OPINIONS

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OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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ADVISING THE

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THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
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FOREWORD

The authority of the Office of Legal Counsel ("OLC") to render legal opinions is derived from the authority of the Attorney General. The Judiciary Act of 1789 authorized the Attorney General to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510, the Attorney General has delegated to OLC the responsibility to prepare the formal opinions of the Attorney General, render opinions to the various federal agencies, assist the Attorney General in the performance of his or her function as legal adviser to the President, and provide opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

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 34 published volumes of the OLC series covered the years 1977 through 2010. The present volume 35 covers 2011.

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

Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act

Section 313(c)(2)(B) of the Clean Water Act does not impose a specific-appropriation requirement for the payment of stormwater assessments. Federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

February 25, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

Congress recently passed "An Act To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution," Pub. L. No. 111-378, 124 Stat. 4128 (2011) (the "Stormwater Amendment"), which revised section 313 of the Clean Water Act ("CWA"), 33 U.S.C. § 1323 (2006), to clarify that reasonable service charges payable by federal agencies, as described in section 313(a), include certain stormwater assessments. Section 313(c)(2)(B), enacted as part of this amendment, provides that federal agencies may not pay certain stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." You have asked whether section 313(c)(2)(B) bars federal agencies from paying stormwater assessments unless Congress makes a specific appropriation (for example, a line-item appropriation) for such payments, or instead whether agencies may "use general, lump-sum appropriations" for such payments.[1] We believe that the best reading of

[1] *See* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Scott C. Fulton, General Counsel, Environmental Protection Agency at 1 (Jan. 21, 2011) ("EPA Letter"). In preparing this opinion, we have received comments from the Tax Division, *see* Memorandum for John A. DiCicco, Acting Assistant Attorney General, Tax Division, from David A. Hubbert, Chief, Special Litigation (Jan. 26, 2011) ("Tax Memorandum"); the Bonneville Power Administration, *see* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Randy A. Roach, General Counsel, Bonneville Power Administration (Feb. 2, 2011); the Environment and Natural Resources Division, *see* Memorandum for Karen Wardzinski, Section Chief, Law & Policy Section, Environment and Natural Resources Division, from Peter J. McVeigh, Attorney, Law & Policy Section (Feb. 3, 2011) ("ENRD Memorandum"); the General Services Administration, *see* Letter for

section 313(c)(2)(B), when construed in accord with the structure, purpose, and history of the Stormwater Amendment, is that the provision does not impose a specific-appropriation requirement. In our view, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations consistent with section 313(c)(2)(B) of the CWA. We emphasize that our opinion is limited to the application of that subsection.

I.

A.

The CWA, as amended, established a National Pollution Discharge Elimination System ("NPDES") that is "designed to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). As a general matter, "the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Because stormwater runoff collects debris, chemicals, and other pollutants and therefore may be a source of pollution when discharged into the Nation's waters, Congress amended the CWA in 1987 to direct the Environmental Protection Agency ("EPA") to issue rules requiring and governing NPDES permits for certain categories of discharges of stormwater, including municipal and industrial discharges. *See* 33 U.S.C.

Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Kris Durmer, General Counsel, General Services Administration (Feb. 3, 2011) ("GSA Letter"); the U.S. Postal Service, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Carrie M. Branson, Attorney, Law Department, U.S. Postal Service (Feb. 3, 2011) ("USPS Letter"); the Council on Environmental Quality, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Nancy H. Sutley, Chair, Council on Environmental Quality (Feb. 3, 2011) ("CEQ Letter"); the U.S. Department of Agriculture, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from James Michael Kelly, Associate General Counsel, U.S. Department of Agriculture (Feb. 7, 2011) ("USDA Letter"); and the Department of Defense, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Robert S. Taylor, Principal Deputy General Counsel, Department of Defense (Feb. 8, 2011) ("DOD Letter").

§ 1342(p)(3)(B) (2006); Final Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990); Final Rule, National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999); *see also Natural Res. Def. Council v. EPA*, 526 F.3d 591, 594–601 (9th Cir. 2008) (recounting statutory and regulatory history of EPA stormwater regulations).

The EPA has issued regulations that, among other things, require municipalities operating separate storm sewer systems to obtain NPDES permits and undertake certain control measures designed to minimize the discharge of pollution from stormwater into the Nation's waters. *See, e.g.*, 40 C.F.R. § 122.34 (2010). Municipal separate storm sewer systems are "publicly owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying storm water, are not combined sewers, and are not part of a publicly owned treatment works." Notice, Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617, 68,619 (Dec. 28, 2009); *see* 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer").

Under this federal regulatory scheme, municipalities operating municipal separate storm sewer systems are required to undertake costly control efforts to minimize pollution from stormwater discharges into the Nation's waters. In response, many municipalities have adopted local stormwater ordinances that attempt to recover the costs of these compliance efforts from property owners, including federal agencies.

B.

The efforts by municipalities to recover stormwater assessments from federal agencies gave rise to a controversy whether federal agencies could be required to pay such assessments. The Supreme Court has explained that as a general matter "the activities of the Federal Government are free from regulation by any state," *Mayo v. United States*, 319 U.S. 441, 445 (1943), and that a state or local law that "regulate[s] the [federal] Government directly" "run[s] afoul of the Supremacy Clause." *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819)); *see also Penn Dairies, Inc.*

v. Milk Control Comm'n, 318 U.S. 261, 269 (1943) ("in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation" of federal entities). Nevertheless, "a clear congressional mandate" divests the presumptive immunity of federal agencies from state and local regulatory compulsion. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1956).

Prior to Congress's enactment of the Stormwater Amendment, there was some doubt whether section 313(a) of the CWA, 33 U.S.C. § 1323(a), divested the immunity of federal agencies with respect to stormwater assessments. *See* ENRD Memorandum at 2–3; EPA Letter at 5–7; USDA Letter at 1–2. Section 313(a), in relevant part, provides that federal agencies owning property or engaged in activities that may result

> in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a). The section further mandates that these requirements attach "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.*; *see Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (interpreting section 313(a) of the CWA). In dispute was whether the phrase "reasonable service charges" in section 313(a) included stormwater assessments, thereby waiving federal immunity and requiring federal agencies to pay such assessments.[2]

As we explain further in Part II below, the Stormwater Amendment reflected an effort by Congress to resolve the controversy whether local

[2] For example, the Government Accountability Office ("GAO") had concluded that federal agencies could not pay the District of Columbia's stormwater assessment because it was a "tax" for which "Congress has not . . . legislated a waiver of sovereign immunity." Letter for David A. Lebryk, Commissioner, Financial Management Service, U.S. Department of the Treasury, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320868, at 1 (Sept. 29, 2010); *see also* Letter for Peter J. Nickles, Attorney General of the District of Columbia, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320795 (Sept. 29, 2010).

governments could levy stormwater assessments against the federal government for its facilities. On June 10, 2010, Senator Cardin introduced S. 3481, "A bill to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution." *See* 156 Cong. Rec. S4855 (daily ed. June 10, 2010). He explained that "the issue of polluted stormwater runoff from federal properties has . . . gained significant attention" and that he had "grave concerns about the failure of the Federal Government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties." *Id.* Senator Cardin stressed that "Uncle Sam must pay his bills" and that he was "introducing legislation that makes [that] clear." *Id.*; *see also id.* at S4856 ("Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees."). At that time, S. 3481 would have accomplished this objective by adding a subsection (c) to section 313 of the CWA to make explicit that the "reasonable service charges" described in section 313(a) include certain stormwater assessments. S. 3481 also stated that such stormwater assessments "may be paid using appropriated funds." *Id.* at S4856 (text of S. 3481).

The Senate amended S. 3481 in the nature of a substitute, S. Amdt. 4917, on Dec. 21, 2010, a day before its passage. The apparent aim of the last-minute revision was to address certain appropriations issues that might otherwise arise with the payment of stormwater assessments. Like the original amendment, the substitute bill, which was introduced on behalf of Senator Cardin, contained language in proposed section 313(c)(1) to make explicit that the phrase "reasonable service charges" includes certain stormwater assessments. *See* 156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010) (text of amendment).[3]

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[3] Section 313(c)(1) provided in full:

> (1) IN GENERAL.—For the purposes of this Act, reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is—
>
> > (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

The substitute bill also added a new subsection (c)(2), with the heading "Limitation on Accounts," containing the appropriations language that is at issue here. *See id.* Proposed section 313(c)(2) provided in full:

> (2) LIMITATION ON ACCOUNTS.—
>
> (A) LIMITATION.—The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.
>
> (B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT.—Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in [section 313(a)], shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

Id. The substitute bill passed the Senate by unanimous consent on December 21, 2010, and passed the House by unanimous consent on December 22, 2010 (the last day of the 111th Congress). The President signed the enrolled bill into law on January 4, 2011.

On January 21, 2011, you requested our opinion whether "it is permissible to construe . . . section 313(c)(2)(B) as authorizing federal governmental entities to use general, lump-sum appropriations to pay the reasonable service charges described in . . . section 313(c)(1)," EPA Letter at 1, or instead whether section 313(c)(2)(B) "requires a specific appropriation"—for example, a line-item appropriation—"for the payment of the stormwater charges," *id.* at 12.

> (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010). The relevant text of section 313(a) is set forth above. *See supra* p. 4.

II.

The issue we address here is whether section 313(c)(2)(B)'s language limiting the payment of stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee" forbids federal agencies from paying stormwater assessments from annual lump-sum appropriations. We conclude that it does not.

The Stormwater Amendment contains two principal provisions. The first provision, section 313(c)(1), instructs that the "reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is . . . based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution" and that is "used to pay or reimburse the costs associated with any stormwater management program." The first provision thus resolves the dispute over federal agencies' duty to pay stormwater assessments, by making clear that the phrase "reasonable service charges" in section 313(a)—which is an unambiguous waiver of immunity—includes certain stormwater assessments. *See* 33 U.S.C. § 1323(a) (requirements of section 313(a) apply "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law").[4]

The second provision, section 313(c)(2), sets forth requirements for the payment of such stormwater assessments by federal agencies. After stating in section 313(c)(2)(A) that federal agencies may not pay these assessments from "any permanent authorization account in the Treasury," section 313(c)(2)(B) allows payment only "to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." Section 313(c)(2)(B) could be read to allow

[4] Some agencies providing views on EPA's opinion request suggested that this Office clarify the meaning of certain terms in section 313(c)(1) and address other legal issues under the Stormwater Amendment. *See, e.g.*, GSA Letter at 2–5; USPS Letter at 1–3; USDA Letter at 5. To respond to EPA's request expeditiously, we confine this opinion to the interpretation of the appropriations language in section 313(c)(2)(B). GSA, for example, asked us to advise whether the Federal Buildings Fund may be used to pay stormwater assessments in light of section 313(c)(2)(A). *See* GSA Letter at 4–5. Although we recognize the importance of this question, it lies beyond the scope of EPA's request, which is focused on section 313(c)(2)(B).

federal agencies to pay stormwater assessments out of lump-sum appropriations, but could also be read to impose a rule that Congress must annually enact a specific appropriation (for example, a line item) for such payments. In our view, the best reading of the text, structure, purpose, and history of the Stormwater Amendment, taken together, is that Congress did not intend to require a specific appropriation.

A.

Although "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted), our analysis of the Stormwater Amendment, "begin[s], as always, with the text of the statute." *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1443 (2009). The text of section 313(c)(2)(B), standing alone, does not unambiguously resolve the issue before us. On the one hand, the phrase "except to the extent and in an amount provided in advance by any appropriations Act" might be read to authorize the payment of stormwater assessments only when Congress makes a specific appropriation of funds for that purpose. *See* USPS Letter at 1 ("The language lends itself to only one logical interpretation, i.e., federal entities are not required to pay stormwater fees unless Congress has provided specific appropriations for that purpose."); USDA Letter at 2–4. On the other hand, the phrase might be interpreted as authorizing federal agencies to pay stormwater assessments, not from a "permanent authorization account in the Treasury," declared off limits by section 313(c)(2)(A),[5] but instead from annual lump-sum appropriations.

While the text of section 312(c)(2)(B), standing alone, does not resolve the issue, reading the section to allow payment from annual lump-sum appropriations is ultimately the better reading of the text. First, such a reading accords with basic principles of appropriations law. The "except to the extent and in an amount" language can be read to clarify that the Stormwater Amendment provides spending authority for payment of

[5] Although we do not address here the meaning of the phrase "permanent authorization account in the Treasury," we note that Senator Cardin explained section 313(c)(2)(A) as "rectify[ing] a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees" and as reflecting "that agencies and departments *should use their annual appropriated funds to pay for stormwater fees*." 156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).

stormwater assessments, but is not itself an appropriation. *See* U.S. General Accounting Office, GAO-04-261SP, *Principles of Federal Appropriations Law* 2–5 (3d ed. 2004) ("*Federal Appropriations Law*") ("While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. Thus, at some point if obligations are paid, they are paid by and from an appropriation.") (internal citations omitted); 31 U.S.C. § 1301(d) (2006) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."). The phrase further can be understood to embody the basic principle that any stormwater assessments paid by federal agencies must come from and may not exceed an actual appropriation. *See, e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 14 (1990) (noting that a statute providing that payments "are effective only 'in such amounts as are provided in advance in appropriation Acts'" reflects a "concept that mirrors Art. I, § 9, of the Constitution ('No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law')"). *See generally* EPA Letter at 12; CEQ Letter at 6; Tax Memorandum at 5.

Second, this reading of the text comports with earlier opinions of this Office interpreting other authorization or appropriations provisions. For instance, faced with a statute that authorized the Secretary of Defense to make available five million dollars out of previously appropriated funds to the Director of the National Science Foundation "[t]o the extent provided in appropriations Acts," this Office concluded that this condition did not require that there have been a specific line-item appropriation in those appropriations acts. *See Funding for the Critical Technologies Institute*, 16 Op. O.L.C. 77, 79–83 (1992) ("*Critical Technologies Institute*") (interpreting section 822(d)(1) of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290, 1435 (1991)). In reaching this conclusion, we noted that the term "provided" can mean "to make a proviso or stipulation," but can also mean, more generally, "to make preparation to meet a need." *Id.* at 81 (citing *Webster's Ninth New Collegiate Dictionary* 948 (1986)). Construing the term against the background of the "fundamental principle of appropriations law" that "Congress is not required to enact a specific

appropriation for a program," and in the absence of any textual indication that Congress intended to depart from this principle, we concluded that a lump-sum appropriation was sufficient to meet the condition. *Id.* at 81–82; *see also id.* at 79–80 (observing that it is "axiomatic" that Congress uses lump-sum appropriations to "cover[] a wide range of activities without specifying precisely the objects to which the appropriation may be applied").[6]

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[6] Nor do we think this Office's interpretation of section 207 of the Equal Access to Justice Act ("EAJA")—which provided that the payment of fees as provided by the statute was "effective only to the extent and in such amounts as are provided in advance in appropriations Acts," Pub. L. No. 96-481, 94 Stat. 2321, 2330 (1980)—is to the contrary. *See Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op. O.L.C. 204, 208–09 (1982) ("Olson Memorandum"). Although this Office observed in *Critical Technologies Institute* that the Department of Defense's reliance on the Olson Memorandum was inapposite because the different statutory language presented a "significantly different question" and that the addition of the phrase "and in such amounts" requires "a greater degree of precision than 'to the extent provided' would alone," 16 Op. O.L.C. at 83, we do not believe that this analysis, which effectively was dicta, precludes the interpretation of section 313(c)(2)(B) we set forth here. As explained in *Critical Technologies Institute*, section 207 of EAJA had *not* been "interpreted" by the Olson Memorandum to "require a specific line-item appropriation." 16 Op. O.L.C. at 83. Rather, "the concern motivating section 207's clause was not," we said, "whether a line-item appropriation rather than a lump-sum appropriation was required, but instead whether an appropriation was necessary at all." *Id.* On this view, section 207 was an effort to "make clear that the bill merely authorized funds, but did not appropriate them" and thus to avoid "hav[ing] the EAJA bill ruled out of order because it contained appropriations, in violation of House rules." *Id.* For these reasons, far from mandating that section 313(c)(2)(B) be interpreted to impose a specific-appropriation requirement, *Critical Technologies Institute*, read as whole, supports our conclusion that section 313(c)(2)(B)'s function is not to impose a rigid specific-appropriation requirement but rather to clarify that the Stormwater Amendment "merely authorized funds, but did not appropriate them." 16 Op. O.L.C. at 82.

The GAO has suggested a contrary interpretation of similar language in other statutory contexts, *see, e.g.*, Letter for Hon. William Lehman, Chairman, Subcommittee on Transportation and Related Agencies, Committee on Appropriations, House of Representatives, from Milton J. Socolar, Acting Comptroller General of the United States, B-204078 (May 6, 1988) (construing a similar phrase as reflecting "a clear prohibition on the obligation or expenditure of funds . . . unless specifically provided for in an appropriation act"), but the GAO has not addressed this particular statutory context and, to the extent that its interpretation of other provisions might be extended here, its interpretation is not binding in any event, *see, e.g.*, *Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 302 (2009) ("Our Office has on many occasions issued opinions and memoranda concluding that GAO decisions are not binding on Executive Branch agencies and that the opinions of the Attorney General and

Finally, section 313(c)(2)(B)'s limitation that stormwater assessments can be paid only "to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the [stormwater assessment]," which makes clear that the amendment itself is not an appropriation, plainly responded to the need to ensure that the statute conformed to the requirements of 2 U.S.C. § 651 (2006). *See* EPA Letter at 7–8. That section provides that "[i]t shall not be in order in either the House of Representatives or the Senate to consider any bill . . . that provides," among other things, "new authority to incur indebtedness . . . for the repayment of which the United States is liable . . . unless that bill . . . also provides that the new authority is to be effective for any fiscal year *only to the extent or in the amounts provided in advance in appropriation Acts*." 2 U.S.C. § 651(a) (emphasis added). Under section 651, "legislation providing new [spending] authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year *only to such extent or in such amounts as are provided in advance in appropriation acts*." *Federal Appropriations Law* at 2–6 (emphasis added).[7] Section 313(c)(2)(B)'s confirmation that the Stormwater Amendment is not an appropriation thus served the important function of avoiding a point of order, thereby enabling passage of the bill. *See* EPA Letter at 8 (setting forth this explanation); *accord* DOD Letter at 3.[8]

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of this Office are controlling."); *see also Critical Technologies Institute*, 16 Op. O.L.C. at 84 (disagreeing with GAO advice).

[7] Section 651 traces its statutory lineage to section 401(a) of the Congressional Budget Act of 1974 (originally codified at 31 U.S.C. § 1351(a) (Supp. IV 1974)). The legislative history of the 1974 statute explains that the purpose of the requirement was to ensure that "backdoor spending authority (such as contract authority, loan authority, and mandatory or open-ended entitlements) could not take effect until funds were provided through the appropriations process." H.R. Rep. No. 93-658, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3462, 3463.

[8] Because we understand section 313(c)(2)(B) to be serving several purposes on this reading—including clarifying that the Stormwater Amendment authorizes spending but is not itself an appropriation; forbidding federal agencies from incurring any stormwater assessment obligations in excess of their appropriations; and conforming with the requirements of 2 U.S.C. § 651—we do not believe that this reading gives no effect to, and thus renders surplusage, the phrase "except to the extent and in an amount provided in advance by any appropriations Act." *Cf.* DOD Letter at 4. Indeed, we rejected a similar objection lodged against our interpretation of the phrase "[t]o the extent provided in

B.

Our textual interpretation is supported by consideration of the text in the context of the Stormwater Amendment's overall structure, purpose, and legislative history. The structure of the Stormwater Amendment favors reading section 313(c)(2)(B) to allow payment from lump-sum appropriations and undermines a specific-appropriation interpretation of that section. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). Reading section 313(c)(2)(B) to restrict payment of stormwater assessments unless and until a *future* Congress makes a *specific* appropriation for that purpose would be in considerable tension with Congress's decision in the immediately preceding subsection—section 313(c)(1)—to clarify that federal agencies are responsible for paying reasonable stormwater assessments. Such a restriction would frustrate the ability of federal agencies to pay those assessments, and "[w]e are disinclined to say that what Congress imposed with one hand . . . it withdrew with the other." *Logan v. United States*, 552 U.S. 23, 35 (2007); *see Greenlaw v. United States*, 554 U.S. 237, 251 (2008) ("We resist attributing to Congress an intention to render a statute so internally inconsistent."). Rather, here, a provision that "seem[s] ambiguous in isolation is . . . clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC*, 543 U.S. at 60.

Interpreting section 313(c)(2)(B) to require a specific appropriation also would substantially conflict with the general purpose of the Stormwater Amendment. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of the "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844,

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Appropriations acts" in *Critical Technologies Institute*, reasoning, among other things, that the phrase "makes clear that the act merely authorized funds, and that a further appropriation is required." 16 Op. O.L.C. at 82. In any event, "[s]urplusage does not always produce ambiguity and [a] preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

861 (2005) ("[e]xamination of purpose is a staple of statutory interpretation"). The central purpose of the Stormwater Amendment was to resolve the controversy surrounding the payment of stormwater assessments by requiring that federal agencies pay such assessments. The very first words of the amendment—"[a]n Act To . . . clarify Federal responsibility for stormwater pollution"—show Congress's purpose to resolve the dispute regarding stormwater assessments and make clear that the federal government as an owner of federal facilities is responsible for the payment of stormwater assessments. Although "[t]he title of an act cannot control its words," it "may furnish some aid in showing what was in the mind of the legislature." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (Marshall, C.J.); *see Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("title of the act" may shed light on the "intent of the legislature"). The title here does just that. *See* ENRD Memorandum at 4 (arguing that the "purpose is readily apparent from the title of the act").

In addition to the title, all of the available legislative history confirms this account of Congress's purpose.[9] The Senate sponsor of the bill, Senator Cardin, explained in introducing the bill: "Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." 156 Cong. Rec. S4856 (daily ed. June 10, 2010).[10] Several members of the House repeated this understanding of the objective of the Stormwater Amendment, including after the substitute

[9] This Office has previously found legislative history one potentially instructive factor to consider, along with other evidence, when confronted with ambiguous appropriations language. *See Critical Technologies Institute*, 16 Op. O.L.C. at 80 (relying on legislative history in ascertaining the meaning of similar appropriations language); *see also Authority of Chrysler Corporation Loan Guarantee Board to Issue Guarantees*, 43 Op. Att'y Gen. 219, 219–23 (1980) (construing phrase "to the extent such amounts are provided in advance in appropriations acts" based principally on legislative history).

[10] Although some of the legislative history we cite here was in connection with the bill as it existed prior to the last-minute addition of section 313(c)(2)(B), that does not render that prior history irrelevant. Senator Cardin's explanation of the purpose of the Stormwater Amendment was the same before and after the addition of the relevant appropriations language (which was added at Senator Cardin's request), and is consistent with statements made by members of the House *after* the revised language was added. Standing alone, the fact that Congress revised the Stormwater Amendment provides no basis for adopting a restrictive interpretation of section 313(c)(2)(B), especially when all available legislative evidence is to the contrary.

version of the bill passed the Senate. Representative Oberstar, for example, noted that "[s]everal states and municipalities . . . have taken aggressive action to address ongoing sources of stormwater pollution" but that such action is undermined "when a significant percentage of Federal property owners take the position that they cannot be held responsible for their pollution." 156 Cong. Rec. H8978 (daily ed. Dec. 22, 2010). He explained that the amendment would "clarif[y] that Federal agencies and departments are financially responsible for any reasonable . . . charges for treating or otherwise addressing stormwater pollution that emanates from Federal property." *Id.* Other statements in the legislative record are to the same effect.[11]

Indeed, after the Senate's passage of the Stormwater Amendment, Senator Cardin again explained the purpose of the amendment in similar terms:

> [T]oday the Congress stands ready to approve S. 3481, a bill to clarify Federal responsibility to pay for stormwater pollution. This legislation, which will soon become law, requires the Federal government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government.

156 Cong. Rec. S11,023 (daily ed. Dec. 22, 2010); *see id.* at S11,024 (statement of Sen. Cardin) (the federal responsibility "to manage . . . stormwater pollution . . . needs to translate into payments to the local governments that are forced to deal with this pollution"). Senator Cardin's consistent, public, and unambiguous articulation of the intended purpose

[11] *See* 156 Cong. Rec. E2259 (daily ed. Dec. 29, 2010) (statement of Rep. Johnson) (describing the bill as "a simple effort to clarify . . . that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities"); *id.* at E2258 (statement of Rep. Johnson) (explaining that the "common sense bill" would "ensure[] that the Federal Government maintains its equitable responsibility for stormwater pollution runoff originating or emanating from its property"); 156 Cong. Rec. E2245 (daily ed. Dec. 22, 2010) (statement of Del. Norton, who sponsored the Stormwater Amendment in the House) ("The consequence of failing to pass this bill is that we give the Federal Government a free ride and pass its fees on to our constituents throughout the United States.").

and effect of the Stormwater Amendment confirms our view that Congress intended the Stormwater Amendment to facilitate the payment of stormwater assessments by the federal government. *See NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (internal quotation marks omitted); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (relying on the stated understanding of "the principal sponsor of the Senate bill" in interpreting a statute). Although the "remarks of a single legislator who sponsors a bill" may not be "controlling in analyzing legislative history," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), Senator Cardin's remarks accord with *all* of the available legislative history. There is no indication in the legislative record that the understanding of the Stormwater Amendment offered by Senator Cardin and others was not shared universally in Congress.

Reading the statute to impose a specific-appropriation requirement would frustrate that purpose. Such a requirement would place a substantial obstacle in the path of payment of stormwater assessments because of the practical burdens associated with attaining specificity in annual appropriations, especially specificity in appropriations bills applying to a range of federal agencies. *See, e.g.*, *Critical Technologies Institute*, 16 Op. O.L.C. at 80 ("A rule requiring greater specificity in appropriations would create extreme obstacles for the functioning of the Federal Government."). Indeed, we note that, to the extent some federal agencies were paying stormwater assessments from lump-sum appropriations prior to the passage of the Stormwater Amendment, a specific-appropriation interpretation would require ascribing to Congress an intent to forbid such ongoing payments unless and until Congress made a specific appropriation. We can find no indication of such a congressional intent. Equally important, a specific-appropriation interpretation of section 313(c)(2)(B), rather than resolving once and for all the obligation of the federal government as an owner of federal facilities to pay certain stormwater assessments, would effectively leave the issue where Congress found it—passing on to future Congresses the task of determining, on an annual basis, whether stormwater assessments should be paid. Such a reading of section 313(c)(2)(B) would reintroduce the same cloud of legal uncertainty Congress intended the Stormwater Amendment to dispel.

Furthermore, the legislative history relating specifically to the addition of section 313(c)(2)(B) weighs heavily against interpreting the section to impose a specific-appropriation requirement. Senator Cardin explained the appropriations language at issue here as follows:

> [W]e added a provision to the bill in order to rectify a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees. The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees. This is exactly what they all do today in paying for their drinking water and wastewater bills or any other utility bill, for that matter. This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose. *It does not mean that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*. The legislative language doesn't say that, and I want to be perfectly clear that such a restrictive reading is not our intent.

156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).[12] Senator Cardin's view was echoed by several members of the House of Representatives, including the House sponsor of the Stormwater Amendment, Delegate Norton. She explained: "The bill requires that Congress make available, in appropriations acts, the funds that could be used to pay for stormwater management charges, but *not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*." *Id.* at H8979 (daily ed. Dec. 22, 2010) (emphasis added).[13] There is no legislative history pointing to a contrary result. *See*

[12] Although Senator Cardin's statement was made after the passage of the Senate version of the bill, his description is consistent with the understanding expressed by members of the House, including the sponsor, prior to passage there. *See infra* n. 13 and accompanying text.

[13] *See also* 156 Cong. Rec. H8979 (daily ed. Dec. 22, 2010) (statement of Rep. Oberstar) ("In addition, the intent of subsection (c)(2)(B) of Section 313 of the Clean Water Act, as added by S. 3481, is to require that Congress make available, in appropriations acts, the funds that could be used to pay stormwater fees, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges."); *id.* at H8980 (daily ed. Dec. 22, 2010) (statement of Rep. Johnson) ("This new language requires that Congress make available, in appropriations acts, the funds

CEQ Letter at 5 (canvassing legislative history supporting an interpretation of section 313(c)(2)(B) as authorizing annual appropriations to pay stormwater assessments and noting "[n]o comments to the contrary appear anywhere in the legislative history" of the Stormwater Amendment).

In sum, we conclude that the best reading of the text of the appropriations provision in section 313(c)(2)(B), in light of the structure, purpose, and history of the Stormwater Amendment, is that Congress did not intend to impose a specific-appropriation requirement. Indeed, a specific-appropriation requirement—which, as we have noted, would have the predictable effect of restricting payment by federal agencies and would leave the status of future stormwater payments in legal limbo—would undermine Congress's central aims in enacting the Stormwater Amendment. We therefore believe that federal agencies may pay stormwater assessments out of annual—including current—lump-sum appropriations.[14]

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that could be used for this purpose. It should not be interpreted as requiring appropriations act [sic] to state specifically or expressly that the funds could be used to pay these charges. The statutory language does not require this, and such a restrictive reading is not intended.").

[14] USDA suggests that section 313(c)(2)(B), in all events, forbids the use of *current* appropriations to pay stormwater assessments because an "additional act of Congress is required." USDA Letter at 4. But the conclusion does not follow from the premise. It is true that an "additional act of Congress is required"—because the Stormwater Amendment is not an appropriation, a point that is central to our reading of section 313(c)(2)(B)—but the view that section 313(c)(2)(B) may be satisfied by a lump-sum appropriation leads logically to the conclusion that such an appropriation may be a current *or* future lump-sum appropriation. Payment of stormwater assessments from a current appropriation would not countermand the statutory requirement that funds be "provided in *advance* by any appropriations Act" because federal agencies' payments of stormwater assessments going forward would be made from appropriations acts previously enacted by Congress. This same analysis largely responds to the Department of Defense's concern that section 313(c)(2)(B) "clearly require[s] some additional action by Congress." DOD Letter at 3. DOD appears to posit that the "shall not be obligated" clause in section 313(c)(2)(B) means that federal agencies *may* pay stormwater assessments out of general operating funds but that agencies *must* pay such assessments in the event that Congress enacts specific "appropriations act language." *Id.* at 4. As we have explained, we agree that "additional action by Congress" is required, but that additional action may be a current or future general lump-sum appropriation. Therefore, we disagree with DOD's suggested interpretation of the "shall not be obligated" phrase because, in our view, a general lump-sum appropriation is sufficient to trigger the "mandatory" payment of stormwater assessments. *Id.*

C.

One significant argument might be advanced against our reading of the Stormwater Amendment. It might be said that, if the plain text of section 313(c)(2)(B) does not definitively resolve the source of payment, then we must embrace a construction that restricts payment on the ground that "a condition to [a] waiver of sovereign immunity . . . must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). We disagree that this rule of construction justifies reading section 313(c)(2)(B) to impose a specific-appropriation requirement.

In our view, the appropriations language in section 313(c)(2)(B) is not properly understood as a condition on the waiver of immunity. Sections 313(a) and 313(c)(1), read together, accomplish that waiver for stormwater assessments. *See supra* p. 7. Section 313(c)(2)(B) serves a different function, operating as an internal accounting provision, directing when and how federal agencies may pay such assessments. *Cf. Henderson v. United States*, 517 U.S. 654, 667–68 (1996) (holding that, notwithstanding that the Suits in Admiralty Act is a broad waiver of sovereign immunity, the provisions in section 742 of the statute governing service of process are not "sensibly typed 'substantive' or 'jurisdictional'"—and therefore a condition on the waiver—but "[i]nstead, they have a distinctly facilitative, 'procedural' cast" as "[t]hey deal with case processing, not substantive rights or consent to suit"). The heading of section 313(c)(2), "Limitation on Accounts," supports the view that section 313(c)(2) is not a condition on a waiver of immunity but rather that it governs the sources from which federal agencies may pay stormwater assessments. *See* Government Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 2 (Sept. 2005) (defining account as "[a] separate financial reporting unit for budget, management, and/or accounting purposes"); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that the "heading of a section" is a "tool[] available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted); ENRD Memorandum at 4. For these reasons, reading section 313(c)(2)(B) not as a condition on the waiver of immunity, but as a separate internal accounting provision specific to stormwater assessments, is most faithful to the Supreme Court's instruction to "interpret [a] statute as a symmetrical and coherent regulatory scheme" that "fit[s] . . . all parts into a harmonious whole." *Brown &*

Williamson, 529 U.S. at 133 (internal quotation marks and citations omitted).

We recognize that section 313(c)(2)(B)'s direction that federal agencies "shall not be obligated to pay" stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act" might be read as a condition on the waiver of immunity. *See* DOD Letter at 4; *cf*. Tax Memorandum at 4 (suggesting that section 313(c)(2)(B) "read[s] more like a traditional waiver given the context of the amendment"). But we believe, in this statutory context, that the phrase "shall not be obligated to pay . . . except to the extent and in an amount provided in advance by any appropriations Act" is instead a textual cue that the Stormwater Amendment is not an appropriation and that stormwater assessment payments require a separate appropriation by Congress. In other words, the "shall not be obligated to pay" phrase is an instruction that federal agencies may not pay stormwater assessments unless there is a separate appropriation of funds by Congress to do so. Because we do not read section 313(c)(2)(B) as a condition on the waiver of immunity effected by sections 313(a) and 313(c)(1), the strict construction canon governing conditions on waivers of immunity is inapposite.

For these reasons, we conclude that section 313(c)(2)(B) of the CWA does not impose a specific-appropriation requirement. Instead, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

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Authority to Use Military Force in Libya

The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest.

Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

April 1, 2011

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President's legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

I.

In mid-February 2011, amid widespread popular demonstrations seeking governmental reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa, protests began in Libya against the autocratic government of Colonel Muammar Qadhafi, who has ruled Libya since taking power in a 1969 coup. Qadhafi moved swiftly in an attempt to end the protests using military force. Some Libyan government officials and elements of the Libyan military left the Qadhafi regime, and by early March, Qadhafi had lost control over much of the eastern part of the country, including the city of Benghazi. The Libyan government's operations against its opponents reportedly included strafing of protesters and shelling, bombing, and other violence deliberately targeting civilians. Many refugees fled to Egypt and other neighboring countries to escape the violence, creating a serious crisis in the region.

On February 26, 2011, the United Nations Security Council ("UNSC") unanimously adopted Resolution 1970, which "[e]xpress[ed] grave con-

cern at the situation in the Libyan Arab Jamahiriya," "condemn[ed] the violence and use of force against civilians," and "[d]eplor[ed] the gross and systematic violation of human rights" in Libya. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); Press Release, Security Council, *In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters*, U.N. Press Release SC/10187/Rev. 1 (Feb. 26, 2011). The resolution called upon member states, among other things, to take "the necessary measures" to prevent arms transfers "from or through their territories or by their nationals, or using their flag vessels or aircraft"; to freeze the assets of Qadhafi and certain other close associates of the regime; and to "facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance" in Libya. S.C. Res. 1970, ¶¶ 9, 17, 26. The resolution did not, however, authorize members of the United Nations to use military force in Libya.

The Libyan government's violence against civilians continued, and even escalated, despite condemnation by the UNSC and strong expressions of disapproval from other regional and international bodies. *See, e.g.*, African Union, Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011) (describing the "prevailing situation in Libya" as "pos[ing] a serious threat to peace and security in that country and in the region as a whole" and "[r]eiterat[ing] AU's strong and unequivocal condemnation of the indiscriminate use of force and lethal weapons"); News Release, Organization of the Islamic Conference, *OIC General Secretariat Condemns Strongly the Excessive Use of Force Against Civilians in the Libyan Jamahiriya* (Feb. 22, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=4947&x_key= (last visited ca. Apr. 2011) (reporting that "the General Secretariat of the Organization of the Islamic Conference (OIC) voiced its strong condemnation of the excessive use of force against civilians in the Arab Libyan Jamahiriya"). On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution "strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms," "call[ed] on Muammar Gadhafi to desist from further violence," and "urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya

from attack, including the possible imposition of a no-fly zone over Libyan territory." S. Res. No. 112-85, §§ 2, 3, 7 (as passed by Senate, Mar. 1, 2011). On March 12, the Council of the League of Arab States similarly called on the UNSC "to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation" and "to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States." League of Arab States, *The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position*, Res. No. 7360, ¶ 1 (Mar. 12, 2011).

By March 17, 2011, Qadhafi's forces were preparing to retake the city of Benghazi. Pledging that his forces would begin an assault on the city that night and show "no mercy and no pity" to those who would not give up resistance, Qadhafi stated in a radio address: "We will come house by house, room by room. It's over. The issue has been decided." Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. Times, Mar. 18, 2011, at A1. Qadhafi, President Obama later noted, "compared [his people] to rats, and threatened to go door to door to inflict punishment. . . . We knew that if we . . . waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world." Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) ("March 28, 2011 Address"), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya (last visited ca. Apr. 2014).

Later the same day, the UNSC addressed the situation in Libya again by adopting, by a vote of 10-0 (with five members abstaining), Resolution 1973, which imposed a no-fly zone and authorized the use of military force to protect civilians. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); Press Release, Security Council, *Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, U.N. Press Release SC/10200 (Mar. 17, 2011). In this resolution, the UNSC determined that the "situation" in Libya "continues to constitute a threat

to international peace and security" and "demand[ed] the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians." S.C. Res. 1973. Resolution 1973 authorized member states, acting individually or through regional organizations, "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory." *Id.* ¶ 4. The resolution also specifically authorized member states to enforce "a ban on all [unauthorized] flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians" and to take "all measures commensurate to the specific circumstances" to inspect vessels on the high seas suspected of violating the arms embargo imposed on Libya by Resolution 1970. *Id.* ¶¶ 6–8, 13.

In remarks on March 18, 2011, President Obama stated that, to avoid military intervention to enforce Resolution 1973, Qadhafi needed to: implement an immediate ceasefire, including by ending all attacks on civilians; halt his troops' advance on Benghazi; pull his troops back from three other cities; and establish water, electricity, and gas supplies to all areas. Press Release, Office of the Press Secretary, The White House, Remarks by the President on the Situation in Libya (Mar. 18, 2011) ("March 18, 2011 Remarks"), http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya (last visited ca. Apr. 2011). The President also identified several national interests supporting United States involvement in the planned operations:

> Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qaddafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.

Id. President Obama further noted the broader context of the Libyan uprising, describing it as "just one more chapter in the change that is unfolding across the Middle East and North Africa." *Id.*

Despite a statement from Libya's Foreign Minister that Libya would honor the requested ceasefire, the Libyan government continued to conduct offensive operations, including attacks on civilians and civilian-populated areas. *See* Press Release, Office of the Press Secretary, The White House, *Letter from the President Regarding Commencement of Operations in Libya: Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Mar. 21, 2011) ("March 21, 2011 Report to Congress"), http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya (last visited ca. Apr. 2011). In response, on March 19, 2011, the United States, with the support of a number of its coalition partners, launched airstrikes against Libyan targets to enforce Resolution 1973. Consistent with the reporting provisions of the War Powers Resolution, 50 U.S.C. § 1543(a) (2006), President Obama provided a report to Congress less than forty-eight hours later, on March 21, 2011. The President explained:

> At approximately 3:00 p.m. Eastern Daylight Time, on March 19, 2011, at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya. As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces, under the command of Commander, U.S. Africa Command, began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone. These strikes will be limited in their nature, duration, and scope. Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms of U.N. Security Council Resolution 1973. These limited U.S. actions will set the stage for further action by other coalition partners.

March 21, 2011 Report to Congress. The report then described the background to the strikes, including UNSC Resolution 1973, the demand for a ceasefire, and Qadhafi's continued attacks.

The March 21 report also identified the risks to regional and international peace and security that, in the President's judgment, had justified military intervention:

> Qadhafi's continued attacks and threats against civilians and civilian populated areas are of grave concern to neighboring Arab nations and, as expressly stated in U.N. Security Council Resolution 1973, constitute a threat to the region and to international peace and security. His illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries, thereby destabilizing the peace and security of the region. Left unaddressed, the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States. Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. Qadhafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection, with any delay only putting more civilians at risk.

Id. Emphasizing that "[t]he United States has not deployed ground forces into Libya," the President explained that "United States forces are conducting a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster" and thus had targeted only "the Qadhafi regime's air defense systems, command and control structures, and other capabilities of Qadhafi's armed forces used to attack civilians and civilian populated areas." *Id.* The President also indicated that "[w]e will seek a rapid, but responsible, transition of operations to coalition, regional, or international organizations that are postured to continue activities as may be necessary to realize the objectives of U.N. Security Council Resolutions 1970 and 1973." *Id.* As authority for the military operations in Libya, President Obama invoked his "constitutional authority to conduct U.S. foreign relations" and his authority "as Commander in Chief and Chief Executive." *Id.*

Before the initiation of military operations in Libya, White House and other executive branch officials conducted multiple meetings and brief-

ings on Libya with members of Congress and testified on the Administration's policy at congressional hearings. *See* Press Release, Office of the Press Secretary, *Press Gaggle by Press Secretary Jay Carney, 3/14/2011* (Mar. 24, 2011), http://www.whitehouse.gov/the-press-office/2011/03/24/press-gaggle-press-secretary-jay-carney-3242011 (last visited ca. Apr. 2011). President Obama invited Republican and Democratic leaders of Congress to the White House for consultation on March 18, 2011 before launching United States military operations, *see id.*, and personally briefed members of Congress on the ongoing operations on March 25, 2011. Press Release, Office of the Press Secretary, Readout of the President's Meeting with Members of Congress on Libya (Mar. 25, 2011), http://www.whitehouse.gov/the-press-office/2011/03/25/readout-presidents-meeting-members-congress-libya (last visited ca. Apr. 2011). Senior executive branch officials are continuing to brief Senators and members of Congress on U.S. operations and events in Libya as they develop.

On March 28, 2011, President Obama addressed the nation regarding the situation in Libya. The President stated that the coalition had succeeded in averting a massacre in Libya and that the United States was now transferring "the lead in enforcing the no-fly zone and protecting civilians on the ground . . . to our allies and partners." March 28, 2011 Address. In future coalition operations in Libya, the President continued, "the United States will play a supporting role—including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications." *Id.* The President also reiterated the national interests supporting military action by the United States. "[G]iven the costs and risks of intervention," he explained, "we must always measure our interests against the need for action." *Id.* But, "[i]n this particular country—Libya—at this particular moment, we were faced with the prospect of violence on a horrific scale," and "[w]e had a unique ability to stop that violence." *Id.* Failure to prevent a slaughter would have disregarded America's "important strategic interest in preventing Qaddafi from overrunning those who oppose him":

> A massacre would have driven thousands of additional refugees across Libya's borders, putting enormous strains on the peaceful—yet fragile—transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the

> darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power. The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security. So while I will never minimize the costs involved in military action, I am convinced that a failure to act in Libya would have carried a far greater price for America.

Id. As of March 31, 2011, the United States had transferred responsibility for all ongoing coalition military operations in Libya to the North Atlantic Treaty Alliance ("NATO").

II.

The President explained in his March 21, 2011 report to Congress that the use of military force in Libya serves important U.S. interests in preventing instability in the Middle East and preserving the credibility and effectiveness of the United Nations Security Council. The President also stated that he intended the anticipated United States military operations in Libya to be limited in nature, scope, and duration. The goal of action by the United States was to "set the stage" for further action by coalition partners in implementing UNSC Resolution 1973, particularly through destruction of Libyan military assets that could either threaten coalition aircraft policing the UNSC-declared no-fly zone or engage in attacks on civilians and civilian-populated areas. In addition, no U.S. ground forces would be deployed, except possibly for any search and rescue missions, and the risk of substantial casualties for U.S. forces would be low. As we advised you prior to the commencement of military operations, we believe that, under these circumstances, the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.

A.

Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office "have concluded that the President has the power to commit United States troops abroad," as well as to "take military

action," "for the purpose of protecting important national interests," even without specific prior authorization from Congress. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992) ("*Military Forces in Somalia*"). This independent authority of the President, which exists at least insofar as Congress has not specifically restricted it, *see Deployment of United States Armed Forces Into Haiti*, 18 Op. O.L.C. 173, 176 n.4, 178 (1994) ("*Haiti Deployment I*"), derives from the President's "unique responsibility," as Commander in Chief and Chief Executive, for "foreign and military affairs," as well as national security. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); U.S. Const. art. II, § 1, cl. 1; *id.* § 2, cl. 2.

The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to "declare War," "raise and support Armies," and "provide and maintain a Navy," as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const. art. I, § 8, cls. 1, 11–14. Yet, under "the historical gloss on the 'executive Power' vested in Article II of the Constitution," the President bears the "'vast share of responsibility for the conduct of our foreign relations,'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)), and accordingly holds "independent authority 'in the areas of foreign policy and national security.'" *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); *see also, e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring) (noting President's constitutional power to "act in external affairs without congressional authority"). Moreover, the President as Commander in Chief "superintend[s] the military," *Loving v. United States*, 517 U.S. 748, 772 (1996), and "is authorized to direct the movements of the naval and military forces placed by law at his command." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *see also Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 184 (1996). The President also holds "the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action," given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action.

Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) ("*Presidential Power*"); *see also Haig*, 453 U.S. at 292 (noting "'the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature'") (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Accordingly, as Attorney General (later Justice) Robert Jackson observed over half a century ago, "the President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941).

This understanding of the President's constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the "historical gloss" placed on the Constitution by two centuries of practice. *Garamendi*, 539 U.S. at 414. "Our history," this Office observed in 1980, "is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." *Presidential Power*, 4A Op. O.L.C. at 187; *see generally* Richard F. Grimmett, Cong. Research Serv., R41677, *Instances of Use of United States Armed Forces Abroad, 1798–2010* (2011) ("Grimmet"). Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993–1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation. *See* Grimmett at 13–31. This historical practice is an important indication of constitutional meaning, because it reflects the two political branches' practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense, and because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292. In this context, the "pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, 'evidences the existence of

broad constitutional power.'" *Haiti Deployment I*, 18 Op. O.L.C. at 178 (quoting *Presidential Power*, 4A Op. O.L.C. at 187); *see also Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 330–31 (1995) ("*Proposed Bosnia Deployment*") (noting that "[t]he scope and limits" of Congress's power to declare war "are not well defined by constitutional text, case law, or statute," but the relationship between that power and the President's authority as Commander in Chief and Chief Executive has been instead "clarified by 200 years of practice").

Indeed, Congress itself has implicitly recognized this presidential authority. The War Powers Resolution ("WPR"), 50 U.S.C. §§ 1541–1548 (2006), a statute Congress described as intended "to fulfill the intent of the framers of the Constitution of the United States," *id.* § 1541(a), provides that, in the absence of a declaration of war, the President must report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." *Id.* § 1543(a). The Resolution further provides that the President generally must terminate such use of force within 60 days (or 90 days for military necessity) unless Congress extends this deadline, declares war, or "enact[s] a specific authorization." *Id.* § 1544(b). As this Office has explained, although the WPR does not itself provide affirmative statutory authority for military operations, *see id.* § 1547(d)(2), the Resolution's "structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces" into hostilities or circumstances presenting an imminent risk of hostilities. *Haiti Deployment I*, 18 Op. O.L.C. at 175; *see also Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334. That structure—requiring a report within 48 hours after the start of hostilities and their termination within 60 days after that—"makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress." *Haiti Deployment I*, 18 Op. O.L.C. at 175–76; *see also Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334–35.[1]

[1] A policy statement in the WPR states that "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statuto-

We have acknowledged one possible constitutionally based limit on this presidential authority to employ military force in defense of important national interests—a planned military engagement that constitutes a "war" within the meaning of the Declaration of War Clause may require prior congressional authorization. *See Proposed Bosnia Deployment*, 19 Op. O.L.C. at 331; *Haiti Deployment I*, 18 Op. O.L.C. at 177. But the historical practice of presidential military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates. In our view, determining whether a particular planned engagement constitutes a "war" for constitutional purposes instead requires a fact-specific assessment of the "anticipated nature, scope, and duration" of the planned military operations. *Haiti Deployment I*, 18 Op. O.L.C. at 179. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period. Again, Congress's own key enactment on the subject reflects this understanding. By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for "major, prolonged conflicts such as the wars in Vietnam and Korea," not more limited engagements. *Id.* at 176.

Applying this fact-specific analysis, we concluded in 1994 that a planned deployment of up to 20,000 United States troops to Haiti to oust military leaders and reinstall Haiti's legitimate government was not a "war" requiring advance congressional approval. *Id.* at 174 n.1, 178–79 &

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ry authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). But this policy statement "is not to be viewed as limiting presidential action in any substantive manner." *Presidential Power*, 4A Op. O.L.C. at 190. The conference committee report accompanying the WPR made clear that "[s]ubsequent sections of the [Resolution] are not dependent upon the language of" the policy statement. H.R. Rep. No. 93-547, at 8 (1973). Moreover, in a later, operative provision, the Resolution makes clear that nothing in it "is intended to alter the constitutional authority . . . of the President." 50 U.S.C. § 1547(d). As demonstrated by U.S. military interventions in Somalia, Haiti, Bosnia, and Kosovo, among many other examples, "the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution." *Proposed Bosnia Deployment*, 19 Op. O.LC. at 335; *see also Haiti Deployment I*, 18 Op. O.L.C. at 176 & n.3.

n.10; *see also Address to the Nation on Haiti*, 30 Weekly Comp. Pres. Doc. 1799 (Sept. 18, 1994); Maureen Taft-Morales & Clare Ribando Seelke, Cong. Research Serv., RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns* 4 (2008). "In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary," we observed, "the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment." *Haiti Deployment I*, 18 Op. O.L.C. at 179. Similarly, a year later we concluded that a proposed deployment of approximately 20,000 ground troops to enforce a peace agreement in Bosnia and Herzegovina also was not a "war," even though this deployment involved some "risk that the United States [would] incur (and inflict) casualties." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. For more than two years preceding this deployment, the United States had undertaken air operations over Bosnia to enforce a UNSC-declared "no-fly zone," protect United Nations peacekeeping forces, and secure "safe areas" for civilians, including one two-week operation in which NATO attacked hundreds of targets and the United States alone flew over 2300 sorties—all based on the President's "constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive," without a declaration of war or other specific prior approval from Congress. *Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina* (Sept. 1, 1995), 2 Pub. Papers of Pres. William J. Clinton 1279, 1280 (1995); *see also, e.g.*, *Letter to Congressional Leaders on Bosnia*, 30 Weekly Comp. Pres. Doc. 2431, 2431 (Nov. 22, 1994); *Letter to Congressional Leaders on Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 1699, 1700 (Aug. 22, 1994); *Letter to Congressional Leaders on Protection of United Nations Personnel in Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 793, 793 (Apr. 12, 1994); *Letter to Congressional Leaders Reporting on NATO Action in Bosnia*, 30 Weekly Comp. Pres. Doc. 406, 406 (Mar. 1, 1994); *Letter to Congressional Leaders on the Conflict in the Former Yugoslavia*, 30 Weekly Comp. Pres. Doc. 324, 325 (Feb. 17, 1994); *Letter to Congressional Leaders Reporting on the No-Fly Zone Over Bosnia*, 29 Weekly Comp.

Pres. Doc. 586, 586 (Apr. 13, 1993); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 328–29; *Deliberate Force: A Case Study in Effective Air Campaigning* 334, 341–44 (Col. Robert C. Owen ed., 2000), http://purl.access.gpo.gov/GPO/LPS20446 (last visited ca. Apr. 2011). This Office acknowledged that "deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention," than air or naval operations because of the increased risk of United States casualties and the far greater difficulty of withdrawing United States ground forces. But we nonetheless concluded that the anticipated risks were not sufficient to make the deployment a "'war' in any sense of the word." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333–34 (emphasis in original).

B.

Under the framework of these precedents, the President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.

In prior opinions, this Office has identified a variety of national interests that, alone or in combination, may justify use of military force by the President. In 2004, for example, we found adequate legal authority for the deployment of U.S. forces to Haiti based on national interests in protecting the lives and property of Americans in the country, preserving "regional stability," and maintaining the credibility of United Nations Security Council mandates. *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30, 32–33 (2004) ("*Haiti Deployment II*"). In 1995, we similarly concluded that the President's authority to deploy approximately 20,000 ground troops to Bosnia, for purposes of enforcing a peace agreement ending the civil war there, rested on national interests in completing a "pattern of inter-allied cooperation and assistance" established by prior U.S. participation in NATO air and naval support for peacekeeping efforts, "preserving peace in the region and forestalling the threat of a wider

conflict," and maintaining the credibility of the UNSC. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332–33. And in 1992, we explained the President's authority to deploy troops in Somalia in terms of national interests in providing security for American civilians and military personnel involved in UNSC-supported humanitarian relief efforts and (once again) enforcing UNSC mandates. *Military Forces in Somalia*, 16 Op. O.L.C. at 10–12.[2]

In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC's credibility and effectiveness—provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force.[3] First, the United States has a strong national security and foreign policy interest in security and stability in the Middle East that was threatened by Qadhafi's actions in Libya. As noted, we recognized similar regional stability interests as justifications for presidential military actions in Haiti and Bosnia. With respect to Haiti, we found "an obvious interest in maintaining peace and stability," "[g]iven the proximity of Haiti to the United States," and particularly considering that "past instances of unrest in Haiti have led to the mass emigration of refugees attempting to reach the United States." *Haiti Deployment II*, 28 Op. O.L.C. at 32–33. In the case of Bosnia, we noted (quoting prior statements by President Clinton justifying military action) the longstanding commitment of the United States to the "'principle that the security and stability of Europe is of fundamental interest to the United States,'" and we identified, as justification for the military action, the

[2] As these examples make clear, defense of the United States to repel a direct and immediate military attack is by no means the only basis on which the President may use military force without congressional authorization. Accordingly, the absence of an immediate self-defense interest does not mean that the President lacked authority for the military operations in Libya.

[3] Although President Obama has expressed opposition to Qadhafi's continued leadership of Libya, we understand that regime change is not an objective of the coalition's military operations. *See* March 28, 2011 Address ("Of course, there is no question that Libya—and the world—would be better off with Qaddafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake."). We therefore do not consider any national interests relating to regime change in assessing the President's legal authority to order military operations in Libya.

President's determination that "[i]f the war in the former Yugoslavia resumes, 'there is a very real risk that it could spread beyond Bosnia, and involve Europe's new democracies as well as our NATO allies.'" *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. In addition, in another important precedent, President Clinton justified extensive airstrikes in the Federal Republic of Yugoslavia ("FRY") in 1999—military action later ratified by Congress but initially conducted without specific authorization, *see Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327 (2000)—based on concerns about the threat to regional security created by that government's repressive treatment of the ethnic Albanian population in Kosovo. "The FRY government's violence," President Clinton explained, "creates a conflict with no natural boundaries, pushing refugees across borders and potentially drawing in neighboring countries. The Kosovo region is a tinderbox that could ignite a wider European war with dangerous consequences to the United States." *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 35 Weekly Comp. Pres. Doc. 527, 527 (Mar. 26, 1999).

As his statements make clear, President Obama determined in this case that the Libyan government's actions posed similar risks to regional peace and security. Much as violence in Bosnia and Kosovo in the 1990s risked creating large refugee movements, destabilizing neighboring countries, and inviting wider conflict, here the Libyan government's "illegitimate use of force . . . [was] forcing many [civilians] to flee to neighboring countries, thereby destabilizing the peace and security of the region." March 21, 2011 Report to Congress. "Left unaddressed," the President noted in his report to Congress, "the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States." *Id.* Without outside intervention, Libya's civilian population faced a "humanitarian catastrophe," *id.*; as the President put it on another occasion, "innocent people" in Libya were "being brutalized" and Qadhafi "threaten[ed] a bloodbath that could destabilize an entire region." Press Release, Office of the Press Secretary, The White House, *Weekly Address: President Obama Says the Mission in Libya is Succeeding* (Mar. 26, 2011), http://www.whitehouse.gov/the-press-office/2011/03/26/weekly-address-president-obama-says-mission-libya-succeeding (last visited ca. Apr. 2011). The risk of regional destabilization in this case was also recognized by the

UNSC, which determined in Resolution 1973 that the "situation" in Libya "constitute[d] a threat to international peace and security." S.C. Res. 1973. As this Office has previously observed, "[t]he President is entitled to rely on" such UNSC findings "in making his determination that the interests of the United States justify providing the military assistance that [the UNSC resolution] calls for." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.[4]

Qadhafi's actions not only endangered regional stability by increasing refugee flows and creating a humanitarian crisis, but, if unchecked, also could have encouraged the repression of other democratic uprisings that were part of a larger movement in the Middle East, thereby further undermining United States foreign policy goals in the region. Against the background of widespread popular unrest in the region, events in Libya formed "just one more chapter in the change that is unfolding across the Middle East and North Africa." March 18, 2011 Remarks. Qadhafi's campaign of violence against his own country's citizens thus might have set an example for others in the region, causing "[t]he democratic impulses that are dawning across the region [to] be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power." March 28, 2011 Address. At a minimum, a massacre in Libya could have imperiled transitions to democratic government underway in neighboring Egypt and Tunisia by driving "thousands of additional refugees across Libya's borders." *Id.* Based on these factors, we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.

The second important national interest implicated here, which reinforces the first, is the longstanding U.S. commitment to maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security. Since at least the Korean War, the United States government has recognized that "'[t]he continued existence of the United Nations as an effective interna-

[4] We note, however, that, at least for purposes of domestic law, a Security Council resolution is "not required as a precondition for Presidential action." *Military Forces in Somalia*, 16 Op. O.L.C. at 7. Rather, as we explained in 2004, "in exercising his authority as Commander in Chief and Chief Executive, the President [may] choose to take" the UNSC resolution into account "in evaluating the foreign policy and national security interests of the United States that are at stake." *Haiti Deployment II*, 28 Op. O.L.C. at 33.

tional organization is a paramount United States interest.'" *Military Forces in Somalia*, 16 Op. O.L.C. at 11 (quoting *Authority of the President to Repel the Attack in Korea*, 23 Dep't of State Bull. 173, 177 (1950)). Accordingly, although of course the President is not required to direct the use of military force simply because the UNSC has authorized it, this Office has recognized that "'maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest'" on which the President may rely in determining that U.S. interests justify the use of military force. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333 (quoting *Military Forces in Somalia*, 16 Op. O.L.C. at 11). Here, the UNSC's credibility and effectiveness as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians—particularly after Qadhafi's forces ignored the UNSC's call for a cease fire and for the cessation of attacks on civilians. As President Obama noted, without military action to stop Qadhafi's repression, "[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security." March 28, 2011 Address; s*ee also* March 21, 2011 Report to Congress ("Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region."). We think the President could legitimately find that military action by the United States to assist the international coalition in giving effect to UNSC Resolution 1973 was needed to secure "a substantial national foreign policy objective." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.

We conclude, therefore, that the use of military force in Libya was supported by sufficiently important national interests to fall within the President's constitutional power. At the same time, turning to the second element of the analysis, we do not believe that anticipated United States operations in Libya amounted to a "war" in the constitutional sense necessitating congressional approval under the Declaration of War Clause. This inquiry, as noted, is highly fact-specific and turns on no single factor. *See Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334 (reaching conclusion

based on specific "circumstances"); *Haiti Deployment I*, 18 Op. O.L.C. at 178 (same). Here, considering all the relevant circumstances, we believe applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a "war" for constitutional purposes.

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the NATO bombing campaign in connection with the Kosovo conflict in 1999—two military campaigns initiated without a prior declaration of war or other specific congressional authorization—President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions; the President made clear that "[t]he United States is not going to deploy ground troops in Libya." March 18, 2011 Remarks. The planned operations thus avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces—two factors that this Office has identified as "arguably" indicating "a greater need for approval [from Congress] at the outset," to avoid creating a situation in which "Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. Furthermore, also as in prior operations conducted without a declaration of war or other specific authorizing legislation, the anticipated operations here served a "limited mission" and did not "aim at the conquest or occupation of territory." *Id.* at 332. President Obama directed United States forces to "conduct[] a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster"; American airstrikes accordingly were to be "limited in their nature, duration, and scope." March 21, 2011 Report to Congress. As the President explained, "we are not going to use force to go beyond [this] well-defined goal." March 18, 2011 Remarks. And although it might not be true here that "the risk of sustained military conflict was negligible," the anticipated operations also did not involve a "preparatory bombardment" in anticipation of a ground invasion—a form of military operation we distinguished from the deployment (without preparatory bombing) of 20,000 U.S. troops to Haiti in concluding that the latter operation did not require advance congressional approval. *Haiti Deployment I*, 18 Op. O.L.C. at 176, 179. Considering the historical practice of even intensive

military action—such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999—without specific prior congressional approval, as well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the "anticipated nature, scope, and duration" of the use of force by the United States in Libya rose to the level of a "war" in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress.

Accordingly, we conclude that President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya—which were limited in their nature, scope, and duration—without prior congressional authorization.

CAROLINE D. KRASS
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Authority to Employ White House Officials Exempt from Annual and Sick Leave Act During Appropriations Lapse

White House officials who are exempt from the Annual and Sick Leave Act pursuant to 5 U.S.C. § 6301(2)(x) and (xi) may continue to work during a lapse in the appropriations for their salaries.

April 8, 2011

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether White House Office officials who are exempt from the provisions of the Annual and Sick Leave Act under 5 U.S.C. § 6301(2)(x) and (xi) may continue to work during a lapse in appropriations. For the reasons set forth below, we conclude that they may.

I.

In September 1995, this Office issued an opinion regarding "the authority available to the White House [O]ffice to employ the services of White House employees during a lapse in appropriations." *Authority to Employ the Services of White House Office Employees During an Appropriations Lapse*, 19 Op. O.L.C. 235 (1995) ("*White House Employees*"). As we explained there, two provisions of the Antideficiency Act impose the principal statutory constraints on this authority. Section 1341 of title 31 provides that "[a]n officer or employee of the United States Government . . . may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). And section 1342 of the same title provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

Applying these provisions to the White House Office, we identified three categories of employees who could continue to work during an appropriations lapse: "personnel who perform functions that are excepted from the Antideficiency Act's general prohibition" set forth in 31 U.S.C. § 1341; personnel who hold nonsalaried positions and whose employment

therefore does not "incur an obligation on behalf of the federal government"; and personnel who hold positions in which compensation is not fixed by law and who have lawfully waived their salaries. *White House Employees*, 19 Op. O.L.C. at 235–37. We explained that the "excepted functions" in the first category included "functions relating to emergencies involving an imminent threat to the safety of human life or protection of property"—an exception set forth in the Antideficiency Act itself, *see* 31 U.S.C. § 1342—and functions "authoriz[ed] . . . by other law," including "those functions as to which express statutory authority to incur obligations in advance of appropriations has been granted; those functions for which such authority arises by necessary implication; and certain functions necessary to the discharge of the President's constitutional duties and powers." *White House Employees*, 19 Op. O.L.C. at 235.[1]

Later that same year, we issued an opinion concerning the participation of Department of Justice officials in congressional hearings held during an appropriations lapse. That opinion contained further analysis potentially relevant to White House Office operations during such a time. We noted that "those officers who are appointed by the President with the advice and consent of the Senate"—so-called "PAS officers"—are "entitled to their salaries by virtue of the office that they hold and without regard to whether they perform any services during the period of appropriations lapse." *Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301, 301–02 (1995) ("*Congressional Hearings*") (citing *United States v. Grant*, 237 F.2d 511 (7th Cir. 1956)). We thus concluded that the Antideficiency Act was "not implicated at all" by such officers' activities, because "no federal officer or employee incurs an obligation in advance of appropriations when these officers perform services; instead, this obligation arises by virtue of their status and cannot be obviated by placing them on furlough status." *Id.*

You have asked whether, in light of these opinions, White House officials who are exempt from the Annual and Sick Leave Act pursuant to

[1] We also emphasized that even if salary funds could sometimes be obligated, "no salaries c[ould] be paid to any government employee, including those in the White House [O]ffice, without an appropriation," and thus that "no White House employee could receive salary or other compensation payments during such a lapse." *White House Employees*, 19 Op. O.L.C. at 235; *see also* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

5 U.S.C. § 6301(2)(x) and (xi) may continue to work during a lapse in the appropriations for their salaries. Although such officials are not specifically mentioned in the *White House Employees* opinion and are not appointed with the advice and consent of the Senate, you explain that, in your view, such persons are (like PAS officers) "entitled to compensation based on their status." E-mail for Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Donald B. Verrilli, Deputy Counsel to the President (Mar. 12, 2011) (citing 5 U.S.C. § 5508 and *Grant*, 237 F.2d 511). As a result, you conclude, "the government is 'authorized by law' within the meaning of 31 U.S.C. 1341" to "continue to . . . emplo[y]" such persons "in the absence of appropriations." *Id*. We agree: In our view, such officials are entitled to compensation based on their status rather than the hours they work, and the government is authorized by law to allow them to continue to work during a lapse in appropriations.

II.

The Annual and Sick Leave Act of 1951, codified as amended at 5 U.S.C. §§ 6301–6391 (2006 & Supp. III 2009) (the "Leave Act"), sets forth the terms under which federal government employees earn annual and sick leave. Section 6301 defines "employee" for purposes of the Leave Act, and specifically excludes from its coverage certain categories of persons. As relevant here, section 6301(2)(x) excludes from the Leave Act "officer[s] in the executive branch . . . who [are] appointed by the President and whose rate of basic pay exceeds the highest rate payable under [the GS schedule]," and section 6301(2)(xi) excludes from the Act "officer[s] in the executive branch . . . who [are] designated by the President, except a postmaster, United States attorney, or United States marshal." 5 U.S.C. § 6301(2)(x), (xi). White House officials who fall within either of these paragraphs are not covered by the Leave Act.[2]

Section 5508 of title 5, which works in harmony with section 6301, provides that "officer[s] in the executive branch . . . to whom [the Leave

[2] We assume for the purposes of this opinion that there are White House officials who are in fact covered by these paragraphs. We have not independently analyzed whether particular officials are so covered and express no view about the scope of 5 U.S.C. § 6301(2)(x) and (xi).

Act] applies are not entitled to the pay of their offices solely because of their status as officers." This provision does not expressly address the entitlements of officials to whom the Leave Act does not apply. But by providing that officers who are covered by the Act do not earn pay by virtue of their status, it suggests by negative implication that officers who are exempt from the Act—including those exempt under 5 U.S.C. § 6301(2)(x) or (xi)—do earn their salaries by virtue of their status. *See* 61 Comp. Gen. 586, 587 (1982) ("The importance of that section for our purposes is that . . . the converse, that officers who are not so covered *are* entitled to compensation solely because of their status as officers, is also true."); *cf. Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (supporting the conclusion that Title VII "was clearly intended to apply with respect to the employment of aliens inside any State" with "a negative inference from the exemption in § 702, which provides that Tit[le] VII 'shall not apply to an employer with respect to the employment of aliens outside any State'" (quoting 42 U.S.C. § 2000e-1)). This implication gains force from the fact that, as far as we are aware, no other provision in the Leave Act or title 5 addresses in terms the categories of officials who are entitled to salaries based on their status. Instead, section 5508 appears to be the only provision that discusses this subject.

Furthermore, the statutory text now found in section 5508 and section 6301(2)(x) and (xi) was enacted against a well-established "background of common-law principles," *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 n.13 (2010) (internal quotation marks omitted), governing officer pay. Prior to 1953, when these provisions were first enacted, it had long been the rule that "the right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office." 24 Comp. Gen. 45, 46 (1944); *see also Grant*, 237 F.2d at 515 ("Congress in 1953 . . . recognized that prior thereto various officers, including United States marshals, were entitled to receive their salaries as incident to their respective offices."); *Pack v. United States*, 41 Ct. Cl. 414, 429 (1906) ("[T]he compensation annexed to a public office is incident to the title to the office and not to the exercise of the functions of such office."); *Sleigh v. United States*, 9 Ct. Cl. 369, 375 (1873) ("The incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties."); 46 C.J., *Officers*

§ 233, at 1015–16 & nn.29–31 (1928) (collecting cases). A federal officer received his salary for as long as he held title to his office, and "the failure of an officer to perform the duties of his office d[id] not *per se* deprive him of the right to compensation, provided his conduct d[id] not amount to an abandonment of the office." 24 Comp. Gen. at 46; *see also* 23 Comp. Treas. 383, 385 (1917). This rule operated even where these officers were covered by a federal leave system, and even where the leave laws enabled them to receive a lump-sum payment covering accumulated leave. *See* 25 Comp. Gen. 212, 220 (1945) (advising that "Presidential Officers" whose "salaries can not [sic] be reduced if they are absent from duty" may receive "lump-sum payment for accumulated and accrued annual leave") (citing 24 Comp. Gen. 804 (1945)); S. Rep. No. 83-294, at 2 (1953) (noting the "double advantage of these officers to statutory leave benefits and freedom to absent themselves from duty as they see fit").

In 1953, Congress amended the Leave Act in two significant respects. First, through the provisions subsequently codified at section 6301(2)(x) and (xi), it removed from the coverage of the Act certain "officers in the executive branch of the Government," including presidential appointees paid above the highest GS level and "such other officers (except postmasters, United States attorneys, and United States marshals) as may be designated by the President." Pub. L. No. 83-102, § 1, 67 Stat. 136 (1953). Second, in the provision codified at section 5508, it directed that "[n]o officer in the executive branch of the Government . . . to whom [the Leave Act] applies shall be deemed to be entitled to the compensation attached to his office solely by virtue of his status as an officer." *Id.* Through these amendments, Congress "intended to and did effect a change in the law" governing officers' entitlement to compensation, *Grant*, 237 F.2d at 515, but this deviation from the background common-law rule was limited to those officers still covered by the Leave Act. Because section 5508 does not purport to alter the law for officers exempt from the Leave Act, we "interpret the statute with the presumption that Congress intended to retain the substance of the common law," which in this case provided that officers are entitled to compensation by virtue of holding office. *Samantar*, 130 S. Ct. at 2290 n.13; *see also Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention

of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

This interpretation of sections 5508 and 6301 is supported by their legislative history. The committee reports explain that the addition of section 6301(2)(x) and (xi) was intended to eliminate the covered officers' "advantage . . . in being eligible to receive the benefits of a statutory leave system and, at the same time, being exempted, in effect, from the obligations of such leave system to the extent that by the nature of their offices and positions they have freedom to absent themselves from duty from time to time." H.R. Rep. No. 83-629, at 7 (1953) (Conf. Rep.); S. Rep. No. 83-294, at 1–2. Significantly, Congress achieved this end not by abrogating the common-law rule entitling such officers to pay by virtue of their status, but rather by withdrawing those officers' entitlement to benefits under the statutory leave system, leaving the background rule intact. And while the addition of section 5508 expressly addressed only those officers who do not earn salary based solely on their status (i.e., those still covered by the Leave Act under section 6301), the reports explain that this provision was also intended to "settl[e] the basic question of which officers shall be entitled in the future to the compensation attached to their office by virtue of their status as an officer." S. Rep. No. 83-294, at 1–2. Thereafter, "[o]fficers removed from . . . Leave Act coverage would be regarded as being entitled to the compensation of their offices by virtue of their officer status." *Id.* at 3; H.R. Rep. No. 83-629, at 7 ("[O]fficers exempted from the Annual and Sick Leave Act of 1951 will retain their freedom to absent themselves from duty on their own volition[.]"). We accordingly conclude that Executive Branch officials (including those in the White House) exempt from the Leave Act under section 6301(2)(x) and (xi) earn their salaries by virtue of holding office.

III.

We further conclude that officials who are exempt from the Leave Act and therefore earn salaries by virtue of holding office are "authorized by law" to continue to work during a lapse in the appropriations for their salaries. 31 U.S.C. § 1341(a)(1)(B).[3] As noted above, our 1995 *White*

[3] We assume that such officials receive no other form of compensation whose continuation during an appropriations lapse would incur any additional government obligation.

House Employees opinion concluded that the functions "authorized by law" to proceed during an appropriations lapse include "those functions as to which express statutory authority to incur obligations in advance of appropriations has been granted," and "those functions for which such authority arises by necessary implication." 19 Op. O.L.C. at 235. In discussing the same categories of functions in an earlier opinion, Attorney General Civiletti explained that when "an agency's regular one-year appropriations lapse, the 'authorized by law' exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are," among other things, "[1] authorized by statutes that expressly permit obligations in advance of appropriations; or [2] authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency." *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5 (1981) ("*Continuance of Government Functions*").

We are not aware of any law that "expressly permit[s] obligations in advance of appropriations" for salaries paid to White House Office officials who are not subject to the Leave Act. *Id.* However, we believe the authority to continue the obligation for these officials' salaries during a lapse in appropriations arises "by necessary implication from the specific terms of" the President's authority to appoint or designate officials who earn pay by virtue of their status. *Id.* We understand that "most White House [O]ffice employees are appointed under [section 105 of title 3] or a similarly formulated authority." *White House Employees*, 19 Op. O.L.C. at 236. That provision grants the President authority to "appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service," subject to salary caps that are higher than the top of the GS scale. 3 U.S.C. § 105(a).[4] On its face, this provision

[4] We do not believe this authorization is sufficiently clear to constitute the kind of "express[] permi[ssion]" to obligate in advance of appropriations we identified in our 1981 opinion. *Continuance of Government Functions*, 5 Op. O.L.C. at 3–4 & n.3. Unlike section 105, other statutes we have previously included in that category expressly reference the authority to incur obligations in advance of appropriations. *See, e.g.*, 25 U.S.C. § 99 (authorizing the Commissioner of Indian Affairs to "enter into contracts . . . for goods and supplies . . . notwithstanding the fact that the appropriations for such fiscal

confers on the President authority to "appoint" persons to work in the White House Office and to fix their "rate of basic pay" at a rate that "exceeds the highest rate payable" under the GS scale. *See* Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Presidential Authority under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office* at 2 (July 30, 1993) ("We believe that, in view of this sweeping language, section 105(a)(1) allows the President complete discretion to adjust the pay for White House Office employees' work in any manner that he chooses, as long as he complies with the salary limits of section 105(a)(2)."). Officers so appointed fall within section 6301(2)(x) of the Leave Act and (as a result) earn salary by virtue of their status under section 5508.[5] Section 6301(2)(xi) likewise recognizes the President's authority to "designate" other Executive Branch officers (except postmasters, U.S. attorneys, or U.S. marshals) as exempt from the Leave Act, again ensuring that they earn salary based on their status.

We think the "specific terms" of these presidential authorities "necessar[ily] impl[y]" the further authority to continue to incur obligations for

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year have not been made"); *see also* 42 U.S.C. § 2210(j) (authorizing the Atomic Energy Commission to "make contracts in advance of appropriations and incur obligations without regard to sections 1341 [and] 1342 . . . of title 31"). Furthermore, we do not read the permission in section 105 to make appointments "without regard to any other provision of law regulating the employment or compensation of [federal employees]" to mean that such actions are outside the purview of the Antideficiency Act altogether. *Cf. Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1054 (D.C. Cir. 1987) ("We believe the plain meaning of the exemption codified in 42 U.S.C. § 1320c-2(e) [authorizing the Secretary to contract 'without regard to any provision of law relating to the making, performance, amendment, or modification of contracts'] is to exempt HHS from those laws 'relating to the making, performance, amendment or modification of contracts'—that is, the vast corpus of laws establishing rules regarding the procurement of contracts from the government. To include among this rather self-contained corpus the general restraints of the Administrative Procedure Act is a step we decline to make without more specific evidence that Congress intended to exempt HHS from the requirements of the APA." (citation omitted)).

[5] You have not asked us to consider whether section 105 gives the President authority to exempt White House personnel from the Leave Act even if they do not fall within any of the exemptions listed in section 6301, and we express no view about that question, or about the question whether any such personnel would be "authorized by law" to perform service during a lapse in appropriations.

the salaries of such exempted officers in the absence of appropriations. *Continuance of Government Functions*, 5 Op. O.L.C. at 5. As discussed above, officials who fall within section 6301(2)(x) or (xi) are, by virtue of section 5508, "entitled to the pay of their offices solely because of their status as officers." 5 U.S.C. § 5508. Such an entitlement to salary, and the corresponding government obligation to fulfill it, is unaffected by the official's absence from the duties of his office. *Grant*, 237 F.2d at 515 (holding that the salary of an officer so entitled "belonged to him as an incident to his office and was in no way impaired by his alleged absence therefrom or neglect to perform his official duties"); *see also* 24 Comp. Gen. 45, 46 (1944). As we noted in our *Congressional Hearings* opinion, this means that the government cannot avoid this obligation during a lapse in appropriations simply by placing the official on furlough status. 19 Op. O.L.C. at 302.

Given the President's clear statutory authority to appoint and designate officials with these kinds of broad salary entitlements, *see* 3 U.S.C. § 105(a)(1); 5 U.S.C. §§ 5508, 6301, and given the Antideficiency Act's express exceptions for obligations exceeding appropriations where "authorized by law," *see* 31 U.S.C. §§ 1341, 1342, we think the best way to reconcile the two statutory schemes is to interpret sections 5508 and 6301 of the Leave Act and section 105 of title 3 as implicitly "authoriz[ing]" the President "by law" to incur such salary obligations in advance of appropriations. *Cf. Continuance of Government Functions*, 5 Op. O.L.C. at 4 ("[W]hen Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment.").[6] If the President's statutory authority to appoint and designate officials who earn salaries by virtue of their status did not implicitly include the authority to obligate funds for those salaries in advance of appropriations, compliance with the Antideficiency Act would arguably require him to appoint such officials to terms limited to the fiscal year (so as to avoid incurring an indefinite obligation

[6] As we understand it, your question concerns only officials who currently work in the White House Office. You have not asked us to consider, and we express no opinion about, whether the President could, during an appropriations lapse, appoint or designate new officials who are exempt from the Leave Act and therefore entitled to earn salary by virtue of their status.

that potentially exceeded the current year's appropriations), to remove such officials during any lapse in appropriations or require them to resign, or otherwise to find a way to avoid involving the government in an obligation that exceeded available appropriations. *See* 31 U.S.C. §§ 1341, 1342.[7] But there is no indication in sections 5508 or 6301 of the Leave Act or section 105 of title 3 that, in authorizing the President to create broad salary obligations for officers who earn pay by virtue of their status, Congress simultaneously intended to limit the President's appointment authority in any of the ways described above. Nor are we aware of any evidence that the Executive has imposed such restrictions as a matter of practice.

This conclusion is consistent with that reached by the Comptroller General in an opinion concerning whether Commissioners of the Copyright Royalty Tribunal could be paid for work performed during a lapse in the Tribunal's appropriations. 61 Comp. Gen. 586 (1982). In that opinion, the Comptroller General reasoned that the Commissioners were exempt from the Leave Act under section 6301(2)(xiii)—a provision similar to section 6301(2)(x) and (xi) but directed at presidentially appointed "officer[s] in the legislative or judicial branch"—and were therefore "entitled to compensation based on their status as officers rather than for the performance of a function based on the amount of hours they spend engaged at their jobs." *Id.* at 587. The Comptroller General then concluded that, in light of this entitlement, "the incurring of obligations for the Commissioners' pay in the absence of sufficient available appropriations to liquidate them is authorized by law within the meaning of the [*Continuance of Government Functions* opinion]." *Id.*

Given that the President is "authorized by law" to continue the obligation for the salaries of officials exempt from the Leave Act under section 6301(2)(x) or (xi) during a lapse in appropriations, the final question whether such officials can continue to work during a lapse is straightforward. As we noted in our *Congressional Hearings* opinion with respect to PAS officers, because such officials "are entitled to their salaries by virtue

[7] Incurring an obligation to pay any particular official's salary, of course, might be justified for particular periods based on other exceptions to the Antideficiency Act. *See* Memorandum for Alice Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Operations in the Event of a Lapse in Appropriations* at 3–4 (Aug. 16, 1995).

of the office[s] that they hold and without regard to whether they perform any services," no further obligation in advance or in excess of appropriations is incurred when they "perform services." 19 Op. O.L.C. at 301–02; *see* 31 U.S.C. §§ 1341, 1342. The funds for these officials' salaries having already been lawfully obligated, "the [Antideficiency] Act is not implicated at all" when they choose or are directed to continue to work during a lapse in appropriations. *Congressional Hearings*, 19 Op. O.L.C. at 301.

IV.

To summarize, we concluded in our *White House Employees* opinion that, during a lapse in appropriations, the Antideficiency Act permits the White House to employ personnel who "perform functions that are excepted from the Antideficiency Act's general prohibition" because the obligation for their salaries during a lapse is "authorized by law." 19 Op. O.L.C. at 235. For the reasons set forth above, we now conclude that such personnel include officials who are exempt from the provisions of the Annual and Sick Leave Act under 5 U.S.C. § 6301(2)(x) and (xi), because the President's authority to appoint such officials necessarily implies the authority to continue the obligations for their salaries during a lapse in appropriations. Accordingly, such officials may work during a lapse in appropriations, so long as the employment of their services does not create any other obligation on behalf of the government.

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Office of Legal Counsel

Electronic Presentment and Return of Bills

The use of electronic means of presentment and return of bills is constitutionally permissible.

The statutes governing the presentment process could be read as encompassing electronic transmission, but that is not necessarily the most natural reading. In light of the novelty of electronic presentment and return, and the need to ensure that the President and Congress—as well as the public—share a common understanding of the means by which these fundamental steps in the lawmaking process may be carried out, we recommend that, before electronic presentment and return might be used, 1 U.S.C. §§ 106, 106a, and 107 be amended to provide expressly for the permissibility of electronic presentment and that the President and Congress reach an agreement, whether by statute or other means, concerning the permissibility of electronic return of bills.

May 3, 2011

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

The second paragraph of Article I, Section 7 of the Constitution sets out the requirements of bicameralism and presentment that define how a bill becomes a law and the two ways in which a bill presented to the President may fail to become a law, including by the President's return of the bill to the originating chamber of Congress with his objections. It provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner

> as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

You have asked whether it would be legally permissible for Congress to present bills to the President, and for the President to return bills to Congress when he disapproves them, in electronic rather than paper form. We understand that the White House Executive Clerk and his counterparts in the House and Senate are considering establishing a system for secure electronic transmission of bills for use in emergencies.

We believe that use of electronic means of presentment and return is permitted by the Constitution. As far as we are aware, the terms "presented" and "return" as used in Article I, Section 7 are not terms of art but rather take their meanings by reference to common usage. Nothing in their usual meanings excludes transmission by electronic means. Nor is electronic transmission inconsistent with the purposes of presentment and return. And historical practice confirms that Congress and the President have long adopted a pragmatic approach to such logistical matters, an approach that allows for some flexibility and revision in light of technological developments and special circumstances.

The presentment process is also governed by statute. Currently, 1 U.S.C. §§ 106 and 107 generally require that an enrolled bill, that is, one that has passed both chambers of Congress, be printed on parchment or paper "of suitable quality" and "sent" to the President. 1 U.S.C. §§ 106 & 107. We think those statutory directives could be read as encompassing electronic transmission, but that is not necessarily the most natural reading. In light of the novelty of electronic presentment and return, and the need to ensure that the President and Congress—as well as the public—share a common understanding of the means by which these fundamental steps in the lawmaking process may be carried out, we recommend that, before electronic presentment and return might be used, 1 U.S.C. §§ 106, 106a, and 107 be amended to provide expressly for the permissibility of electronic presentment and that the President and Congress reach an agreement, whether by statute or other means, concerning the permissibility of electronic return of bills.

I.

The Constitution does not specify the form in which or the means by which Congress must present a bill to the President for his consideration or the President must return a bill to Congress when he disapproves it. Rather, the Constitution outlines the decisional process by which Congress and the President may enact a bill into law and the methods by which the President may veto a bill. Once both houses of Congress have approved a bill, it must be "presented" to the President. U.S. Const. art. I, § 7. If he disapproves the bill, he must "return" "it" to the originating chamber with his objections. *Id*. No doubt those who drafted and ratified the Constitution, living long before the era of facsimile machines and portable document format (".pdf") files, expected that the required presentment and return would be accomplished through physical delivery of documents. But we see no reason to read Article I, Section 7 as excluding electronic means of transmission.

A.

When a term in the Constitution had a well-established meaning in the common law at the time of the founding, that meaning may provide a helpful tool in interpreting the term, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (holding that the constitutional right of the accused "'to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding"), and we have resorted to contemporaneous common-law usage in interpreting the requirement in Article I, Section 7 that the President "sign" a bill when he approves its adoption into law, *see Whether the President May Sign a Bill by Directing That His Signature Be Affixed to It*, 29 Op. O.L.C. 97 (2005) ("Nielson Memo"). But as far as we are aware, "presented" and "return" are not, at least as used in Article I, Section 7, terms drawn from the common law.[1] Thus, we look initially to their meanings in

[1] The term "present" was used then, as it is today as well, in reference to negotiable instruments. *See, e.g.*, Joseph Story, *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America; with Occasional Illustrations from the Commercial Law of the Nations of Continental Europe* ch. 8 (3d ed. 1853) (discussing "presentment of bills for acceptance"); Joseph Chitty, *A Treatise on the Law*

ordinary usage. *See, e.g.*, *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning").

Both terms connote delivery to a particular recipient. To "present," according to Noah Webster's dictionary, means "[t]o set, place or introduce into the presence" of someone, "[t]o put into the hands of another," "[t]o lay before a public body for consideration." 2 Noah Webster, *An American Dictionary of the English Language* 41–42 (photo. reprint 1967) (1828). The *Oxford English Dictionary*, which looks back to examples from the time of the Constitution's adoption and earlier, similarly defines the verb "present" as simply "[t]o make present to, bring into the presence of." 12 *Oxford English Dictionary* 396 (2d ed. 1989). Other modern-day dictionaries give similar definitions.[2] The word "return" has an equally general meaning. According to Webster, "to return" means "[t]o bring, carry, or send back." 2 Webster, *An American Dictionary of the English Language* at 57. Other dictionaries are in accord.[3] These definitions

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of Bills of Exchange, Checks on Bankers, Promissory Notes, Bankers' Cash Notes, and Bank-Notes ch. 4 (1803) (same). It also was known in criminal law. When a grand jury approves an indictment, it may be said to "present" a "true bill." *See, e.g.*, 2 *An American Dictionary of the English Language* 42 (photo. reprint 1967) (1828) ("it is the duty of grand juries to *present* all breaches of law within their knowledge"). We do not think the uses of the term "present" in these contexts sheds any light on the question we address about its meaning in the different context of the legislative process. But in any event, these different uses are all consistent with what the *Oxford English Dictionary* records as a more general legal meaning of "present," namely, "[t]o bring or lay before a court, magistrate, or person in authority, for consideration or trial; to make presentment of," 12 *Oxford English Dictionary* 397 (2d ed. 1989), a meaning consistent with our interpretation of the term in Article I, Section 7.

[2] *See Webster's Third New International Dictionary* 1793 (1986) ("to bring or introduce into the presence of someone"); *The Random House Dictionary of the English Language* 1529 (2d ed. 1987) ("to bring, offer, or give, often in a formal or ceremonious way"); *The American Heritage Dictionary of the English Language* 1388 (4th ed. 2006) ("[t]o offer for observation, examination, or consideration").

[3] *See* 13 *Oxford English Dictionary* at 805–06 ("[t]o give or render back (*to* one)"); *Webster's Third New International Dictionary* at 1941 ("to pass back to an earlier possessor"); *The Random House Dictionary of the English Language* at 1645 ("to put, bring, take, give, or send back to the original place, position, etc."); *The American Heritage Dictionary of the English Language* at 1490 ("[t]o send, put, or carry back").

suggest transmission back and forth, but they are easily broad enough to encompass transmission by electronic means.

Article I, Section 7 does provide that it must be the "[b]ill" approved by Congress that is presented to the President and either signed by him if he approves "it" or returned by him if he disapproves "it." The generation that wrote and adopted the Constitution no doubt understood legislative "bills" to be physical documents. But we do not think that term limits Congress only to the presentment to the President of a paper document with original signatures.[4] We have in the past advised that this provision requires the President to sign the enrolled bill actually signed by the presiding officers of the House and Senate. *See* Memorandum for the Files from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Signing of Bankruptcy Extension Act* at 10–11 (June 13, 1984) ("The Constitution appears to require that the President sign the actual enrolled bill presented to him, not a copy or facsimile thereof") ("Tarr Memo"); *see also* Memorandum for the Files from Jeffrey P. Singdahlsen, Attorney-Adviser, Office of Legal Counsel, *Re: Preliminary Advice and Consideration Regarding Proposal to Fax Continuing Resolution to the President While He Was Abroad* at 1–2 (Dec. 22, 1999) ("Singdahlsen Memo"). We did so in part based on the provision's wording and in part based on the unbroken practice of presenting the copy actually signed by the presiding officers.

