

OPINIONS
OF THE
OFFICE OF LEGAL COUNSEL
OF THE
UNITED STATES DEPARTMENT OF JUSTICE
CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE
PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL,
AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
GOVERNMENT
IN RELATION TO
THEIR OFFICIAL DUTIES

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VOLUME 38

2014

WASHINGTON
2021

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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 37 published volumes of the OLC series covered the years 1977 through 2013. The present volume 38 covers 2014.

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.

Opinions of the Office of Legal Counsel

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Prosecutorial Discretion Regarding Citations for Contempt of Congress

A United States Attorney to whom a contempt of Congress citation is referred retains traditional prosecutorial discretion regardless of whether the contempt citation is related to an assertion of executive privilege.

June 16, 2014

LETTER OPINION FOR THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA

This letter responds to an inquiry sent to our Office on your behalf on May 22, 2014. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Matthew Jones, Counsel to the United States Attorney, Office of the U.S. Attorney for the District of Columbia (May 22, 2014) (“Jones E-mail”). The inquiry indicates that you have reviewed a 1984 OLC opinion entitled *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984) (“1984 Opinion”). That opinion concluded (among other things) that a United States Attorney is not required by “the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194, . . . [to] prosecute or refer to a grand jury a citation for contempt of Congress issued with respect to an Executive Branch official who has asserted a claim of executive privilege in response to written instructions from the President of the United States.” *Id.*; *see also id.* at 102, 128. Having reviewed that opinion, you have asked whether this prosecutorial discretion is limited to circumstances in which the conduct cited for contempt is based on a claim of executive privilege, or whether it is also available when a United States Attorney concludes, following a review of the factual and legal sufficiency of the contempt citation, that no violation of the law has occurred for reasons other than an assertion of executive privilege.

In our view, the 1984 Opinion resolves your question, and concludes that a United States Attorney to whom a contempt of Congress citation is referred retains traditional prosecutorial discretion regardless of whether the contempt citation is related to an assertion of executive privilege. The 1984 Opinion considered two distinct questions. “The first specific question [was] whether the United States Attorney is required to refer every

contempt of Congress citation to a grand jury.” *Id.* at 118. The second question was, “aside from the issue of prosecutorial discretion, whether the criminal contempt of Congress statute is intended to apply, or constitutionally could be applied, to Presidential claims of executive privilege.” *Id.* at 129. In our view, your question is resolved by the 1984 Opinion’s analysis of the first question. The opinion concludes that, “as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury.” *Id.* at 128.

In reaching this conclusion, the 1984 Opinion first clarified that, “as a matter of statutory interpretation, there is no doubt that the contempt of Congress statute does not require a prosecution” because it

does not on its face actually purport to require the United States Attorney to proceed with the prosecution of a person cited by a house of Congress for contempt; by its express terms the statute discusses only referral to a grand jury. Even if a grand jury were to return a true bill, the United States Attorney could refuse to sign the indictment and thereby prevent the case from going forward.

Id. at 118. Thus, “the only question is whether [the contempt provision] requires referral to the grand jury.” *Id.*

Turning to this question, the 1984 Opinion concluded that the statute does not require United States Attorneys to refer contempt of Congress citations to a grand jury, for four main reasons. First, the Justice Department had previously taken the position that the contempt provision did not require referral to a grand jury, including in connection with contempt citations of officials of the Port of New York Authority. *Id.* at 119–20. (Notably, there had been no assertion of the President’s executive privilege in that matter. *See United States v. Tobin*, 195 F. Supp. 588, 596–97, 608–09 (D.D.C. 1961), *rev’d*, 306 F.2d 270, 271–72 (D.C. Cir. 1962).)

