June 19, 1985); Letter for Robert Dole, Chairman, Senate Finance Committee, from Rex E. Lee, Solicitor General (May 7, 1984), *entered into the congressional record at* 130 Cong. Rec. 25,977 (1984) ("Lee Letter").

extends to "particular cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).[8] Consistent with this limitation, the Supreme Court held in *United States v. Mendoza*, 464 U.S. 154 (1984), that the government was not foreclosed by the doctrine of "nonmutual collateral estoppel" from relitigating a legal issue it had previously litigated unsuccessfully in another action against a different party, even when the prior litigation had occurred in the same judicial circuit. In explaining its holding, the Court observed that "many constitutional questions can arise only in the context of litigation to which the Government is a party," and "[a] rule allowing nonmutual collateral estoppel against the Government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160. The Court also noted that the application of nonmutual estoppel against the government would have the undesirable consequences of (i) forcing the Solicitor General, "in order to avoid foreclosing further review," to abandon prudential considerations in favor of "appeal[ing] every adverse decision [to the Supreme Court]," and (ii) permitting the policy decisions of one administration to unduly constrain a later one. *Id.* at 161. As the Court had observed previously in *United States v. Estate of Donnelly*, "[t]he United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case." 397 U.S. 286, 294–95 (1970).

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[8] We recognize that in *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court observed that *Marbury* had "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that [that] principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Id.* at 18. That statement does not contradict our conclusion that nonacquiescence would be permissible here, if only because the *Witt* decision was rendered by a court of appeals rather than by the Supreme Court, and the latter plays a "special role" in our constitutional system in "resolving disputes about the constitutionality of enactments." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994); *cf. Plaut*, 514 U.S. at 227 (noting that because Article III creates "not a batch of unconnected courts, but a judicial department composed of 'inferior Courts' and 'one supreme Court,'" the decision of an inferior court "is not (unless the time for appeal has expired) the final word of the department as a whole").

Of course, the Court's recognition in *Mendoza* of the government's authority to relitigate an issue lost in a prior case does not necessarily imply that an agency may decline to conform its conduct to a court of appeals decision in exercising its administrative authority with respect to nonparties within that circuit. But *Mendoza*, together with the relevant language from *Donnelly*, reflects the importance the Court ascribes to affording the government wide berth to contest federal judicial decisions and to "control[] the progress of Government litigation through the federal courts." *Mendoza*, 464 U.S. at 161. And DOJ has relied upon both considerations in justifying nonacquiescence as an acceptable legal practice. *See* Preston Testimony, *supra* note 5, at 43 (legislation "[p]rescribing fixed, across-the-board standards for determining when nonacquiescence is appropriate is antithetical to the flexibility needed in deciding which cases to appeal to the Supreme Court and which legal issues to continue litigating in the lower courts"); *see also* Lee Letter, 130 Cong. Rec. at 25,977 (stating that regulation of nonacquiescence by House version of the Reform Act would have had "serious adverse implications for the conduct of the government's litigation in the Social Security context").[9]

Moreover, the Ninth Circuit's ruling in *Witt* was set forth in an interlocutory order, and the Attorney General expressly noted in the 530D Letter that the decision not to appeal it at that time reflected a recognition of the Supreme Court's reluctance to review such interlocutory decisions. Interlocutory judgments by their nature do not definitively resolve a case. In this instance, for example, at least if the district court determines that the statute is invalid as applied and the Ninth Circuit upholds this decision on appeal, the government will be able to "raise any and all of its arguments in defense of the statute in a petition for a writ of certiorari seeking review of the final judgment." 530D Letter. Thus, the Ninth Circuit's decision in *Witt* is not "final" in the sense that the government will not be able under any circumstances to seek further review of that decision by the Supreme Court. The Court explained the relevant meaning of "finality" in *Plaut*:

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[9] Indeed, the action that gave rise to the litigation in *Mendoza* was a decision by an administrative official that was inconsistent with the unappealed ruling of a district court, thus demonstrating the close connection between nonacquiescence and the ability of the government to relitigate the underlying issue. *See* Estreicher & Revesz, 98 Yale L.J. at 686.

> [A] distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.

514 U.S. at 227.

Indeed, the Department of Justice specifically has observed that "[i]n such cases [involving interlocutory court of appeals decisions], nonacquiescence may be entirely appropriate." Preston Testimony, *supra* note 5, at 45. Moreover, the conference report that Congress issued in enacting the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, stated the view that "a policy of non-acquiescence be followed only in situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court." H.R. Rep. No. 98-1039, at 37. Thus, even if nonacquiescence might raise legal concerns in certain instances, we do not believe that it would do so here.[10]

III.

We next consider whether, given that acquiescence in the *Witt* decision is not legally required, it could be undertaken in a legally permissible

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[10] We acknowledge that nonacquiescence in this case, in addition to resulting in the likelihood that courts within the Ninth Circuit would enjoin separations that are not *Witt*-conforming, might present some additional litigation risk. For example, we cannot foreclose the possibility that a court might assess attorney's fees against DoD under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2006). *See, e.g.*, *Hyatt v. Heckler*, 807 F.2d 376, 382 (4th Cir. 1986); Preston Testimony, *supra* note 5, at 46 ("any time it decides not to acquiesce, an agency runs the risk of not only losing on the merits, but also being held liable for attorney's fees [under the EAJA]"). A ruling against the government for a non-*Witt*-conforming separation might also provide the basis for a court to issue an injunction prohibiting nonacquiescence with respect to a much broader certified class of plaintiffs. *See, e.g.*, *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984); *Lopez*, 572 F. Supp. at 31–32. We express no view of the merits of any such claims, but simply identify the possibility that a decision not to acquiesce could itself be the subject of litigation.

manner. The issue arises because you have asked us to consider whether DoD could lawfully establish a policy of acquiescing in *Witt* within the Ninth Circuit through the revision of existing policies and procedures governing section 654 separations. Presumably, the effect of such a revision would be to preclude the separation authority from effecting separations within the Ninth Circuit that section 654 standing alone would require, but that would not satisfy the heightened substantive due process standard announced in *Witt*.

In our view, such a course of action could constitute a lawful means of acquiescing in the *Witt* decision, although the permissibility of any particular policy of acquiescence would of course depend on the details of that policy. Our conclusion that acquiescence in *Witt* could be undertaken in a lawful manner follows from the Executive's longstanding view that acquiescence is a permissible practice and the absence of any indication in precedents of the Executive Branch or the judiciary that acquiescence is impermissible where an agency conforms its conduct to a court of appeals' constitutional decision in a manner that may result in the agency's declining to follow statutory requirements as to a class of cases. We caution, however, that we are aware of no precedent in executive branch practice that is precisely on point with the policy you have asked us to consider—i.e., an agency's establishment of a categorical policy of intracircuit acquiescence in a constitutional ruling that might result in the agency acting contrary to statutory requirements while options for obtaining further review of the ruling in the case at issue remain potentially unexhausted. We further caution that our conclusion regarding the permissibility of acquiescence is limited to the implementation of policies and procedures tailored to ensuring that separations satisfy the *Witt* standard. Thus, modification of the policies and procedures governing separation proceedings within the Ninth Circuit for purposes of acquiescing in *Witt* should be temporary and contingent on further developments in the case.

A.

In assessing the lawfulness of a possible DoD policy of intracircuit acquiescence in *Witt*, we begin with a point made above: intracircuit acquiescence is the norm when an agency and a court of appeals construe an

applicable statute in different ways and the court of appeals has set forth its construction of the statute in a final, binding decision for which the mandate has issued. *See* Preston Testimony, *supra* note 5, at 44 (noting that "the general practice of federal agencies is to follow adverse court of appeals rulings"); *see also, e.g.*, 66 Fed. Reg. 6436, 6438 (Jan. 22, 2001) (final DOJ rule announcing nationwide acquiescence in court of appeals decisions holding that section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "is not to be applied in the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted"); 55 Fed. Reg. 1012, 1016 (Jan. 11, 1990) (final Department of Health and Human Services ("HHS") rule establishing policy of applying within the relevant circuit those court of appeals decisions that HHS determines conflict with SSA policy, unless the government seeks further review of the decision). Furthermore, as far as we are aware, neither this Office nor any court has ever concluded that an agency's acquiescence in a court of appeals decision was unlawful. In fact, there is judicial precedent from the Ninth Circuit (and other circuits) directly addressing acquiescence and indicating that acquiescence may be compelled, *see Lopez*, 725 F.2d at 1489, or at least permissible, *cf. Castillo-Felix*, 601 F.2d at 467 (acquiescence not compelled).

Thus, the Executive Branch evidently has long viewed intracircuit acquiescence, although not legally required, as nonetheless an exercise of, and in accord with, the Executive's obligation to take care that the laws be faithfully executed. *See* U.S. Const. art. II, § 3. And the Executive has held this view even though acquiescence may involve an agency's accepting, and operating in conformity with, a construction of a statute that represents the controlling law of the circuit at the time, but that the Executive believes is incorrect and not legally binding on it as a party and that it intends at some opportune point to challenge in future litigation. The range of interests that are served by acquiescence have, in other words, been understood to make an agency's acceptance of even a disputed legal construction by a court of appeals a means of faithfully executing the statute in question, notwithstanding that the agency believes acquiescence will result in the agency's taking action at odds with its own view of the statute's proper implementation.

Given this long-established practice, we believe there would be little question of the permissibility of acquiescence if the conflict precipitated

by the *Witt* decision were due to the Ninth Circuit's differing construction of the statute. For example, acquiescence would be permissible if the court had concluded as a matter of statutory construction that separation is not warranted when based solely upon a finding of "homosexual conduct," and may instead be ordered only if there has been a more individualized determination about the need for the separation. In such a case, even if the agency construed the statute in a manner contrary to that adopted by the court, we think the agency could acquiesce in the circuit court's determination regarding what the statute prescribes.

But *Witt* is a constitutional, not a statutory, ruling. And the underlying statute on its face mandates DoD to take certain action in some instances. Accordingly, acquiescence in that decision by rendering separation contingent upon an individualized determination that the *Witt* court's heightened substantive due process standard has been met could, in application, result in DoD's declining to effect separations that section 654, standing alone, clearly would require. The situation before us thus raises a more substantial question than does the typical case of acquiescence in a circuit court's adverse statutory ruling. After all, the Executive Branch has no general power to disregard enforcement of a statute, *see Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838), and we do not understand DoD to be asserting that it has independently determined that section 654 is unconstitutional in any applications, *cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200. Thus, the possibility of DoD acquiescence in *Witt* presents the question whether DoD may take action that conforms to the Ninth Circuit's construction of the Constitution but that would be impermissible under section 654 in the absence of the court's constitutional ruling. The issue is made more substantial, moreover, because the *Witt* court's heightened substantive due process standard was announced in an interlocutory ruling in a case that is pending on remand.

We have not identified a prior occasion in which an agency has announced a policy of intracircuit acquiescence in a circuit court's constitutional ruling while the case in which the court issued the ruling remains pending. Indeed, in one recent instance presenting the opportunity for such acquiescence, the INS appears to have declined to acquiesce in various court of appeals decisions holding that 8 U.S.C. § 1226(c) (2006), which requires the mandatory detention of aliens found subject to remov-

al, violates the requirements of constitutional due process as applied to lawful permanent resident aliens absent the holding of an individualized bond hearing. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev'd sub nom. Demore v. Kim*, 538 U.S. 510 (2003). Until the Supreme Court concluded in 2003 that the statute was in fact constitutional, *see Demore*, 538 U.S. 510, immigration judges, in conformity with the court of appeals decisions cited above, granted aliens in such circumstances individualized hearings. But the INS appears to have appealed every decision by an immigration judge to release the alien on bond, thus triggering an automatic stay of the release orders under INS regulations. *See Almonte-Vargas v. Elwood*, No. 02-cv-2666, 2002 WL 1471555, at *3 n.5 (E.D. Pa. June 28, 2002). The U.S. District Court for the Eastern District of Pennsylvania criticized this practice of apparent nonacquiescence as having been "designed to administratively overrule [the appeals court decisions requiring hearings] pending Supreme Court review of the mandatory detention issue." *Id.*; *see also id.* at *4 ("'The Government has not acquiesced to the Third Circuit's decision in *Patel*.'" (quoting government's Notice of Appeal to the Board of Immigration Appeals ("BIA") of the Bond Decision of the Immigration Judge, alterations omitted)).

However, the general tenor of the relevant statements by DOJ suggests that acquiescence is a permissible course of action in general—seemingly regardless of whether the underlying decision by the court of appeals is constitutional or statutory. For example, we are aware of no prior statements by DOJ that qualify in a relevant manner its view of the permissibility of acquiescence as a practice. And we have identified at least two instances in which agencies charged with enforcement of a statute have acquiesced in adverse judicial judgments holding that the statutes were unconstitutional if applied in a manner that the statute seemed to require, although each instance is in some way distinguishable from the type of acquiescence you have asked us to consider. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 5 (2008) (noting that government did not appeal district court decision holding that tax on coal was unconstitutional and that the Internal Revenue Service "acquiesced in the District Court's holding") (citing IRS Notice 2000-28, 2000-1 Cum. Bull.

1116, 1116–17); *Matter of Silva*, 16 I. & N. Dec. 26, 29–30 (1976) (observing that Solicitor General had declined to seek review in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), and stating that "[i]n view of the ruling in *Francis*," the BIA would "withdraw from the contrary position" regarding the constitutionality of 8 U.S.C. § 1182(c) "expressed by th[e] Board in" prior decisions).

The example that is most relevant here is *Silva*. That precedent, unlike the present situation, did not involve agency acquiescence in an interlocutory order issued in a case that remained pending. Nonetheless, the example is instructive. In *Silva*, 16 I. & N. Dec. at 29–30, the BIA acquiesced in *Francis*, 532 F.2d 268, a constitutional ruling by the Second Circuit regarding the application of 8 U.S.C. § 1182(c) (1970, repealed 1996). That provision by its terms authorized the Attorney General to waive certain grounds for exclusion applicable to permanent resident aliens "who temporarily proceeded abroad voluntarily." 8 U.S.C. § 1182(c). The *Francis* court held that the equal protection component of the Due Process Clause of the Fifth Amendment required the Attorney General to exercise his waiver authority under the statute equally with respect to aliens who had departed the country and those who had never left. 532 F.2d at 273. The BIA acquiesced in this ruling in every circuit but the Ninth Circuit—thereby retreating in every circuit except the Ninth from its established position that the Attorney General could exercise his waiver authority under section 1182(c) only with respect to departing aliens. *See Silva*, 16 I. & N. Dec. at 29–30. In the Ninth Circuit, however, the BIA maintained its prior reading of the statute, thus conforming its conduct to that circuit's own binding precedent. *See Tapia-Acuna v. INS*, 640 F.2d 223, 224–25 (9th Cir. 1981) ("The BIA has voluntarily adopted the rule announced in *Francis* . . . except in cases arising in the Ninth Circuit.") (internal citations omitted); *Abebe v. Holder*, 577 F.3d 1113, 1116 (9th Cir. 2009) (denial of petition for en banc panel rehearing and petition for full court rehearing en banc) (Berzon, J., dissenting from denial of full court rehearing) (observing that the BIA in *Silva* acquiesced in *Francis* "in all circuits except [the Ninth Circuit], where contrary precedent was controlling").[11] Thus, the example of *Silva* appears to

[11] The BIA adhered in the Ninth Circuit to its prior position until 1981, when the Ninth Circuit adopted the Second Circuit's view that the Constitution required application of the

demonstrate that an agency has in the past exercised discretion to determine whether and in what manner to acquiesce in constitutional rulings by courts of appeals that would require the agency to enforce a statute in a manner the agency believed would be contrary to what Congress would have intended in the absence of the adverse ruling.

B.

In light of this past practice, and notwithstanding that we have identified no example of prior acquiescence that is precisely on point, we believe that DoD could lawfully acquiesce in *Witt*. In our view, Congress has not unambiguously expressed the intent to foreclose DoD from suspending enforcement of section 654 for the narrow and limited purpose of acquiescing in an adverse court of appeals precedent such as *Witt*, and the Take Care Clause, U.S. Const. art. II, § 3, does not impose an independent obligation to refrain from such acquiescence in the absence of a clear statutory bar to doing so. This conclusion holds even though the new procedures might result in the retention of service members whose separations the statute otherwise would require.

To be sure, the phrasing of the statute—in particular the provision that a service member "*shall* be separated," 10 U.S.C. § 654(b) (emphasis added)—indicates that Congress did not mean to authorize DoD to categorically decline to enforce section 654. However, "shall" is not a term that invariably admits of no exceptions without regard to the circumstances. In *Town of Castle Rock v. Gonzales*, for example, the Supreme Court held that a state statute providing that "'[a] peace officer shall enforce a valid restraining order'" does not "truly [make] enforcement of restraining orders mandatory." 545 U.S. 748, 759–60 (2005) (quoting Colo. Rev. Stat. § 18-6-803.5(3) (Lexis 1999)). In reaching this conclusion, the Court relied on the "well established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes." *Id.* at 760. Here, likewise, in enacting section 654, Congress legislated against a well-established historical practice of agencies generally acquiescing in ad-

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statute to both departing and nondeparting aliens. *See Tapia-Acuna*, 640 F.2d 223. In 2009, however, the Ninth Circuit returned to its pre-1981 position that waiver under section 1182(c) is available only with respect to aliens who have left the country. *See Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam).

verse circuit precedent. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97, 698–99 (1979) (observing that it is "always appropriate to assume that our elected representatives, like other citizens, know the law" and that an "evaluation of congressional action . . . must take into account its contemporary legal context"). Indeed, insofar as we are aware, Congress has never purported to statutorily bar an agency from acquiescing in adverse circuit precedent. To the contrary, the legislation that Congress has considered on the subject has been uniformly directed at limiting the circumstances in which agencies may nonacquiesce, and would have applied even if the affected agencies believed an underlying statute was best read to require a course of action other than that prescribed by the governing law of the circuit.[12] The committee report accompanying a 1998 House-passed bill that would have generally barred agencies from declining to follow controlling circuit precedent, for example, stated that "citizens who file claims or who otherwise are involved in proceedings with federal agencies have the right to expect that those agencies will obey the law as interpreted by the courts." H.R. Rep. No. 105-395, at 3; *see also* H.R. Rep. No. 98-1039, at 37 (stating that "many of the conferees have strong concerns about some of the ways in which [SSA's] policy [of nonacquiescence] has been applied"); H.R. Rep. No. 98-618, at 24 (stating that "[w]hile the issue of the constitutionality of the non-acquiescence policy may be in doubt, the undesirable consequences of escalating hostility between the Federal courts and [HHS] are clear").

In light of this history, it is fair to expect that Congress would have spoken in clear and direct terms had it intended to prohibit DoD from engaging in this generally well-established agency practice of acquiescing in adverse circuit precedent. *Cf. INS v. St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("'In traditionally sensitive areas, the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal alterations omitted))). And we do not think that section 654's use of the word

[12] *See, e.g.*, H.R. 1544, 105th Cong. § 2(a) (as passed by House, Feb. 25, 1998) (bill that would require agencies to follow circuit precedent except in narrow specified circumstances); H.R. 3755, 98th Cong. § 302(b) (as passed by House, Mar. 27, 1984) (bill that would require acquiescence by Secretary of HHS in court of appeals decisions interpreting Social Security Act, except during pendency of Supreme Court review).

"shall," when read against this background, suffices to provide the clarity that would be necessary to conclude that Congress intended to displace the discretion to acquiesce that agencies generally retain and exercise. Nor do we think that, although Congress may fairly be understood not to have intended to bar DoD's intracircuit acquiescence in court of appeals rulings construing section 654, Congress must have intended to prohibit DoD from engaging in such acquiescence in court of appeals rulings imposing constitutional limits on the enforcement of section 654. There is no basis for concluding that Congress meant in section 654 to bar acquiescence in the latter, but not the former, contexts.

This conclusion draws additional support from the fact that the historical practice of intracircuit acquiescence reflects substantial government interests in avoiding the adverse potential consequences of nonacquiescence—such as inter-branch conflict and the imposition of significant burdens on regulated parties—that are present regardless whether statutory or constitutional rulings are involved. Indeed, legislative reports have at times cited considerations such as these in expressing concern regarding an agency's decision not to acquiesce. *See* H.R. Rep. No. 105-395, at 7 ("equity and orderly governance require that agencies, like private citizens, should obey the law enunciated by courts of competent jurisdiction"); H.R. Rep. No. 98-618, at 24 (raising concerns about "the result of [SSA's] non-acquiescence policy for claimants, the courts, and SSA").

These governmental interests may have particular force depending on the circumstances. An agency may conclude that intracircuit acquiescence is appropriate to demonstrate respect for a court of appeals and its status within the federal judiciary and to avoid the interbranch conflict that might otherwise result. *Cf.* H.R. Rep. No. 98-618, at 25 (expressing "concern[] about the increasing number and intensity of confrontations between [the SSA] and the courts as SSA refuses to apply circuit court opinions").[13] An agency may also view acquiescence in adverse circuit precedent as the best way to serve those affected by the relevant statutory regime and to ensure effective program administration. *See Atchison,*

[13] Indeed, as noted above, commentators have argued that this general interest arguably has even greater force where, as here, the agency would be acquiescing in a constitutional ruling. *Cf.* Estreicher & Revesz, 98 Yale L.J. at 720 n.214 (nonacquiescence is "much more troubling" in a constitutional rather than in a statutory case).

Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring) ("[A]n agency prudently may decide to acquiesce, to reduce uncertainty and the costs of both the legal process and compliance with multiple standards . . . ."), *aff'd sub nom. Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996); *see also, e.g.,* 55 Fed. Reg. at 1017 (characterizing SSA's policy of acquiescence as "an appropriate exercise of our responsibility to administer the vast and complex Social Security benefit programs in a manner that is least burdensome to Social Security claimants and preserves our ability to attempt to maintain national uniformity in program administration"); 66 Fed. Reg. at 6438 (describing policy of acquiescence in section 440(d) of AEDPA as motivated by "the interest of the uniform and expeditious administration of the immigration laws"). The government may also have litigation-related reasons for acquiescing, including an interest in avoiding resource-consuming challenges to the agency's actions within the circuit, *see Castillo-Felix*, 601 F.2d at 467 (noting that nonacquiescence "would only invite appeal and reversal"), and a desire to advance the most advantageous litigation strategy for ensuring vindication of the government's position over the long term. And, again, these interests could, as a general matter, be served through agency acquiescence in constitutional, as well as statutory, rulings. Thus, although we are not aware of the precise rationales that DoD would invoke were it to decide to acquiesce in *Witt*, we cannot say that acquiescence here would be impermissible as a matter of law in light of these reasons why, as a general matter, agencies may permissibly acquiesce. Whether acquiescence would be advisable as a matter of policy in these circumstances, of course, is a distinct question that this memorandum does not address.

To be sure, because the *Witt* decision is an interlocutory ruling from which the government did not seek immediate appeal, a decision not to acquiesce would be in accord with a well-recognized exception to the usual practice of acquiescence. As the Department has previously observed in discussing the importance of the government retaining the option of nonacquiescence, a determination not to appeal an interlocutory ruling is not a determination that the government must conform its conduct to that ruling. *See* Preston Testimony, *supra* note 5, at 45. But we do not think it follows from this recognized exception to the general practice of acquiescence that DoD would be acting unlawfully if it chose to acqui-

esce in *Witt*. Although DOJ has stated that nonacquiescence in interlocutory decisions "may be entirely appropriate," *id.*, it never has suggested that intracircuit acquiescence in such cases would be unlawful. Indeed, in light of the attendant consequences—and collateral litigation—that may result from nonacquiescence, we could not say the government would have no legitimate interest in having the flexibility, at least in certain appropriate contexts, to acquiesce in an interlocutory decision until such time as the case ripens and the ruling may properly be subject to appeal. Simply put, even though the *Witt* ruling is set forth in an unappealed interlocutory order, the controlling law of the circuit is established by that ruling until such time as it may be reconsidered by the circuit itself or overruled by the Supreme Court. Accordingly, in our view, the procedural posture of a binding interlocutory ruling does not so undermine the comity and policy factors identified above that such acquiescence, even if it were determined to be ill-advised, would constitute a violation of the Executive's "AEDPA" responsibilities.

Another consideration that may arguably weaken the case for acquiescence here is one to which we have already alluded. It arises from the possible tension between such acquiescence and Congress's unqualified finding that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," 10 U.S.C. § 654(a)(15). DoD acquiescence in *Witt* might well result in the Department declining to effectuate the separation of an individual whose separation the statute, standing alone, would appear to require. However, so long as any such decision is premised solely on DoD's interest in conforming its conduct to the controlling law of the circuit—and not on a broader judgment not to comply with section 654 or an independent judgment that the provision is unconstitutional—such tension would be at least somewhat mitigated. Indeed, because *Witt* is binding as a matter of *stare decisis* within the Ninth Circuit, separations that could not satisfy the *Witt* standard presumably could not be effected within that circuit if challenged in court so long as *Witt* remains the governing law. And that would be the case wholly independent of DoD's decision to acquiesce. Thus, at least with respect to this category of cases, an appropriately tailored policy of acquiescence may be understood as designed to conform

agency conduct to the governing law, given that any policy of acquiescence would be temporary and contingent on further developments in *Witt*.

We recognize that this Office has previously set forth guidance with respect to when the President may, consistent with his "take care" responsibilities, decline to enforce enacted legislation for constitutional reasons. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199. This guidance notes that the President should presume that enactments are constitutional and, thereby, "give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation." *Id.* at 200. We also acknowledge in that guidance the "special role" of the Supreme Court in resolving disputes about the constitutionality of enactments and the deference to be accorded the Court's likely decisions regarding particular provisions. *Id.* We did not consider, however, the legitimacy of intracircuit acquiescence, which is a practice distinct from, and more cabined than, an Executive Branch decision not to enforce a statutory provision at all based on an independent assessment that the law is unconstitutional. Accordingly, we do not believe that the principles set forth in the guidance control the decision of an agency to acquiesce in adverse circuit precedent, even when that precedent imposes constitutional limits on an agency's ability to act in accord with what a statute would otherwise require. Thus, in light of the established historical practice of intracircuit acquiescence as a general matter, and the substantial interests that it can serve, we cannot conclude that such acquiescence would violate the Executive's "take care" responsibilities here, even if it could result in some instances in nonenforcement of an otherwise mandatory statutory command.

Our conclusion is consistent with, although it is not compelled by, judicial precedents in other contexts involving agency decisions not to enforce a statute. As the Supreme Court has observed, "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," and "[t]hat discretion is at its height when the agency decides not to bring an enforcement action." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). Indeed, in *Heckler v. Chaney*, the Court stated that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally

committed to an agency's absolute discretion," and attributed this proposition "to the general unsuitability for judicial review of agency decisions to refuse enforcement." 470 U.S. 821, 831 (1985).[14] In particular, the Court noted, "an agency decision not to enforce often involves a complicated balancing of a numbers of factors which are peculiarly within its expertise." *Id.* These factors include not only whether "a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* An agency decision, based on considerations of inter-branch comity and sound policy, to suspend enforcement of a statute within a particular circuit in order to acquiesce in a court of appeals decision resembles a decision not to enforce based on the types of "factors" identified in *Chaney* as "peculiarly within [an agency's] expertise." *Id.*

We acknowledge, however, that extending the reasoning of *Chaney* to a practice of intracircuit acquiescence such as the one proposed here would raise two potentially significant concerns. First, as the Eighth Circuit has noted, the *Chaney* framework for determining whether agency action rests within the agency's sole discretion appears to "appl[y] to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards." *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *see also Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (noting that general enforcement policies are "more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are . . . particularly within the agency's expertise and discretion"). A formal policy of acquiescence in *Witt* resembles the more broadly applicable type

[14] The precise question at issue in *Chaney* was whether an agency's decision not to enforce a statute was subject to judicial review under the Administrative Procedure Act ("APA"). The Court observed that under 5 U.S.C. § 701(a)(2), an agency's action is not subject to judicial review if it is "'committed to agency discretion by law.'" *Chaney*, 470 U.S. at 828. Thus, although the question directly presented in *Chaney* was the availability of judicial review under the APA, the Court resolved that question by determining whether Congress had afforded the agency the requisite nonenforcement discretion.

of categorical nonenforcement policy that even the "absolute discretion" discussed in *Chaney* may not encompass. Second, as the Court also recognized in *Chaney*, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." 470 U.S. at 833. And, in discussing a prior decision, *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the *Chaney* Court stated that the statute at issue in that case, which provided that the Secretary of Labor "'shall investigate [a] complaint and, if he finds probable cause to believe that a violation has occurred he shall bring a civil action,'" "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." 470 U.S. at 833–34 (quoting 29 U.S.C. § 482(b), internal alterations omitted); *see also id.* at 833 (discussing the provision at issue in *Dunlop* as "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability"); Letter for Richard W. Allen, Assistant General Counsel for General Law, Consumer Product Safety Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel 3 n.* (Dec. 14, 1977) (observing that an agency's "[e]nforcement discretion may be circumscribed to a substantial degree if the agency is guided by a statute that employs mandatory enforcement language").

Nonetheless, the potential nonenforcement decision here—assuming it is based upon temporary acquiescence in a court of appeals decision within that court's jurisdiction—would be of the type that is "often inherently policy driven and thus best left to the discretion of the agency" rather than to the reviewing court. *Harrington v. Chao*, 372 F.3d 52, 55 (1st Cir. 2004). Accordingly, and in light of an established general practice of acquiescence, it is fair to assume that Congress did not mean to bar such a course of action, at least absent a clearer statement to that effect than is evidenced in section 654, notwithstanding its use of the mandatory term "shall." Indeed, as the Court explained in *Dunlop*, even if a governing statute establishes that a nonenforcement decision is not "an unreviewable exercise of prosecutorial discretion," such decisions should still be reviewed under an extremely deferential standard, asking only whether the decision was "so irrational as to constitute the decision arbitrary and capricious." 421 U.S. at 567 n.7, 573; *see also Harrington*, 372 F.3d at 55–56 (Secretary's decision to enforce 29 U.S.C. § 482 "is reviewed only

under the highly limited arbitrary and capricious standard contained in the Administrative Procedure Act, 5 U.S.C. § 706," and "a court reviews the Secretary's stated reasons for not suing only to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") (citations and internal quotation marks omitted). Thus, although an agency may not "consciously and expressly adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," *Chaney*, 470 U.S. at 833 n.4, we could not say that a DoD policy of suspending the enforcement of section 654 in a limited class of cases in order to acquiesce in the *Witt* decision would constitute action of that kind.

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Acting Assistant Attorney General
Office of Legal Counsel

Constitutional Concerns Presented by Proposed Orderly Liquidation Authority Panel

The Orderly Liquidation Authority Panel that would be authorized by section 202 of the Committee Print of the Restoring American Financial Stability Act of 2010 would have independent jurisdiction to determine the statutory permissibility of petitions issued by the Secretary of the Treasury to appoint the Federal Deposit Insurance Corporation as receiver for certain systemically important financial companies that are in default or in danger of default. If this Panel—a bankruptcy court tribunal composed of three judges from the U.S. Bankruptcy Court for the District of Delaware who are appointed by the Chief Judge of that court—were deemed to be a part of the Executive Branch, its exercise of this jurisdiction would raise both Appointments Clause and separation of powers concerns.

If the Panel instead were deemed to be a part of the Judicial Branch, the Appointments Clause concerns would be mitigated, if not resolved, but the separation of powers concerns would be heightened.

The Panel could be located within the Judicial Branch while addressing both the Appointments Clause and separation of powers concerns if Congress were to vest jurisdiction to review receivership petitions in an Article III court, with that court authorized to refer such petitions to the Panel and to withdraw referrals under appropriate circumstances, or if the Panel were to consist of Article III judges rather than bankruptcy judges. This structure, however, would likely prevent the Panel from adjudicating petitions where the financial company consents to the appointment of the FDIC as receiver and thus does not present a justiciable case or controversy.

April 19, 2010

LETTER OPINION FOR THE ASSISTANT SECRETARY
FOR FINANCIAL INSTITUTIONS
DEPARTMENT OF THE TREASURY

This letter is to convey our constitutional concerns regarding the Orderly Liquidation Authority Panel ("Panel") that would be authorized by section 202 of the Committee Print ("Print") of the Restoring American Financial Stability Act of 2010 ("Act"). *See* S. Comm. on Banking, Housing, and Urban Affairs, Restoring American Financial Stability Act of 2010, 111th Cong. § 202 (Comm. Print 2010). As a bankruptcy court tribunal with independent jurisdiction to determine the statutory permissibility of petitions issued by the Secretary of the Treasury ("Secretary") under section 202 of the Act, the Panel would constitute an unusual type of hybrid adjudicatory entity that defies ready categorization. Congress's

establishment of such an entity, however it is categorized, would be of uncertain constitutionality because it would blur the lines between adjudications conducted by judges who enjoy the Article III protections of irreducible salary and life tenure and adjudications conducted by judges who lack those protections. The level of this uncertainty would vary to some extent, however, depending on which branch of government the Panel is determined to be located in for constitutional purposes. In our view, a court might characterize the Panel as residing in either the Executive Branch or the Judicial Branch. A determination that the Panel resides in the Executive Branch would present a relatively lower risk that the Panel violates the separation of powers, but would also render the current method of appointing the Panel's judges questionable under the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2. A determination that the Panel resides in the Judicial Branch would mitigate, if not resolve, these Appointments Clause concerns, but would in turn heighten the potential threat to judicial integrity—and the separation of powers concerns—presented by the Panel's structure.

After setting forth the statutory background, we consider the Appointments Clause and separation of powers issues that the Print raises, analyzing these issues separately depending on whether the Panel is determined to be located for constitutional purposes in the Executive Branch or the Judicial Branch. We then describe how the Panel could be structured to resolve these issues while still locating it within the Judicial Branch, but note that the Panel, even as restructured, would likely lack authority to consider one class of petitions filed by the Secretary under section 202—namely, those that concern financial companies that have consented to the appointment of the Federal Deposit Insurance Corporation ("FDIC") as their receiver—because such petitions may well not give rise to a justiciable "Case[]" or "Controvers[y]" within the meaning of Article III of the Constitution, U.S. Const. art. III, § 2, cl. 1.

I.

The Print would require the Secretary to appoint the FDIC as receiver for certain systemically important financial companies that are in default or in danger of default, and would establish a comprehensive set of procedures to govern the making of such appointments. Print §§ 202,

203. Specifically, the Print would direct the Secretary, upon receiving a written recommendation regarding a company from the FDIC and the Board of Governors of the Federal Reserve System, to determine whether the company meets the statutory requirements for FDIC receivership. *Id.* § 203(a), (b). If the Secretary determines that the company qualifies for receivership, he must petition the Panel for an order authorizing the appointment of the FDIC as receiver, and this petition must be accompanied by notice to the FDIC and the subject company. *Id.* §§ 202(b)(1)(A)(i), 203(b). The Print would establish the Panel within the U.S. Bankruptcy Court for the District of Delaware, and would direct that it be composed of three judges from that court appointed by the Chief Judge of the court. *Id.* § 202(a)(1), (2). The Panel would have "original and exclusive jurisdiction of proceedings to consider petitions by the Secretary," *id.* § 202(a)(3), and would be charged with "establish[ing] such rules and procedures as may be necessary to ensure the orderly conduct of [its] proceedings," *id.* § 202(c)(1).

Within twenty-four hours of receiving a petition, the Panel would be required to issue a "final" determination regarding whether "substantial evidence" supports the Secretary's determination that "the covered financial company is in default or in danger of default." *Id.* § 202(b)(1)(A)(iii), (B). If the Panel determines that there is substantial evidence for the Secretary's determination, it would have to "issue an order immediately authorizing the Secretary to appoint the [FDIC] as receiver of the . . . company." *Id.* § 202(b)(1)(A)(iv). If the Panel determines that there is not substantial evidence for the Secretary's determination, it would have to provide the Secretary with a written statement of the Panel's reasons for so determining and afford the Secretary an opportunity to amend and refile the petition. *Id.* Before the Panel could issue its final determination, it would have to provide the covered financial company notice and a hearing at which the company "may oppose the petition." *Id.* § 202(b)(1)(A)(iii).

After the Panel has issued its final determination, both the Secretary and the covered financial company (through its board of directors) would be authorized to appeal that determination to the U.S. Court of Appeals for the Third Circuit, although the Third Circuit would have jurisdiction over appeals by the company only if the company "did not acquiesce or consent to the appointment of a receiver by the Secretary."

Id. § 202(b)(2)(A)(i), (ii). Review by the court of appeals would "be limited to whether the determination of the Secretary that a covered financial company is in default or in danger of default is supported by substantial evidence." *Id.* § 202(b)(2)(A)(iv). Once the Third Circuit has ruled, the Secretary or the company (through its board of directors) would be authorized to petition the Supreme Court to review that ruling. *See id.* § 202(b)(2)(B).

II.

The Panel appears to be a novel type of government entity. It would be located by statute within the U.S. Bankruptcy Court for the District of Delaware, Print § 202(a)(1); would be composed of bankruptcy judges appointed by the Chief Judge of that court, *id.* § 202(a)(1), (2); and would be charged with rendering final decisions regarding the Secretary's authority under the Act to appoint the FDIC as receiver of troubled financial companies, *id*. § 202(b)(1)(A)(iii), (B). We are not aware of any precedent for Congress creating an entity of precisely this type, i.e., one (a) located within a tribunal that is by statute part of the federal judiciary, *see* 28 U.S.C. § 151 (2006) (describing bankruptcy courts as "unit[s] of the district court"); (b) composed of non-Article III judges appointed to the entity by an officer located by statute in the Judicial Branch, *see id.* § 152(a)(1) (describing bankruptcy judges as "judicial officers of the United States district court"); *infra* note 1; and (c) vested with independent jurisdiction to render final, binding decisions regarding an executive agency's exercise of its statutory authority. And while "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation," *Mistretta v. United States*, 488 U.S. 361, 385 (1989), this unconventional structure does, in our view, raise constitutional concerns. The nature of these concerns differs somewhat, however, depending on whether the Panel is properly conceived of as residing for constitutional purposes within the Executive Branch or the Judicial Branch. Because the relevant judicial precedents do not afford definitive guidance with respect to locating the Panel in either branch, we consider separately the distinct constitutional concerns raised by each possibility.