The wording of the provision indicates that the President must sign or return what Congress presents and that Congress must present the precise text approved by its two chambers, but we think the Constitution leaves to Congress to determine the specific physical manifestation of the legislative text that it will present to the President. As a bill moves through Congress, it takes many forms and appears in many copies. Since the

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[4] Noah Webster's dictionary defines "bill" as "[a] form or draft of a law, presented to a legislature, but not enacted." 1 *An American Dictionary of the English Language* at 27. "In some cases," it notes, "*statutes* are called *bills*." *Id.* The Oxford English Dictionary similarly defines "bill" as "[t]he draft of an Act of Parliament submitted to the legislature for discussion and adoption as an 'Act.'" 2 *Oxford English Dictionary* at 191; *see also Webster's Third New International Dictionary* at 215 ("a draft of a law presented to a legislature for enactment"); *The Random House Dictionary of the English Language* at 207 ("a form or draft of a proposed statute presented to a legislature but not yet enacted or passed and made law "); *The American Heritage Dictionary of the English Language* at 180 ("[a] draft of a proposed law presented for approval to a legislative body ").

beginning of our government under the Constitution, as described below, Congress has regulated, by rule and statute, how the text of bills must be prepared and certified. Those congressional directives would have been unnecessary if the Constitution itself dictated the form presented bills must take. And on a number of occasions, also described below, when the certified copies of enrolled bills presented to the President have been lost, the President and Congress have not begun the legislative process again but have simply authorized the issuance of duplicate copies for re-transmission to the President, again suggesting that the Constitution leaves to the political branches the determination of the precise mechanisms by which presentment and return are accomplished.[5] It is true that the consistent practice of Congress from the beginning has been to present to the President the document actually signed by its presiding officers. That longstanding practice perhaps counsels caution in resort to other methods. But we think it reflects practical considerations rather than considered judgments about what the Constitution requires.[6] *Cf.* Nielson Memo, 29 Op. O.L.C. at 123 ("the historical practice should be viewed

[5] If any additional textual warrant were required, the Necessary and Proper Clause, with its sweeping grant to Congress of the power to "make all laws which shall be necessary and proper for carrying into execution" the other powers vested in itself or in any other part of the federal government, stands as further support for the proposition that the Constitution leaves to the political branches the manner by which Congress and the President fulfill the requirements of presentment and return. *See* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[6] The Supreme Court has cautioned that "an unbroken practice . . . is not something lightly to be cast aside." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970). But it has done so in avoiding reading constitutional provisions as prohibiting long-established practices. *See id.* (rejecting First Amendment challenge to State tax exemption for religious organizations for properties used solely for religious purposes); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (rejecting First Amendment challenge to state legislature's practice of opening sessions with religious prayer led by state-paid chaplain); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (rejecting 14th Amendment challenge to local law). Our interpretation of Article I, Section 7 does not "cast aside" a longstanding practice in this sense. Far from interpreting a constitutional provision as prohibiting any particular established practice, we interpret it as permitting both longstanding practices and novel ones by leaving some measure of discretion, and thus some room for logistical innovation, in the hands of the political branches.

not as rejecting the position we adopt today, but rather as simply reflecting the practical reality that for much of our Nation's history the President was precluded by circumstance and technological limitations from approving and signing a bill that had not been physically delivered to him"). The Constitution's sparse text, we believe, leaves these determinations to the political branches. As the Supreme Court has explained in a different context:

> The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode . . . is persuasive evidence that no qualification was intended.

Sprague, 282 U.S. at 732.[7]

B.

The purposes of the presentment and return requirements of Article I, Section 7, as we understand them, also seem consistent with interpreting that provision to permit electronic transmission. *See, e.g.*, *Edwards v. United States*, 286 U.S. 482, 485–86 (1932) (interpreting last sentence of the second paragraph of Article I, Section 7 in light of its "controlling purposes"). The basic purpose of the presentment requirement is to ensure the President receives a prompt and full opportunity to fulfill his constitutional duty to consider bills and determine whether to approve them or not. *See The Pocket Veto Case*, 279 U.S. 655, 676–77 (1929) ("The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves,

[7] We are unaware of anything in the history of the drafting or ratification of the Constitution that sheds any light on the issue addressed here, though there was considerable discussion about whether the President should be given a veto and, if so, what kind. For brief summaries of the progress of what became Article I, Section 7 during the Constitutional Convention, see Edward C. Mason, *The Veto Power: Its Origin, Development and Function in the Government of the United States* 20–22 (1890); Jaynie Randall, *Sundays Excepted*, 59 Ala. L. Rev. 507, 512–13 (2008).

with his objections, in order that they may be reconsidered by Congress."). The basic purpose of the return requirement is to ensure that Congress receives a prompt and full opportunity to reconsider a bill that has been vetoed by the President. *See id*. Both those purposes will be advanced by allowing electronic transmission when circumstances require it. Denying the permissibility of electronic transmission, by contrast, would frustrate those purposes when an emergency might make electronic transmission the only feasible method of ensuring the prompt enactment of a law or the prompt conveying of a presidential veto and thus the ensuring of a prompt opportunity for Congress to consider an override.

C.

Historical practice in both the Executive and Legislative Branches confirms the appropriateness of an interpretation of Article I, Section 7 that permits the political branches to take advantage of improvements in communications technology in the manner in which they record and transmit bills. Since the adoption of the Constitution, Congress and the President have reached practical accommodations concerning the manner of presentment and return, allowing clerks to deliver and receive bills on behalf of each branch, including when Congress is out of session or the President is away from the White House. This Office has also opined that the President may use means besides signing his own full name in ink in order to "sign" a bill within the meaning of the Constitution—including inscription of initials, inscription by a subordinate, and use of an autopen. On occasions when Congress or the President has lost an enrolled bill prior to enactment, they have used a duplicate to complete the process of enactment, without starting over and re-introducing a new version of the bill and having it re-approved by each chamber of Congress. Congress has used rules, parliamentary precedents, and most recently statutes to determine the process by which bills will be recorded and transmitted. It has adapted this process over time to improve accuracy and efficiency. At no point in this evolution are we aware of any suggestion, judicial or otherwise, that the Constitution forecloses such adaptations.

1.

Strict attention to the core requirement of personal presidential decisionmaking combined with a pragmatic approach to the precise mechanisms by which that decisionmaking is accomplished have characterized the manner in which Presidents have met their responsibilities to receive, to approve and sign, or to veto by returning, an enrolled bill. Although Article I, Section 7 states that each bill passed by both houses of Congress shall be presented "to the President" and that the President must "sign it" or "return it," the Executive Branch has not interpreted this language as requiring the President personally to receive or return enrolled bills or as requiring the President personally to inscribe his signature on each approved bill. Congress has acquiesced in those judgments. "[T]he presentment and return requirements have been understood and applied to give the President and Congress flexibility with respect to ministerial detail so long as the essential aspects of these requirements are performed by the appropriate constitutional actors." Nielson Memo, 29 Op. O.L.C. at 122. The historical precedents leave room, in our view, for the President to receive and return bills electronically.

When Congress presents a bill to the President, it does not typically place it directly in the President's hands. For at least the last century, a clerk from Congress has delivered the enrolled print of the bill to a clerk in the White House, who signs a receipt for it.[8] "This is not to say that the

[8] Nielson Memo, 29 Op. O.L.C. at 118 ("The presentment and return provisions have not been interpreted to require the President to receive or return a bill with his own hands."); *Presentation of Enrolled Bills When the President Is Abroad*, 2 Op. O.L.C. 383, 383 (1977) ("When the President is in the United States, presentation does not require delivery to him personally; rather it is done by delivery of the bill to one of the legislative clerks on the White House staff."); *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 635 (Ct. Cl. 1964) (Whitaker, J., concurring) ("[E]nrolled Bills have not been presented to the President in person, except in the case of the Bank Holiday Bill of 1933 and Bills passed on the eve of *sine die* adjournment of the Congress. The usage has been for the Committee on Administration of either the House or the Senate, after the Bill has been signed by the Speaker of the House and the Presiding Officer of the Senate, to send a clerk to the White House with the enrolled Bill and deliver it to a legislative clerk in the records office of the White House, who signs a receipt for it. The Committee on Administration then reports to the House or Senate 'that this day they presented to the President of the United States, for his approval, the following Bills.'"); *id.* at 631 n.15 (majority)

bill is not *presented* to the President within the meaning of the Constitution, but only that the ministerial process of physically accepting delivery of the bill from Congress may, if the President so directs, be carried out by a subordinate." Nielson Memo, 29 Op. O.L.C. at 119. The receipt triggers the start of the ten-day period within which the President must either approve and sign the bill or return it to Congress, along with a statement of his reasons for not approving it (unless Congress, by its adjournment, prevents the return). When the President is away from the White House, he will sometimes ask congressional leadership not to send enrolled bills to the White House during his absence, *see* Nielson Memo, 29 Op. O.L.C. at 121–22; *Presentation of Enrolled Bills When the President Is Abroad*, 2 Op. O.L.C. 383, 383–85 (1977) ("*Presentation of Enrolled Bills*"), or will instruct the White House clerk to accept delivery of an enrolled bill "for presentation to the President upon his return to the United States," *Eber Bros.*, 337 F.2d at 625, so as not to start the ten-day clock during a period when the President might not be able to give the bill immediate consideration. Congress has accepted these practical accommodations to modern circumstances.

Likewise, when the President returns a bill that he has decided to veto, "the accepted practice has been for the President to return the bill by way of a messenger." Nielson Memo, 29 Op. O.L.C. at 119 (citing *Wright v. United States*, 302 U.S. 583, 590 (1938)). "Again, it is *the President* who returns the bill even though, pursuant to the President's instructions, someone other than the President physically delivers it to Congress." *Id*. When one chamber of Congress goes out of session, it will sometimes authorize a clerk to receive bills on its behalf, so as not to prevent return and thus enable a pocket veto. "The Supreme Court has implicitly approved this practice." *Id*. In addressing whether the President could return a bill to a house of Congress that has gone into recess for three days but has appointed an agent to accept bills, the Court has said that "'a rule of construction or of official action which would require in every instance the persons who constitute the Houses of Congress to be in formal session in order to receive bills from the President would also require the person who is President personally to return such bills.'" *Wright*, 302 U.S. at

("Delivery to an authorized aide in the President's immediate entourage would undoubtedly be equivalent to personal delivery to the President.").

591–92 (quoting with apparent approval the Brief for Amicus Curiae Committee on the Judiciary of the House of Representatives in *The Pocket Veto Case*, 279 U.S. 655 (1929)). Explaining that "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return," the Court held that a bill could in these circumstances be returned by delivery to an agent authorized to accept it on behalf of the originating chamber. *Id.* at 589. That the Constitution permits bills to be transmitted between the branches by messengers and through agents instead of by direct exchange between the President and the presiding officers of Congress supports the conclusion that they may also be transmitted electronically.

The Executive Branch also has interpreted the signature requirement of Article I, Section 7 not to require the President literally to take pen in hand and ascribe his full signature in ink on every bill that he approves. A contrary rule, we noted, could have the untoward effect of preventing a President with a physical disability from signing bills into law. Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Delegation of the President's Authority to Physically Sign Documents* at 8 (Mar. 20, 1969) ("Rehnquist Memo") ("If the President's hands only were to become disabled so that he could not personally sign his name, obviously some other means for affixing his signature would have to be used.") (accompanying Letter for John D. Ehrlichman, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (Mar. 20, 1969) ("Rehnquist Letter")). In 1958, this Office advised the White House that President Eisenhower could, if he chose, inscribe his initials instead of his full signature on bills that he approved. Memorandum for Gerald D. Morgan, Special Counsel to the President, from Malcolm R. Wilkey, Assistant Attorney General, Office of Legal Counsel, *Re: Responsibility of the President to Sign Bills Passed by the House and the Senate* (Aug. 19, 1958) ("Wilkey Memo"). In 2002, we were asked whether the President, who was out of the country at the time, could direct an aide to affix his signature to a joint resolution that he wished to approve. We advised that he could. "[T]he word 'sign' is expansive enough to include the meaning of 'cause the bill to bear the President's signature.'" Memorandum for Alberto R. Gonzales, Counsel to the President, from M. Edward Whelan III, Principal Deputy Assistant Attorney General, *Re: Signing of H.J.*

Res. 124 at 1 (Nov. 22, 2002) ("Whelan Memo") (citing Wilkey Memo at 9 n.5); *see also Presentation of Enrolled Bills*, 2 Op. O.L.C. at 383. In 2005, we similarly advised that the President could indicate his approval of a bill "by directing a subordinate to affix the President's signature to it, for example by autopen." Nielson Memo, 29 Op. O.L.C. at 97. In doing so, we examined at considerable length precedents bearing on the presentment process, and we linked our approval of signature by autopen to "the latitude traditionally exercised by Congress and the President in determining how to execute the ministerial duties associated with the presentment and return requirements." Nielson Memo, 29 Op. O.L.C. at 120.

We also clarified that the President did not have to be physically present when a bill was signed for him at his direction, but that the President still could not delegate his constitutional signing responsibility. The President thus should be permitted to examine a copy of a bill in one part of the world and then instruct an aide at the White House to affix his signature to whatever Congress has identified as the enrolled bill and presented to the President. Nielson Memo, 29 Op. O.L.C. at 123–26; Whelan Memo at 1–2.[9]

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[9] On at least two prior occasions, in accord with our advice, the White House had flown the print of the enrolled bill it had received from Congress to the President at a location abroad, so that the President could sign the print, instead of having the President sign a faxed copy or instruct a subordinate to sign the original enrolled bill for him back in Washington, D.C.

In April 1984, President Reagan was traveling to China when Congress presented to the White House a bill to cure a constitutional infirmity in the bankruptcy court system. The President needed to sign the bill before May 1 to keep the bankruptcy courts in operation, but he was not scheduled to return to the United States until May 1. We advised the White House that the President must himself sign the bill. *See* Tarr Memo at 9–10. The White House accordingly flew the print it had received from Congress to China, where President Reagan signed the bill into law on April 30.

In November 1999, we similarly recommended that the White House fly the original print of an enrolled continuing resolution to President Clinton in Turkey, so that he could sign the original print instead of a facsimile copy. We followed the 1984 China precedent out of an abundance of caution but raised as a question to be considered in the future whether Congress might have been able to declare the facsimile copy to be the true enrolled bill, such that the President could have signed the facsimile copy consistently with Article I, Section 7. *See* Singdahlsen Memo at 1–2.

These precedents about presidential signature are especially instructive in that they address a word in Article I, Section 7—"sign"—which has formal as well as substantive connotations as to the actions necessary for a bill to become law. Signature is a physical rather than a mental act. It is an external manifestation of internal assent, and Article I, Section 7 plainly requires the outward manifestation in addition to the internal assent when it states: "If [the President] approve [a bill] he shall sign it."[10] An item that must be "signed" is most commonly understood to be a piece of paper, and a person typically "signs" a piece of paper in his own hand, with stylus and ink. That somebody other than the President may nevertheless "sign" a bill at his direction again suggests that there is flexibility in the external manifestation required of the President. If the President may manifest his assent by instructing an aide to sign a bill for him or by using an autopen, it is no great leap to conclude that he may manifest his assent by signing a printed copy of a bill transmitted to him electronically.

With respect to each step required of the President under Article I, Section 7, then—receipt of a presented bill and its return or signing by him—Presidents, with congressional agreement or acquiescence, have allowed themselves some logistical flexibility in how they carry out their responsibilities in order to take account of the demands of the office.

2.

Further support for a pragmatic approach to the logistics of presentment and return comes from the several occasions on which either Congress or the President has lost the original copy of an enrolled bill and used a duplicate to complete the process of enactment. If a "bill" for purposes of Article I, Section 7 were considered to be a particular physical manifestation rather than the text of the law, the loss of a bill prior to enactment

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In our 2002 and 2005 opinions, we concluded signature by the President himself had not been constitutionally compelled, but reaffirmed our longstanding position that the President's authority to sign bills was non-delegable. *See* Nielson Memo, 29 Op. O.L.C. at 123–26; Whelan Memo at 1–2.

[10] *See Gardner v. Collector of Customs*, 73 U.S. (6 Wall.) 499, 506 (1867) ("The only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more. The simple signing his name at the appropriate place is *the one act which the Constitution requires of him as the evidence of his approval*, and upon his performance of this act the bill becomes law.") (emphasis added).

would presumably require a re-starting of the legislative process, with one of the chambers of Congress initiating consideration of a new version of the bill, engrossing it upon approval, and delivering it to the other chamber for approval and enrollment. Neither Congress nor the President, however, has insisted on such measures.

In February 1911, for example, the Speaker of the House signed an enrolled bill that had originated in the Senate but then lost the bill prior to presentment. The Senate passed a resolution authorizing the Secretary of the Senate to prepare a duplicate copy. The Speaker signed this duplicate copy, and it was treated as fully enrolled without any further action on the part of the Senate or the House and presented to the President.[11]

In 1935 and again in 1938, the White House lost enrolled bills that had been presented to the President but was able to obtain duplicate copies from Congress, and the President signed those duplicate bills into law. In 1935, Congress enrolled a bill authorizing a city in Alaska to issue bonds. When President Roosevelt informed Congress that the White House had lost the bill, the House and Senate issued a concurrent resolution authorizing the Speaker and the President of the Senate (the Vice President) to sign a "duplicate copy of the enrolled bill" and present it to the President.[12] In 1938, Congress enrolled a bill to extend the time for building a bridge across the Missouri River. The Senate, as the originating chamber,

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[11] 7 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* ch. 117, § 1072 (1935).

Twice in 1921, the White House lost enrolled bills that had been presented to the President by Congress, and the bills became law because of the President's failure to return them to the originating chamber of Congress with a statement of his objections within ten days of presentment. On both occasions, President Wilson asked Congress for duplicates so he could deliver them to the Secretary of State for publication, as required by statute. Congress complied, and the bills were published as laws despite the lack of the originals. The first case involved a joint resolution to create a commission on reorganization of the administrative branch. Pub. Res. No. 66-54, 41 Stat. 1083 (Dec. 29, 1920); 60 Cong. Rec. 1086 (Jan. 7, 1921) (request by President for copy of joint resolution to file with Secretary of State); VII *Cannon's Precedents* ch. 118, § 1093. The second involved a private bill to authorize the award of a medal of honor to Chief Gunner Robert Edward Cox of the United States Navy. Priv. L. No. 66-86, 41 Stat. 1526 (Feb. 1, 1921); 60 Cong. Rec. 2539, 2552 (Feb. 3, 4, 1921) (request by President for copy of private bill to file with Secretary of State; concurrent resolution by House and Senate authorizing provision of duplicate).

[12] 7 Lewis Deschler, *Deschler's Precedents of the United States House of Representatives*, H.R. Doc. No. 94-661, ch. 24, §§ 14.20, 15.16 (1977).

presented the bill to the President on May 19. On May 27, President Roosevelt sent a letter to the Senate, advising that the bill "ha[d] become lost" and requesting "that a duplicate bill be authorized."[13] That same day, the House and Senate issued a concurrent resolution authorizing the presentment of a duplicate, and the Speaker and Vice President signed the duplicate and delivered it to the President.[14] On May 31, President Roosevelt signed the duplicate into law and filed it with the Secretary of State.[15] On June 9, the White House found the original print of the enrolled bill that it had originally received from Congress. It did not matter; the bill was already law.[16] The White House accordingly retained the original for its files.[17]

In each of these cases, had the original enrolled print been considered the only true "bill," the Senate's production of a copy and the President's signature on that copy would have been constitutionally futile to enact the "bill" into law. Congress would have been required to enroll a new, iden-

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[13] 83 Cong. Rec. 7601 (May 27, 1938).

[14] *Id.* at 7620.

[15] May 19, 1938, the day on which Congress presented S. 3532 to the President, was a Thursday. May 31, 1938, when President Roosevelt signed the bill, was a Tuesday, with two intervening Sundays. The President thus signed S. 3532 on the tenth day after presentment, meaning that the bill became law upon his signature and not as a result of his failure to return the bill within ten days.

[16] S. 3532 was recorded in the Statutes at Large as having become law by approval of the President on May 31. Pub. L. No. 75-556, 52 Stat. 585 ("Approved, May 31, 1938"). By contrast, when a bill became law due to the President's failure to return it within ten days, as with the two lost bills discussed above, the Secretary of State would record the date when the President received the bill from Congress and would include a notation explaining that the bill had become law by presidential inaction. *See* Pub. Res. No. 66-54, 41 Stat. 1083, 1084 (Dec. 29, 1920) ("Received by the President, December 17, 1920"; "NOTE BY THE DEPARTMENT OF STATE.—The foregoing joint resolution having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval."); Priv. L. No. 66-86, 41 Stat. 1526, 1527 (Feb. 1, 1921) ("Received by the President, January 20, 1921"; "NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.").

[17] Memorandum for the Files, from the White House (June 9, 1938) (reproduced at Appendix 1).

tical bill and present that bill to the President. Alternatively, the original could have been considered to have become law by virtue of the President's failure to return it within ten days; upon rediscovery, the original could have been filed with the Secretary of State as evidence of its enactment. That neither Congress nor the President felt compelled to follow these alternative procedures evinces a common understanding that the language of the bill, independent of the medium of expression, is the "bill" for constitutional purposes. Consistent with this understanding, Congress should be able to create a digital image of an enrolled bill, and present it to the President in that fashion, even though the bill would then exist electronically and there would be no single physical representation of it.

3.

Congress's establishment of different methods for engrossing and enrolling bills, partly in response to technological developments and partly in response to practical concerns for efficiency in the face of growing legislative calendars, also supports the conclusion that the Constitution does not dictate the precise mechanics by which the requirements of Article I, Section 7 are satisfied.

The first Congress agreed to a set of joint rules, modeled on English practice, which required that, "[a]fter a bill shall have passed both Houses, it shall be duly enrolled on parchment, by the Clerk of the House of Representatives, or the Secretary of the Senate, as the bill may have originated in the one or the other House, before it shall be presented to the President of the United States."[18] Being "duly enrolled on parchment" meant being written by hand. A joint Committee on Enrolled Bills—initially consisting of one Senator and two Members of the House—was responsible to check the hand-written parchment against the engrossed bills (the ones that had passed each house) and correct any errors. The Speaker of the House and the President of the Senate would then sign the

[18] 1 Annals of Cong. 57 (Aug. 6, 1789) (Joseph Gales ed., 1834) (Senate) ("The following joint rules, established between the two Houses, were received from the House of Representatives[.]"); *see also Jefferson's Manual of Parliamentary Practice*, H.R. Doc. No. 110-162, § 573, at 301 (2009) ("When a bill has passed both Houses of Congress, the House last acting on it notifies its passage to the other, and delivers the bill to the joint committee of enrollment, who see that it is truly enrolled in parchment.").

hand-written parchment, and the Committee on Enrolled Bills was responsible to ensure that the parchment was delivered to the President.[19]

These joint rules remained in place for close to a century. In the 1870s, members of Congress began to agitate for a change in the hand-enrollment process, due to its inefficiency and propensity for errors. In 1874, it came to light that during the process of enacting an important tariff bill two years earlier, someone had made a critical punctuation error in recording a Senate amendment.[20] During debate over the source of this error, Senator Sumner proposed that Congress consider following the lead of the English Parliament, which in 1849 had begun printing its enrolled bills on regular paper, instead of recording them by hand on parchment.[21] Nearly twenty years later, in 1893, a joint commission of three Representatives and three Senators—appointed to "inquire into the status of the laws organizing the Executive Departments of the Government"—issued a report repeating Senator Sumner's recommendation that the process of hand enrollment be

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[19] *Id.*; *see also* 4 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* chs. 91–93 (1907) ("*Hinds' Precedents*"); J.A.C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. Pol. Q. 364, 365–69 (1950).

[20] A Florida Senator had proposed to include on a list of tariff-free items in the 1872 bill the following: "fruit-plants, tropical and semi-tropical." The Senate approved this amendment, but the engrossed bill that went from the Senate to the House omitted the first hyphen: "fruit plants, tropical and semi-tropical." By the time the bill was introduced in the House, someone had inserted a comma and pluralized "fruit"—"fruits, plants, tropical and semi-tropical"—and the bill was ultimately enrolled and signed by the President in this form. The effect was thus to eliminate tariffs not just on "fruit-plants" but on all "fruits" and all "plants, tropical and semi-tropical," causing the loss of an estimated "half a million dollars of revenue" in two years. Senators could not agree on whether these changes had been made inadvertently or intentionally in bad faith. 2 Cong. Rec. 1663 (Feb. 20, 1874); *see also Legislative, Executive, and Judicial Appropriation Bill: Hearings on H.R. 8767 Before the Subcomm. of the H. Comm. on Appropriations*, 53d Cong. 60 (1895) (enclosing letter from Acting Secretary of Treasury recounting fruit-plant controversy).

[21] *See* 2 Cong. Rec. 1664 (Feb. 20, 1874) ("The Congress of the United States and the Commonwealth of Massachusetts are the only two legislative bodies, I believe, now in the world that adhere to the old system of parchment in the last stage of the bill. We borrowed it from England; but the English have seen that it was not advisable to trust their statutes to a written roll, as they had done for generations; and now, at the last stage, and when the measure receives the assent of the Crown, it is always in print; . . . Now I think it would be well for Congress to follow in that channel. We followed it originally in adopting parchment; I would follow it now in adopting print."); *see also* IV *Hinds' Precedents* § 3437.

discontinued and that enrolled bills be printed and presented in print to the President.[22]

This proposal prompted considerable deliberation in both houses of Congress, which reveals a common understanding on the part of members at the time that they had the constitutional flexibility to devise the most effective means of recording enrolled bills and transmitting them to the President. Members on both sides of the debate expressed practical, not legal, concerns. The primary argument in favor of changing from hand to print enrollment was eliminating scrivener's errors. "The manuscript copy of a bill is not always in the best handwriting," noted one Representative who had served on the joint commission, "and errors are very liable to creep in and to go undiscovered."[23] The commission had surveyed the practices of European parliaments and state legislatures, and it presented concrete examples of printed bills and resolutions from England to illustrate the advantages in readability and accuracy afforded by printing engrossed and enrolled bills.[24] A member from Maine reported that the Maine Legislature had cut costs by 25% in moving from hand-written to printed enrollment and projected that Congress would save the same amount.[25]

The primary concern expressed in opposition to the proposed change arose from the rush to enroll lengthy appropriations bills that often occurred at the end of a session of Congress. Some members were worried that there might not be time to print, enroll, and present a bill to the President if the bill were passed shortly before adjournment.[26] In response, members of the commission emphasized that the move to printing enrolled bills was "an experiment"; "[w]e do not propose to burn our bridges

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[22] 25 Cong. Rec. 2858–59 (Oct. 26, 1893) (House); *id.* at 3039 (Nov. 1, 1893) (Senate).

[23] *Id.* at 2859 (Oct. 26, 1893) (statement of Rep. James D. Richardson); *see also id.* ("It is so much easier to detect an error in plain print than in manuscript[.]").

[24] *See id.* at 2859–60 (Oct. 26, 1893) (House); *id.* at 3039–40 (Nov. 1, 1893) (Senate). "[T]here is not a civilized government in the world, except the United States," asserted one Representative, "which employs the present system of enrolling bills by the pen." *Id.* at 2861 (Oct. 26, 1893) (statement of Rep. Alex M. Dockery).

[25] *Id.* at 2860 (Oct. 26, 1893) (statement of Rep. Nelson Dingley, Jr.).

[26] *Id.* at 2859, 2861 (House) (Oct. 26, 1893); 25 Cong. Rec. 3040 (Senate) (Nov. 1, 1893).

behind us so that we can not go back to another process if it be desirable to do so."[27]

In the end, both houses of Congress passed a concurrent resolution requiring that engrossed and enrolled bills be printed on parchment.[28] In February 1895, Congress passed another concurrent resolution allowing for hand enrollment during the last six days of a session "when in the judgment of the Joint Committee on Printing it is deemed necessary."[29] Less than a month later, Congress put both of these principles into a statute.[30] In 1920, Congress authorized the printing of enrolled bills "on parchment or paper of suitable quality as shall be determined by the Joint Committee on Printing."[31] In 1947 these statutes were codified at 1 U.S.C. §§ 106–107 as part of the act creating title I of the United States Code.[32]

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[27] *Id.* at 2861 (Oct. 26, 1893) (statement of Rep. James Richardson); *see also id*. at 3040 (Nov. 1, 1893) (statement of Sen. F.M. Cockrell) ("This is only a concurrent resolution, and we can amend it in ten minutes at any time we wish to[.]").

[28] *See id*. at 2858–61 (Oct. 26, 1893) (House); *id*. at 3039–40, 3067–68 (Nov. 1, 1893) (Senate); IV *Hinds' Precedents* § 3433.

[29] IV *Hinds' Precedents* § 3434; *see* 27 Cong. Rec. 2012 (Feb. 11, 1895) (statement of Sen. Arthur P. Gorman) (proposing concurrent resolution "[t]hat, during the last *ten* days of any session of Congress the engrossing and enrolling of bills and joint resolutions by printing, as provided for in the concurrent resolution adopted by the Fifty-third Congress, first session, November 1, 1893, may be suspended, and said bills and joint resolutions may be written by hand when in the judgment of the Joint Committee on Printing it is deemed necessary") (emphasis added); *id.* at 2077 (Feb. 12, 1895) (Senate) (amending proposed concurrent resolution to provide "[t]hat, during the last *six* days of any session of Congress the engrossing and enrolling of bills and joint resolutions by printing, as provided for in the concurrent resolution adopted by the Fifty-third Congress, first session, November 1, 1893, may be suspended, and said bills and joint resolutions may be written by hand when in the judgment of the Joint Committee on Printing it is deemed necessary") (emphasis added); *id*. at 2089 (Feb. 12, 1895) (House) (agreeing to amended concurrent resolution).

[30] Act of Mar. 2, 1895, 28 Stat. 764, 769 ("That hereafter the engrossing and enrolling of bills and joint resolutions of either House of Congress shall be done in accordance with the concurrent resolution adopted by the Fifty-third Congress at its first session, November first, eighteen hundred and ninety-three: *Provided*, That during the last six days of a session such engrossing and enrolling of bills and joint resolutions may be done otherwise than as prescribed in said concurrent resolution, upon the order of Congress by concurrent resolution.").

[31] Second Deficiency Appropriation Act, 1920, Pub. L. No. 66-155, 41 Stat. 503, 520 ("Hereafter enrolled bills and resolutions of either House of Congress shall be printed on paper or parchment of suitable quality as shall be determined by the Joint Committee on

Today, 1 U.S.C. §§ 106 and 107 still require that enrolled bills be printed on parchment or suitable paper. Section 106 provides that "[w]hen such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States." 1 U.S.C § 106. Section 107 in turn requires that "[e]nrolled bills and resolutions of either House of Congress [] be printed on parchment or paper of suitable quality as shall be determined by the Joint Committee on Printing." *Id.* § 107. "During the last six days of a session," however, "such engrossing and enrolling of bills and joint resolutions may be done otherwise than as above prescribed, upon the order of Congress by concurrent resolution." *Id.* § 106.

Congress's shift from manuscript to print at the end of the nineteenth century—as well as its provision for special flexibility in engrossing and enrollment at the tail end of congressional sessions—provides some additional support for the proposition that Congress has understood the Constitution as leaving to the discretion of the political branches the precise mechanics of preparing bills and thereby complying with the requirements of Article I, Section 7. So too it shows that Congress has changed such mechanics when it has concluded that improvements in technology or changed circumstances have warranted revisions.[33]

Printing."). This relaxation of the parchment requirement was apparently motivated by cost concerns and by the possibility that ink on parchment could be erased. H.R. Rep. No. 66-683, at 8 (Feb. 27, 1920) (Conf. Rep.); 59 Cong. Rec. 3634 (Feb. 28, 1920) (statement of Rep. James V. McClintic).

[32] *See* Pub. L. No. 80-278, §§ 106–107, 61 Stat. 633, 634–35 (1947).

[33] That the procedures for enrollment and presentment may be adapted to changing circumstances is additionally confirmed by the number of occasions on which Congress has authorized departures from the existing rules. In March 1855, upon report that the Committee on Enrolled Bills would not be able to examine all the bills pending before the adjournment of the session, Congress suspended the rules and permitted the Committee "to report without examination, for the signature of the Speaker," two appropriations bills. 4 *Hinds' Precedents* § 3441. In May 1874, shortly after the flap over the punctuation error in the tariff bill, the House proposed a concurrent resolution suspending the rules and permitting certain bills to be enrolled in print instead of by hand on parchment. The Senate initially rejected this proposal but, after conference with the House, agreed that the bills in question should be "printed upon paper, and duly examined and certified by the Joint Committee on Enrolled Bills provided by the joint rules." *Id.* § 3442; *see* 2 Cong.

D.

We are unaware of any case law that is directly on point, but there are two Supreme Court decisions that may be said to have some bearing on the question. The first is the rather unusual one of *United States v. Wright*, 302 U.S. 583 (1938). That case concerned a situation in which the ten-day period for return of a bill that had originated in the Senate expired while the Senate was on a three-day recess, but the House remained in session.

Rec. 4380–83 (May 29, 1874) (Senate); *id.* at 4465 (June 2, 1874) (Senate); *id.* at 4483 (June 2, 1874) (House).

Even after the shift to the modern process of printing enrolled bills, Congress has frequently authorized departures from the statutory rule. It has done so sometimes through concurrent resolutions, other times through joint resolutions or statutes temporarily waiving the print requirements for specific bills or types of bills. *See* Appendix 2 (non-exclusive list of occasions when Congress has waived print requirements in 1 U.S.C. §§ 106 and 107 or predecessor statutes); *see also* 1 U.S.C. § 106 note (listing waivers); *Preparation of Slip Laws from Hand-Enrolled Legislation*, 13 Op. O.L.C. 353, 355–56 (1989) ("*Slip Laws*") (same). These departures have created occasional confusion concerning what language is actually a part of a bill that passed, *see, e.g.*, *Slip Laws*, 13 Op. O.L.C. at 358–60 (in publishing hand-enrolled legislation that was authorized by congressional waiver of print requirement in 1 U.S.C. §§ 106 and 107, National Archives and Records Administration may not make even minor editorial corrections or reconstruct illegible text and must instead typeset legible portions and photograph illegible portions for insertion in slip law), but so have the standard procedures in 1 U.S.C. §§ 106 and 107, *see, e.g.*, Memorandum for Jeffrey A. Rosen, General Counsel, Office of Management and Budget, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Validity of the Food, Conservation, and Energy Act of 2008* (May 23, 2008) (discussing bill in which enrolled version omitted a title passed by both Houses of Congress); *OneSimpleLoan v. Sec'y of Education*, 496 F.3d 197, 199–201 (2d Cir. 2007) (discussing discrepancy between enrolled version of Deficit Reduction Act of 2005 and version adopted in the House); *Pub. Citizen v. United States Dist. Ct. for the Dist. of Columbia*, 486 F.3d 1342, 1344–45 (D.C. Cir. 2007) (same); Memorandum for the Files from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Omission of Section From Enrolled Continuing Resolution* (Nov. 13, 1986) (memorializing advice that, to cure accidental omis–sion of important section from enrolled version of continuing resolution the President signed into law, the entire continuing resolution including the omitted text should be enrolled by Congress again and presented to the President), and for that matter so did the original hand-enrollment process, *see, e.g.*, *supra* text accompanying notes 20–22; *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) (rejecting challenge to validity of tariff act, despite evidence that rebate provisions approved by both chambers of Congress had improperly been omitted from enrolled bill presented to and signed by the President). Again, we are not aware of any suggestion that a particular method of enrollment (or presentment) employed by Congress was prohibited by the Constitution.

The bill at issue authorized the Court of Claims to hear a particular suit. The President returned the bill on the ninth day with his objections by delivering them to the Secretary of the Senate, who accepted the delivery. When the Senate returned from recess, the Secretary of the Senate laid the documents before the Senate, which considered the bill as having been vetoed. The plaintiff whose suit the bill would have authorized filed suit anyway, claiming that the President's return had to be to the Senate, not to the Secretary of the Senate, and that only an adjournment by both chambers could prevent return so as to lead to a "pocket veto." To veto the bill, the plaintiff contended, the President should have returned it before the start of the Senate's recess.

The Supreme Court disagreed. It rejected the contention that the requirement in Article I, Section 7 that the President, upon disapproving a bill, return it "to that House in which it shall have originated," mandates return to the chamber itself and thus requires return when the chamber is in session. On the contrary, the Court held that the Constitution permits return to an agent of the House or the Senate. "In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution," the Court explained. "*The Constitution does not define what shall constitute a return of a bill* or deny the use of appropriate agencies in effecting the return." *Wright*, 302 U.S. at 598 (emphasis added). *Wright*, then, supports the notion that the Constitution itself does not define the mechanics of "return" (and presumably presentment as well) but instead leaves the determination of such logistics to the political branches.[34]

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[34] As Justices Stone and Brandeis pointed out in dissent in *Wright*, there is some tension between that decision and the decision just nine years earlier in the *Pocket Veto Case*, 279 U.S. 655 (1929). *See Wright*, 302 U.S. at 599 (Stone, J., dissenting). In the *Pocket Veto Case*, the Court held that the adjournment after the first session of a Congress, not just an adjournment between one Congress and the next, constitutes an adjournment for purposes of the last sentence of the second paragraph of Article I, Section 7: "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their *Adjournment* prevent its Return, in which Case it shall not be a Law." U.S. Const. art. I, § 7 (emphasis added). In reaching that conclusion the Court accepted the position urged by the United States that in requiring the President to return a disapproved bill to "that House in which it shall have originated," *id*., the Constitution mandates that "it is to be returned to the 'House' when

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), may also provide some indirect support for that conclusion. In *Marshall Field*, several companies sought to have a tariff act invalidated on the ground that it did not comply with Article I, Section 7 because the enrolled and signed version of the act omitted a provision that had been included in the bill as adopted by both chambers of Congress. Relying principally on the Journal Clause in Article I, Section 5, the companies urged the Supreme Court to look to various documents from the legislative process—journals, committee reports, and records of proceedings—to determine that the law actually adopted by the House and Senate varied from the one enrolled, presented to the President, and signed by him.[35] The Court refused to do so. Adopting what has since been called "the enrolled bill rule," *see, e.g.*, *United States v. Farmer*, 583 F.3d 131, 151–52 (2d Cir. 2009); *Pub. Citizen*, 486 F.3d at 1349–50, it held that courts should not look behind the version of a statute certified by the presiding officers of the two chambers, signed by the President, and deposited by him with the official federal repository as the enacted law. The Court explained that its decision was largely dictated by the respect due to the political branches in handling such matters:

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sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body and its members are dispersed." *Pocket Veto Case*, 279 U.S. at 683. The *Wright* Court dismissed this reasoning as dictum: "In the *Pocket Veto Case*, the Congress had adjourned. The question was whether the concluding clause of paragraph 2 of section 7 of Article 1 was limited to a *final* adjournment of the Congress or embraced an adjournment of the Congress at the close of the first regular session. The Court held that the clause was not so limited and applied to the latter. In interpreting the word 'adjournment,' and in referring to other provisions of the Constitution using the word 'adjourn,' the Court was still addressing itself to a case where there had been an adjournment by the Congress. The Court did not decide, and there was no occasion for ruling, that the clause applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress. Any observations which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation." *Wright*, 302 U.S. at 593.

[35] The Journal Clause provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." U.S. Const. art. I, § 5, cl. 3.

> The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the Constitution.

Marshall Field, 143 U.S. at 672. The Court observed that no provision "either expressly or by necessary implication, prescribe[s] the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests." *Id.* at 671. The Court was not addressing the presentment process. Nor was it offering a gloss on the word "bill" in Article I, Section 7. But its approach comports with the broader notion that the methods of determining what constitutes the authoritative text of a bill for purposes of compliance with

the Constitution's bicameralism and presentment requirements rest in the sound discretion of the political branches.[36]

* * * * *

In sum, considering the text and purposes of the second paragraph of Article I, Section 7, the practice of the political branches under that provision, and the limited relevant judicial authorities, we conclude that the Constitution permits Congress to authorize presentment and return by electronic means.

II.

The question remains whether electronic transmission would be consistent with the existing statutes governing enrollment and, to a degree, presentment. Section 106 of title I provides:

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[36] In *United States v. Munoz-Flores*, 495 U.S. 385 (1990), a case about the Origination Clause in Article I, Section 7, the Court characterized *Marshall Field* as "concern[ing] 'the nature of the evidence' the Court would consider in determining whether a bill had actually passed Congress." *Id*. at 391 n.4 (citation omitted). The *Munoz-Flores* Court stated:

> Appellants had argued that the constitutional Clause providing that '[e]ach House shall keep a Journal of its Proceedings' implied that whether a bill had passed must be determined by an examination of the journals. See *ibid.* (quoting Art. I, § 5) (internal quotation marks omitted). The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that '[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision *is* implicated, *Field* does not apply."

Id. (citations omitted). We consider this footnote consistent with our understanding of *Marshall Field*'s significance for the question we address.

Two courts of appeals have held that Congress may present bills to the President after an adjournment *sine die*. *See Mester Mfg. v. INS*, 879 F.2d 561, 570–71 (9th Cir. 1989); *United States v. Kapsalis*, 214 F.2d 677, 680–83 (7th Cir. 1954). Both courts endorsed the view that Article I, Section 7 does not "provide how or when . . . bills, after they have been passed by both Houses, are to be presented to the President." *Kapsalis*, 214 F.2d at 680; *see Mester Mfg*., 879 F.2d at 571 ("In the absence of express constitutional direction, we defer to the reasonable procedures Congress has ordained for its internal business.").

> Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. *When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States.* During the last six days of a session such engrossing and enrolling of bills and joint resolutions may be done otherwise than as above prescribed, upon the order of Congress by concurrent resolution.

1 U.S.C. § 106 (emphasis added). Section 107, in turn, provides that "[e]nrolled bills and resolutions of either House of Congress shall be printed on parchment or paper of suitable quality as shall be determined by the Joint Committee on Printing." *Id.* § 107. Thus, an enrolled bill must be printed. It must be signed by the presiding officers of the two houses. Only then may "it" be "sent" to the President. *Id.* § 106.

Like the terms "presented" and "return," the word "sent" connotes delivery without specifying the precise method of transmission.[37] Thus, one might well read section 106 as permitting an enrolled bill to be sent to the President by electronic means. Electronic transmission would pose verification and authentication issues, to be sure, but the historical record discussed above demonstrates that so too does paper. If electronic transmission were employed, it would be incumbent upon Congress and the President, as it always has been, to minimize the possibility of error and to ensure authentication.[38]

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[37] *See Webster's Third New International Dictionary* at 2065 ("to dispatch by a means of communication"); *The Random House Dictionary of the English Language* at 1743 ("to cause to be conveyed or transmitted to a destination"); *The American Heritage Dictionary of the English Language* at 1584 ("to cause to be conveyed by an intermediary to a destination"; "[t]o dispatch, as by a communications medium").

[38] The House and Senate Rules also contain provisions addressing enrollment and presentment. *See* House Rule II.2(d)(2) ("The Clerk shall examine all bills, amendments, and

Given that the statute codified in sections 106 and 107 was originally adopted in the 1890s, modern means of electronic transmission plainly were not within the contemplation of the Congress that enacted it. Moreover, section 107 requires that "[e]nrolled bills and resolutions of either House of Congress shall be printed on parchment or paper of suitable quality." 1 U.S.C. § 107. Thus, one might reasonably understand section 106's requirement of certification of each enrolled bill by the chambers' presiding officers and the specification that "*it* shall be printed . . . signed . . . and sent to the President," 1 U.S.C. § 106 (emphasis added), as mandating delivery of the parchment or paper copy that bears the presiding officers' original signatures. As far as we are aware, that has been Congress's unbroken practice.[39]

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joint resolutions after passage by the House and, in cooperation with the Senate, examine all bills and joint resolutions that have passed both Houses to see that they are correctly enrolled and forthwith present those bills and joint resolutions that originated in the House to the President in person after their signature by the Speaker and the President of the Senate, and report to the House the fact and date of their presentment."); Senate Rule XIV.5 ("All bills, amendments, and joint resolutions shall be examined under the supervision of the Secretary of the Senate before they go out of the possession of the Senate, and all bills and joint resolutions which shall have passed both Houses shall be examined under the supervision of the Secretary of the Senate, to see that the same are correctly enrolled, and, when signed by the Speaker of the House and the President of the Senate, the Secretary of the Senate shall forthwith present the same, when they shall have originated in the Senate, to the President of the United States and report the fact and date of such presentation to the Senate."). For a brief description of the precise procedures followed by Congress in engrossing, enrolling, and presenting bills, see R. Eric Petersen, Cong. Research Serv., 98-826 GOV, *Engrossment, Enrollment, and Presentation of Legislation* (updated Mar. 24, 2008). Presumably, the House Rule should be amended to remove the words "in person" before enrolled bills originating in the House would be presented to the President by electronic means.

[39] We are unaware of any legislative history that bears on the meaning of section 106 in this regard. *See* S. Rep. No. 80-658, at 4–5, 16 (1947) (Conf. Rep.); H.R. Rep. No. 80-251, at 5–6 (1947); H.R. Rep. No. 66-701 (1920) (Conf. Rep.); H.R. Rep. No. 66-683 (1980) (Conf. Rep.); S. Rep. No. 66-426 (1920); H.R. Rep. No. 66-584 (1920); H.R. Rep. No. 53-1758 (1895); S. Rep. No. 53-965 (1895); *Legislative, Executive, and Judicial Appropriation Bill: Hearings on H.R. 8767 Before Subcomm. of H. Comm. on Appropriations*, 53d Cong. (1895).

Section 107 does expressly leave to the Joint Committee on Printing some discretion in selecting the medium on which enrolled bills should be printed, but it is not clear that that discretion would extend to selecting the method of transmitting enrolled bills.

Given the ambiguity about whether sections 106 and 107 authorize presentment by electronic means and the need to ensure that Congress, the President, and the public understand in advance the methods by which the steps required to accomplish enactment of a federal law may be carried out, we recommend that, before electronic presentment might be used, 1 U.S.C. §§ 106 and 107 be amended to clarify that they permit electronic presentment. The advisability of statutory amendment is perhaps heightened by the language of the related statutory provision that specifies how bills are to be preserved in the National Archives:

> Whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Archivist of the United States from the President; and whenever a bill, order, resolution, or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed, and is approved by two-thirds of both Houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Archivist of the United States from the President of the Senate, or Speaker of the House of Representatives in whichsoever House it shall last have been so approved, and he shall carefully preserve the originals.

Id. § 106a. In the event that Congress were to present a bill to the President and the President were to return it by electronic transmission via .pdf file and Congress were to override the veto, it is unclear which documents would count as the "originals" mentioned at the end of this provision—a printout of the bill as returned by the President, or the hard copy as signed by the presiding officers before a .pdf file of the bill was prepared for presentment to the President. The desirability of eliminating any ambiguity on this score also counsels in favor of statutory clarification.