Second, judicial opinions interpreting the language of section 194 in other contexts reflected an understanding that the United States Attorney retains discretion not to make a referral to the grand jury, despite the apparently mandatory language of the statute. 1984 Opinion, 8 Op. O.L.C. at 120–22. These contexts included consideration of whether the Speaker

of the House's duty to refer contempt citations to United States Attorneys under section 194 is mandatory, *see id.* at 120–21 (discussing *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966)), and rejection of private parties' motions to quash congressional subpoenas on the grounds that those parties would have adequate opportunities to challenge any contempt finding by, *inter alia*, persuading the U.S. Attorney not to refer the citation to a grand jury, *see id.* at 121–22 (discussing *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971), *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972), and *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1975)).

Third, “the common-law doctrine of prosecutorial discretion,” which embodies a “wide scope of . . . discretion in determining which cases to bring,” precluded interpreting the statute to “require[] automatic referral” to the grand jury, at least in the absence of a “clearly and unequivocally stated” congressional intent to displace the traditional prosecutorial discretion. *Id.* at 122–24.

Finally, construing section 194 to permit the exercise of prosecutorial discretion was “reinforced by the need to avoid the constitutional problems that would result if section 194 were read to require referral to a grand jury.” *Id.* at 124–25. A contrary construction, the opinion explained, would “create two distinct problems with respect to the [constitutional] separation of powers”: it would both “strip[] the Executive of its proper constitutional authority” and “vest[] improper power in Congress,” in contravention of the principle that, as “[t]he courts have declared,” “the ultimate decision with respect to prosecution of individuals must remain an executive function under the Constitution.” *Id.* at 127; *see also, e.g., id.* at 114–15 (citing *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take care that the laws be faithfully executed.’”), and *Smith v. United States*, 375 F.2d 243, 246–47 (5th Cir. 1967) (recognizing that the Executive's prosecutorial discretion not to arrest or prosecute is rooted in the constitutional separation of powers)); *id.* at 126 (citing *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”)).

We recognize that there are general caveats in the 1984 Opinion stating that its conclusions are “limited to the unique circumstances” that prompted it. *Id.* at 102; *see also id.* at 103, 142. We agree that the 1984 Opinion’s “general statements of legal principles should be applied in other contexts only after careful analysis.” *Id.* at 103. But it is a key characteristic of “legal principles” that they can apply in cases other than the specific ones in which they are stated as grounds for decision. And we do not read the analysis supporting the 1984 Opinion’s conclusion regarding prosecutorial discretion as turning on whether the conduct underlying a contempt citation is based on an assertion of executive privilege. The opinion does not state or suggest that the underlying basis for a contempt citation must be analyzed in determining whether a prosecutor retains the discretion not to refer a contempt citation to a grand jury. Nor does the opinion state or suggest that the United States Attorney to whom a citation is referred would lack traditional prosecutorial discretion if the citation were not related to an assertion of executive privilege. As noted above, the opinion describes and relies in part on a specific prior instance in which the Justice Department declined to refer contempt citations to a grand jury, in a case that did not involve a presidential assertion of executive privilege. *See id.* at 119–20 (discussing contempt citations of Port of New York Authority officials). And the cases the opinion cites in which courts treated section 194 as if it did not make grand jury referrals mandatory involved situations in which the underlying contempt citations did not concern executive privilege. *See id.* at 121–22 (discussing *Ansara*, 442 F.2d 751, *Sanders*, 463 F.2d 894, and *U.S. Servicemen’s Fund*, 488 F.2d 1252). We therefore believe that the 1984 Opinion’s conclusion regarding prosecutorial discretion—that U.S. Attorneys to whom contempt of Congress citations are referred retain the traditional prosecutorial discretion not to prosecute or refer those citations to a grand jury—applies regardless of whether the contempt citations are related to an assertion of executive privilege.

KARL R. THOMPSON
Acting Assistant Attorney General
Office of Legal Counsel

Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena

The Assistant to the President and Director of the Office of Political Strategy and Outreach (“OPSO”) is immune from the House Committee on Oversight and Government Reform’s subpoena to compel him to testify about matters concerning his service to the President in the OPSO.