A.

There is an argument that the Print establishes the Panel within the Executive Branch for constitutional purposes, on the theory that the Executive Branch is the most plausible location for a non-Article III tribunal charged with adjudicating the permissibility of Executive Branch action affecting private rights. *Cf. Freytag v. Comm'r*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy, and Souter, JJ.) (arguing that "[legislative] tribunals, like any other administrative board, exercise the executive power, not the judicial power of the United States").[1] Further supporting this conclusion is the fact that the creation of such an Executive Branch tribunal would not be clearly inconsistent with constitutional limitations on the legislative assignment of adjudicative functions to non-Article III courts, although there are aspects of the Panel's structure that give us some pause in this regard.

The Supreme Court has explained that Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to [non-Article III] legislative tribunals," *Freytag*, 501 U.S. at 889, and that "the constitutionality of a given congressional delegation of adjudicative functions to [such a tribunal] must be assessed by reference to the purposes underlying the requirements of Article III," *CFTC v. Schor*, 478 U.S. 833, 847 (1986). "[I]n reviewing Article III challenges" to the establishment of non-Article III courts, the Supreme Court weighs "a number of factors, none of which [it] has . . . deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* at 851. Among the factors the Court has focused on "are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range

[1] The Panel—like the bankruptcy courts—would not constitute an Article III court, because the bankruptcy judges who would serve on the Panel do not enjoy the constitutional protections—life tenure and an irreducible compensation—that Article III judges must possess. *See* U.S. Const. art. III, § 1; 28 U.S.C. § 152(a)(1) (bankruptcy judges appointed to fourteen-year terms); *id.* § 152(e) (authorizing removal of bankruptcy judges); *see generally N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60–61 (1982) (plurality op.).

of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.*

Here, the Panel would have the narrow function of adjudicating the statutory permissibility of a single type of action undertaken by the Secretary—albeit one with potentially significant consequences for the subject financial company—and the government would be a party to the proceedings. In addition, the Panel's decisions would be subject to review by Article III courts, even though that review would not be de novo. Given these circumstances, Article III would not appear to categorically bar the vesting of such a relatively limited adjudicatory function in a tribunal such as the Panel whose members do not enjoy the constitutional protections afforded Article III judges. *See id.* at 853–54 ("'[W]hen Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication." (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (internal quotation marks omitted))); *cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982) (plurality opinion) (describing as subject to adjudication in Article I tribunals "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 "historically [subject to] determin[ation] exclusively by those departments" (internal quotation marks and citations omitted)).

We are somewhat troubled, however, by the fact that the Panel, unlike the other non-Article III tribunals of which we are aware, would be located in an Article III court's adjunct tribunal—namely, the Bankruptcy Court for the District of Delaware—and composed of non-Article III judges of that adjunct who would continue to serve in that capacity. *See* Print § 202(a)(1), (2); *In re Kilen*, 129 B.R. 538, 542 (Bankr. N.D. Ill. 1991); *supra* p. 128. Although the Supreme Court has stated that "Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers," it also has suggested that "the function of resolving administrative claims" cannot "be assigned to a court, or to judges acting as part of a court."

Mistretta, 488 U.S. at 404; *cf.* Letter for Edward P. Boland, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, at 2 n.1 (Apr. 18, 1978) ("Harmon Memo") (noting that Supreme Court has raised concerns "over the assignment of Article III judges to non-Article III tribunals" (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 540, 561 (1962), *Ex parte Bakelite Corp.*, 279 U.S. 438, 460 (1929))). Whether the service of bankruptcy judges on the Panel and the Panel's placement in a bankruptcy court would transgress this apparent limitation on congressional authority to assign administrative power to "courts" and "judges" is not entirely clear. But we believe that, were the Panel deemed to be located in the Executive Branch, those aspects of its structure would give rise to uncertainty regarding its constitutionality because they would create at least some risk of the Panel "undermin[ing] the integrity of the Judicial Branch." *Mistretta*, 488 U.S. at 404.

An even clearer source of constitutional concern, were the Panel determined to be located within the Executive Branch, would be the possibility that the Print's method of appointing judges to serve on the Panel is inconsistent with the Appointments Clause. The Appointments Clause provides that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint 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. Panel members would have been appointed as bankruptcy judges by the U.S. Court of Appeals for the Third Circuit, *see* Print § 202(a)(2); 28 U.S.C. § 152(a)(1), and would be appointed to the Panel itself by the Chief Judge of the U.S. Bankruptcy Court for the District of Delaware, *see* Print § 202(a)(1). Accordingly, if the Appointments Clause governs the means of appointing Panel members, they would have to be inferior officers in order for their appointments to be valid.

The judges serving on the Panel would issue final, binding decisions controlling the Secretary's authority to place private companies into government receivership, and would appear to satisfy all of the other relevant criteria necessary to qualify as constitutional officers within the meaning of the Appointments Clause. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 (1996) (explaining that "[a]n appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an 'Officer of the United States,'" and must be appointed in conformity with the Appointments Clause); *see also Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam); *cf. Freytag*, 501 U.S. at 881–82 (special trial judges charged with assisting U.S. Tax Court judges are officers of the United States). Accordingly, the critical question concerns whether the Panel members would properly be characterized as principal officers, in which case they would have to be appointed by the President with the advice and consent of the Senate, or inferior officers, in which case they could be appointed, as the Print provides, by the Chief Judge of the U.S. Bankruptcy Court for the District of Delaware, who would appear to qualify as a "Court[] of Law" within the meaning of the Appointments Clause. *Cf. Freytag*, 501 U.S. at 888–92 (Chief Judge of Tax Court is "Court[] of Law" for purposes of Appointments Clause).

The Supreme Court has "not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond v. United States*, 520 U.S. 651, 661 (1997). In *Morrison v. Olson*, 487 U.S. 654 (1998), the Court considered four factors in holding that an independent counsel authorized by the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599, was an inferior officer: (a) the independent counsel was subject to removal by a higher Executive Branch official (the Attorney General), (b) she performed only limited duties, (c) her jurisdiction was narrow, and (d) her tenure was limited. *Id.* at 671–72. The Court later characterized these factors as not "definitive," holding in *Edmond* that civilians appointed by the Secretary of Transportation to serve as judges on the Coast Guard Court of Criminal Appeals ("Court of Criminal Appeals") were inferior officers. 520 U.S. at 653, 661–66.

In *Edmond*, the Court acknowledged that judges on the Court of Criminal Appeals were not limited in "tenure" or "jurisdiction" as those terms

were used in *Morrison*. *Id.* at 661. But the *Edmond* Court nonetheless deemed them inferior officers because their work was subject to supervision by the Judge Advocate General of the Coast Guard (who controlled administrative matters) and the executive-controlled Court of Appeals for the Armed Forces (which could reverse the lower tribunal's decisions and prevent any final order from being issued). *See id.* at 664–65. The Court summarized its approach when it stated that "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. In the course of its analysis, the *Edmond* Court rejected the argument that the judges on the Court of Criminal Appeals were akin to judges on the Tax Court (a non-Article III court), whom the petitioners argued were principal officers under the Court's decision in *Freytag*, 501 U.S. 868. Expressly declining to confirm this reading of *Freytag*, the *Edmond* Court noted "two significant distinctions between Tax Court judges and Court of Criminal Appeals judges" that explained why the latter were "inferior" officers even if the former were not. *Edmond*, 520 U.S. at 665. First, decisions of the Tax Court are not appealable to any higher Executive Branch tribunal, but only to Article III courts; and second, "there is no officer comparable to a Judge Advocate General who supervises the work of the Tax Court, with power to determine its procedural rules, to remove any judge without cause, and to order any decision submitted for review." *Id.* at 665–66.

Morrison and *Edmond* indicate that if the Panel is deemed to be an Executive Branch tribunal, its members could well be principal officers for purposes of the Appointments Clause. If so, they could only be appointed by the President with the advice and consent of the Senate. Most importantly, the decisions of the Panel, unlike the decisions issued by the Court of Criminal Appeals, would not be reviewable by any superior Executive Branch tribunal or official, but rather would be appealable only to Article III courts—the Third Circuit followed by the Supreme Court. Print § 202(b)(2)(A), (B). Moreover, Panel judges would not be subject to removal from the Panel by any higher Executive Branch official—a factor that the Court deemed significant in both *Edmond* and *Morrison*. *See Edmond*, 520 U.S. at 664 ("It is conceded by the parties that the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers,

we have recognized, is a powerful tool for control."); *Morrison*, 487 U.S. at 671 (observing that "appellant is subject to removal by a higher Executive Branch official").[2] Indeed, the Act makes no express provision for the removal of judges from the Panel. The authority of the Chief Judge of the U.S. Bankruptcy Court for the District of Delaware to appoint judges to the Panel does imply that the Chief Judge may also remove them, *see Keim v. United States*, 177 U.S. 290, 293 (1900) ("In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment."), but the circumstances in which he would be able to do so are not clear.[3]

B.

Alternatively, there is an argument for locating the Panel within the Judicial Branch for constitutional purposes. As noted, the Print would

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[2] It could be argued that one factor identified in *Morrison*—limited jurisdiction—weighs in favor of deeming the Panel's judges inferior officers. 487 U.S. at 672. In a sense, the Panel does have a relatively narrow jurisdiction, since it is charged solely with reviewing the Secretary's petitions for the appointment of the FDIC as receiver under the Act. However, unlike the independent counsel in *Morrison*, who was responsible for handling only a single investigation, *see id.* at 672, the Panel could be responsible for reviewing numerous petitions, indicating a broader jurisdiction.

[3] Were the Panel to be located in the Executive Branch, there would be the additional constitutional question whether the separation of powers permits the appointment and removal of the members of such an Executive Branch tribunal by judicial officers. *Cf. Morrison*, 487 U.S. at 675–76 (statute providing for interbranch appointments constitutionally impermissible where it would "impair the constitutional functions assigned to one of the branches" or "if there [i]s some incongruity between the functions normally performed by the [appointing] courts and the performance of their duty to appoint" (internal quotation marks omitted)); *id.* at 682–83 (construing termination provisions of the Ethics in Government Act not to give the Special Division of the U.S. Court of Appeals for the D.C. Circuit "anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway," and noting that "this power is vested solely in the Attorney General," in concluding that "the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III"); *cf. also Freytag*, 501 U.S. at 891 (noting that Tax Court, whose judges are appointed by the President, with the advice and consent of the Senate, and who are removable by the President for inefficiency, neglect of duty, or malfeasance in office, "remains independent of the Executive and Legislative Branches," and "[i]ts decisions are not subject to review by either the Congress or the President").

structure the Panel as a tribunal composed of bankruptcy judges appointed by the Chief Judge of the U.S. Bankruptcy Court for the District of Delaware, and would locate the Panel within that court, thus perhaps suggesting an intent on the part of its drafters to place the Panel in the same branch of government as the bankruptcy courts. Bankruptcy courts may well reside in the Judicial Branch as a constitutional matter. *Cf. United States v. Rowland*, 789 F.2d 1169, 1171 (5th Cir. 1986) (characterizing bankruptcy courts as part of Judicial Branch); *In re 1900 M Rest. Assocs., Inc.*, 319 B.R. 302, 316 (Bankr. D.D.C. 2005) (same); *In re Sharon Steel Corp.*, 100 B.R. 767, 775 (Bankr. W.D. Pa. 1989) (same). The statute designating the bankruptcy courts characterizes them as "unit[s] of the district court," 28 U.S.C. § 151, and another statutory provision characterizes bankruptcy judges "as judicial officers of the United States district court," *id.* § 152(a)(1). Bankruptcy judges are also both appointed by and subject to removal by judicial officers. *Id.* § 152(a)(1), (e). And, finally, bankruptcy judges function as judicial "adjuncts" of the district courts, qualifying for this status because in resolving proceedings arising under the Bankruptcy Code, *see* title 11, U.S. Code, they act solely by referral from—and under the supervision of—the district courts, which have original jurisdiction over bankruptcy cases and proceedings, 28 U.S.C. § 1334 (2006). *See Kilen*, 129 B.R. at 542; *cf. United States v. Raddatz*, 447 U.S. 667 (1980) (approving use of magistrates as adjuncts to Article III courts).

If the Panel were determined to be located in the Judicial Branch, the Appointments Clause analysis might differ, such that the Panel members could be deemed inferior rather than principal officers. This conclusion is far from certain, however, as the Supreme Court's precedents do not clearly establish how to ascertain the status of non-Executive Branch officers under the Appointments Clause. Nevertheless, decisions addressing the status of Executive Branch officers suggest that a relevant consideration in determining the status of any officer is whether there is some level of direction and supervision by superior officers within that officer's branch. *Cf. Edmond*, 520 U.S. at 663 ("'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"); *id.* at 662 ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below

the President."). Here, the Panel members would be "directed and supervised at some level," *id.* at 663, by superior officers within the Judicial Branch—namely, the Chief Judge of the U.S. Bankruptcy Court for the District of Delaware, who may be able to remove them from their Panel positions, *see supra* p. 135, and the Judicial Council of the Third Circuit, which could remove them from their positions as bankruptcy judges under certain circumstances, *see* 28 U.S.C. § 152(e). Moreover, the Third Circuit and the Supreme Court would be authorized to exercise appellate review over the Panel's decisions. Print § 202(b)(2)(A), (B). Thus, even though the Panel members might be deemed principal officers if located within the Executive Branch, due to the lack of higher-level Executive Branch supervision, there is an argument that they should be deemed inferior officers if located in the Judicial Branch, due to the supervision to which they would be subject by Judicial Branch officers. *Cf. Landry v. FDIC*, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (noting that "it has long been settled that federal magistrates are 'inferior Officers' under Article II").[4]

But even if Appointments Clause concerns might be diminished by a determination that the Panel is located within the Judicial Branch for constitutional purposes, such a determination would heighten the separation of powers concerns presented by the Panel's hybrid structure. Although the Panel would carry out an adjudicative function—deciding whether particular petitions by the Secretary for the appointment of the FDIC as receiver satisfy the relevant statutory criteria—its status as a non-Article III court would mean that it could not exercise Article III judicial power. *See N. Pipeline Constr. Co.*, 458 U.S. at 59 ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."). As a general matter, Congress may delegate to the Judicial Branch functions that do not constitute the exercise of Article III judicial power only if those additional functions "do not trench upon the prerogatives of another Branch and . . . are appropriate to the central mission of the Judiciary." *Mistretta*, 488 U.S. at 388. For example,

[4] This conclusion should not be taken as expressing a view on the status under the Appointments Clause of district judges, who of course enjoy life tenure, U.S. Const. art. III, § 1, and thus are not removable except by impeachment. *See Weiss v. United States*, 510 U.S. 163, 191 (1994) (Souter, J., concurring) (stating view that district court judges are principal officers).

Congress may assign authority other than Article III judicial power to adjuncts of Article III courts, as it has done with respect to magistrate judges and bankruptcy judges. *See, e.g.*, *Raddatz*, 447 U.S. 667. In addition, the Supreme Court has approved Congress's creation within the Judicial Branch of certain entities charged with exercising rulemaking and administrative functions, including the U.S. Sentencing Commission, the Judicial Councils, the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Rules Advisory Committees. *See Mistretta*, 488 U.S. at 386–89.

We are not aware of any precedent, however, for Congress's creation within the Judicial Branch of a tribunal, like the Panel, composed of non-Article III judges and possessing the independent jurisdiction—outside of the control or supervision of any Article III court—to make binding, final decisions regarding the Executive's exercise of statutory authority. Such a Panel could not be characterized as an adjunct of an Article III court in the way that bankruptcy judges and magistrate judges function as adjuncts of the district courts. The Panel instead would have "exclusive and original" jurisdiction to determine whether the Secretary's petitions satisfy the relevant statutory criteria, Print § 202(a)(3), and neither a district court nor a court of appeals could withdraw the Panel's jurisdiction. Moreover, the Third Circuit and the Supreme Court could exercise only limited appellate review of the Panel's decisions. *See id.* § 202(b)(2)(A), (B). Thus, the Panel's functions would not appear to "be limited in such a way that 'the essential attributes' of judicial power are retained in [some overseeing] Art. III court." *N. Pipeline Constr. Co.*, 458 U.S. at 81 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

To be sure, as we have explained, although the Panel's location within an adjunct to an Article III court and its composition of non-Article III judges in active service on that adjunct raise some constitutional concerns, we do not believe that the Constitution bars Congress from statutorily vesting the underlying adjudicative function in an Executive Branch tribunal of some kind. *See supra* pp. 130–131. But for a *Judicial Branch* tribunal to be comprised as this one is would raise special constitutional concerns and, in our view, pose a serious "threat[]" to "the institutional integrity of [that branch]." *Mistretta*, 488 U.S. at 383 (internal quotation marks omitted). Specifically, although Article III's structural protections do not bar federal courts from using non-Article III judicial officers "to

support judicial functions, as long as a[n Article III] judicial officer retains and exercises ultimate responsibility," *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995), Article III may prevent the "elevat[ion]" of non-Article III judicial officers from "adjunct [status] to the functional equivalent of an Article III judge," *Thomas v. Arn*, 474 U.S. 140, 154 (1985). This risk would be heightened by the service of bankruptcy judges on the Panel because such service would involve those non-Article III judges exercising authority both as adjuncts to an Article III court and under a source of jurisdiction independent of any Article III court. *See supra* pp. 131–132.

The purposes underlying Article III's guarantees of undiminished compensation and lifetime tenure to federal judges would afford the structural reasons for a possible separation of powers-based objection to the Panel were it located within the Judicial Branch. Those guarantees "protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts." *Union Carbide*, 473 U.S. 582–83. By creating the Panel within the Judicial Branch and designating non-Article III officers who also function as judicial adjuncts to serve on it, Congress would be enabling the Panel to draw on the "reputation for impartiality and nonpartisanship" so critical to the legitimacy of Article III courts and the non-Article III officers who support them as adjuncts. *Mistretta*, 488 U.S. at 407. But the Panel members would lack the very Article III protections designed to insulate Article III judges from political pressures on their decisionmaking. And the Panel, by virtue of its independent statutory jurisdiction, would be free of the "'total control and jurisdiction'" of an Article III court that the Supreme Court has suggested is necessary to ensure that the actions of judicial adjuncts (such as magistrate judges and bankruptcy judges) are consistent with the separation of powers. *Peretz v. United States*, 501 U.S. 923, 937 (1991) (quoting *Raddatz*, 447 U.S. at 681). The resulting blurring of the lines between judicial functions and other governmental functions—i.e., between the actions of tribunals subject to Article III's protections, either directly or by virtue of adjunct status, and the actions of a tribunal such as the Panel that is not so protected—might be thought to pose a particular threat to the integrity of the Judicial Branch. *Cf. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (identifying possibility that

Congress's provision for reference of court cases to a magistrate may threaten "the integrity of the judiciary" by "invad[ing] the power of a coordinate branch or permitting an improper abdication of that branch's central authority").

On this view, the Panel would be different in kind from both judicial adjuncts and those entities exercising rulemaking and administrative powers of a non-Article III nature that the Supreme Court has to this point allowed to be placed in the Judicial Branch. Because the Panel would exercise independent adjudicative authority of a type not given to those adjuncts and other Judicial Branch entities, it would raise separation of powers concerns they do not. Indeed, in concluding that the placement of the Sentencing Commission within the Judicial Branch was consistent with the separation of powers, the *Mistretta* Court expressly noted that the Commission lacked the power to "bind or regulate the primary conduct of the public," 488 U.S. at 396—a power that the Panel would possess by virtue of its control over the Secretary's petition authority. *See* 20 Op. O.L.C. at 168 n.116 (noting that "questions would arise under current constitutional doctrine as to the legitimacy . . . of an Article III non-judicial entity 'bind[ing] or regulat[ing] the primary conduct of the public'" (quoting *Mistretta*, 488 U.S. at 396)). Thus, by creating an entity within the Judiciary that looks and functions like a court or a judicial adjunct, but that is composed of members who are not subject to either Article III's guarantees of independence or the supervision of an Article III court, the Print would appear to risk eroding the Judiciary's reputation for neutrality. Ultimately, Congress's exercise of the authority to create such tribunals could threaten the Judicial Branch with the "'emasculati[on]'" against which the Supreme Court has warned. *Peretz*, 501 U.S. at 937 (quoting *Schor*, 478 U.S. at 850).[5]

[5] The majority opinion in *Freytag*, although touching on related themes, does not establish the constitutionality of placing an entity such as the Panel within the Judicial Branch. In *Freytag*, the Court held that the special trial judges who assist Tax Court judges are inferior officers and can be appointed by the Chief Judge of the Tax Court. Like the Panel, the Tax Court is a non-Article III tribunal charged by Congress with making decisions regarding "matters that involve the application of legal standards to facts and [that] affect private interests." *Union Carbide*, 473 U.S. at 583. In determining that the Tax Court is a "Court[] of Law" within the meaning of the Appointments Clause, the Court did describe the Tax Court as "exercis[ing] judicial, rather than executive,

These concerns could be addressed by making the Panel, still composed of bankruptcy judges, a true adjunct of an Article III court, with the relationship between the two tribunals structured in a manner similar to the relationship between the district courts and the bankruptcy courts under current law. This modification would require at a minimum vesting jurisdiction to review receivership petitions in an Article III court, with that court authorized to refer such petitions to the Panel and to withdraw referrals under appropriate circumstances. Such an adjunct structure would ensure that the Panel members are subject to sufficient supervision to constitute inferior officers, and thus properly appointed by a "Court[] of Law." And such a structure would also guard against the possible threat to the integrity of the Article III judiciary that would arise from vesting binding adjudicative authority in a bankruptcy court tribunal that lacks the essential attributes of an Article III court and does not function as an adjunct to such a court. The constitutional concerns we have identified could also be addressed by providing for the service on the Panel of Article III judges rather than bankruptcy judges. The Panel members would then be appointed by the President with the advice and consent of the Senate, thereby satisfying the Appointments Clause, *see Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (officer can be assigned additional duties "germane" to those the officer already performs without the need for a separate appointment), and would retain the essential attributes of Article III judges, thereby resolving the separation of powers concerns identified above.[6]

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legislative, or administrative, power" and as "independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 890–91. The *Freytag* Court was not presented with the question of which branch the Tax Court is located in for constitutional purposes, however, and we do not read the majority opinion to resolve definitively that the Tax Court is located in the Judicial Branch—let alone that its placement in the Judicial Branch would be consistent with the separation of powers. We are particularly reluctant to read the majority opinion as resolving this question in light of the persuasive four-justice concurrence, which argued that all legislative tribunals "exercise the executive power, not the judicial power of the United States" and that only adjudicative decisionmakers who "possess life tenure and a permanent salary" may exercise the latter power. *Id.* at 909, 911 (Scalia, J., concurring, joined by O'Connor, Kennedy, and Souter, JJ.).

[6] We do not address whether the brevity of the period the Print would allow for the Panel to reach a final decision—twenty-four hours, Print § 202(b)(1)(A)(iii)—would raise any constitutional concerns under the Due Process Clause or the separation of powers.

III.

So long as the Panel is located within the Judicial Branch, however, whether as an Article III court or as an adjunct to an Article III court, there is considerable doubt whether the Panel could adjudicate petitions filed by the Secretary concerning companies that have affirmatively consented to the appointment of the FDIC as their receiver. Such petitions likely would not give rise to a "Case[]" or "Controvers[y]" within the meaning of Article III of the Constitution, U.S. Const. art. III, § 2, cl. 1. Moreover, even in cases in which the company that is the subject of the petition does not affirmatively consent to receivership but simply acquiesces by choosing not to appear before the Panel, there is some question whether the "case or controversy" requirement would be met.

Service of Article III judges on the Panel would appear to render the Panel an "inferior Court[]" under Article III. *Id.* art. III, § 1; *see also id.* art. I, § 8, cl. 9 (authorizing Congress "[t]o constitute Tribunals inferior to the supreme Court"); Harmon Memo at 1–2 (tribunal composed of Article III judges designated by a judicial officer constitutes Article III court). Because "Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies,'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), the jurisdiction of a Panel composed of Article III judges would be so limited as well. The "case or controversy" requirement also likely would apply to the Panel were it structured simply as an adjunct to an Article III court, because in that case the Act presumably would render the Panel's jurisdiction completely derivative of the jurisdiction possessed by the Article III court. *Cf. Kilen*, 129 B.R. at 543 (holding that "[i]n establishing the bankruptcy courts of the United States, Congress assigned to those courts the resolution of certain disputes that otherwise could be resolved by the Article III district court," that "[b]y definition . . . those disputes must involve cases or controversies or Congress could not have assigned them initially to the district court to resolve," and that, therefore, "by statute . . . bankruptcy courts are limited to resolving disputes involving actual cases or controversies").

See Miller v. French, 530 U.S. 327, 349–50 (2000) (reserving the question whether Congress's imposition of a very brief period for resolution of a case before an Article III court could violate due process or the separation of powers).

As the Supreme Court has explained, "[a] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (internal citations omitted). Thus, "judicial power . . . is the right to determine actual controversies arising between adverse litigants." *Muskrat v. United States*, 219 U.S. 346, 361 (1911). "It is an essential prerequisite of a case or controversy to have at least two genuinely adverse parties, for otherwise there is no need for adjudication." Harmon Memo at 5.

Many Panel proceedings would present the degree of adverseness necessary to satisfy the "case or controversy" requirement. Companies subject to a petition would be afforded notice and an opportunity to appear before the Panel. Print § 202(b)(1)(A)(i), (iii). If a company appears and challenges the petition, that would create sufficient adverseness. Even if a company chooses not to appear, the Panel proceeding might still satisfy the requisites of Article III so long as the company does not affirmatively indicate its consent to the receivership, although the question is a close and uncertain one. If a company did affirmatively accept the receivership, however, that acceptance likely would undermine the adverseness needed to make jurisdiction proper under Article III.

As this Office has previously stated, although "the usual case or controversy involves the presence of the adverse parties and an opportunity for them to present arguments to the court, . . . this is not an absolutely necessary requirement." Harmon Memo at 5. In *Pope v. United States*, 323 U.S. 1 (1944), for example, the Supreme Court held that a contractor's suit against the government seeking payment for prior work was justiciable even though Congress had by statute essentially "consented to judgment in an amount to be ascertained by reference to [certain] specified data" and the government had not contested the suit. *Id.* at 11. The Court stated that "[w]hen a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." *Id.* Moreover, federal courts may "participate in the issuance of search warrants and review applications for wiretaps, both of which may require a court to consider

the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding." *Morrison*, 487 U.S. at 681 n.20 (internal citations omitted); *see also* Harmon Memo at 3 (mechanism for review by Article III judges of *ex parte* government applications for electronic surveillance warrants satisfies "case or controversy" requirement). Federal courts also may adjudicate *ex parte* petitions for naturalization under the Immigration and Nationality Act, even though in most such cases the United States does not appear as an adverse party and, as a result, there are no conflicting positions for the court to resolve. *See Tutun v. United States*, 270 U.S. 568, 577 (1926); Harmon Memo at 6. As we have observed, all of the above proceedings satisfy the Article III requirement of adverseness because, "while they may formally take place *ex parte*, they also implicate a potentially adverse party competent to challenge the result of the proceedings either in that forum or at a later date." Memorandum for Sheryl L. Walter, Office of Legislative Affairs, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Draft Bill Entitled the "Identity Theft Victim Assistance Act of 2001"* at 3 (Feb. 6, 2001). For example, as the Court noted in *Tutun* with respect to naturalization proceedings, "[t]he United States is always a possible adverse party" to a claim for citizenship. 270 U.S. at 577.

Whether a financial company subject to a petition that chooses not to appear before the Panel might be said to be "a possible adverse party" in this sense is not clear. The Print deprives the Third Circuit of jurisdiction over company appeals if the company "acquiesce[d] or consent[ed] to the appointment of a receiver by the Secretary." Print § 202(b)(2)(A)(ii). And it appears that such a company would be statutorily foreclosed from attacking a receivership order in any collateral proceeding. *See* Print § 202(a)(3) (granting Panel "original and exclusive jurisdiction of proceedings to consider petitions by the Secretary").[7] One could argue that

[7] In a case involving an ex parte proceeding under 12 U.S.C. § 192, which requires the Comptroller of the Currency and the FDIC to obtain judicial approval before selling the assets of a failed bank, the U.S. Court of Appeals for the Seventh Circuit indicated (but did not decide) that the possible availability of a subsequent opportunity to challenge the outcome of the proceeding could be relevant to whether that proceeding constitutes a justiciable case or controversy. *See FDIC v. Bank One, Waukesha*, 881 F.2d 390, 394 (1989). We do not discern any obvious way, however, in which the outcome of a Panel proceeding could be challenged in a later proceeding. *See* Print § 202(a)(3).

even more so than a naturalization proceeding, a Panel proceeding—on which would turn the government's assumption of control of significant amounts of private property—would present sufficient inherent adverseness between the legal interests of the government and a private party to satisfy Article III, even if the private party does not appear to protect its interests. But we are not confident that we understand sufficiently the economic circumstances that would give rise to a petition, or the manner in which the compressed time frame for Panel consideration of a petition would unfold in practice, to deem such an argument persuasive.

Whatever the answer in the case of a company that simply failed to appear before the Panel, a proceeding concerning a financial company that had affirmatively consented to its placement in FDIC receivership would seem to lack the adverseness necessary to support the jurisdiction of an Article III tribunal. Such a company would not have interests that are "present[ly] or possibl[y] adverse" to those of the government. *Muskrat*, 219 U.S. at 357. Accordingly, a Panel proceeding concerning such a consenting company likely would not present "the honest and actual antagonistic assertion of rights" necessary to "safeguard . . . the integrity of the judicial process." *United States v. Johnson*, 319 U.S. 302, 305 (1943) (internal quotation marks omitted). Indeed, Panel consideration of a petition concerning such a company would seem to raise the same sorts of concerns as an advisory opinion, requiring "legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Therefore, we are concerned that a Panel proceeding concerning a consenting company would not qualify as a justiciable "case or controversy." *See, e.g.*, *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47–48 (1971) (case dismissed based on lack of case or controversy where both sides argued that an anti-busing law was constitutional, thus "confront[ing]" the Court "with the anomaly that both litigants desire precisely the same result"); *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir. 1979) (court lacked jurisdiction to reduce attorney's fee to which plaintiff's attorney and victorious plaintiff had agreed where no party was challenging the fee). And although the Court held in *Pope* that a contractor's statutorily authorized suit was justiciable even though the

government had essentially "consented to judgment," that decision is readily distinguishable. 323 U.S. at 11. Unlike the contractor's suit, "in which the existence, validity and extent of the [government's] obligation, the existence of the data, and the correctness of the computation [could] be put at issue," *id.*, a Panel proceeding involving a company that has consented to receivership would present no issues still open for dispute between the parties.[8]

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[8] Citing the Supreme Court's decision in *Ullmann v. United States*, 350 U.S. 422 (1956), the Harmon Memo observed that "the Court has held the process of issuing an order conferring immunity to be a judicial function," even though "there might be no adverse interests before the court [in such a proceeding]" because "all parties involved may actually want immunity conferred." Harmon Memo at 6; *see also Morrison*, 487 U.S. at 681 n.20 (noting role of federal courts in "compelling the testimony of witnesses"). Although *Ullmann* did hold that Article III permits a court to compel a witness's testimony, the witness in the case affirmatively contested the government's application for a court order and indeed was convicted of contempt when he continued to refuse to testify after the order was issued. *See Ullmann*, 350 U.S. at 425, 434.

Application of the Violence Against Women Act When the Offender and Victim Are the Same Sex

The criminal provisions of the Violence Against Women Act apply to otherwise-covered conduct when the offender and victim are the same sex.

April 27, 2010

MEMORANDUM OPINION FOR THE
ACTING DEPUTY ATTORNEY GENERAL

You have asked us whether the criminal provisions of the Violence Against Women Act ("VAWA") apply to otherwise-covered conduct when the offender and victim are of the same sex. VAWA includes three criminal provisions: 18 U.S.C. § 2261 (2006), addressing interstate domestic violence; 18 U.S.C. § 2261A (2006), addressing interstate stalking; and 18 U.S.C. § 2262 (2006), addressing the interstate violation of a protection order. Consistent with the views we received, we conclude that each of these provisions applies when the offender and the victim are the same sex.[1]

I.

The first of VAWA's three criminal provisions, section 2261, addresses certain specified types of interstate domestic violence. Subsection (a)(1)

[1] We received views from the Criminal and Civil Rights Divisions, the Office on Violence Against Women, and the Executive Office for United States Attorneys. *See* E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, from Mythili Raman, Principal Deputy Assistant Attorney General, Criminal Division (Feb. 23, 2010) (attaching Memorandum for Lanny A. Breuer, Assistant Attorney General, Criminal Division, from P. Kevin Carwile, Chief, Gang Unit, and Michael S. Warbel, Trial Attorney, Criminal Division, *Re: Criminal Prosecution of Same-Sex Partners Under the Violence Against Women Act* (Feb. 19, 2010)); E-mail for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Samuel Bagenstos, Principal Deputy Assistant Attorney General, Civil Rights Division (Apr. 8, 2010); Memorandum for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, from Jennifer E. Kaplan, Attorney Advisor, Office on Violence Against Women, *Re: Application of the Violence Against Women Act to Same-Sex Dating Violence* (Mar. 24, 2010); E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, from Margaret S. Groban, Assistant United States Attorney, Office of Legal Programs and Policy, Executive Office for United States Attorneys (Feb. 10, 2010).

makes it a federal crime to travel in interstate or foreign commerce, to enter or leave Indian country, or to travel within the special maritime or territorial jurisdiction of the United States "with the intent to kill, injure, harass, or intimidate a *spouse, intimate partner, or dating partner*" if, in the course of or as a result of such travel, the offender "commits or attempts to commit a crime of violence against that *spouse, intimate partner, or dating partner*." 18 U.S.C. § 2261(a)(1) (emphases added). Subsection (a)(2) makes it a federal crime to "cause[] *a spouse, intimate partner, or dating partner* to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud" and, during, as a result of, or to facilitate such conduct or travel, to "commit[] or attempt[] to commit a crime of violence against that *spouse, intimate partner, or dating partner*." *Id.* § 2261(a)(2) (emphases added). Section 2261 was part of VAWA as originally enacted in 1994, but at that time it covered only victims who were a "spouse or intimate partner" of the offender. The 2006 VAWA amendments added the term "dating partner" to both paragraphs described above. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 116(a), 119 Stat. 2960, 2988 (2006).

Second, section 2261A addresses interstate stalking. Subsection (1) makes it a federal crime to travel in interstate or foreign commerce, to enter or leave Indian country, or to travel within the special maritime or territorial jurisdiction of the United States "with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate *another person*" if, in the course of or as a result of such travel, the offender "places that person in reasonable fear of the death of, or serious bodily injury to, or causes substantial emotional distress to that person, a member of the immediate family (as defined in section 115)[2] of that person, *or the spouse or intimate partner of that person*." 18 U.S.C. § 2261A(1) (emphases added). Subsection (2) makes it a federal crime to, with certain specified intent, "use[] the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to" "*a*

[2] Section 115 defines "immediate family member" as an individual's "spouse, parent, brother or sister, child or person to whom he stands in loco parentis" or "any other person living in his household and related to him by blood or marriage." 18 U.S.C. § 115 (2006).

person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States," or to place "that person in reasonable fear of the death of, or serious bodily injury to," "that person," "a member of the immediate family (as defined in section 115) of that person," or "*a spouse or intimate partner of that person*." *Id.* § 2261A(2) (emphases added). When first enacted in the 1996 amendments to VAWA, section 2261A covered only the target of the stalking and that person's immediate family members. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1069, 110 Stat. 2422, 2655 (1996). The 2000 VAWA amendments added subsection (2) and the phrase "spouse or intimate partner" after "immediate family" in subsection (1). Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1107(b)(1), 114 Stat. 1464, 1498 (2000).

Finally, section 2262 addresses the interstate violation of a protection order.[3] Subsection (a)(1) makes it a federal crime to travel in interstate or foreign commerce, to enter or leave Indian country, or to travel within the special maritime and territorial jurisdiction of the United States "with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, *another person*, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued," and to subsequently engage in such conduct. 18 U.S.C. § 2262(a)(1) (emphasis added). Subsection (a)(2) makes it a federal crime to "cause[] *another person* to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud" if, in the course of, as a result of, or to facilitate such conduct or travel, the offender engages in conduct described in subsection (a)(1). *Id.* § 2262(a)(2) (emphasis added). Section 2262 was part of VAWA as originally enacted in 1994, but subsection (a)(2) applied at that time only to "a spouse or intimate partner" of the offender. The 2000 amendments to VAWA substituted "another person" for "a spouse or intimate partner." Pub. L. No. 106-386, § 1107(c), 114 Stat. at 1498–99. These amendments also changed the wording of subsection (a)(1) to refer to "another person" rather than to "the person or persons for whom the protection order was issued." *Id.*

[3] For purposes of VAWA, "protection order" is defined in 18 U.S.C. § 2266(5) (2006).

II.

We begin with an analysis of similar language that is used in sections 2261A and 2262, which cover interstate stalking and the interstate violation of a protection order, to define the class of victims to which they apply. Each provision applies to covered acts committed by an offender against "another person," although 2261A also applies in some circumstances to acts that affect a "spouse or intimate partner of that person," a point that we discuss further below.