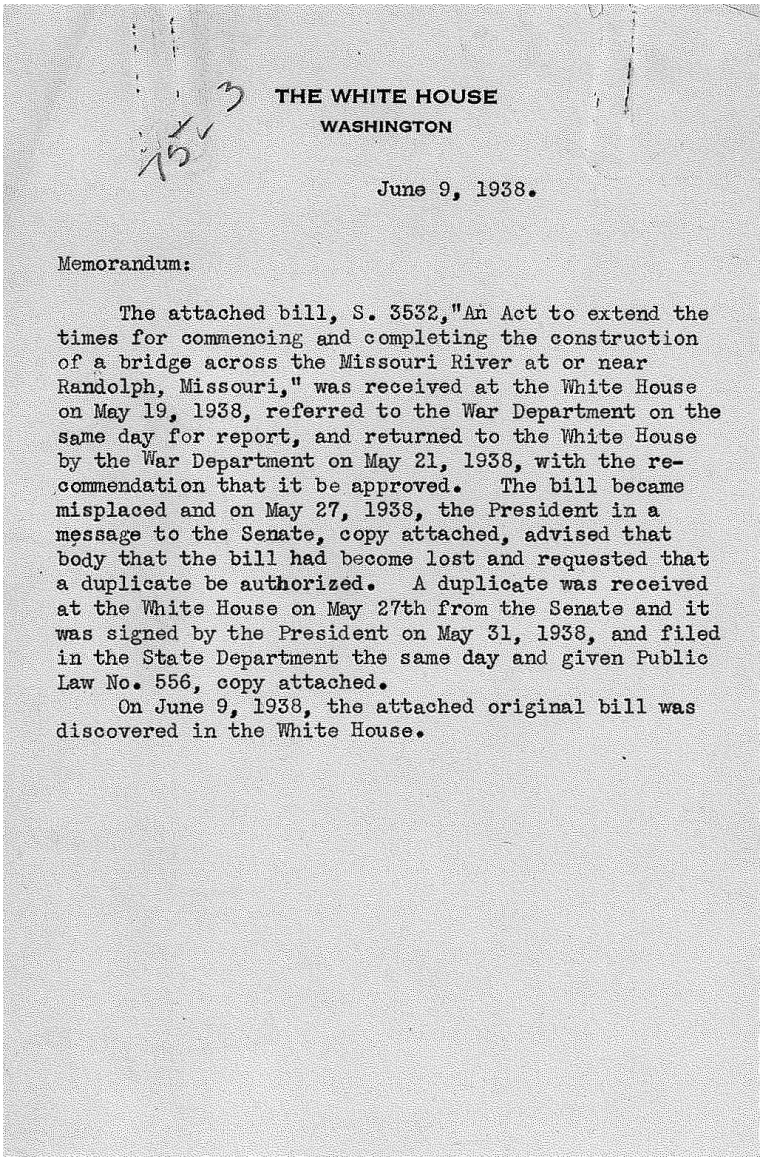
No statute currently governs the manner in which the President returns a bill when he disapproves it, and it is not necessary for Congress expressly to authorize the President to use electronic means to return a bill. Nevertheless, for purposes of authentication and clarity, we recommend that Congress and the President reach an agreement, whether memorialized by statute or otherwise, concerning the permissibility of electronic return. Such a statute regulating the manner of return would have to be

written so that it did not "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

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

APPENDIX 1

WHITE HOUSE MEMORANDUM TO FILE REGARDING BILL THAT BECAME LAW BY PRESIDENT'S SIGNATURE ON DUPLICATE



THE WHITE HOUSE
WASHINGTON

June 9, 1938.

Memorandum:

The attached bill, S. 3532,"An Act to extend the times for commencing and completing the construction of a bridge across the Missouri River at or near Randolph, Missouri," was received at the White House on May 19, 1938, referred to the War Department on the same day for report, and returned to the White House by the War Department on May 21, 1938, with the recommendation that it be approved. The bill became misplaced and on May 27, 1938, the President in a message to the Senate, copy attached, advised that body that the bill had become lost and requested that a duplicate be authorized. A duplicate was received at the White House on May 27th from the Senate and it was signed by the President on May 31, 1938, and filed in the State Department the same day and given Public Law No. 556, copy attached.

On June 9, 1938, the attached original bill was discovered in the White House.

APPENDIX 2

AUTHORIZED DEPARTURES FROM THE PRINTING REQUIREMENTS IN 1 U.S.C. §§ 106 AND 107 (OR THEIR PREDECESSOR STATUTES)

• On November 10, 1999, the 106th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 for the remainder of the first session "with respect to the printing (on parchment or otherwise) of the enrollment of any bill or joint resolution making general appropriations or continuing appropriations for the fiscal year ending September 30, 2000." Pub. L. No. 106-93, 113 Stat. 1310.

• On October 12, 1998, the 105th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 for the remainder of the second session "with respect to the printing (on parchment or otherwise) of the enrollment of any bill or joint resolution making general appropriations or continuing appropriations for the fiscal year ending September 30, 1999." Pub. L. No. 105-253, 112 Stat. 1887.

• On November 26, 1997, the 105th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 for the remainder of the second session "with respect to the printing (on parchment or otherwise) of the enrollment of any bill or joint resolution making general appropriations for the fiscal year ending on September 30, 1998, or continuing appropriations for the fiscal year ending on September 30, 1998." Pub. L. No. 105-120, 111 Stat. 2527.

• On August 1, 1997, the 105th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of" two bills: H.R. 2014 and H.R. 2015. Pub. L. No. 105-32, 111 Stat. 250. H.R. 2014 was ultimately enacted as Pub. L. No. 105-34, 111 Stat. 788 (1997), and H.R. 2015 as Pub. L. No. 105-33, 111 Stat. 251 (1997).

• On September 30, 1996, the 104th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of any appropriation measure" for fiscal year 1997, passed during the remainder of the second session. Pub. L. No. 104-207, § 1(a), 110 Stat. 3008.

• On April 9, 1996, the 104th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of" two bills: H.R. 3019 and H.R. 3136. Pub. L. No. 104-129, 110 Stat. 1199. H.R. 3019 was ultimately enacted as Pub. L. No. 104-134, 110 Stat. 1321 (1996), and H.R. 3136 as Pub. L. No. 104-121, 110 Stat. 847 (1996).

• In November 1995, the 104th Congress twice passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of any of the following measures . . ." for fiscal year 1996, passed during the remainder of the first session. Pub. L. No. 104-54, § 201(a), 109 Stat. 540, 545 (Nov. 19, 1995); Pub. L. No. 104-56, § 201(a), 109 Stat. 548, 553 (Nov. 20, 1995).

• On October 6, 1992, the 102d Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of any appropriation bill" for fiscal year 1993, passed during the remainder the second session. Pub. L. No. 102-387, 106 Stat. 1519.

• On March 20, 1992, the 102d Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of H.R. 4210 [the Tax Fairness and Economic Growth Act of 1992]." Pub. L. No. 102-260, 106 Stat. 85. That same day, however, President Bush vetoed the bill.

• On October 31, 1990, the 101st Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of S. 2830." Pub. L. No. 101-497, § 1(a), 104 Stat. 1205. S. 2830 became the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359.

• On October 27, 1990, the 101st Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of any reconciliation bill, appropriation bill, or continuing resolution" for fiscal year 1991, passed during the remainder of the second session. Pub. L. No. 101-466, § 1(a), 104 Stat. 1084.

• On September 29, 1988, the 100th Congress passed a statute waiving the requirements of 1 U.S.C. §§ 106 and 107 "with respect to the printing (on parchment or otherwise) of the enrollment of any general appropria-

tions bill making appropriations for the fiscal year ending September 30, 1989." Pub. L. No. 100-454, § 1(a), 102 Stat. 1914.

• On December 21, 1987, the 100th Congress passed a joint resolution "[a]uthorizing the hand enrollment of the budget reconciliation bill and of the full-year continuing resolution for fiscal year 1988." H.R.J. Res. 426, Pub. L. No. 100-199, 101 Stat. 1326. The next day, President Reagan signed these two bills into law: the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, and the continuing resolution for fiscal year 1988, Pub. L. No. 100-202, 101 Stat. 1329. Each of these laws required the President to make certain that the hand enrollment he signed matched the printed enrollment that would later be signed by the presiding officers of each house and by the President. Pub. L. No. 100-203, § 8004, 101 Stat. 1330-282; Pub. L. No. 100-202, § 630(n), 101 Stat. 1329-432. On January 28, 1988, the President delegated to [the National Archives and Records Administration] the responsibility to ensure that the hand enrollment matched the printed enrollment. 53 Fed. Reg. 2816.

• On October 9, 1986, the 99th Congress passed a joint resolution providing "[t]hat the requirement of sections 106 and 107 of title I, United States Code, that the enrollment of the following bills and joint resolutions be printed on parchment be waived during the remainder of the second session of the Ninety-ninth Congress, and that the enrollment of said bills and joint resolutions be in such form as may be certified by the Committee on House Administration to be truly enrolled: H.R. 2005; H.R. 3838; H.R. 5300; H.R. 5484; and H.J. Res. 738, or any other measure continuing appropriations." H.R.J. Res. 749, Pub. L. No. 99-463, 100 Stat. 1184.

• On December 18, 1985, the 99th Congress passed a joint resolution providing "[t]hat the requirement of sections 106 and 107 of title I, United States Code, that the enrollment of any bill or joint resolution originating in the House be printed on parchment be waived at the discretion of the Speaker, after consultation with the Minority Leader of the House, for the duration of the first session of the Ninety-ninth Congress, and that any enrollment be in such form as may be certified by the Committee on House Administration to be truly enrolled." H.R.J. Res. 485; Pub. L. No. 99-188, 99 Stat. 1183.

• On October 11, 1984, the 98th Congress passed a concurrent resolution providing "[t]hat the requirement of 1 U.S.C. 107 that the enrollment

of H.J. Res. 648 or any measure continuing appropriations be printed on parchment be waived for the duration of the Ninety-eighth Congress, and that the enrollment of H.J. Res. 648 or any measure continuing appropriations be in such form as may be certified by the Committee on House Administration to be a truly enrolled joint resolution." H.R. Con. Res. 375, 98 Stat. 3519.

• On December 20, 1982, the 97th Congress passed a concurrent resolution providing "[t]hat the requirement of 1 U.S.C. 107 that the enrollment of H.J. Res. 631 or any measure continuing appropriations be printed on parchment be waived for the duration of the Ninety-seventh Congress, and that the enrollment of H.J. Res. 631 or any measure continuing appropriations be in such form as may be certified by the Committee on House Administration to be a truly enrolled joint resolution." H.R. Con. Res. 436, 96 Stat. 2678.

• On February 25, 1929, the 70th Congress passed a concurrent resolution providing "[t]hat during the remainder of the present session of Congress, engrossment and enrolling of bills and joint resolutions by printing, as provided by an Act of Congress, approved March 2, 1895, may be suspended, and said bills and joint resolutions may be engrossed and enrolled by the most expeditious methods consistent with accuracy." H.R. Con. Res. 59, 45 Stat. 2398.

• On February 25, 1901, the 56th Congress passed a concurrent resolution providing "[t]hat during the remainder of the present session of Congress the engrossment and enrolling of bills and joint resolutions by printing, as provided by an act of Congress approved March second, eighteen hundred and ninety-five, may be suspended, and said bills and joint resolutions may be written by hand." H.R. Con. Res. 432, 31 Stat. 2003; 34 Cong. Rec. 3007.

• On June 5, 1900, the 56th Congress passed a concurrent resolution providing "[t]hat during the remainder of the present session of Congress the engrossing and enrolling of bills and joint resolutions by printing, as provided by act of Congress approved March second, eighteen hundred and ninety-five, may be suspended, and said bills and joint resolutions may be written by hand." 31 Stat. 1995, 1995.

• On February 25, 1899, the 55th Congress passed a concurrent resolution providing "[t]hat during the last six days of the present session of Congress the engrossing and enrolling of bills and joint resolutions by

printing, as provided by act of Congress, approved March second, eighteen hundred and ninety-five, may be suspended, and said bills and joint resolutions may be written by hand." 30 Stat. 1806, 1806.

• On July 8, 1898, the 55th Congress passed a concurrent resolution providing "[t]hat during the remaining days of the present session of Congress the engrossing and enrolling of bills and joint resolutions by printing, as provided by act of Congress approved March second, eighteen hundred and ninety-five, may be suspended, and said bills and joint resolutions may be written by hand." 30 Stat. 1802, 1802.

Security Clearance Adjudications by the DOJ Access Review Committee

The notification requirement in section 106(c) of the Foreign Intelligence Surveillance Act generally applies when the Department of Justice intends to use information obtained from electronic surveillance against an aggrieved person in an adjudication before the Access Review Committee concerning the Department's revocation of an employee's security clearance.

Compliance with the notification requirement in section 106(c) of the Foreign Intelligence Surveillance Act in particular Access Review Committee adjudications could raise as-applied constitutional questions if such notice would require disclosure of sensitive national security information protected by executive privilege.

June 3, 2011

MEMORANDUM OPINION FOR THE CHAIR AND MEMBERS OF THE ACCESS REVIEW COMMITTEE

Section 106(c) of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1806(c) (2006), requires the government to notify an "aggrieved person"—that is, a person who was the target of electronic surveillance or whose communications or activities were subject to electronic surveillance, *see id.* § 1801(k)—whenever the government intends to use "against" that person any information "obtained or derived from [such] electronic surveillance of that aggrieved person" in any "trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States." You have asked whether this notification requirement applies when the Department of Justice intends to use information obtained from such electronic surveillance against an aggrieved person in an adjudication before the Access Review Committee ("ARC") concerning the Department's revocation of an employee's security clearance.[1] In accord with views we received from the Department's Justice Management and National Security Divisions, we conclude that the notification requirement generally applies to such

[1] *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Mari Barr Santangelo, Chair, Access Review Committee, et al., *Re: Request for Opinion* (Jan. 26, 2010).

adjudications.[2] But, as we explain below, compliance with the notification requirement in particular ARC adjudications could raise as-applied constitutional questions if such notice would require disclosure of sensitive national security information protected by executive privilege.

I.

Section 106(c) of FISA provides:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

50 U.S.C. § 1806(c). Section 106(e), in turn, provides that the aggrieved person "may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—(1) the information was unlawfully acquired; or (2) the surveillance was not made in conformity with an order of authorization or approval." *Id*. § 1806(e).

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[2] *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Stuart Frisch, General Counsel, Justice Management Division, *Re: ARC request* (Apr. 2, 2010); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Todd Hinnen, Deputy Assistant Attorney General for Law and Policy, National Security Division, *Re: NSD Views Regarding the Applicability of 1806's Notification Provision to Access Review Committee Proceedings* (Mar. 31, 2010). We also received views from the Federal Bureau of Investigation ("FBI") that did not take issue with the position that section 106(c) applies to ARC adjudications, but that raised other, related issues, two of which we respond to below in note 3 and in Part III. *See* Memorandum for the Acting Assistant Attorney General, Office of Legal Counsel, from Valerie Caproni, General Counsel, Federal Bureau of Investigation, *Re: Request for an OLC Opinion Dated January 26, 2010 by ARC* (Aug. 9, 2010) ("Caproni Memo").

You have asked us to assume, for purposes of our analysis, that a Department component has revoked an employee's security clearance; that the loss of security clearance caused the component to discharge the employee; that the employee has appealed the component's security-clearance revocation decision to the ARC; and that, in the course of the ARC adjudication, the Department intends to justify the clearance revocation with the use of information it has "obtained . . . from an electronic surveillance" of communications that involved the employee.[3] *Id.* § 1806(c). Accordingly, we will assume that the employee in question would be an "aggrieved person" under section 106(c),[4] and that the government would use "information obtained . . . from an electronic surveillance of" that aggrieved person "against" that person in the ARC adjudication. *Id.*

The function of a security clearance for a Department employee is to designate the employee as someone who is eligible to be afforded access to classified information, in accordance with the standards set forth in part 3 of Executive Order 12968, 3 C.F.R. 391, 397 (1996). *See* 28 C.F.R. § 17.41(a)(1) (2010). Executive Order 12968 provides in relevant part that eligibility for access to classified materials may be granted only to those employees

> for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willing-

[3] Because the circumstances you posit involve the use of information obtained directly from the electronic surveillance in question, we need not address the language in section 106(c) that also makes the section applicable when information has been "derived from" electronic surveillance.

[4] Section 101(k) of FISA defines an "aggrieved person" as a "person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). In other words, "aggrieved person[s]" include only those persons targeted by the surveillance and others who are parties to communications subject to surveillance; as explained in a FISA House Report, "[t]he term specifically does not include persons, not parties to a communication, who may be mentioned or talked about by others." H.R. Rep. No. 95-1283, pt. I, at 66 (1978).

> ness and ability to abide by regulations governing the use, handling, and protection of classified information.

Exec. Order No. 12968, § 3.1(b), 3 C.F.R. at 397. The Executive Order requires that departments and agencies reinvestigate employees on a periodic basis, and it authorizes additional reinvestigation "if, at any time, there is reason to believe" that an employee "may no longer meet the standards for access established" by the Order. *Id*. § 3.4(b), 3 C.F.R. at 399.[5] The applicable Department of Justice regulations accordingly provide that "[e]ligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States and any doubt shall be resolved in favor of the national security." 28 C.F.R. § 17.41(b).[6]

If a Department component denies an employee a security clearance—that is, if the component determines that the employee is not eligible for access to classified information—or if the component revokes such eligibility, the component must provide the employee "with a comprehensive and detailed written explanation of the basis" for the decision, to the extent that "the national security interests of the United States and other applicable law permit." *Id*. § 17.47(a)(1). The component must also inform the employee that she has a right, at her own expense, to be represented by counsel or another representative of her choice. *Id*. During the thirty days following the date of the component's written explanation of the clearance denial, the employee may request any "documents, records or reports" from the security clearance investigation, "including the

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[5] In 2008, section 3(b) of Executive Order 13467 amended Executive Order 12968 in several respects, including by adding a new section 3.5 that provides for "continuous evaluation" of individuals determined to be eligible for access to classified information. *See* 3 C.F.R. §§ 196, 201 (2009). None of the 2008 amendments is germane to our analysis here.

[6] Eligibility for access to classified information—i.e., having a security clearance—does not mean that an employee will necessarily be afforded access to such information. Both Executive Order 12968 and the Department's regulations provide that eligibility for access is merely one prerequisite to actual access. In particular, an employee may not be provided access to such information without a demonstrated "need-to-know," *see* Exec. Order No. 12968, § 1.2(a) & (c)(2), 3 C.F.R. at 392; 28 C.F.R. § 17.41(a)(2), and agencies must "ensure that access to classified information by each employee is clearly consistent with the interests of the national security," Exec. Order No. 12968, § 1.2(b), 3 C.F.R. at 392; *accord* 28 C.F.R. § 17.41(c).

entire investigative file upon which [the] denial or revocation [was] based," *id*. § 17.47(a)(2), and within thirty days of such a request the employee must receive copies of the requested materials to the extent such materials would have been provided if requested under the Freedom of Information Act or the Privacy Act and "as the national security interests and other applicable law permit." *Id*. § 17.47(a)(3). Thirty days after receiving the written explanation of the denial or the requested documents under section 17.47(a)(3)—whichever is later—the employee may file a written reply and request a review of the adverse determination. *Id*. § 17.47(b). Thereafter, the employee must be provided a written notice of the results of the requested review, including the reasons for the results, along with the identity of the deciding authority and notice of the right to appeal an adverse decision to the ARC. The employee then may, within thirty days of receiving that written notice, appeal an adverse decision to the ARC and may request the opportunity to appear personally before the ARC and to present relevant documents, materials, and information. *Id*. § 17.47(d). The Department Security Officer must also be afforded an opportunity to present relevant materials to the ARC in support of the security clearance denial or revocation, and may appear personally if the employee does so. *Id*. § 17.47(g).

The ARC is composed of the Deputy Attorney General, the Assistant Attorney General for National Security, and the Assistant Attorney General for Administration—each of whom may name a designee, subject to the Attorney General's approval. *See* 28 C.F.R. § 17.15(b). When an employee appeals an adverse security clearance decision, the ARC must make a written "determination of eligibility for access to classified information . . . as expeditiously as possible." *Id*. § 17.47(f). Although the regulations describe this determination as a "discretionary security decision" by the ARC, they also mirror the regulations governing the component's initial decision by providing that the ARC may conclude that an employee should be granted eligibility for access to classified materials "only where facts and circumstances indicate that access to classified information is clearly consistent with the national security interest of the United States"; any doubt is to be "resolved in favor of the national security." *Id*. The ARC's decision is final unless the Attorney General requests a recommendation from the ARC and "personally exercises appeal authority." *Id*. § 17.15(a).

II.

Because the ARC is composed of three high-ranking Department officials or their designees and its decisions are final unless the Attorney General personally exercises appeal authority over them, an ARC adjudication challenging revocation of a security clearance takes place before a "department, officer[s], . . . or other authority of the United States." 50 U.S.C. § 1806(c); *see* 28 U.S.C. § 501 (2006) ("[t]he Department of Justice is an executive department of the United States"); *see also Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) ("At the very least . . . it seems logical that for an entity to be an authority of the government it must exercise some governmental authority.") (emphasis omitted); *Webster's Third New International Dictionary* 146 (1993) (defining "authority" as "superiority derived from a status that carries with it the right to command and give final decisions"). Thus, section 106(c)'s notification requirement would generally be applicable in an ARC adjudication if that adjudication is a "trial, hearing, or other proceeding." 50 U.S.C. § 1806(c). Although we are not aware of any judicial precedent discussing whether an employment-related administrative process such as an ARC adjudication would be a "trial, hearing, or other proceeding" for purposes of either section 106(c) or analogous, similarly worded notice statutes, we believe the ordinary meaning of the statutory language encompasses such an adjudication, and the legislative history is consistent with our understanding.

We consider first whether the ARC process is a "proceeding" within the meaning of section 106(c). *Id*. The term "proceeding" has several broad definitions, including, most importantly for present purposes, a "procedural means for seeking redress from a tribunal or agency." *Black's Law Dictionary* 1324 (9th ed. 2009); *see also Webster's Third New International Dictionary* at 1807 (defining "proceeding" as "a particular step or series of steps adopted for doing or accomplishing something"); *Random House Dictionary of the English Language* 1542 (2d ed. 1987) (defining "proceeding" as "a particular action or course or manner of action"). In order for that term to have some independent effect in section 106(c)—which we assume Congress intended, *see, e.g.*, *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009) ("'we are obliged to give effect, if possible, to every word Congress used'") (quoting *Reiter v.*

Sonotone Corp., 442 U.S. 330, 339 (1979))—the term "other proceeding" in section 106(c) is best read to include processes "before any court, department, officer, agency, regulatory body, or other authority of the United States" that are distinct from, and in addition to, trials and hearings. *See* 50 U.S.C. § 1806(c). The reference to proceedings before a "department, officer, agency, regulatory body, or other authority" strongly suggests that Congress did not intend to limit the application of this provision to judicial proceedings. *See id*. Accordingly, although we need not determine the outer bounds of the meaning of "proceeding," the breadth of the dictionary definition of the term and the surrounding text in section 106(c) lead us to believe that "proceeding" would encompass the ARC's process for adjudicating an appeal from a decision by a Department of Justice component to revoke an employee's security clearance.

The legislative history is consistent with this broad reading of "proceeding." When proposed legislation concerning electronic surveillance for foreign intelligence purposes was introduced in 1976, the original version of section 106(c) would have limited its scope to a "trial, hearing, or other proceeding in a Federal or State court," S. Rep. No. 94-1035, at 64 (1976); S. Rep. No. 94-1161, at 41, 65 (1976). When a revised version of the bill was introduced in the next Congress, the language was altered to cover non-judicial proceedings expressly, *see* S. Rep. No. 95-604, at 56 (1977) ("This provision has been broadened in S. 1566 over its counterpart in S. 3197 by including non-judicial proceedings.").[7] To be sure, some of the language used in the relevant congressional reports echoes language used in the context of trials or court proceedings. *See, e.g.*, H.R.

[7] The relevant draft statutory language discussed in Senate Report 95-604 is similar, although not identical to, the language actually passed a year later. The revised language proposed in 1977 did not explicitly include proceedings before a "regulatory body," and would have applied not only to authorities of the United States, but also to those of a state or political subdivision. *See* S. Rep. No. 95-604, at 80. In 1978, the House Permanent Select Committee on Intelligence proposed the language that was adopted later that year and remains the current statutory text—adding the reference to "regulatory body" and focusing the section on federal authorities. *See* H.R. Rep. No. 95-1283, pt. I, at 9 (1978). Although the House Report setting out the language of section 106(c) as finally adopted explains that the notice requirements are imposed on the states through a separate section, it does not provide a reason for the change, nor does it explain the reason for the addition of the term "regulatory body." *See id*. at 89.

Rep. No. 95-1720, at 31 (1978) (Conf. Rep.) (explaining that the Senate bill "provided for notification to the court when information derived from electronic surveillance is to be used in legal proceedings"); *id*. (explaining that early notice would allow for "the disposition of any motions concerning evidence derived from electronic surveillance"); S. Rep. No. 95-701, at 62 (1978) (explaining that the notice provision, as well as the provisions governing motions for suppression, "establish the procedural mechanisms by which such information may be used in *formal* proceedings") (emphasis added); H.R. Rep. No. 95-1283, pt. I, at 89 (1978) (same). Nevertheless, Congress's decision to eliminate the reference to federal or state courts in the statutory provision, coupled with the legislative history's explicit statement that the terms "trial, hearing, or other proceeding" were not limited to judicial proceedings, indicates that references to legal proceedings in the legislative history should not be understood as limiting section 106(c)'s reach to court proceedings.[8]

In sum, Congress's expansion of the language of section 106(c) supports the broad reading indicated by the plain meaning of the phrase "other proceeding,"[9] and we conclude that an ARC adjudication of a

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[8] Analogous provisions in the statutory scheme governing wiretaps for law enforcement purposes also strongly suggest that Congress intended the phrase "trial, hearing, or other proceeding" to be quite broad. In one provision, using language nearly identical in relevant part to that in section 106(c), Congress authorized any "aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States" to "move to suppress the contents" of interceptions. 18 U.S.C. § 2518(10)(a) (2006). According to the legislative history, "the scope of the provision [wa]s intended to be comprehensive," although it would not include grand jury proceedings or Congressional hearings. S. Rep. No. 90-1097, at 106 (1968). The statutory scheme in the law enforcement context uses the narrower phrase—rejected in the FISA notification provision—"trial, hearing, or other proceeding in a Federal or State court" to require that certain information be provided to parties before the contents of a wiretap are used in such proceedings. 18 U.S.C. § 2518(9) (2006). The legislative history of that provision makes clear that the phrase was limited to "adversary type hearings," and would not include a grand jury hearing. S. Rep. No. 90-1097, at 105.

[9] Whether the term "proceeding" as used in section 106(c) refers only to an adversarial process is a question we need not decide. *Cf. In re Grand Jury Proceedings*, 856 F.2d 685, 690 & n.9 (4th Cir. 1988) (concluding that notice under section 106(c) was not required in the grand jury context because Congress explicitly included grand juries in certain provisions governing domestic wiretaps, demonstrating that Congress "knew how to include grand jury investigations as proceedings before which notice must be given to overheard persons" and because the legislative history of the domestic wiretap provisions

Department component's revocation of an employee's security clearance is an "other proceeding" within the meaning of FISA's notification provision.[10] Section 106(c) thus generally requires the government to notify an "aggrieved person" when it intends to use information "obtained or derived from . . . electronic surveillance of that aggrieved person" against that person in such an ARC adjudication.[11] 50 U.S.C. § 1806(c).

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demonstrated that "the term 'proceeding' was limited to include only adversary hearings"). The ARC adjudication at issue here is distinguishable from a federal grand jury proceeding because it is an adversarial process in which both sides are provided an opportunity to present their cases to a decision-maker. *See* 28 C.F.R. § 17.47.

[10] Because we conclude that the ARC process is an "other proceeding," we need not decide whether it is also a "hearing." We note, however, that the term "hearing" can—and in federal law often does—refer to any "opportunity to be heard or to present one's side of a case." *Webster's Third New International Dictionary* at 1044; *see also Black's Law Dictionary* at 788 (defining a "hearing" for purposes of administrative law as "[a]ny setting in which an affected person presents arguments to a decision-maker"); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 8.2, at 708–12 (5th ed. 2010) (collecting and discussing decisions giving deference to various agency interpretations of statutory requirements for a "hearing"). Although the term may in some instances refer specifically to a particular stage of litigation, *see Black's Law Dictionary* at 788 (defining a "hearing" as "[a] judicial session, usu. open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying"), or to the sort of formal, adversary process that ordinarily characterizes a trial, these are not its only meanings. Thus, an ARC adjudication may be a "hearing" as well as a "proceeding."

[11] Section 106 does not specify the form of notice the government must provide to an "aggrieved person." *See* David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* § 27:11 (2007) (comparing section 106(c) to other statutory search notice requirements). We have been informed that the ordinary government practice is simply to state without elaboration that the United States intends to offer into evidence, or otherwise use or disclose, information obtained or derived from electronic surveillance conducted pursuant to FISA, and not in the first instance to provide any further information, such as the identity of the FISA target, what communications were intercepted, when the information was obtained, or what FISA information the government intends to use. *See* Caproni Memo, *supra* note 2, at 2–3. You have not asked us to address the scope of the required notification. We note, however, that if the aggrieved person moves the relevant authority to suppress evidence or information obtained or derived from such electronic surveillance pursuant to section 106(e), section 106(f) authorizes the Attorney General to file an affidavit under oath to the district court in the same district as the authority stating "that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1806(f) (2006). If the Attorney General files such an affidavit, the district court is to "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully author-

III.

Finally, we address a constitutional issue that bears on the statutory question you have asked. The FBI notes that the President's authority to control access to national security information, and thus to make security clearance determinations for Executive Branch employees, "flows primarily" from the President's constitutional powers, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), and, further, that federal employees do not have a statutory or constitutional right to a security clearance, *see id.* at 528. In light of these premises, the FBI questions "whether Congress has the legal authority to impose restrictions on the Executive's authority and decision-making process in the security clearance context," and suggests that perhaps section 106(c) is therefore unconstitutional as applied to ARC adjudications. Caproni Memo, *supra* note 2, at 1–2.

We agree with the FBI that the President's constitutional authority to classify information concerning the national defense and foreign relations of the United States and to determine whether particular individuals should be given access to such information "exists quite apart from any explicit congressional grant." *Egan*, 484 U.S. at 527; *see Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94–99 (1998) (statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, before the House Permanent Select Committee on Intelligence). But that does not imply that Congress entirely lacks authority to legislate in a manner that touches upon disclosure of classified information. *See EPA v. Mink*, 410 U.S. 73, 83 (1973) ("Congress could certainly have provided that the Executive Branch adopt new procedures [concerning information required to be kept secret in the interest of the national defense] or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering."). For example, we believe Congress's authority to regulate foreign intelligence surveillance

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ized and conducted." *Id.*; *see also id.* § 1801(g) (2006) (defining "Attorney General" for purposes of FISA to include the Attorney General (or the Acting Attorney General); the Deputy Attorney General; and, upon designation by the Attorney General, the Assistant Attorney General for National Security).

under FISA,[12] and to regulate the terms of federal employment,[13] does, as a general matter, permit Congress to impose the notification requirement in section 106(c), even when that requirement reaches proceedings concerning security clearance revocations.

The doctrine of separation of powers, however, places some limits on Congress's authority to participate in regulating the system for protecting classified information. The key question in identifying such limits is whether Congress's action is "of such a nature that [it] impede[s] the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). Congress may not, for example, provide Executive Branch employees with independent authority to countermand or evade the President's determinations as to when it is lawful and appropriate to disclose classified information. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. at 100. And, as noted above, Congress's authority is "subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." *Mink*, 410 U.S. at 83 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)).

Section 106(c), by reaching broadly to require notice in proceedings such as ARC adjudications, could give rise to as-applied constitutional concerns under this separation of powers framework. There may, for example, be cases in which providing notice under section 106(c) would effectively disclose sensitive national security information that is constitutionally privileged. *Cf. Whistleblower Protections for Classified Disclo-*

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[12] *See generally* Memorandum for Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Apr. 18, 1978), *in Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 31 (1978) (explaining that it would be "unreasonable to conclude that Congress, in the exercise of its powers in this area," could not grant courts the authority under FISA to approve the legality of the Executive's electronic surveillance); *Foreign Intelligence Surveillance Act of 1978: Statement on Signing S. 1566 into Law* (Oct. 25, 1978), 2 Pub. Papers of Pres. Jimmy Carter 1853, 1853 (1978) (explaining that FISA "clarifies the Executive's authority" and noting no constitutional objections to the Act).

[13] *See, e.g.*, *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *Ex parte Curtis*, 106 U.S. 371, 372–73 (1882). Various statutes regulate the security clearance process more generally. *See* 50 U.S.C. §§ 435–438 (2006 & Supp. III 2009); 50 U.S.C. §§ 831–835 (2006) (governing employees of the National Security Agency).

sures, 22 Op. O.L.C. at 94–99 (noting historical examples of presidential claims of constitutional privilege to protect national security information). Given our understanding that the information provided when notice is required by section 106(c) is quite limited, *see supra* note 11, we expect such as-applied concerns will arise infrequently.

CAROLINE D. KRASS
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Extending the Term of the FBI Director

It would be constitutional for Congress to enact legislation extending the term of Robert S. Mueller, III, as Director of the Federal Bureau of Investigation.

June 20, 2011

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether it would be constitutional for Congress to enact legislation extending the term of Robert S. Mueller, III, as Director of the Federal Bureau of Investigation ("FBI"). We believe that it would.

President George W. Bush, with the Senate's advice and consent, appointed Mr. Mueller Director of the FBI on August 3, 2001. The statute providing for the Director's appointment sets a 10-year term and bars reappointment. *See* Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (1968), *as amended by* Crime Control Act, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (1976), *codified as amended at* 28 U.S.C. § 532 note (2006). A bill now pending in Congress would extend Mr. Mueller's term for two years.

Under the Constitution, *see* U.S. Const. art. I, § 8, cl. 18, Congress has the power to create offices of the United States Government and to define their features, including the terms during which office-holders will serve:

> To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, *and the fixing of the term for which they are to be appointed*, and their compensation—all except as otherwise provided by the Constitution.

Myers v. United States, 272 U.S. 52, 129 (1926) (emphasis added). In the exercise of this authority, Congress from time to time has extended the terms of incumbents. Opinions of the courts, the Attorneys General, and this Office have repeatedly affirmed the constitutionality of such extensions. *See In re Investment Bankers, Inc.*, 4 F.3d 1556, 1562–63 (10th Cir. 1993); *In re Benny*, 812 F.2d 1133, 1141–42 (9th Cir. 1987); *In re Koerner*, 800 F.2d 1358, 1366–67 (5th Cir. 1986); *Constitutionality of Legislation Extending the Terms of Office of United States Parole*

Commissioners, 18 Op. O.L.C. 166 (1994) ("*Parole Commissioners*"); *Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute*, 18 Op. O.L.C. 33 (1994); *Displaced Persons Commission—Terms of Members*, 41 Op. Att'y Gen. 88, 89–90 (1951) ("*Displaced Persons Commission*"); *Civil Service Retirement Act—Postmasters—Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 314 (1927); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 153–57 (1996) ("*Separation of Powers*") (discussing the opinions).

Although Congress has the power to set office-holders' terms, this power is subject to any limits "otherwise provided by the Constitution." *Myers*, 272 U.S. at 129. Under the Appointments Clause, art. II, § 2, cl. 2, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States"; in the case of inferior officers, Congress may vest the appointment in the President alone, the heads of Departments, or the courts of law. If the extension of an officer's term amounts to an appointment by Congress, the extension goes beyond Congress's authority to fix the terms of service. *See Parole Commissioners*, 18 Op. O.L.C. at 167 (citing *Buckley v. Valeo*, 424 U.S. 1, 124–41 (1976) (per curiam)); *Shoemaker v. United States*, 147 U.S. 282, 300 (1893).

The traditional position of the Executive Branch has been that Congress, by extending an incumbent officer's term, does not displace and take over the President's appointment authority, as long as the President remains free to remove the officer at will and make another appointment. In 1951, for example, the Acting Attorney General concluded that Congress by statute could extend the terms of two members of the Displaced Persons Commission: "I do not think . . . that there can be any question as to the power of the Congress to extend the terms of offices which it has created, subject, of course, to the President's constitutional power of appointment and removal." *Displaced Persons Commission*, 41 Op. Att'y Gen. at 90 (citation omitted). The Acting Attorney General "noted that such joint action by the Executive and the Congress in this field is not without precedent," *id.*, and gave as examples the extensions of the terms of members of the Reconstruction Finance Corporation, *see* Reconstruction Finance Corporation Act, Pub. L. No. 80-548, § 2, 62 Stat. 261, 262

(1948), and the Atomic Energy Commission, *see* Atomic Energy Act, Pub. L. No. 80-899, § 2, 62 Stat. 1259, 1259 (1948). In both instances, "no new nominations were submitted to the Senate and the incumbents continued to serve." *Displaced Persons Commission*, 41 Op. Att'y Gen. at 91.

In 1987, without discussing this traditional view, this Office reversed course and concluded that a statute extending the terms of United States Parole Commissioners was "an unconstitutional interference with the President's appointment power," because "[b]y extending the term of office for incumbent Commissioners appointed by the President for a fixed term, the Congress will effectively reappoint those Commissioners to new terms." *Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135, 136 (1987). Seven years later, however, we returned to the earlier view, finding that Congress could extend the terms of Parole Commissioners. *See Parole Commissioners*, 18 Op. O.L.C. at 167–68. We noted that the extension of an incumbent's term creates a "potential tension" between Congress's power "to set and amend the term of an office" and the prohibition against its appointing officers of the United States, *id.*, but that whether any conflict actually exists "depends on how the extension functions," *id*. at 168. In particular, "[i]f applying an extension to an incumbent officer would function as a congressional appointment of the incumbent to a new term, then it violates the Appointments Clause." *Id.* "The classic example" of a statute raising the potential tension would be one lengthening the tenure of an incumbent whom the President may remove only for cause. *Id.* On the other hand, if Congress extends the term of an incumbent whom the President may remove at will, "there is no violation of the Appointments Clause, for here the President remains free to remove the officer and embark on the process of appointing a successor—the only impediment being the constitutionally sanctioned one of Senate confirmation." *Id.* In these circumstances, the "legislation leaves the appointing authority—and incidental removal power—on precisely the same footing as it was prior to the enactment of the legislation." *Id.* (citations omitted). Because Parole Commissioners were removable at will, we concluded that the extension of their terms was constitutional. *See id.* at 169–72.

The courts have gone even further in sustaining congressional power to extend the terms of incumbents. They uniformly rejected the argument

that Congress could not extend, by two to four years, the tenure of bankruptcy judges, even though those judges were removable only for cause. In the most prominent of these cases, *In re Benny*, the Ninth Circuit held that "the only point at which a prospective extension of term of office becomes similar to an appointment is when it extends the office for a very long time." 812 F.2d at 1141. Because of our concerns about Congress's extending the terms of officers with tenure protection, we have questioned the reasoning of that opinion, *see Separation of Powers*, 20 Op. O.L.C. at 155 & nn.89, 90, but the opinion does support the power of Congress to enact legislation that would lengthen the term of the incumbent FBI Director.[1]

In any event, even under the longstanding Executive Branch approach, which makes it relevant whether a position is tenure-protected, Congress would not violate the Appointments Clause by extending the FBI Director's term. As we have previously concluded, the FBI Director is removable at the will of the President. *See* Memorandum for Stuart M. Gerson, Acting Attorney General, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Removal of the Director of the Federal Bureau of Investigation* (Jan. 26, 1993). No statute purports to restrict the President's power to remove the Director. Specification of a term of office does not create such a restriction. *See Parsons v. United States*, 167 U.S. 324, 342 (1897). Nor is there any ground for inferring a restriction. Indeed, tenure protection for an officer with the FBI Director's broad investigative, administrative, and policymaking responsibilities would raise a serious constitutional question whether Congress had "im-

[1] Concurring in the judgment in *In re Benny*, Judge Norris argued that there was no "principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments," because "[b]oth implicate the identical constitutional evil—congressional selection of the individuals filling nonlegislative offices." 812 F.2d at 1143 (footnotes omitted). This argument would seem to deny that any extension of an incumbent's term could be constitutional. Judge Norris's reasoning, however, may depend in part on the protected tenure of the bankruptcy judges in *In re Benny* whose terms were extended: "By extending the terms of known incumbents, Congress can guarantee that its choices will continue to serve for as long as Congress wishes, *unless the officers can be removed*." *Id.* (emphasis added). A footnote to this sentence discusses the circumstances in which Congress may confer tenure protection on officers, *id.* at 1143 n.5, but does not acknowledge the President's power to remove an officer who is serving at will.

pede[d] the President's ability to perform his constitutional duty" to take care that the laws be faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The legislative history of the statute specifying the Director's term, moreover, refutes any idea that Congress intended to limit the President's removal power. *See* 122 Cong. Rec. 23,809 (1976) (statement of Sen. Byrd) ("Under the provisions of my amendment, there is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term."); *id.* at 23,811 (statement of Sen. Byrd) ("The FBI Director is a highly placed figure in the executive branch and he can be removed by the President at any time, and for any reason that the President sees fit.").[2]

Here, therefore, the issue is whether we continue to believe that the approach outlined in our earlier opinions and particularly in *Parole Commissioners* is correct. In connection with the pending bill, it has been argued that any legal act causing a person to hold an office that otherwise would be vacant is an "Appointment" under the Constitution, art. II, § 2, cl. 2, and thus requires use of the procedure laid out in the Appointments Clause. According to the argument, if legislation appoints an officer, the President's authority to remove him does not cure the defect. The Constitution forbids the appointment, whether or not the President may later act to undo it, and in practice the political costs of undoing the extension through removal of the incumbent may be prohibitive. Furthermore, whereas the process under the Constitution of nomination, confirmation, and appointment places on the President alone, with the advice and consent of the Senate, the responsibility for selection of an individual, legislation enabling an office-holder to serve an extended term without being reappointed diffuses that responsibility among the President and the members of the House and Senate.[3]

We disagree with this argument. We begin with the fundamental observation that legislation extending a term "does not represent a formal

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[2] President Clinton, in fact, did remove FBI Director William S. Sessions. *See* Memorandum for Senate Committee on the Judiciary, from Vivian Chu, Legislative Attorney, Congressional Research Service, *Re: Director of the FBI: Position and Tenure* at 5 & n.39 (June 1, 2011).

[3] *See The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of John Harrison, Professor of Law, University of Virginia School of Law).

appointment by Congress." *Separation of Powers*, 20 Op. O.L.C. at 156. Director Mueller holds an office, and if his term is extended by Congress, he will continue to hold that office by virtue of appointment by President Bush, with the advice and consent of the Senate, in strict conformity with the requirements of the Appointments Clause. Rather than an exercise of the power to select the officer, the pending legislation, as a formal matter, is an exercise of Congress's power to set the term of service for the office. That the legislation here would enable Director Mueller to stay in an office he would otherwise have to vacate does not in itself constitute a formal appointment, any more than Congress makes an appointment when it relieves an individual office-holder from mandatory retirement for age, thereby lifting an impending legal disability and enabling him to retain his position.[4] In neither situation has Congress prescribed a method of appointment at variance with the Appointments Clause. *Cf. Buckley*, 424 U.S. at 124–41.

Nor is the term extension contemplated by the pending legislation *functionally* the equivalent of a congressional appointment. Whether the extension of a term functions as an appointment depends on its effect on the President's appointment power. If the extension of a term were to preclude the President from making an appointment that he otherwise

[4] For example, section 704 of the National Defense Authorization Act, Fiscal Year 1989, provided that "[n]otwithstanding the limitation" otherwise requiring retirement for age, "the President may defer until October 1, 1989, the retirement of the officer serving as Chairman of the Joint Chiefs of Staff for the term which began on October 1, 1987." Pub. L. No. 100-456, 102 Stat. 1918, 1996–97 (1988). Without that legislation, the Chairman would have had to retire from active service, and the office of Chairman of the Joint Chiefs of Staff would have become vacant. Similarly, section 504 of the National Defense Authorization Act for Fiscal Year 1998, provided that a service Secretary could "defer the retirement . . . of an officer who is the Chief of Chaplains or Deputy Chief of Chaplains of that officer's armed force," as long as the deferment did not go beyond the month that the officer turned 68 years old. Pub. L. No. 105-85, 111 Stat. 1629, 1725 (1997). Congress, moreover, has twice enacted statutes contemplating that, by specific later legislation, it would raise the retirement age of individual officers in the civil service. *See* Pub. L. No. 89-554, § 8335(d), 80 Stat. 378, 571 (1966) ("The automatic separation provisions of this section do not apply to—(1) an individual named by a statute providing for the continuance of the individual in the [civil] service."); Federal Executive Pay Act, Pub. L. No. 84-854, § 5(d), 70 Stat. 736, 749 (1956) ("The automatic separation provisions of this section shall not apply to any person named in any Act of Congress providing for the continuance of such person in the [civil] service.").

would have the power to make, Congress would in effect have displaced the President and itself exercised the appointment power. We believe that such a displacement can take place when Congress extends the term of a tenure-protected officer. *See Parole Commissioners*, 18 Op. O.L.C. at 168. If, however, "the President remains free to remove the officer and embark on the process of appointing a successor—the only impediment being the constitutionally sanctioned one of Senate confirmation," *id.*, the President has precisely the same appointment power as before the legislation. Congress has not taken over that power but has acted within its own power to fix the term during which the officer serves. Because the President is free at any time to dismiss the FBI Director and, with the Senate's advice and consent, appoint a new Director, the pending legislation does not functionally deprive the President of his role in appointing the Director under the Appointments Clause.