July 15, 2014

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Assistant to the President and Director of the Office of Political Strategy and Outreach (“OPSO”) David Simas is legally required to appear to testify at a congressional hearing scheduled for July 16, 2014, in response to a subpoena issued to Mr. Simas by the House Committee on Oversight and Government Reform on July 10, 2014. We understand that the Committee seeks testimony about “whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act,” and about “the role and function of the White House Office of Political Strategy and Outreach.” Letter for David Simas from Darrell Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 3, 2014) (“Invitation Letter”). For the reasons set forth below, we believe that Mr. Simas is immune from compulsion to testify before the Committee on these matters, and therefore is not required to appear to testify in response to this subpoena.

I.

A.

The Executive Branch’s longstanding position, reaffirmed by numerous administrations of both political parties, is that the President’s immediate advisers are absolutely immune from congressional testimonial process. *See, e.g.*, Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff”*

at 7 (Feb. 5, 1971) (“Rehnquist Memorandum”).¹ This immunity is rooted in the constitutional separation of powers, and in the immunity of the President himself from congressional compulsion to testify. As this Office has previously observed, “[t]he President is the head of one of the independent Branches of the federal government. If a congressional committee could force the President’s appearance” to testify before it, “fundamental separation of powers principles—including the President’s independence and autonomy from Congress—would be threatened.” *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192 (2007) (“Bradbury Memorandum”). In the words of one President, “[t]he doctrine [of separation of powers] would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government[,] if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purpose.” Texts of Truman Letter and Velde Reply, *N.Y. Times*, Nov. 13, 1953, at 14 (reprinting November 11, 1953 letter by President Truman). Thus, just as the President “may not compel congressmen to appear before him,” “[a]s a matter of separation of powers, Congress may not compel him to appear before it.” *Assertion of*

¹ See also Letter for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007); *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191 (2007); *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1 (1999); *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308 (1996); Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 29, 1982); Letter for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Demand for Deposition of Counsel to the President Fred F. Fielding* (July 23, 1982); Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Testimony by Presidential Assistants* (Apr. 14, 1981); Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* (Aug. 11, 1977); Memorandum for John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee* (Mar. 15, 1972).

Executive Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 4 (1999) (“*Assertion of Executive Privilege*”) (quoting Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982)).

For the President’s absolute immunity to be fully meaningful, and for these separation of powers principles to be adequately protected, the President’s immediate advisers must likewise have absolute immunity from congressional compulsion to testify about matters that occur during the course of discharging their official duties. “Given the numerous demands of his office, the President must rely upon senior advisers” to do his job. Bradbury Memorandum, 31 Op. O.L.C. at 192. The President’s immediate advisers—those trusted members of the President’s inner circle “who customarily meet with the President on a regular or frequent basis,” Rehnquist Memorandum at 7, and upon whom the President relies directly for candid and sound advice—are in many ways an extension of the President himself. They “function[] as the President’s alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities,” including supervising the Executive Branch and developing policy. *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5; see also *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (the Constitution “establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity,” including “the enforcement of federal law” and the “management of the Executive Branch”); *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) (“The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”). “Given the close working relationship that the President must have with his immediate advisers as he discharges his constitutionally assigned duties,” “[s]ubjecting [those advisers] to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions.” *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.

In particular, a congressional power to compel the testimony of the President's immediate advisers would interfere with the President's discharge of his constitutional functions and damage the separation of powers in at least two important respects. First, such a power would threaten the President's "independence and autonomy from Congress." Bradbury Memorandum, 31 Op. O.L.C. at 192; *cf. Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 370, 385 (2004) (citing the President's need for autonomy and confidentiality in holding that courts must consider constraints imposed by the separation of powers in fashioning the timing and scope of discovery directed at high-level presidential advisers who "give advice and make recommendations to the President"). Absent immunity for a President's closest advisers, congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain. Such efforts would risk significant congressional encroachment on, and interference with, the President's prerogatives and his ability to discharge his duties with the advice and assistance of his closest advisers. They also would promote a perception that the President is subordinate to Congress, contrary to the Constitution's separation of governmental powers into equal and coordinate branches.