With respect to the meaning of "another person," the analysis is straightforward. The plain meaning of the term encompasses individuals of both sexes, regardless of their relationship to the offender, and nothing in the text or the structure or purpose of VAWA indicates that a departure from plain meaning would be appropriate. It is true that the statute is entitled the Violence Against Women Act, but other provisions of the Act make clear it applies to conduct perpetrated against male, as well as female, victims, *see, e.g.*, 42 U.S.C. § 13925(b)(8) (2006) (providing, with respect to VAWA's grant conditions, that "[n]othing in this subchapter shall be construed to prohibit male victims of domestic violence, dating violence, sexual assault, and stalking from receiving benefits and services under this subchapter"), and courts have so held, *see, e.g.*, *United States v. Bell*, 303 F.3d 1187 (9th Cir. 2002) (male victims of interstate stalking); *see also United States v. Page*, 167 F.3d 325, 326 (6th Cir. 1999) (Moore, J., concurring) ("While Congress was particularly concerned with those crimes that 'disproportionately burden women,' S. Rep. No. 103-138, at 37 [(1993)], [VAWA's] criminal provisions are gender-neutral, and enforcement has been gender-neutral as well."). Courts have also held that sections 2261A and 2262 apply when the offender and victim are the same sex, *see, e.g.*, *Bell*, 303 F.3d at 1189 (man convicted of stalking several men believed to have been government agents); *United States v. Wills*, 346 F.3d 476 (4th Cir. 2003) (man convicted of stalking man who was a government witness against him); *United States v. Nedd*, 262 F.3d 85 (1st Cir. 2001) (man convicted of violating protection order covering an unrequited love interest and her father), and regardless of whether the offender and victim are involved in a romantic relationship, *see, e.g.*, *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (animal rights activists convicted of stalking individuals associated with a compa-

ny that conducted animal testing). We thus conclude that, in referring to "another person," sections 2261A and 2262 apply to otherwise-covered conduct when the offender and victim are the same sex, and irrespective of the relationship between the offender and victim.

Section 2261A also applies when an offender places the target of the stalking in "reasonable fear of the death of, or serious bodily injury to," the target's "spouse or intimate partner" or "causes substantial emotional distress" to the target's "spouse or intimate partner." For purposes of VAWA, the term "spouse" cannot be read to cover an individual who is the same sex as the target of the stalking, even if they are married under state law, because the Defense of Marriage Act ("DOMA") provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, . . . the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2006).[4]

DOMA does not, however, address the additional term "intimate partner," which, for purposes of section 2261A, is defined in 18 U.S.C. § 2266(7) (2006). That section provides that the composite phrase "spouse or intimate partner" means "a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking"; "a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship"; or "any other person similarly situated to a spouse who is protected

[4] Section 2261A also applies when an offender places the target of the stalking in reasonable fear of the death of, or serious bodily injury to, or causes substantial emotional distress to a member of the target's "immediate family," which, as defined in 18 U.S.C. § 115, includes a spouse. *See supra* note 2. This section thus applies to the target's spouse through two separate references—"immediate family" and "spouse or intimate partner"—a redundancy that is explained, at least in part, by the fact that section 115's definition is not specific to VAWA and that the term "spouse or intimate partner," added to section 2261A as an amendment after its original enactment, occurs throughout VAWA and is defined as a composite phrase. *See* 18 U.S.C. § 2266(7) (2006). DOMA's limitation on the term "spouse" applies to section 115 as well as to the phrase "spouse or intimate partner."

by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides."[5] Two parts of this composite definition—namely, "a person who shares a child in common with the target of the stalking" and "a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking"—refer to a "person" without any kind of spousal relationship to the target of the stalking and thus provide content to what it means to be an "intimate partner." The unqualified use of the term "person" is significant, as its plain meaning, for the reasons set forth above, is best read to be encompassing. And there is nothing else in section 2266(7) that provides a basis for reading the term "person" more narrowly in this context to exclude an individual who is the same sex as the target of the stalking. Two individuals who are the same sex may, for example, "shar[e] a child in common," *see, e.g.*, *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), or be involved in a "social relationship of a romantic or intimate nature" for purposes of that subsection, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999). And although the definition of "intimate partner" refers to the "type of relationship" as one criterion for determining whether a relationship is a "social relationship of a romantic or intimate nature," there is no indication Congress intended by that vague phrase to require such relationships to be heterosexual. Indeed, the phrase is most naturally read to refer to indicia that the relationship is or was "romantic or intimate," as the statute prescribes.[6] Thus, based on the

[5] The 2006 VAWA amendments added the reference to individuals in social relationships of a romantic or intimate nature. Pub. L. No. 109-162, § 106(d), 119 Stat. at 2982.

[6] Although "a word may be known by the company it keeps," *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287 (2010) (internal quotation marks omitted), the fact that VAWA joins the term "spouse" with the term "intimate partner" in one combined definition is not a ground for concluding that DOMA's restriction on the former term should be applied to the latter term so as to preclude an "intimate partner" from being the same sex as the offender. The *noscitur a sociis* canon applies when a potentially broad term appears as part of "some sort of gathering with a common feature to extrapolate" in order to give consistent meaning to the statutory terms that are so gathered. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379–80 (2006); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008); *Gutierrez v. Ada*, 528 U.S. 250, 254–58 (2000) (applying the canon to limit the phrase "any election" to gubernatorial elections when the phrase was surrounded by six specific references to gubernatorial elections). Simply put, the terms "spouse" and

statutory definition, a person who is the same sex as the target of the stalking may be an "intimate partner" of the target for purposes of section 2261A.

The last of VAWA's criminal provisions, section 2261, is limited in reach to those victims who are the "spouse, intimate partner, or dating partner" of the offender. Despite this difference from sections 2261A and 2262, we conclude that section 2261, too, applies when the victim and the offender are the same sex. The analysis that leads us to this conclusion is essentially the same as that set forth above.

The term "spouse" may not be read to include an individual who is the same sex as the offender because of DOMA, but 18 U.S.C. § 2266(7) defines the phrase "spouse or intimate partner"[7] for purposes of section 2261 in materially identical terms to the definition that governs section 2261A. An "intimate partner" of the offender thus includes "a person who shares a child in common with the abuser" and "a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." Because, as we have noted, persons who are the same sex may share a child in common or be in a social relationship of a romantic or intimate nature, the term "intimate partner" in section 2261 includes a victim who is the same sex as the abuser.

With respect to section 2261, therefore, that leaves only the term "dating partner" to be examined. The term is defined in 18 U.S.C. § 2266(10) similarly to one portion of section 2266(7)'s definition of "spouse or intimate partner." Section 2266(10) provides that a "dating partner" is "a

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"intimate partner," despite their appearance together in the definitional section of VAWA, do not constitute the requisite sort of "gathering with a common feature" to which the *noscitur* canon could apply. *See, e.g.*, *Graham County*, 559 U.S. at 288–89 (declining to apply the canon to the adjectives "congressional, administrative, or Government Accounting Office" in order to limit the middle term to federal, rather than all governmental, administrative reports).

[7] Section 2261, as originally enacted, included the exact phrase "spouse or intimate partner," but the 2006 VAWA amendments replaced that phrase with "spouse, intimate partner, or dating partner." Despite the fact that the terms "spouse" and "intimate partner" are now separated by a comma rather than by the word "or" in section 2261, it is clear that the definition in section 2266(7) ("spouse or intimate partner") continues to govern the meaning of the two terms.

person who is or has been in a social relationship of a romantic or intimate nature with the abuser," and it specifies that "[t]he existence of such a relationship is based on a consideration of" "the length of the relationship," "the type of relationship," and "the frequency of interaction between the persons involved in the relationship."[8] As we have explained, materially identical language supports the conclusion that an "intimate partner" may be the same sex as the abuser, and we see no reason for reaching a different conclusion as to this language when it defines the term "dating partner." In both cases, the relevant definitions contained in section 2266 state that the terms "intimate partner" and "dating partner" in section 2261 refer to a "person" with a particular sort of relationship to the abuser. They do not further suggest any limitation based on the sex of either the abuser or the victim or any requirement that the abuser and the victim not be the same sex.

The limited legislative history that bears on the pertinent VAWA provisions is consistent with our reading of the terms "intimate partner" and "dating partner." The 2006 VAWA amendments added the definition of "dating partner" and amended the definition of "spouse or intimate partner" for purposes of VAWA's criminal provisions. Those amendments also sought to strengthen the health care system's response to domestic violence, dating violence, sexual assault, and stalking. A finding pertaining to these latter changes discusses the "health-related costs of intimate partner violence" and notes that "[t]hirty-seven percent of all *women* who sought care in hospital emergency rooms for violence-related injuries were injured by a current or former spouse, boyfriend, or *girlfriend*." Pub. L. No. 109-162, § 501(1)–(2), 119 Stat. at 3023 (emphases added). This finding's reference to "intimate partner" violence between women and their girlfriends comports with our conclusion that two individuals

[8] The 2006 VAWA amendments introduced the term "dating partner" and this attendant definition, Pub. L. No. 109-162, § 116(b), 119 Stat. at 2989, although the 2000 amendments had previously used the term "dating violence" in several of VAWA's noncriminal provisions and had defined that term in nearly identical language, *see, e.g.*, Pub. L. No. 106-386, § 1108, 114 Stat. at 1500 ("[T]he term 'dating violence' means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship; (ii) the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.").

who are the same sex may be considered "intimate partner[s]" for purposes of VAWA.

Similarly, H.R. 1248, 106th Cong. (1999), which became Public Law 106-386, initially defined "domestic violence" for purposes of VAWA's grant programs as including "acts or threats of violence, not including acts of self-defense, committed . . . by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim." H.R. 1248, § 2. During Committee markups, a manager's amendment changed the definition to exclude the reference to those persons in romantic or intimate relationships. Instead, a separate definition of "dating violence" was added to select VAWA programs. That definition tracks the definition of "dating partner" in the 2006 amendments, covering violence committed by a person "who is or has been in a social relationship of a romantic or intimate nature" as determined by the length of relationship, type of relationship, and frequency of interaction between the persons. *See supra* note 8. In published additional views, sixteen members of Congress expressed concern that dating violence had not been included in all of VAWA's grant programs. In doing so, those members stated that dating violence encompassed violence in same-sex relationships. *See* H.R. Rep. No. 106-891, pt. 1, at 85 (2000) (Additional Views) ("One of the most serious concerns we have with the committee-passed bill is its failure to expand the scope of VAWA funding to include programs designed to combat dating violence, including violence in same-sex relationships. As introduced, H.R. 1248 would have amended VAWA so that the term 'domestic violence' would have included dating violence, and violence between same-sex couples, a position which is strongly supported by all of the major domestic violence and sexual assault groups, the Department of Justice, the National Association of Attorneys General, and the U.S. Conference of Mayors." (footnotes omitted)). In other words, the additional views endorsed the position that a "social relationship of a romantic or intimate nature" includes such a relationship between two individuals who are the same sex. Nothing elsewhere in the House Report calls this reading into question. Subsequently, in the 2006 VAWA amendments Congress added the "social relationship of a romantic or intimate nature" language to VAWA's criminal provisions, defining both "intimate partner" and "dating partner" in terms of such relationships. The legislative history of this phrase in the 2000 House Report is thus con-

sistent with reading the terms "intimate partner[s]" and "dating partner[s]" for purposes of section 2261, as amended, to include two individuals who are the same sex.

III.

The text, relevant case law, and legislative history all support the conclusion that VAWA's three criminal provisions, 18 U.S.C. §§ 2261, 2261A, and 2262, apply to otherwise-covered conduct when the offender and victim are the same sex. And the views we have received reach the same conclusion. Thus, for the reasons set forth above, we conclude that each of these provisions apply when the offender and the victim are the same sex.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

Applicability of Tax Levies to Thrift Savings Plan Accounts

Thrift Savings Plan accounts are subject to federal tax levies under sections 6331 and 6334 of the Internal Revenue Code, notwithstanding a statute that, standing alone, would protect such accounts from "levy" except as expressly provided in that statute.

May 3, 2010

MEMORANDUM OPINION FOR THE CHIEF COUNSEL
INTERNAL REVENUE SERVICE

Your office has asked whether Thrift Savings Plan ("TSP") accounts, which permit tax-deferred retirement savings for certain federal employees, are subject to federal tax levies under sections 6331 and 6334 of the Internal Revenue Code, notwithstanding a statute that, standing alone, would protect such accounts from "levy" except as expressly provided in that statute.[1] We believe that TSP accounts are subject to federal tax levies under the applicable statutes.

I.

Your question deals with the interaction between the federal tax levy provisions of the Internal Revenue Code, *see* 26 U.S.C. §§ 6321, 6331, 6334 (2006), and a provision of the Federal Employees' Retirement System Act of 1986 ("FERSA"), 5 U.S.C.A. § 8437(e)(2) (West 2007).

The Internal Revenue Code has long given broad authority to the Treasury Secretary to collect unpaid federal taxes (and associated interest, penalties, and costs) by levy. *See* Internal Revenue Code of 1954, Pub. L. No. 83-591, §§ 6331(a), 6334(c), 68A Stat. 1, 783, 785. Under current Code provisions, "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand," the amount of the liability, including interest and penalties, "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. If a taxpayer "liable to pay any tax neglects or refuses to pay the same within 10 days after notice and

[1] In addition to the views of your office and the Federal Retirement Thrift Investment Board, we have considered views submitted by the Tax Division of the Department of Justice.

demand," the Treasury Secretary may "collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) 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 [which includes section 6321] for the payment of such tax." *Id.* § 6331(a). The code defines such levies to "include[] the power of distraint and seizure by any means" and states that "[i]n any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)." *Id.* § 6331(b).

Section 6334(a) does exempt specified categories of assets from levies. Since 1966, such exempt assets have included "[a]nnuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code." 26 U.S.C. § 6334(a)(6) (codifying the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(c)(2), 80 Stat. 1125, 1137).[2] Section 6334(c) directs that "[n]otwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334 makes no express exemption for TSP accounts.

Congress enacted FERSA in 1986 to reform the retirement savings system for federal employees. *See* FERSA § 100A, *reprinted in* 5 U.S.C. § 8401 note (2006). Among other things, FERSA established the Thrift Savings Plan, which enables federal employees to hold individual retirement savings accounts in the Thrift Savings Fund, an investment fund managed by the Federal Retirement Thrift Investment Board ("FRTIB"). *See* 5 U.S.C.A. §§ 8432, 8437 (West 2007 & West Supp. 2009); 5 U.S.C. §§ 8472, 8479(b) (2006). These accounts, commonly known as "Thrift

[2] Under section 6331(h) of the Code, certain payments otherwise covered by exemptions in section 6334(a), including "any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act," may be subject to a tax levy, generally limited to fifteen percent of the payment, "[n]otwithstanding section 6334." *See* 26 U.S.C. § 6331(h).

Savings Plan" or "TSP" accounts, *see* 5 C.F.R. § 1690.1 (2009), offer federal employees a tax-deferred retirement savings opportunity similar to that offered to private-sector employees by so-called "401(k)" plans established under section 401(k) of the Internal Revenue Code, 26 U.S.C.A. § 401 (West Supp. 2009). *See* 5 U.S.C. § 8440 (2006); *see also*, *e.g.*, *Hewitt v. Thrift Sav. Plan*, 664 F. Supp. 2d 529, 530 (D.S.C. 2009) (describing the Thrift Savings Plan as "a retirement plan for certain federal government employees that was designed to allow government employees savings-related benefits very similar to those enjoyed by private sector employees whose employers offer them 401(k) retirement plans"); *Cavanaugh v. Saul*, 233 F.R.D. 21, 22 (D.D.C. 2005) (similar); *In re Hasse*, 246 B.R. 247, 252 (Bankr. E.D. Va. 2000) (similar).

FERSA includes a provision that broadly protects assets in TSP accounts from "levy," subject to specified exceptions. It states:

> Except as provided in paragraph (3), sums in the Thrift Savings Fund may not be assigned or alienated and are not subject to execution, levy, attachment, garnishment, or other legal process. For the purposes of this paragraph, a loan made from such Fund to an employee or Member shall not be considered to be an assignment or alienation.

5 U.S.C.A. § 8437(e)(2). The cross-referenced paragraph (3) permits legal process to obtain "[m]oneys due or payable from the Thrift Savings Fund" or the "balance" in a TSP account for enforcement of certain child support or alimony obligations under the Social Security Act, 42 U.S.C.A. § 659 (West Supp. 2009); enforcement of certain victim restitution orders under the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A (2006); forfeiture under a FERSA provision, 5 U.S.C.A. § 8432(g)(5), of government contributions to a TSP account based on the account-holder's commission of one or more specified national security offenses; and payments required by another FERSA provision, 5 U.S.C. § 8467 (2006), to satisfy certain divorce, annulment, or separation decrees and certain judgments for physical, sexual, or emotional abuse of a child. *See* 5 U.S.C.A. § 8437(e)(3). Paragraph (3) does not cross-reference section 6334 and thus does not expressly indicate that federal tax levies under that provision may be imposed on TSP accounts.

II.

A.

To resolve the question here, we must reconcile these two statutes, each of which appears exclusive on its face. While FERSA provides that funds in TSP accounts shall not be subject to levy except as provided in 5 U.S.C.A. § 8437(e)(3), the Internal Revenue Code directs that "[n]otwithstanding any other" federal law, no property is exempt from federal tax levies except as provided in section 6334(a) of the Code. And although both statutes include express exceptions, neither includes a cross-reference to the other specifying how the two statutes should be reconciled.[3]

Despite the apparent conflict between the TSP provision and the federal tax levy statute, our "duty" is "to regard each as effective" if the two statutes are "capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "[I]t is '[a] long-standing maxim of statutory construction that statutes are enacted in accord with the legislative policy embodied in prior statutes, and that therefore statutes dealing with the same subject should be construed together.'" *Relationship Between Illegal Immigration Re-*

[3] We do not consider here the validity of federal tax levies on any state-law community property interests that spouses of account-holders may have in TSP accounts. In a 1981 opinion, this Office addressed whether a federal tax levy under 26 U.S.C. § 6331(a) could be asserted against a tax delinquent's community property interest in his wife's federal pension, despite a provision directing that the pension benefits in question were "not assignable, either in law or equity, except under [certain provisions], or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws," 5 U.S.C. § 8346(a) (2006). *Validity of Federal Tax Lien on Civil Service Retirement Refund*, 5 Op. O.L.C. 37, 37 (1981). We concluded that "Nevada's community property law, in the absence of explicit legislation by Congress, has not created for [the delinquent taxpayer] 'property [or] rights to property' in his wife's retirement deductions that are assailable by IRS." *Id.* at 40 (quoting 26 U.S.C. § 6331(a)). Your office has asked us here to address the validity of "federal tax levies served on [FRTIB] to attach taxpayer's rights in their individual TSP accounts in order to satisfy outstanding tax liabilities." Letter for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Clarissa C. Potter, Acting Chief Counsel, Internal Revenue Service at 1 (July 1, 2009). Because it appears undisputed that taxpayers' rights in their own TSP accounts constitute "property [or] rights to property" of the individual taxpayer, we need not consider here whether the reasoning of our 1981 opinion should extend to any community property interests in TSP accounts.

form and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information, __ Op. O.L.C. Supp. __, at *5 (May 18, 1999) ("IIRIRA Opinion") (quoting Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice* at 3 (Apr. 3, 1975), https://www.justice.gov/olc/page/file/936041/download). In our view, the texts of the two statutes are properly reconciled by giving primacy to the federal tax levy provision in section 6334.

Although the TSP provision may appear absolute if read in isolation, section 6334(c)'s "notwithstanding" clause indicates by its terms that all "other law[s] of the United States," a category that necessarily includes FERSA, are ineffective to bar a federal tax levy, except as provided by the express exceptions in section 6334(a). As a general rule "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993); *see also*, *e.g.*, IIRIRA Opinion at *7 (observing that a prefatory "notwithstanding" clause "does reflect a congressional intention to displace inconsistent law"). Indeed, some courts have observed that "'a clearer statement'" of congressional intent to supersede all other laws "'is difficult to imagine,'" *see Cisneros*, 508 U.S. at 18 (quoting *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (1991) (internal quotation marks omitted) (collecting other similar cases), and the Supreme Court has described the "notwithstanding" clause in section 6334 as "direct[ing]" that "[t]he enumeration [of exceptions] contained in § 6334(a) . . . is exclusive." *Drye v. United States*, 528 U.S. 49, 56 (1999); *see also In re Beam (Beam v. IRS)*, 192 F.3d 941, 944 (9th Cir. 1999) (describing section 6334 as "unambiguous" in indicating "that Congress clearly intended to exclude from IRS levy only those 13 categories of property specifically-exempted in section 6334(a)"). In contrast, while the TSP provision appears exclusive by its own terms because it establishes a general bar on levies that applies "except as" provided in FERSA, this provision does not include language comparable to the "notwithstanding" clause in section 6334(c) that expressly overrides other potentially applicable statutes. The text of section 6334 thus appears to reflect a stronger

congressional intent to override conflicting statutes than does the text of the TSP provision. *Cf.*, *e.g.*, *Beam*, 192 F.3d at 944 (holding that section 6334 overrides a bankruptcy statute directing that the bankruptcy trustee "shall return" certain payments to the debtor in certain circumstances); *Crowley Caribbean Transp., Inc. v. United States*, 865 F.2d 1281, 1282–83 (D.C. Cir. 1989) (deeming it "implausible" that a statute applicable "notwithstanding" any other statute did not override a separate statute applicable "whenever" the United States took certain actions). As one court has put it, the "plain language [of section 6334(c)] bars interpreting 5 U.S.C. § 8437(e)(2) as proscribing a § 6331 levy on a TSP account." *In re Jones (Jones v. IRS)*, 206 B.R. 614, 617 (Bankr. D.D.C. 1997); *see also United States v. Laws*, 352 F. Supp. 2d 707, 712 & n.7 (E.D. Va. 2004) (holding that criminal restitution order could be enforced against TSP account under statute generally permitting such enforcement to the same extent as federal tax levies).[4]

It is true that FERSA was enacted after section 6334(c), which might be thought to make the preemptive effect of section 6334(c)'s "notwithstanding" clause "less certain," since "[t]he drafters of [section 6334(c)] can hardly be said to have had [FERSA] specifically within their contemplation." *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1403 (D.C. Cir. 1988) (quoting *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982)); *cf. United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) (observing that courts have "determined the reach of each such 'notwithstanding' clause by taking into account the whole of the statutory context in which it appears"). Yet in cases involving later-enacted statutes lacking their own applicable "notwithstanding" clauses, courts have deemed "notwithstanding" clauses "powerful evidence that Congress did not intend" other statutes, "whenever enacted," to qualify the terms of the

[4] As we have recently observed, "'notwithstanding' phrases are best read simply to qualify the substantive requirement that follows." *Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 296 (2009). They therefore do not "support a broad construction of the substantive provision that would give rise to . . . inconsistencies" with other statutes. IIRIRA Opinion at *7. Here, however, the substantive clause of section 6334(c) broadly states that "no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)," 26 U.S.C. § 6334(c), and there appears to be no dispute that this substantive provision is inconsistent with the TSP provision to the extent the former statute authorizes levies while the latter restricts them.

earlier-enacted statute. *Ill. Nat'l Guard*, 854 F.2d at 1403 (quoting *N.J. Air Nat'l Guard*, 677 F.2d at 283); *see also*, *e.g.*, *Am. Fed'n of Gov't Employees v. FLRA*, 239 F.3d 66, 70 (1st Cir. 2001) (following *N.J. Air Nat'l Guard*). As some courts have explained, "[t]he [notwithstanding] language does not preclude a subsequent change of heart on the part of Congress, but it does suggest that any qualification of the terms of [the earlier-enacted statute] would be accepted by Congress only after some consideration of the factors requiring or permitting such a change." *Ill. Nat'l Guard*, 854 F.2d at 1403 (quoting *N.J. Air Nat'l Guard*, 677 F.2d at 283). Moreover, the TSP anti-levy provision, as a later-enacted statute that has no "notwithstanding" clause and does not expressly cross-reference section 6334 or even mention any exercise of authority by the Secretary of Treasury, could override section 6334 and thus preclude federal tax levies on TSP accounts only if it effected an implied partial repeal of section 6334's broad directive that "no property or rights to property shall be exempt from levy other than the property specifically made exempt by [26 U.S.C. § 6334(a)]." 26 U.S.C. § 6334(c). But "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (internal quotation marks and brackets omitted)). Here, we believe the text and history of the two statutes support the conclusion that Congress, far from "clear[ly] and manifest[ly]," *id.*, intending to repeal section 6334(c), in fact intended to permit federal tax levies on TSP accounts.[5]

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[5] A related principle of statutory interpretation holds that "in the absence of a clear intention to the contrary 'a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Disclosure of Confidential Business Records Obtained Under the National Traffic and Motor Vehicle Safety Act*, 4B Op. O.L.C. 735, 736 (1980) (quoting *Morton*, 417 U.S. at 550–51). This canon is inapplicable here, however, because neither statute is clearly more specific or more general than the other in relevant respects. On the one hand, federal tax levies under section 6334 are only a subset of the broader category of "levies" covered by the plain terms of the TSP provision, while on the other hand TSP accounts are only a subset of the broader category of "property or rights to property" covered by the plain terms of federal tax levy provisions. *See*, *e.g.*, *Restrictions on Travel by Voice of America Correspondents*, 23 Op. O.L.C. 192, 195 n.2 (1999) (observing that an issue of statutory construction could not be resolved "by turning to the principle that, absent a clear intention to the contrary, a specific statute controls a general one" because one set of applicable statutes was "more specific" on one question but "less specific" on another); *Gulf War Veterans Health Statutes*, 23 Op.

As one indication of section 6334(c)'s breadth, Congress amended that provision in 1984 expressly to include section 207 of the Social Security Act, 42 U.S.C. § 407 (2006), which provides that "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." *Id.* § 407(a). This provision itself had recently been amended to provide that "[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." *See* Social Security Amendments of 1983, Pub. L. No. 98-21, § 335(a)(2), 97 Stat. 65, 130 (codified at 42 U.S.C. § 407(b)); Spending Reduction Act of 1984, Pub. L. No. 98-369, div. B, tit. VI, § 2661(o)(5), 98 Stat. 494, 1159 (codified at 26 U.S.C. § 6334(c)); *see also* H.R. Rep. No. 98-861, at 1413 (1984) (Conf. Rep.) (describing subtitle including change to section 6334 as "contain[ing] a number of minor technical amendments to the Social Security Act and the Internal Revenue Code, to correct clerical and other minor errors either resulting from the Social Security Amendments of 1983, or already existing in those acts"). The "express reference" requirement of section 207 shows, if anything, a stronger congressional intent to preclude levies than the relevant prohibitory language of FERSA, which includes no such "express reference" requirement broadening its scope. Accordingly, as the en banc Ninth Circuit recently observed in an analysis of provisions similar to those at issue here, "[i]t would . . . be anomalous to interpret" section 6334(c) "as abandoning the protection of Social Security benefits but not of retirement plans" covered by other provisions that do not even have a comparable "express reference" requirement. *Novak*, 476 F.3d at 1048. "[B]y making clear that the 'notwithstanding' clause 'includes' the one federal anti-alienation provision that demands explicit statutory override, Congress manifested that [section 6334(c)] means what it says"—that absent an express exception in section 6334, no "property or rights to property" are exempt from levy.

O.L.C. 49, 52 (1999) (rejecting application of the canon where "the two provisions are at the same order of specificity").

Id.; *see also id.* at 1076–77 (W. Fletcher, J., dissenting) (disagreeing with majority's conclusions regarding the statutes at issue but distinguishing Internal Revenue Code section 6334).

Congress's express exemption of certain retirement benefits from tax levies under section 6334 reinforces the view that Congress did not intend to provide a similar exception for TSP accounts, which are not expressly exempted. The four exempted retirement statutes all include anti-alienation provisions. While one of these statutes (the Railroad Retirement Act) expressly cross-references the Internal Revenue Code and applies "notwithstanding any other law of the United States," *see* 45 U.S.C. § 231m(a) (2006), and another (the Railroad Unemployment Insurance Act) also applies "[n]otwithstanding any other law of the United States," *id.* § 352(e), the other two employ language closely similar to the TSP provision. Specifically, provisions governing the exempted "annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code," 26 U.S.C. § 6334(a)(6), provide, without any express carve-out for the Internal Revenue Code, that "[e]xcept as provided" elsewhere in that chapter, certain annuities are not "assignable or subject to execution, levy, attachment, garnishment, or other legal process." 10 U.S.C. § 1440 (2006) (covering annuities under one subchapter of chapter 73); *id.* § 1450(i) (covering annuities under another subchapter of chapter 73). And provisions governing the exempted "special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562)," 26 U.S.C. § 6334(a)(6), provide that such "[s]pecial pension[s] shall not be subject to any attachment, execution, levy, tax, lien, or detention under any process whatever." *See* 38 U.S.C. § 1562(c) (2006).

Given the breadth of section 6334(c)'s terms— "no property or rights to property shall be exempt from levy" except as "specifically" provided in section 6334(a)—and its express applicability "[n]otwithstanding any other law of the United States," 26 U.S.C. § 6334(c), the express exemptions from federal tax levies in section 6334(a) cannot be understood as simply "clarify[ing]" the scope of the rule in section 6334(c). *Am. Fed'n of Gov't Employees v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983) (opinion by Scalia, J.); *see also Drye*, 528 U.S. at 56 (concluding that "[t]he enumeration [of exceptions to section 6334(c)] contained in § 6334(a) . . . is exclusive"). Accordingly, section 6334's

express exceptions for these pension and annuity benefits suggest that without the exceptions the benefits *would* be subject to levy under sections 6331 and 6334, despite the applicable anti-alienation provisions in the cross-referenced statutes governing the benefits. By the same token, it is unlikely Congress intended the comparable language of the TSP provision—"[e]xcept as provided in [section 8437(e)(3)], sums in the Thrift Savings Fund may not be assigned or alienated and are not subject to execution, levy, attachment, garnishment, or other legal process," 5 U.S.C.A. § 8437(e)(2)—to create an exemption from tax levies under the Internal Revenue Code without an express exemption in section 6334. In other words, there would be no apparent need for the express exemption for the retirement benefits listed in section 6334(a)(6) if language such as that in the TSP provision sufficed on its own to establish such an exemption.

The relevant legislative history of the two statutes accords with our construction of them. With respect to section 6334, the legislative history plainly shows that this provision should override other statutes. According to the committee reports on the 1954 Internal Revenue Code, Congress intended section 6334(c) to "make[] it clear that no other provision of Federal law shall exempt property" from federal tax levies. *See* H.R. Rep. No. 83-1337, at A409 (1954) (House Ways and Means Committee report on Internal Revenue Code of 1954); S. Rep. No. 83-1622, at 578 (1954) (Senate Finance Committee report on Internal Revenue Code of 1954). And with respect to FERSA, the legislative history shows that Congress "patterned" the Thrift Savings Plan "after [retirement savings plans] found among large employers in private industry." *See* S. Rep. No. 99-166, at 48 (1985); *see also* H.R. Rep. No. 99-606, at 134 (1986) (Conf. Rep.) (observing that "[t]he tax-deferred features of the plan . . . make the Thrift Savings Plan economically attractive to employees" and that "[t]hese popular tax-deferred savings plans should be as available to Federal employees as they are to private sector employees"); S. Rep. No. 99-302, at 134 (1986) (Conf. Rep.) (same). Similar private-sector plans are generally governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001–1461 (West 2008 & West Supp. 2009; West 2009), which includes its own anti-alienation provision directing that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *See id.* § 1056(d)(1).

Courts have construed section 6334 to permit tax levies on plans covered by this provision. *See, e.g.*, *United States v. Hosking*, 567 F.3d 329, 335 (7th Cir. 2009); *United States v. Taylor*, 338 F.3d 947, 950 n.3 (8th Cir. 2003); *McIntyre v. United States* (*In re McIntyre*), 222 F.3d 655, 660 (9th Cir. 2000); *United States v. Sawaf*, 74 F.3d 119, 124 (6th Cir. 1996); *Shanbaum v. United States*, 32 F.3d 180, 183 (5th Cir. 1994); *United States v. Rogers*, 558 F. Supp. 2d 774, 786 n.1 (N.D. Ohio 2008); *see also* 26 C.F.R. § 1.401(a)-13(b) (providing that certain qualified ERISA plans must provide that "benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process," but indicating that such plans "shall not preclude . . . [t]he enforcement of a Federal tax levy made pursuant to section 6331"). These courts, to be sure, have relied in part on ERISA's savings clause, which generally provides that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C.A. § 1144(d). But Congress's decision to model TSP accounts on private retirement savings plans is in line with the textual indications that Congress did not intend to prevent tax levies on TSP accounts of public employees who fail to pay taxes and suggests that Congress did not wish to provide greater protection against federal tax levies to the assets held in the TSP retirement accounts of federal employees than it conferred on the comparable accounts of private-sector employees.

Our interpretation of the relationship between section 6334 and the TSP provision, moreover, continues to give effect to the term "levy" in the latter statute. While federal tax levies under section 6331 may be one common form of "levy," the term has other applications as well. Black's Law Dictionary defines "levy" to mean not only "[t]he imposition of a fine or tax; the fine or tax so imposed" (so-called "tax levies"), but also "[t]he legally sanctioned seizure and sale of property; the money obtained from such a sale" (so-called "levies of execution"). *Black's Law Dictionary* 991 (9th ed. 2009). In keeping with this definition, the term has been used in other contexts to describe means of recovering a variety of both public and private debts. *See*, *e.g.*, 28 U.S.C. §§ 3002(3), (4), 3102(d), 3203(d) (2006) (authorizing "levies" to collect various debts owed to the United States); U.C.C. § 6-111 (1987 Official Text), *reprint-*

ed in U.C.C. app. V at 1497 (2005) (providing with respect to recovery of certain private debts that "[n]o action under this Article shall be brought *nor levy made* more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed" (emphasis added)); D.C. Code § 28:6-111 (2001) (codifying this provision); Md. Code Ann., Com. Law, § 6-111 (West 2009) (same); U.C.C. § 6-111 cmt. 2 (1987 Official Text), *reprinted in* U.C.C. app. V at 1497 (2005) (indicating that while "'levy' . . . is not a defined term under the Code," the term "should be read broadly [in this provision] as including not only levies of execution proper but also attachment, garnishment, trustee process, receivership, or whatever proceeding, under the state's practice, is used to apply a debtor's property to payment of his debts"); *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 782–85 (5th Cir. 2006) (discussing levies imposed on certain bank account assets under New York, South Carolina, and Washington state law to execute a federal court civil judgment), *vacated in part on other grounds*, 493 F.3d 469 (5th Cir. 2007) (en banc). Furthermore, a Treasury Department regulation requires certain pension plans to bar "benefits provided under the plan" from being "anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, *levy*, execution or other legal or equitable process," but then exempts federal tax levies under section 6331 from this prohibition. *See* 26 C.F.R. § 1.401(a)-13(b) (emphasis added). As this regulation demonstrates, the term "levy" in the Treasury Department's view encompasses more than federal tax levies. Therefore, a restriction on "levies," as appears in FERSA, need not be viewed as unnecessary or without meaningful effect where federal tax levies are expressly permitted by a different statute that controls. In short, absent some statutory restriction on doing so, both private and governmental parties might seek to impose levies on TSP accounts to collect debts other than federal tax liabilities. Because FERSA's general bar against levies on TSP accounts therefore need not be understood solely as a limitation against federal tax levies, the provision is not rendered superfluous by reconciling the two measures as we think proper.

B.

Against this reading of the proper means of reconciling the two statutes, we have been offered several reasons to conclude that Congress

intended the TSP provision to bar federal tax levies under sections 6331 and 6334.

First, another FERSA anti-alienation provision (applicable to certain annuities) includes the phrase "except as otherwise may be provided by Federal laws," 5 U.S.C. § 8470(a) (2006), and the Senate version of the TSP anti-alienation provision included a similar clause that was dropped from the final bill by a conference committee. *See* H.R. Rep. No. 99-606, at 39; S. Rep. No. 99-302, at 39; H.R. 2672, 99th Cong. § 101(a) (as ordered printed with Senate amendments, Nov. 14, 1985) (proposing new 5 U.S.C. § 8426(d)); S. Rep. No. 99-166, at 52. While the contrast between section 8470 and the TSP anti-alienation provision might suggest that Congress intended to protect TSP accounts from levy under other "Federal laws," and thus presumably under section 6334 as well, the conference committee did not explain its decision to omit this Senate language.[6] *See* H.R. Rep. No. 99-606, at 133–39; S. Rep. No. 99-302, at 133–39. Given the "notwithstanding" clause in section 6334, Congress might well have concluded that, whatever the effect of the anti-alienation provision on other federal statutes, a broad express exception for "Federal laws" was unnecessary to permit federal tax levies on TSP accounts. Indeed, several years before Congress enacted FERSA, this Office concluded that a similar "except as" clause in 5 U.S.C. § 8346(a) (2006), an anti-alienation provision for certain federal pensions, "was probably included *pro forma*" and "was not necessary to enable IRS to reach funds payable under the retirement law to employees or former employees

[6] As explained in the conference committee reports, the Senate passed the legislation that became FERSA as an amendment to unrelated House legislation. H.R. Rep. No. 99-606, at 125; S. Rep. No. 99-302, at 125; *see also* 131 Cong. Rec. 31,087 (1985) (Senate passage of legislation). Although the House bill in the conference included no provisions for the establishment of a new federal retirement system, the conferees "were cognizant of" a pending House retirement reform bill, and they "incorporated many of [this bill's provisions] in the conference agreement." H.R. Rep. No. 99-606, at 125; S. Rep. No. 99-302, at 125; *see also* H.R. 3660, 99th Cong. (1985) (pending House bill); H.R. Rep. No. 99-1030, at 174–75 (1986) (review of committee activity describing legislative history of FERSA and H.R. 3660). The House bill included a TSP anti-alienation provision that, among other differences from the Senate provision, omitted the clause "except as may be provided in a Federal law" that appeared in the Senate bill. *See* H.R. 3660, § 101(a) (proposing new 5 U.S.C. § 8434(d)); H.R. 2672, § 101(a) (proposing new 5 U.S.C. § 8426(d)).

delinquent in the payment of their taxes." *Validity of Federal Tax Lien on Civil Service Retirement Refund*, 5 Op. O.L.C. 37, 39 (1981). In any event, we cannot presume that, contrary to the other considerations of text and history discussed above, Congress's omission of an "except as" clause included in another provision and originally included in the Senate bill signals the kind of "clear and manifest" intent, *Office of Hawaiian Affairs*, 129 S. Ct. at 1445 (internal quotation marks omitted), that would be required to repeal section 6334 by implication and thus shield TSP accounts from federal tax levies.