The proposed legislation, moreover, would leave with the President the "sole and undivided responsibility" for appointments. *The Federalist* No. 76, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). If the President signs the bill and allows the incumbent to remain in office, the "sole and undivided responsibility" of a single official, as well as the Senate's advice and consent, will still have been exercised in the incumbent's appointment—here, when President Bush appointed Director Mueller. Under the pending legislation, Director Mueller for the next two years would continue to serve as a result of that exercise of responsibility, just as he has since January 20, 2009, when President Obama took office. Throughout that time, each President sequentially will have had an additional "sole and undivided responsibility" for Director Mueller's service, because each President will have been able to remove him immediately, with or without cause.[5]

We also disagree that term-extension legislation violates the Appointments Clause because as a hypothetical matter it might impose some new political cost on the President. The relative political cost to the President of removing a term-extended incumbent as compared to the costs presented by other decisions involving appointment matters is speculative. In any

[5] *See The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of William Van Alstyne, Professor of Law, Marshall-Wythe Law School).

event, the Appointments Clause does not prohibit all measures that might impose a political cost, but rather insures that Congress leave "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment." *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 520 (1871). The pending legislation allows the exercise of the President's "judgment and will" with respect to who shall serve as Director of the FBI and for that reason is consistent with the Appointments Clause.

Nor do we believe that we should depart from our earlier view because the present bill would apply only to Director Mueller, while the earlier extensions applied to multi-member groups. In this respect, the pending bill might be thought more like an individual appointment. But in *Displaced Persons Commission*, the terms of only two commissioners were extended, 41 Op. Att'y Gen. at 88, and our opinion in *Parole Commissioners* stated that as few as three commissioners might benefit from the extension, 18 Op. O.L.C. at 167. The difference between those cases and this one does not appear significant. To be sure, the grounds for the extensions at issue in those cases do not seem to have included, at least expressly, the merits of the individual office-holders. But although Director Mueller's personal strengths are a key reason for the pending legislation, the need for stability in the Nation's efforts against terrorism is also a significant part of the justification. As the President said in announcing the proposal, "[g]iven the ongoing threats facing the United States, as well as the leadership transitions at other agencies like the Defense Department and Central Intelligence Agency, I believe continuity and stability at the FBI is critical at this time." Office of the Press Secretary, The White House, Press Release, *President Obama Proposes Extending Term for FBI Director Robert Mueller* (May 12, 2011). We do not believe (and, to our knowledge, no one has argued) that high regard for an office-holder disables Congress from extending his term.

CAROLINE D. KRASS
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GAO Access to National Directory of New Hires

Title 42, section 653(*l*) of the U.S. Code prohibits the Department of Health and Human Services from providing the Government Accountability Office access to personally identifiable information from the National Directory of New Hires, notwithstanding GAO's general access provision, 31 U.S.C. § 716(a).

August 23, 2011

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

You have asked whether the Department of Health and Human Services ("HHS") may provide the Government Accountability Office ("GAO") access to the National Directory of New Hires ("NDNH") "for unspecified purposes related to GAO's investigatory duties" pursuant to 31 U.S.C. § 716(a) (2006), notwithstanding the restrictions on the use and disclosure of such information contained in 42 U.S.C. § 653(*l*) (2006). *See* Letter for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from William B. Schultz, Acting General Counsel, HHS (June 8, 2011). For the reasons discussed below, we believe that 42 U.S.C. § 653(*l*) prohibits HHS from providing GAO access to personally identifiable NDNH information.

Answering your question requires us to determine how two statutory provisions interact: a provision limiting disclosure of information in the NDNH, 42 U.S.C. § 653(*l*), and a provision authorizing GAO to access Executive Branch information, 31 U.S.C. § 716(a). We begin our analysis with the NDNH provision. Part of the Federal Parent Locator Service ("FPLS") operated by HHS, the NDNH contains individual employment information for use in enforcement of state child support orders, among other applications. 42 U.S.C. § 653(i)(1) (2006). HHS obtains this information from the states, which gather it as part of maintaining their own directories of new hires. 42 U.S.C. §§ 653(i)(1) & 653a(g)(2) (2006). Section 653 expressly authorizes the Secretary of HHS to share certain information in the NDNH under particular circumstances and conditions with various state and federal officials, including "authorized" state agents and specified Executive Branch officials. 42 U.S.C. § 653(b), (c), (j) (2006 & Supp. III 2009).

The creation of the NDNH in 1996 pursuant to the Omnibus Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 316, 110 Stat. 2105, 2214–20, greatly expanded the collection and use of personal information through the FPLS. In the same Act, Congress imposed limits on the use and disclosure of that information by including the following provision, entitled "Restriction on disclosure and use": "Information in the Federal Parent Locator Service, and information resulting from comparisons using such information, shall not be used or disclosed except as expressly provided in this section, subject to section 6103 of the Internal Revenue Code of 1986." 42 U.S.C. § 653(*l*)(1).

In its letter to HHS asserting a right to access NDNH information, GAO does not argue that any provision in the FPLS statute expressly permits GAO to use or access NDNH information. *See* Letter for Kathleen Sebelius, Secretary of HHS, from Lynn H. Gibson, General Counsel, GAO (Mar. 31, 2011) ("GAO Letter"). Instead, GAO invokes its "broad statutory right of access to agency records" under 31 U.S.C. § 716. *GAO Letter* at 1. Section 716(a) provides that "[e]ach agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information." 31 U.S.C. § 716(a).[1] GAO argues that this provision "requires all agencies to provide GAO with information about their duties and activities and authorizes GAO to inspect agency records to obtain such information. Maintenance of the NDNH is both a statutory duty and an activity of HHS, and thus, HHS is required by section 716 to provide GAO with access to information in the database." GAO Letter at 1.[2]

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[1] The Comptroller General is the head of GAO.

[2] You have asked us to consider GAO's position that 31 U.S.C. § 716(a) entitles it to access personally identifiable information in the NDNH from HHS notwithstanding the restrictions on the use and disclosure of such information contained in 42 U.S.C. § 653(*l*). We assume without deciding that GAO would be entitled to such NDNH information pursuant to 31 U.S.C. § 716(a) in the absence of 42 U.S.C. § 653(*l*), and do not address other statutory authority, if any, under which GAO might potentially seek access to such information.

This Office has previously opined that section 716(a) does not authorize GAO to access information that is subject to a statutory provision restricting dissemination of the information to specified parties, not including GAO. In *GAO Access to Trade Secret Information*, 12 Op. O.L.C. 181 (1988) ("1988 Opinion"), this Office addressed whether GAO was entitled to access trade secret information held by the Food and Drug Administration ("FDA"). At that time, 21 U.S.C. § 331(j) (1982) (section 301(j) of the Federal Food, Drug, and Cosmetic Act of 1938) prohibited the FDA from revealing such information "other than to the Secretary [of HHS] or officers or employees of [HHS], or to the courts when relevant in any judicial proceeding."[3] We first found that "there is . . . no exception in section 301(j) for disclosure to the GAO," 1988 Opinion, 12 Op. O.L.C. at 182, and we then went on to reject the view that section 716(a) "authorizes the GAO to gain access to the trade secret information covered by section 301(j)," *id*. We explained:

> Under established rules of statutory construction concerning statutes that may arguably conflict, . . . section 301(j) controls in this situation. It is a cardinal axiom of statutory construction that "[w]here there is no clear [congressional] intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550–51

[3] In 1990, Congress amended this statutory provision to specify that the provision does not bar disclosing trade secret information to Congress: "This paragraph does not authorize the withholding of information from either House of Congress or from, to the extent of matter within its jurisdiction, any committee or subcommittee of such committee or any joint committee of Congress or any subcommittee of such joint committee." Pub. L. No. 101-508, § 4755(c)(2), 104 Stat. 1388, 1388-210 (codified at 21 U.S.C. § 331(j) (Supp. II 1990)). Prior to our 1988 Opinion and the 1990 amendment, the Attorney General had concluded that 21 U.S.C. § 331(j) forbade disclosure of trade secret information to Congress. *See Federal Food, Drug and Cosmetic Act—Prohibition on Disclosure of Trade Secret Information to a Congressional Committee*, 43 Op. Att'y Gen. 116, 116 (1978) (The Secretary of Health, Education, and Welfare is "required by § 301(j) [of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j)] to decline to furnish trade secret data covered by that section to Congress or one of its Committees. I base this conclusion on the unqualified language of § 301(j), the consistent and longstanding interpretation to this effect by [the Department of Health, Education and Welfare], and prior congressional approval of that interpretation through the rejection of an amendment to create an express exemption permitting disclosures to Congress."). Our 1988 Opinion addressed whether that reasoning extended to GAO.

> (1974); *see also Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence."). Since section 301(j) is a specific statute directly addressing one executive branch agency's handling of trade secret information, while section 716(a) is a general statute addressed to all kinds of information in possession of the executive branch, section 301(j) controls in the absence of congressional intent to the contrary. We have reviewed the legislative history of section 716(a) and have found no evidence of any such intent.

Id. at 182–83. In informal advice to HHS in 2007 regarding a different statute, we reaffirmed this analysis of the interaction between section 716(a) and a specific statutory provision that authorizes the sharing of specified information with only certain parties, not including the Comptroller General or GAO. *See* E-mail for Daniel Meron, General Counsel, HHS, from John Elwood, Deputy Assistant Attorney General, Office of Legal Counsel at 4–6 (Sept. 26, 2007).

As was the case with the disclosure restrictions at issue in our 1988 Opinion, the plain language of section 653(*l*) prohibits disclosure to GAO. Section 653(*l*) is a flat prohibition on disclosure of FPLS information by HHS unless affirmative authority is "expressly provided" elsewhere in section 653. We could find no such affirmative authority in section 653 providing for disclosure of personally identifiable information in the NDNH to GAO.

Nor is there any other evidence of a congressional intent to except GAO from section 653(*l*)'s limitation on disclosure. The fact that section 653 affirmatively authorizes and circumscribes disclosure of FPLS information to certain Executive Branch officials shows that Congress was cognizant of disclosure issues within the federal government when it passed section 653(*l*). *See, e.g.*, 42 U.S.C. § 653(j) (permitting disclosures of FPLS information in certain circumstances to the Social Security Administration and the Secretaries of Education, the Treasury, and Veterans Affairs). Section 653(*l*)'s allowance of only "expressly provided" uses and disclosures is thus, in context, designed to address disclosures within the federal government, and not just outside it. Furthermore, Congress saw fit to specify that the disclosure limitation is "subject to section

6103 of the Internal Revenue Code of 1986," 42 U.S.C. § 653(*l*)(1), a provision that permits certain disclosures of tax return information to Congress, including to GAO, in certain circumstances. *See* 26 U.S.C. § 6103(f), (i)(8) (2006).[4] If Congress had understood an independent

[4] Title 26, section 6103 provides that tax "[r]eturns and return information shall be confidential." 26 U.S.C. § 6103(a) (Supp. III 2009). Section 6103 then sets forth various permitted disclosures of such information, including to congressional committees according to certain processes. 26 U.S.C. § 6103(f) (2006). Title 26, section 6103(i)(8) further provides for disclosures of return and return information to the Comptroller General, head of the GAO, subject to certain conditions:

> (A) *Returns available for inspection.* Except as provided . . . , upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the Government Accountability Office for the purpose of, and to the extent necessary in, making—
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> (i) an audit of the Internal Revenue Service, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice, or the Tax and Trade Bureau, Department of the Treasury, which may be required by section 713 of title 31, United States Code, or
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> (ii) any audit authorized by subsection (p)(6), except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.
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> (B) *Audits of other agencies*
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> (i) *In general.* Nothing in this section shall prohibit any return or return information obtained under [title 26] by any Federal agency (other than an agency referred to in subparagraph (A)) or by a Trustee as defined in the District of Columbia Retirement Protection Act of 1977, for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the Government Accountability Office if such inspection or disclosure is—
>
> (I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and
>
> (II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.
>
> (ii) *Information from Secretary.* If the Comptroller General of the United States determines that the returns or return information available under clause (i)

statutory provision that was written in broad terms authorizing or requiring disclosure to trump the "except as expressly provided" language of section 653(*l*)(1), it would have had no reason to include this explicit carve-out for section 6103. To the contrary, Congress's decision to clarify expressly that section 653(*l*)'s limitation on disclosure is subject to section 6103 suggests that Congress was aware that, absent such a cross-reference (or an express provision elsewhere in section 653), the stringent restrictions it was enacting on the use and disclosure of FPLS information, including NDNH information, might limit disclosure of this information under other statutes governing access to sensitive Executive Branch information. Congress nevertheless did not provide expressly in section 653 that such information could be disclosed to the Comptroller General or GAO. Insofar as Congress knows how to make clear that a statute that limits the use or disclosure of information in the possession of the Executive Branch nevertheless authorizes disclosure to Congress, the

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are not sufficient for purposes of making an audit of any program or activity of a Federal agency (other than an agency referred to in subparagraph (A)), upon written request by the Comptroller General to the Secretary, returns and return information (of the type authorized by subsection (*l*) or (m) to be made available to the Federal agency for use in such program or activity) shall be open to inspection by, or disclosure to, officers and employees of the Government Accountability Office for the purpose of, and to the extent necessary in, making such audit.

. . .

(iv) *Certain restrictions made applicable.* The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.

(C) *Disapproval by Joint Committee on Taxation.* Returns and return information shall not be open to inspection or disclosed under subparagraph (A) or (B) with respect to an audit—

(i) unless the Comptroller General of the United States notifies in writing the Joint Committee on Taxation of such audit, and

(ii) if the Joint Committee on Taxation disapproves such audit by a vote of at least two-thirds of its members within the 30-day period beginning on the day the Joint Committee on Taxation receives such notice.

26 U.S.C. § 6103(i)(8) (2006).

Comptroller General, or GAO, as it has done in other statutes,[5] the absence of such an authorization here is significant. *Cf. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987) (observing that Congress "knows how to" authorize nationwide service of process "when it wants to" and that the fact that "Congress failed to do so here argues forcefully that such authorization was not its intention").

The relevant legislative history of the Omnibus Personal Responsibility and Work Opportunity Reconciliation Act (the Act that created the NDNH) also does not indicate any intent to except GAO from the disclosure prohibition. Rather, the legislative history simply frames the disclosure limitation in terms as broad as that of the statutory provision itself. *See, e.g.*, H.R. Rep. No. 104-725, at 349 (1996) (Conf. Rep.) ("Information from the FPLS cannot be used for purposes other than those provided in this section, subject to section 6103 of the Internal Revenue Code (confidentiality and disclosure of returns and return information)."); H.R. Rep. No. 104-651, at 1409–10 (1996) (Conf. Rep.) (same). At the same time, unrelated portions of the legislative history contain references to similar provisions, either existing or proposed, authorizing Congress, the Comptroller General, or GAO to access other protected information, which further highlights the fact that Congress was cognizant of these disclosure issues at the time of enactment, yet did not include a provision in section 653 expressly authorizing disclosure of information in the NDNH to Congress or GAO. *See, e.g.*, H.R. Rep. No. 104-651, at 139 (quoting existing statutory language providing that "safeguards which limit the use or disclosure of information . . . shall not prevent the use or disclosure of such information to the Comptroller General of the United States"); *id*. at 303–04 (quoting proposed statutory language providing that certain information "shall not be disclosed by the Secretary or the Secretary of Veterans Affairs . . . except . . . to permit the Comptroller

[5] *See, e.g.*, 10 U.S.C. § 1102(d)(2) (2006) ("Nothing in this section shall be construed as authority to withhold any . . . record from a committee of either House of Congress, any joint committee of Congress, or the Comptroller General if such record pertains to any matter within their respective jurisdictions."); 41 U.S.C. § 423(h)(5) (2006) ("This section does not . . . authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency."); 41 U.S.C. § 2107(5) (Supp. V 2011) (similar).

General to review the information provided"). The absence of an express exception here, where the plain language of section 653(*l*) would otherwise bar disclosure to GAO, is meaningful against this backdrop.

Having concluded that section 653(*l*) cannot be construed to except GAO from its limitation on disclosure, we turn to the question we addressed in our 1988 Opinion—whether section 716 nevertheless authorizes GAO to access the information. We find that section 716 cannot be read to operate in this way. Section 653(*l*) explicitly restricts which recipients have access to FPLS information, including NDNH information, and under what circumstances. It is a specific provision with regard to the use and disclosure of FPLS information. Section 716, in contrast, grants GAO general access to all kinds of information across the Executive Branch. In circumstances where there is no textual basis or legislative history to indicate that section 716(a) is intended to override specific access restrictions or that section 653 is not intended to apply to GAO, section 653's explicit restriction on disclosure controls. *See Census Confidentiality and the PATRIOT Act*, 34 Op. O.L.C. 1, 15 (2010) (concluding that use restrictions in the Census Act control in the face of a general access provision and noting that our Office has applied a "strong presumption of confidentiality in concluding that such [general access provisions] did not override more specific confidentiality protections"); *Disclosure of Confidential Business Records Obtained Under the National Traffic and Motor Vehicle Safety Act*, 4B Op. O.L.C. 735, 736–37 (1980) (noting that "a specific statute will not be controlled or nullified by a general one," and observing that the disclosure limitation at issue "is not only a later enactment" than an intragovernmental information exchange statute, "but also deals with the specific issue of the disclosure of [the information at issue], rather than . . . with the general matter of intragovernmental exchange of information" (internal quotation marks omitted)).

GAO advances two other arguments for access to NDNH information. First, GAO argues that section 716's enforcement provisions empower GAO to enforce a request for access to NDNH information, and therefore demonstrate that GAO is authorized to access that information:

> While section 716 does provide some exceptions to GAO's ability, to file an action in district court to enforce its access authority, the

> circumstances in which those exceptions may be invoked are narrowly circumscribed. As relevant here, section 716(d)(1)(B) provides that GAO may not bring a civil action to enforce its right of access if a record is "specifically" exempted from disclosure to GAO by a statute that: (a) requires without discretion that the record be withheld from GAO; (b) establishes particular criteria for withholding the record from GAO; or (c) refers to particular types of records to be withheld from GAO. Although the NDNH statute contains restrictions on the disclosure of NDNH data, it does not specifically prohibit disclosure to GAO. In fact, the statute makes no mention of GAO. Therefore, since it does not qualify under the statutory criteria for which Congress barred an enforcement under section 716, *a fortiori*, Congress did not bar GAO's access to NDNH data.

GAO Letter at 1–2. Even assuming that GAO is correct that section 653 does not "specifically" exempt NDNH information from disclosure to GAO because its limitation on disclosure does not mention GAO expressly, this argument, like a similar argument addressed in our 1988 Opinion,

> ignores the fundamental distinction between a right and a judicial remedy to enforce the right: these other subsections simply address a method of enforcing GAO's right to information under section 716(a); they do not define in any way the right itself. The question of the applicability of GAO's right to information under section 716(a) is separate from, and does not depend on, any questions that may arise under other subsections of 31 U.S.C. § 716 concerning judicial enforcement of that right.

1988 Opinion at 183 n.2.

Second, GAO argues that "an interpretation of the NDNH statute to prohibit disclosure to GAO would constitute an implied repeal of GAO's right of access under section 716," and that implied repeals are disfavored. GAO Letter at 2. But this is no implied repeal. "Where a later special or local statute is not irreconcilable with a general statute to the degree that both statutes cannot have a coincident operation, the general statute is not repealed, and the special or local statute exists as an exception to its terms." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 23:16, at 509 (7th ed.

2009). Rather than constituting a repeal by implication, we understand section 653(*l*) to set forth a statutory prohibition that is not overridden by section 716(a) and that therefore exists as an exception to section 716(a)'s general grant of access.

* * * * *

For the foregoing reasons, we conclude that 42 U.S.C. § 653(*l*) prohibits HHS from providing GAO access to personally identifiable NDNH information.

JOHN E. BIES
Deputy Assistant Attorney General
Office of Legal Counsel

Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China

Section 1340(a) of division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, which purports to prevent the Office of Science and Technology Policy from using appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company," is unconstitutional as applied to certain activities undertaken pursuant to the President's constitutional authority to conduct the foreign relations of the United States.

The plain terms of section 1340(a) do not apply to OSTP's use of funds to perform its functions as a member of the Committee on Foreign Investment in the United States.

September 19, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF SCIENCE AND TECHNOLOGY POLICY

This memorandum confirms and elaborates upon advice this Office provided to you regarding the permissibility of certain activities of the Office of Science and Technology Policy ("OSTP") involving Chinese officials, organizations, and experts, in light of section 1340(a) of division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38, 102, 123 ("Continuing Appropriations Act"). Section 1340(a) purports to prevent OSTP from using appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company." In our view, section 1340(a) is unconstitutional as applied to certain activities undertaken pursuant to the President's constitutional authority to conduct the foreign relations of the United States. Most, if not all, of the activities you have described to us fall within the President's exclusive power to conduct diplomacy, and OSTP's officers and employees therefore may engage in those activities as agents designated by the President for the conduct of diplomacy with the People's Republic of China ("China" or "PRC"), notwithstanding section 1340(a). We also believe that the plain terms of section 1340(a) do not apply to OSTP's use of funds to perform its functions as a member of the Committee on Foreign Investment in the United

States, even though those functions include reviewing proposed asset purchases in the United States by Chinese businesses and institutions.

I.

Congress established OSTP in 1976 within the Executive Office of the President to "serve as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government." Presidential Science and Technology Advisory Organization Act of 1976, Pub. L. 94–282, § 205(a), 90 Stat. 463, 464 (codified as amended at 42 U.S.C. § 6614(a)). The Office is headed by a Director, whose "primary function" is "to provide . . . advice on the scientific, engineering, and technological aspects of issues that require attention at the highest levels of Government." 42 U.S.C. § 6613(a). The Director's statutory responsibilities also include "defin-[ing] coherent approaches for applying science and technology to critical and emerging national and international problems"; "assess[ing] and advis[ing] on policies for international cooperation in science and technology which will advance the national and international objectives of the United States"; "advis[ing] the President of scientific and technological considerations involved in areas of national concern including, but not limited to, the economy, national security, homeland security, health, foreign relations, the environment, and the technological recovery and use of resources"; and "perform[ing] such other duties and functions . . . as the President may request." *Id.* §§ 6613(b)(1), 6614(a)(1), (9), (13).

In 1979, the United States and the People's Republic of China entered into an executive agreement on cooperation in science and technology. Intended "to provide broad opportunities for cooperation in scientific and technological fields of mutual interest," this agreement and subsequent protocols obligate the two contracting parties to "encourage and facilitate, as appropriate, the development of contacts and cooperation between government agencies, universities, organizations, institutions, and other entities of both countries, and the conclusion of accords between such bodies for the conduct of cooperative activities." Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Cooperation in Science and Technology, U.S.-China, arts. 1, 4, Jan. 31, 1979, 30 U.S.T. 35 ("1979 Agreement"). The 1979 Agreement authorizes the United States and China to enter into

subsequent accords to implement its terms, including accords to promote further cooperation and address "intellectual property, funding and other appropriate matters." *Id.* art. 5. The 1979 Agreement also specifies that the United States and China "shall establish a US-PRC Joint Commission on Scientific and Technological Cooperation," which "shall plan and coordinate cooperation in science and technology, and monitor and facilitate such cooperation." *Id.* art. 10.

Under the agreement, each contracting party must "designate an Executive Agent" with responsibility "for coordinating the implementation of its side of [all covered] activities and programs." *Id.* The agreement stipulates that the agent of the United States "shall be the Office of Science and Technology Policy." *Id.* Although the 1979 Agreement originally provided that it would remain in force for only five years, it also provided for extension by mutual agreement of the contracting parties, *id.* art. 11; and, in fact, the United States and China have repeatedly agreed to extensions. Most recently, in a January 19, 2011 protocol (signed for the United States by the Director of OSTP), the contracting parties extended the agreement until April 2016. Protocol Extending the Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Cooperation in Science and Technology, U.S.-China, Jan. 19, 2011; *see also, e.g.*, Protocol Extending the Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Cooperation in Science and Technology, U.S.-China, Apr. 18, 2006, Temp. State Dep't No. 06-112, 2006 WL 2620339.

Since 1979, OSTP's officers and employees have had extensive contact and engagement with their Chinese counterparts, as contemplated by the agreement. The Joint Commission on Scientific and Technological Cooperation ("Joint Commission") established by the 1979 Agreement meets biannually to coordinate and manage the collaborative science and technology activities of the U.S. and Chinese governments. Letter for the Office of Legal Counsel, Department of Justice, from Rachael Leonard, General Counsel, Office of Science and Technology Policy at 2 (June 2, 2011) ("Leonard Letter"). We understand that the Joint Commission now manages numerous protocols, memoranda of understanding, and other cooperative agreements or undertakings between U.S. agencies and Chinese government entities. *Id.* at 3. These accords address subjects

such as agriculture, energy, health, the environment, earth sciences, marine research, and nuclear safety. *Id.* In addition, we understand that, in 2010, a U.S.-China Dialogue on Innovation Policy ("Innovation Policy Dialogue") was established as an activity of the Joint Commission. *Id.* The Innovation Policy Dialogue is a forum for sharing best practices in promoting innovation, entrepreneurship, and mutually beneficial technology activities and for identifying, analyzing, and overcoming barriers to innovation associated with the two countries' policies. *Id.*

In recent appropriations legislation, Congress sought to restrict OSTP's interactions with and activities involving China. Section 1340 of the Continuing Appropriations Act, enacted on April 15, 2011, provides in full:

> (a) None of the funds made available by this division may be used for the National Aeronautics and Space Administration or the Office of Science and Technology Policy to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division.
>
> (b) The limitation in subsection (a) shall also apply to any funds used to effectuate the hosting of official Chinese visitors at facilities belonging to or utilized by the National Aeronautics and Space Administration.

125 Stat. at 123. You asked us, in light of this provision, whether and to what extent OSTP may engage in activities related to the Joint Commission and the Innovation Policy Dialogue, as well as other interactions with representatives of the Chinese government. Leonard Letter at 7–8.

II.

To the extent that funding conditions such as those set out in section 1340(a) bar the President from conducting international diplomacy through his chosen agents, they unconstitutionally interfere with the President's foreign affairs powers and may be disregarded by Executive Branch agencies.

A.

As "the constitutional representative of the United States in its dealings with foreign nations," *United States v. Louisiana*, 363 U.S. 1, 35 (1960), the President has "unique responsibility" for the conduct of "foreign . . . affairs." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *see also, e.g.*, *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (noting "the lead role of the Executive in foreign policy"). One well-established component of the President's foreign affairs power is the "basic authority to conduct the Nation's diplomatic relations." *Prohibition of Spending to Send Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism*, 33 Op. O.L.C. 221, 226 (2009) ("*Delegations to U.N. Agencies*"). To be sure, Congress "clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration," *id.* at 226–27; and Congress's exercise of those powers has sometimes limited the President's options in implementing foreign policy, *id.* at 234. But, "[i]n the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's." *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 40 (1990) ("*Foreign Relations Authorization Bill*") (quoting *Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology for the Joint Japan-United States Development of FS-X Aircraft* (July 31, 1989), 2 Pub. Papers of Pres. George H.W. Bush 1042, 1043 (1989)).

The President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution,[1] and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("the historical gloss on the 'executive Power' vested in Article II of the

[1] *See* U.S. Const. art. II, § 1, cl. 1 (vesting "[t]he executive Power" in the President); *id.* art. II, § 2, cl. 2 (enumerating the President's powers to "make Treaties," and "appoint Ambassadors . . . and Consuls"); *id.* art. II, § 3 (establishing President's authority to "receive Ambassadors and other public Ministers").

Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))).[2] This core presidential power over the conduct of diplomacy includes the "exclusive authority to determine the time, scope, and objectives" of international negotiations and the individuals who will represent the United States in those contexts. *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 231 (citations and internal quotation marks omitted); *see also, e.g.*, *id*. at 231–32 nn. 9–10 (collecting authorities); *Section 235A of the Immigration and Nationality Act*, 24 Op. O.L.C. 276, 281 (2000) (describing statute as "impermissibly specify[ing] the precise subject matter of the Executive's communications with foreign governments"). As one President observed in a veto message addressing a legislative provision he determined could impede U.S. consultations with other nations:

> It has . . . long been recognized—by the Framers, by the Supreme Court, and by past Congresses—that the President, both personally and through his subordinates in the executive branch, possesses the constitutional authority to communicate freely with representatives of foreign governments, and to encourage foreign nations to take such actions as the President believes are in our Nation's interest.

Message to the House of Representatives Returning Without Approval the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 Weekly Comp. Pres. Doc. 1783, 1784 (Nov. 19, 1989) ("1990 Foreign Operations Appropriations Veto Message"); *see also Message to the House of Representatives Returning Without Approval the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, 25 Weekly Comp. Pres. Doc. 1806, 1806 (Nov. 21, 1989) (repeating same statement in veto message addressing similar provision in another bill).

We have described the President's authority over "international negotiations" as extending to "any subject that has bearing on the national

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[2] *See generally Delegations to U.N. Agencies*, 33 Op. O.L.C. at 227–30 (discussing longstanding Executive Branch practice and early congressional precedents regarding the President's foreign affairs powers); *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 39–41 (discussing historical examples showing that "the courts, the Executive, and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent the United States abroad").

interest." *The President—Authority to Participate in International Negotiations*, 2 Op. O.L.C. 227, 228 (1978) ("*Authority to Participate in International Negotiations*"). The Executive Branch has treated widely varied subject matters as falling within the President's exclusive authority over diplomacy, including discussion with foreign governments of international fishing restrictions, inquiries regarding the status of certain Israeli soldiers missing in action, and requests by the United States for "covert action" by a foreign government or private party.[3] We also have deemed legislative restrictions on the President's conduct of diplomacy impermissible even when they did not purport to limit discussion of any particular subjects, but rather barred participation by Executive Branch officials in certain international exchanges. *See, e.g.*, *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 235; *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 25–26 (1992) ("*Issuance of Official or Diplomatic Passports*").

The President's power over the conduct of diplomacy also includes exclusive authority "to determine the individuals who will represent the United States in those diplomatic exchanges." *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 231 (footnote and internal quotation marks omitted). As we have recently explained, "ample precedent" demonstrates that Congress may not constitutionally "dictate the modes and means by which the President engages in international diplomacy," and "[s]pecifically[] . . . may not . . . place limits on the President's use of his preferred agents to engage in a category of important diplomatic relations." *Id.* at 226, 227. We thus deemed unconstitutional a provision that "effectively denie[d] the President the use of his preferred agents—representatives of the State Department—to participate in delegations to specified U.N. entities chaired or presided over by certain countries." *Id.* at 226.

The President also has plenary and exclusive authority to *receive* diplomatic representatives of foreign governments, by virtue of his specific constitutional authority to "receive Ambassadors and other public Minis-

[3] *See* Statement on Signing the Sustainable Fisheries Act, 32 Weekly Comp. Pres. Doc. 2040, 2041 (Oct. 11, 1996); Statement on Signing Legislation to Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action, 35 Weekly Comp. Pres. Doc. 2305, 2305 (Nov. 8, 1999); Memorandum of Disapproval for the Intelligence Authorization Act, Fiscal Year 1991, 26 Weekly Comp. Pres. Doc. 1958, 1958 (Nov. 30, 1990).

ters." U.S. Const. art. II, § 3. As the Attorney General noted over a century and a half ago, the President's "right of reception extends to 'all possible diplomatic agents which any foreign power may accredit to the United States.'" *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4A Op. O.L.C. 174, 180 (1980) (quoting *Ambassadors and Other Public Ministers of the United States*, 7 Op. Atty. Gen. 186, 209 (1855)).[4] Presidents therefore have regularly objected to legislation purporting to bar their interaction with particular foreign officials.[5]

Finally, we believe the President's constitutional prerogatives to engage in international negotiations and discussions through his preferred agents and to receive diplomatic agents from abroad also prevent congressional interference with the participation by the President and his agents in the activities, functions, and preparatory work necessary to carry out meaningful diplomatic interaction with foreign officials. Without the authority to prepare and perform other necessary related tasks, the diplomatic activities of the President and his agents would be unduly constrained or foreclosed. *Cf. Issuance of Official or Diplomatic Passports*, 16 Op.

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[4] *See also, e.g.*, *Constitutionality of Closing the Palestine Information Office, an Affiliate of the Palestine Liberation Organization*, 11 Op. O.L.C. 104, 122 (1987) ("The right to decide whether to accord to the [Palestine Liberation Organization] diplomatic status and what that diplomatic status should be is encompassed within the right of the President to receive ambassadors. U.S. Const. art. II, § 3. This power is textually committed to the Executive alone.").

[5] *See, e.g.*, *Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 32 Weekly Comp. Pres. Doc. 479, 479 (Mar. 12, 1996) (observing that "[a] categorical prohibition on the entry of [certain individuals who confiscate or traffic in expropriated property] could constrain the exercise of my exclusive authority under Article II of the Constitution to receive ambassadors and to conduct diplomacy"); *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, 26 Weekly Comp. Pres. Doc. 266, 267 (Feb. 16, 1990) (objecting on constitutional grounds to provisions restricting expenditure of funds for discussion with representatives of the Palestine Liberation Organization whom the President knew to be directly involved in terrorist activity and purporting to bar admission to the United States of foreign representatives to the United Nations who had been found to have engaged in certain espionage activities directed against the United States or its allies); *cf. Statement on Signing H.R. 1777 into Law*, 23 Weekly Comp. Pres. Doc. 1547, 1548 (Dec. 22, 1987) (concluding that prohibition on "establishment anywhere within the jurisdiction of the United States of an office 'to further the interests of' the Palestine Liberation Organization" created "no actual constitutional conflict" only because the President had "no intention of establishing diplomatic relations with the PLO").

O.L.C. at 21–22, 25–27 (concluding that a legislative provision was invalid insofar as it barred the issuance of multiple official diplomatic passports to U.S. officials, because that practice facilitated diplomacy and flowed from the Executive's authority "to determine the form and manner in which the United States will maintain relations with foreign nations"); *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 125 (1995) ("*Bill to Relocate U.S. Embassy*") ("Congress may not impose on the President its own foreign policy judgments as to the particular sites at which the United States' diplomatic relations are to take place," because "the venue at which diplomatic relations occur is itself often diplomatically significant").

B.

We turn now to the application of these principles to section 1340. Initially, we note that the fact that section 1340 is an appropriations restriction, rather than a direct prohibition of conduct, does not affect our analysis of whether the particular limits that section 1340 places on OSTP's activities are constitutional. As we explained in our *Delegations to U.N. Agencies* opinion, Congress may use its spending power to decline to appropriate money or place conditions on its appropriations. 33 Op. O.L.C. at 235–36. Congress may not, however, "use the appropriations power to control a Presidential power that is beyond its direct control" or to "invade core Presidential prerogatives in the conduct of diplomacy." *Id.* at 237 (citations and quotation marks omitted).[6] At least

[6] *See also, e.g.*, *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 197 (1996) ("it has long been established that the spending power may not be deployed to invade core Presidential prerogatives in the conduct of diplomacy"); *Placing of United States Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 187–88 (1996) ("That Congress has chosen to invade the President's authority indirectly, through a condition on an appropriation, rather than through a direct mandate, is immaterial."); *Bill to Relocate U.S. Embassy*, 19 Op. O.L.C. at 126 ("it does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional"); *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 44 ("the President may enforce the remainder of the provision, disregarding" an unconstitutional funding condition).

insofar as it has otherwise appropriated funds,[7] Congress may not impair the President's conduct of foreign affairs by imposing restrictions on expenditures that serve diplomatic purposes.

Applying the general legal principles and conclusions outlined in Part II.A to the particular facts presented here, we conclude that OSTP may engage in most, if not all, of the activities you have described, notwithstanding section 1340(a). As a general matter, discussions of the sort identified in your request—meetings and exchanges with Chinese officials regarding policy concerns and possible cooperative undertakings or agreements relating to science and technology—fall squarely within the scope of the President's constitutional authority to engage in discussions with foreign governments. Such matters undoubtedly have a significant "bearing on the national interest." *Authority to Participate in International Negotiations*, 2 Op. O.L.C. at 228. Indeed, in an indication of the significance of these matters for U.S. relations with China, the State Department has informally advised us that the U.S. Embassy in Beijing includes multiple officials, recognized as diplomatic agents by the Chinese government, who work principally on facilitating cooperative activities with China on science and technology matters. *Cf.* Vienna Convention on Diplomatic Relations art. 3, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States Dec. 13, 1972) (identifying "developing . . . economic, cultural, and scientific relations" as a function of a diplomatic mission).

In light of the diplomatic character of such activities, it is equally clear that the President has exclusive constitutional authority to choose the agents who will engage in the activities. *See, e.g.*, *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 227. That authority provides him with absolute discretion to choose whomever he considers most suitable for a particular purpose. The circumstances here, in fact, illustrate the practical importance of this presidential prerogative. OSTP, as noted, is the designated "Executive Agent" of the United States for exchanges with China on science and technology matters under a longstanding international agreement. But the current Director of OSTP, Dr. John P. Holdren, is also

[7] We have been asked only to address the effect of section 1340(a) and therefore presume, for purposes of this opinion, that the expenditures were otherwise authorized. We need not and do not address the legality or propriety of OSTP's expenditures under governing appropriations provisions apart from section 1340(a).

an accomplished scientist with a distinguished résumé who serves as the Assistant to the President for Science and Technology. In addition to any background knowledge, scientific expertise, and personal relationships Dr. Holdren may bring to bear in particular diplomatic exchanges, it would be reasonable for the President to conclude that the prestige associated with Dr. Holdren's official titles and qualifications may assist the United States in achieving its diplomatic goals. Accordingly, barring Dr. Holdren's participation in diplomatic exchanges could severely impair the achievement of those goals by denying to the President one important means of signaling the priority the United States attaches to science and technology policy in its international relationships.

Our answers to your specific questions are as follows: You asked, first, whether Dr. Holdren may continue to serve as co-chair of the Joint Commission and the Innovation Policy Dialogue, and also whether he may represent the work of the Innovation Policy Dialogue in a broader diplomatic forum known as the U.S.-China Strategic and Economic Dialogue ("S&ED Dialogue"). You have described the Joint Commission as "the main body that facilitates science and technology cooperation under the [1979] bilateral agreement." Leonard Letter at 2. The Joint Commission "oversees, implements, and promotes expansion of [science and technology] cooperation with China in areas of mutual benefit to the two countries." *Id.* You have described the Innovation Policy Dialogue as a forum for "shar[ing] best practices in promoting innovation, entrepreneurship, and mutually beneficial joint activities in high technology" and "especially" for "identify[ing], analyz[ing], and overcom[ing] barriers to innovation and associated trade and business activities that may be associated with innovation policies, intellectual-property rights . . . policies, trade policies, etc., on either side." *Id.* at 3–4.

Based on your descriptions, we believe that most, if not all, activity associated with the Director of OSTP's participation in these activities would involve either diplomatic discussion of the two countries' policies, or the formation and refinement of international agreements and other cooperative undertakings between the United States and China. The Joint Commission, the Innovation Dialogue, and the S&ED Dialogue also all involve efforts to encourage China "to take such actions as the President believes are in our Nation's interest." 1990 Foreign Operations Appropriations Veto Message, 25 Weekly Comp. Pres. Doc. at 1783. These

efforts implicate the President's exclusive authority to determine the time, scope, and objectives of discussions with China, as well as his exclusive authority to select the agent he prefers as the representative of the United States in these discussions.

You also asked whether the Director of OSTP may "meet with Chinese officials and technical experts on . . . issues, like the ongoing nuclear crisis in Japan, to discuss ways in which the U.S. and China might work together on these topics." Leonard Letter at 8. Again, we conclude that such meetings to discuss possible joint responses to an international crisis and other possible "ways [the two countries] might work together" constitute quintessential diplomatic activities and exchanges over which the President has exclusive authority.

Other activities you describe that support or facilitate exchanges between U.S. and Chinese officials to discuss matters of mutual and ongoing concern also fall within the Executive's exclusive power to conduct diplomacy. We include in this category expenditures for the Director of OSTP's work in preparation for Joint Commission and Innovation Policy Dialogue meetings and presentations to the S&ED Dialogue; staff support work necessary to prepare for and participate in such meetings and activities; associated travel and lodging expenses, translation services, meeting room fees, and use of audiovisual equipment; and other administrative support services. *See id.* at 7–8. Such expenditures for preparation, support, and facilitation of diplomatic discussion fall within the President's exclusive authority when they are necessary to carry out meaningful diplomatic initiatives. Accordingly, at least insofar as Congress has appropriated funds for agency staff work and expenses generally, section 1340(a) may not constrain the use of those funds for expenditures necessary to support diplomatic activities. *Cf. Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. at 25–27 (deeming unconstitutional an appropriations rider that barred use of funds for issuance of multiple official passports to diplomats who would be denied entry to certain Arab League states and thus be unable to represent the United States in important diplomatic exchanges if they used a passport showing prior travel to Israel); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (rejecting view "that Congress could impair the President's pardon power by denying him appropriations for pen and paper").

We also would include in this category the support activities for the "experts-level working group" associated with the Innovation Policy Dialogue. Your submission to us indicates that there is "[a]ssociated with the ministerial level [Dialogue on Innovation Policy] . . . an experts-level working group that is addressing a variety of key technical issues, including 'on the ground' monitoring of whether commitments are being observed in practice." Leonard Letter at 3. You have asked whether OSTP employees may "support the experts-level working group (made up of non-government officials from American and Chinese businesses and universities) in their role of providing information and advice on barriers to the successful fulfillment of bi-lateral agreements," and whether OSTP may "make recommendations to the co-chairs of the Innovation Dialogue regarding policies that will enhance market access for US companies." *Id.* at 8. To the extent that the OSTP employees are supporting activities of the experts-level working group that provide policymakers with information and analysis needed to facilitate dialogue with Chinese officials, or the formulation of joint policy initiatives, the activities of OSTP employees would be facilitating diplomacy and would fall within the President's exclusive constitutional authority over diplomatic relations. Likewise, OSTP employee activity necessary to "mak[ing] recommendations" to diplomatic negotiators on particular policy options facilitates diplomatic negotiations and would fall within the President's exclusive authority.

Finally, you asked whether OSTP may provide "small gifts" and meals for visiting Chinese delegations. We believe that, to the extent Congress has appropriated funds to OSTP for such purposes generally,[8] OSTP's decision to use those funds to provide small gifts and meals to particular foreign officials falls within the Executive's exclusive constitutional prerogatives. Congress may not impose restrictions on the funds it has appropriated that would interfere with the President's conduct of diplomacy. Participation in social interactions with foreign officials, exchanges of customary gifts, and the extension of the courtesies associated with diplomatic meetings can constitute an expected element of international diplomacy and may be necessary to facilitate diplomatic exchange or to repay hospitality afforded to U.S. delegations by the Chinese government.

[8] As noted above, *see supra* note 7, we assume for purposes of this opinion that appropriated funds are available in general for the purposes you have described; we address only the effect of section 1340(a) on such appropriations.

The President could reasonably conclude that the failure of the United States to engage in these activities would harm the standing and influence of the United States and therefore impair our ability to achieve diplomatic objectives.[9] Congress itself has recognized the diplomatic significance of these types of expenditures by specifically authorizing many agencies, including OSTP, to expend funds for "official reception and representation," a practice that "originated," according to the Comptroller General, "from the need to permit officials of agencies with significant presence in foreign countries to reciprocate courtesies extended to them by foreign officials." *Matter of: United States Trade Representative—Use of Reception and Representation Funds*, B-223678, 1989 WL 240750, at *4 n.2 (Comp. Gen. June 5).[10]

Though we have concluded that section 1340(a) is unconstitutional in the many applications we have discussed, the provision is constitutional in some other applications. For example, its broad terms—restricting any use of funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company"—may well bar expenditures for activities that are neither diplomatic in character nor otherwise within the exclusive consti-

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[9] *Cf. Delegations to U.N. Agencies*, 33 Op. O.L.C. at 235 (objecting to restrictions on U.S. delegations to the United Nations on the ground that failure to send such delegations would compromise the "standing and influence" of the United States).