Second, a congressional power to subpoena the President's closest advisers to testify about matters that occur during the course of discharging their official duties would threaten Executive Branch confidentiality, which is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties. The Supreme Court has recognized "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. 683, 708 (1974). "A President and those who assist him," the Court has explained, "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* The prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President's immediate staff could chill presidential advisers

from providing unpopular advice or from fully examining an issue with the President or others.

To be sure, the President's advisers could invoke executive privilege to decline to answer specific questions if they were required to testify. *See, e.g.,* Rehnquist Memorandum at 8 & n.4. But the ability to assert executive privilege during live testimony in response to hostile questioning would not remove the threat to the confidentiality of presidential communications. An immediate presidential adviser could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure. These concerns are heightened because, in a hearing before a congressional committee, there is no judge or other neutral magistrate to whom a witness can turn for protection against questions seeking confidential and privileged information. The committee not only poses the questions to the witness, but also rules on any objections to its own questions according to procedures it establishes. The pressure of compelled live testimony about White House activities in a public congressional hearing would thus create an inherent and substantial risk of inadvertent or coerced disclosure of confidential information relating to presidential decision-making—thereby ultimately threatening the President's ability to receive candid and carefully considered advice from his immediate advisers. To guard against these harms to the President's ability to discharge his constitutional functions and to the separation of powers, immediate presidential advisers must have absolute immunity from congressional compulsion to testify about matters that occurred during the course of the adviser's discharge of official duties.²

² A number of senior presidential advisers have voluntarily testified before Congress as an accommodation to a congressional committee's legitimate interest in investigating certain activities of the Executive Branch. These instances of voluntary testimony do not undermine the Executive Branch's long-established position on absolute immunity. Unlike compelled testimony, voluntary testimony by a senior presidential adviser represents an affirmative exercise of presidential autonomy. It reflects a decision by the

B.

This longstanding Executive Branch position is consistent with relevant Supreme Court case law. The Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process. But in an analogous context, the Court did conclude that legislative aides are entitled to immunity under the Speech or Debate Clause that is co-extensive with the immunity afforded Members of Congress themselves. *See Gravel v. United States*, 408 U.S. 606 (1972). “It is literally impossible,” the Court explained, “for Members of Congress to perform their legislative tasks without the help of aides and assistants.” *Id.* at 616. Legislative aides must therefore “be treated as . . . alter egos” of the Members they serve. As a result, they must be granted the same immunity as those Members in order to preserve “the central role of the Speech or Debate Clause,” which is “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.” *Id.* at 617.

The Court’s reasoning in *Gravel* supports the position that the President’s immediate advisers must share his absolute immunity from congressional compulsion to testify. As noted above, the President’s immediate advisers are his “alter egos,” allowing him to fulfill the myriad responsibilities of his office in a way it would be “literally impossible” for him to do alone. A congressional power to compel their testimony would (as we have discussed) undermine the President’s independence, create the appearance that the President is subordinate to Congress, and impair the President’s ability to receive sound and candid advice, thereby hindering his ability to carry out the functions entrusted to him by the Constitution. Subjecting immediate presidential advisers to congressional testimonial process would thus “diminish[] and frustrate[]” the purpose of the President’s own absolute immunity from such process—just as in *Gravel*,

President and his immediate advisers that the benefit of providing such testimony as an accommodation to a committee’s interests outweighs the potential for harassment and harm to Executive Branch confidentiality. Such testimony, moreover, may be provided on terms negotiated to focus and limit the scope of the questioning. Because voluntary testimony represents an exercise of presidential autonomy rather than legally required compliance with congressional will, it does not implicate the separation of powers in the same manner, or to anything like the same extent, as compelled testimony.

denying “Speech or Debate” immunity to legislative aides would have “diminished and frustrated” the protections granted to Members of Congress under that clause. *Gravel*, 408 U.S. at 617.