Second, according to the legislative history, Congress enacted ownership and vesting protections for TSP accounts to prevent "political involvement in the thrift plan management" and eliminate any congressional temptation to "use the large pool of thrift money for political purposes." *See* H.R. Rep. No. 99-606, at 136; S. Rep. No. 99-302, at 136. An IRS levy to collect unpaid taxes, however, does not implicate these concerns, because such levies are possible only in the case of a tax delinquency.

Third, in 1996, Congress amended FERSA to provide that "[n]otwithstanding any other provision of law," the government's contributions to an employee's TSP account (and any associated earnings) "shall be forfeited" if the employee forfeits certain other federal retirement benefits under provisions authorizing such forfeiture based on the employee's commission of one or more specified national security offenses. *See* Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 304, 109 Stat. 961, 965 (1996) (codified at 5 U.S.C.A. § 8432(g)(5)). Congress's placement of the new provision, 5 U.S.C.A. § 8432(g)(5), in provisions governing TSP accounts, rather than in the provisions generally governing forfeiture based on national security offenses, might be argued to support the conclusion that "Congress intended that TSP funds were, and are, to be alienated only pursuant to the express exceptions set forth in FERSA." Letter for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Thomas K. Emswiler, General Counsel, Federal Retirement Thrift Investment Board, at 5 (Sept. 17, 2009) ("FRTIB Submission"). Yet because other provisions of the subsection to which Congress added this provision deal with forfeiture of government contributions to TSP accounts, *see* 5 U.S.C.A. § 8432(g), it would seem a natural, or at least convenient, place to locate the new provision. In any event, we do not believe we can draw such a sweeping

inference about congressional intent from Congress's decision where to codify this provision, which is described in the legislative history as merely "clos[ing] a loophole." *See* H.R. Rep. No. 104-138, pt. 1, at 29 (1995). In fact, if anything, this amendment reinforces the conclusion that section 6334(c) permits federal tax levies on TSP accounts, because in section 8432(g)(5) Congress authorized forfeiture from TSP accounts using precisely the phrase—"notwithstanding any other" law—that also appears in section 6334(c).[7]

Finally, another FERSA amendment, enacted in 2009, created an express exception to the TSP anti-alienation provision for the "enforcement" of certain victim restitution orders under the MVRA, 18 U.S.C. § 3663A. *See* 5 U.S.C.A. § 8437(e)(3). Because a separate MVRA provision already provided for civil enforcement of such restitution orders "[n]otwithstanding any other Federal law (including section 207 of the Social Security Act)," *see* 18 U.S.C. § 3613(a), (f) (2006), Congress's addition of this express exception could show that Congress did not believe that the "notwithstanding" provision in the MVRA already authorized alienation of TSP account assets and thus that Congress did not intend the closely similar "notwithstanding" language of section 6334(c) to authorize such alienation. The legislative background of this amendment, however, undermines this inference. The Ninth Circuit, among other courts, had held that the MVRA enforcement provision superseded ERISA's anti-alienation provision, thus allowing enforcement against funds in ERISA-

[7] More broadly, FRTIB suggests that because certain provisions in Title 5 of the U.S. Code governing the Thrift Savings Fund explicitly incorporate or cross-reference specific provisions of the Internal Revenue Code (Title 26) applicable to analogous private retirement savings plans, Congress "designed the TSP to be governed by title 5, not title 26," and did not intend "[p]rovisions in the [Internal Revenue Code] applicable to private sector plans [to be] self-executing with regard to the TSP." FRTIB Submission at 10–11. But express cross-references to such other Internal Revenue Code provisions would not preclude the application of the federal tax levy provisions, which by their terms reach all "property and rights to property," to TSP accounts. 26 U.S.C. §§ 6331(a), 6334(c); *see also*, *e.g.*, *Drye*, 528 U.S. at 56 (observing that the language in section 6331(a) "'is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have'" (quoting *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719–20 (1985)). We express no view in this opinion about the applicability of any other Internal Revenue Code provisions to TSP accounts or the Thrift Savings Fund.

governed plans.[8] *See Novak*, 476 F.3d at 1053 (en banc); *see also*, *e.g.*, *United States v. Miller*, 588 F. Supp. 2d 789, 796 (E.D. Mich. 2008); *United States v. Lazorwitz*, 411 F. Supp. 2d 634, 636–37 (E.D.N.C. 2005); *United States v. James*, 312 F. Supp. 2d 802, 804–05 (E.D. Va. 2004); *cf. United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006) (adopting the "understanding" that "18 U.S.C. § 3613(a) permits courts to consider ERISA protected assets in determining appropriate fines and restitution" because "ERISA pension plans are not exempted from payment of taxes under 26 U.S.C. § 6334, and thus they should not be exempted from payment of criminal fines"); *Hosking*, 567 F.3d at 335 (holding that a sentencing court "may order a lump-sum payment from [a retirement] account to satisfy a restitution order"). In addition, at least one federal court had held that TSP accounts were subject to MVRA orders. *See Laws*, 352 F. Supp. 2d at 712 & n.7. FRTIB, however, advised Congress and the Department of Justice that it nevertheless would not honor MVRA orders. *See* FRTIB Submission at 6–7; Letter for Kenneth E. Melson, Director, Executive Office for United States Attorneys, from Thomas K. Emswiler, General Counsel, Federal Retirement Thrift Investment Board (Apr. 30, 2009) (attachment 3 to FRTIB Submission); E-mail for Larry Novey from Thomas Trabucco (Apr. 21, 2009) ("Trabucco E-mail") (attachment 4 to FRTIB Submission). FRTIB also approved a motion to "seek clarification" from Congress as to whether the MVRA applied to TSP accounts, and in e-mail correspondence FRTIB requested that a congressional committee revise FERSA "[i]f after review the Committee believes that the MVRA provision was intended to allow access to TSP funds." *See* Trabucco E-mail.

In light of FRTIB's request for clarifying legislation, Congress may not have intended to make any substantive change in the 2009 amendments, but simply to clarify congressional intent and provide FRTIB with comfort that MVRA orders may be satisfied from TSP accounts. Indeed, at the same time that it added the MVRA exception, Congress also added an express exception to the anti-alienation provision for forfeiture under the provision regarding government contributions enacted in 1996. *See*

[8] Although several judges dissented from the en banc Ninth Circuit's holding with respect to the MVRA in *Novak*, the dissenters distinguished federal tax levies from the MVRA. *See Novak*, 476 F.3d at 1076–77 (W. Fletcher, J., dissenting).

Thrift Savings Plan Enhancement Act of 2009, Pub. L. No. 111-31, § 108, 123 Stat. 1853, 1856 (2009) (codified at 5 U.S.C.A. § 8437(e)(3)). This change also seems to have been intended as a clarification, not a substantive amendment, as it seems unlikely that Congress intended the 1996 amendment to have been ineffective before the anti-alienation provision was thus amended to include an express cross-reference. *See* FRTIB Submission at 5–6, 12 n.13 (asserting that the addition of this exception to § 8437(e)(3) was "unnecessary" because forfeitable government contributions under § 8432(g) are "not protected by 5 U.S.C. § 8437"). To the extent the express exception for MVRA restitution orders was intended to be clarifying rather than substantive, this amendment may only reinforce the conclusion that Congress believed the closely similar language of the federal tax levy provision also creates an exception to the TSP provision. *Cf. Am. Fed'n of Gov't Employees*, 702 F.2d at 1186–87 (contrasting clarifying provisions and exceptions to otherwise governing law). In any event, the legislative history gives no clear explanation for the 2009 changes. Thus, here, too, the amendment fails to indicate a "clear and manifest" intention, *Office of Hawaiian Affairs*, 129 S. Ct. at 1445 (internal quotation marks omitted), partially to repeal section 6334(c) and preclude federal tax levies on TSP accounts.[9]

DANIEL L. KOFFSKY
Deputy Assistant Attorney General
Office of Legal Counsel

[9] The Tax Division also argues that tax levies under sections 6331 and 6334 do not fall within the scope of the TSP anti-alienation provision because that provision's ban on "execution, levy, attachment, garnishment, *or other legal process*," 5 U.S.C.A. § 8437(e)(2) (emphasis added), applies only to forms of "legal process," a term the Tax Division argues should be understood to "require judicial intervention," whereas tax levies under sections 6331 and 6334 are imposed administratively. *See* Memorandum for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from John A. DiCicco, Acting Assistant Attorney General, Tax Division, *Re: Validity of IRS Tax Levies on Thrift Savings Fund Accounts* at 8–9 (Dec. 18, 2009). We need not, and therefore do not, reach this argument to resolve the question presented to us.

Administration of the Ronald Reagan Centennial Commission

The Ronald Reagan Centennial Commission should create an executive committee, composed of its five presidentially appointed members, to discharge the purely executive functions of the Commission.

The six congressional members, in turn, could participate in nearly all of the Commission's activities, including in ceremonial functions, and could advise the executive committee on the formulation of programs that would be technically approved and executed by non-congressional members.

May 7, 2010

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have forwarded to our Office a letter from four of the presidentially appointed members of the Ronald Reagan Centennial Commission, in which they request advice on a plan they have developed in order to avoid the constitutional concerns raised by the composition of the Commission under the Ronald Reagan Centennial Commission Act of 2009, Pub. L. No. 111-25, 123 Stat. 1767 (the "Act"). *See* Letter for Robert Bauer, Counsel to the President, from Peggy Noonan, John F.W. Rogers, Frederick J. Ryan Jr., and Fred W. Smith, *Re: Operation of the Ronald Reagan Centennial Commission* (Mar. 11, 2010) ("March 11 Letter"). Under this plan, four of the presidentially appointed members of the Commission, and all six congressional members, would vote to delegate to the one other presidentially appointed member the responsibility to exercise the Commission's duties under section 3(1) of the Act. The remaining ten members would then be limited to advisory and ceremonial functions, and the eleventh, designated member would exercise all of the Commission's significant executive responsibilities. *See* Memorandum on Implementation of the Ronald Reagan Centennial Commission Act ("Implementation Memo") at 3 (attached to March 11 Letter). You have asked for our views of this proposal.

The proposal, at least in spirit if not in letter, well addresses the concerns that we previously identified. We believe, however, that the precise form of the proposed solution requires some refinement in order to ensure it conforms to the constitutional understandings on which it appears to be premised and to avoid a potential statutory problem. Thus,

we conclude that the Commission should instead follow the recommendation this Office offered in a very similar context in its 1984 opinion on *Appointments to the Commission on the Bicentennial of the Constitution*—namely, to create an "executive committee," composed of the five presidentially appointed members, which "would be legally responsible for discharging the purely executive functions of the Commission." 8 Op. O.L.C. 200, 207 (1984) ("*Constitution Bicentennial Commission*"). These functions would include determining which activities would be "fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth" and "plan[ning], develop[ing], and carry[ing] out" such activities. Pub. L. No. 111-25, § 3(1). The six congressional members, in turn, could "participate in nearly all of the Commission's activities," including in ceremonial functions, and could advise the executive committee on "the formulation of programs that would be technically approved and executed by non-congressional members." *Constitution Bicentennial Commission*, 8 Op. O.L.C. at 207. At the end of this memorandum, we briefly explain why this recommendation could be implemented in a manner that would not violate the constitutional holding in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

I.

The Ronald Reagan Centennial Commission Act created an eleven-member commission with responsibility to "plan, develop, and carry out such activities as the Commission considers fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth." Pub. L. No. 111-25, § 3(1). Six of the eleven commissioners are members of Congress, appointed by congressional leadership. *Id.* § 4(a). Four commissioners are appointed by the President, and the remaining commissioner is the Secretary of the Interior. *Id.*

As we explained in a memorandum concerning the constitutionality of the bill before Congress enacted it, the inclusion of members of Congress raises significant concerns under the Appointments Clause and the Ineligibility Clause of the Constitution, and in light of the anti-aggrandizement principle underlying the constitutional separation of powers. *See Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193 (2009) ("*Reagan Centennial Commission*").

To ameliorate these concerns, we suggested that the bill be amended to provide for designation of an executive branch official as the officer responsible for considering the advice and recommendations of the commissioners and then "planning, developing and carrying out" the ceremonial events. Congress did not make any such amendment, however. Therefore, when he signed the bill into law President Obama stated that, in order to implement the Act in a constitutional manner, "members of Congress 'w[ould] be able to participate only in ceremonial or advisory functions of [the] Commission, and not in matters involving the administration of the act.'" *Statement on Signing the Ronald Reagan Centennial Commission Act*, 2009 Daily Comp. Pres. Doc. No. 424, at 1 (June 2, 2009) (quoting *Statement on Signing the Bill Establishing a Commission on the Bicentennial of the United States Constitution* (Sept. 29, 1983), 2 Pub. Papers of Pres. Ronald Reagan 1390, 1390 (1983)).

Four of the five presidentially appointed commissioners (all except the Secretary of the Interior) have proposed the following plan to avoid the constitutional problems we previously identified:

> First, all Commissioners save one Presidentially appointed Commissioner would elect—subject to their statutory rights—not to exercise the powers set forth in § 3(1) of the Act. Second, the Commission would carry out its planning and other functions up to the point of execution, and then create a final plan in the form of a resolution. Third, the Commission would transmit this resolution to the Presidentially appointed member of the Commission who would be designated to exercise the § 3(1) power. That designated Commissioner would evaluate and potentially execute the resolution as an Officer of the United States.

Implementation Memo at 3.

II.

This proposal raises the following constitutional concern. The six congressional members, along with four of the five presidentially appointed members, would vote to delegate statutory duties to the remaining presidentially appointed commissioner. Those duties would include all of the statutory duties of the Commission, including those that may constitution-

ally be exercised only by Commission members who were presidentially appointed. The congressional members lack the authority to exercise the significant executive authority that, under the proposal, they would purport to confer on another member of the Commission.

To avoid this anomaly, and to reflect the allocation of authority the Constitution requires, we believe the Commission should follow the recommendation this Office offered in a comparable context in 1984, *see Constitution Bicentennial Commission*, 8 Op. O.L.C. 200—namely, "to create an executive committee composed of all [five of the Commission members who are constitutionally eligible to exercise the duties of the Commission] that would be legally responsible for discharging the purely executive functions of the Commission," *id*. at 207—including, in particular, determining which activities would be "fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth," Pub. L. No. 111-25, § 3(1), and giving final approval to all executive actions. The six congressional members, in turn, could "participate in nearly all of the Commission's activities," could perform ceremonial functions, and could advise the executive committee as to all of its functions, including "the formulation of programs that would be technically approved and executed by non-congressional members." *Constitution Bicentennial Commission*, 8 Op. O.L.C. at 207. Moreover, under this approach the entire Commission, including the congressionally appointed members, could also "provide advice and assistance to Federal, State, and local governmental agencies, as well as civic groups to carry out activities to honor Ronald Reagan on the occasion of the 100th anniversary of his birth," as section 3(2) of the Act authorizes, since such functions do not raise the constitutional problems we have identified.

We do not think that the Commission's establishment of such an "executive committee" would present the problem identified above. Consistent with the President's signing statement, and in order to avoid serious constitutional questions, we would construe the Act *already* to limit the exercise of "the purely executive functions of the Commission," *Constitution Bicentennial Commission*, 8 Op. O.L.C. at 207, to the five presidentially appointed commissioners who would constitute the "executive committee." *Cf.* 58 Fed. Reg. 59,640 (Nov. 10, 1993) (reporting that four days after a court of appeals had held that the presence of two *ex officio* congressional appointees on the Federal Election Commission was

unconstitutional, the FEC "reconstituted itself as a body of six voting members"). Thus, there would be no purported "delegation" of significant authority from congressionally appointed officers to presidentially appointed ones. This formal distinction, while effectively resulting in the same allocation of functions to the congressional members as in the proposal in the Implementation Memo submitted to you, would not present the constitutional infirmities we discussed in our earlier memorandum, or the anomaly described above. Instead, an executive committee would simply exercise those functions that may be properly exercised only by the presidentially appointed officers.

Moreover, because this course would involve no delegation of statutory authority within the Commission, it would also avoid a potentially serious statutory problem. The members' proposal would call for a delegation of the Commission's statutory duties to a single member. Particularly in light of section 4(h) of the Act, which provides that "[a] majority of the members of the Commission shall constitute a quorum to conduct business, but two or more members may hold hearings," and the fact that the statute contains neither a specific authority to delegate powers to Commission members, *see R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1334 (D.C. Cir. 1983) (citing 45 U.S.C. § 154 (1976)), nor a general rulemaking authority from which certain delegation authorities might be inferred, *see Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947), we do not see any obvious source of authority for the Commission to delegate its powers to a subset (or one) of its members. That is another reason why the better course would be for the Commission to create an "executive committee," consisting of the five presidentially appointed members, to exercise the Commission's statutory authorities. Were the executive committee to consist of fewer than five members, it would raise the issue of the statutory authority of the presidentially appointed members to delegate some of their significant executive authority to that smaller group. But so long as the executive committee consists of all members entitled to exercise significant executive authority under the Constitution, there would be no delegation of Commission duties and thus no statutory problem.

III.

Finally, the members who sent you the March 11 Letter appear to be concerned (*see* Implementation Memo at 2) that adopting the "executive committee" solution from our 1984 opinion could run afoul of *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). The court in that case declared invalid a section of the Federal Election Campaign Act, 2 U.S.C. § 437c(a)(1), which provided that the Secretary of the Senate and Clerk of the House or their designees were to be members of the Federal Election Commission "ex officio and without the right to vote." The FEC had argued that the presence of those members was constitutionally harmless because their only formal role was informational and advisory. The court rejected this argument, reasoning that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." 6 F.3d at 827; *see also Reagan Centennial Commission*, 33 Op. O.L.C. at 199 & n.8.

But this case would be distinguishable in important respects from *NRA Political Victory Fund*. As the United States explained in its brief to the Supreme Court in that case, the statute at issue there compelled the FEC "to afford the Secretary and Clerk an integral role in all its deliberative processes. By participating as members in the FEC's deliberations, the *ex officio* agents give Congress the ability to express its views from within the Commission on issues involving the execution and administration of the FECA in specific cases and instances." Brief for the United States as Amicus Curiae at 18–19, *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994); *see also id.* at 20–21 (warning about the "lack of confidentiality" and explaining that "[t]he prospect that these congressional employees will report on FEC proceedings to Congress may cause the other members to 'temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process'") (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)); *NRA Political Victory Fund*, 6 F.3d at 827 (reasoning that entitling congressional agents to be present during the confidential deliberations of the executive officials was analogous to the compelled presence of nonvoting alternate jurors during jury deliberations); Harold H. Bruff, *The Incompatibility Principle*, 59 Admin. L. Rev. 225, 255–56 (2007) ("Although Congress opened many of the deliberations of multi-member agencies like the FEC to public view

through the Sunshine Act, the Act contains exceptions allowing confidential discussions, which would lose much of their efficacy if congressional monitors were present for discussions among the Commissioners. . . . The values underlying both executive privilege and the incompatibility principle suggest the need for some zone of privacy for executive deliberation." (footnote omitted)).

The Ronald Reagan Centennial Commission, by contrast, could implement our 1984 recommendation in a manner that does not raise these concerns: The executive committee would simply choose to consult with and receive advice from those members not serving on the executive committee. Here, the executive committee alone would be responsible for exercising significant executive authority, and no one other than the presidentially appointed officers would be serving on that decision-making body, thereby distinguishing this case from *NRA Political Victory Fund*, in which the congressional agents were ex officio members of a commission that was required to deliberate as a whole on its decisions. In *NRA Political Victory Fund*, the congressional agents did not serve on a body in which the decisional and advisory functions were segregated in the manner that our 1984 memorandum suggested and that we recommend to be the proper course here. Moreover, absent the particular problem present in *NRA Political Victory Fund*, there is nothing constitutionally problematic about members of Congress offering advice designed to influence executive action, as the court in *NRA Political Victory Fund* itself acknowledged. 6 F.3d at 827 (Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency," including by "direct communication with the [agency]"); *see also Mistretta v. United States*, 488 U.S. 361, 408 (1989) (the Constitution "anticipates that the coordinate Branches will converse with each other on matters of vital common interest").

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Applicability of the Emoluments Clause to Non-Government Members of ACUS (II)

A nongovernmental member of the Administrative Conference of the United States does not occupy an office of profit or trust within the meaning of the Emoluments Clause.

June 3, 2010

MEMORANDUM OPINION FOR THE CHAIRMAN
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This memorandum responds to your request that we reconsider our 1993 opinion that the nongovernmental members of the Administrative Conference of the United States ("ACUS" or "the Conference") hold an "Office of . . . Trust" within the meaning of the Emoluments Clause of the Constitution, Article I, Section 9, Clause 8. *See* Memorandum for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Paul R. Verkuil, Chairman, ACUS (May 18, 2010) ("Verkuil Memorandum"); *see also Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114 (1993) ("*ACUS I*"). The Clause forbids anyone "holding any Office of Profit or Trust" under the United States from accepting, without congressional consent, "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. Since the issuance of our 1993 opinion, our Office has addressed the applicability of the Emoluments Clause to members of advisory committees in four published opinions, and in none of these have we concluded that the Clause was implicated.[1] In light of this subsequent guidance, we now confirm and further explain the oral advice we recently provided that

[1] *See Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director's Advisory Board*, 31 Op. O.L.C. 154 (2007) ("*FBI Advisory Board*"); *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55 (2005) ("*Bioethics Council*"); *Applicability of Emoluments Clause to "Representative" Members of Advisory Committees*, 21 Op. O.L.C. 176 (1997) ("*Representative Members*"); *The Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123 (1996) ("*IEP*").

a nongovernmental member of ACUS does not occupy an office of profit or trust within the meaning of the Emoluments Clause.[2]

I.

ACUS was established in 1964 to develop recommendations to improve the efficiency and fairness of federal agencies. Among its stated purposes is to "provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest." 5 U.S.C. § 591(1) (2006); *see also ACUS I*, 17 Op. O.L.C. at 114–16 (describing background and structure of ACUS). Although agencies are not compelled to follow ACUS's recommendations, several of ACUS's studies have had a significant influence on administrative law over the years. *See* Marshall J. Breger*, The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. Pitt. L. Rev. 813, 831 (1992) ("Breger"). Congress has also, from time to time, assigned ACUS to study and formulate recommendations as to particular issues, *see ACUS I*, 17 Op. O.L.C. at 117 n.3 (citing several examples). Nonetheless, we are not aware of any instance in which ACUS's role has been anything but advisory in nature. *See* Verkuil Memorandum at 2 (characterizing these statutory assignments as involving "purely consultative, research, or reporting roles").

Although Congress created ACUS in 1964, the "idea of a government-sponsored organization which reviews and recommends improvements in agency procedures" dates back to a 1949 report of the Judicial Conference of the United States suggesting that the President convene such a body. *See* Breger, 53 U. Pitt. L. Rev. at 814–15. In 1953, President Eisenhower established a temporary Conference on Administrative Procedure, which

[2] Nothing in this opinion should be viewed as expressing our views on any aspect of our 1993 opinion other than the narrow legal issue regarding the applicability of the Emoluments Clause to the nongovernmental members of ACUS.

consisted of representatives of federal agencies and several private-sector lawyers with expertise in administrative law. *Id.*

President Kennedy in 1961 convened a second temporary conference called the Administrative Conference of the United States, to recommend improvements regarding administrative procedure. This 1961 predecessor to ACUS was led by a Chairman, and its members consisted not only of federal agency officials but also of members of the public. *See* Exec. Order No. 10934, § 1, 3 C.F.R. 464 (1959–63). As President Kennedy's Executive Order establishing the 1961 Conference stated, "[m]embers of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States." *Id.* § 3. After several years and six plenary sessions, President Kennedy's conference issued thirty recommendations regarding administrative procedure, one of which was to establish a permanent Administrative Conference. *See* Breger, 53 U. Pitt. L. Rev. at 817–18.

In 1964, Congress did just that. *See* Pub. L. No. 88-499, 78 Stat. 615; *see also* S. Rep. No. 88-621, at 4 (1963) (noting the statute "would establish a permanent Administrative Conference of the United States"). In creating a permanent body, Congress replicated the 1961 Conference's limited advisory role of developing recommendations for improving agency procedure. S. Rep. No. 88-621, at 5 ("The basic powers of the Conference would be to study problems and make recommendations. It would have no power whatever to enforce such recommendations."). In addition, Congress established a structure much like the one that President Kennedy had established. The Conference consists of not more than 101 or fewer than 75 governmental and nongovernmental members, including a Chairman and a Council. 5 U.S.C. § 593(a); *see also id.* § 595(a) (noting that when meeting in plenary session, the Conference's members along with the Chairman and the Council are known as "the Assembly of the Conference"). ACUS's Chairman is appointed by the President for a five-year term, with the advice and consent of the Senate. *Id.* § 593(b)(1). The Council is composed of the Chairman and ten other governmental and nongovernmental members, and the latter ten members are appointed for three-year terms by the President (without Senate involvement). *Id.* § 595(b) (2006). Congress specified that "not more

than one-half [of the Council's members] shall be employees of Federal regulatory agencies or Executive Departments." *Id.*

Together, the Chairman and the Council manage several critical aspects of the Conference's operations, including the selection of a portion of the Conference's membership. Specifically, the Chairman may appoint to the Conference, with the Council's approval, not more than forty nongovernmental members for two-year terms in addition to certain government officials who are required to serve on ACUS. *Id.* § 593(b)(6) ("[T]he number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total numbers of members."). These nongovernmental members are selected by the Chairman to "provide [a] broad representation of the views of private citizens and [to] utilize diverse experiences." *Id.* ("The [nongovernmental] members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.").

ACUS ceased operations on October 31, 1995, but in 2004 Congress authorized funds for ACUS, Pub. L. No. 108-401, § 2(a), 118 Stat. 2255, although no funds were appropriated before the expiration of the authorization period. In 2008, Congress reauthorized ACUS, Pub. L. No. 110-290, § 2, 122 Stat. 2914, which began operations on March 11, 2009, with the passage of the omnibus appropriations statute, Pub. L. No. 111-8, 123 Stat. 524.

II.

In 1993 our Office advised that the Emoluments Clause applied to the nongovernmental members of ACUS. *ACUS I*, 17 Op. O.L.C. at 117. More specifically, given that ACUS's nongovernmental members were not paid for their services to the Conference, we concluded that they occupied an "Office of . . . Trust" (and not an office of profit) within the meaning of the Emoluments Clause. *Id.* We reached this conclusion for several reasons. First, we noted that ACUS was a "Federal agency established by statute." *Id.* Second, although we acknowledged that ACUS was an advisory committee as well as an agency, we cited our then prevailing view that "'Federal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause.'" *Id.* (quot-

ing *Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65, 68 (1991) ("*Section 219*")). Third, we noted that the Conference's advice and recommendations "have had (and were intended to have) a significant effect on the Government's administrative processes." *Id.* Finally, we observed that "under the Conference's own by-laws, its members may be considered to be special government employees subject to Federal conflict of interest statutes and regulations." *Id.*

Subsequent Office precedent, however, has undermined the rationale for our 1993 opinion's conclusion that nongovernmental members of ACUS are subject to the Emoluments Clause. *Cf. Representative Members*, 21 Op. O.L.C. at 176–77 (disavowing prior OLC opinion because of subsequent "refinements to our position" and because the opinion led to results that were "exceedingly incongruous" with intervening opinions of the Office). While we have previously characterized the Emoluments Clause as broad in scope, *see*, *e.g.*, *Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 17–18 (1994), the text of the Clause also makes clear that it applies only to a specified class of persons—i.e., those who hold offices of profit or trust under the United States—and not to all positions in the United States government. Consistent with that textual limitation, our precedents since our *ACUS I* opinion have endeavored to give substance to that category.

In accord with this textual limitation, we have receded from the view, set forth in our *Section 219* opinion, that all federal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause. Indeed, only months after issuing our *ACUS I* opinion, we advised that this categorical position, on which the *ACUS I* opinion itself appeared to rely in part, was "overbroad" and that "not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the Clause." Letter for Conrad K. Harper, Legal Adviser, Department of State, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Mar. 1, 1994). In a subsequent published opinion, we characterized that same conclusion in our *Section 219* opinion as "sweeping and unqualified," and specifically determined that members of an advisory committee established by the Department of State were not

subject to the Emoluments Clause on the basis of a multi-factor test. *See IEP*, 20 Op. O.L.C. at 123. Under that test, we noted that the members of the committee were not subject to the Clause because they "meet only occasionally, serve without compensation, take no oath, and do not have access to classified information," and that "the Committee is purely advisory, is not a creature of statute, and discharges no substantive statutory responsibilities." *Id.*

In addition, on two later occasions, we concluded in published opinions that members of other advisory bodies were not subject to the prohibitions of the Emoluments Clause. In 2005, based on an extensive historical analysis of the phrase "Office of Profit or Trust," we advised that the Clause did not apply to members of the President's Council on Bioethics because that Council was "purely advisory" in nature. *See Bioethics Council*, 29 Op. O.L.C. at 73; *id.* at 70 (noting that our conclusion was "generally consistent" with our Office's 1996 opinion regarding the State Department's Advisory Committee on International Economic Policy). We stated that to qualify as an office within the meaning of the Constitution, a position must "at least involve some exercise of governmental authority, and an advisory position does not." *Id.* at 10. Two years later, we advised that the Emoluments Clause did not apply to a board charged with providing advice to the FBI Director on improving the FBI's operations because that Board served a purely advisory function. *FBI Advisory Board*, 31 Op. O.L.C. at 154 ("The sole role of the Board is to advise the Director, who is free to adopt, modify, or ignore its recommendations. Board members have no decisional or enforcement authority, and they exercise no supervisory responsibilities over other persons or employees as a result of their positions on the Board.").

Our *Bioethics Council* and *FBI Advisory Board* opinions go further than our *IEP* opinion and indicate that only those persons considered officers within the meaning of the Appointments Clause, U.S. Const. art. II, § 2, may be subject to the Emoluments Clause, *see, e.g.*, *FBI Advisory Board*, 31 Op. O.L.C. at 156 ("The threshold question . . . in determining whether a member of the Board holds an 'Office of Profit or Trust under [the United States]' is whether a position on the Board is an 'Office under the United States'"); *Bioethics Council*, 29 Op. O.L.C. at 71 ("A position that carried with it no governmental authority (significant or

otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under that analysis, would not be an office under the Emoluments Clause"), a conclusion that plainly would foreclose application of the Emoluments Clause here, given the purely advisory functions of ACUS. But, for present purposes, we need not rest our decision on that ground. Because our Office had rejected the "sweeping and unqualified" view that *all* advisory bodies are subject to the Emoluments Clause, *IEP*, 20 Op. O.L.C. at 123, even before it had issued opinions suggesting that only those persons who were officers for purposes of the Appointments Clause were subject to the Emoluments Clause, it suffices to observe that, under the precedents issued since we decided *ACUS I*, the nature of this advisory body is such that its nongovernmental members cannot be deemed to hold the kind of office to which the Emoluments Clause applies.

In particular, the same factors that led us to conclude in our *IEP* opinion that the advisory committee for the State Department was not subject to the Emoluments Clause also lead to us to conclude that the nongovernmental members of ACUS, itself a purely advisory body, are not subject to it. *See IEP*, 20 Op. O.L.C. at 123 (setting out multiple factors indicating that particular advisory body was not subject to the Clause). Such a conclusion best accords with our Office's now substantial precedents giving substance to the Emoluments Clause through a careful explication of its proper scope, so as to ensure that concerns about foreign corruption and influence are accounted for with respect to the types of "Office[s]" that the Clause was meant to cover in identifying "Office[s] of Profit or Trust."

First, as was the case with the committee at issue in our *IEP* opinion, ACUS's nongovernmental members serve without compensation, 5 U.S.C. § 593(c) (2006) ("Members of the Conference, except the Chairman, are not entitled to pay for service."), and meet only on an occasional basis. By law, the Conference as a whole (i.e., the Chairman, the Council, and ACUS's governmental and nongovernmental members) is required to meet for "at least one plenary session each year," *id.* § 595(b)(1), and we understand that the practice was to convene two such sessions a year. ACUS's Council has in the past typically met only five to six times a year. *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney Gen-

eral, from Paul R. Verkuil, Chairman, ACUS (May 28, 2010 8:40 AM) ("Verkuil E-mail"). In addition, most ACUS members also participate in various subject matter committees, which in the past have held four or five meetings a year. *See* 1 C.F.R. § 302.3 (1995) (listing ACUS's standing committees). By any measure, then, the nongovernmental members of ACUS "meet only occasionally." *IEP*, 20 Op. O.L.C. at 123.

To support the application of the Emoluments Clause, our 1993 opinion did point to the status of ACUS's members as special government employees ("SGEs") subject to federal conflict of interest statutes and regulations. *See ACUS I*, 17 Op. O.L.C. at 117. Advisory committee members often have that status, however, and subsequent opinions of this Office make clear that this factor is far from determinative. *See IEP*, 20 Op. O.L.C. at 123 (concluding that advisory body members were not subject to the Emoluments Clause notwithstanding their SGE status); *see also Representative Members*, 21 Op. O.L.C. at 177 ("special government employees on some advisory committees do not occupy offices of profit or trust").

Moreover, as was also the case with the committee members at issue in *IEP*, 20 Op. O.L.C. at 123, neither the statutes nor the bylaws governing ACUS indicate that its nongovernmental members would be given access to classified information. *See* Verkuil Memorandum at 5 n.7 ("I cannot foresee any likelihood that nongovernmental members of ACUS would require . . . access [to classified information] in the performance of their role with ACUS, particularly because ACUS is barred by statute from addressing 'a military or foreign affairs function of the United States.'" (quoting 5 U.S.C. § 592(1))). It is the case that, unlike the committee members in *IEP*, the nongovernmental members of ACUS have traditionally taken oaths of office. *See* Verkuil E-mail. We are uncertain how longstanding this practice is, however, and, we understand that, in contrast to the requirements of several other federal agencies, ACUS's nongovernmental members are not required to take an oath by either organic statute or governing regulations. *Cf.* 12 U.S.C. § 242 (2006) (requiring members of the Board of Governors of the Federal Reserve System to "make and subscribe to the oath of office"); 16 U.S.C.A. § 831g(c) (West Supp. 2010) (requiring Board members of the Tennessee Valley Authority to take an oath of office). Thus, while there is support for the notion that

the taking of an oath may in certain circumstances indicate a constitutional office, *see*, *e.g.*, Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 6 (1890) (noting that "the taking of the oath is not an indispensable criterion" of an office), for purposes of analyzing purely advisory bodies, this factor is, in our view, not particularly weighty.

We have arguably indicated that supervisory or decisional control may be of some relevance in determining the applicability of the Emoluments Clause to an advisory body, *cf. FBI Advisory Board*, 31 Op. O.L.C. at 154 (noting that the Board was not subject to the Emoluments Clause in part because its members "have no decisional . . . authority, and they exercise no supervisory responsibilities over other persons or employees as a result of their positions on the Board"), but even if that factor is relevant, it is not significant here. The Council and the Assembly (i.e., ACUS's membership meeting in plenary session, 5 U.S.C. § 595(a)) do appear to have authority over certain limited decisions of the Chairman, *see, e.g.*, *id.* § 595(b)(7) (Council may "approve or revise the budgetary proposals of the Chairman"); *id.* § 595(c)(5) (Chairman may "appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference"); *id.* § 595(c)(10) (Chairman may "organize and direct studies ordered by the Assembly or the Council"), but nongovernmental members are likely to constitute only a minority of the members of the Conference and the Council. By statute, no more than two-fifths of the Conference's general membership may consist of nongovernmental persons, 5 U.S.C. § 593(b)(6), while ACUS's Council may be composed of a majority of government officials. *See id.* § 595(b) (permitting the appointment of up to five government officers, in addition to the Chairman, on the eleven-person Council). That Congress did not structure ACUS to ensure a majority of nongovernmental members reinforces our view that such members were not vested (either individually or collectively) with the type of discretion and authority that inheres in an office of profit or trust within the meaning of the Emoluments Clause. In light of ACUS's purely advisory function as well as its governance structure, we do not believe its nongovernmental members exercise the type of supervisory power or decisional authority that would potentially be relevant to a conclusion that they are subject to the Emoluments Clause.

We acknowledge that ACUS is established by statute and that we have characterized it as an "agency." We emphasized these points in our 1993 *ACUS I* opinion, 17 Op. O.L.C. at 117, and appealed to it again in distinguishing our application of the Emoluments Clause to ACUS from our conclusion that the Clause did not apply to the President's Bioethics Council, which also exercised purely advisory functions, *see Bioethics Council*, 29 Op. O.L.C. at 70. In the latter opinion, we observed that "while nominally called an 'advisory committee,' [ACUS] was, in fact, a 'Federal agency established by statute' with certain statutorily assigned powers and functions." *Id.*; *see also IEP*, 20 Op. O.L.C. at 123 (noting that advisory panel was "not a creature of statute"). In neither opinion, however, did we explain precisely why ACUS's status in this regard would be significant to the analysis of whether ACUS's nongovernmental members are subject to the Emoluments Clause, and on reflection we do not believe that it is.

To be sure, ACUS's policy recommendations may "have had (and were intended to have) a significant effect on the Government's administrative processes," *id.*, and our prior characterization of it as an "agency" is reflective of the importance of its mission. But this status ultimately does not meaningfully distinguish ACUS from other similar advisory bodies, which also are established to play an important advisory role in the formulation of public policy. In our *IEP* opinion, for example, we did not suggest the advisory committee at issue there was exempt from the Clause because its mission was unimportant, and the Office's consistent decisions since 1993 have rejected the Clause's application to various advisory committees, even though they plainly had been charged with important missions. *Cf. FBI Advisory Board*, 31 Op. O.L.C. at 154 (concluding that the Advisory Board was not subject to the Clause, while noting that it was charged with recommending to the FBI Director how the "FBI can more effectively exploit science and technology to improve its operations, particularly its priorities of preventing terrorist attacks, countering foreign intelligence operations, combating cyber-based attacks, and strengthening the FBI's collaboration with other federal law enforcement agencies."). And the mere fact that ACUS is not within an otherwise established agency does not provide a sufficient basis for drawing a different conclusion. Not every position in a free-standing agency constitutes an office of

profit or trust within the meaning of the Emoluments Clause, and thus we do not think that the entity's location within the federal government is determinative of whether ACUS's nongovernmental members are subject to the Clause.