[10] Congress appropriated funds for OSTP most recently in the Continuing Appropriations Act § 1101(a)(6), 125 Stat. at 103, which carried forward appropriations levels from the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. B, tit. III, 123 Stat. 3034, 3142 (2009). The latter statute appropriated funds "not to exceed $2,500 for official reception and representation expenses" of OSTP. *Id.* A permanent authorization statute for the State Department similarly recognizes that expenditures for "official receptions" and other "entertainment and representational expenses" may be necessary "for the proper representation of the United States and its interests." 22 U.S.C. § 4085; *see also* General Accounting Office, GAO-04-261SP, 1 *Principles of Federal Appropriations Law* 4-135 (3d ed. 2004) ("the State Department would find it difficult to accomplish its mission if it could not spend any money entertaining foreign officials"); *cf. Application of 18 U.S.C. § 603 to Activities in the White House Involving the President*, 3 Op. O.L.C. 31, 42 (1979) (noting, in connection with interpreting a particular statute, that "[p]articipation in ceremonial dinners and attendance at other gatherings in furtherance of the conduct of the President's constitutional duties," including "entertainment of foreign dignitaries," are "ordinarily regarded as essential parts of the President's job").

tutional authority of the President. Congress may restrict the implementation of previously negotiated agreements, insofar as such restrictions do not interfere with activity that is itself diplomatic. Congress may also "modify the domestic legal effects" of an agreement, even if doing so has repercussions for the United States on the international stage. *See, e.g.*, *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 389 (1996) (noting the well-established nature of this congressional power).[11] Thus, whether Congress may validly prevent Dr. Holdren from performing work "required to . . . follow up" on meetings of the Joint Commission and Innovation Policy Dialogue—another type of activity you inquired about—may depend on the nature of the follow-up work.

To provide a concrete illustration, Congress could decline to appropriate funds for OSTP participation in a conference bringing together the U.S. business community to determine how to meet energy efficiency benchmarks, even if those benchmarks were articulated in agreements negotiated between OSTP and China. On the other hand, Congress may not bar follow up work after Joint Commission or Innovation Policy Dialogue meetings that is itself diplomatic in character or necessary to the effective conduct of diplomacy, including efforts to evaluate an agreement's effectiveness in order to determine how best to proceed in future diplomatic discussions. As you have explained, "[t]he negotiation of a new agreement or modification of an existing agreement often requires knowledge of the implementation history of current agreements." Leonard Letter at 8.

In sum, at least insofar as Congress has otherwise appropriated funds to OSTP, Congress may not impair the President's conduct of foreign affairs through restrictions targeted at OSTP expenditures for diplomatic purposes. In many instances, therefore, the restrictions that section 1340 imposes

[11] *See also, e.g.*, *Breard v. Greene*, 523 U.S. 371, 376 (1998) ("'an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null'") (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (first ellipsis in original)); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) ("Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate").

are unconstitutional. But, given that section 1340 is likely constitutional in certain applications, the appropriate course of action is to treat the unconstitutional applications of section 1340(a) as effectively severed.[12] *See Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 44–45 ("A presumption in favor of the severability of unconstitutional provisions exists so long as what remains of the statute is capable of functioning independently.") (collecting cases). Moreover, there is no reason to believe that the Continuing Appropriations Act "will not function in a *manner* consistent with the intent of Congress" if the unconstitutional applications of section 1340(a) are severed.[13] *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 238 n.18 (internal quotation marks omitted). The Continuing Appropriations Act, of which section 1340 is a part, as well as section 1340 itself, may continue to be applied as if the Act did not include the unconstitutional funding restrictions. *See id*.

III.

You have also asked whether, under section 1340(a), OSTP may continue to participate in the Committee on Foreign Investment in the United

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[12] The general rule that unconstitutional provisions in Acts of Congress should be severed, leaving the remainder of the Act in question valid and in place, applies equally to situations in which only certain *applications* of a provision would be unconstitutional. *See generally United States v. Booker*, 543 U.S. 220, 247 (2005) ("[S]ometimes severability questions (questions as to how, or whether, Congress would intend a statute to apply) . . . arise when a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances . . . . [S]everability questions can arise from unconstitutional applications of statutes." (citation and internal quotation marks omitted)).

[13] To the contrary, although the chairman of the House appropriations subcommittee with jurisdiction over OSTP noted in a floor statement that the appropriations bill included "language prohibiting NASA and the Office of Science and Technology in the White House from participating in bilateral cooperation with China," 157 Cong. Rec. H2741 (daily ed. Apr. 14, 2011) (statement of Rep. Wolf), statements by this same Representative and other Members of Congress emphasized the bill's overriding purpose of establishing appropriations levels for the federal Government as a whole, including OSTP, for the remainder of the fiscal year. *See, e.g.*, *id.* (expressing "very strong support" for the bill and noting that it "preserves strong funding levels for critical national priorities"); 157 Cong. Rec. H2742 (daily ed. Apr. 14, 2011) (statement by Rep. Fattah, ranking member of same appropriations subcommittee) ("[i]n our section of this bill . . . it's very, very important that we get out of the temporary [continuing resolution] business").

States ("CFIUS"), a federal government entity that reviews certain transactions that have national security implications. *See* 50 U.S.C. app. § 2170 (2006 & Supp. III 2009); Exec. Order No. 11858, *reprinted as amended in* 50 U.S.C. app. § 2170, at 823–25. We conclude that section 1340(a) is best understood not to restrict OSTP's participation in CFIUS.

CFIUS is composed of the heads of federal agencies and offices specified by statute and executive order, one of which is OSTP. 50 U.S.C. app. § 2170(k); Exec. Order No. 11858, § 3, *reprinted as amended in* 50 U.S.C. app. § 2170, at 824. CFIUS reviews certain transactions "by or with any foreign person which could result in foreign control [as defined in applicable regulations] of any person engaged in interstate commerce in the United States." 50 U.S.C. app. § 2170(a)(2), (3), (b); *see also* 31 C.F.R. § 800.204 (2010) (defining "control"); *id.* §§ 800.301–800.303 (discussing scope of covered transactions).

In certain circumstances, including any case where the transaction "could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government," CFIUS must "conduct an investigation of the effects of [the] transaction on the national security of the United States, and take any necessary actions in connection with the transaction to protect the national security of the United States." 50 U.S.C. app. § 2170(a)(3), (b)(1)(B), (b)(2)(A); Exec. Order No. 11858, § 6(b), *reprinted as amended in* 50 U.S.C. app. § 2170, at 824. Where appropriate, CFIUS or, on its behalf, a "lead agency" designated by the Secretary of the Treasury (who is a member of CFIUS and serves as its chairperson) may "negotiate, enter into or impose, and enforce any agreement with any party to [a] covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction." 50 U.S.C. app. § 2170(k)(2), (3), (5), (*l*); Exec. Order No. 11858, § 7(a)–(c), *reprinted as amended in* 50 U.S.C. app. § 2170, at 824. In addition, the President has authority, following a CFIUS investigation, to "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. app. § 2170(d); Exec. Order No. 11858, § 6(c), *reprinted as amended in* 50 U.S.C. app. § 2170, at 824.

The Director of OSTP's participation in CFIUS could involve OSTP in the review and approval or disapproval of transactions involving "China or any Chinese-owned company." Continuing Appropriations Act § 1340(a). Indeed, in particular cases, either as a CFIUS member or as the designated "lead agency," OSTP might be involved in negotiating, imposing, or enforcing agreements or other conditions that CFIUS deems necessary to protect U.S. national security with respect to such transactions. But while such mitigation agreements may be a form of "contract," we do not understand them to fall within the scope of section 1340(a)'s funding restrictions.

By its plain terms, section 1340(a) restricts OSTP's use of funds only with respect to "a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company." This language applies only to agreements between the United States and China or any Chinese-owned company that are both "bilateral" and in some sense cooperative. *See* 157 Cong. Rec. H2741 (daily ed. Apr. 14, 2011) (statement of Rep. Wolf) (describing provision as prohibiting OSTP "from participating in bilateral cooperation with China"). Mitigation agreements negotiated by CFIUS or a CFIUS lead agency are not bilateral cooperative undertakings, because they are negotiated to satisfy regulatory requirements imposed by the United States, through the CFIUS process, as a condition on a desired transaction. Likewise, OSTP's other activities as a CFIUS member, as you have described them to us, involve review, investigation, and regulation of transactions involving foreign-controlled parties and thus would not involve OSTP in "develop[ing], design[ing], plan[ning], promulgat[ing], implement[ing], or execut[ing]" a bilateral cooperative undertaking covered by section 1340(a). Accordingly, OSTP's CFIUS-related activities with respect to transactions involving China or any Chinese-owned company are not restricted by section 1340(a).

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Whether the Wire Act Applies to Non-Sports Gambling

Interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.

Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them.

September 20, 2011

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION*

You have asked for our opinion regarding the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (July 12, 2010) ("Crim. Mem."); Memorandum for Jonathan Goldman Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (Oct. 8, 2010) ("Crim. Supp. Mem."). You have explained that, in the Criminal Division's view, the Wire Act, 18 U.S.C. § 1084 (2006), may prohibit states from conducting in-state lottery transactions via the Internet if the transmissions over the Internet during the transaction cross state lines, and may also limit states' abilities to transmit lottery data to out-of-state transaction processors. You further observe, however, that so interpreted, the Wire Act may conflict with the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361–5367 (2006), because UIGEA appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state. In light of this apparent conflict, you have asked whether the Wire Act and UIGEA prohibit a state-run lottery from using the Internet to sell tickets to in-state adults where the transmission using the Internet crosses state lines, and whether these statutes prohibit a state lottery from trans-

* Editor's Note: This opinion was superseded by *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. __ (Nov. 2, 2018).

mitting lottery data associated with in-state ticket sales to an out-of-state transaction processor either during or after the purchasing process.

Having considered the Criminal Division's views, as well as letters from New York and Illinois to the Criminal Division that were attached to your opinion request,[1] we conclude that interstate transmissions of wire communications that do not relate to a "sporting event or contest," 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act. Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not, in our view, prohibit them. Given this conclusion, we have not found it necessary to address the Wire Act's interaction with UIGEA, or to analyze UIGEA in any other respect.

I.

In December 2009, officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois sought the Criminal Division's views regarding their plans to use the Internet and out-of-state transaction processors to sell lottery tickets to adults within their states. *See* Crim. Mem. at 1; Ill. Letter; N.Y. Letter. According to its letter to the Criminal Division, New York is finalizing construction of a new computerized system that will control the sale of lottery tickets to in-state customers. Most of the tickets will be printed at retail locations and delivered to customers over the counter, but some will be "virtual tickets electronically delivered over the Internet to computers or mobile phones located inside the State of New York." N.Y. Letter at 1. New York also notes that all transaction data in the new system will be routed from the customer's location in New York to the lottery's data centers in New York and Texas through networks controlled in Maryland and Nevada. *Id.* Illinois, for its part, plans to implement a pilot program to sell lottery

[1] *See* Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009) ("N.Y. Letter"); Letter for Eric H. Holder, Jr., Attorney General of the United States, from Pat Quinn, Governor, State of Illinois (Dec. 11, 2009) ("Ill. Letter"); Letter for Bruce Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, from John W. McCaffrey, General Counsel, Illinois Department of Revenue (Mar. 10, 2010); Department of Revenue and Illinois Lottery, State of Illinois Internet Lottery Pilot Program (Mar. 10, 2010) ("Ill. White Paper").

tickets to adults over the Internet, with sales restricted by geolocation technology to "transactions initiated and received or otherwise made exclusively within the State of Illinois." Ill. Letter at 2 (citation and internal quotation marks omitted). Illinois characterizes its program as "an intrastate lottery, despite the fact that packets of data may intermediately be routed across state lines over the Internet." Ill. White Paper at 12 (italics omitted). Both states argue in their submissions to the Criminal Division that the Wire Act is inapplicable because it does not cover communications related to non-sports wagering, and that their proposed lotteries are lawful under UIGEA. *Id.* at 11–12; N.Y. Letter at 3.

In the Criminal Division's view, both the New York and Illinois Internet lottery proposals may violate the Wire Act. Crim. Mem. at 3. The Criminal Division notes that "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." *Id.* at 3; *see also* Crim. Supp. Mem. at 1–2. The Division also explains that "the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law's interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process." Crim. Mem. at 3; *see also* Crim. Supp. Mem. at 2. Taken together, these interpretations of the Wire Act "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state. Crim. Supp. Mem. at 2.

The Criminal Division further notes, however, that reading the Wire Act in this manner creates tension with UIGEA, which appears to permit out-of-state routing of data associated with in-state lottery transactions. Crim. Mem. at 4–5. UIGEA prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter's participation in "unlawful Internet gambling." 31 U.S.C. § 5363; *see* Crim. Mem. at 3. Under UIGEA, "unlawful Internet gambling" means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet" in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A). Critically, however, UIGEA specifies that "unlawful Internet gambling" does not include bets "initiated and received or otherwise made exclusively within a single State," *id.* § 5362(10)(B), and expressly provides that "[t]he

intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made," *id.* § 5362(10)(E).

The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful. On the one hand, the Criminal Division believes that the New York and Illinois lottery plans violate the Wire Act because they will involve Internet transmissions that cross state lines or the transmission of lottery data to out-of-state transaction processors. Crim. Mem. at 4; Crim. Supp. Mem. at 2. On the other hand, the Division acknowledges that state-run intrastate lotteries are lawful and that UIGEA specifically provides that the kind of "intermediate routing" of lottery transaction data contemplated by New York and Illinois cannot in itself render a lottery transaction interstate. Crim. Supp. Mem. at 2; Crim. Mem. at 4–5. The Criminal Division further notes that the conclusion that the Wire Act prohibits state lotteries from making in-state sales over the Internet creates "a potential oddity of circumstances" in which "the use of interstate commerce," rather than simply supplying a jurisdictional hook for conduct that is already wrongful, would transform otherwise lawful activity—state-run in-state lottery transactions—into wrongful conduct under the Wire Act. Crim. Supp. Mem. at 2.[2]

In light of this tension, the Criminal Division asked this Office to provide an opinion addressing whether the Wire Act and UIGEA prohibit state-run lotteries from using the Internet to sell tickets to in-state adults (a) where the transmission over the Internet crosses state lines, or (b) where the lottery transmits lottery data across state lines to an out-of-state transaction processor. Crim. Mem. at 5; Crim. Supp. Mem. at 1.

II.

The Criminal Division's conclusion that the New York and Illinois lottery proposals may be unlawful rests on the premise that the Wire Act prohibits interstate wire transmissions of gambling-related communications that do not involve "any sporting event or contest." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 2. As noted above, both Illinois and New York dispute this premise, contending that the Wire Act prohibits only trans-

[2] State-run lotteries are exempt from many federal anti-gambling prohibitions. *See, e.g.*, 18 U.S.C. §§ 1307, 1953(b)(4) (2006).

missions concerning sports-related wagering. *See* Ill. White Paper at 11–12; N.Y. Letter at 3; *see also In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."), *aff'd*, 313 F.3d 257 (5th Cir. 2002). The sparse case law on this issue is divided. *Compare, e.g.*, *Mastercard*, 313 F.3d at 262–63 (holding that the Wire Act does not extend to non-sports wagering), *with United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (taking the opposite view), *and* Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3–12, at 4–6, *United States v. Kaplan*, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2008) (same).[3] We conclude that the Criminal Division's premise is incorrect and that the Wire Act prohibits only the transmission of communications related to bets or wagers on sporting events or contests.

The relevant portion of the Wire Act, section 1084(a), provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a) (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491 (1961)).[4]

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[3] A New York court also found that section 1084(a) applied to gambling in the form of "virtual slots, blackjack, or roulette," but did so without analyzing the meaning of the "sporting event or contest" qualification. *See New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847, 851–52 (N.Y. Sup. Ct. 1999).

[4] The Wire Act defines "wire communication facility" as "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." 18 U.S.C. § 1081 (2006).

This provision contains two broad clauses. The first bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." *Id.* The second bars any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id.*[5]

Our question is whether the term "on any sporting event or contest" modifies each instance of "bets or wagers" in section 1084(a) or only the

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[5] The Criminal Division reads this second clause of section 1084(a) as if it were two separate clauses: the first prohibiting the use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," and the second prohibiting the use of a wire communication facility "for information assisting in the placing of bets or wagers." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 1 n.1. We do not find this reading convincing. Under that reading, the latter clause would prohibit the "use[] [of] a wire communication facility . . . for information assisting in the placing of bets or wagers," but it is unclear what, if anything, "us[ing]" a wire communication facility "for information" would mean. This difficulty could be remedied by reading the phrase "the transmission of" into the statute. However, doing so would both add words to the text and make the last clause in section 1084(a)—prohibiting use of a wire facility "for [the transmission of] information assisting in the placing of bets or wagers"—overlap with the first part of section 1084(a), which prohibits using wire communications for "the transmission . . . of . . . information assisting in the placing of bets or wagers on any sporting event or contest." This redundancy counsels against the Criminal Division's reading. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (invoking "rule against superfluities"). We believe the second half of section 1084(a) is better read as a single prohibition barring "the transmission of a wire communication which entitles the recipient *to receive money or credit* [*either*] as a result of bets or wagers[] *or* for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a) (emphasis added). This reading avoids the illogic and redundancy of the first reading. It is also supported by the Wire Act's legislative history, which characterizes the second half of section 1084(a) as a provision that would prohibit "the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering," S. Rep. No. 87-588, at 2 (1961)—*not* as a set of two provisions that both would prohibit the transmission of wire communications entitling the recipients to receive money or credit as a result of bets or wagers *and* broadly bar the transmission of information assisting in the placing of bets or wagers. *See* H.R. Rep. No. 87-967, at 2 (1961) (subsection (a) "also prohibits the transmission of a wire communication which entitled the recipient to receive money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers").

instance it directly follows. The second part of the first clause clearly prohibits a person who is engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit "information assisting in the placing of bets or wagers on any sporting event or contest" in interstate or foreign commerce. *Id.* § 1084(a). It is less clear that the "sporting event or contest" limitation also applies to the first part of the first clause, prohibiting the use of a wire communication facility to transmit "bets or wagers" in interstate or foreign commerce, or to the second clause, prohibiting the transmission of a wire communication "which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." *Id.* For the reasons set forth below, we conclude that both provisions are limited to bets or wagers on or wagering communications related to sporting events or contests. We begin by discussing the first part of the first clause, and then turn to the second clause.

A.

In our view, it is more natural to treat the phrase "on any sporting event or contest" in section 1084(a)'s first clause as modifying both "the transmission in interstate or foreign commerce of bets or wagers" and "information assisting in the placing of bets or wagers," rather than as modifying the latter phrase alone. The text itself can be read either way—it does not, for example, contain a comma after the first reference to "bets or wagers," which would have rendered our proposed reading significantly less plausible. By the same token, the text does not contain commas after *each* reference to "bets or wagers," which would have rendered our proposed reading that much more certain. *See* 18 U.S.C. § 1084(a) ("Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest[.]").

Reading "on any sporting event or contest" to modify "the transmission . . . of bets or wagers" produces the more logical result. The text could be read to forbid the interstate or foreign transmission of bets and wagers of all kinds, including non-sports bets and wagers, while forbidding the transmission of information to assist only sports-related bets and wagers. But it is difficult to discern why Congress, having forbidden the transmis-

sion of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports, thereby effectively permitting covered persons to transmit information assisting in the placing of a large class of bets or wagers whose transmission was expressly forbidden by the clause's first part. *See id.*; *see also id.* § 1084(b) (providing exceptions for news reporting, and for transmissions of wagering information from one state where betting is legal to another state where betting is legal, both expressly relating to "sporting events or contests"). The more reasonable inference is that Congress intended the Wire Act's prohibitions to be parallel in scope, prohibiting the use of wire communication facilities to transmit both bets or wagers *and* betting or wagering information on sporting events or contests. Given that this interpretation is an equally plausible reading of the text and makes better sense of the statutory scheme, we believe it is the better reading of the first clause. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent.").

The legislative history of section 1084(a) supports this conclusion. As originally proposed, section 1084(a) would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of *bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest*." S. 1656, 87th Cong. § 2 (1961) (as introduced) (emphasis added). The commas around the phrase "or information assisting in the placing of bets or wagers" make clear that the phrase "on any sporting event or contest" modifies both "bets or wagers" and "information assisting in the placing of bets or wagers."

In redrafting section 1084(a), the Senate Judiciary Committee altered the provision's first clause, changing the class of covered persons and removing the commas after both references to "wagers," and added a second clause prohibiting transmissions relating to "money or credit" (which we discuss below in section II.B). The Senate Judiciary Committee Report noted that the purpose of this amendment was to limit the subsection's reach to persons engaged in the gambling business, and to expand its reach to include "money or credit" communications:

> The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; and has further amended the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering which is designed to close another avenue utilized by gamblers for the conduct of their business.

S. Rep. No. 87-588, at 2 (1961). Nothing in the legislative history of this amendment suggests that, in deleting the commas around "or information assisting in the placing of bets or wagers" and adding section 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions from "bets or wagers . . . on any sporting event or contest" to *all* "bets or wagers," or to introduce a counterintuitive disparity between the scope of the statute's prohibition on the transmission of bets or wagers and the scope of its prohibition on the transmission of information assisting in the placing of bets or wagers. *See also* 107 Cong. Rec. 13,901 (1961) (explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, submitted for the record by Sen. Eastland, Chairman, S. Judiciary Comm.) (describing Senate Judiciary Committee's two major amendments to S. 1656 without mentioning an expansion of prohibited wagering to reach non-sports wagering); *cf. Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 55 (1961) (statement of Byron R. White, Deputy Att'y Gen.) (the bill, as amended, "is aimed now at those who use the wire communication facility for the transmission of bets or wagers in connection with a sporting event").[6] Given that such changes would have

[6] The legislative history indicates that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General's program to fight organized crime and syndicated gambling. *See, e.g.*, S. Rep. No. 87-588, at 3 (noting that S. 1656 was introduced by the committee chairman on the recommendation of the Attorney General); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S.*

significantly altered the scope of the statute, we think this absence of comment in the legislative history is significant. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

B.

We likewise conclude that the phrase "on any sporting event or contest" modifies section 1084(a)'s second clause, which prohibits "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). The qualifying phrase "on any sporting event or contest" does not appear in this clause. But in our view, the references to "bets or wagers" in the second clause are best read as shorthand references to the "bets or wagers on any sporting event or contest" described in the first clause.

Although Congress could have made such an intent even clearer by writing "*such* bets or wagers" in the second clause, the text itself is consistent with our interpretation. And the interpretation gains support from the fact that the phrase "in interstate and foreign commerce" is likewise omitted from the second clause, even though Congress presumably intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications. *See* Crim. Mem. at 3 (to violate the Wire Act, the wire communication must "cross[] state lines"); *see also, e.g.*, H.R. Rep. No. 87-967, at 1–2 ("The purpose of the bill is to . . . aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information *in interstate and foreign commerce*.")

Comm. on the Judiciary, 87th Cong. 12 (1961) ("Senate Hearings") (statement of Robert F. Kennedy, Att'y Gen.) ("We have drafted this statute carefully to protect the freedom of the press."), *quoted in* S. Rep. No. 87-588, at 3; *Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 54–55 (1961) (statement of Byron R. White, Deputy Att'y Gen.) (describing amendments to S. 1656 negotiated by the Justice Department); *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 5 (1961) ("House Hearings") (statement of Rep. McCulloch) (referring to "the legislative proposals of the Kennedy administration").

(emphasis added). This omission suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.

Reading the entire subsection, including its second clause, as limited to sports-related betting also makes functional sense of the statute. *Cf. Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (construing the statute as a whole to avoid "the absurd results of a literal reading"). On this reading, all of section 1084(a)'s prohibitions serve the same end, forbidding wagering, information, and winnings transmissions of the same scope: No person may send a wire communication that places a bet on a sporting event or entitles the sender to receive money or credit as a result of a sports-related bet, and no person may send a wire communication that shares information assisting in the placing of a sports-related bet or entitles the sender to money or credit for sharing information that assisted in the placing of a sports-related bet.

Reading section 1084(a) to contain some prohibitions that apply solely to sports-related gambling activities and other prohibitions that apply to all gambling activities, in contrast, would create a counterintuitive patchwork of prohibitions. If the provision's second clause is read to apply to *all* bets or wagers, section 1084(a) as a whole would prohibit using a wire communication facility to place bets or to provide betting information only when sports wagering is involved, but would prohibit using a wire communication facility to transmit *any and all* money or credit communications involving wagering, whether sports-related or not. We think it is unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications would become entitled to receive money or credit as a result of those bets. We think it similarly unlikely that Congress would have intended to allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets.

The legislative history of section 1084(a) supports our reading of the text. *Cf. Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend

the term its proper scope.") (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)); *cf. Green*, 490 U.S. at 527 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [Federal] Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule"). To begin, when Congress revised the Wire Act during the legislative process to add the second clause, it indicated (as noted above) that its purpose in doing so was to "further amend[] the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering[,] which is designed to close another avenue utilized by gamblers for the conduct of their business." S. Rep. No. 87-588, at 2. There is no indication that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly than the underlying prohibitions on betting, wagering, and information communications, let alone any discussion of any rationale behind such a counterintuitive scheme. *Cf. Am. Trucking*, 531 U.S. at 468.

More broadly, the Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular. Congress was principally focused on off-track betting on horse races, but also expressed concern about other sports-related events or contests, such as baseball, basketball, football, and boxing. The House Judiciary Committee Report, for example, explains:

> Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins.

H.R. Rep. No. 87-967, at 2; *see also* 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("This particular bill involves the transmission of wagers or bets and layoffs on horse-racing and other sporting events."); House Hearings, *supra* note 6, at 24–26 (statement of Robert F. Kennedy, Att'y Gen.) (describing horse racing bookmaking operations and the importance to the bookmaker of rapid inbound and outbound communications); House Hearings, *supra* note 6, at 236–38 (statement of Frank D. O'Connor, District Attorney, Long Island City, N.Y.) (describing the operation of the Delaware Sports Service, a wire service that enables bookies and gambling syndicates to lay off horse race bets with other bookies, reduce odds on a horse, and even cheat by taking bets after a race has finished).

Legislative history from the Senate similarly suggests that Congress's motive in enacting the Wire Act was to combat sports-related betting. The Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, provided by Chairman Eastland during the Senate debate, describes the problem addressed by the legislation this way:

> Information essential to gambling must be readily and quickly available. Illegal bookmaking depends upon races at about 20 major racetracks throughout the country, only a few of which are in operation at any one time. Since the bookmaker needs many bets in order to operate a successful book, he needs replays, including money on each race. Bettors will bet on successive races only if they know quickly the results of the prior race and the bookmaker cannot accept bets without the knowledge of the results of each race. Thus, information so quickly received as to be almost simultaneous, prior to, during, and immediately after each race with regard to starting horse, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to both the illegal bookmaker and his customers.

107 Cong. Rec. 13,901 (1961); *see also* S. Rep. No. 87-588, at 4 (quoting Letter for Vice President, U.S. Senate, from Robert F. Kennedy, Att'y Gen. (Apr. 6, 1961)); Senate Hearings, *supra* note 6, at 12 (statement of Robert F. Kennedy, Att'y Gen.) ("The people who will be affected [by S. 1656] are the bookmakers and the layoff men, who need incoming and outgoing wire communications in order to operate.").

Although Congress was most concerned about horse racing, testimony during the hearings also highlighted the increasing importance of rapid wire communications to "large-scale betting operations" involving other professional and amateur sporting events, such as baseball, basketball, football, and boxing. House Hearings, *supra* note 6, at 25 (statement of Robert F. Kennedy, Att'y Gen.). The Attorney General testified, for instance, that recent disclosures revealed that gamblers had bribed college basketball players to shave points on games, and that up-to-the-minute information regarding "the latest 'line' on the contest," "late injuries to key players," and the like was critical to bookmakers. *Id.*; *accord* Senate Hearings, *supra* note 6, at 6 (statement of Robert F. Kennedy, Att'y Gen.); *see also* House Hearings, *supra* note 6, at 272 (statement of Nathan Skolnik, N.Y. Comm'n of Investigation) (bookmakers handling illegal baseball, basketball, football, hockey, and boxing wagering need wire communications to obtain "the line," to make layoff bets, and to receive race results); *id.* at 298–99 (statement of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.) (discussing baseball-sports ticker installations refused or removed by Western Union because of illegal use). This focus on sports-related betting makes sense, as the record before Congress indicated that sports bookmaking was the principal gambling activity for which crime syndicates were using wire communications at the time. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 Berkeley Tech. L.J. 529, 537 (2010); *see also* Senate Hearings, *supra* note 6, at 277–78 (testimony of Herbert Miller, Assistant Attorney General, Criminal Division).[7]

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[7] As noted above, the Justice Department played a key role in drafting S. 1656, and it understood the bill to reach only the use of wire communications for sports-related wagering and communications. The colloquy between Mr. Miller and Senator Kefauver, chairman of a committee that held hearings to investigate organized crime and gambling in the 1950s, underscores that Congress was well aware of that understanding:

> SENATOR KEFAUVER. The bill [S. 1656] on page 2 seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?
>
> MR. MILLER. Primarily for this reason, Senator: The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest. Now, as a practical matter, your numbers game does not require the utilization of communications facilities.
>
> . . .

Our conclusion that section 1084(a) is limited to sports betting finds additional support in the fact that, on the same day Congress enacted the Wire Act, it also passed another statute in which it expressly addressed types of gambling other than sports gambling, including gambling known as the "numbers racket," which involved lottery-style games. In addressing these forms of gambling, Congress used terms wholly different from those employed in the Wire Act. For example, the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953), specifically prohibits the interstate transportation of wagering paraphernalia, including materials used in lottery-style games such as numbers, policy, and bolita.[8] Subject to exemptions, the statute provides, in part:

> Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

18 U.S.C. § 1953(a) (2006). The legislative history indicates that the reference to "a numbers, policy, bolita, or similar game" under subpart (c)

> SENATOR KEFAUVER. I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.
>
> How about laying off bets by the use of telephones and laying off bets in bigtime gambling? Does that not happen sometimes?
>
> MR. MILLER. We can see that this statute will cover it. Oh, you mean gambling on other than a sporting event or contest?
>
> SENATOR KEFAUVER. Yes.
>
> MR. MILLER. This bill, of course, would not cover that because it is limited to sporting events or contests.

Senate Hearings, *supra* note 6, at 277–78.

[8] As Assistant Attorney General Herbert Miller explained, "numbers, policy, and bolita[] are similar types of lotteries wherein an individual purchases a ticket with a number." House Hearings, *supra* note 6, at 350; *see generally* National Institute of Law Enforcement and Criminal Justice, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776–1976*, at 748–52 (1977) (describing the numbers game and lotteries).

of this provision was intended to cover lotteries. *See* H.R. Rep. No. 87-968, at 2 (1961); *see also* House Hearings, *supra* note 6, at 29–30 (1961) (statement of Robert F. Kennedy, Att'y Gen.) (highlighting the need for legislation prohibiting the interstate transportation of wagering paraphernalia to help suppress "lottery traffic" and to close loopholes created by judicial decisions).

Congress thus expressly distinguished these lottery games from "bookmaking" or "wagering pools with respect to a sporting event," and made explicit that the Interstate Transportation of Wagering Paraphernalia Act applied to all three forms of gambling. 18 U.S.C. § 1953(a).[9] Congress's decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act. *See Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) (construing one federal statute in light of another congressional enactment the same year).[10]

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[9] The Supreme Court later held that 18 U.S.C. § 1953 barred the interstate transportation of records, papers, and writings in connection with a sweepstake race operated by the state of New Hampshire. *United States v. Fabrizio*, 385 U.S. 263, 266–70 (1966). In 1975, Congress amended the statute to exempt "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law," Pub. L. No. 93-583, sec. 3, § 1953(b)(4), 88 Stat. 1916, 1916 (1975), and established a new provision exempting state-conducted lotteries from statutory restrictions governing lotteries in 18 U.S.C. §§ 1301–1304, Pub. L. No. 93-583, sec. 1, § 1307, 88 Stat. at 1916. No similar exemption for state lotteries was added to the Wire Act.

[10] The legislative history of the Wire Act does contain numerous references to "gambling information." However, in context, this term is best read as a reference to the specific kinds of gambling information covered by the statute being discussed, not evidence of an independent intent to include other kinds of gambling information within the scope of the statute—let alone an intent to include that other kind of information *only* with respect to money or credit communications. *See, e.g.*, H.R. Rep. No. 87-967, at 3 (citing the exemption in section 1084(b) for the transmission of "gambling information" from "a State where the placing of bets and wagers on a sporting event is legal, to a State where betting on that particular event is legal," even though section 1084(b) does not refer to "gambling information"); House Hearings, *supra* note 6, at 353–54 (referring, in discussing H.R. 7039, 87th Cong. (1961), to "[o]ur purpose [being] to prohibit the interstate transmission of gambling information which is essential to the gambling fraternity," even though H.R. 7039 did not refer to "gambling information" but would have prohibited the transmission of wagers and wagering information only with respect to a "sporting event or contest").

In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.[11]

III.

What remains for resolution is only whether the lotteries proposed by New York and Illinois involve "sporting event[s] or contest[s]" within the meaning of the Wire Act. We conclude that they do not. The ordinary meaning of the phrase "sporting event or contest" does not encompass lotteries. As noted above, a statute enacted the same day as the Wire Act expressly distinguished sports betting from other forms of gambling, including lotteries. *See supra* pp. 148–149 (discussing section 1953(e)). Other federal statutes regulating lotteries make the same distinction. *See*

We further note that the Wire Act itself uses the term "gambling information" in section 1084(d). *See* 18 U.S.C. § 1084(d) ("When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber[.]") (emphasis added). We express no opinion about the scope of that term as it is used in that statutory provision.

[11] We also considered the possibility that, in the Wire Act's reference to "any sporting event or contest," 18 U.S.C. § 1084(a), the word "sporting" modifies only "event" and not "contest," such that the provision would bar the wire transmission of "wagers on any sporting event or [any] contest." This interpretation would give independent meaning to "event" and "contest," but it would also create redundancy of its own. If Congress had intended to cover *any* contest, it is unclear why it would have needed to mention sporting events separately. Moreover, as discussed above, the legislative history of the Wire Act makes clear that Congress was focused on preventing the use of wire communications for sports gambling in particular. And, legislative proposals from the 1950s in which the phrase "any sporting event or contest" originated further confirm that Congress intended to reach only "sporting contests." A key debate at that time concerned whether to regulate "any sporting event or contest" or "any horse or dog racing event or contest." *See, e.g.*, S. Rep. No. 81-1752, at 3, 22, 28 (1950) (explaining committee amendment to bill narrowing the definition of "gambling information" from covering "any sporting event or contest" to "any horse or dog racing event or contest"); *compare* S. 3358, 81st Cong. § 2(b) (1950) (as introduced), *with* S. 3358, 81st Cong. § 2(b) (1950) (as reported by the Interstate and Foreign Commerce Committee). If Congress had intended the Wire Act's predecessors to reach *any* "contest," however, the debate over which adjectival phrase to apply to "event" would have been meaningless.

18 U.S.C. § 1307(d) (2006) ("'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.").[12] Nothing in the materials supplied by the Criminal Division suggests that the New York or Illinois lottery plans involve sports wagering, rather than garden-variety lotteries. Accordingly, we conclude that the proposed lotteries are not within the prohibitions of the Wire Act.

Given that the Wire Act does not reach interstate transmissions of wire communications that do not relate to a "sporting event or contest," and that the state-run lotteries proposed by New York and Illinois do not involve sporting events or contests, we conclude that the Wire Act does not prohibit the lotteries described in these proposals. In light of that conclusion, we need not consider how to reconcile the Wire Act with UIGEA, because the Wire Act does not apply in this situation. Accordingly, we express no view about the proper interpretation or scope of UIGEA.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

[12] In addition, the Professional and Amateur Sports Protection Act ("PASPA") prohibits a governmental entity from sponsoring, operating, or authorizing by law "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702 (2006). While the statute grandfathers some established state gambling schemes, a new state lottery falling within the Act's prohibitions would not be exempt. *Id.* § 3704; *see, e.g.*, *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 300–04 (3d Cir. 2009) (PASPA preempted aspects of Delaware statute permitting wagering on athletic contests, which were not saved by any of the statutory exceptions).

Potential Litigation Between the Department of Labor and the United States Postal Service

The Attorney General has authority under 39 U.S.C. § 409(g)(2) to allow the United States Postal Service to direct its own defense of a suit filed against it by the Department of Labor, alleging that USPS has violated a whistleblower provision of the Occupational Safety and Health Act of 1970.

USPS may contract with private counsel to conduct the litigation on USPS's behalf, consistent with the Appointments Clause.

If the Attorney General opts to allow USPS to direct its own defense, the suit will fall within the constitutional authority of the Article III courts.

October 26, 2011

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

The Department of Labor ("DOL") has asked the Attorney General for permission to file suit against an employer that DOL believes has violated a whistleblower provision of the Occupational Safety and Health Act of 1970 ("OSHA"), Pub. L. No. 91-596, § 11(c), 84 Stat. 1590, 1603 (1970). This request is consistent with 29 U.S.C. § 663 (2006), which authorizes the Solicitor of Labor to litigate civil actions under OSHA, but makes that authority "subject to the direction and control of the Attorney General." The twist in this case is that the employer is the United States Postal Service ("USPS"). The suit that DOL wishes to bring would therefore pit one agency of the federal government against another.

You asked us to address two questions relevant to DOL's request. The first question arises because the Attorney General has statutory authority to supervise the litigation conduct of both DOL and USPS in suits of this kind. As a result, unless the Attorney General may validly cede that authority to one agency or the other, he would oversee both the plaintiff and the defendant in the proposed litigation. You have therefore asked whether the Attorney General may authorize USPS to conduct its own defense, independent of his direction and control, in order to address this potential conflict of interest. *See* Memorandum for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Tony West, Assistant Attorney General, Civil Division at 2, 6 (May 1, 2011) ("Opinion Request"). Your second question, *see id.* at 4–5, is

whether, in the circumstances presented here, the proposed inter-agency whistleblower suit would be a "Case[]" or "Controvers[y]" that is within the "judicial Power" of an Article III court to resolve. U.S. Const. art. III, § 2.

We conclude, first, that the Attorney General has authority under 39 U.S.C. § 409(g)(2) (2006) to allow USPS to direct its own defense of this case, and that the exercise of this authority would not raise concerns under the Appointments Clause. Second, if the Attorney General opts to allow USPS to direct its own defense,[1] we conclude that this suit would fall within the constitutional authority of the Article III courts. The Supreme Court and opinions of this Office have explained that suits between components of the Executive Branch may be resolved by Article III courts where, as here, the claim at issue is of a kind that courts traditionally resolve, and where the requirement of concrete adverseness would be met. This case would involve an unlawful termination claim by a whistleblower, standard fare for federal courts. In addition, in the proposed litigation, DOL would represent the interests of a private individual who has a concrete dispute with USPS, an "independent" agency with a governing board that has a degree of insulation from Presidential direction and control.[2]

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[1] We understand that the Department is not currently considering the option of authorizing DOL to file the proposed suit *and* supervising both parties to the dispute. *See* Opinion Request at 13 (describing that scenario as presenting "an untenable conflict"). We therefore do not address the distinct justiciability question that would be presented by an inter-agency suit in which the Attorney General controlled the litigation conduct of both federal agencies.

[2] We have also considered whether presenting this dispute to a court would impermissibly interfere with the President's Article II authority to supervise the Executive Branch—a question we have often addressed in tandem with justiciability questions presented by potential intra-branch litigation. *See, e.g., Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109, 115–18 (1997) ("*EPA Enforcement*"). We conclude that it would not. Generally, a statute does not violate Article II merely by *authorizing* judicial resolution of an inter-agency dispute. Rather, "[t]he critical point for constitutional purposes is that the [statute] does not preclude the President from authorizing any process he chooses to resolve" such a dispute. *Id.* at 116 (citing *Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 136–37 (1989)) ("*NRC Enforcement*"). Here, the relevant statutes do not require DOL to file suit, and they subject DOL's litigating authority to the direction and control of the Attorney General. Thus, the President, through the Secretary of Labor and Attorney General, retains control

I.

DOL alleges that USPS discharged one of its employees after she filed a complaint with the Occupational Safety and Health Administration concerning environmental conditions at her workplace. *See* Opinion Request at 1. DOL contends that this discharge violated section 11(c) of OSHA, 29 U.S.C. § 660(c) (2006), which in relevant part makes it unlawful for an employer to "discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." Our understanding is that USPS disagrees with this conclusion. *See* Opinion Request at 1–2 (noting that the Civil Division's attempts to mediate the dispute thus far have not succeeded).

Under section 11(c), "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination." 29 U.S.C. § 660(c)(2) (2006). If the Secretary determines that provision has been violated, she is authorized to "bring an action in any appropriate United States district court against such person." *Id.* The district court may grant injunctive relief against the employer if the Secretary prevails, and may "order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." *Id.* Section 11(c) does not expressly create a private right of action, and the courts that have addressed the question appear to be in agreement that it does not do so implicitly. *See, e.g.*, *George v. Aztec Rental Ctr., Inc.*, 763 F.2d 184, 186–87 (5th Cir. 1985); *Taylor v. Brighton Corp.*, 616 F.2d 256, 258–64 (6th

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over whether a suit against USPS will be filed and how such a suit will be conducted. Of course, USPS is "an *independent* establishment of the executive branch of the Government of the United States," 39 U.S.C. § 201 (2006) (emphasis added), and the President has limited authority to remove members of the Postal Service's Board of Governors. *See* 39 U.S.C. § 202(a)(1). These statutory restrictions on removal limit the President's ability to direct the decisions of the Service's Board of Governors, including its litigation decisions. But it is the fact that Congress created an "independent" Postal Service that constrains the President's authority to resolve this inter-agency dispute, *not* the fact that Congress has authorized DOL to bring suit against USPS. Indeed, Congress's grant of authority to DOL and the Attorney General to sue USPS to ensure that USPS complies with OSHA does not diminish the President's authority over USPS, but instead provides him with an additional tool to resolve any dispute with USPS regarding its legal obligations under OSHA.

Cir. 1980). Accordingly, a discharged USPS employee may obtain judicial relief under section 11(c) only if DOL sues on her behalf.

Prior to 1998, USPS was not subject to suit under this provision. Although section 11(c) protects "any employee," that phrase is not as all-encompassing as it first appears. This is because OSHA defines "employee" to mean an "employee of an employer," *see* 29 U.S.C. § 652(6) (2006), and, from its inception, has exempted certain *employers* from OSHA's reach. Among other exceptions, OSHA originally provided that "[t]he term 'employer' . . . does not include the United States or any State or political subdivision of a State." *See* 29 U.S.C. § 652(5) (1970).[3]

In 1998, however, Congress enacted the Postal Employee Safety Enhancement Act, Pub. L. No. 105-241, 112 Stat. 1572 (1998). The Act's preamble states that the law was intended "to make [OSHA] applicable to the United States Postal Service in the same manner as any other employer." *Id.* To that end, Congress amended OSHA's definition of "employer" to remove USPS from the exception it created for the United States. *Id.* § 2(a) (employer "does not include the United States (*not including the United States Postal Service*)") (emphasis added)) (codified at 29 U.S.C. § 652(5) (2006)). As the statutory text now reads, therefore, USPS is no longer excluded from the class of "employer[s]" who are subject to OSHA and to OSHA enforcement actions.

The legislative history of the 1998 Act confirms that Congress intended to make USPS subject to OSHA enforcement actions. For example, Senator Enzi, a co-sponsor of the Act, stated that the changes would "bring the Postal Service under the full jurisdiction of the Occupational Safety and Health Administration," and in doing so "permit[] OSHA to fully regulate the Postal Service the way it does private businesses." 144 Cong. Rec. 18,364 (1998). Similarly, Senator Kennedy, also a co-sponsor, explained that although President Carter had by Executive Order "directed federal agencies to comply with all OSHA safety standards, and . . . authorized

[3] Congress instead addressed the need for increased safety in federal workplaces by directing "the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated" with respect to private workplaces. OSHA § 19(a), 84 Stat. at 1609. Several executive orders have also adopted measures, consistent with OSHA, to address the need for safety in federal workplaces. *See, e.g.*, Exec. Order No. 11807 (Sept. 28, 1974), 3 C.F.R. 897 (1975); Exec. Order No. 12196 (Feb. 26, 1980), 3 C.F.R. 145 (1981).

OSHA to inspect workplaces and issue citations for violations," the order had not provided OSHA with "authority to seek enforcement of its order in court, and it cannot assess a financial penalty on the agency to obtain compliance." *Id.* at 18,365. Senator Kennedy explained that the bill would "permit[] OSHA to issue citations for safety hazards, and back them up with penalties. This credible enforcement threat will encourage the Postal Service to comply with the law." *Id.* Discussion in the House of Representatives, which voted several weeks later to adopt the bill passed by the Senate, was to the same effect. *See, e.g., id.* at 20,199–200 (remarks of Congressman Goodling); *id.* at 20,200–201 (remarks of Congressman Martinez).

In sum, when Congress made OSHA "applicable to the United States Postal Service in the same manner as any other employer," Pub. L. No. 105-241 pmbl., 112 Stat. at 1572, it intended to authorize DOL to bring suits against USPS in circumstances where it could bring suit against another covered employer.[4] OSHA enforcement actions give rise to litigation in Article III courts in at least two ways. First, when an "employer" is cited for violating OSHA standards, it may seek administrative review of DOL's determination before the Occupational Safety and Health Review Commission. *See* 29 U.S.C. § 659(c) (2006); *see also id.* § 661 (establishing the Commission as a freestanding federal agency). After the Commission rules, either a "person adversely affected or aggrieved by an order of the Commission" or the Secretary of Labor may seek judicial review in an appropriate court of appeals. *See* 29 U.S.C. § 660(a)–(b). Second, as noted, section 11(c) expressly authorizes DOL to bring a civil action in federal district court when it determines that an "employer" has taken an unlawful retaliatory action against an "employee." *See id.* § 660(c)(2). It is this latter circumstance that is of present concern.