To be sure, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court rejected a claim of absolute immunity made by senior presidential advisers. But it did so in the context of a civil suit against those advisers for money damages. In our view, *Harlow*’s holding that presidential advisers are generally entitled to only qualified immunity in suits for money damages should not be extended to the context of congressional subpoenas for the testimony of immediate presidential advisers, because the separation of powers concerns that underlie the need for absolute immunity from congressional testimonial compulsion are not present to the same degree in civil lawsuits brought by third parties. *But see Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 100–02 (D.D.C. 2008) (reading *Harlow* to preclude absolute immunity for senior presidential advisers from compulsion to testify before Congress).

As explained above, subjecting an immediate presidential adviser to Congress’s subpoena power would threaten the President’s autonomy and his ability to receive sound and candid advice. Both of these prospective harms would raise acute concerns related to the separation of powers. A suit for damages brought by a private party does not raise comparable separation of powers concerns. It is true that such a suit involves a judicially supervised inquiry into the actions of presidential advisers, and that the threat of financial liability from such a suit may chill the conduct of those advisers. *See Harlow*, 457 U.S. at 814; *Miers*, 558 F. Supp. 2d at 101–02. But, in civil damages actions, the Judiciary acts as a disinterested arbiter of a private dispute, not as a party in interest to the very lawsuit it adjudicates. Indeed, the court is charged with impartially administering procedural rules designed to protect witnesses from irrelevant, argumentative, harassing, cumulative, and other problematic questions. *Cf., e.g.*, Fed. R. Civ. P. 26(b); Fed. R. Evid. 103. And mechanisms exist to eliminate unmeritorious claims. *See, e.g.*, Fed. R. Civ. P. 12(b), (c), (e), (f); Fed. R. Civ. P. 56. In contrast, in the congressional context (as noted earlier), the subpoenaing committee is both the interested party and the presiding authority, asking questions that further its own interests, and setting the rules for the proceeding and judging whether a witness has failed to comply with those rules. In part for these reasons, a con-

gressional proceeding threatens to subject presidential advisers to coercion and harassment, create a heightened impression of presidential subordination to Congress, and cause public disclosure of confidential presidential communications in a way that the careful development of evidence through the judicially monitored application of the Federal Rules of Civil Procedure does not.

Harlow also contains a discussion of *Gravel*, in which the Court rejected the defendants' argument that, as "alter egos" of the President, they should be entitled to absolute immunity from civil claims for damages, derivative of the absolute immunity afforded the President. But we do not think *Harlow's* discussion undermines the relevance of *Gravel* to the issue of immunity from congressional compulsion to testify. In *Harlow*, the Court conceded that the defendants' claim of absolute immunity based on *Gravel* was "not without force," but concluded that the argument would "sweep[] too far," because it would imply that Cabinet officials too should enjoy derivative absolute immunity, and the Court had already decided (in *Butz v. Economou*, 438 U.S. 478 (1978)) that Cabinet officials—"Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself"—are entitled to only qualified immunity. *Harlow*, 457 U.S. at 810.

Given the dissimilarities between civil suits for damages and compelled congressional testimony just discussed, it is doubtful that this discussion in *Harlow* (or the holding in *Butz*) bears much on the question of whether immediate presidential advisers have absolute immunity from congressional compulsion to testify. Further, even if it is appropriate to harmonize the immunity afforded Cabinet officials and presidential advisers in the context of suits for damages, the same is not true in the context of compelled congressional testimony. This is because the prospect of compelled congressional testimony by a President's immediate advisers would, as a general matter, be significantly more damaging to the separation of powers than the prospect of compelled testimony by a Cabinet official. As a department head, a Cabinet officer is confirmed by the Senate, and her authority and functions are generally established by statute. It may be a significant part of her regular duties to testify before Congress about the implementation of laws that Congress has passed. *Cf.* Rehnquist Memorandum at 8–9. By contrast, an immediate presidential adviser is appointed solely by the President, without Senate confirmation,