Nor do we believe that the fact that ACUS was established by statute compels the judgment that the Clause applies to that entity's nongovernmental members. Here, too, recent precedents of the Office are in direct tension with such a conclusion. For example, Congress by statute required the FBI Director to establish a board to advise on certain matters, *see* Pub. L. No. 108-7, § 109, 117 Stat. 11, 67 (2003), and yet we nevertheless concluded that its members were not subject to the Emoluments Clause. *FBI Advisory Board*, 31 Op. O.L.C. at 154. Similarly, although statutes created both the purely advisory Board of Trustees of the Federal Old-Age and Survivors Insurance Trust Fund and Federal Disability Insurance Trust Fund and the purely advisory Board of Trustees of the Federal Hospital Trust Insurance Fund, *see* 42 U.S.C.A. § 401(c) (West Supp. 2009); 42 U.S.C. § 910 (2006), we advised that the members of neither were subject to the Emoluments Clause. *See* E-mail for John Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from Daniel L. Koffsky, Special Counsel, Office of Legal Counsel (Jan. 22, 2008, 12:31 PM) (memorializing oral advice). But equally importantly, we do not see why the fact that ACUS is established by statute matters here. The Clause's underlying concerns with undue foreign influence and corruption would seem, in principle, to be no more relevant with respect to the nongovernmental members of a purely advisory agency like ACUS that has been established directly by statute than they would be with respect to the nongovernmental members of an important advisory body that Congress has by statute authorized an executive official to establish. Consistent with this judgment, our precedents since 1993 provide no support for concluding that the Clause applies whenever (as will often be the case) an advisory committee's creation may be traced to a statute; indeed, these precedents point against that conclusion in rejecting the "sweeping and unqualified view" that all advisory committees are subject to the Clause. *See IEP*, 20 Op. O.L.C. at 123. Thus, particularly given our Office's subsequent precedents, we do not believe ACUS's status as a statutorily created entity, *ACUS I*, 17 Op. O.L.C. at 117, 123 n.10, provides suffi-

cient ground to compel the application of the Emoluments Clause to ACUS's nongovernmental members, even assuming that the Clause may apply in some instances to persons who do not hold an office under the Appointments Clause.

III.

For the reasons given above, we conclude that the Emoluments Clause does not apply to the nongovernmental members of ACUS.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

Entitlement to Reservist Differential Pay Under Pre-Amendment Version of 5 U.S.C. § 5538

Under the pre-amendment version of 5 U.S.C. § 5538, covered employees may receive reservist differential pay not only for pay periods that occur when they are serving on active duty, but also for those pay periods that fall within the additional period in which they have re-employment rights following the completion of that duty.

June 28, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

You have asked for our views on how to interpret the pre-amendment version of 5 U.S.C. § 5538, a law that provides a monetary payment to qualifying federal employees who are called to active duty from the military reserves.[1] Under section 5538, reservists who take a leave of absence from federal civilian employment "in order to perform active duty in the uniformed services pursuant to a call or order to active duty" under certain statutory authorities are entitled to additional compensation for pay periods in which their military pay would be less than their basic civilian pay. Section 5538 thus ensures that such reservists do not experience a pay cut because of a call to active duty. You have asked whether the pay periods during which eligible federal employees are entitled to receive this additional compensation, commonly known as "reservist differential pay," include only those that occur within the period of active duty, or whether they also include those pay periods that fall within the additional period of time, specified by 38 U.S.C. § 4312, in which a

[1] In addition to the views we received from the Office of Personnel Management, we also solicited and received the views of the Department of Defense ("DoD"). *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Elaine D. Kaplan, General Counsel, Office of Personnel Management ("OPM"), *Re: Request for OLC Opinion Regarding Entitlement to Payment of the Reservist Differential Under 5 U.S.C. § 5538 During Periods of Time After Active Duty Ends, and During Which an Employee Is Entitled to Reemployment Rights Under the Uniformed Services Employment and Reemployment Rights Act* (Nov. 19, 2009); E-mail for Jeannie Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, from James Smyser, Associate Deputy General Counsel, Department of Defense, *Re: FW: Opinion Request from OPM on interpretation of 5 USC 5538 (Reservist Differential Pay)* (Feb. 4, 2010) ("DoD E-mail").

returning reservist is generally entitled to report for re-employment at his or her civilian workplace. We conclude that under the pre-amendment statute, covered employees may receive reservist differential pay not only for pay periods that occur when they are serving on active duty, but also for those pay periods that fall within the additional period in which they have re-employment rights following the completion of that duty. 5 U.S.C. § 5538(b)(2)(B).[2]

I.

First enacted on March 11, 2009 (*see* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. D, § 751(a), 123 Stat. 524, 693), 5 U.S.C. § 5538 contains three provisions relevant to your question. The first, subsection (a), describes the requirements a federal employee must meet to be eligible for reservist differential pay and sets forth the method for calculating the amount:

> (a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10[3] *shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b)*, an amount equal to the amount by which—

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[2] In December 2009, Congress amended section 5538 in a manner that OPM and DoD believe makes clear "that the reservist differential is not payable for periods following completion of active duty." OPM, Reservist Differential, Guidance, Qualifying Periods, http://www.opm.gov/reservist/guidance/qualifying.asp (last visited ca. 2010); *see also* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. C, § 745(a), 123 Stat. 3034, 3219 (2009). We express no opinion on that interpretation, although we note that section 5538 gives OPM, "in consultation with [the] Secretary of Defense," the discretion to "prescribe any regulations necessary to carry out the preceding provisions of this section." 5 U.S.C. § 5538(d).

[3] As an OPM guidance document explains, section 101(a)(13)(B) references "specific provisions in title 10 of the United States Code" which function as "authorities for certain military contingency operations for which a reservist (i.e., member of a Reserve component or the National Guard) may be called or ordered to active duty." OPM, Reservist Differential, Guidance, Appendix D, http://www.opm.gov/reservist/guidance/appendixd.asp (last visited ca. 2010).

> (1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)
>
> (2) the amount of pay and allowances which (as determined under subsection (d))—
>
> (A) is payable to such employee for that service; and
>
> (B) is allocable to such pay period.

5 U.S.C. § 5538(a) (emphasis added).

Second, subsection (b)(1) describes the "pay period[s]" referenced in subsection (a) during which an eligible employee is entitled to receive reservist differential payments:

> (b) (1) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—
>
> (A) during which such employee is entitled to reemployment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and
>
> (B) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

5 U.S.C. § 5538(b)(1).

Third, as originally enacted, subsection (b) also contained an additional provision, paragraph (2), that provided a further gloss on the period during which an employee would be "entitled to reemployment rights under chapter 43 of title 38":

> (2) For purposes of this section, the period during which an employee is entitled to reemployment rights under chapter 43 of title 38—

> (A) shall be determined disregarding the provisions of section 4312(d) of title 38;[4] and
>
> (B) *shall include any period of time specified in section 4312(e) of title 38 within which an employee may report or apply for employment or reemployment following completion of service on active duty to which called or ordered as described in subsection (a)*.

5 U.S.C. § 5538(b)(2) (emphasis added).

Section 5538(b)'s references to "chapter 43 of title 38" are to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301–4335 (2006 & West Supp. 2010).[5] Among other things, USERRA broadly requires an employer to promptly reemploy a returning reservist to "the position for which qualified that he or she would have attained if continuously employed," or, in the case of active service periods lasting 91 days or more, "a position of like seniority, status, and pay." 5 C.F.R. § 353.207 (2009); *see* 38 U.S.C. § 4312. To take advantage of this entitlement, an employee must timely report for work or submit an application for reemployment "upon the completion of a period of service in the uniformed services" and by a statutorily prescribed deadline. 38 U.S.C. § 4312(e)(1). Persons "whose period of service in the uniformed services was less than 31 days" must report to their employer on the first work day following completion of their service, a period allowing for safe travel back to their residence, and an

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[4] Section 4312(d) excuses employers from their reemployment obligations when they are able to demonstrate: (1) "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable"; (2) "such employment would impose an undue hardship on the employer"; or (3) the reservist was employed for "a brief, nonrecurrent period" prior to active service and "there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. § 4312(d)(1).

[5] USERRA's general purposes are: "(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a) (2006).

additional "eight hours." *Id*. § 4312(e)(1)(A)(i). Those who serve for "more than 30 days but less than 181 days" must submit an "application for reemployment . . . not later than 14 days after the completion" of their service. *Id*. § 4312(e)(1)(C). And those who serve for "more than 180 days" must submit an application for reemployment "not later than 90 days after the completion" of their service. *Id*. § 4312(e)(1)(D).[6]

II.

Your question regarding the duration of a federal employee's entitlement to "reservist differential pay" arises because two provisions of the original statutory text could be read to give conflicting indications as to how long that entitlement was intended to last. On the one hand, section 5538(a) declared that eligible employees are "entitled, *while serving on active duty*, to receive, for each pay period described in subsection (b)," reservist differential pay—a provision that, at least in isolation, seemed to indicate that employees would be entitled to receive such pay only "while serving on active duty." 5 U.S.C. § 5538(a) (emphasis added). On the other hand, section 5538(b)—which described the pay periods during which an employee is entitled to receive reservist differential pay—provided that the "period . . . during which such employee is entitled to" differential pay "shall include any period of time . . . within which an employee may report or apply for employment or reemployment *following completion of service on active duty*." *Id*. § 5538(b)(1)(A) & (2)(B) (emphasis added). In contrast to section 5538(a), section 5538(b)(2)(B) appeared to contemplate that an eligible employee could receive differential pay during periods that "follow[] completion of service on active duty."

In the time since we received your opinion request, Congress has amended section 5538 by, in effect, deleting subsection (b)(2). *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. C,

[6] These deadlines are extended in the case of "[a] person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services." 38 U.S.C. § 4312(e)(2)(A). Such a person may report or apply for reemployment after recovering from the illness or injury. This recovery period is limited to two years, except where reporting for reemployment within that period is made impossible or unreasonable by circumstances beyond the person's control. *Id.*

§ 745(a), 123 Stat. 3034, 3219 (2009) (deleting the original subsection (b) and inserting in its place a new subsection (b) that contains all of the language of former subsection (b)(1) and none of the language of former subsection (b)(2)). The conference report termed this change a "technical correction" to section 5538, but did not otherwise discuss the intended purpose or import of this amendment. *See* H.R. Rep. No. 111-366, at 946 (2009) (Conf. Rep.). As we understand it, OPM and DoD agree that this amendment "clarif[ies] that the reservist differential is not payable for periods following completion of active duty." OPM, Reservist Differential, Guidance, Qualifying Periods, http://www.opm.gov/reservist/guidance/qualifying.asp (last visited ca. 2010). However, your opinion request remains outstanding, in light of continued disagreement regarding the proper interpretation of the original statute, as it applies to those who served on active duty and were entitled to reemployment rights during the pre-amendment period.

A.

The principle that "[a] statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous, void or insignificant" is "one of the most basic interpretive canons." *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009). *See also*, *e.g.*, *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 489 n.13 (2004) ("It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted)); *Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("we are obliged to give effect, if possible, to every word Congress used"). When presented with provisions that appear to be in conflict, we must therefore endeavor to reconcile those provisions by adopting a construction that refrains from treating any provision as void or meaningless, in accordance with the maxim that "[t]he cardinal principle of statutory construction is to save and not to destroy." *United States v. Menasche*, 348 U.S. 528, 538–39

(1955); *see also Moskal v. United States*, 498 U.S. 103, 109 (1990) (rejecting proposed construction that would fail to give meaning to certain statutory language because such a reading would "violate[] the established principle that a court should give effect, if possible, to every clause and word of a statute") (quotation marks omitted); *Hoffman*, 101 U.S. at 116 ("every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each"); 2A Norman J. Singer & J.D. Shamble Singer, *Sutherland Statutes and Statutory Construction* § 46.6 (7th ed. 2007) ("Singer") ("No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute.").

It is clearly possible to read subsection (a)'s "while serving on active duty" provision, at least in isolation, to permit employees to receive reservist differential pay only for pay periods that occur within the period of active duty. However, adopting this reading of subsection (a) would deprive a substantial part of subsection (b) of meaning, since the latter provision states that such pay "shall by payable with respect to each pay period . . . during which such employee is entitled to re-employment rights under chapter 43 of title 38" (5 U.S.C. § 5538(b)(1)), a category that is then expressly defined to include the time "*following* completion of service on active duty" (5 U.S.C. § 5538(b)(2)(B) (emphasis added)). Reading subsection (a) as controlling the meaning of section 5538 in this way thus would effectively read subsection (b)(2)(B) out of the statute and produce a reading that contradicts its plain language—a result that would be difficult to square with the statutory construction principles we have just described. *See* 2A Singer § 46:6 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."); *Menasche*, 348 U.S. at 538–39 ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section") (quotation marks omitted). Reading subsection (a) in this manner would also introduce an internal tension in subsection (a) itself: subsection (a) states that eligible employees "shall be entitled" to receive reservist differential pay "for each pay period described in subsection (b)," but on this interpretation of section 5538, such employees in

fact would *not* be entitled to receive differential pay for each pay period described in subsection (b)—they would not receive such pay for the periods "following completion of service on active duty" described in subsection (b)(2)(B).

In view of these difficulties, we believe subsection (a) should not be read as restricting reservist differential pay to those periods during which a reservist is actually serving on active duty if another plausible reading of the statute is available. And here, we think such a reading is available: it is also possible to read subsection (a)'s phrase "entitled, while serving on active duty, to receive" reservist differential pay to mean that an employee's entitlement to receive such pay accrues and vests during his or her service on active duty. On this reading, the employee accrues the "entitle[ment]" to receive reservist differential pay during "each pay period described in subsection (b)" by virtue of service on active duty. However, the duration of the entitlement that would thereby vest, on this reading, would not be limited solely to the term of active service, but would also encompass "each pay period described in subsection (b)," including those periods that "follow[] completion of service on active duty." This reading harmonizes subsection (a) and subsection (b)(2)(B), avoiding the apparent conflict that would arise from the narrower reading of subsection (a) discussed above.

In addition to avoiding any apparent conflict with subsection (b), this reading gives distinct meaning to each of the references in subsection (a) to "active duty." The first part of subsection (a) states that the entitlement to reservist differential pay applies to employees who are absent from federal employment "in order to perform active duty in the uniformed services pursuant to a call or order to active duty" under certain specified statutory provisions. This language makes clear that an employee qualifies for reservist differential pay only if he or she is absent for the purpose of serving on active duty, as opposed to other forms of service, and only if that service on active duty is pursuant to a call or order under one of the referenced statutory provisions.[7] Subsection (a) then refers to "active

[7] Reemployment rights under chapter 43 apply to persons "whose absence from a position of employment is necessitated by reason of service in the uniformed services." 38 U.S.C. § 4312(a). The term "service in the uniformed services," in turn, is defined as "the performance of duty on a voluntary or involuntary basis in a uniformed service under

duty" a second time, in the provision at issue here, stating that an eligible employee "shall be entitled, while serving on active duty, to receive" reservist differential pay. On the reading proposed here, this second reference to "active duty" clarifies that the right to reservist pay accrues and vests only if the employee actually performs active duty.

It is true that the word "while" suggests a bounded duration, circumscribed by the time period or event to which it refers, rather than an open-ended period initiated by that time period or event. *See Webster's Third New International Dictionary* 2604 (1993) (defining "while," when used as a conjunction in similar contexts, to mean "during the time that," "until the end of the time that," or "during which time"). And on our reading, the period in which an employee would receive reservist differential pay would not be confined to the bounded duration of the employee's period of active service. However, our reading is nonetheless consistent with understanding the word "while" to connote a circumscribed duration, because the employee's receipt of reservist differential pay would be defined, in two distinct but related respects, by the period of time that the employee spends in active service. First, during each day of active duty—i.e., "while serving on active duty"—an eligible employee is entitled to reservist differential pay that corresponds to that day. Second, and simultaneously, each day of active duty counts towards the total length of service that determines, in turn, the period following the completion of active duty during which the employee is entitled to reemployment rights and, consequently, reservist differential pay. *See* 5 U.S.C. § 5538(b)(2)(B).

We therefore do not believe that section 5538 presents the rare circumstance in which it is necessary to resort to the "elimination of words" in order to "give [an] act meaning, effect or intelligibility" or "avoid inconsistencies and to make the provisions of the act harmonize." 2A Singer § 47:37. As we have explained above, consistent with the view expressed by OPM, we believe there is a reading of the statute that is permissible and gives meaning to all its provisions. As such, we do not face a circum-

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competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent . . . for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent . . . for the purpose of performing funeral honors duty." 38 U.S.C. § 4303(13).

stance comparable to that at issue in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), where the Supreme Court adopted a construction of a federal statute that concededly "deprive[d] the words 'chapter 35' of any effect," *id.* at 93. The unusual circumstances of that case compelled the Court to conclude, after applying ordinary tools of statutory construction, that "no other reasonable reading of the statute" was available. *Id*. at 89. Moreover, the language the Court deprived of meaning in *Chicksaw Nation* appeared in an illustrative parenthetical. *See id.* at 90 (emphasizing that the words "chapter 35" appeared in a parenthetical phrase and that "[t]he use of parentheses emphasizes the fact that that which is within is meant simply to be illustrative, hence redundant"); *id.* at 89–90 (finding that "the language outside the parenthetical is unambiguous," and "too strong to bend as the Tribes would wish—i.e., so that it gives the chapter 35 reference independent operative effect," without "seriously rewriting the language of the rest of the statute" or resorting to a construction "far too convoluted to believe Congress intended it"); *id.* at 91 (noting that the legislative history of the provision at issue "on balance supports our conclusion"). Here, in contrast, the language that would be disregarded if we did not adopt our reading is not a single example in an arguably illustrative parenthetical, but rather an entire subsection—one that employs mandatory language and thus suggests on its own terms that it was intended to have substantive meaning. *See* 5 U.S.C. § 5538(b)(2) ("the period during which an employee is entitled to reemployment rights under chapter 43 of title 38 . . . (B) shall include any period of time specified in section 4312(e) of title 38"). There is nothing in the text to indicate that Congress intended subsection (b)(2)(B) to be merely illustrative, or otherwise ineffectual. We therefore do not believe that the provision at issue here is one that may be treated as void, in contravention of the ordinary rule that no portion of a statute should be treated as "inoperative or superfluous, void or insignificant." *Corley*, 129 S. Ct. at 1566.

We also do not think that the inclusion of subsection (b)(2)(B) can be viewed as "the result of obvious mistake or error." *See* 2A Singer § 46:6. So far as we have been able to discern, all but one of the precursors to the bill originally enacted as section 5538, dating back as far as 2001, included subsection (b)(2)(B), cast in similar or even identical terms. *See, e.g.*, H.R. 3337, 107th Cong. (introduced Nov. 16, 2001); S. 1818, 107th Cong. (introduced Dec. 13, 2001). The only exception of which we

are aware was H.R. 4247, introduced in 2007. It too would have provided for reservist differential pay following the completion of active service, even though, unlike subsection (b)(2)(B), it did not expressly reference USERRA's reemployment rights provisions to define the scope of that coverage.[8] Moreover, we know of no precedent for treating such a lengthy statutory phrase as the product of mere inadvertence or error. We would be particularly reluctant to accord such treatment to subsection (b)(2)(B) because the text of section 5538 suggests that the drafters viewed subsections (a) and (b)—including subsection (b)(2)(B)—as parts of an integrated whole that defined the benefit that Congress intended to confer. Subsection (a) expressly cross-references subsection (b) in describing the period for which employees will be entitled to receive reservist differential pay; subsection (b)(2)(B) clarifies that the period "during which such employee is entitled to reemployment rights under chapter 43 of title 38," as that phrase is used in subsection (b)(1)(A), "shall include any period of time" "within which an employee may report or apply for employment or reemployment rights following completion of service on active duty"; and subsection (b)(2)(B) expressly refers back to subsection (a)'s "call or order to active duty" requirement. In view of these circumstances, we are not persuaded that the inclusion of subsection (b)(2)(B) could be reasonably viewed as the result of inadvertence. The better course, we think, is to accord meaning to that subsection, in keeping with its plain terms.

We are aware of the argument that the statute should not be so construed because it is doubtful that Congress would have intended that "reservist differential pay would continue during periods in which the [covered employee] is not serving on active duty and not receiving military pay," particularly given that subsection (a) of the statute defines the amount of the reservist differential as an "amount equal to the amount by which [a covered employee's] basic pay . . . exceeds [the covered employee's] military pay and allowances." DoD E-mail (emphasis removed) (citing 5 U.S.C. § 5538(a)). We acknowledge that the statute does not

[8] *See* H.R. 4247, 110th Cong. § 4(b)(1) (introduced Nov. 15, 2007) (providing for reservist differential pay "(A) while the employee serves on active duty for a period of more than 30 days; (B) while the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of such active duty; or (C) during the 14-day period beginning at the end of such active duty or the end of the period referred to in subparagraph (B)").

expressly contemplate that the amount of military pay and allowances allocable to a particular pay period might be zero: subsection (a) refers to "*the* amount of pay and allowances" allocable to a given pay period, not, for example, "the amount, *if any*, of pay and allowances" allocable to a given period. *See* 5 U.S.C. § 5538(a)(2); *cf. id.* § 5538(a)(1) (referring to the amount, "if at all," by which basic pay exceeds military pay for a given pay period). But reservist differential pay may still be calculated under subsection (a) even if military pay and allowances are zero. And this argument with respect to subsection (a) does not indicate any alternate way of giving meaning to subsection (b)(2)(B)—the difficulty that, as discussed above, necessitates our approach.

The interpretation set forth above, moreover, is consistent with the overall purpose of the statutory scheme—to prevent federal employees from suffering a reduction in pay and thereby incurring a financial burden in the performance of active duty pursuant to one of the referenced statutory provisions. *See* 5 U.S.C. § 5538(a); *cf.* 149 Cong. Rec. 5764 (2003) (statement of Sen. Durbin, introducing a prior version of section 5538) ("I would like to discuss the financial burden faced by many of the men and women who serve in the military Reserves or National Guard and who are forced to take unpaid leave from their jobs when called to active duty . . . . It is unfair to ask the men and women who have volunteered to serve their country . . . to also face a financial strain on their families."). Section 5538's reference to USERRA to determine the pay periods during which reservist pay is available is consistent with this objective. USERRA operates to "minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers." 38 U.S.C. § 4301(a) (2006). As the House report accompanying USERRA states, Congress included a reemployment period after uniformed service because "[o]ne of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an 'unburned bridge.'" H.R. Rep. No. 103-65, at 26 (1993). The period ensures that servicemembers are "not pressed for a decision immediately on [their] discharge, but ha[ve] the opportunity to make plans for the future and readjust [themselves] to civilian life." *Id.* (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946)). Accordingly, it is entirely consistent with Congress's objective to mitigate the financial burden of those called to active duty to provide, when the term of active

duty ends, reservist differential pay during their period of statutory readjustment to civilian life—a period during which they could otherwise have remained gainfully employed at their original government job had they not been ordered to active duty.

For the reasons discussed above, we think the better reading of section 5538, viewed as a whole, would permit eligible employees to receive differential pay in accordance with the plain language of subsection (b)(2)(B). That reading is also consistent with and gains support from the interpretive canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (interpreting a provision of the Veterans' Reemployment Rights Act, a USERRA precursor); *see also, e.g.*, *Fishgold*, 328 U.S. at 285 ("This legislation [the Selective Training and Service Act of 1940] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

B.

In our view, neither the pre-enactment nor post-enactment legislative history of section 5538 offers much aid in interpreting the original text. Beginning in about 2001, numerous measures were introduced in both houses of Congress regarding reservist differential pay. Many of these bills were phrased in terms very similar to the bill first enacted as section 5538. However, there were significant differences in certain bills. For example, the earliest bills omitted the phrase "while serving on active duty," from subsection (a), thus providing simply that that eligible federal employees would be "entitled to receive" a reservist differential "for each pay period described in subsection (b)"—a subsection that, in each case, included the language eventually enacted as subsection (b)(2)(B). *See*, *e.g.*, H.R. 3337, 107th Cong. (introduced Nov. 16, 2001); S. 1818, 107th Cong. (introduced Dec. 13, 2001); H.R. 217, 108th Cong. (introduced Jan. 7, 2003). If such a bill had been adopted by Congress, the apparent tension in the pre-amendment text of subsections (a) and (b) of section 5538 would not have been presented. That tension first emerged in 2003. *See* S. 593, 108th Cong. (introduced Mar. 11, 2003). As originally introduced, S. 593 did not contain the phrase "while serving on

active duty" in subsection (a). That phrase was added in committee, in the same place it appears in the first-enacted version of subsection (a). *See* S. 593, 108th Cong. (reported out of Committee on Governmental Affairs, Nov. 16, 2004). Notably, however, the conference report for the amended S. 593 does not list the addition of the phrase "while serving on active duty" as among the changes made to the bill, or discuss the intended interplay between subsections (a) and (b). *See* S. Rep. No. 108-409 (Nov. 16, 2004).

It appears that nearly every bill subsequently introduced regarding reservist differential pay incorporated both the phrase "while serving on active duty" in subsection (a) and the phrase "following completion of service on active duty" in subsection (b)(2)(B), just as did the bill that ultimately became law. *See*, *e.g.*, S. 989, 109th Cong. (introduced May 10, 2005); H.R. 5525, 109th Cong. (introduced June 6, 2006); Financial Services and General Government Appropriations Act, 2009, S. 3260, 110th Cong. § 750(a) (introduced July 14, 2008). *But see* H.R. 4247, 110th Cong. § 4 (introduced Nov. 15, 2007) (omitting the "while serving on active duty" language from subsection (a) and providing in subsection (b) that reservist differential payments would be due "(A) while the employee serves on active duty for a period of more than 30 days; (B) while the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of such active duty; or (C) during the 14-day period beginning at the end of such active duty or the end of the period referred to in subparagraph (B)."). We are not aware of any legislative history of any of these predecessor bills that illuminates the question you have asked.

The legislative history of the original enactment similarly sheds little light on congressional intent. Section 5538 was passed as part of an omnibus appropriations bill, and it appears that the only mention of this statute in the legislative history is contained in an explanatory statement submitted by Representative Obey. That statement says, simply, that "Section 751 provides for nonreduction in pay for Federal employees while serving in the uniformed services or National Guard." 155 Cong. Rec. H2704 (daily ed. Feb. 23, 2009).

There have been some significant post-enactment developments, although we ultimately do not believe that Congress's subsequent actions in this area provide clear direction as to its purpose in enacting the origi-

nal statute. *Cf. PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990) (cautioning that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress") (internal quotation marks omitted). As we previously noted, Congress amended section 5538 in December 2009, nine months after it was originally enacted. Both OPM and DoD have expressed the view, on which we offer no opinion, that, as revised, section 5538 no longer permits employees to receive reservist differential pay during the period after active service during which they continue to enjoy reemployment rights. *See* OPM, Reservist Differential, Guidance, Qualifying Periods, http://www.opm.gov/reservist/guidance/qualifying.asp (last visited ca. 2010). In some circumstances, when "a former statute is amended, or a doubtful meaning clarified by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent of the first statute." 2A Singer § 49:11; *see also Bailey v. Clark*, 88 U.S. 284, 288 (1874) (statutory amendment "was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning"); *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982) (same); *Porter v. Comm'r of Internal Revenue*, 856 F.2d 1205, 1209 (8th Cir. 1988) ("Amending legislation is perceived as clarifying, not changing, an original statute's intended meaning when a conflict of statutory interpretation has arisen.").

However, a statutory amendment does not invariably mean that the revised statute and the original statute share a common meaning. To the contrary, the Supreme Court has acknowledged a "canon of statutory construction requiring a change in language to be read, if possible, to have some effect," *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992), and has stated that "[t]he deliberate selection of language . . . differing from that used in the earlier acts indicates that a change of law was intended." *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes."); *see also* 2A Singer § 49:11 ("A number of cases have held that where an act is amended or changed so that doubtful meaning is resolved such action constitutes evidence that the previous statue meant the contrary."). Accordingly, the significance of a statutory revision—i.e., whether it clarifies the original statute, or amends it—is appropriately determined by reference to the text

of the amendment and the context surrounding its adoption. *See, e.g.*, *S.G.*, 505 U.S. at 263–64 n.15 (relying on an absence of any indication in the "Advisory Report, the document both Houses of Congress acknowledged as the source for the amendment," in rejecting the view that the amendment was intended merely to clarify "the Red Cross's clear pre-amendment capacity to sue in federal court" rather than amend the law); *Barnes v. Cohen*, 749 F.2d 1009, 1015–16 (3d Cir. 1984) (determining in light of legislative history and a subsequent agency interpretation that Congress's purpose in amending an ambiguous statute was to provide "'clarification' rather than a 'change'").

Here, there is no clear textual indication that the amendment was meant to explain the meaning of the existing statute, rather than modify its meaning—indeed, the statute itself is simply silent on that point. It is true that the conference report described the amendment as a "technical correction" to the existing law, *see* H.R. Rep. No. 111-366, at 946 (2009) (Conf. Rep.), and that, in some instances, the phrase "technical correction" is used to denote that Congress does not intend to make a substantive change to an existing provision. *See*, *e.g.*, *N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 97 (D.C. Cir. 1999) (where statutory amendment "was styled a 'technical correction,'" "only clarification and not substantive change was intended"); *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1211 (11th Cir. 1999) ("While the text of the corrections does not explicitly tell us whether the additions and subtractions constitute new law, their designation as technical corrections tends to indicate that they were merely changes meant to clarify existing law."); *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996) ("By labelling the 1994 change a 'technical correction,' Congress recognized that the [prior] amendment did not purport to change the substantive meaning of the law."). However, courts have also recognized that such labels are not determinative of a statute's meaning and that amendments described by Congress as "technical" sometimes make significant changes in existing law. *See, e.g., Graham County Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1407–08 (2010) ("Significant substantive changes—including the introduction of the term we are construing in this case—were inserted without floor debate, as 'technical' amendments."); *United States v. R.L.C.*, 503 U.S. 291, 305 n.5 (1992) ("The dissent takes us to task for reliance upon a 'technical amendment.'

But a statute is a statute, whatever its label."); *Pub. Emps. Ret. Bd. v. Shalala*, 153 F.3d 1160, 1162 (10th Cir. 1998) ("Congress did not consider the 1984 change to be dramatic, labeling the amendment a technical correction. Nonetheless, that technical correction has become very important" because it made certain retirement plan contributions subject to FICA taxes.); *cf. H.R. 3658, H.R. 8321, and Related Bills, Congressional Review of Administrative Rulemaking: Hearing Before the Subcomm. on Admin. L. & Gov't Rels. of the H. Committee on the Judiciary*, 94th Cong. 376 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel) ("Presidents have sometimes vetoed 'clarifying' legislation on the grounds that, in their view, the amendment did not clarify but vitiated the intent of the original act."). Accordingly, the mere fact that the committee labeled this change a "technical correction" does not establish that it was intended to clarify the statute's meaning, rather than amend it.

III.

Taken as a whole, and giving effect to each of its provisions, the text of section 5538 prior to its recent amendment is consistent with the view that the entitlement to reservist differential pay extends to the period following the completion of active duty service during which a returning reservist may apply or report for reemployment at his or her civilian workplace. Accordingly, we conclude that the pre-amendment version of section 5538 entitled federal employees to receive reservist differential pay during "any period of time specified in section 4312(e) of title 38 within which an employee may report or apply for employment or reemployment following completion of service on active duty." 5 U.S.C. § 5538(b)(2)(B).

JEANNIE S. RHEE
Deputy Assistant Attorney General
Office of Legal Counsel

NOAA Employee's Receipt of the Göteborg Award for Sustainable Development

Neither the Emoluments Clause of the Constitution nor the Foreign Gifts and Decorations Act would bar an employee of the National Oceanic and Atmospheric Administration from accepting the 2010 Göteborg Award for Sustainable Development.

October 6, 2010

MEMORANDUM OPINION FOR THE
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF COMMERCE

You have asked for our opinion whether the Emoluments Clause of the Constitution would bar an employee of the National Oceanic and Atmospheric Administration ("NOAA") from accepting the 2010 Göteborg Award for Sustainable Development. *See* Memorandum for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Barbara S. Fredericks, Assistant General Counsel, Department of Commerce (July 22, 2010) ("Commerce Memo"). The Clause forbids anyone "holding any Office of Profit or Trust" under the United States from accepting, without congressional consent, "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. On the facts you have provided, we conclude that the employee may accept the award without violating the Emoluments Clause, because the award would not be "from any King, Prince, or foreign State." For similar reasons, we conclude that acceptance of the award would not violate the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2006).

I.

The Association for the Göteborg Award for Sustainable Development ("Göteborg Award Association") has chosen a NOAA scientist* to be one

* Editor's Note: For privacy reasons, the published version of this opinion does not identify the NOAA scientist.

of two recipients of the 2010 Göteborg Award.[1] The award consists of one million Swedish Kroner (approximately $142,000) to be shared equally with the co-recipient, travel expenses to the award ceremony in Sweden, and a ceremonial globe.

The Göteborg Award Association is registered under Swedish law as a non-governmental entity, and its sole function is to administer the Göteborg Award. You have told us that the Association consists of the City of Göteborg and twelve businesses and that the Association is "funded one-third by the City and two-thirds by the private businesses." Commerce Memo at 1. The Association is managed by a Board of Trustees that currently consists of three officials of the City of Göteborg and one businessman. *See* Göteborg Award, Organisation, http://www.goteborgaward.com/en/informationssida/organisation.html (last visited Oct. 5, 2010). That Board appoints the seven-member jury that selects the winners and presents the award during a formal ceremony. None of the members of the jury that selected the 2010 awardees was a government official. The Göteborg Association's bylaws authorize the Board to act as the "ultimate decisionmaker," but you have told us that, as a matter of practice, neither the City of Göteborg nor the Association's Board has interfered with the jury's selection process during the ten years the award has existed. *See* Jacobi E-mail, *supra* note 1.

II.

Under the Emoluments Clause of the Constitution, "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The Clause was intended to "preserv[e] foreign Ministers & other officers of the U.S. independent of external influence" by foreign governments. 2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., rev. ed. 1966) (notes of James Madison); *see also* 3 *id.* at 327 (remarks of Governor Randolph) ("It was thought

[1] For the facts regarding the award, we rely chiefly upon the statements of the Commerce Department. *See* Commerce Memo at 1; *see also* E-mail for Pankaj Venugopal, Attorney-Adviser, Office of Legal Counsel, from Will Jacobi, Senior Counsel, Department of Commerce (Aug. 20, 2010) ("Jacobi E-mail").

proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states."); *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981) (discussing background of ratification of the Clause).

In our view, the Emoluments Clause does not apply to the NOAA scientist's acceptance of the Göteborg Award because that prize would not be tendered by a "foreign State" within the Clause's meaning.[2] That view does not rest on the notion that the City of Göteborg is not a "foreign State" under the Emoluments Clause,[3] but rather on the conclusion, based on the representations you have made, that the City does not appear to control the granting of the Göteborg Award. Rather, the selection of the award recipients appears to be made by the Göteborg Award Association,

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[2] In light of this conclusion, we do not address whether the NOAA scientist holds an "Office of Profit or Trust" within the meaning of the Emoluments Clause. Nor do we consider whether each element of the Göteborg Award—the cash prize, the travel to Sweden, or the ceremonial globe—is a "present" or "Emolument . . . of any kind whatever." U.S. Const. art I, § 9, cl. 8.

[3] We need not resolve that issue definitively here. At least once, we have informally advised that the term "foreign State" in the Emoluments Clause applies equally to national governments and to sub-national governmental units. *See* Memorandum for the Files from Rosemary Nidiry, Attorney-Adviser, *Re: Title of Honorary Village Chief from a Nigerian Village* at 2 (Jan. 19, 2001) (rejecting a "literal reading" of the term "foreign State" in the Emoluments Clause and noting that "just as 'King' and 'Prince' should be read to cover a foreign 'Queen' or 'Princess' or 'Duke,' 'foreign State' did not mean merely the 'national government of that foreign State,' but also should include any political governing entity within that foreign state"). And we appear to have assumed the same position in one of our published opinions. *See Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 19 (1994) ("*Foreign Public Universities*") (characterizing University of Victoria as "an instrumentality of a foreign state (the province of British Columbia)"). The Comptroller General has also taken the position that the Emoluments Clause is not limited to the national government of a foreign state. *See Major James D. Dunn*, B-251084, 1993 WL 426335, at *3 (Comp. Gen. Oct. 12, 1993) ("Foreign governmental influence can just as readily occur whether a member is employed by local government within a foreign country or by the national government of the country. For this reason, we believe that the term 'foreign State' should be interpreted to include local governmental units within a foreign country as well as the national government itself."); *see also Military Personnel—Acceptance of Foreign Presents, Emoluments, etc.—Foreign Government Employment—Retired Enlisted Members*, 44 Comp. Gen. 130, 131 (1964) ("[T]he State of Tasmania must be considered a 'foreign State' within the meaning of the constitutional provision.").

acting through a jury appointed by the Board of the Association. The relevant question here is whether the decision to grant the award to a particular individual by the jury appointed by the Board of the Association is sufficiently independent of the government of the City of Göteborg that conferral of the award should not be deemed an action of a foreign state for the purposes of the Emoluments Clause. *See President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 370, 380–82 (2009) ("*Nobel Peace Prize*").

In previous opinions, the factors we have considered in conducting such an assessment include whether a foreign government has an active role in the management of the decisionmaking entity, *Foreign Public Universities*, 18 Op. O.L.C. at 15; whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument, Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expense Reimbursement in Connection with Trip to Indonesia* (Aug. 11, 1980) ("*Indonesia Trip*"); *see also Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156 (1982); and whether a foreign government is a substantial source of funding for the entity, *see Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 (1987) ("*International Historians*"). No one of these factors has been dispositive. We have looked to them in combination to assess the status of the decisionmaking entity for purposes of the Clause, keeping in mind the underlying purpose that the Clause serves. *See, e.g.*, Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* at 4–5 (May 23, 1986) ("*NASA Scientist*") ("The answer to the Emoluments Clause question . . . must depend [on] whether the consultancy would raise the kind of concern (viz., the potential for 'corruption and foreign influence') that motivated the Framers in enacting the constitutional prohibition").