As your Opinion Request indicates, OSHA whistleblower litigation between DOL and USPS raises two distinct legal complications. First, it

[4] We reached a similar conclusion in a 1997 opinion construing the enforcement authorities of the Environmental Protection Agency ("EPA"). *See EPA Enforcement*, 21 Op. O.L.C. at 109. There, the initial statutory enactment "did not contain any language subjecting federal agencies to enforcement authority." *Id.* at 114. Congress then revised the statutory definition of "person" to include "any agency, department, or instrumentality of the United States." *Id.* (quoting statutory language). Against that backdrop, we concluded that Congress had "clearly indicated . . . its intent to authorize EPA to use its section 113 enforcement authorities against federal agencies." *Id.* at 115.

appears that Congress intended that DOL and USPS would litigate whistleblower disputes against one another, and yet it also vested the Attorney General with broad authority to control the litigation conduct of each agency. If possible, we should construe these potentially conflicting statutory commands to give effect to the language and purpose of each. *See generally Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009) (when confronted with conflicting statutory requirements, a court "must interpret the statute to give effect to both provisions where possible").

Second, because we conclude that Congress clearly intended to grant Article III courts authority to adjudicate suits of this kind between DOL and USPS, we must confront the constitutional question of whether an Article III court may validly exercise that authority. *See, e.g.*, *Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies*, 18 Op. O.L.C. 101, 107 (1994) ("*HUD Enforcement*") (declining to address similar constitutional question upon concluding HUD did not have authority to "initiat[e] statutory enforcement proceedings that could result in judicial resolution of disputes between HUD and respondent executive branch agencies" where Congress did not expressly state that "the United States" could be a respondent in such actions); *EPA Enforcement*, 21 Op. O.L.C. at 115 (addressing similar constitutional questions only after concluding that Congress clearly intended to authorize enforcement against federal agencies).

II.

Our analysis begins by addressing whether the Attorney General may authorize USPS to direct its own defense of the case you have described, and, if so, whether the exercise of that authority would raise concerns under the Appointments Clause.

A.

We first conclude that the Attorney General has statutory authority, pursuant to 39 U.S.C. § 409(g)(2), to permit USPS to direct its own defense of the whistleblower suit that DOL has proposed to bring.

Section 409(g) begins, in paragraph (1), by setting out certain cases in which "legal representation may not be furnished by the Department of Justice to the Postal Service." These include suits under the Trademark

Act of 1946, certain antitrust claims, and unfair or deceptive acts or practices claims brought under section 5 of the Federal Trade Commission Act. *See id.* § 409(g)(1)(A) (barring representation in cases encompassed by section 409(d)–(e)). With respect to these suits, USPS "may, by contract or otherwise, employ attorneys to obtain any legal representation that it is precluded from obtaining from the Department of Justice under this paragraph." *Id.* § 409(g)(1). Section 409(g)(2) then sets out the following rule with respect to "any circumstance not covered by paragraph (1)":

> [T]he Department of Justice shall, under section 411, furnish the Postal Service such legal representation as it may require, *except that, with the prior consent of the Attorney General, the Postal Service may, in any such circumstance, employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service*.

Id. § 409(g)(2) (emphasis added).

Consistent with the Office's construction of a prior version of this provision, we conclude that section 409(g)(2) grants the Attorney General discretion to authorize USPS to conduct its own defense of a particular litigation, independent of the "full plenary authority" that the Attorney General customarily exercises over "all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 48 (1982) ("*Chief Litigator*"). That is, we think section 409(g)(2) grants to USPS a *conditional* independent litigating authority—USPS may litigate independently of the Attorney General's direction and control, but only where the Attorney General has given his "prior consent."

In the past, we reached the same conclusion in considering a prior version of the statute that similarly provided that the "Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service." *See* 39 U.S.C. § 409(d) (1976). We first reached that conclusion in 1976, in the context of determining whether the Department could be reimbursed for expenses used to retain private attorneys to represent certain

Postal Service employees in connection with a congressional investigation. The issue arose following advice that the Attorney General had the authority to employ private attorneys to represent certain government employees in connection with congressional investigations where the Department was conducting criminal investigations of the same employees, and "representation of the individuals by Department attorneys would present an unacceptable appearance of conflict of interest, and create a substantial potential of prejudicing effective defense of the civil cases by required withdrawal of representation in the future." Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Authority for Employment of Outside Legal Counsel* at 1 (Mar. 4, 1976).

We then considered whether the Department could obtain reimbursement from the agencies that employed the individuals for whom private representation had been provided—one of which was USPS. *See* Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Employment of Outside Legal Counsel—Nature of Contracts; Reimbursement by Other Agencies* (Mar. 15, 1976) ("*Contracts and Reimbursement*"). Our analysis as to each agency turned on whether that agency had statutory authority to litigate independently of the Justice Department. With respect to the Central Intelligence Agency ("CIA"), for example, we concluded that because "the CIA has no authority to conduct or contract for representation in litigation, it cannot reimburse the Department for that activity. Or, viewed conversely, the duty to provide defense counsel for the employees and former employees of the CIA belongs exclusively to this Department, and must be supported from its funds." *Id*. at 13. We reached an analogous conclusion with respect to reimbursement from the Federal Bureau of Investigation ("FBI"): "Our examination of the authorization and appropriations statutes of the FBI reveals no express reference to the retention or compensation of counsel. Accordingly, we find no basis for obtaining reimbursement of defense attorneys' fees from the Bureau." *Id.* at 14.

We reached a different conclusion about USPS reimbursement, however, opining that under 39 U.S.C. § 409(d) (1976), "the Attorney General could have given his consent to an arrangement under which the Postal Service itself provided representation for its employees." *Id.* at 10. Be-

cause the Department had instead elected to furnish legal representation to the Postal Service employees, and because 39 U.S.C. § 411 expressly authorizes Executive agencies to "furnish property . . . and personal and nonpersonal service to the Postal Service . . . under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate," *id.*, we found that there was "clear" statutory authority for the Postal Service to reimburse the Justice Department for the costs of representation incurred in civil litigation. *Contracts and Reimbursement* at 10.

In 1980, a dispute arose between this Department and USPS about whether Congress had granted USPS independent litigating authority with respect to a narrow range of judicial proceedings between USPS and the Postal Rate Commission.[5] In that context, we again advised that the 1976 version of section 409(d) authorized the Attorney General to allow USPS to litigate independently of his supervision and control. Although we did not agree with USPS's contention that Congress had granted it independent litigating authority with respect to such suits, we advised that the Attorney General could put the dispute to rest by "exercis[ing] his prerogative under [section] 409(d) to remove himself from representation by consenting to representation by outside counsel." Memorandum for John H. Shenefield, Associate Attorney General, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Representation of the Governors of the United States Postal Service* at 4 (Sept.

[5] In *Mail Order Association of America v. United States Postal Service,* 986 F.2d 509, 516 (D.C. Cir. 1993), the court of appeals concluded that USPS did have independent litigating authority with respect to that narrow category of disputes. The court also discussed in dicta the question of how section 409(d) should be interpreted as a general matter, suggesting that it "could be construed to give the Department of Justice a sort of 'right of first refusal' for Postal Service representation. The Postal Service would be required first to seek representation from the Department. If the Department declined, it would be expected . . . to consent to the Postal Service's self-representation." *Id.* at 516.

This suggestion contrasted with the Department's litigating position, which was that section 409(d) gave the Department "full discretion to furnish or withhold legal representation (in effect, to determine what legal representation the Postal Service 'may require'), and g[ave] the Attorney General full discretion to grant or withhold consent for the Postal Service to proceed on its own." *Id.* at 515. The court expressly declined to decide "which is the correct reading of § 409(d) generally," however, limiting its holding to the narrower question before it. *Id.* at 516. Both readings are compatible with our conclusion here that the Attorney General, at a minimum, has statutory discretion to allow USPS to represent itself in this litigation.

24, 1980). Or, as we put it in a related memorandum: "Although the Department of Justice has litigating authority for the Postal Service, there is a provision of the Postal Service laws, 39 U.S.C. § 409(d), that empowers [the Attorney General] to consent to the Postal Service's handling of its own case in court, either through its General Counsel or through contract." Memorandum for the Attorney General from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Postal Services Litigation* at 1 (Aug. 27, 1980).

We believe our prior opinions correctly understood 39 U.S.C. § 409(d) (1976) to grant the Attorney General discretion to authorize USPS to control its own litigation in a particular case, and we adopt the same construction of its modern successor, 39 U.S.C. § 409(g)(2) (2006). This conclusion is consonant with the test we have long applied to assess whether Congress has granted independent litigating authority to an agency: "In order to come within the 'as otherwise authorized by law' exception to the Attorney General's authority . . . it is necessary that Congress use language authorizing agencies to employ outside counsel (or to use their own attorneys) to represent them in court." *Chief Litigator*, 6 Op. O.L.C. at 56–57; *see also Case v. Bowles*, 327 U.S. 92, 96–97 (1946) (rejecting litigant's contention that a suit was improperly filed and litigated by officials outside the Justice Department, noting that the relevant statutory scheme "specifically empowers the [Emergency Price Control Act] Administrator to commence actions such as this one and authorizes attorneys employed by him to represent him in such actions").

Section 409(g)(2) plainly meets this standard. Provided that the Attorney General has given his "prior consent," the statute grants USPS express license to "employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service." 39 U.S.C. § 409(g)(2). We grant that section 409(g)(2) differs to a degree from more conventional grants of independent litigating authority, which typically give an agency unconditional authority to employ its own attorneys (or private attorneys) to litigate some or all of its cases. *See Chief Litigator*, 6 Op. O.L.C. at 56–57 & nn.12–14 (citing exemplary statutes, such as 29 U.S.C. § 154(a), which grants the National Labor Relations Board express authority to appoint attorneys to "appear for and represent the Board in any case in court"). But we see no basis to believe that Congress lacks the power to condition an agency's exercise of independent litigating authori-

ty on a judgment by the Attorney General that such independence would be appropriate in a particular case. To the contrary, that sort of structure is consistent with the basic premise that the litigation of the United States is, as a general matter, "subject to the direction, and within the control of, the Attorney-General." *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 459 (1868).

B.

You also asked whether the Appointments Clause would preclude the Attorney General from "consent[ing] to USPS contracting with private counsel to conduct the litigation on USPS's behalf" in the case that DOL has proposed to file.[6] *See* Opinion Request at 10. We conclude that it would not.

You explained that your question was prompted by language in a 1990 opinion of this Office entitled *Constitutional Limits on "Contracting Out" Department of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94 (1990). In that opinion, responding to a request by the Justice Management Division for "general guidance" on limits that the Constitution may impose on the federal government's ability to contract out the performance of certain functions to private entities, *id.* at 95, we stated that "the authority to direct litigation on behalf of the United States may not be vested in persons who are not officers of the United States appointed in the proper manner under Article II, Section 2, Clause 2 of the Constitution." *Id.* at 100. As you observed, that statement is capable of being read as standing for the broad proposition that the Appointments Clause prohibits the Executive from "fully 'contracting out' litigation responsibility to private parties." Opinion Request at 11.[7]

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[6] The Appointments Clause provides: "[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.

[7] At least one other opinion of this Office states this position expressly. *See Representation of the United States Sentencing Commission in Litigation*, 12 Op. O.L.C. 18, 26 (1988) ("as a general matter, a government agency cannot constitutionally delegate to a private party responsibility for the conduct of litigation in the name of the United States

At least since 1996, however, it has been clear that this Office does not find the requirements of that clause applicable when U.S. departments and agencies contract with private attorneys to provide legal representation in discrete matters. Over time, the Office has cited somewhat different reasons for reaching that conclusion, but has adhered to it steadfastly.

In 1996, we explained that "[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors." *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 145 (1996). Thus, we concluded that the "simple assignment of some duties" to private individuals, "even significant ones, does not by itself pose an Appointments Clause problem." *Id.* at 146. A subsequent opinion of the Office, while questioning the conclusion that the Appointments Clause *never* applies to individuals who are non-federal employees, nonetheless agreed that "'an engagement with a gentleman of the bar, whereby, for a valuable consideration, he is to render his professional services *in a given case*, is a contract, a bargain, an agreement, in the legal sense of these terms,' not an appointment to an office." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 113 (2007) (quoting *Contracts with Members of Congress*, 2 Op. Att'y Gen. 38, 40 (1826) (referring to contracts "for the service of a lawyer, a physician, or a mail carrier, an army purveyor, or a turnpike-road maker")).

Our conclusion that the Appointments Clause does not apply when federal agencies employ private litigation counsel to handle a particular matter is supported by significant historical practice. We recognize that the conduct of litigation on behalf of the federal government is today concentrated in the Justice Department, as it has been since 1870, and that federal agencies are barred by statute from employing private litigation counsel, "[e]xcept as otherwise authorized by law." 5 U.S.C. § 3106 (2006). But early opinions of the Attorneys General reflect that prior to the creation of this Department, it was commonplace for federal agencies to hire private attorneys. *See, e.g.*, *Employment of Counsel*, 7 Op. Att'y Gen. 141, 141–42 (1855) ("According to the traditional practice of the Government, it has belonged to the attributes of any Head of Department to employ counsel in his discretion for the conduct of legal business

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or one of its agencies," and "may not constitutionally entrust to a private party the formulation and presentation of its views on its own authority to a court").

arising in his department. The act of February 26th, 1853, for the regulation of fees in the legal business of the Government, expressly recognises the existence of this power in any Head of Department."); *Bryan's Case*, 10 Op. Att'y Gen. 40, 43 (1861) ("The purpose of this law [authorizing heads of department to pay fees for legal counsel] is obvious. Legal controversies often arise in which the Government is concerned; and although the counsel authorized and required by law to represent the Government in these controversies is the United States Attorney for the proper district, it often happens that it is expedient to employ other counsel in his aid, or in his place. . . . In such cases, the law allows the head of the department, to which the business belongs, to employ and pay counsel 'such sum as may be stipulated or agreed on.'"); *Employment of Counsel by a Department*, 12 Op. Att'y Gen. 368 (1868) (affirming statutory authority of the Secretary of War to employ special counsel to represent a military officer in a habeas proceeding).

Even after consolidating the vast mass of federal government litigation in this Department, moreover, Congress has on occasion carved out exceptions that expressly authorize federal agencies to employ private counsel in specified circumstances, including for purposes of litigation. *See Chief Litigator*, 6 Op. O.L.C. at 56 n.11 (noting authority of the Secretary of Defense, pursuant to 10 U.S.C. § 1037, to "employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation" of U.S. servicemembers and other specified individuals). In view of this longstanding practice, we do not think the Appointments Clause precludes a federal agency from entering into a contract creating an ordinary attorney-client relationship with a private attorney to handle an individual case.

III.

We now turn to the Article III question posed by DOL's proposal to sue USPS to enforce section 11(c) of OSHA. Section 2 of that Article "extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies,'" and thus to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). A logical and long-accepted corollary to that rule is that "no person may sue himself," because adjudicating such a suit would require the court to engage in "the academic

pastime of rendering judgments in favor of persons against themselves." *United States v. ICC*, 337 U.S. 426, 430 (1949). This Office has concluded that this general rule applies to the federal government as well, and accordingly that it limits the authority of an Article III court to resolve legal disputes that arise between federal agencies. *See, e.g.*, *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79 (1977) ("*Proposed Tax Assessment*") (opining that a dispute between the Internal Revenue Service ("IRS") and USPS over federal taxes owed by USPS would not be justiciable); *NRC Enforcement*, 13 Op. O.L.C. at 138 ("lawsuits between two federal agencies are not generally justiciable"); *HUD Enforcement*, 18 Op. O.L.C. at 106 (same).

As our opinions also reflect, however, the Supreme Court's decisions in *United States v. ICC* and *United States v. Nixon*, 418 U.S. 683 (1974), make clear that in certain circumstances, federal courts do have power to resolve an inter-agency legal dispute. *See, e.g.*, *Proposed Tax Assessment*, 1 Op. O.L.C. at 80–84; *NRC Enforcement*, 13 Op. O.L.C. at 138–41. For example, in *United States v. ICC*, the Supreme Court allowed a suit by the United States against an independent agency of the United States, the Interstate Commerce Commission ("ICC"), to go forward. In fact, owing to a statutory requirement that the United States be named as a party defendant in any suit against the ICC, the United States named *itself* as a defendant in its petition for relief. 337 U.S. at 429.[8] The Supreme Court nonetheless found, on the particular facts before it, that the dispute presented a justiciable controversy. The Court explained that the question of justiciability did not turn on formalities:

> While this case is United States v. United States, et al., it involves controversies of a type which are traditionally justiciable. The basic question is whether railroads have illegally exacted sums of money from the United States. Unless barred by the statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection. To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission. In pursuit of the same objective the Government challenged the legality of the Commission's action.

[8] The district court further noted that both the government's petition for relief and the answer filed by the United States had been "signed by the same Assistant Attorney General." *United States v. ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948).

> This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads. The order if valid would defeat the Government's claim to that money. But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

Id. at 430–31 (citation omitted).

United States v. Nixon also presented, on very different facts, the question of the federal courts' constitutional authority to resolve an "intra-branch dispute." 418 U.S. at 693. The United States and the President of the United States found themselves on opposite sides of a suit, initiated by President Nixon, which sought to quash a subpoena issued at the request of a Justice Department Special Prosecutor. In this context, "the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch," and accordingly did not "present a 'case' or 'controversy' which can be adjudicated in the federal courts." *Id.* at 692. The Supreme Court rejected this argument, relying in significant part on its decision in *United States v. ICC.*

The Court first stated that "[t]he mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction." *United States v. Nixon*, 418 U.S. at 693. It then instructed that "'courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.'" *Id.* (quoting *United States v. ICC*, 337 U.S. at 430). The Court concluded that the issues at stake in the suit, principally "the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case," were "'of a type which are traditionally justiciable.'" *Id.* at 697 (quoting *United States v. ICC*, 337 U.S. at 430). The Court further determined that Article III's requirement of "'concrete adverseness'" was satisfied, because "[t]he independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Finally, the Court stated that "since the matter is one arising in the regular course

of a federal criminal prosecution, it is within the traditional scope of Art. III power." *Id.* It therefore concluded that "the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability." *Id.*[9]

Our opinions describe *United States v. ICC* and *Nixon* as establishing that an intra-branch dispute will fall within the judicial power of an Article III court where "at a minimum . . . there [is] an issue of the kind traditionally viewed as justiciable, and also . . . there [is] sufficient adverseness to sharpen the issues." *Proposed Tax Assessment*, 1 Op. O.L.C. at 83. In considering the second prong of this test—adversity of parties—we have focused our analysis on two factors. First, we have viewed as relevant whether one of the agencies concerned "has a degree of independence from the executive branch," "like the Special Prosecutor in *Nixon* and the regulatory agenc[y] involved in *United States v.* [*ICC*]." *Id.* Second, we have indicated that there cannot be true adversity unless there is a nongovernmental real party in interest who has a stake in the outcome of litigation that is distinct from that of the public as a whole. *See id.* at 83–84 (concluding that a potential suit between USPS—an independent agency—and IRS over a tax assessment levied against USPS could not be adjudicated by an Article III court because there were no private parties with a distinct and concrete interest in the outcome of the dispute); *Ability of the Environmental Protection Agency to Sue Another Government Agency*, 9 Op. O.L.C. 99, 100 (1985) (advising that Article III "case or controversy" requirements may be satisfied in an intra-branch dispute

[9] Since *Nixon*, the Supreme Court has resolved several disputes between a traditional Executive Branch agency and an "independent" agency—the Federal Labor Relations Authority ("FLRA"). *See, e.g.*, *NASA v. FLRA*, 527 U.S. 229, 231 (1999) (holding that an investigator employed by NASA's Office of Inspector General is a "representative" of NASA for purposes of a statutory provision conferring a right to union representation during covered examinations); *IRS v. FLRA*, 494 U.S. 922, 924 (1990) (reviewing "the determination of the Federal Labor Relations Authority" that "the Internal Revenue Service must bargain with the National Treasury Employees Union over a proposed contract provision") (abbreviations omitted); *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 643 (1990) (reviewing dispute concerning scope of statutory collective bargaining obligations between schools "owned and operated by the United States Army" and the FLRA); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 90–91 (1983) (addressing challenge by the Bureau of Alcohol, Tobacco and Firearms to FLRA's construction of statute that would have required the Bureau to pay certain expenses to employees engaged in collective bargaining). The Court did not, however, discuss in any of these cases whether the suit was justiciable.

only if "the real party in interest challenging the Executive's position in court" is not "an agency of the Executive" (quotations omitted)); *NRC Enforcement*, 13 Op. O.L.C. at 141 (concluding that a potential lawsuit between the Air Force and the Nuclear Regulatory Commission—an independent agency—would not be justiciable because "the [Nuclear Regulatory Commission] and the Air Force would be the real parties in interest in the lawsuit").

Under this standard, we conclude that a court would have authority under Article III to resolve the proposed suit. As we understand it, DOL's claim would be that USPS violated its statutory obligation not to "discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA]." 29 U.S.C. § 660(c)(1). Courts routinely resolve claims arising under this and other provisions of law that protect whistleblowers from retaliatory discharge. Accordingly, we believe that the suit would involve "an issue of the kind traditionally viewed as justiciable," *Proposed Tax Assessment*, 1 Op. O.L.C. at 83. *See United States v. ICC*, 337 U.S. at 431 (finding justiciable the question whether the ICC's order had been "issued arbitrarily and without substantial evidence"); *United States v. Nixon*, 418 U.S. at 696–97 (finding justiciable the question whether the Special Prosecutor's subpoena should be quashed).

We also conclude that this potential lawsuit would satisfy both aspects of the "concrete adverseness" prong of our standard. First, USPS plainly has a "degree of independence" from the Executive branch. USPS is an "independent establishment of the executive branch," 39 U.S.C. § 201, and nine of the eleven voting members of its Board of Governors are subject to removal by the President "only for cause." *See id.* § 202(a)(1). As an independent agency with a tenure-protected governing board, USPS thus possesses some "degree of independence from the executive branch." *See generally Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (per curiam) (describing such agencies as "independent of the Executive in their day-to-day operations"). Second, we think the former USPS employee who DOL believes was unlawfully terminated would be a "private real party in interest" in this litigation, because she would be entitled to receive an individualized remedy for the harm allegedly done to her by USPS if DOL prevails in the litigation. As the result of a suit brought by DOL, the district court could enter judgment ordering the "rehiring or reinstatement

of the employee to [her] former position with back pay." *See* 29 U.S.C. § 660(c)(2). The district court also has authority under that provision to "order all appropriate relief," *id.*, a phrase that courts have interpreted to encompass both compensatory and punitive damages. *See, e.g.*, *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1190–94 (1st Cir. 1994); *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Okla. 1997). These possible remedies give the former USPS employee the kind of specific, individualized interest in the outcome of the suit that is generally viewed as sufficient to make an inter-agency dispute justiciable in an Article III court. *See, e.g.*, *NRC Enforcement*, 13 Op. O.L.C. at 140–41 (describing cases involving a private real party in interest). We therefore conclude that the proposed suit would be justiciable under our traditional standard.

We acknowledge support in the case law for the view that our traditional test is too restrictive, specifically that there need not be a "private real party in interest" in all circumstances for an Article III court to have the authority to adjudicate an inter-agency dispute. For example, both the D.C. Circuit and the Eleventh Circuit found inter-agency suits justiciable without resting their judgments on the presence of a private real party in interest. *See United States v. Fed. Mar. Comm'n*, 694 F.2d 793, 810 (D.C. Cir. 1982); *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184, 1196–98 (11th Cir. 2002). In fact, the D.C. Circuit "[a]ssum[ed] arguendo that the real parties in interest are the Department [of Justice] and the [Federal Maritime] Commission," and concluded, nevertheless, that the suit was justiciable under Article III because it "raises issues that courts traditionally resolve and the setting assures the concrete adverseness on which sharpened presentation of the issues is thought to depend." *Fed. Mar. Comm'n*, 694 F.2d at 810.[10] The reasoning of these opinions seems to be in significant tension with our long-held view that a private real party in interest must be present if an Article III court is to adjudicate an inter-

[10] More recently, the concurring opinion in *SEC v. FLRA*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J.), noted the "anomaly" of the fact that "[b]oth the [Securities and Exchange Commission] and the FLRA are agencies in the Executive Branch, yet one is suing the other in an Article III court." *Id.* Judge Kavanaugh opined that the suit was within the authority of an Article III court because "this case involves a so-called independent agency." *Id.* Observing that such agencies "typically operate with some (undefined) degree of substantive autonomy from the President," he concluded that "an independent agency therefore can be sufficiently adverse to a traditional executive agency to create a justiciable case." *Id.*

agency suit. But in light of our conclusion that the former USPS employee would be a private real party in interest in this proposed suit, we need not consider whether to revisit our view here.

IV.

We conclude that the Attorney General has authority under 39 U.S.C. § 409(g)(2) to allow USPS to direct its own defense of this case, that the exercise of this authority would not violate the Appointments Clause, and that, if the Attorney General opts to allow USPS to direct its own defense, there would be no constitutional bar to the adjudication of this dispute by an Article III court.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Firearms Disabilities of Nonimmigrant Aliens Under the Gun Control Act

The prohibition in 18 U.S.C. § 922(g)(5)(B) of shipping, transporting, possessing, or receiving any firearm or ammunition that has a connection to interstate commerce applies only to nonimmigrant aliens who must have visas to be admitted to the United States, not to all aliens with nonimmigrant status. The text of the statute forecloses the interpretation advanced by the Bureau of Alcohol, Tobacco, Firearms and Explosives in an interim final rule applying section 922(g)(5)(B) to all nonimmigrant aliens.

October 28, 2011

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

A provision of the federal Gun Control Act prohibits any "alien" who has "been admitted to the United States under a nonimmigrant visa" from shipping, transporting, possessing, or receiving "any firearm or ammunition" that has a connection to interstate commerce. 18 U.S.C. § 922(g)(5)(B) (2006). In 2002, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued an interim final rule interpreting this prohibition to apply to any alien who has the status of "nonimmigrant alien," regardless of whether the alien required a visa in order to be admitted to the United States. *See* 27 C.F.R. § 478.32(a)(5)(ii) (2011). In March 2011, in response to a request for informal advice regarding ATF's interpretation, we concluded that the text of the statute forecloses that interpretation. We explained that the text is clear: the provision applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status. In May 2011, you requested a formal opinion from the Office on this matter.[1] This memorandum memorializes and elaborates upon the informal advice we provided in March. In the course of formalizing our advice, we received views from the Department of Homeland Security ("DHS"),[2] which also concluded that the

[1] *See* Memorandum for the Office of Legal Counsel from Stephen R. Rubenstein, Chief Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives (May 11, 2011) ("ATF Memorandum").

[2] *See* Letter for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from Seth Grossman, Chief of Staff, Office of the General Counsel, Department of Homeland Security (July 20, 2011) ("DHS Letter"). We also received

interpretation reflected in ATF's interim final rule conflicts with the plain text of the statute.

I.

Congress enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–931), to "establish[] a detailed federal scheme" to govern "the distribution of firearms," *Printz v. United States*, 521 U.S. 898, 902 (1997). Congress also prescribed criminal and civil penalties for knowing violations of the statute's provisions. *See* 18 U.S.C. § 924(a)(2) (2006) ("Whoever knowingly violates subsection . . . (d) [or] (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."). The concerns animating the legislation included the need to address "the widespread traffic in firearms" and the "general availability" of firearms to persons "whose possession thereof was contrary to the public interest." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (internal quotation marks omitted); *see also Barrett v. United States*, 423 U.S. 212, 220 (1976) ("The history of the 1968 Act reflects a . . . concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons.").

As part of the Act's scheme, Congress laid out various so-called "prohibitors" to identify the categories of people barred from possessing, shipping, transporting, or receiving firearms. *See* 18 U.S.C. § 922(h) (Supp. IV 1968). These prohibitors are now codified in 18 U.S.C. § 922(g) (2006). In 1998, Congress added the prohibitor here at issue to the statute: section 922(g)(5)(B) bars "aliens"[3] who have "been admitted

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views from the Federal Bureau of Investigations ("FBI"). *See* E-mail for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from Scarlett Everly, National Instant Criminal Background Check System Bureau of Investigation, Federal Bureau of Investigation (June 13, 2011) (noting that when a Federal Firearms Licensee provides the FBI with information that a prospective purchaser has indicated he or she is a non-U.S. citizen, the FBI searches DHS records to determine if the potential purchaser is an unlawful or nonimmigrant alien and processes firearm background checks in line with ATF's interpretation of 18 U.S.C. § 922(g)(5)(B)).

[3] The original Gun Control Act did not contain a prohibitor applicable to aliens. Congress first adopted that prohibition in title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. app. § 1202(a) (Supp. IV 1968), barring possession by

to the United States under a nonimmigrant visa" from possessing, shipping, transporting, or receiving firearms. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 18 U.S.C. § 922(g)(5)(B)).[4]

In 2002, ATF adopted an interim final rule implementing section 922(g)(5)(B). *See Implementation of Public Law 105-277, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Relating to Firearms Disabilities for Nonimmigrant Aliens, and Requirement for Import Permit for Nonimmigrant Aliens Bringing Firearms and Ammunition Into the United States (2001R-332P)*, 67 Fed. Reg. 5422 (Feb. 5, 2002) (temporary rule, Treasury decision).[5] ATF interpreted the prohibitor to include all aliens with the status of nonimmigrant alien, not just those nonimmigrants who required a visa to be admitted to the United States. In explaining this interpretation, ATF acknowledged that section 922(g)(5)(B) applied by its terms to "aliens admitted to the United States under a nonimmigrant visa," but also determined that such a visa "simply facilitates travel and expedites inspection and admission to the United States," and "does not itself provide nonimmigrant status." *Id*. at 5422. Based on this observation, as well as its view that drawing distinctions among different types of nonimmigrant aliens was neither rational nor supported by the legislative history, ATF concluded that Congress intended the prohibitor to cover all persons with nonimmigrant alien status, *see id.*, and issued its interim final rule. *See* 27 C.F.R. § 478.32(a)(5)(ii); *see id.* § 478.11 (defining "nonimmigrant alien"). ATF has since understood

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"'alien[s]'" who are "'illegally or unlawfully in the United States,'" *United States v. Bass*, 404 U.S. 336, 337 n.1 (1971). In 1986, Congress repealed title VII and added a firearms disability for aliens who are "illegally or unlawfully in the United States" to 18 U.S.C. § 922. *See* Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 457 (1986).

[4] Section 922(y)(2) lists various exceptions to the prohibition in section 922(g)(5)(B), and section 922(y)(3) sets out a waiver procedure for aliens subject to the requirements of section 922(g)(5).

[5] ATF issued the interim rule before Congress transferred ATF from the Department of the Treasury to the Department of Justice through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. *See* 6 U.S.C. § 531(c) (2006); 28 U.S.C. § 599A(c)(1) (2006). Congress originally delegated rulemaking authority to implement the Gun Control Act to the Secretary of the Treasury but, due to the transfer, such rulemaking authority now resides in the Attorney General. *See* 18 U.S.C. § 926(a) (2006).

section 922(g)(5)(B) to apply to all aliens with nonimmigrant status, including nonimmigrant aliens admitted to the United States without a visa, pursuant either to the Visa Waiver Program, *see* 8 U.S.C. § 1187 (2006), or to regulations otherwise exempting them from visa requirements.[6]

II.

You have asked whether ATF's interim rule permissibly construes section 922(g)(5)(B). Our analysis of the provision "begin[s], as always, with the text of the statute." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009) (internal quotation marks omitted). In our view, the text of the statute is clear and forecloses ATF's interpretation. Section 922(g)(5)(B) makes it unlawful for aliens who have been "admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))" to ship, transport, possess, or receive any firearms or ammunition. 18 U.S.C. § 922(g)(5)(B). Section 101(a)(26) of the Immigration and Nationality Act ("INA"), in turn, defines a "nonimmigrant visa" as "a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." 8 U.S.C. § 1101(a)(26) (2006). The text of section 922(g)(5)(B), read in accord with section 101(a)(26) of the INA, therefore makes it a crime for an alien who has been "issued" a "visa . . . as an eligible nonimmigrant by a competent officer" to ship, transport, possess, or receive any firearm or ammunition.[7]

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[6] By statute, the Attorney General and the Secretary of State are authorized to establish a Visa Waiver Program under which a nonimmigrant alien may seek a waiver of the visa requirement if, among other things, he or she seeks entry "for a period not exceeding 90 days"; is "a national of, and presents a passport issued by, a country which . . . extends . . . for immigration admissions, reciprocal privileges to citizens and nationals of the United States"; and "has been determined not to represent a threat to the welfare, health, safety, or security of the United States." 8 U.S.C. § 1187(a)(1), (2), (6) (2006). In addition, the visa requirement has been waived by regulation for certain categories of foreign nationals, including nationals from particular countries, such as Canada and Mexico, seeking admission to the United States for particular purposes. *See* 22 C.F.R. § 41.2(a), (g) (2011).

[7] Section 922(d)(5) similarly makes it unlawful to sell or dispose of a firearm or ammunition to "an alien" who "has been admitted to the United States under a nonimmigrant

Nothing in this statutory text indicates that the prohibition applies to persons simply by virtue of their status as nonimmigrants. The statute instead requires that the covered nonimmigrant possess a visa. ATF's interim rule thus reads a key limiting phrase—"admitted . . . under a nonimmigrant visa"—out of the statute, in contravention of bedrock principles of statutory interpretation. *See, e.g.*, *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 163 (1982) (declining to construe a statute "so as to render [certain] provisions nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect") (internal quotation marks omitted); *see also* DHS Letter at 5–8 (noting that ATF's interpretation finds support in neither ordinary linguistic practices nor case law).

ATF suggests that the text of section 922(g)(5)(B) is "inaccurate and ambiguous" because nonimmigrant aliens are not actually "'admitted under'" a visa. ATF Memorandum at 2. Instead, a visa merely "expedites admission to the United States by showing that the State Department found the person to be admissible." *Id.* According to ATF, it then "is up to the immigration officer at the port of entry to determine if the individual is in fact admissible and, if so, under what terms and conditions and in what category." *Id.*

Though DHS indicates that ATF accurately describes the admissions process, *see* DHS Letter at 7, that description does not support ATF's reading of section 922(g)(5)(B). As a matter of ordinary usage, the process to which ATF refers could be described as admission "under a nonimmigrant visa" because the nonimmigrant must present the visa when seeking admission. As DHS emphasizes, *see* DHS Letter at 7–8, courts have employed language similar to that contained in the statutory provision when describing different categories of aliens, underscoring that "admitted . . . under a nonimmigrant visa" can be used in a non-technical sense to refer to the particular subclass of nonimmigrant aliens admitted with a visa. *See, e.g.*, *Phal v. Mukasey*, 524 F.3d 85, 87 (1st Cir. 2008) (noting an alien "entered the United States on a nonimmigrant visa");

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visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))." 18 U.S.C. § 922(d)(5) (2006). Because ATF has requested our view on the meaning of section 922(g)(5)(B) only, our opinion is limited to that subsection, but our analysis would likely apply to section 922(d)(5), provided no relevant differences between that provision and section 922(g)(5)(B) exist.

Choe v. INS, 11 F.3d 925, 943 (9th Cir. 1993) ("Before 1960, the Attorney General had three options when faced with an adjustment application from an alien who entered under a nonimmigrant visa[.]"). Moreover, "[i]mmigration law draws a distinction between aliens in possession of a nonimmigrant visa and those who have been admitted in a nonimmigrant classification." DHS Letter at 5. The statutory reference to nonimmigrants "admitted . . . under a nonimmigrant visa" therefore has a clear meaning here: it indicates that Congress intended the firearms disabilities in section 922(g)(5)(B) to apply only to a subset of nonimmigrants—namely those who possess a "nonimmigrant visa"—whatever that visa's function.[8]

ATF also justifies its interpretation of the statutory text on the ground that applying the prohibitor to only a particular subset of nonimmigrants would produce "irrational" results, because "[t]here is no logical reason nonimmigrants with nonimmigrant visas should have a firearms disability, if nonimmigrants without visas do not have the disability." ATF Memorandum at 4. Although an established canon of statutory construction might permit departure from the literal meaning of statutory text where such a reading would produce "positively absurd" results, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), the literal meaning of section 922(g)(5)(B) is far from absurd. Indeed, the Supreme Court recently has emphasized that "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2582 (2011) (internal quotation marks omitted).

Although the text of the statute does not include an express rationale for the distinction drawn between nonimmigrants with visas and those without, it is not difficult to discern a rational basis for the distinction. DHS has told us, for example, that applying the prohibitor to nonimmigrant aliens in a limited fashion, "while not ideal . . . would not be irra-

[8] DHS also observes that Congress would have been fully aware of the existence of categories of nonimmigrants who did not require visas to be admitted to the United States when it enacted section 922(g)(5)(B). The Visa Waiver Program had been in effect for twelve years at the time Congress debated section 922(g)(5)(B), and Canadian and Mexican nationals in possession of border crossing cards had long been permitted to enter the United States without a nonimmigrant visa. *See* DHS Letter at 7; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

tional," as it is possible that Congress considered those aliens eligible for admission to the United States without a nonimmigrant visa to be a "lesser security risk" than aliens admitted with visas. DHS Letter at 8–9. After all, Congress has tied the decision whether to waive visa requirements to judgments about a waiver's effects on public safety, and Congress here could have concluded that nonimmigrant aliens who do not require visas do not present the public safety risks that warrant prohibiting their acquisition of firearms. *See id.* at 8.[9]

Other factors may also explain why Congress decided to treat nonimmigrant aliens eligible for visa waivers differently from nonimmigrant aliens admitted under visas. For example, nonimmigrants admitted under the Visa Waiver Program may well spend less time in the country than other nonimmigrants, *see* 8 U.S.C. § 1187(a)(1) (2006) (imposing 90-day limit on aliens admitted under Visa Waiver Program), perhaps making them less likely to purchase firearms. Congress also could have thought that imposing criminal firearms prohibitions on nonimmigrant aliens admitted under the program would frustrate the objectives of the program, which include reducing barriers to and burdens upon travel. *See* Department of State, Visa Waiver Program (VWP), http://travel.state.gov/visa/temp/without/without_1990.html (last visited Oct. 21, 2011) ("The program was established to eliminate unnecessary barriers to travel, stimulating the tourism industry, and permitting the Department of State to focus consular resources in other areas.").

Congress (or some members thereof) ultimately could have had all, some, or none of these considerations in mind. Whatever Congress's motivation, these rationales demonstrate that it would have been rational for Congress to draw a statutory line between nonimmigrants with visas

[9] DHS cites 8 U.S.C. § 1187(c)(2)(C), which provides that a country will not be eligible for the Visa Waiver Program unless the Secretary of Homeland Security "evaluates the effect that the country's designation would have on the law enforcement and security interests of the United States." *See also id.* § 1187(c)(2)(F) (Supp. IV 2010) (requiring participating countries to share information regarding safety risks); Department of State, Visa Waiver Program (VWP), http://travel.state.gov/visa/temp/without/without_1990.html (last visited Oct. 21, 2011) ("To be admitted to the Visa Waiver Program, a country must meet various security and other requirements, such as enhanced law enforcement and security-related data sharing with the United States and timely reporting of both blank and issued lost and stolen passports. VWP members are also required to maintain high counterterrorism, law enforcement, border control, and document security standards.").

and those without, such that the plain meaning of the text is not absurd. ATF may be correct that the firearms disabilities in section 922(g)(5)(B) should be applied to all nonimmigrant aliens "as a matter of sound public policy" or administrative convenience. ATF Memorandum at 4. But any debate over whether the current statute is deficient as a policy matter ultimately "belongs in the halls of Congress." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 237 (2007).

ATF next turns to legislative history to support its position. ATF first points to two floor statements made by members of Congress during the debate over section 922(g)(5)(B): a statement by Senator Richard Durbin that a restriction on gun possession should apply to persons who "'come into this country as our guest, not as a citizen of the United States,'" and a statement by Senator Larry Craig supporting restrictions on gun possession by persons "'who are guests in our country, legally or illegally.'" ATF Memorandum at 2 (quoting 144 Cong. Rec. 16,493–94 (1998)). From these statements, ATF concludes that Congress intended the gun control prohibition to apply to all nonimmigrant aliens, regardless of visa status.

Because the text of the statute is clear, any resort to legislative history in this context is unnecessary. *See*, *e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (internal quotation marks omitted)); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). What is more, floor statements are generally of limited interpretive assistance as they "reflect at best the understanding of individual Congressmen." *Zuber v. Allen*, 396 U.S. 168, 186 (1969). Indeed, we think it unlikely that even unambiguous floor statements by a few members of Congress could ever overcome the plain meaning of a statute. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute.").

In any event, neither of the floor statements speaks directly to the interpretive issue addressed here. Neither uses the term "nonimmigrants." Each statement refers instead to "guests" or a person who enters the country "not as a citizen" of the United States. The plain meaning of these references, particularly the reference to non-citizens, encompasses all

immigrants, including lawful permanent residents—immigrants who neither ATF nor the legislative record suggests are covered by section 922(g)(5)(B). Thus, two Senators' use of the references "guest[]" and person who enters "not as a citizen" during a floor debate provides little, if any, insight into the meaning of the statutory phrase "nonimmigrants . . . admitted under a visa." *Cf. Aaron v. SEC*, 446 U.S. 680, 697 (1980) ("it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say").[10]

ATF also highlights a floor statement from the debate over a later-enacted statutory provision—an explosives prohibition contained in the Homeland Security Act of 2002. *See* ATF Memorandum at 4. During that legislative debate, a section-by-section analysis was introduced into the record explaining that the prohibition would apply to "aliens other than lawful permanent resident aliens" and that the provision "brings the explosives law in line with most categories of prohibited people in the Gun Control Act." 148 Cong. Rec. 22,985 (2002) (noting also that "[t]he language relating to non-immigrant aliens differs slightly from that in the Gun Control Act, as technical changes have been made to improve the clarity of the provisions"). ATF's argument appears to be that (i) because a sectional analysis accompanying the explosives statute stated that the statute would bring the law into line with the Gun Control Act; (ii) because the explosives provision clearly applied to all aliens other than lawful permanent residents, including all nonimmigrant aliens; and (iii) because the only difference in the language of the definitions of the two statutes was "technical," Congress must have intended the Gun Control Act to apply to all nonimmigrant aliens. *See* ATF Memorandum at 4.

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[10] Although it is unnecessary to our statutory analysis, we note that elements of the legislative history reinforce the plain meaning of the text. The legislative record suggests that the prohibition in section 922(g)(5)(B) was added in response to a shooting by "a resident of the Nation of Lebanon" who had come "to the United States on a nonimmigrant visa, such as a tourist visa." 144 Cong. Rec. 16,493 (1998). Furthermore, the principal sponsor of the bill, Senator Durbin, used the term "nonimmigrant visa" six times in the course of a short floor statement discussing the need for the prohibition. *See id.* This legislative history suggests that Congress drafted section 922(g)(5)(B) to apply to nonimmigrants admitted under a visa for the simple reason that it was that category of nonimmigrant aliens Congress had in mind in enacting the bill.

This argument rests not on the legislative history of the Gun Control Act, but on the history of a subsequently enacted statute. Like broad statements from individual members of Congress, such evidence provides only limited support for a statutory reading that is inconsistent with the text. The history of later-enacted statutes generally does not provide reliable evidence of the intent of the Congress that enacted an earlier provision. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (internal quotation marks omitted). For these reasons, we do not believe the legislative history of the explosives statute sheds light on the meaning of section 922(g)(5)(B).

III.

You also have asked us what actions ATF would be legally required to take with respect to past or pending criminal cases in the event that section 922(g)(5)(B) does not apply to all nonimmigrant aliens. *See* ATF Memorandum at 5. The necessary implication of our conclusion here is that section 922(g)(5)(B) does not authorize future or pending investigations and prosecutions predicated on the view that the statute applies to all nonimmigrant aliens, regardless of visa status. Although we are not aware of any legal obligations ATF or the Department might have to seek the vacatur of any past criminal convictions, we note that the Criminal Division possesses substantial expertise on the relevant legal rules and Department practices in such circumstances.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contributions

The Office of Personnel Management may not address the United States Postal Service's failure to make statutorily required retirement contributions by denying its employees accrued service credit under the Federal Employees' Retirement System during their periods of qualifying federal employment.