Although the question is close, we believe that the Göteborg Award Association, acting through the jury, is not an instrumentality of a foreign

state for purposes of the Emoluments Clause. As you have told us, the Association is governed by a Board, a majority of whose members are City officials. For the Emoluments Clause analysis, however, this fact is less significant than the composition of the entity that actually selects award recipients. The selection is made not by the Association as a whole or by its Board, but by the jury of seven private individuals, without interference from the Association's members, including the municipal government. To be sure, the bylaws of the Association designate the Board as the "ultimate decisionmaker," and we assume that this control could potentially include the authority to veto the jury's selection of award winners. Our Office's precedents nonetheless suggest that such ultimate authority is not dispositive where, as here, there is a strong indication that the decision at issue was in fact made autonomously and without governmental influence.

In our *Foreign Public Universities* opinion, for example, we considered whether the University of British Columbia's hiring of faculty members was so independent of the provincial government's control as not to implicate the Emoluments Clause. We acknowledged that the University's faculty was "constituted by the board [of governors]," a majority of whose members were appointed by the provincial government. 18 Op. O.L.C. at 14–15, 22. We nevertheless determined that the Emoluments Clause was inapplicable, in significant part because there was no evidence of a governmental effort to influence the University's faculty hiring decisions. *Id.* at 15 ("[T]he [U]niversity can be shown to be acting independently of the foreign state with respect to its faculty employment decisions."); *id.* at 20–21 ("'There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative.'" (quoting *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229, 269, 273 (Can.))); *id.* at 20 (noting "the autonomy of the provincial universities when making faculty employment decisions"). Despite the board of governors' "ultimate" control over the constitution of the faculty, *id.* at 20, faculty hiring decisions were, in practice, made autonomously by the University itself.[4]

[4] We acknowledge that, in the *Foreign Public Universities* opinion, decisions of Canadian courts had affirmed the independence of the universities from day-to-day control by

Similarly, while the Board of the Göteborg Association may formally be the "ultimate decisionmaker" with respect to various aspects of the Göteborg Award, neither the Board nor the City of Göteborg has dictated the selection of recipients. Indeed, the Secretary of the Board, Lennart Wassenius, has represented that "[d]uring [his] close to ten years with the [A]ssociation it has been absolutely clear that the jury de facto has the complete control of and the full responsibility for the selection process as well as the final decision as regards the award. The Board has never discussed less so questioned, the work of the jury." Jacobi E-mail, *supra* note 1 (emphases deleted).[5]

Besides looking to whether the government makes the ultimate decision as to the conferral of a gift or emolument, our opinions indicate that a substantial amount of government funding may help to establish that an institution is an instrumentality of a "foreign State" for the purposes of the Emoluments Clause. For instance, our conclusion that a commission of international historians was a foreign state within the meaning of the Clause was based on the "Commission's establishment and funding" by the Austrian government. *International Historians*, 11 Op. O.L.C. at 89–90.

The presence of some public funding, however, does not necessarily mean that an institution counts as a "foreign State." Although the existence of significant public funding raises the potential for foreign governmental influence, other evidence of an entity's independence may establish that the Emoluments Clause does not apply. The more an entity is financed by a foreign government, the more likely it is that the state exercises control over that entity's decision to confer a present or emolu-

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the government, 18 Op. O.L.C. at 20 (citing *Harrison v. Univ. of British Columbia*, [1990] 3 S.C.R. 451 (Can.); *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229 (Can.)), while here the conclusion that the jury is independent does not rest on a foreign judicial determination. The issue here is thus closer than in our earlier opinion. Even in *Foreign Public Universities*, however, we observed that the Canadian court cases, while "compelling evidence" of independence, "cannot of course determine our interpretation of the Emoluments Clause." *Id.* at 22. The question, here as there, is whether the decisionmaking entity is free from governmental control when it makes its selection.

[5] The Board does appoint the jury members, but in view of the private composition of the jury and its de facto autonomy in selecting award recipients, we do not view the Board's "appointment authority . . . as having dispositive significance." *Nobel Peace Prize*, 33 Op. O.L.C. at 384.

ment. A greater measure of public funding would require correspondingly stronger evidence that the foreign government does not in fact retain control over the decision at issue. Nevertheless, even when a foreign government was the sole source of funding for an institution, we have determined that the particular institution was not a foreign state because of its "functional and operational separation and independence" from the government. *See NASA Scientist* at 4. Such considerations of autonomy also informed our view that a federal officer could serve as a consultant to Harvard University on a project funded substantially, if not entirely, by the government of Indonesia. *See Indonesia Trip* at 5. Despite the funding by the foreign government, we determined that the Emoluments Clause did not apply because "Harvard has complete discretion in the selection" of consultants and Indonesia "neither controls nor even influences . . . [Harvard's] selection and payment of consultants." *Id.* at 4–5. Here, similarly, although the City of Göteborg's contribution of one-third of the Association's annual funding is significant, this factor does not outweigh the jury's consistent ten-year practice of selecting both the nominees for and ultimate recipients of the award without governmental interference.

On the facts presented, we accordingly conclude that the NOAA scientist's receipt of the award would not violate the Emoluments Clause.

III.

The reasons making the Emoluments Clause inapplicable also lead to the conclusion that the NOAA scientist may accept the Göteborg Award without violating the Foreign Gifts and Decorations Act. The Act generally bars the acceptance of "gifts and decorations" from "foreign government[s]" except under certain limited circumstances. 5 U.S.C. § 7342(b)(2) (2006); *id.* § 7342(a)(3) (defining "gift" to mean "a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government"). We need not address whether any of those exceptions would apply here because we do not believe that the scientist would be receiving an award "tendered by, or received from, a foreign government."

In pertinent part, the Act defines the term "foreign government" to mean:

> (A) any unit of foreign governmental authority, including any foreign national, State, local, and municipal government;
>
> . . . and
>
> (C) any agent or representative of any such unit or such organization, while acting as such.

Id. § 7342(a)(2).

Our Office previously gave some guidance about this definitional provision in the context of a prize awarded by the Alexander Von Humboldt Foundation. *See* Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983) ("*Von Humboldt Foundation*"). The Foundation was established and mainly financed by the West German government, and we noted that the West German government was undoubtedly a "unit of foreign governmental authority." *Id.* at 2. Yet we explained that it was not necessary "to go into the questions whether, in view of its intimate connection with the German Government, the Foundation should always be considered a foreign government." *Id.* at 3. Under the statute, the relevant question was instead whether the Alexander Von Humboldt Foundation was a "foreign government, as defined in section 7342(a)(2)(C), while it [was] acting as the agent for the German Government in connection with the administration of [the award program]." *Id.*; *see also* 5 U.S.C. § 7342(a)(2)(C) ("agent or representative . . . *while acting as such*" (emphasis added)). On the facts, we concluded that the Foundation was acting as an agent in awarding the prize. In particular, ministers of the German government sat not only on the Board of the Foundation, but also on the special committee of the Foundation that selected the award recipients.[6]

This prior interpretation of the Act supports the conclusion that the Göteborg Association is not a "foreign government" within the meaning of the Act. Although, as a "local" or "municipal government," the City of Göteborg is a "unit of foreign governmental authority," 5 U.S.C. § 7342(a)(2)(A), we do not believe that this definition of "foreign gov-

[6] Although we concluded that the award was from a foreign government, we advised that the award could be accepted because it fell within the Act's exception for "educational scholarship[s]." *Von Humboldt Foundation* at 4 (citing 5 U.S.C. § 7342(c)(1)(B)).

ernment" applies to the Göteborg Award Association, which is registered as a non-governmental entity under Swedish law, when it acts through its award jury consisting of private persons. To be sure, the City's representation on the Association's Board makes it theoretically possible that the Association could function as an agent or representative of the City for certain purposes, but the critical question is whether the Association acts as an agent or representative of the City in determining the winners of the award. *Id.* § 7342(a)(2)(C); *see also Von Humboldt Foundation* at 1. As explained above, the Association has assigned a jury of private persons the authority to select the recipients of the Göteborg Award—a decision made without interference by either the Board or the Association's members, including the city government. The Board does appoint the award jury's members, but the jury's private composition and decisional autonomy refute the idea that the jury members act as "agents or representatives" of the City when they choose the recipients of the Göteborg Award. Furthermore, unlike the special committee of the Von Humboldt Foundation, the Göteborg Award Association does not distribute a wholly (or even mostly) government-financed award. *See Von Humboldt Foundation* at 2. The majority of the Association's funding (two-thirds) comes from private businesses. The Act consequently poses no bar to the scientist's acceptance of the Göteborg Award.

IV.

For the foregoing reasons, we conclude that neither the Emoluments Clause nor the Foreign Gifts and Decorations Act would prohibit the NOAA scientist from accepting the Göteborg Award.[7]

DANIEL L. KOFFSKY
Deputy Assistant Attorney General
Office of Legal Counsel

[7] We address here only the Emoluments Clause and the Foreign Gifts and Decorations Act. In particular, we do not consider 5 C.F.R. § 2635.502(d) (2010), a provision in the Standards of Ethical Conduct for Employees in the Executive Branch dealing with acceptance of awards.

Special Master for Troubled Asset Relief Program Executive Compensation

The Special Master for Troubled Asset Relief Program Executive Compensation is not a principal officer for purposes of the Appointments Clause and thus need not be appointed by the President, by and with the advice and consent of the Senate.

November 5, 2010

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY
AND THE
SPECIAL INSPECTOR GENERAL
TROUBLED ASSET RELIEF PROGRAM

You have asked for our opinion whether the Special Master for Troubled Asset Relief Program Executive Compensation ("Special Master") is a principal officer for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and thus must be appointed by the President, by and with the advice and consent of the Senate.[1] The position of Special Master was created by the Secretary of the Treasury, who has charged the Special Master with assisting in the enforcement of the executive compensation and corporate governance requirements established under the Emergency Economic Stabilization Act ("EESA"), Pub. L. No. 110-343, § 111, 122 Stat. 3765, 3776–77 (2008) (as amended). *See* 31 C.F.R. § 30.16(a) (2010). For the reasons that follow, we conclude that the Special Master is not a principal officer.[2]

[1] *See* Letter for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Neil M. Barofsky, Special Inspector General, Office of the Special Inspector General for the Troubled Asset Relief Program (Aug. 20, 2010) ("SIGTARP Letter"). The Treasury Department General Counsel's request was conveyed orally.

[2] Both the Treasury Department General Counsel and the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") premise their shared opinion request on the assumption that the Special Master is an officer of the United States. We take that assumption as a given for purposes of this memorandum.

I.

On October 3, 2008, in the midst of a major crisis affecting the Nation's financial system, Congress enacted the EESA to provide the Secretary of the Treasury with immediate authority and facilities "to restore liquidity and stability to the financial system of the United States." 12 U.S.C. § 5201(1) (2006 & Supp. III 2009). Generally speaking, the "EESA vests the Secretary with the flexibility and power to take bold actions necessary to stabilize the economy." *In re Motors Liquidation Co.*, 430 B.R. 65, 94 (S.D.N.Y. 2010).

Title I of the EESA authorizes the Secretary "to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary." 12 U.S.C. § 5211(a)(1). Section 111 of the EESA, as amended, *see* Pub. L. No. 111-22, § 403, 123 Stat. 1632, 1658 (2009); Pub. L. No. 111-5, § 7001, 123 Stat. 115, 516–20 (2009), imposes requirements on TARP recipients related to corporate governance and executive compensation. *See* 12 U.S.C. § 5221. Subsections (b), (f), and (h) of that section are of particular relevance to determining the status of the Special Master. Subsection (b) provides that "[t]he Secretary shall require each TARP recipient to meet appropriate standards for executive compensation and corporate governance," *id.* § 5221(b)(2); *see also id.* § 5221(b)(1) ("During the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, each TARP recipient shall be subject to . . . the standards established by the Secretary under this section"), and it establishes a series of specific requirements that must be included in those standards, *see id.* § 5221(b)(3).[3] Subsection (f) directs

[3] Those requirements include:

> (A) Limits on compensation that exclude incentives for senior executive officers of the TARP recipient to take unnecessary and excessive risks that threaten the value of such recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.
>
> (B) A provision for the recovery by such TARP recipient of any bonus, retention award, or incentive compensation paid to a senior executive officer and any of the next 20 most highly-compensated employees of the TARP recipient based on

statements of earnings, revenues, gains, or other criteria that are later found to be materially inaccurate.

(C) A prohibition on such TARP recipient making any golden parachute payment to a senior executive officer or any of the next 5 most highly-compensated employees of the TARP recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

(D) (i) A prohibition on such TARP recipient paying or accruing any bonus, retention award, or incentive compensation during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, except that any prohibition developed under this paragraph shall not apply to the payment of long-term restricted stock by such TARP recipient, provided that such long-term restricted stock—

(I) does not fully vest during the period in which any obligation arising from financial assistance provided to that TARP recipient remains outstanding;

(II) has a value in an amount that is not greater than 1/3 of the total amount of annual compensation of the employee receiving the stock; and

(III) is subject to such other terms and conditions as the Secretary may determine is in the public interest.

(ii) The prohibition required under clause (i) shall apply as follows:

(I) For any financial institution that received financial assistance provided under the TARP equal to less than $25,000,000, the prohibition shall apply only to the most highly compensated employee of the financial institution.

(II) For any financial institution that received financial assistance provided under the TARP equal to at least $25,000,000, but less than $250,000,000, the prohibition shall apply to at least the 5 most highly-compensated employees of the financial institution, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

(III) For any financial institution that received financial assistance provided under the TARP equal to at least $250,000,000, but less than $500,000,000, the prohibition shall apply to the senior executive officers and at least the 10 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

(IV) For any financial institution that received financial assistance provided under the TARP equal to $500,000,000 or more, the prohibition shall apply to the senior executive officers and at least the 20 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

(iii) The prohibition required under clause (i) shall not be construed to prohibit any bonus payment required to be paid pursuant to a written employment contract executed on or before February 11, 2009, as such valid employment contracts are determined by the Secretary or the designee of the Secretary.

the Secretary to "review bonuses, retention awards, and other compensation paid to the senior executive officers and the next 20 most highly-compensated employees of each entity receiving TARP assistance before February 17, 2009, to determine whether any such payments were inconsistent with the purposes of this section or the TARP or were otherwise contrary to the public interest." *Id.* § 5221(f). Subsection (h) requires the Secretary to "promulgate regulations to implement this section." *Id.* § 5221(h).

Section 101(c) of the EESA provides that "[t]he Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in [the EESA]." 12 U.S.C. § 5211(c). These authorities include, "without limitation," "direct hiring authority with respect to the appointment of employees to administer [the EESA]," *id.* § 5211(c)(1), and "[i]ssuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of [the EESA]," *id.* § 5211(c)(5).

On June 15, 2009, the Secretary issued an Interim Final Rule on TARP Standards for Compensation and Corporate Governance ("Interim Rule"). *See* 74 Fed. Reg. 28,394–423 (codified at 31 C.F.R. pt. 30). The Interim Rule, which became effective on the day it was issued, *see* 74 Fed. Reg. at 28,423; 31 C.F.R. § 30.17 (2010), elaborates the specific standards and other requirements relating to corporate governance and executive compensation that section 111 of the EESA establishes for TARP recipients.

To ensure that these requirements are applied "efficiently," "consistently," and "equitably," the Interim Rule further provides that the Secretary "shall establish the Office of the Special Master for TARP Executive Compensation." 74 Fed. Reg. at 28,403; 31 C.F.R. § 30.16(a). The Special Master is to "be appointed by, and serve at the pleasure of, the Secretary," and "may be removed by the Secretary without notice, without cause, and prior to the naming of any successor Special Master." *Id*. The Interim

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(E) A prohibition on any compensation plan that would encourage manipulation of the reported earnings of such TARP recipient to enhance the compensation of any of its employees.

(F) A requirement for the establishment of a Board Compensation Committee that meets the requirements of subsection (c).

12 U.S.C. § 5221(b)(3).

Rule delegates to the Special Master certain of the Secretary's "powers, duties, and responsibilities" relating to enforcement of the Act. *Id*. These delegated functions include: (1) interpreting how the requirements on executive compensation and corporate governance established under section 111 of the EESA, the Interim Rule, and any other applicable guidance apply to TARP recipients and their employees; (2) determining whether compensation paid to employees of TARP recipients prior to February 17, 2009 was "inconsistent with the purposes of section 111 of [the] EESA or TARP, or otherwise contrary to the public interest," and, if so, negotiating with the TARP recipient and the compensated employee for appropriate reimbursement to the government; (3) determining whether to approve compensation payments to, and compensation structures for, certain highly compensated employees of TARP recipients receiving financial assistance defined by the Interim Rule as "exceptional financial assistance"; and (4) issuing advisory opinions on compensation payments to, and compensation structures for, certain employees of TARP recipients generally. *Id*. § 30.16(a)(1)–(4). In making determinations under paragraphs (2) or (3) and in offering opinions under paragraph (4), the Special Master must follow a set of principles outlined in the Interim Rule. *See id*. § 30.16(a)(2)–(4).[4]

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[4] The Interim Rule provides:

> In reviewing a compensation structure or a compensation payment to determine whether it is inconsistent with the purposes of section 111 of EESA or TARP or is otherwise contrary to the public interest, the Special Master shall apply the principles enumerated below. The principles are intended to be consistent with sound compensation practices appropriate for TARP recipients, and to advance the purposes and considerations described in EESA sections 2 and 103, including the maximization of overall returns to the taxpayers of the United States and providing stability and preventing disruptions to financial markets. The Special Master has discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment under consideration, such as whether a payment occurred in the past or is proposed for the future, the role of the employee within the TARP recipient, the situation of the TARP recipient within the marketplace and the amount and type of financial assistance provided. To the extent that two or more principles may appear inconsistent in a particular situation, the Special Master will determine the relative weight to be accorded each principle. In the case of any review of payments already made under paragraph (c)(2) of this section, or of any rights to bonuses, awards, or other compensation already granted, the Special Master shall apply these principles

by considering the facts and circumstances at the time the compensation was granted, earned, or paid, as appropriate.

(i) Risk. The compensation structure should avoid incentives to take unnecessary or excessive risks that could threaten the value of the TARP recipient, including incentives that reward employees for short-term or temporary increases in value, performance, or similar measure that may not ultimately be reflected by an increase in the long-term value of the TARP recipient. Accordingly, incentive payments or similar rewards should be structured to be paid over a time horizon that takes into account the risk horizon so that the payment or reward reflects whether the employee's performance over the particular service period has actually contributed to the long-term value of the TARP recipient.

(ii) Taxpayer return. The compensation structure, and amount payable where applicable, should reflect the need for the TARP recipient to remain a competitive enterprise, to retain and recruit talented employees who will contribute to the TARP recipient's future success, and ultimately to be able to repay TARP obligations.

(iii) Appropriate allocation. The compensation structure should appropriately allocate the components of compensation such as salary, short-term and long-term incentives, as well as the extent to which compensation is provided in cash, equity or other types of compensation such as executive pensions, other benefits, or perquisites, based on the specific role of the employee and other relevant circumstances, including the nature and amount of current compensation, deferred compensation, or other compensation and benefits previously paid or awarded. The appropriate allocation may be different for different positions and for different employees, but generally, in the case of an executive or other senior level position a significant portion of the overall compensation should be long-term compensation that aligns the interest of the employee with the interests of shareholders and taxpayers.

(iv) Performance-based compensation. An appropriate portion of the compensation should be performance-based over a relevant performance period. Performance-based compensation should be determined through tailored metrics that encompass individual performance and/or the performance of the TARP recipient or a relevant business unit taking into consideration specific business objectives. Performance metrics may relate to employee compliance with relevant corporate policies. In addition, the likelihood of meeting the performance metrics should not be so great that the arrangement fails to provide an adequate incentive for the employee to perform, and performance metrics should be measurable, enforceable, and actually enforced if not met. The appropriate allocation and the appropriate performance metrics may be different for different positions and for different employees, but generally a significant portion of total compensation should be performance-based compensation, and generally that portion should be greater for positions that exercise higher levels of responsibility.

(v) Comparable structures and payments. The compensation structure, and amount payable where applicable, should be consistent with, and not excessive,

When acting under paragraphs (2) and (3), the Special Master must make an "initial determination" within 60 days of receiving a "substantially complete submission" from a TARP recipient. *Id.* § 30.16(c)(1). The TARP recipient then has 30 days to request reconsideration of the initial determination, and the Special Master must provide a "final determination" in writing within 30 days thereafter, setting forth the facts and analysis that formed the basis for the determination. *Id*. If the TARP recipient does not request reconsideration within 30 days, the initial determination "shall be treated as a final determination." *Id.*

The Interim Rule also specifies the effects of the Special Master's decisions. The Interim Rule provides that "[i]n the case of any final determination that the TARP recipient is required to receive, the final determination of the Special Master shall be final and binding and treated as the determination of the Treasury." *Id*. § 30.16(c)(2). "An advisory opinion of the Special Master," however, "shall not be binding upon any TARP recipient or employee, but may be relied upon by a TARP recipient or employee if the advisory opinion applies to the TARP recipient and the employee and the TARP recipient and employee comply in all respects with the advisory opinion." *Id*. § 30.16(c)(3).

Finally, the Interim Rule provides that the Special Master "shall have such other duties and powers related to the application of compensation issues arising in the administration of [the] EESA or TARP as the Secretary or the Secretary's designate may delegate to the Special Master, including, but not limited to, the interpretation or application of contrac-

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> taking into account compensation structures and amounts for persons in similar positions or roles at similar entities that are similarly situated, including, as applicable, entities competing in the same markets and similarly situated entities that are financially distressed or that are contemplating or undergoing reorganization.
>
> (vi) Employee contribution to TARP recipient value. The compensation structure, and amount payable where applicable, should reflect the current or prospective contributions of an employee to the value of the TARP recipient, taking into account multiple factors such as revenue production, specific expertise, compliance with company policy and regulation (including risk management), and corporate leadership, as well as the role the employee may have had with respect to any change in the financial health or competitive position of the TARP recipient.

31 C.F.R. § 30.16(b).

tual provisions between the Federal government and a TARP recipient as those provisions relate to the compensation paid to, or accrued by, an employee of such TARP recipient." *Id.* § 30.16(a)(5).[5]

II.

The Appointments Clause states:

> [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. As the Clause thus makes clear, officers of the United States fall into two basic categories: principal officers and inferior officers. *See*, *e.g.*, *United States v. Germaine*, 99 U.S. (9 Otto) 508, 509 (1878) ("The Constitution for purposes of appointment . . . divides all its officers into two classes."); *see also Morrison v. Olson*, 487 U.S. 654, 670 (1988). Principal officers must be appointed by the President, by and with the advice and consent of the Senate. Inferior officers must be appointed in the same manner, unless Congress "by Law vest[s] the[ir] Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2; *see Morrison*, 487 U.S. at 670–71; *Buckley v. Valeo*, 424 U.S. 1, 132

[5] The preamble to the Interim Rule characterizes the Special Master's residual authority as limited to matters arising under section 111 of the EESA. It states that "[t]he scope of the Special Master's authority and responsibility is limited to compensation and corporate governance matters *under section 111* with respect to TARP recipients, and the Special Master has no authority to provide guidance or review any submissions with respect to matters other than compensation and corporate governance matters *under section 111*, or to provide guidance or review any submissions with respect to compensation or corporate governance matters of employers that are not TARP recipients." 74 Fed. Reg. at 28,404 (emphasis added). The Treasury Department General Counsel's Office has informed us that the Secretary has not assigned any additional functions to the Special Master under this provision.

(1976) (per curiam). "[T]he terms of the Appointments Clause set out the only means by which Congress may provide for the appointment of 'Officers of the United States,'" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 139 (1996) (citing *Buckley*, 424 U.S. at 124–37), and "[n]either Congress nor the Executive can agree to waive this structural protection," *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991).

The Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") questions whether the Special Master is a principal officer because, in his view, "the Secretary appears to be without authority to control the actions of the Special Master in any . . . meaningful manner" other than removal. SIGTARP Letter at 5.[6] If the Special Master were indeed a principal officer, his appointment by the Secretary would not be in conformity with the Appointments Clause.

In our view, the Special Master is not a principal officer. The Supreme Court has "not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond v. United States*, 520 U.S. 651, 661 (1997). But in three decisions over the past quarter century the Court has set out a number of important guideposts by which to distinguish principal from inferior officers.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court considered whether an independent counsel appointed pursuant to the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (1988), was an inferior officer. It concluded that she was, based on four considerations. First, the Court noted that the independent counsel was "subject to removal by a higher Executive Branch official" (the Attorney General). *Morrison*, 487 U.S. at 671. The Court explained that this factor weighed in favor of viewing the independent counsel as an inferior officer even though "she possesse[d] a degree of independent discretion to exercise the powers delegated to her under the Act." *Id.* Second, the Court relied on the fact

[6] The Office of the Special Inspector General for the Troubled Asset Relief Program was created by the EESA. 12 U.S.C. § 5231(a). The Office is headed by a Special Inspector General—the SIGTARP—who is appointed by the President, with the advice and consent of the Senate. *Id.* § 5231(b). The duties of the SIGTARP include conducting audits and investigations of the Secretary's purchase, management, and sale of assets under the TARP and of the Secretary's management of the TARP, as well as conducting audits and investigations of other actions taken under the EESA. *Id.* § 5231(c)(1), (4).

that the independent counsel performed what it considered only "limited duties" because she was "restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes." *Id*. The Court acknowledged that the Ethics in Government Act gave the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," but thought it significant that "this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office." *Id*. at 671–72. Third, the Court stressed that the independent counsel's jurisdiction was relatively narrow, both because the Ethics in Government Act itself was "restricted in applicability to certain federal officials suspected of certain serious federal crimes" and because "an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General." *Id*. at 672. Fourth, the Court pointed out that the independent counsel's tenure was "limited" because while her office had no fixed term, it was "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated." *Id.*

Almost a decade after *Morrison*, the Court returned to the distinction between principal and inferior officers in *Edmond v. United States*, 520 U.S. 651 (1997). *Edmond* concerned civilians appointed by the Secretary of Transportation to serve as military judges on the Coast Guard Court of Criminal Appeals. The Supreme Court concluded that the judges were inferior officers, but it characterized the factors it had relied on in *Morrison* as not "definitive" and adopted a somewhat different approach. *Id*. at 661.

The Court acknowledged that judges on the Coast Guard Court of Criminal Appeals did not have a "narrow" jurisdiction or "limited" tenure, as those terms had been used in *Morrison*, and that the third and fourth considerations discussed in *Morrison* thus cut against characterizing the judges as inferior officers. *Id*. It nonetheless deemed them inferior officers because their work was "directed and supervised at some level by other [officers] who were appointed by Presidential nomination with the advice and consent of the Senate." *Id*. at 663. That supervision, the Court

explained, was carried out by two Executive Branch actors. The Judge Advocate General of the Coast Guard (the Secretary of Transportation's subordinate) "exercise[d] administrative oversight over the Court of Criminal Appeals" in that the Judge Advocate General established the court's rules of procedure, could order any of its decisions submitted for review, and could remove judges without cause. *Id.* at 664, 666. And the Court of Appeals for the Armed Forces (an Executive Branch tribunal) could review and reverse the lower tribunal's decisions, and prevent any final order from being issued. *Id.* at 664–65. Thus, "[w]hat is significant," the Supreme Court explained, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

Rather than listing a number of non-exclusive factors as it had done in *Morrison*, then, the Court in *Edmond* appeared to offer one overall standard for identifying inferior officers. "Generally speaking," the Court stated, "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Id*. at 662. At the same time, the Court indicated that determining whether an officer has a superior in this sense may well require considering a number of factors, including whether the officer is removable by an Executive Branch official below the President and whether the officer's work "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id*. at 663.

Earlier this year, the Supreme Court followed the *Edmond* approach for distinguishing inferior from principal officers in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3139 (June 28, 2010). In *Free Enterprise Fund*, the Court considered separation of powers and Appointments Clause challenges to the structure of the Public Company Accounting Oversight Board ("PCAOB"), a statutorily created entity with "expansive powers to govern [the accounting] industry." *Id.* at 3147. The statute establishing the PCAOB, the Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7211–7219 ("SOX Act"), provided for the Securities and Exchange Commission ("SEC") to appoint

the PCAOB's members.[7] The SOX Act also granted the SEC "[b]road power over [the PCAOB] functions," *id*. at 3148, including approving the PCAOB's budget, issuing regulations that bind it, relieving the PCAOB of authority, amending and denying approval for PCAOB sanctions and rules, and enforcing PCAOB rules on its own. *See id.* at 3158. Under the SOX Act as enacted, however, the SEC could remove PCAOB members only "'for good cause shown,'" "'in accordance with'" specified procedures. *Id.* at 3148 (quoting 15 U.S.C. § 7211(e)(6)). The Court held that the resulting dual for-cause limitations on the President's ability to remove PCAOB members—with the SEC Commissioners removable by the President only for good cause, and the PCAOB members removable by the SEC only for another, more restrictive type of good cause specified in the SOX Act—was "contrary to Article II's vesting of the executive power in the President," and therefore violated the separation of powers. *Id.* at 3147, 3154. To remedy the infirmity, the Court excised from the SOX Act the provision making PCAOB members removable only for cause, thus rendering them removable by the SEC at will.

Turning to the Appointments Clause challenge under this modified statutory structure, the Court concluded that the PCAOB's members were properly appointed inferior officers. "Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will," the Court explained, "and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers." *Id.* at 3162.

Both *Edmond* and *Free Enterprise Fund* indicate that the level of direction and supervision exercised by a superior over a subordinate need not be total for the subordinate to qualify as an inferior officer. In *Edmond*, for example, the Court acknowledged that the scope of substantive review that the Court of Appeals for the Armed Forces exercised over the Court of Criminal Appeals "is narrower than that exercised by the Court of Criminal Appeals," because "so long as there is some competent evidence

[7] The parties stipulated that SEC Commissioners could not be removed by the President except for "'inefficiency, neglect of duty, or malfeasance in office,'" and the Court decided the case based on that understanding. *Free Enterprise Fund*, 130 S. Ct. at 3148–49.

in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts." 520 U.S. at 665. What was "significant" in concluding that the Court of Criminal Appeals judges nonetheless were inferior officers, however, was that they "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. Similarly, in *Free Enterprise Fund*, the Court rejected the proposition that the SEC's power over the PCAOB's activities was "plenary." 130 S. Ct. at 3159. Rather, the Court observed, the PCAOB "is empowered to take significant enforcement actions, and does so largely independently of the Commission"; indeed, "the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations." *Id.*; *see also id.* at 3159 ("The Board . . . has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction."). Thus, *Edmond* and *Free Enterprise Fund* make clear (as had *Morrison*) that an executive official can exercise some level of independent authority and still qualify as an inferior officer, so long as it can be said that the official "is directed and supervised *at some level* by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663 (emphasis added).

III.

Applying the principles established by the Supreme Court, we think it clear that the Special Master is not a principal officer. If one looks to the four *Morrison* factors—removal, duties, jurisdiction, and tenure—they all point in favor of the conclusion that the Special Master is not a principal officer. The Special Master is subject to at-will removal by the Secretary (without "notice" or "cause"). 31 C.F.R. § 30.16(a). The Special Master's duties are limited. As indicated above, they consist of interpreting EESA-related requirements on TARP recipients' executive compensation and corporate governance, negotiating reimbursements for improper compensation payments made by TARP recipients before February 17, 2009, determining whether to approve compensation payments and structures relating to certain employees of TARP recipients receiving "exceptional financial assistance," and issuing advisory opinions. *See supra* pp. 222–

226 & note 4. Like the independent counsel in *Morrison*, the Special Master thus lacks both "authority to formulate policy for the Government or the Executive Branch" and significant administrative duties. 487 U.S. at 671–72.[8] While the Special Master is entrusted with authority to interpret section 111 of the EESA, the Interim Rule, and related guidance, the Special Master is authorized to do so only in applying those provisions to the compensation practices of particular TARP recipients and certain of their employees. The Special Master's jurisdiction is limited to TARP recipients' executive compensation and corporate governance. *See id.* And the Special Master's tenure is limited to the duration of the Secretary's authority under section 111 of EESA, namely "the period in which any obligation arising from financial assistance provided under the TARP remains outstanding." 12 U.S.C. § 5221(b)(1). The Special Master, then, bears each of the marks of inferior officer status attributed to the independent counsel in *Morrison*.

If one looks not to the *Morrison* factors, but instead to the *Edmond* considerations of whether the Special Master is removable by an officer other than the President and whether the Special Master's work is subject to "some level" of "direct[ion] and supervis[ion]" by an official appointed by the President, with the advice and consent of the Senate—here, the Secretary of the Treasury—again we think it clear that the Special Master is not a principal officer. 520 U.S. at 663.

First, the Special Master is removable by the Treasury Secretary at will. The Special Master serves "at the pleasure of the Secretary, and may be removed by the Secretary without notice, without cause, and prior to the naming of any successor Special Master." 31 C.F.R. § 30.16(a). As the Supreme Court has remarked more than once, "[t]he power to remove

[8] Under the Interim Rule's residual clause, the Special Master may also be given those "duties and powers related to the application of compensation [and corporate governance] issues arising in the administration of [the] EESA or TARP as the Secretary or the Secretary's designate may delegate to the Special Master." *Id.* § 30.16(a)(5). But while the outer limit of those potential duties—none of which has been granted—is not precisely defined, the clause by its terms encompasses only the "application" of compensation issues. *Id.* Accordingly, we do not believe that the clause contemplates the Secretary's delegation to the Special Master of authorities under section 111 that might be characterized as more closely resembling policymaking, such as the establishment of executive compensation and corporate governance standards. *Cf.* 12 U.S.C. § 5221(b)(2).

officers . . . is a powerful tool for control." *Edmond*, 520 U.S. at 664 (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) and *Myers v. United States*, 272 U.S. 52 (1927)); *see Free Enterprise Fund*, 130 S. Ct. at 3162 ("'[t]he power to remove officers' at will and without cause 'is a powerful tool for control' of an inferior" (quoting *Edmond*)).

Second, the Treasury Department has reasonably construed the Interim Rule as not precluding the Treasury Secretary from reviewing and revising the Special Master's determinations should the Secretary choose to exercise that authority.

Whether the Interim Rule permits the Special Master's determinations to be reviewed by the Treasury Secretary is a point of contention between the SIGTARP and the Treasury Department. The SIGTARP argues that the Interim Rule insulates the Special Master's determinations from secretarial review. He notes that the Interim Rule "does not expressly authorize any internal approval or review of the Special Master's actions." SIGTARP Letter at 8. Instead, by making the "final determinations" of the Special Master "final and binding" and "treated as the determination of the Treasury," the SIGTARP contends, the Interim Rule precludes further review. *Id.* The Treasury Department, by contrast, takes the view that the Special Master's "decisions remain subject to further review within the Treasury."[9]

Our approach to this question is informed by the familiar principle that the Secretary's interpretation of his own regulations is entitled to deference "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), in turn quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). We think the Treasury Department's interpretation of the Interim Rule readily meets that standard.

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[9] Letter for Bryan Saddler, Chief Counsel, SIGTARP, from Timothy G. Massad, Chief Counsel, Office of Financial Stability, at 2 (Mar. 26, 2010); *see* Letter for Bryan Saddler, Chief Counsel, Special Inspector General for the Troubled Asset Relief Program, Department of the Treasury, from Timothy G. Massad, Chief Counsel, Office of Financial Stability, at 1 (July 29, 2010) ("the decisions of the Special Master are subject to review (i.e., can be reviewed) by other officials within Treasury"). The Treasury Department General Counsel's Office has confirmed for us that these statements reflect the view of the Secretary of the Treasury.

The Interim Rule's lack of an express authorization for secretarial review of the Special Master's determination does not imply preclusion of such review. On the contrary, by statute the Secretary is "the head of the Department," 31 U.S.C. § 301(b), and is vested with the "[d]uties and powers of the officers and employees of the Department," *id*. § 321(c). In our view, these statutes create a strong presumption that officials within the Department are subject to the Secretary's supervision, including the authority to review and reverse their decisions. This default rule may be overcome, we have suggested, when there is "specific and explicit *reservation* of 'final decisionmaking *power*' in a subordinate official," in the sense of a preclusion of the presumptive reviewing authority possessed by the department head. Memorandum for the Deputy Attorney General from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Attorney General Over the National Institute of Justice and the Bureau of Justice Statistics* at 2 (Oct. 14, 1980) ("NIJ/BJS Memo") (emphasis added); *see also Under Secretary of Treasury for Enforcement*, 26 Op. O.L.C. 230, 232–33 (2002) (applying similar principle to Treasury Department). But we think it reasonable to conclude that the Interim Rule lacks a clear enough preclusion of secretarial review to overcome the presumption of secretarial supervisory authority.

To be sure, the Interim Rule characterizes the Special Master's final determinations as "final and binding" and directs that they be "treated as the determination of the Treasury." 31 C.F.R. § 30.16(c)(2). But those phrases by themselves do not necessarily, or even most naturally, amount to the sort of specific and explicit reservation of decision-making power in the Special Master that would insulate the Special Master's final determinations from secretarial review. Indeed, on at least two occasions we have concluded that similar phrases were inadequate to demonstrate an intent to insulate subordinate officials' decisions from review by the head of a Department. See Memorandum for Alan C. Raul, General Counsel, Department of Agriculture, from Doug R. Cox, Deputy Assistant Attorney General, *Re: Secretary of Agriculture Review of ALJ Decisions* (Feb. 20, 1991) (statute providing that subordinate officials' decisions "shall be final" and "shall take effect" thirty days after notice of their delivery did not prohibit issuance of regulations providing for secretarial review); *Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 10–13 (1991) ("*Secretary of Educa-*

tion Review") (statute providing that an administrative law judge's decision "shall be considered to be a final agency action" did not preclude further agency review). As we explained in the earlier of those opinions, when a statute (or regulation) refers to a decision as "final agency action" it is often "understood to mean that action which is necessary and sufficient for judicial review" under the Administrative Procedure Act even though the decision may be "subject to reconsideration or appeal to a higher authority within the agency." *Id*. at 10–11; *cf. Darby v. Cisneros*, 509 U.S. 137, 144–47 (1993) (explaining that agency decisions may be final for purposes of judicial review even though additional, optional levels of administrative review may be available). As we made clear in the later of those prior opinions, we have concluded that it was reasonable to attach the same interpretation to a statute (or regulation) that characterizes an official's decision as "final." *Secretary of Agriculture Review*, 15 Op. O.L.C. at 1–2.[10]

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[10] The SIGTARP contends that our opinion in Secretary of Education Review of ALJ Decisions is "largely inapposite" because the statute at issue there and the Interim Rule differ in two material respects. SIGTARP Letter at 6. First, the SIGTARP points out that the statute at issue in *Secretary of Education Review* used the phrase "*shall be considered to be* a final agency action," whereas the Interim Rule provides that "final determinations" of the Special Master "*shall be* final and binding and treated as the determination of the Treasury." SIGTARP Letter at 6–7. We do not think, however, that the absence of the verb "considered" is decisive (particularly given the Interim Rule's use of the similar verb "treated"). Indeed, we have previously rejected such a distinction. Admittedly, in *Secretary of Education Review*, we determined that Congress's use of "shall be considered" instead of the more unequivocal "shall be" made it easier to conclude that Congress did not intend to preclude further agency review. 15 Op. O.L.C. at 10. "[L]anguage that the ALJ's decision 'shall be the final agency action'," we explained, "would, at a minimum, present a question as to whether Congress intended for the ALJ decision to be final in the sense that no further agency review is available." *Id*. at 10 n.3. Nevertheless, we concluded that it was "unlikely that we would construe even this language to express an intent to foreclose secretarial review, absent affirmative evidence that Congress so intended." *Id*. A month later we made good on that prediction by finding that a statute using the phrase "shall be final"—without the "considered" phrasing—also did not preclude secretarial review. *Secretary of Agriculture Review* at 1–2. Second, the SIGTARP emphasizes that the statute at issue in *Secretary of Education Review* used the phrase "final agency action," a term borrowed almost directly from the Administrative Procedure Act, *see* 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court [is] subject to judicial review"), while the Interim Rule uses "final determination" and "final and binding." *See* SIGTARP Letter at 7. Again, we hardly think that difference is decisive, as our memorandum on *Secretary of Agriculture Review*, which addressed a

Similarly, the Interim Rule's characterization of the Special Master's final determinations as "final and binding" may reasonably be understood as intended not to insulate the Special Master's decisions from secretarial review, but instead to make clear when the Special Master's decisions take effect and thus become ripe for judicial review. This understanding draws support from the Interim Rule's distinction between "initial determinations" and "final determinations." 31 C.F.R. § 30.16(c)(1). After the Special Master renders an "initial determination," the TARP recipient has 30 days to request reconsideration, and the Special Master must provide a "final determination" in writing within 30 days thereafter, setting forth the facts and analysis that formed the basis for the determination. *Id*. If the TARP recipient does not request reconsideration within 30 days, the initial determination "shall be treated as a final determination." *Id.* Initial determinations trigger a deadline for a reconsideration request; final determinations impose an obligation to abide by the Special Master's directives and thus signal an entitlement to seek judicial review. Given these other legal effects, we do not see any reason to conclude that the terms "final and binding" in the Interim Rule must be read to have the additional effect of insulating the Special Master's decisions from further review by the Secretary.

A comparison of the Interim Rule with a regulation the Supreme Court has found to impose a limitation on review by the head of a department underscores the point that the Treasury Department's understanding of the Interim Rule as not involving such elimination of secretarial review is reasonable. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court found that a regulation delegating authority in certain matters to a Special Prosecutor and providing that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions" shielded the Special Prosecutor's decisions from revision by the Attorney General. *Id*. at 694 n.8. That language is much more direct and specific than the language in the Interim Rule. It constitutes the sort of "specific and explicit reservation of 'final decisionmaking power'" that we have indicated would be necessary to shield a subordinate official's decisions from review by a Department head.

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statute characterizing officials' decisions as "final" (rather than as "final agency action"), indicates.

For all these reasons, we think the Treasury Department's interpretation of the Interim Rule as not precluding secretarial review of the Special Master's determinations is not plainly erroneous or inconsistent with the Interim Rule.[11]

A third consideration, not necessary to our analysis, may offer some further support for the conclusion that the Special Master is not a principal officer. The Secretary has established the specific functions of the Special Master by regulation and thus may alter the Special Master's powers, or even abolish the position, by regulation. The degree of incremental control this regulatory power over the Special Master affords the Secretary is not clear, given both that (i) were the Secretary to eliminate or modify the position of Special Master, he would need to do so by regulation, and that revising regulation would have to conform to statutes

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[11] We do not mean to suggest that use of the term "final," when considered in context and in conjunction with other considerations, may never lead to the conclusion that a statute or regulation was intended to insulate a subordinate official's decisions from review by the head of a Department. In at least one instance, for example, we have advised that an explicit statutory delegation of "final authority over all grants, cooperative agreements, and contracts" to the "Directors" of certain entities established by statute within the Department of Justice precluded the Attorney General from overturning the Directors' decisions. NIJ/BJS Memo at 2. But our reasoning in reaching that conclusion only confirms the reasonableness of interpreting the Interim Rule as not precluding secretarial review.

First, the statute at issue in that earlier memorandum did not characterize the subordinate officials' individual decisions as "final," let alone contrast such "final determinations" with "initial determinations," as the Interim Rule does. Rather, that statute endowed those officials with "final *authority*" over several classes of decisions. *Id*. at 1 (emphasis added). The latter wording is not easily understood as simply identifying certain decisions as ready for judicial review; instead it is much more readily understood as granting certain officials the last word in the Department. Second, as we noted, the legislative history of the statute at issue in that memorandum supported the conclusion that Congress intended the Directors created by the statute to be protected from reversal by the Attorney General. *See id*. Third, the Directors, unlike the Special Master, were appointed by the President, with the advice and consent of the Senate. *Id*. That eliminated any concern rooted in the Appointments Clause that might have counseled against finding that the Directors' decisions were shielded from review by the Attorney General. Here, such constitutional avoidance concerns would, if anything, support the reasonableness of reading the Interim Rule as not precluding secretarial review of the Special Master's decisions. *See generally Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 352 (1995) (describing avoidance canon and noting its use in Executive Branch legal interpretation).

placing procedural limits on the Secretary's rulemaking authority and that (ii) the Special Master is already subject to removal by the Secretary without cause.[12] But this power may represent some small additional lever of "direct[ion] and supervis[ion]." *Edmond*, 520 U.S. at 663.

IV.

Accordingly, whether we apply the *Morrison* or the *Edmond* analysis, the Special Master is not a principal officer and therefore need not be appointed by the President, by and with the advice and consent of the Senate.

JONATHAN G. CEDARBAUM
Acting Assistant Attorney General
Office of Legal Counsel

[12] *Compare Morrison*, 487 U.S. at 721 (Scalia, J., dissenting) (characterizing power of "amending or revoking [an authorizing] regulation" as a means of at-will removal); *and In re Sealed Case*, 829 F.2d 50, 56–57 (D.C. Cir. 1987) (Attorney General's ability to abolish position of Iran-Contra Independent Counsel by rescinding authorizing regulation supports conclusion that Independent Counsel is not a principal officer), *with Free Enterprise Fund*, 130 S. Ct at 3158–59 ("[A]ltering the . . . powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.").

Availability of Rights Under the Crime Victims' Rights Act of 2004

The rights provided by the Crime Victims' Rights Act are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the government declines to bring formal charges after the filing of a complaint).

December 17, 2010

MEMORANDUM OPINION FOR THE
ACTING DEPUTY ATTORNEY GENERAL

The Crime Victims' Rights Act ("CVRA"), enacted as section 102 of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260, 2261–64 (codified at 18 U.S.C. § 3771 (2006 & Supp. III 2009)), guarantees victims of federal (and District of Columbia) crimes eight rights. *See* 18 U.S.C. § 3771(a). In connection with an effort to update the Attorney General's Guidelines for Victims and Witness Assistance, you have asked whether some or all of these rights must be made available to crime victims before the United States files charges and whether the rights no longer apply once the relevant charges are declined, dropped, or dismissed.

In 2005, this Office conducted a preliminary review of these questions and concluded that a person's status as a qualifying crime victim under the Act could reasonably be understood to commence upon the filing of a criminal complaint, and could reasonably be understood to cease if the relevant charges are declined, dropped, or dismissed. *See* E-mail for Rachel Brand et al., Office of Legal Policy, from Luke Sobota, Office of Legal Counsel (Apr. 1, 2005). That informal guidance did not foreclose the possibility that other readings of the CVRA might also be reasonable. We observed, however, that the statutory definition of "crime victim," the nature of the rights provided under the Act, and the CVRA's legislative history all suggested that the rights guaranteed by the CVRA were limited in their applicability to pending criminal proceedings. Having carefully considered written submissions by components of the Department as well as other federal law enforcement agencies, and for the reasons outlined below, we now conclude, consistent with our 2005 guidance, that the CVRA is best read as providing that the rights identified in section

3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the government declines to bring formal charges after the filing of a complaint).[1]

The questions we address are limited to issues of statutory obligation under the CVRA. We express no opinion as to whether any of the rights identified in 18 U.S.C. § 3771(a) should be provided prior to the filing of a complaint (or after the dismissal of charges) as a matter of good prac-

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[1] *See* Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Christine A. Varney, Assistant Attorney General, Antitrust Division (Sept. 27, 2010); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Karen Stevens, Acting Chief, Policy and Strategy Section, Civil Rights Division (Oct. 4, 2010, 9:06 PM); Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Eugene Thirolf, Director, Office of Consumer Litigation, Civil Division (Sept. 24, 2010); Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Patty M. Stemler, Chief, Appellate Section, Criminal Division (Sept. 30, 2010); Memorandum for Jonathan Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Ignacia S. Moreno, Assistant Attorney General, Environment and Natural Resources Division (Sept. 27, 2010) ("ENRD Memo"); Memorandum for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from H. Marshall Jarrett, Director, Executive Office for United States Attorneys (Sept. 29, 2010); Office of the Assistant Attorney General, National Security Division, White Paper, *The Vesting of Rights Under the Crime Victims Rights Act* (Sept. 29, 2010); Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Ronald A. Cimino, Deputy Assistant Attorney General, Tax Division (Sept. 24, 2010); Memorandum for Jonathan Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Christopher H. Schroeder, Assistant Attorney General, Office of Legal Policy (Sept. 28, 2010); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Rafael Madan, General Counsel, Office of Justice Programs (Sept. 29, 2010, 7:23 PM); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from St. Clair Theodore, Assistant General Counsel, Federal Bureau of Investigation (Sept. 27, 2010, 2:52 PM); Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Wendy H. Goggin, Chief Counsel, Drug Enforcement Administration (Oct. 6, 2010); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Audrey J. Anderson, Associate General Counsel, Office of Legal Counsel, Department of Homeland Security (Sept. 30, 2010, 3:17 PM); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Christopher B. Sterner, Deputy Chief Counsel (Operations), Internal Revenue Service, Department of the Treasury (Sept. 24, 2010, 9:22 AM). We appreciate the thoroughness and thoughtfulness of these submissions.

tice, Departmental policy, or pursuant to the provisions of other victim-related statutes, such as section 503 of the Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10607 (2006).[2]

I.

The CVRA defines a "crime victim" in relevant part as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). The Act states that crime victims so defined have the following rights:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided by law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(1)–(8). The CVRA repealed and replaced section 502 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789,

[2] This memorandum addresses only the CVRA. It does not address the application of other statutes providing for rights, services, or restitution for crime victims, including when such other statutes apply or who might qualify as a "victim" under them. Likewise, we were not asked, and intimate no view on, the question of what constitutes the "direct and proximate harm" necessary to qualify as a "crime victim" under the CVRA for a given offense, as opposed to the question of when such rights must be provided.

4820 (codified at 42 U.S.C. § 10606 (2000)), which appeared in a portion of that statute known as the Victims' Rights and Restitution Act of 1990 ("VRRA"), and which originally provided crime victims with a very similar list of rights.[3] (Other sections of the VRRA remain in force.)

Having identified these rights, the Act provides several avenues for their protection: by the courts, by Executive Branch officers, and finally by providing standing to victims themselves. First, the Act states that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [these rights]." 18 U.S.C. § 3771(b)(1). Second, the Act provides that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime" shall "make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)," *id.* § 3771(c)(1), and it requires "[t]he prosecutor" to "advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a)," *id.* § 3771(c)(2). Third, the Act authorizes crime victims, or their lawful representatives, as well as "the attorney for the Government," *id.* § 3771(d)(1), to assert CVRA rights by motion "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the

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[3] The VRRA had read as follows:

> (b) Rights of Crime Victims.—A crime victim has the following rights:
>
> (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
>
> (2) The right to be reasonably protected from the accused offender.
>
> (3) The right to be notified of court proceedings.
>
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the crime victim would be materially affected if the victim heard other testimony at trial.
>
> (5) The right to confer with [the] attorney for the Government in the case.
>
> (6) The right to restitution.
>
> (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

42 U.S.C. § 10606(b)(1)–(7) (2000). The rights provided in the VRRA applied to any victim of crime, defined in section 503 of that Act as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime," 42 U.S.C. § 10607(e)(2) (2006), including a crime under federal, state, or tribal law.

district in which the crime occurred," *id*. § 3771(d)(3). The Act directs the district court "to take up and decide [such a motion] forthwith." *Id*. The Act provides for expedited mandamus review by the court of appeals of any decision denying relief, *id*., and it permits the government (but not the crime victim) to assert as error on appeal any denial of a crime victim's right, *id*. § 3771(d)(4). The Act provides that a crime victim may seek to reopen a plea or a sentence in limited circumstances. *See id*. § 3771(d)(5). Finally, the Act provides that "[n]othing in this chapter shall be construed to authorize a cause of action for damages," *id*. § 3771(d)(6), and directs that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction," *id*.

In addition to providing means for judicial enforcement of the rights it guarantees, the Act directs the Attorney General to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims." *Id*. § 3771(f)(1). These regulations "shall . . . designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim," *id*. § 3771(f)(2)(A); "require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims," *id.* § 3771(f)(2)(B); "contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims," *id*. § 3771(f)(2)(C); and "provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant," *id*. § 3771(f)(2)(D). Pursuant to the Act's directive, the Attorney General has promulgated regulations establishing procedures for crime victims to file complaints regarding the provision of CVRA rights or other obligations regarding crime victims provided by law, and to have such complaints adjudicated. *See* 28 C.F.R. § 45.10 (2010).

II.

While a number of provisions in the CVRA indicate that the rights it guarantees do not apply until after the initiation of criminal proceedings, a few provisions could be read to suggest that at least some of the rights are to be provided before any charges are filed. In our view, the better reading of the Act—considering its text, structure, purpose, and legislative history—is that the rights provided by the CVRA are guaranteed only from the time criminal proceedings are initiated through a complaint, information, or indictment. *See, e.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988) ("[s]tatutory construction . . . is a holistic endeavor"). To begin with, there are a number of textual indications that Congress was focused on providing crime victims an opportunity to participate in pending criminal proceedings; these include the use of the term "offense" in the definition of "crime victim" and the use of a number of terms—e.g., "the accused," "court proceedings," and "in the case"—in the characterizations of several of the rights in section 3771(a). The nature of the CVRA rights considered as a whole also reflects a paramount focus on ensuring that crime victims have standing and an opportunity to be heard in pending criminal proceedings involving conduct that harmed them. This focus is embodied in the enforcement mechanisms provided in the Act, which direct courts to ensure that crime victims are afforded their CVRA rights to participate in pending criminal proceedings and empower crime victims to file motions to enforce these rights directly in such proceedings without intervening or becoming a party. The judicial enforceability of CVRA rights by victims themselves distinguishes those rights, in the main, from the rights protected in other victims' rights statutes, and counsels a construction of the Act that clearly defines the availability of the rights. The CVRA's legislative history likewise reflects the importance to Congress of ensuring that crime victims be heard in the judicial process, and that they have standing to protect their interests in such proceedings. By contrast, there is no indication in the Act or its legislative history that Congress intended to empower crime victims to initiate independent court proceedings outside the context of a pending criminal proceeding to enforce their rights under the Act, and thereby compel federal courts to adjudicate the existence of a federal offense absent any formal charging decision by the government, a

prospect that would be in considerable tension with the Act's express disavowal of any intent to "impair . . . prosecutorial discretion." 18 U.S.C. § 3771(d)(6).

A.

An analysis of the rights provided by the CVRA logically begins with its definition of "crime victim." Only "crime victims" are entitled to the rights articulated in 18 U.S.C. § 3771(a), the opening clause of which states that "[a] crime victim has the following rights." For the purposes of the CVRA, a "crime victim" is defined as "a person directly and proximately harmed as a result of the commission of a Federal *offense* or an *offense* in the District of Columbia." *Id.* § 3771(e) (emphasis added).[4] The CVRA's definition of "crime victim," however, does not conclusively resolve the question of when the rights afforded in section 3771(a) become available. Nevertheless, the definition's requirement that a crime victim be harmed as a result of the commission of a federal "offense" naturally suggests that a person's status as a "crime victim" can only be determined after there has been a formal decision to charge a defendant with a particular federal offense. Under this reading, the earliest that a "crime victim" under the Act could be identified would be upon the filing of a criminal complaint—that is, at the earliest point at which there is a sworn written statement of probable cause to believe that a particular defendant committed an identified federal offense, *see* Fed. R. Crim. P. 4, and hence the first point at which it is possible with any certainty to identify a "crime victim" directly and proximately harmed by the commission of that offense. As our 2005 informal advice observed, before the filing of a criminal complaint, it is not clear how one ascertains whether a particular harm is the result of a "Federal offense" or some other sort of conduct that does not constitute a "Federal offense."[5] Consistent with this

[4] Hereafter, this memorandum will use "federal offense" to refer to offenses either under federal law or the laws of the District of Columbia.

[5] This reading of the definition of "crime victim" also finds some support in the history of the CVRA's enactment. As noted, the CVRA repealed and replaced section 502 of the VRRA (codified at 42 U.S.C. § 10606 (2000)), which originally provided victims of crime with a very similar list of rights, *see supra* note 3. The VRRA defined "victim" broadly as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime," 42 U.S.C. § 10607(e)(2) (2006), including the

reading, most courts to consider who qualifies as a "crime victim" under the Act have declined to extend enforceable rights under the CVRA to alleged victims of conduct that did not lead to criminal proceedings.[6]

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commission of a crime under federal, state, or tribal law. Rather than adopt this definition of "crime victim" in the CVRA, Congress relied on a definition that appears to be taken nearly verbatim from two prior federal victim-oriented statutes that limit rights to restitution to individuals "directly and proximately harmed" by an "offense." *See* 18 U.S.C. § 3663(a)(2) (2006 & Supp. III 2009) (defining "victim" for purposes of the Victim and Witness Protection Act of 1982 ("VWPA") as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered"); 18 U.S.C. § 3553A(a)(2) (same for purposes of the Mandatory Victims Restitution Act). Congress's apparent decision to adopt the VWPA's definition of "victim" is potentially significant insofar as it allows us to look for guidance to decisions interpreting that statute. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) (holding that VWPA authorized restitution only for losses caused by the offense of conviction). Indeed, some courts have interpreted the CVRA based on the assumption that Congress was aware that courts had interpreted the VWPA not to apply to uncharged conduct. *See, e.g.*, *United States v. Turner*, 367 F. Supp. 2d 319, 326–27 (E.D.N.Y. 2005) ("[T]he full Congress passed the [CVRA] knowing that similar language in an earlier victims' rights bill had been interpreted *not* to refer to uncharged conduct. . . . Since the [VWPA] and the CVRA use similar definitions of 'victim,' it appears that the same reasoning would exclude victims of uncharged conduct from the class of those entitled to participatory rights under the [CVRA]." (footnote omitted)). This comports with how courts have interpreted the CVRA in the context of restitution claims; in that context they have emphasized the statutory requirement of "direct and proximate harm" caused by the offense of conviction to limit the standing of alleged crime victims to assert restitution claims under the CVRA. *See In re Rendon Galvis*, 564 F.3d 170, 175–76 (2d Cir. 2009); *In re Stewart* 552 F.3d 1285, 1288–89 (11th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1125–26 (10th Cir. 2008); *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009); *United States v. Sharp*, 463 F. Supp. 2d 556, 563–64 (E.D. Va. 2006). However, insofar as restitution, unlike many of the other rights provided in section 3771(a), necessarily depends on the existence of a predicate conviction, these considerations are only suggestive.

[6] *See, e.g.*, *Turner*, 367 F. Supp. 2d at 326–27 (excluding victims of uncharged conduct from the class of those entitled to participatory rights under the Act because "the offense charged against a defendant can serve as a basis for identifying a 'crime victim' as defined in the CVRA"); *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at *6 (D.S.C. June 27, 2007) (inmate does not qualify as a "crime victim" under the CVRA where there has been a prosecutorial decision not to charge another inmate accused of attacking him); *Searcy v. Skinner*, No. 6:06-1418-GRA-WMC, 2006 WL 1677177, at *2 (D.S.C. June 16, 2006) (where Government had declined to bring a prosecution against an inmate accused of attacking plaintiff, he could not use the CVRA as basis to bring his own action against inmate). *But see United States v. BP Prods. N.*

B.

Standing alone, the CVRA's definition of "crime victim" is not dispositive of the questions you have posed. But when we consider other aspects of the Act, including the nature of the rights conferred, the enforcement mechanisms adopted, the general structure and purposes of the Act, and the Act's legislative history, they only strengthen the conclusion that the Act is best understood to confer the rights in section 3771(a) only when a direct and proximate relationship can be drawn between the victim and an underlying federal offense with which a defendant has been charged in a federal criminal proceeding.

To begin with, the rights conferred in 18 U.S.C. § 3771(a), taken together, appear to contemplate the existence of an ongoing criminal proceeding initiated by the government. Five of the eight rights articulated there expressly refer to or necessarily presuppose the existence of a criminal proceeding. *Id.* § 3771(a)(2), (3), (4), (6), (7). Three of these reflect the victim's right to notification of, access to, and opportunity to be heard in public court proceedings involving release, plea, sentencing, or parole. *Id.* § 3771(a)(2) ("The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused."); *id.* § 3771(a)(3) ("The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."); *id.* § 3771(a)(4) ("The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."). Two others, regarding the right to restitution and the right to proceedings free from unreasonable delay, likewise presume the existence of criminal proceedings against a defendant. *Id.* § 3771(a)(6) ("The right to full and timely restitution as provided in law."); *id.* § 3771(a)(7) ("The right to proceedings free from unreasonable delay.").

Am. Inc., No. H-07-434, 2008 WL 501321, at *11–16 (S.D. Tex. Feb. 21, 2008) (finding certain CVRA rights to apply pre-charge but construing them narrowly so as not to interfere with prosecutorial discretion).

Admittedly, the remaining three rights (set out in sections 3771(a)(1), (5) and (8)) would not *necessarily* have to be limited to the period after the initiation of a criminal proceeding. Nevertheless, in our view, the CVRA is best read to contemplate judicial enforcement of these rights only once the government has initiated a federal criminal proceeding.

We turn first to the "right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). Section 3771(a)(1)'s use of the term "the accused" appears to contemplate that the government has already initiated criminal proceedings. "The accused" is a legal term of art that means a person who has been formally charged with a crime. *See Black's Law Dictionary* 25 (9th ed. 2009) ("A person who has been arrested and brought before a magistrate or who has been formally charged with a crime . . . . A person against whom legal proceedings have been initiated."); *see also Michigan v. Jackson*, 475 U.S. 625, 632 (1986) ("[A]fter a formal accusation has been made . . . a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment[.]"). The single CVRA decision of which we are aware to address this issue on the merits adopts just such a reading of "accused," finding the right to reasonable protection afforded in section 3771(a)(1) of the Act to be applicable only in the context of an ongoing criminal proceeding. *See United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008) ("'[A]ccused' must mean accused by criminal complaint, information or indictment of conduct victimizing the complainant. The right . . . to be 'reasonably protected from the accused' cannot have ripened before the earliest of one of these happenings.").

The context in which Congress enacted the CVRA provides an additional reason to adopt this understanding of its right to protection from the accused. Congress enacted section 3771(a)(1) against the backdrop of a pre-existing requirement in section 503 of the VRRA that, during the investigation of a crime, designated "responsible officials" at any agency "engaged in the detection, investigation or prosecution of crime," 42 U.S.C. § 10607(a), shall, "[a]t the earliest opportunity after the detection of a crime," *id.* § 10607(b), "arrange for a victim to receive reasonable protection from a *suspected offender*," *id.* § 10607(c)(2) (emphasis added). This requirement remains in force and, by its terms, can apply before the filing of criminal charges. The contrast between VRRA's continuing requirement that the government provide victims with reasonable protec-

tion from a "suspected offender" and the CVRA's "right to be reasonably protected from the accused," 18 U.S.C. § 3771(a)(1), strengthens our conclusion that Congress elected in the CVRA to guarantee crime victims a judicially enforceable right to protection only after a formal accusation by the government, i.e., after the initiation of criminal proceedings. This is particularly so given that the right to protection in the CVRA replaced a similar right "to be reasonably protected from the *accused offender*," 42 U.S.C. § 10606(b)(2) (emphasis added), previously provided in section 502 of the VRRA. Indeed, reading a victim's entitlement to protection under section 10607(c)(2) and under section 3771(a)(1) as coterminous would fail to give meaning to Congress's deliberate choice to use different words in two provisions of the same statutory scheme (as well as in what were originally two parts of the same enactment). *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995) (holding that "a legislature is presumed to have used no superfluous words," and construing words "use" and "carry" in the same statutory scheme as having separate and non-overlapping meanings) (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. (9 Otto) 48, 58 (1878)).[7]

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[7] In a law review article published shortly after passage of the CVRA, one of the Act's sponsors suggested that the CVRA's right to be "reasonably protected from the accused" might apply "without regard to the existence of legal proceedings," which could be read to include before a complaint has been filed. Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 594 (2005). For the reasons outlined above, we think this is not what Congress intended with respect to the CVRA's judicially enforceable right to protection (as opposed, perhaps, to the protective "services" that section 503(c)(2) of the VRRA obligates the government to provide). If this right were read to apply before the filing of charges, the CVRA would empower private citizens to go into court, in the absence of any pending charges, and seek a court order for protection, which would require a judicial determination whether the requisite elements, including the existence of a federal offense, are present, without regard for any impact on governmental resources or on pending and potentially confidential investigations. As we discuss more fully below, such a reading would be in tension with the long tradition of executive discretion to initiate criminal proceedings, and with section 3771(d)(6) of the Act, which directs that the Act not to "be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."

The legislative record suggests that Congress's principal concern, beyond ensuring protection of victims during the pendency of criminal charges, was protection after a conviction to ensure the victim could be heard with respect to a determination regarding

Similarly, the wording of the CVRA's "reasonable right to confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5), suggests that the right is intended to apply only once the government has initiated criminal proceedings. The phrase "in the case" implies the pendency of a judicial proceeding. *See Chavez v. Martinez*, 538 U.S. 760, 766 (2003) ("a 'criminal case' at the very least requires the initiation of legal proceedings"); *Black's Law Dictionary* 243 (defining "case" as a "civil or criminal proceeding, action, suit or controversy at law or in equity"); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action."); *cf. Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1233 (3d Cir. 1994) (a "case" within the meaning of 11 U.S.C. § 1109(b) "is commenced by the filing of a petition under the Bankruptcy Code"). Congress's use of the definite article "the" in reference to the word "case" also supports the view that "the case" implies a specific adversary proceeding rather than an indefinite ongoing investigation. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434–35 (2004) (interpreting use of the definite article "the person" in a provision regarding a habeas corpus custodian to signify that there is usually only one proper custodian, and not several different ones).

That the right to confer is with "*the* attorney" for the government in the case reinforces the conclusion that the right to confer is tied to the existence of a criminal proceeding in which a government attorney plays a lead role. Of course, attorneys for the government may sometimes play a role during an investigation, particularly once a matter is being presented to a grand jury,[8] but typically most investigative work is done by federal

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parole or early release of a convicted offender. A colloquy between two original sponsors of the bill reflects this concern:

> Ms. Feinstein: One final point. Throughout this act, reference is made to the "accused." Would the Senator also agree that it is our intention to use this word in the broadest sense to include both those *charged and convicted* so that the rights we establish apply throughout the criminal justice system?
>
> Mr. Kyl: Yes . . . .

150 Cong. Rec. 7304 (2004) (colloquy of Sens. Feinstein and Kyl) (emphasis added).

[8] Strictly speaking, the grand jury foreperson, not an attorney for the government, is "in charge" of proceedings before a grand jury. Fed. R. Crim. P. 6(c). Furthermore, such proceedings are confidential as a matter of law, Fed. R. Crim. P. 6(e), and the CVRA's

agents. If the right to confer were meant to apply during investigations, it is not clear why Congress would have limited the responsibility to confer with a crime victim to the attorney for the government, particularly since there may be many open investigations where no attorney has been assigned. Congress understood how to assign responsibilities in connection with protecting victims' rights to officials involved in the criminal justice process who were not attorneys, including responsibilities that take effect before the filing of any criminal charges, as it did in the VRRA when it specifically required designated "responsible officials" at all agencies "engaged in the detection, investigation or prosecution of crime," 42 U.S.C. § 10607(a), to provide the specified services, including, for example, a duty to ensure that victims receive "the earliest possible notice of—the status of the investigation of the crime," *id.* § 10607(c)(3)(A). By contrast, limiting the responsibility to confer to a single government attorney would make sense if the right to confer relates to issues that arise in the course of a criminal proceeding, such as potential release, the role of the victim as a witness in the course of the prosecution, potential plea agreements, sentencing, and restitution efforts, for which the prosecuting attorney would be the most natural party to confer with victims.

The CVRA's legislative history further bolsters our conclusion that the right to confer arises once a criminal proceeding has been commenced. Floor statements by both original sponsors of the Act in the Senate emphasize that the right to confer relates to the conduct of criminal proceedings after the filing of charges. Senator Feinstein explained that

> The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. . . . Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. . . . This right is intended to be expansive. For example, the victim has the right to confer with the Government concerning *any critical stage or disposition of the case*."

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legislative history shows that Congress did not intend to permit crime victims to attend grand jury proceedings. *See* 150 Cong. Rec. 22,951 (2004) (statement of Sen. Kyl) ("the right is limited to public proceedings, thus grand jury proceedings are excluded from the right").

150 Cong. Rec. 7302 (2004) (emphasis added). Similarly, Senator Kyl stated that

> This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the Government's attorney about proceedings *after charging*.

Id. (emphasis added).

Some have suggested that the right to confer should be understood to apply to plea negotiations that take place before the filing of charges. *See* ENRD Memo at 2–3. And it is true that a pre-charge negotiated plea agreement may reduce a victim's ability to provide input in a meaningful way regarding the matters addressed in the agreement. Although much of such pre-charge negotiations may relate to charging decisions that we believe are beyond the ambit of the right to confer, *see* 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."), we recognize that our reading of the CVRA may in certain circumstances reduce the impact of a victim's participation in subsequent court proceedings to which the right to confer does apply, *see, e.g.*, Fed. R. Crim. P. 11(c)(1)(C) (plea agreement binding on court). Even in such a case, the CVRA would still ensure that the victim has an opportunity to be heard by the court, and by the government, before the court accepts the plea or imposes a sentence, as well as a right to seek mandamus and attempt to have the plea set aside. And, of course, our view of what the CVRA requires in no way limits the discretion either of individual prosecutors to confer with victims about pre-charge plea negotiations or of the Attorney General to direct that prosecutors do so as a matter of departmental policy. The question before us, though, is not whether it would be advisable as a matter of good practice or departmental policy for government attorneys to confer with victims pre-charge when appropriate, but whether Congress created a judicially enforceable right for victims pursuant to which they may compel prosecutors to do so. Nothing in the Act or its legislative history suggests Congress intended such a result. Accordingly, we do not believe the CVRA is best read to obligate the

government to confer with victims during such pre-charge negotiations with a criminal suspect.[9]

The eighth CVRA right is "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Unlike the terms of the other seven CVRA rights, the wording of the right to fairness and dignity does not itself indicate that the right applies only once criminal charges have been filed. The concepts of "fairness," "dignity," and "privacy" are certainly implicated directly in judicial proceedings. *See, e.g.*, *Nixon v. Warner Commc'ns, Inc*. 435 U.S. 589, 602–03, 608–11 (1978) (addressing tension between privacy and common law right of public access to court records). But issues of fairness, privacy, and dignity for victims can arise during the course of a criminal investiga-

[9] The Fifth Circuit's decision in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), might be read to reach a contrary result. Determining the significance of *Dean* on this question, however, is complicated both by the unusual circumstances of that particular case and by the fact that the parties did not contest whether the right to confer applied pre-charge. In connection with the underlying criminal matter, shortly before the initiation of criminal proceedings against a corporate defendant, the government first filed an ex parte proceeding seeking (and obtaining) a court order restricting notice to victims under the CVRA until after charges (and a plea agreement) had been filed and unsealed, arguing that this met the "reasonableness" requirements of 18 U.S.C. § 3771(a)(5) because of the practical difficulties any pre-charge notice would have entailed. *See Dean*, 527 F.3d at 395. In rejecting this argument, the Fifth Circuit ruled that such an ex parte proceeding was contrary to the provisions of the CVRA and unprecedented as a matter of law. *Id*. It is unclear whether the court's subsequent criticism of the government's failure to confer pre-charge was simply a response to the unusual ex parte filing in the case or reflected a broader view that the CVRA obligates the government to engage in such pre-charge referrals more generally. The court appeared to recognize the unique "posture of this case," and was careful not to "speculate on the applicability to other situations." *Id.* at 394. In any event, the question of whether the right to confer under the CVRA applied at all pre-charge (as opposed to the question of the reasonableness of the procedure used in that case) was not contested or briefed in the district court or on appeal. To the extent that the court of appeals in *Dean* held that the right to confer under the CVRA can be triggered during the initial investigative phase of the case, and that CVRA obligates the government as a general matter to confer with crime victims during pre-charge negotiations with criminal suspects regarding a potential plea agreement, we respectfully disagree. A number of subsequent decisions do not follow *Dean* on this point. *See, e.g.*, *United States. v. Merkosky*, No. 1:02cr-0168-01, 2008 WL 1744762, at *2 (N.D. Ohio Apr. 11, 2008) (victim has rights under the CVRA only once prosecution has begun); *Rubin*, 558 F. Supp. 2d at 420 (victims' rights accrue upon filing of the indictment); *see also In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (whether a victim has rights prior to formal charges being filed is "uncertain").

tion as well. *See BP Prods.*, 2008 WL 501321, at *11 ("The right to be treated with fairness and with respect for the victim's dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed."); *cf.* VRRA, Pub. L. No. 101-647, § 506(1), 104 Stat. 4789, 4822 (1990) ("It is the sense of Congress that the States should make every effort to adopt the following goals of the Victim of Crime Bill of Rights," including that "[v]ictims of crime should be treated with compassion, respect, and dignity throughout the criminal justice process.").

This right, however, must be considered in the context of the other rights guaranteed by the CVRA. Under the well-known canon of statutory interpretation *noscitur a sociis,* which means that "words and people are known by their companions," *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000), "several items in a list shar[ing] an attribute counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham v. United States,* 511 U.S. 368, 371 (1994). Similarly, here, the range of application of the first seven, more specific rights should be understood to inform the scope of the potentially more general right to fairness, dignity, and privacy afforded by section 3771(a)(8). *Cf. Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 311–12 (1961) (construing for tax purposes the term "discovery" in the phrase "exploration, discovery or prospecting" to be limited to the finding of minerals, as suggested by its association with exploration and prospecting, and therefore inapplicable to income from a patented item).

Reading the right to be treated with fairness and dignity to apply during pending criminal proceedings is consistent with the discussion concerning the right in the CVRA's legislative history. Every example of crime victims experiencing unfairness, indignities, or violations of their privacy discussed in the legislative history refers to situations occurring after the filing of charges and typically involved a deprivation of one or more of the other rights protected by the Act as well. For instance, the floor debates reflect concern with the fairness and dignity with which crime victims are treated during pending criminal prosecutions. *See, e.g.*, 150 Cong. Rec. 7296–97 (2004) (statement of Sen. Feinstein) (describing several examples of the failure to notify crime victims of critical hearings in criminal cases, as well as other instances where crime victims were problematically excluded from criminal proceedings); *id.* at 7297 ("This is

not the way criminal justice should be practiced in the United States of America. The time has come to give victims of crime the right to participate in the system, the right to notice of a public hearing, the right to be present at that public proceeding, the right to make a statement when appropriate, the right to have restitution, if ordered by a judge, the right to know when your assailant or attacker is released from prison, and the right to be treated by our prosecutors and by our criminal justice system with respect and dignity."); *id.* at 7298 (statement of Sen. Kyl) ("Fair play for crime victims, meaningful participation . . . in the justice system, protection against a government that would take from a crime victim the dignity of due process—these are consistent with the most basic values of due process in our society.").[10] These statements and examples suggest that Congress was concerned with ensuring fair treatment for crime victims in the context of pending criminal proceedings, rather than creating a right that could be asserted independent of any criminal prosecution. For these reasons, we conclude that the right to fairness, dignity, and privacy in section 3771(a)(8) of the Act, like the other seven rights, should be understood as applying only after the filing of criminal charges against a defendant.

C.