November 1, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT
AND
THE GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT
UNITED STATES POSTAL SERVICE

On June 22, 2011, the United States Postal Service ("USPS" or "Postal Service") notified the Office of Personnel Management ("OPM") that, because of its financial difficulties, the Postal Service, as a cash conservation measure, was suspending its employer contributions to the Civil Service Retirement and Disability Fund ("the Fund") on behalf of those postal employees covered by the Federal Employees' Retirement System Act ("FERS"), 5 U.S.C. §§ 8401–8479 (2006 & Supp. IV 2010). In light of that suspension, OPM requested an opinion from our Office regarding (1) whether, and to what extent, OPM has discretion to offset the Postal Service's obligation to make employer retirement contributions against a "surplus" the Postal Service asserts that it has accumulated in the Fund; and (2) whether postal employees are entitled to receive service credit, for purposes of determining their eligibility for retirement and calculating the amount of their retirement annuity, for periods of employment during which the Postal Service has not made its required employer contributions.[1] The Postal Service, an independent agency, joined OPM in the request for an opinion and agreed to be bound by our decision.[2]

[1] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (July 14, 2011) ("OPM Memo"). OPM enclosed with its submission an undated paper it had received from USPS, with the heading "Effect of Suspension of Agency Contribution to

In its submission to the Office of Legal Counsel ("OLC"), the Postal Service indicated that, despite earlier disagreement, it now "does not contest OPM's position that the Postal Service is still obligated by the statute to make its employer contribution, despite the existence of the surplus." USPS Memo at 14; *see also id.* at 4. The Postal Service, however, also specifically stated that it considers the question "whether the [Postal Service's] Board [of Governors] was justified in its decision to suspend the employer contribution in order to conserve cash so as to avoid a shutdown in mail service" to be outside "the scope of [OLC's] review." *Id.* at 3 n.2. Thus, we do not address (i) whether OPM could offset the Postal Service's required contributions against any surplus it may have in the Fund; (ii) whether the Postal Service's apparent statutory violation may be excused; or (iii) what other avenues of recourse OPM may have against the Postal Service for its failure to make the statutorily required contributions. Instead, this opinion addresses only the question whether, under the relevant provisions of the FERS statute, postal employees are entitled to receive service credit for periods during which the Postal Service has not made the required employer contributions to the Fund. The Postal Service argues that its employees should receive such credit. *Id.* at 2–14. OPM disagrees, maintaining that employees cannot be credited with service for periods in which no employer contributions have been made into the Fund. OPM Memo at 5–9. For the reasons that follow, we agree with the Postal Service that OPM may not address the Postal Service's failure to make statutorily required contributions by denying its employees accrued service credit under FERS during their periods of qualifying federal employment.

I.

In 1986, Congress enacted the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (codified as amended at

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FERS on Employees" ("USPS Paper"). OPM has agreed provisionally to provide service credit to postal employees who may retire while the issue is pending before our Office. OPM Memo at 2.

[2] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, General Counsel and Executive Vice President, United States Postal Service (Aug. 12, 2011) ("USPS Memo").

5 U.S.C. §§ 8401–8479 and scattered U.S.C. sections), a system of retirement and other benefits for federal employees that will gradually supersede the Civil Service Retirement System ("CSRS"), which has been in effect since 1920. *See* Pub. L. No. 66-215, 41 Stat. 614 (1920) (codified as amended at 5 U.S.C. §§ 8331–8351 (2006 & Supp. 2010)). In enacting FERS, Congress set out, among other things, "to establish a Federal employees' retirement plan which is coordinated with title II of the Social Security Act"; "to ensure a fully funded and financially sound retirement benefits plan for Federal employees"; and "to assist in building a quality career work force in the Federal Government." Pub. L. No. 99-335, § 100A(1), (2), & (5), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note (2006)).[3] With certain exceptions, the Act became effective on January 1, 1987. *Id.* § 702, 100 Stat. at 631 (codified at 5 U.S.C. § 8401 note). Since then, most newly hired federal employees who are covered by Social Security have also been covered by FERS.

FERS is a three-tiered retirement system that consists of Social Security, a basic annuity, and a Thrift Savings Plan ("TSP"). *See* 5 U.S.C. § 8403 (2006) (except as otherwise provided, benefits payable under FERS are in addition to benefits payable under the Social Security Act); *id.* §§ 8410–8425 (2006 & Supp. IV 2010) (basic annuity); *id.* §§ 8431–8440f (2006 & Supp. IV 2010) (TSP).[4] The Postal Service and its employees fall within FERS coverage. 39 U.S.C. § 1005(d) (2006 & Supp. III 2009). The dispute between OPM and the Postal Service concerns the basic annuity.

Under FERS, an "employee," as defined in 5 U.S.C. § 8401(11) (2006), must complete at least five years of creditable civilian service under 5 U.S.C. § 8411 to be eligible for the annuity. 5 U.S.C. § 8410

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[3] From Congress's enactment of the Social Security Act in 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935), until 1983, federal employees were excluded from Social Security coverage. In 1983, the Social Security Act was amended to cover newly hired federal employees. Pub. L. No. 98-21, § 101, 97 Stat. 65, 67–70 (1983) (codified at 42 U.S.C. § 410). That expansion of Social Security was a major impetus behind the adoption of FERS, the new retirement system for federal employees, in 1986. *See generally* S. Rep. No. 99-166, at 1–2 (1985) (providing background on the CSRS and amendment of the Social Security Act to cover federal employees).

[4] The TSP is a tax-deferred savings plan for federal employees in which employee contributions are matched in part by employer agency contributions.

(2006). As a general matter, creditable service includes "employment as an employee . . . after December 31, 1986." *Id.* § 8411(b)(1). With certain exceptions, the annuity of a retiring employee is 1 percent of that individual's average pay (the highest average pay in effect over any three consecutive years of service) multiplied by that individual's "total [years of] service." *Id.* §§ 8415(a), 8401(3) (defining "average pay"). The statute establishes different potential retirement ages for employees depending on the number of years of service completed. *Id.* § 8412 (2006 & Supp. IV 2010). For example, an employee who is separated from service after becoming 62 years old and completing five years of service is entitled to an annuity. *Id.* § 8412(c). "[S]ervice," in turn, "means service which is creditable under section 8411." *Id.* § 8401(26). As these provisions make clear, the determination whether service is creditable under the statute has important ramifications for an employee's eligibility to receive a basic annuity, the applicable retirement age, and the calculation of the amount of the annuity.[5]

The FERS basic annuity is funded through a combination of employee deductions and employer agency contributions to the Civil Service Retirement and Disability Fund. *Id.* §§ 8422, 8423, 8401(6) (2006 & Supp. IV 2010). Under FERS, the employing agency is required to deduct and withhold from each employee's basic pay a percentage that is equal to 7 percent of basic pay (with a different percentage applicable to Members of Congress and certain categories of employees) less the Old Age, Survivors, and Disability Insurance ("OASDI") tax rate in effect, which is now 6.2 percent. *Id.* § 8422(a), (c) (2006 & Supp. IV 2010); 26 U.S.C. § 3101(a) (2006). Accordingly, the employer is required by the statute to deduct 0.8 percent of most employees' basic pay for contribution to the Fund.

The employing agency's own contribution to the Fund is much larger and is based on the "normal-cost percentage," which is "the entry-age normal cost of the provisions of [FERS] which relate to the Fund," as computed by OPM "in accordance with generally accepted actuarial

[5] Creditable service is also important to other facets of the retirement system. For example, an employee is not entitled to retain the employer's contributions to the TSP and earnings attributable to such contributions before completing specific periods of service. *See* 5 U.S.C. § 8432(g)(2) (2006).

practice and standards" and "expressed as a level percentage of aggregate basic pay." 5 U.S.C. § 8401(23) (defining "normal-cost percentage"); *see id.* § 8423(a) (2006 & Supp. IV 2010).[6] Under the statute, "each employing agency having any employees or Members subject to section 8422(a) shall contribute to the Fund an amount" that is the product of the applicable normal-cost percentage and the aggregate amount of basic pay payable by the agency for the period involved. *Id.* § 8423(a)(1). In determining the normal-cost percentage to be applied, the employee deductions required by section 8422 must be taken into account. *Id.* § 8423(a)(2).[7] Thus, for

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[6] "Entry age normal cost" is

> generally understood as the percentage of every paycheck that should be invested, over the total career of each employee in a group of new entrants, to pay fully for all benefits received by that group, including all eligible survivors. Normal cost is formally defined as the present value of future benefits divided by the present value of future compensation. These values are expressed as a percentage of payroll, and provide a consistent measure of relative pension costs over time.

S. Rep. No. 99-166, at 35 (1985). OPM publishes the "normal cost percentages" for particular categories of employees in the Federal Register. At the time the Postal Service suspended its employer contributions to the Fund, the government-wide normal cost percentage for most employees was 12.5 percent. Federal Employees' Retirement System; Normal Cost Percentages, 75 Fed. Reg. 35,098 (June 21, 2010). For the first pay period commencing on or after October 1, 2011, the normal cost percentage for most employees rose to 12.7 percent. Federal Employees' Retirement System; Normal Cost Percentages, 76 Fed. Reg. 32,242, 32,243 (June 3, 2011).

[7] Section 8422(a) requires that "[t]he employing agency shall deduct and withhold from basic pay of each employee . . . a percentage of basic pay." 5 U.S.C. § 8422(a)(1). Thus, so long as the individual is an "employee," *see id.* § 8401(11), and is not otherwise excluded from coverage under the statute, *see id.* § 8402 (2006), the individual is "subject to section 8422(a)," and the employing agency is required to make contributions to the Fund under section 8423. There is no dispute here that the Postal Service's employees for whom the employer contributions have been withheld are "employees" for purposes of FERS. As a general matter, the FERS definition of "employee" refers to the definition of "employee" for CSRS benefits under chapter 83, in 5 U.S.C. § 8331(1) (2006). Section 8331(1), in turn, defines the term by reference to 5 U.S.C. § 2105. Under section 2105(a), an "employee" is an individual who is "appointed in the civil service" by a federal official; "engaged in the performance of a Federal function"; and "subject to the supervision" of a federal official. 5 U.S.C. § 2105(a) (2006); *see Taylor v. OPM*, 82 M.S.P.R. 237, 241 (M.S.P.B. 1999). Employees of the Postal Service, who are generally covered by the retirement statutes by virtue of 39 U.S.C. § 1005(d), must still meet the definition of "employee" to be covered by FERS. *See Taylor*, 82 M.S.P.R. at 241. An "employee" for purposes of FERS must also be covered by title II of the Social Security Act. 5 U.S.C. § 8401(11).

most employees, employing agencies contribute to the Fund an amount equal to 11.9 percent of basic pay—the aggregate normal cost of 12.7 percent minus the 0.8 percent employee deduction—which is more than 93 percent of the normal cost. OPM, which has authority to prescribe regulations under the statute, *id.* § 8461(g) (2006), has construed FERS to require the employing agency to "remit in full the total amount of normal cost (which includes both employee deductions and Government contributions), so that payment is received by the Fund on the day of payment to the employee of the basic pay from which the employee deductions were made." 5 C.F.R. § 841.504(h) (2011); *see also id.* § 841.413 (2011).[8]

II.

The dispute between OPM and the Postal Service was precipitated by the Postal Service's decision, in light of its current financial crisis, to conserve cash by suspending its employer contributions for the basic annuity, effective June 24, 2011, for those postal employees covered by FERS. OPM Memo at 1; USPS Memo at 2. The Postal Service is continuing to withhold employee deductions from basic pay; it also continues to make its automatic and matching contributions to the TSP accounts of FERS employees and to remit those contributions, along with employee TSP contributions. USPS Memo at 2. OPM does not dispute that the Postal Service and its employees continue to satisfy all the requirements of the statute *except* the agency's obligation to make employer contributions to the Fund for the basic annuity. The question we must address is

[8] FERS further requires OPM to compute the amount of the "supplemental liability" of the Fund as of the close of each fiscal year, both with respect to current or former employees of the Postal Service and other individuals. 5 U.S.C. § 8423(b)(1). The "supplemental liability" is the estimated excess of the actuarial present value of all future benefits payable from the Fund based on the service of current or former employees or Members of Congress over the sum of the actuarial present value of employee deductions, employer contributions, and the Fund balance. *Id.* § 8401(27). The amount of any supplemental liability must be amortized in 30 equal annual installments, with interest. *Id.* § 8423(b)(2). At the end of each fiscal year, OPM must notify the Postmaster General of the amount of the required installment computed with respect to current or former postal employees and the Secretary of the Treasury of the amount computed with respect to other individuals. *Id.* § 8423(b)(3). Upon receiving such notifications, the Postal Service is required to pay, and the Secretary of the Treasury is required to credit, to the Fund the amounts specified. *Id.* § 8423(b)(4).

thus narrow: whether postal employees are entitled to service credit for retirement purposes for the periods in which the Postal Service has suspended its employer contributions under 5 U.S.C. § 8423, but in all other respects has complied with the FERS statute.

OPM states that its "longstanding interpretation of the statute," as codified in its regulations, provides that "in order for an employee to be covered under FERS, an agency must make the periodic contributions to the Retirement Fund that are required by law." OPM Memo at 2. OPM does not claim that FERS expressly provides that employer contributions are a necessary precondition for employee coverage or that employees shall not receive service credit for periods in which their employing agencies fail to make employer contributions. Instead, OPM points out that section 8423 of FERS mandates that USPS must make contributions to the Fund on behalf of employees covered by FERS. *See* 5 U.S.C. § 8423(a)(1) ("[e]ach employing agency having any employees . . . subject to section 8422(a) *shall contribute* to the Fund" an amount that is based on the normal-cost percentage set by OPM) (emphasis added)). And while section 8423 does not expressly make the mandatory employer contributions a precondition to employee eligibility, in OPM's view, the relevant OPM regulation does:

> To be covered under FERS, an individual must:
>
> (a) Be an employee, Member, or specifically covered by another provision of law;
>
> (b) Be covered by social security;
>
> (c) Have retirement deductions withheld from pay and have agency contributions made; and
>
> (d) Be paid based on units of time.
>
> Except as provided in § 842.104 and as excluded by § 842.105, an employee or Member is covered by FERS.

5 C.F.R. § 842.103 (2011) (emphasis added); *see also id.* § 842.304(a) (2011) (providing, with exceptions not relevant here, that "an employee . . . is entitled to credit for all purposes under FERS for a period of civilian service with the Government or the U.S. Postal Service—[p]erformed after December 31, 1986, *which is covered service under subpart A of this part*," a reference back to section 842.103) (emphasis added).

As OPM explains, section 842.103 "merges the various statutory requirements applicable to FERS into one regulatory provision that determines whether an individual is covered by FERS." OPM Memo at 5. OPM's basic claim is thus that, "while there is no single provision in the statute which states that each of these requirements is essential to 'coverage,' when read as a whole, it was clearly reasonable for OPM to make coverage dependent upon compliance with all of the statutory requirements." *Id.* at 6. In OPM's view, section 842.103 makes "clear" that "to be 'covered by FERS' an individual must not only have deductions withheld from their pay—their employing agency must make the necessary contributions" as well. *Id.* at 5–6.

On its face, section 842.103 is not as free from ambiguity as OPM suggests. In particular, the last sentence in the provision states that "[e]xcept as provided in § 842.104 and as excluded by § 842.105, an employee or Member is covered by FERS," 5 C.F.R. § 842.103, language that appears to define coverage under FERS without making employer contributions a prerequisite. We do not think that the ambiguity in this language can be resolved by examining OPM's practice because there does not appear to be any relevant practice: OPM has pointed us to no instance of an agency refusing to remit the contributions it is statutorily required to pay under CSRS or FERS. *Cf.* OPM Memo at 9 (stating that no agency has failed to make employer contributions under CSRS). Nonetheless, we assume that OPM's interpretation of its own regulation is entitled to deference, and thus that section 842.103 has the meaning OPM suggests. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

In addition to relying on the statutory text and its regulation, OPM also finds support for its view in Congress's purpose. OPM notes that "Congress created FERS as a fully funded pension system," intending that "the Fund would be placed on a firm financial footing by requiring agencies to pay the full 'normal costs' for FERS employees." OPM Memo at 6. In light of Congress's "'interest in sound fiscal and accounting management,'" *id.* at 7 (quoting S. Rep. No. 99-166, at 29 (1985)), OPM contends that it is "highly unlikely that Congress would have provided that employees would be considered 'covered' by FERS and credited for their service if their employing agencies did not make the requisite contribution to the Fund." *Id.*

The Postal Service, for its part, does not deny that FERS requires it to make its employer contributions, USPS Memo at 4, 14, or that Congress intended that FERS be placed on a sound financial footing, *id.* But it points out that Congress chose to further this goal by requiring all employers to contribute to the Fund, not by depriving employees of service credit in the highly unusual situation in which an agency fails to make its required payments. *Id.* at 2–3. The Postal Service contends that under the statute, "creditable service is generated so long as employees are performing the required service for the Federal government and are contributing the required amounts to their pension, without regard to whether the employing agency cannot or does not make its employer contribution." *Id.* at 2. None of the key statutory provisions, in the Postal Service's view, "indicate[s] that creditable service under FERS is dependent on the employer contribution." *Id.* at 6. The Postal Service emphasizes that in enacting the basic annuity, Congress "intended to provide clearly defined and reliable benefits to employees"—a purpose that would be "vitiated by OPM's interpretation, which would predicate the level of employee benefits on the funding decisions of agency officials." *Id.* at 3; *see also id.* at 12. Accordingly, the Postal Service argues that OPM's interpretation of FERS, as embodied in its regulations, is at odds with the statute or, at least, unreasonable, *id.* at 5, and that OPM cannot enforce the Postal Service's statutory obligation to contribute by denying service credit to its employees.

We assume that OPM's authority to implement FERS by regulation, 5 U.S.C. § 8461(g), would entitle it, in appropriate circumstances, to deference in its construction of FERS pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, *Inc.*, 467 U.S. 837 (1984). However, OPM's construction of the statute is entitled to deference only "if the statute is silent or ambiguous with respect to the specific issue" at hand. *Id.* at 843. If, on the other hand, "Congress has directly spoken to the precise question at issue," and in so doing made its intent clear, "that is the end of the matter." *Id.* at 842. And here, for the reasons set forth below, we conclude that FERS makes clear that postal employees who otherwise qualify for retirement benefits under FERS are both covered by and accrue service credit under the statute notwithstanding the Postal Service's failure to make its employer contributions pursuant to 5 U.S.C. § 8423. Thus, OPM's interpretation of FERS—that OPM can address the

Postal Service's failure to remit the required contributions by depriving employees of accrued service credit—is foreclosed by the statute.

III.

A.

"We begin with the text of the statute." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011). Section 8410 of FERS, which governs eligibility, provides: "Notwithstanding any other provision of this chapter, an employee or Member must complete at least 5 years of civilian service creditable under section 8411 in order to be eligible for an annuity under this subchapter." 5 U.S.C. § 8410. Central to resolving this controversy is section 8411, which governs creditable service. It provides that "[t]he total service of an employee . . . is the full years and twelfth parts thereof, excluding from the aggregate the fractional part of a month, if any." *Id.* § 8411(a)(1). Section 8411 further specifies, in relevant part, that for purposes of FERS, "creditable service of an employee . . . includes . . . employment as an employee . . . after December 31, 1986." *Id.* § 8411(b), (b)(1). These provisions are not vague or unclear. They indicate plainly the category of employees who are eligible for FERS benefits, and Congress's broad, but not unbounded, definition of "creditable service" for FERS purposes.

Section 8401(11) excludes certain categories of individuals from the definition of "employee," and section 8402 excludes certain categories of individuals from coverage under FERS. *Id.* §§ 8401(11), 8402. But these exclusions are irrelevant to the present dispute. As USPS points out, OPM does not argue that "the non-payment of the employer contribution means that Postal Service employees are no longer 'employees' under the FERS statute or that they now fall within one of the exceptions in 5 U.S.C. § 8402 by virtue of such non-payment." USPS Memo at 6. And the postal employees potentially affected by their employer's non-payment of its contributions are still engaged in "employment." The plain language of FERS, then, supports the view that employees earn creditable service so long as they are employed as "employee[s]" after December 31, 1986, 5 U.S.C. § 8411(b)(1), regardless of whether their employer has suspended its contributions to the Fund.

To be sure, as noted earlier, OPM acknowledges that FERS's definition of "creditable service" does not mention employer contributions. Its argument is that a correct determination of what counts as "creditable service" under FERS does not depend on the wording of section 8411(b)(1) alone, but also on the overall statutory plan—in particular, on the fact that another provision of FERS clearly requires employer contributions as part of the overall FERS scheme.

We agree that section 8423 of FERS requires employers to make contributions to the Fund. We further agree that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). However, the mere fact that employer contributions are a mandatory part of the overall FERS scheme does not indicate that OPM is authorized to suspend or eliminate the accrual of employees' service credit as a remedy for an employer's failure to make such contributions. *Cf. Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 247 (2000) (ERISA's "'comprehensive and reticulated' scheme warrants a cautious approach to inferring remedies not expressly authorized by the text" (citations and internal quotation marks omitted)). As noted above, the specific statutory provision that addresses creditable service says nothing that suggests that an employee's accrual of credit depends on the fact or extent of employer contributions. Section 8423 of FERS likewise fails to mandate, or even suggest, that a lapse in an employing agency's contributions should result in a denial of service credit to that agency's employees.

Certainly, as OPM states, section 8423 reflects Congress's goal that "the Fund . . . be placed on a firm financial footing by requiring agencies to pay the full 'normal costs' for FERS employees." OPM Memo at 6. But it does so not by stipulating that employees will earn service credit (and therefore future benefits) only if their employers make all required contributions, but rather by imposing on agency employers a legal obligation to make the required contributions. OPM itself has suggested no reason to think that in practice this statutory mechanism has proven ineffective in serving Congress's goal. *Cf.* OPM Memo at 9 ("no agency has ever defaulted on its obligation to make the required contributions" under CSRS).

Moreover, the text of the FERS statute suggests that Congress considered the question of statutory mechanisms to address funding shortfalls and enacted a mechanism to deal with one kind of shortfall, without indicating that the suspension of employee service credit might be used as a solution to that or any other funding deficiency. Specifically, the statute provides that, in the event that OPM determines, on an annual review, that an agency's employer contributions do not in fact satisfy the statute's funding goals, OPM must notify the Postmaster General (or the Secretary of the Treasury, as applicable) of any "supplemental liability" and the amount of the required installment payments, amortized over 30 years. 5 U.S.C. § 8423(b); *see supra* note 8. The Postal Service must then pay the amount specified in the notification to address the funding shortfall. 5 U.S.C. § 8423(b)(4)(B). The existence of this supplemental liability process does not affirmatively authorize the Postal Service to avoid making its employer contributions as they come due in favor of amortizing such payments over 30 years. But the existence of a supplemental liability remedy for at least one type of funding shortfall shows that Congress was aware of the possibility that the employer contributions remitted under section 8423 might in some circumstances fail to result in agency funding of the full costs of employee benefits. Congress chose nonetheless to provide expressly for only one response to such a possibility. In light of that awareness, the omission of any other mechanism for addressing this or other kinds of shortfalls, such as denying service credit to employees when their employer defaults on its contributions, suggests that "the statute fails to mention [other responses] 'by deliberate choice, not inadvertence.'" *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (citation omitted).

In sum, none of the most clearly relevant provisions of the statute suggests that either employee eligibility or creditable service under FERS depends upon the extent of the employer's contributions to the Fund. As OPM insists, and the Postal Service effectively concedes, the plain language of FERS's key provisions specifies that agency employers must contribute to the Fund the normal cost of their covered employees' basic pay. At the same time, these provisions fail to link an agency's failure to comply with this requirement to the affected employees' eligibility for an annuity or accrual of creditable service. Instead, they appear on their face to provide that an employee is entitled to service credit so long as he or

she is employed as an "employee" after December 31, 1986. *See* 5 U.S.C. § 8411(a) & (b). Given the harsh penalty federal employees would suffer if they were denied FERS coverage or service credit for periods of employment during which their agency employers failed to make the required contributions to the Fund—an action over which the employees have no control—the absence of any reference in FERS's key provisions to OPM's authority to impose that particular remedy for an agency's noncompliance strongly suggests that Congress did not intend such authority to exist. As we discuss next, we do not think any of OPM's additional arguments in support of this authority are persuasive.

B.

OPM offers several other arguments that, in its view, show that the FERS statute requires employer contributions as a condition of employees' coverage and accrual of creditable service under FERS. First, OPM relies heavily on the Postal Service's concession that, to receive service credit under FERS, an employee must have deductions withheld from his or her wages, even though, in the Postal Service's view, the employing agency's contributions are not required for that purpose. OPM Memo at 7; *see* USPS Memo at 5–10. OPM insists that these two propositions cannot be reconciled because it is illogical to distinguish between the employee's deduction and the employer's contribution—both of which are statutorily required and neither of which is expressly linked by the statutory text to accrual of service credit—for purposes of determining whether an employee accrues creditable service for periods when employee deductions or employer contributions have not been made. OPM Memo at 7.

We need not resolve this issue. As a practical matter, the Postal Service has continued to withhold from its employees' basic pay the deductions required under 5 U.S.C. § 8422—including the employee deductions—and to deposit the deductions into the Fund. USPS Memo at 2. If fulfillment of the Postal Service's obligations under section 8422 is a necessary condition to postal employees receiving credit under FERS, that condition is being met. Furthermore, although OPM and the Postal Service agree that a failure to make these employee deductions would affect employees' ability to earn creditable service, we are unsure that they are correct. In our view, this issue is difficult, particularly in the context of a scheme in

which it is the *agency's* legal obligation to effectuate the employee deduction. *See* 5 U.S.C. § 8422(a). In fact, the answer to the question may well depend on the reason that employee deductions have not been made.[9] In any event, even if employee deductions constitute a prerequisite to the accrual of service credit under FERS—one that does not appear in the FERS eligibility or accrual provisions themselves—that would not necessarily mean that employer contributions likewise would be a prerequisite for the accrual of such credit, because the significance and treatment of employee deductions and employer contributions within the statutory scheme are different. Each argument for linking employee service credit to separate requirements in the statute would have to be considered on its own terms.

Both OPM and the Postal Service cite different subsections of section 8411—some requiring employee deductions as a condition of receiving creditable service and a couple requiring employee deductions *and* em-

[9] For example, if the employer failed to make the employee deduction because the affected employee was not subject to deductions under 5 U.S.C. § 8422, the employee's eligibility for coverage and ability to accrue creditable service under FERS might be implicated. *Cf. Tomboc v. OPM*, 355 Fed. Appx. 422, 424 (Fed. Cir. 2009) (noting that "[w]hile the absence of deductions" under the CSRA "is an indication" regarding whether a position is covered, "it is not necessarily dispositive"). Alternatively, if the employer failed to make the employee deductions because of an agency error, the error may be corrected, *see* 5 C.F.R. § 841.505 (2011); and, in any event, an agency error would not necessarily affect the employee's entitlement to coverage. *Cf. Noveloso v. OPM*, 45 M.S.P.R. 321, 324 n.2 (M.S.P.B. 1990) (noting, in addressing CSRS coverage, that "[i]f no deductions were withheld because of agency error, or because it was not determined until after the fact that such service should have been covered, the employment will still constitute covered service"); *accord Staffney v. OPM*, 54 M.S.P.R. 99, 102–03 (M.S.P.B. 1992) (same, under CSRS coverage); *In re Kaltakji*, 1 M.S.P.R. 63, 64 (M.S.P.B. 1978) (same). *But see* 5 U.S.C. § 8339(i) (2006) (providing, for purposes of computing a CSRS annuity, that the total service of an employee "shall not include any period of civilian service . . . for which retirement deductions or deposits [under section 8334] have not been made" unless the employee makes a deposit under section 8334(c) or (d)(1) or no deposit is required for such service as specified under section 8334(g) or another statute). And, for the same reasons that an agency error may not affect the employee's entitlement to coverage, a willful agency refusal to make the required employee deductions likewise may not affect that entitlement. For the reasons stated in the text, however, we need not decide the circumstances, if any, in which an employing agency's failure to make the employee deductions and deposit them into the Fund would affect an employee's coverage and accrual of service under FERS.

ployer contributions—to support their respective positions. On the one hand, OPM contends that, where Congress intended to permit service credit to be afforded even if no contributions were made by the agency, it did so explicitly. It cites as an example section 8411(b)(3), which permits employees to receive service credit for periods of employment during which no employing agency contributions or employee deductions were paid into the Fund for certain service performed prior to January 1, 1989. OPM Memo at 8 n.5. In such instances, the employee must make a deposit into the Fund of 1.3 percent of his or her basic pay, with interest, for that period of service. *Id.* (citing 5 U.S.C. § 8411(f)(2)).[10] However, no employing agency contribution is required for that period. *Id.*[11] The Postal

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[10] Section 8411(b)(3), with the introductory language in section 8411(b), provides:

> For the purpose of this chapter, creditable service of an employee or Member includes[,] except as provided in subsection (f) or (h), any civilian service (performed before January 1, 1989, other than any service under paragraph (1) or (2)) which, but for the amendments made by subsections (a)(4) and (b) of section 202 of the Federal Employees' Retirement System Act of 1986, would be creditable under subchapter III of chapter 83 of this title (determined without regard to any deposit or redeposit requirement under such subchapter, any requirement that the individual become subject to such subchapter after performing the service involved, or any requirement that the individual give notice in writing to the official by whom such individual is paid of such individual's desire to become subject to such subchapter)[.]

5 U.S.C. § 8411(b), (b)(3). Section 8411(f)(2) prohibits an employee from receiving "credit under this chapter for any service described in subsection (b)(3) for which retirement deductions under subchapter III of chapter 83 have not been made, unless such employee or Member deposits an amount equal to 1.3 percent of basic pay for such service, with interest." *Id.* § 8411(f)(2). Section 8411(f)(1) requires an employee who has received a refund of CSRS retirement deductions for service described in subsections (b)(2) or (b)(3) to "deposit[] an amount equal to 1.3 percent of basic pay for such service, with interest," as a condition of receiving credit for such service. *Id.* § 8411(f)(1).

The Senate Committee on Governmental Affairs released a Committee Print in October 1986, four months after the enactment of FERS, that set out a detailed section-by-section analysis of the statute. The committee print explains that section 8411(b)(3) "provides that creditable service includes . . . service before January 1, 1989, which was either non-covered or was not vested under CSRS in which case a contribution must be made under subsection (f)." S. Comm. on Governmental Affairs, 99th Cong., Supplemental Information Regarding the Federal Employees' Retirement System Act of 1986, at 7 (Comm. Print 1986) ("FERS Comm. Print").

[11] Section 8411(b)(3) is not unique in requiring employees who had not contributed to the Fund (sometimes because they had been covered by other retirement systems) but who

Service, on the other hand, cites two instances in which the statute expressly requires the payment of an employer contribution to render certain service creditable, arguing that there would have been no reason for Congress to have explicitly required an employer contribution if accrual of service credit is invariably conditioned on an agency's having made employer contributions to the Fund. USPS Memo at 8 (citing 5 U.S.C. § 8411(e), (g) (the latter of these added in subsequent amendments to FERS)).[12]

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seek service credit within the FERS system, to make payments to the Fund equal to the amounts that would have been deducted as FERS employee contributions for that period of service—without any mention of the necessity of an employer contribution. *See, e.g.*, 5 U.S.C. § 8411(b)(4) & (5) (the latter of these added in subsequent amendments to FERS); USPS Paper at 6. In still other instances, Congress treated service for which deductions were not paid to the Fund as creditable with no requirement of any kind of employee or employer deposit. *See* 5 U.S.C. § 8411(c)(1)(A) (military service performed before January 1, 1957); *id.* § 8411(d) (certain periods of leave without pay); USPS Paper at 7.

[12] Section 8411(e) provides:

> Credit shall be allowed for periods of approved leave without pay granted an employee to serve as a full-time officer or employee of an organization composed primarily of employees . . . , subject to the employee arranging to pay, through the employee's employing agency, within 60 days after commencement of such leave without pay, *amounts equal to the retirement deductions and agency contributions which would be applicable under sections 8422(a) and 8423(a)*, respectively, if the employee were in pay status. If the election and all payments provided by this subsection are not made, the employee may not receive credit for the periods of leave without pay, notwithstanding the third sentence of subsection (d).

5 U.S.C. § 8411(e) (emphasis added). Section 8411(g), in turn, provides that "[a]ny employee who—

> "(1) served in a position in which the employee was excluded from coverage under this subchapter because the employee was covered under a retirement system established under section 10 of the Federal Reserve Act; and
>
> "(2) transferred without a break in service to a position to which the employee was appointed by the President, with the advice and consent of the Senate, and in which position the employee is subject to this subchapter,

"shall be treated for all purposes of this subchapter as if any service that would have been creditable under the retirement system established under section 10 of the Federal Reserve Act was service performed while subject to this subchapter *if any employee and employer deductions, contributions or rights with respect to the employee's service are transferred from such retirement system to the Fund*." *Id.* § 8411(g) (emphasis added).

None of these examples, in our view, supports either inference. As the Postal Service observes, section 8411 sets forth a variety of rules regarding when certain types of service that fall outside the scope of section 8411(b)(1) (the service at issue here) nonetheless may be credited for FERS purposes. *Id.* Congress's varying responses to divergent coverage and employee deduction scenarios do not shed light on what it intended as a general matter for employees otherwise covered by FERS. With respect to section 8411(b)(3), for example, Congress's decision to allow the accrual of service credit for employees in a transitional period during the early implementation of FERS and to address the absence of retirement deductions by requiring that the employee deposit an amount compensating for those missing employee deductions, 5 U.S.C. § 8411(f)(2), suggests, at most, that Congress viewed employee deductions as more significant to coverage requirements than employer contributions. By the same token, that Congress required employer contributions to be made as a condition of receiving service credit in the examples cited by the Postal Service, *id.* § 8411(e), (g), shows little more than that Congress chose to impose that additional requirement in those instances and explicitly provided for employer contributions to make the requirement clear.[13]

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[13] For similar reasons, we do not find Congress's treatment of reemployed annuitants in 5 U.S.C. § 8468, on which the Postal Service relies, *see* USPS Memo at 6–7, particularly illuminating. In language added to that section after the enactment of FERS, the statute provides that, with certain exceptions, if the annuitant becomes reemployed, "deductions for the Fund shall be withheld from the annuitant's pay under section 8422(a) and contributions under section 8423 shall be made." 5 U.S.C. § 8468(a) (2006). The Postal Service makes much of the fact that a subsequent subsection provides that if an annuitant "*subject to deductions* under the second sentence of subsection (a)" serves for at least 5 years, the annuitant may elect to have his or her rights redetermined under FERS. *Id.* § 8468(b)(2)(A) (emphasis added). The Postal Service finds it significant that this subsection mentions "deductions" and not employer "contributions." But an employee subject to "deductions" under the second sentence of section 8468(a) would also be subject to "contributions," and so there was no need for Congress to repeat the full phrase in section 8468(b)(2)(A) to indicate the employees to whom it was referring. Moreover, contrary to the Postal Service's assertion that Congress made clear that reemployed annuitants earn service credit "so long as 'deductions' are being made from their basic pay," USPS Memo at 7, Congress merely referred to reemployed annuitants who were "subject to deductions," without regard to whether the deductions were actually "being made." *See* 5 U.S.C. § 8468(b)(2)(A). More importantly, however, we believe again that Congress's policy determination about the coverage of reemployed annuitants tells us little about

What these examples reveal is that, even where there was no other statutory commitment to treat service as creditable under FERS or where employees were covered under other federal retirement systems, Congress sometimes extended FERS service credit in exchange for the payment of specified employee deductions—or the payment of employer contributions, or the relinquishment of service credit under other retirement systems, or without imposing any conditions—to serve some other policy goal, such as increased portability of retirement benefits. *See* Pub. L. No. 99-335, § 100A(3), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note) (one purpose of FERS was "to enhance portability of retirement assets earned as an employee of the Federal Government"). In our view, the discrete scenarios addressed in section 8411 provide little assistance, one way or another, in the assessment whether Congress intended to authorize OPM to deny service credit to employees otherwise subject to the FERS retirement plan for periods of employment under that plan if agencies violated the statutory requirement that they make employer contributions to the Fund.

Finally, as noted above, OPM argues that, in light of Congress's creation of FERS as a "fully funded pension system," OPM Memo at 6, and its purpose to ensure "sound fiscal and accounting management," *id.* at 7 (citing S. Rep. No. 99-166, at 29), "it is highly unlikely that Congress would have provided that employees be considered 'covered' by FERS and credited for their service if their employing agencies did not make the requisite contribution[s] to the Fund." *Id.* But, of course, Congress did require employing agencies to make specified contributions to the Fund, and the Postal Service is legally obligated to do so. *See supra* pp. 184–186, 191. The question here is only whether Congress intended that the remedy for the Postal Service's failure to meet its obligations would be to deny employees the service credit that the statute contemplates they will earn.

We agree with OPM that Congress was concerned with the fiscal management of the Fund. But "ensur[ing] a fully funded and financially sound retirement benefits plan for Federal employees," Pub. L. No. 99-335, § 100A(2), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note), was only

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whether Congress intended generally to condition coverage and accrual of service credit for FERS employees on the agency's deposit of its employer contributions into the Fund.

one of several congressional purposes in enacting FERS. Among other things, Congress also enacted FERS to establish a new retirement plan "to assist in building a quality career work force in the Federal Government." *Id.* § 100A(5). That goal could well be subverted if Congress were to create a retirement system in which employees' retirement benefits could be diminished or stripped away by their agencies' failure to pay the statutorily required contributions into the Fund. Even recognizing that a fully funded pension system was an important congressional objective, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular object is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987).

Further, although we do not "resort to legislative history to cloud a statutory text that is clear," *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994), we believe that, to the extent that the legislative history of FERS is illuminating, it undermines, rather than supports, the view that Congress intended to deny employees eligibility and creditable service under FERS for periods of employment in which their employing agencies fail to make their required employer contributions to the Fund.

The legislative history makes clear that Congress intended the basic annuity in FERS to operate as a defined benefit plan. *See, e.g.*, S. Rep. No. 99-166, at 6, 9, 30, 42; FERS Comm. Print at 7. Such a plan consists of "a general pool of assets" out of which an employee, "upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citation omitted). "A defined benefit plan promises a participant a specific amount of pension benefits at retirement determined under a formula based on years of participation in the plan, and in most nonbargained plans, based on an average of compensation." Stephen R. Bruce, *Pension Claims: Rights and Obligations* 17–18 (1988) ("Bruce"); *see also* James E. Burk, *Pension Plan Management Manual: Administration and Investment* ¶ 1.01[8], at 1-8 (1987) ("Burk") (benefits in a defined benefits plan determined "by a formula that is generally related to service and compensation"); H.R. Comm. on Post Office and Civil Serv., 98th Cong., *Designating a Retirement System for Federal Workers Covered by Social Security* 6 (Comm. Print 1984) (prepared by

the Congressional Research Service) ("CRS Comm. Print") ("A defined benefit plan determines benefit amount by a formula. Upon reaching the terms specified in the definition of eligibility (usually a combination of age and years of service), the worker receives the benefit computed from the application of the formula to the employee's years of service and salary.").[14]

The FERS basic annuity follows this model. FERS promises participants a specific level of benefits by application of a formula that is generally dependent on the employee's average pay and total service, 5 U.S.C. § 8415(a), and that bases the employing agencies' contributions on the "normal-cost percentage" of benefits, *id.* § 8423(a), which is actuarially computed by OPM. *Id.* § 8401(23); *cf.* Burk ¶ 2.01, at 2-4 (employer's contribution in a defined benefit plan is actuarially computed). The benefit formula in a defined benefit plan "is geared to providing a specific retirement benefit rather than based on the rate of contributions made by the employer to the pension fund." Burk ¶ 2.01, at 2-5. A pension plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461 (2006 & Supp. III 2009), for example, "is liable for benefits without regard to whether the employer has made required contributions." ABA Section of Labor and Employment Law, *Employment Benefits Law* 279 (1991). Thus, it was well established by the time Congress enacted FERS, *see* USPS Memo at 9, that a multiemployer pension plan covered by ERISA, which is analogous in many respects to the multi-agency approach of FERS, must award credit based on the service performed for a participating employer regardless of whether the employer made the required contributions for such service. As the Supreme Court recognized a year before the enactment of FERS:

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[14] By contrast, under a "defined contribution plan," the promise is that "certain contributions will be made and credited to an employee's individual account. Contribution rates are fixed, usually as a percentage of the employee's earnings. Such plans do not guarantee an employee any fixed level of benefits at retirement. An employee's benefit will vary, depending on the amount of the contributions and the interest and capital appreciation accumulated on them." Burk ¶ 1.02[8], at 1-8–1-9; *see also Hughes*, 525 U.S. at 439; Bruce at 18. "Under defined contribution plans, employers know exactly what the pension obligation is and the benefits are fully funded at the time of the contribution. Employees bear the risk of variable market performance[.]" CRS Comm. Print at 6–7.

> The consistent view of the Secretary of Labor is that, under ERISA's minimum participation, vesting, and benefit accrual standards for pension plans . . . a pension plan covered by ERISA *must* award credit "solely on the basis of service performed for a participating employer, regardless [of] whether that employer is required to contribute for such service or has made or defaulted on his required contributions." In the Secretary's judgment, "[a]ny plan term or Trustees' resolution to the contrary is . . . unlawful and unenforceable."

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 567 n.7 (1985) (citations omitted).[15]

Given this backdrop, it would be reasonable to expect some indication in the text of FERS, or at least in its legislative history, if Congress had intended to depart from these principles and make accrual of employee

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[15] *Accord Cent. States, Se. & Sw. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1988) ("Multi-employer plans are defined-contribution in, defined-benefits out. Once they promise a level of benefits to employees, they must pay even if the contributions they expected to receive do not materialize[.]"); Bruce at 135–36 ("[H]ours of service for use in determining [years of work] are determined solely on the basis of hours of work, or hours for which payment is due the employee from the employer, without reference to the delinquency or nondelinquency of the employer's contributions to the [multiemployer] plan."). As the Supreme Court noted, the longstanding position of the Secretary of Labor at the time of the enactment of FERS was that ERISA required that credit for hours worked "must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees resolution to the contrary is, in our judgment, unlawful and unenforceable." Dep't of Labor Advisory Op. No. 76–89 (Aug. 31, 1976); *accord* Dep't of Labor Advisory Op. No. 78-28A (Dec. 5, 1978); Dep't of Labor Advisory Op. 78-21A (Oct. 16, 1978); Dep't of Labor Advisory Op. No. 78-20A (Oct. 6, 1978); *see also* Rules and Regulations for Minimum Standards for Employee Pension Benefit Plans, 41 Fed. Reg. 56,462, 56,464 (Dec. 28, 1976) (explaining, with respect to 29 C.F.R. § 2530.200b-2, regarding accrual of hours of service, that employee hours "must be credited to an employee regardless of whether contributions are required to be made to the plan on account of such hours or whether such contributions, even though required, have not in fact been made"). Before the passage of FERS, the IRS had also issued a Revenue Ruling explaining that a multiemployer plan that did not credit all years of service because of an employer's failure to make the required contributions failed to meet the requirements of "a qualified pension plan" that it provide "definitely determinable benefits" to its employees and violated the minimum participation and vesting standards of the Internal Revenue Code. Rev. Ruling 85-130, 1985-2 C.B. 137.

benefits contingent on employer contributions. Instead, the legislative history underlines that Congress intended to establish a new retirement plan for federal employees that would "provid[e] employees with financial security through a retirement program that compares favorably with those found in the private sector." S. Rep. No. 99-166, at 38.[16] It is unlikely, in light of this goal, that Congress would have incorporated into FERS an arrangement that would have been unlawful in the private sector without saying so.

Finally, OPM argues that construing FERS to give employees an entitlement to service credit without the employer's contribution "would be inconsistent with the Director's fiduciary responsibilities to the Fund." OPM Memo at 7. But, as set forth above, OPM is obligated under the statute to award service credit to employees who satisfy the statutory conditions set forth, *see supra* Part III.A, and to "pay all benefits that are payable under subchapter II, IV, V, or VI of this chapter from the Fund." 5 U.S.C. § 8461(a). As we read the statute, OPM is required to pay those benefits without regard to whether the employing agency—here, the Postal Service—has made its employer contributions to the Fund. The Director's fiduciary obligations thus include awarding service credit and paying benefits in accordance with the statute, and he would not violate those obligations by doing so.

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[16] *See also, e.g.*, 132 Cong. Rec. 11,912 (1986) (statement of Rep. Myers) (conference report includes "many of the concepts that a great many of the better private retirement programs have"); *id.* at 11,909 (1986) (statement of Rep. Ford) (Congress had an opportunity "to create a new pension system with the best features found in the private sector"); *id.* at 11,304 (1986) (statement of Sen. Gore) ("The retirement system which we have developed employs a three-tier design that combines Social Security with a defined benefit tier that focuses on providing a reliable base pension benefit[.]"); *id.* at 11,303 (1986) (statement of Sen. Glenn) (FERS "provides Government employees with a three-part program which is comparable to plans widely used in private industry" and "one that helps to recruit and maintain an excellent and skilled work force"); *id.* at 11,301 (1986) (statement of Sen. Stevens) (praising the new retirement plan as "a top notch, economical retirement system for the Federal workforce which is on part with the best in the private sector," providing "solid retirement benefits" and "offering financial security to Federal retirees"); S. Rep. No. 99-166, at 4 (emphasizing that "the Federal Government must have the ability to attract and retain highly qualified individuals in all occupations" and that "[a]n attractive, flexible retirement plan can assist the government in meeting these objectives . . . to build a career workforce" and "to assist in recruiting midcareer employees").

IV.

"If, upon examination of 'the particular statutory language at issue, as well as the language and design of the statute as a whole,' . . . it is clear that [the agency's] interpretation is incorrect, then we need look no further[.]" *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In our view, FERS has "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and OPM may not address the Postal Service's failure to make the employer contributions required by FERS by denying postal employees coverage or creditable service under FERS. We do not address the propriety of any other action OPM might take to address the Postal Service's failure to make the required contributions to the Fund.

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