In addition to the nature of the rights provided, the structure and purpose of the Act, as reflected in the mechanisms provided to enforce the rights and the Act's legislative history, also support our conclusion that the rights are guaranteed only once the government has initiated criminal proceedings. The mechanisms Congress established in the CVRA to ensure that crime victims are afforded their rights, including by providing crime victims standing to assert the rights directly, all relate to pending criminal proceedings. Three provisions of the Act ensure that crime victims are provided their rights or have standing to assert them. First,

[10] In the more extensive legislative history for S.J. Res. 1, 108th Cong. (2003) (the proposed constitutional amendment for which the CVRA emerged as a statutory substitute), the numerous examples of alleged affronts to fairness, dignity, and privacy suffered by crime victims again uniformly arise from the conduct of criminal proceedings and relate to perceived failures by courts to allow a crime victim to participate meaningfully in those proceedings against the alleged victimizer. *See generally* S. Rep. No. 108-191, at 19–20, 25, 28 (2003).

under the heading "Rights Afforded," the CVRA provides expressly that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. § 3771(b)(1). This provision explicitly empowers—and, indeed, requires—the courts to afford the CVRA rights during pending criminal proceedings. Second, the Act explicitly provides crime victims the right to participate in a pending criminal proceeding without intervening or becoming a party to the litigation by filing a motion on their own behalf. *Id.* § 3771(d)(3) (providing crime victims standing to assert their rights under the Act by motion). Third, the Act provides that crime victims are entitled to seek relief by writ of mandamus from the court of appeals if the district court denies the relief sought by motion in a pending criminal proceeding. *Id.* ("If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.").[11] By contrast, the CVRA includes no provision for crime victims to initiate independent judicial proceedings by any mechanism, whether by private complaint or petition or otherwise, to enforce these rights. Taken together, the enforcement mechanisms provided by the CVRA appear to be designed to ensure that crime victims would have legal standing to be heard in the context of ongoing criminal proceedings against defendants who have been accused by the government of a federal offense.

The CVRA's legislative history likewise underscores more generally that protecting the ability of crime victims to participate in pending criminal proceedings was the primary purpose underlying the Act. Much of the impetus for enactment of the CVRA arose after the Tenth Circuit issued a decision in *United States v. McVeigh*, the prosecution of Timothy McVeigh, the bomber of the federal building in Oklahoma City, limiting the ability of victims to enforce in court their rights under the VRRA.[12]

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[11] The Act also assigns "[t]he *prosecutor*" the responsibility to advise crime victims that they "can seek the advice of an attorney" with respect to their CVRA rights. 18 U.S.C. § 3771(c)(2) (emphasis added).

[12] *See, e.g.*, 150 Cong. Rec. 7295 (2004) (statement of Sen. Feinstein) ("Nowhere was the need for this legislation made more clear than during the trials over the Oklahoma City bombing."); *see also id.* at 22,953 (statement of Sen. Kyl) ("This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts

The district judge ordered the sequestration of crime victims from the trial in anticipation of hearing victim-impact statements at sentencing. The victims and their families sought mandamus review in the Tenth Circuit, relying, *inter alia*, on the language in section 502(b)(4) of the VRRA, granting them a "right to be present at all public court proceedings related to the offense." 106 F.3d 325, 328–29 (10th Cir. 1997). The Tenth Circuit denied the mandamus petition, holding that crime victims lacked standing to enforce their rights under the VRRA in court.[13] *Id.* at 335 (declaring VRRA enforceable only through the "best efforts" of the government); *see also* Memorandum for Kathryn Turman, Acting Director, Office for Victims of Crime, from William Michael Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re*: *Effect of 42 U.S.C. Section 10607 on Proposed Revisions to the Attorney General's Guidelines for Victim and Witness Assistance* at 4 (Jan. 15, 1999) (VRRA's "best efforts" obligation does not create judicially enforceable rights). The legislative record is replete with statements reflecting Congress's particular concern with ensuring that crime victims would have standing to participate in ongoing criminal proceedings. CVRA supporters repeatedly expressed concern regarding the failures of the judicial system to account sufficiently for victims' interests and emphasized the need to give crime victims the opportunity to participate in such proceedings through judi-

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from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.").

[13] Although the Tenth Circuit's ruling in *McVeigh* figures most prominently in the CVRA's legislative history, Congress was also troubled generally by courts denying victims standing with respect to restitution orders under the VWPA. *See* S. Rep. No. 108-191, at 13 (2003) ("In those rare cases when [victims seek restitution] they face a daunting array of obstacles, including barriers to their even obtaining 'standing' to be heard to raise their claims."). Prior to the CVRA, courts generally denied victims standing to be heard in VWPA cases. *See, e.g.*, *United States v. Johnson*, 983 F.2d 216, 221 (11th Cir. 1993) (crime victim lacks standing under VWPA to challenge denial of restitution order); *United States v. Kelley*, 997 F.2d 806, 808 (10th Cir. 1993) (same). These cases rested in part on a series of Supreme Court decisions denying standing to crime victims more generally. *See, e.g.*, *Leeke v. Timmerman*, 454 U.S. 83, 86–87 (1981) (because decision to prosecute is solely within discretion of prosecutor, private citizen has no judicially cognizable right to challenge how prosecutor goes about making decision to prosecute); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another").

cially enforceable rights.[14] By contrast, the legislative history contains no discussion of the possibility of crime victims bringing independent proceedings to enforce their rights rather than enforcing them in the context of existing, pending criminal proceedings.

D.

Particularly given the support for our reading in the text of the Act and its legislative history, we are not persuaded by two arguments that have been presented in support of the view that the rights afforded in the Act were meant to apply in some circumstances before the filing of a criminal complaint.

Perhaps the most significant argument that the rights guaranteed by the CVRA may apply before the pendency of criminal proceedings comes from the venue provision, which provides that the "rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). The phrase "if no prosecution is underway," understood colloquially, might be thought to envisage the possibility that some CVRA rights may be asserted before the pendency of criminal proceedings against a particular defendant. But "prosecution" is also a legal term of art used to refer to the levying of formal charges, and not merely the issuance of a warrant upon the filing of a complaint, and we think the venue provision should be read in light of this understanding,

[14] The legislative history reflects a clear concern with a failure to provide crime victims with a meaningful opportunity to participate in criminal proceedings, and consequently the need to create express enforcement mechanisms for the rights. *See, e.g.*, H.R. Rep. No. 108-711, at 2, *reprinted in* 2004 U.S.C.C.A.N. 2274, 2276 ("Victims of crime often do not feel their voices are heard or that their concerns are adequately addressed in the judicial process. . . . This legislation addresses these concerns by codifying the rights of victims and providing the means to enforce those rights."); 150 Cong. Rec. 7296 (2004) (statement of Sen. Feinstein) ("In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to [sic] busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have a place for them."); *id.* at 7297 ("The time has come to give victims of crime the right to participate in the system[.]"); *id.* at 7298 (statement of Sen. Kyl) (describing the Act as providing crime victims "meaningful participation . . . in the justice system").

particularly when considered in the context of the other aspects of the Act discussed above. For instance, Rule 7 of the Federal Rules of Criminal Procedure requires that a felony "be prosecuted by indictment," and therefore any prosecution of a felony must commence with the return of an indictment by a grand jury, Fed. R. Crim. P. 7(a)(1) (or, if the defendant waives his right to indictment, the filing of an information by the government, Fed. R. Crim. P. 7(b)). *Cf. United States v. Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006) (stating that, for Sixth Amendment purposes, "[t]he filing of a federal criminal complaint does not commence a formal prosecution").[15]

As a result, a "prosecution" does not necessarily commence simply because criminal proceedings have been initiated by the filing of a complaint, although an initial appearance must be held "without unnecessary delay" after a defendant is arrested on a warrant. Fed. R. Crim. P. 5(a)(1)(A) (providing for initial appearance of a person arrested pursuant to a warrant). At such an initial appearance the magistrate judge informs the defendant of his rights, affords him a reasonable opportunity to consult with counsel, and makes an initial determination with respect to the defendant's continued detention. Fed. R. Crim. P. 5(d). Consequently, even before a "prosecution" is "underway," important rights secured by the CVRA may be at stake, including the right of crime victims to be heard with respect to the possible release of the defendant. *See* 18 U.S.C. § 3771(a)(1), (2), (4).[16] Accordingly, we believe the venue

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[15] *See also Kirby v. Illinois*, 406 U.S. 682, 688–90 (1972) (for purposes of Sixth Amendment right to counsel, "criminal prosecution" does not commence with filing of complaint and issuance of arrest warrant); *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987) (filing of complaint and issuance of arrest warrant do not commence criminal prosecution for Sixth Amendment purposes, but rather, based on Fed. R. Crim. P. 7, "prosecution commenced when the indictment was handed down"). *But see Hanrahan v. United States*, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965) ("In some cases the formal prosecution may begin with the indictment or information. But in others, the prosecution may begin with the filing of a complaint.").

[16] Moreover, when a defendant is arrested outside of the district where the crime occurred, such initial proceedings may not occur in the district where the crime occurred. On this reading, the Act's direction that the victim seek relief "in the district court in the district in which the crime occurred," 18 U.S.C. § 3771(d)(3), would apply during such a period and would sensibly direct the crime victim to the court where the prosecution most likely would ultimately occur, in conformity with Fed. R. Crim. P. 18 ("the government must prosecute an offense in a district where the offense was committed").

provision's reference to the period when a prosecution is not underway is best read as applying to the period of time between the filing of a complaint and the initiation of formal charges.[17]

Similarly, in our view, section 3771(c)(1) of the Act—which requires those involved in the "detection, investigation or prosecution of crime [to] make their best efforts to see that crime victims are notified of, and accorded, [their CVRA rights]"—does not indicate that the CVRA rights apply before the government initiates criminal proceedings. As we noted in our 2005 informal advice, these references to detection and investigation tell us about which federal officials have obligations to ensure the protection of victims' rights, not when those rights arise. For example, the role of field agents, that is, those centrally responsible for the detection and investigation of crime, does not stop with the filing of criminal charges. Rather, agents and detectives play an ongoing role throughout the prosecution of a case, including continued investigative efforts and interactions with victims, and, where necessary, assisting in providing protection to victims and witnesses. In particular, agents often develop a relationship of trust with crime victims during the investigation that continues as they assist crime victims in negotiating active criminal proceedings. Given this continuing active role that agents typically play during criminal prosecutions, we find the fact that the CVRA assigns responsibility to them, together with the attorney for the government, to notify crime victims of and accord them their rights under the CVRA to be entirely consistent with our conclusion that those rights arise only once the government has initiated criminal proceedings.

Finally, we would note that a contrary view would be in some tension with the CVRA's express disavowal of permitting any interference with our country's long-standing tradition of governmental control of prosecutions.[18] *See* 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be

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[17] Given that we read this provision as consistent with our conclusion regarding when CVRA rights become available, we do not reach the question of whether other periods of time (such as after judgment has been entered and a prosecution is no longer underway) may also satisfy the venue provision of the Act.

[18] The principle that the authority to charge criminal offenses is reserved to attorneys for the government has deep roots that go back to the founding of our government under the Constitution. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (establishing office of United States District Attorney with the exclusive power to prosecute "all

construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."). Reading the CVRA to empower private individuals to initiate proceedings in court making allegations that a federal offense occurred prior to the filing of any criminal charges by the government would, at a minimum, create substantial tension with this tradition. Courts would be required to adjudicate, at a private party's instigation, the factual questions necessary to conclude that an asserted CVRA right should be enforced, including the existence of a federal offense. Such a court proceeding while the government's investigation of the crime remains underway, and in the absence of any conclusion by the government that federal charges are warranted, would place substantial pressure on the government's prosecutorial charging decisions and may even risk, in some circumstances, impairing the government's ability to build a viable case. This risk may be particularly apparent in large-scale cases where the government often relies in part on the assistance of cooperating defendants and depends upon maintaining the secrecy of the ongoing investigation. The legislative history does not suggest that Congress intended such an outcome. To the contrary, both section 3771(d)(6) and the legislative record as a whole suggest that Congress did not intend to impinge upon prosecutorial independence, but rather to ensure that once criminal proceedings are initiated, crime victims have rights to be heard and treated fairly in the process, and standing to enforce those rights.

E.

For these same reasons, we also conclude that rights under the CVRA cease to be guaranteed if all charges in the case are dismissed either voluntarily or on the merits once the dismissal becomes final and the criminal proceedings have ended (or if the government declines to bring

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delinquents for crimes and offenses, cognizable under the authority of the United States"); *see also Respect Due to Consuls*, 1 Op. Att'y Gen. 41, 43 (1794) ("it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for *judicial* determination"); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[t]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed") (citing U.S. Const. art. II, § 3).

formal charges after the filing of a complaint). As we have explained, the CVRA's guarantees are premised on the existence of an accused against whom the government has initiated criminal proceedings with respect to a particular offense or offenses. Ensuring that victims' interests are protected during the course of those proceedings is the CVRA's core purpose. In the absence of a proceeding against a particular accused that animates the CVRA's guarantees, the rights guaranteed by the Act would not apply.

For these reasons, we conclude that rights of crime victims under the Crime Victims' Rights Act are not guaranteed until criminal proceedings are initiated by the filing of a criminal complaint or information, or by the return of an indictment, and cease to be guaranteed if all charges in the case are declined or dismissed either voluntarily or on the merits.

JOHN E. BIES
Deputy Assistant Attorney General
Office of Legal Counsel

Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds

The General Services Administration is authorized, under section 412 of the Consolidated Appropriations Act of 2005, to convey Social Security Administration buildings that were acquired with money derived from the Social Security Trust Funds and to retain the net proceeds in the Federal Buildings Fund.

December 17, 2010

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION

You have asked us to resolve a disagreement about the retention of proceeds from the sale of certain government office buildings.[1] At issue is whether the Social Security Administration ("SSA") or the General Services Administration ("GSA") is entitled to the proceeds from the sale of buildings currently occupied by SSA and originally acquired with money from the Federal Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund ("Social Security Trust Funds" or "Trust Funds").[2] Relying on the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended at 40 U.S.C. § 101 *et seq*. (2006 & Supp. III 2009)) ("Property Act"), SSA argues that any proceeds from the sale of the buildings should be credited to the Social Security Trust Funds. GSA contends that it is entitled to the funds, citing both section 574 of the Property Act and a separate authority to convey property and to keep any resulting income—section 412 of division H of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. H, § 412, 118 Stat. 2809, 3199, 3259 (2004) ("section

[1] *See* Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Black, General Counsel, Social Security Administration (Oct. 1, 2008) ("SSA Memo").

[2] More precisely, your question pertains to "the sale of real property purchased, constructed, or otherwise acquired with money" from the Social Security Trust Funds. SSA Memo at 1. In this opinion, we use the term "acquired" as a shorthand for the various means by which Trust Fund money may have been used to obtain real property. Furthermore, we have used interchangeably the terms "building" and "real property"; nothing in our opinion turns on the distinction.

412").[3] We conclude that section 412 authorizes GSA to convey the SSA-occupied buildings acquired with Trust Fund monies and to retain the net proceeds from those transactions.[4] We thus have no occasion to address the application of section 574 of the Property Act to the contemplated sale of the SSA buildings here.

I.

Ordinarily, when federal property is sold under the Property Act,[5] the proceeds of the sale, excluding certain expenses incurred by GSA in disposing of the property, are deposited in the Land and Water Conservation Fund in the Treasury. *See generally* 40 U.S.C. § 572(a); *see also* 16 U.S.C. § 460*l*-5 (2006).[6] Section 574 of the Property Act establishes an

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[3] GSA's initial submission to our Office contained only a brief description of section 412. Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Leslie A. Nicholson, General Counsel, General Services Administration (Jan. 13, 2009) ("GSA Memo"). We then solicited the supplemental views of both agencies about the applicability of section 412 to the conveyance of real property acquired with Trust Fund monies. *See* Memorandum for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (Jan. 15, 2010) ("GSA Supp. Memo"); Memorandum for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from David F. Black, General Counsel, Social Security Administration (Jan. 19, 2010) ("SSA Supp. Memo").

[4] GSA's own regulations pertaining to the conveyance of federal real property provide that "[e]xcept for disposals specifically authorized by *special legislation*, disposals of real property must be made only under the authority of Chapter 5 of Subtitle I of Title 40 of the United States Code [i.e., the Property Act]." 41 C.F.R. § 102-75.290 (2010) (emphasis added). GSA's Associate General Counsel has informed us of GSA's determination that section 412 falls under the exception for "special legislation," so that this regulation would not restrict its authority under section 412 to dispose of property and retain the net proceeds. (GSA has made similar determinations with respect to other statutory disposal authorities, e.g., 42 U.S.C. § 2201(g) (2006) (authorizing Atomic Energy Commission to dispose of its real and personal property).) We have not been asked to address section 102-75.290, and we intimate no view on GSA's interpretation of the regulation as it pertains to section 412.

[5] Not all federal property is subject to the Property Act. *See* 40 U.S.C. § 113(e) (listing numerous exceptions to the application of the Act).

[6] In pertinent part, section 460*l*-5 of title 16 provides:

> During the period ending September 30, 2015, there shall be covered into the land and water conservation fund in the Treasury of the United States, . . . the following

exception to this general rule. If "property [has been] acquired with amounts . . . not appropriated from the general fund of the Treasury,"

> [t]he net proceeds of a disposition or transfer of [such] property . . . shall be . . . [1] [either] credited to the applicable reimbursable fund or appropriation; or . . . [2] paid to the federal agency that determined the property to be excess.

40 U.S.C. § 574(a).[7] SSA contends that section 574 applies to sales of SSA-occupied office buildings that were originally acquired with money from the Social Security Trust Funds and that the provision enables it to keep the proceeds from such sales.

GSA disagrees with SSA's interpretation of section 574, but, more important for resolving the question before us, GSA contends that its claim to any proceeds from the sale of SSA-occupied buildings rests on an independent statutory authority: section 412. *See* GSA Memo at 10-11; *see also* GSA Supp. Memo at 1-2.[8] Because we agree with GSA that

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> revenues and collections: . . . All proceeds [with certain exceptions] hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury.

16 U.S.C. §§ 460*l*-5 & 460*l*-5(a). Thus, although the Property Act provides that the "excess amounts [from the sale of federal real property] beyond [the] current operating needs [of GSA] shall be transferred . . . to miscellaneous receipts," 40 U.S.C. § 572(a)(3), section 460*l*-5 of title 16 instead directs those amounts to the Land and Conservation Fund.

[7] "Excess" property is a term of art in the Property Act and means property that an agency determines it no longer requires in order to meet that "agency's needs or responsibilities." 40 U.S.C. § 102(3); *see also id.* § 524(a)(2) (requiring each executive agency subject to the Act to "continuously survey property under its control to identify excess property").

[8] Noting that "SSA has provided no evidence that monies of the Trust Funds were used to directly acquire the[] properties" at issue, GSA argues that it, and not SSA, is the "landholding agency that would declare any of the SSA-occupied [b]uildings excess to the Government's needs." GSA Memo at 3. Furthermore, GSA contends that it, and not SSA, "acquired" some of the properties at issue using money from GSA's Federal Buildings Fund—a fund that is created by the Property Act and contains revenue collected by GSA, including rent from federal agencies, *see* 40 U.S.C. § 592 (establishing the Federal Buildings Fund). GSA Memo at 6. In light of our conclusion—that section 412 vests GSA with discretion to convey SSA property and to retain the net proceeds, notwithstanding

section 412 would permit GSA to retain the net proceeds of sales of SSA-occupied buildings, we have no occasion to address the applicability of section 574.

II.

A.

Section 412 authorizes GSA to convey property and retain any resulting net proceeds in the Federal Buildings Fund. Section 412 provides:

> Notwithstanding any other provision of law, the Administrator of General Services may convey, by sale, lease, exchange or otherwise, including through leaseback arrangements, real and related personal property, or interests therein, and retain the net proceeds of such dispositions in an account within the Federal Buildings Fund to be used for the General Services Administration's real property capital needs: *Provided*, That all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts: *Provided further*, That for the purposes of this section, the term "net proceeds" means the rental and other sums received less the costs of the disposition, and the term "real property capital need" means any expenses necessary and incident to the agency's real property capital acquisitions, improvements, and dispositions.

118 Stat. at 3259. Invoking section 412, GSA has retained approximately $140 million in proceeds from the sale of real property since Congress enacted the provision in 2004. See E-mail for Pankaj Venugopal, Attorney-Adviser, Office of Legal Counsel, from Richard R. Butter-

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section 574—we need not resolve the agencies' dispute about the application of section 574.

SSA's request for our opinion is not limited to any specific building SSA intends to vacate, and we thus have no need to consider whether a particular SSA building was in fact acquired with money from the Trust Funds. We understand that, at the least, SSA occupies some buildings acquired with those funds. *Cf.* Memorandum for Stanley Ebner, General Counsel, Office of Management and Budget, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel at 8 (Dec. 20, 1973) (noting that SSA's facility in Woodlawn, Maryland "was funded by appropriations from the Federal Old Age and Survivors Insurance Trust Fund").

worth, Jr., Senior Assistant General Counsel, General Services Administration (Dec. 6, 2010).

Section 412 supports GSA's claim to proceeds from a sale of SSA buildings, including those acquired with money from the Social Security Trust Funds. The provision authorizes the GSA Administrator to "convey" "by sale" "real and related personal property," and GSA may retain the "net proceeds of such dispositions" for its Federal Buildings Fund. On its face, section 412 makes no exception for the type of Social Security buildings at issue here.

Section 574 of the Property Act, however, might be read to entitle SSA to the proceeds of the sale of SSA buildings. Assuming that section 412 and section 574 lead to divergent outcomes, we have a "duty . . . to regard each as effective" if the two statutes are "capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also* SSA Supp. Memo at 2 (urging the application of the presumption against implied repeal). Under a "'long-standing maxim of statutory construction . . . statutes are enacted in accord with the legislative policy embodied in prior statutes, and . . . therefore statutes dealing with the same subject should be construed together.'" *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, __ Op. O.L.C. Supp. __, at *5 (May 18, 1999) ("IIRIRA Opinion") (quoting Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice* at 3 (Apr. 3, 1975), https://www.justice.gov/olc/page/file/936041/download). We believe that the apparent conflict between the two statutes is properly resolved by reading section 412 to give GSA the discretion to convey SSA buildings, *see* 118 Stat. at 3259 ("the Administrator of General Services *may* convey" (emphasis added)), and retain the proceeds of the sales, with section 574 potentially applying if GSA chooses not to exercise this discretion.

Even if we assume that section 574 of the Property Act would otherwise entitle SSA to the net proceeds of a building sale, section 412 would apply "[n]otwithstanding any other provision of law," a category that necessarily includes section 574. As a general rule, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the

provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *see also, e.g.*, *Applicability of Tax Levies to Thrift Savings Plan Accounts*, 34 Op. O.L.C. 157, 161–62 (2010) ("Tax Levies Opinion"); IIRIRA Opinion at *7 (observing that a prefatory "notwithstanding" clause "does reflect a congressional intention to displace inconsistent law"). Some courts have observed that "'a clearer statement'" of congressional intent "'to supersede all other laws . . . is difficult to imagine,'" *Cisneros*, 508 U.S. at 18 (quoting *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (internal quotation marks omitted) (collecting cases)); *see also Miccosukee Tribe of Indians of Fla. v. Army Corps of Eng'rs*, 619 F.3d 1289, 1298 (11th Cir. 2010) (noting that a "'notwithstanding' clause'" was "'Congress's indication that the statute containing that language is intended to take precedence over any preexisting or subsequently-enacted legislation [on the same subject]'" (alteration in original)); *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("[T]he '[n]otwithstanding any other provision of law' clause demonstrates that Congress intended to supersede any previously enacted conflicting provisions") (alterations in original, internal quotation marks omitted). In our view, section 412's "notwithstanding" clause indicates Congress's intent to override potentially applicable and inconsistent statutes, including section 574 of the Property Act.[9]

We do not read section 412's "notwithstanding" clause as making an implicit exception for section 574. Indeed, other sections of the same law in which section 412 appears authorize the sale of certain federal real property under a more narrowly tailored "notwithstanding" clause. *See* Consolidated Appropriations Act §§ 407, 638, 118 Stat. at 2922, 3258 ("[n]otwithstanding 40 U.S.C. 524, 571, and 572"). Congress thus knew how to restrict the scope of a "notwithstanding" clause to certain provi-

[9] A "notwithstanding" clause is "'best read simply to qualify the substantive requirement that follows.'" Tax Levies Opinion, 34 Op. O.L.C. at 162 n.4 (quoting *Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 296 (2009)). Thus, such a clause does not itself "'support a broad construction of the substantive provision that would give rise . . . to inconsistencies' with other statutes." *Id*. (quoting IIRIRA Opinion at *7). Here, we conclude only that the substantive clauses of section 412 authorize GSA to retain the net proceeds of the sales of real property, while section 574 of the Property Act, when applicable, might direct such proceeds to SSA.

sions of the Property Act, but chose instead to make section 412 broadly applicable "notwithstanding any other provision of law." Furthermore, on several occasions when Congress has intended section 574 to apply, it has made that intention plain. When the same Congress that enacted section 412 authorized the Secretary of Defense to convey a certain parcel of land, it expressly stated that "[s]ection 574(a) of title 40, United States Code, shall apply to the consideration received." Pub. L. No. 108-136, § 2861(c), 117 Stat. 1392, 1736 (2003). Similarly, when Congress directed proceeds from the sale of surplus real property and related personal property to the Land and Water Conservation Fund ("LWCF"), it excluded proceeds governed by section 574. 16 U.S.C. § 460*l*-5(a) (providing that the LWCF receives "[a]ll proceeds (except so much thereof as may be otherwise obligated, credited, or paid under authority of those provisions of law set forth in section . . . 574(a)–(c) of title 40") hereafter received from any disposal of surplus real property and related personal property under the [Property Act], as amended, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury"). In light of these other provisions, the absence in section 412 of any reference to section 574 bolsters the conclusion that section 412 overrides "any other federal law," including section 574.

We accordingly believe that section 412 vests the Administrator of GSA with discretion to sell SSA-occupied buildings that have been acquired with money from the Social Security Trust Funds and to retain the net proceeds of those sales in the Federal Buildings Fund.

B.

Contending that section 412 would not displace the application of section 574 of the Property Act to the buildings at issue, SSA relies upon the canon of statutory interpretation that a general statute will not be construed to repeal a specific statute by implication, unless Congress expresses a clear intention to effect the repeal. SSA Supp. Memo at 2–3; *see generally Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting the "strong presumption against repeals by implication, especially an implied repeal of a specific statute by a general one" (internal citation omitted)). SSA contends that section 412 "does not amend, expressly or implicitly, the more specific legislation that addresses a particular subset of real property proceeds [i.e., section 574]." SSA Supp.

Memo at 2–3. It further argues that the rule against implied repeal has special force with respect to provisions, such as section 412, that were enacted in appropriations laws. Alternatively, SSA contends that section 412 was a temporary measure that expired at the end of the 2005 fiscal year. *Id.* at 3.

We first consider the argument that "repeals by implication are especially disfavored in the appropriations context." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992). Although section 412 was enacted as part of an appropriations statute, we do not believe that this admonition applies here, because section 412 is substantive legislation. A special rule for implied repeals by appropriations statutes is necessary because without it, "every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 190 (1978) ("*TVA*"). For this reason, the canon against implied repeal by appropriations bills is codified in the rules of both houses of Congress, including House Rule XXI(2)(b), H.R. Doc. No. 107-284, at 814 (2003) ("A provision changing existing law may not be reported in a general appropriation bill"); *see also* Senate Rule 16.4, S. Doc. No. 107-1, at 15 (2002). Citing House Rule XXI, the *TVA* Court observed that the absence of a presumption against implied repeal by appropriations statutes would "lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, [and] it would flout the very rules the Congress carefully adopted to avoid this need." *TVA*, 437 U.S. at 190; *see also United States v. Will*, 449 U.S. 200, 222 (1980) ("[T]he rules of both Houses limit the ability to change substantive law through appropriations measures."); *Andrus v. Sierra Club*, 442 U.S. 347, 359–60 (1979) (noting that the "rules of both Houses prohibit [substantive] legislation from being added to an appropriation bill" (internal quotation marks omitted)).

Here, the House rule cited by the *TVA* Court was invoked against the language in section 412 when it was being considered by the House acting as the Committee of the Whole. The provision that was enacted ultimately as section 412 first appeared in one of the several appropriations bills later incorporated into the 2005 Consolidated Appropriations Act—specifically, the identically worded section 409 of the Transporta-

tion, Treasury, and Independent Agencies Appropriations Act, H.R. 5025, 108th Cong. (as reported by H. Comm. on Appropriations, Sept. 8, 2004). During the debate over H.R. 5025, a member raised a point of order that section 409 violated House Rule XXI. 150 Cong. Rec. 18,426 (2004) (statement of Rep. Shays). The Chair sustained the objection and, as a result, section 409 was struck from H.R. 5025 before its passage by the House. *Id.* ("The Chair finds that this section [409] explicitly supersedes existing law. The section therefore constitutes legislation in violation of clause 2 of rule XXI."). When H.R. 5025, along with several other appropriations bills, was referred to the conference committee, however, section 409's authority for GSA to convey property and retain its proceeds was reinserted as section 412 of the Consolidated Appropriations Bill. *See* H.R. Rep. No. 108-792, at 665 (2004) (Conf. Rep.) (noting that the "conference agreement" included the "Transportation, Treasury, and Independent Agencies Appropriations Act, 2005 [H.R. 5025]").[10] In light of the determination under the House Rules that the language of section 412, as contained in section 409 of H.R. 5025, "supersede[d] existing law," 150 Cong. Rec. at 18,426, we believe that the special rule against "implied repeals" by appropriations measures does not apply to section 412.

More broadly, SSA contends that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." SSA Supp. Memo at 2–3 (quoting *Morton*, 417 U.S. at 550–51). We believe that section 412 reveals a sufficiently "clear intention" to supersede conflicting law, including provisions concerning specific types of federal property, such as section 574.[11] Congress made section 412 appli-

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[10] Although section 412 is identical to section 409 of H.R. 5025, no objection appears to have been raised in the House against the inclusion of section 412 in the Consolidated Appropriations Act. But because the House chose to waive all points of order in the consideration of the omnibus appropriations bill, *see* H.R. Res. 866, 108th Cong. (2004), 150 Cong. Rec. at 25,051, we do not believe that this silence undercuts the House's earlier determination that the same language—contained in section 409 of H.R. 5025—"explicitly supersede[d] existing law."

[11] The conference report accompanying the passage of section 412 notes only that section 412 "allow[s] GSA to convey property and retain the proceeds in the Federal Buildings Fund." H.R. Rep. No. 108-792, at 1455 (2004). An earlier House Report sets out an identical description of the provision that became section 412. H.R. Rep. No. 108-671, at 147 (2004).

cable "notwithstanding any other provision of law," and although it expressly referred to section 574 in similar statutes about disposition of property or retention of proceeds, it omitted any such reference in section 412. *See United States v. DeCay*, 620 F.3d 534, 540 (5th Cir. 2010) (rejecting application of canon of specific trumps the general, noting that "'notwithstanding any other Federal law' clause signals a clear Congressional intent to override conflicting federal law"); *see also Novak*, 476 F.3d at 1055-56 (holding similar "notwithstanding" phrase constitutes, *inter alia*, "clear intention" for general statute to supersede arguably more specific statute). The intention to override provisions such as section 574 appears plain enough.

This conclusion is buttressed by the text of the Property Act, as amended in 2002, when Congress revised and recodified the provisions of the 1949 Act. *See* Pub. L. No. 107-217, 116 Stat. 1062. In section 5(b)(3) of the 2002 Act, Congress provided that "[t]his Act restates certain laws enacted before April 1, 2002. Any law enacted after March 31, 2002, that is inconsistent with this Act . . . supersedes this Act to the extent of the inconsistency." 116 Stat. at 1303 (codified as note preceding 40 U.S.C. § 101). This provision shows congressional intent to "suspend[ ]the Property Act's applicability" in the face of a subsequent, inconsistent statute. *Shawnee Tribe v. United States*, 423 F.3d 1204, 1215–16 (10th Cir. 2005) (noting that although section 5(b)(3) is "not an operative part of the statute itself," "th[e] statement was legislatively enacted as part of the public law and is a good indication of Congressional intent").[12] Thus, even if the

[12] In *Shawnee Tribe*, the Tenth Circuit held that a 2005 provision under which the Secretary of the Army could convey a former military installation on an Indian reservation overrode section 523 of the Property Act, which would have directed GSA to transfer that property to a tribe. 423 F.3d at 1215–16; *see also* 40 U.S.C. § 523(a) ("The Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs.").

Moreover, the Tenth Circuit held that section 113 of the Property Act did not compel a different conclusion. Section 113 provides that (save for certain exceptions applicable neither here nor in the *Shawnee Tribe* case), the "authority conferred by this subtitle [including, as pertinent here, sections 523 and 574] is in addition to any other authority conferred by law and *is not subject to any inconsistent provision of law*." 40 U.S.C. § 113(a) (emphasis added). But in light of section 5(b)(3) of the 2002 Act, the court held that section 113 "stand[s] for the relatively unremarkable proposition that the Property

application of section 412 to Trust Fund buildings would be inconsistent with section 574 of the Property Act, section 412 would "supersede[]" section 574 "to the extent of the inconsistency," in accordance with section 5(b)(3) of the 2002 Act.

SSA alternatively contends that "even if Section 412 repealed or superseded 40 U.S.C. § 574, that effect expired at the close of Fiscal Year (FY) 2005 when the annual appropriations act expired." SSA Supp. Memo at 3. GSA argues that section 412 operates as "permanent" legislation that remained in effect beyond the end of the 2005 fiscal year ("FY 2005"). Indeed, GSA has collected approximately $136 million in net proceeds under its section 412 authority since the end of FY 2005.

To determine whether a provision in an appropriations measure operates as permanent law, we follow these "basic governing principles":

> While appropriation acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year. In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. 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.

Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations, 20 Op. O.L.C. 232, 240 (1996) (quoting *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273–74 (D.C. Cir. 1992)). The "whole question" of permanence "depends on the intention of Congress as expressed in the statutes." *Id*. at 239 (internal quotation marks omitted). On balance, we believe that the text of section 412 shows that the provision remains in effect.

The text of section 412 accords with the conclusion that it is permanent legislation. As we have explained, Congress's intent to enact permanent legislation is "principally established though 'words of futurity or permanence,' such as the phrase 'to apply in all years hereafter.'" *Id.* at 240; *see*

Act trumps any pre-existing laws not specifically excluded by [section] 113 when it was re-enacted in 2002, but that the Congress . . . is free to change the Property Act's coverage in the future by any act enacted after March 31, 2002." *Shawnee Tribe*, 423 F.3d at 1216.

also, *e.g.*, *Whatley v. Dist. of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006) (noting that phrase "[n]one of the funds appropriated under this Act, *or in appropriations Acts for subsequent fiscal years*" "clearly indicate[d] that it is intended to be permanent"). Section 412 provides that "all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts."[13] The reference to spending net proceeds pursuant to future spending legislation shows that, at a minimum, the authority to retain the net proceeds from property sales made under section 412 is permanent. If GSA's authority to retain the net proceeds of its dispositions under section 412 in the Federal Buildings Fund had been effective only for FY 2005, any such proceeds would presumably have been transferred from GSA's Federal Buildings Fund to the Treasury at the end of that fiscal year. Yet if GSA no longer retained any such net proceeds, it would have made little sense for Congress to have permitted GSA's "expend[itures]" of that money only "as authorized in annual appropriations Acts." Thus, the reference to future "annual appropriations Acts" presumes that GSA is able to retain the net proceeds collected under section 412 beyond FY 2005.[14]

It might be argued that while the authority to retain proceeds in the Federal Buildings Fund is permanent for proceeds of conveyances made in FY 2005, the authority to make those conveyances is limited to FY

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[13] "[T]he words 'notwithstanding any other provision of law' are not words of futurity and, standing alone, offer no indication as to the duration of the provision." 1 Government Accountability Office, *Principles of Federal Appropriations Law* 2-36 (3d ed. 2004).

[14] The term "annual appropriations Acts" appears in a proviso, Consolidated Appropriations Act, div. D, § 412, 118 Stat. at 3259 ("*Provided*, That all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts"), and we recognize that words of futurity that "appear[] only in an exception clause" may apply only to that clause and not to the entire statute. *See Principles of Federal Appropriations Law* at 2-35. If the words of futurity were read as limited only to the proviso, the restriction on GSA's spending of net proceeds from conveyances in FY 2005 would be permanent, while the authorities contained in section 412's operative clause—both the authority to convey property and the authority to retain the net proceeds in the Federal Building Fund—would have expired at the end of FY 2005. We do not believe that section 412's words of futurity should be understood in this manner. Because the reference to future spending legislation presupposes the permanence of GSA's authority to retain the proceeds of its conveyances, section 412's words of futurity are applicable not only to the proviso in which those words are contained, but also to the statute's operative clause.

2005. There is no indication that Congress intended to divide section 412's operative provision—both the agency's authority to convey property and its authority to retain the net proceeds in the Federal Buildings Fund—into temporary and permanent parts. To the contrary, the closely connected nature of section 412's authorities to convey property and retain proceeds strongly indicates that both of these authorities were intended to be permanent. Unlike the Property Act, where GSA's disposal function (contained in subchapter III of chapter 5 of title 40 of the United States Code) is separate from its authority to retain proceeds (contained in subchapter IV), section 412 ties those two authorities in the same opening clause: "[GSA] may convey [property by various means] . . . and retain the proceeds of *such dispositions* in an account within the Federal Buildings Fund." 118 Stat. at 3259 (emphasis added). Accordingly, that GSA's authority to retain proceeds is permanent strongly suggests that the authority to convey property is likewise permanent.

Finally, we note that, although the views of the Comptroller General are not legally binding on the Executive Branch, *see Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996), the Government Accountability Office has also concluded that section 412 is permanent legislation. *See* Government Accountability Office, GAO-07-349, *Federal Real Property: Progress Made Toward Addressing Problems, but Underlying Obstacles Continue to Hamper Reform* at 19 n.24 (2007).

III.

For these reasons, we conclude that GSA has the authority to invoke the discretion afforded by section 412 in order to convey SSA property acquired with money derived from the Social Security Trust Funds and to retain any net proceeds in the Federal Buildings Fund.

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