and his role is to advise and assist the President in the performance of the President's constitutionally assigned functions. The separation of powers concerns identified above—the threats to both the independence of the presidency and the President's ability to obtain candid and sound advice—are significantly more acute in the case of close personal advisers than high-ranking Executive Branch officials who do not function as the President's "alter egos." Cf. *Harlow*, 457 U.S. at 828 (Burger, C.J., dissenting) (faulting the Court majority for "fail[ing] to distinguish the role of a President or his 'elbow aides' from the role of Cabinet officers, who are department heads rather than 'alter egos,'" and stating that "[i]t would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers"); *id.* at 810 n.14 (majority opinion) (acknowledging Chief Justice Burger's argument and noting that "it is impossible to generalize about the role of 'offices' in an individual President's administration" because some individuals have served simultaneously in both presidential advisory and Cabinet positions).³

Similarly, in *United States v. Nixon*, the Supreme Court expressly distinguished the privilege issues arising in criminal cases from the privilege issues that would arise in the context of compelled congressional testimony. In *Nixon*, the Court held that the President could assert only a qualified, rather than an absolute, privilege to resist a subpoena for tape recordings and documents issued in the course of a criminal proceeding brought against certain third parties. 418 U.S. 683; *see also Sealed Case*, 121 F.3d at 753–57 (presidential communications privilege may be overcome by need for information in a grand jury investigation). But the Court made

³ The *Harlow* Court also observed that civil suits for money damages against presidential advisers "generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." 457 U.S. at 811 n.17. This observation is consistent with *Nixon v. Fitzgerald*, a case decided the same day as *Harlow*, in which the Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. 731, 749 (1982). This logic too suggests that the President's immediate advisers should be absolutely immune from congressional compulsion to testify, because (as we have explained) compelling immediate presidential advisers to testify before Congress would risk serious harm to the separation of powers that is closely related to the harm that would be caused by compelling the President himself to appear, and because absolute immunity for the President's immediate advisers is necessary to render the President's own immunity fully meaningful.

clear that it was “not . . . concerned with the balance between the President’s . . . confidentiality interest and congressional demands for information.” *Nixon*, 418 U.S. at 712 n.19; *see also id.* (“We address only the conflict between the President’s assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.”); *Sealed Case*, 121 F.3d at 753 (recognizing that the unique “constitutional considerations” in the “congressional-executive context” render limitations on executive privilege in the judicial context inapposite). Particularly in light of this explicit statement, we do not believe *Nixon* casts doubt on the President’s—and by extension his immediate advisers’—immunity from congressional compulsion to testify. As with liability for private suits for damages, requiring the President to comply with a third-party subpoena in a criminal case is very different from—and has very different separation of powers implications than—requiring him to comply with a congressional subpoena for testimony. This is so in at least two respects.

First, as the Court explained in *Cheney*, “the need for information in the criminal context is” particularly weighty “because ‘our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of [criminal justice] is that guilt not escape or innocence suffer.’” 542 U.S. at 384 (alterations in original) (internal quotation marks omitted) (quoting *United States v. Nixon*, 418 U.S. at 708–09). Outside the criminal context, “the need for information . . . does not share the [same] urgency or significance.” *Id.* Comparing the informational need of congressional committees with that of grand juries, for instance, the en banc Court of Appeals for the D.C. Circuit explained that

while factfinding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events. . . . In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.

Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc).

Second, the potentially harmful effect on the President's ability to carry out his duties and on the separation of powers is more serious in the context of subpoenaed congressional testimony than in the context of compulsory judicial process in a criminal case. As in the civil context, the criminal justice system imposes "various constraints, albeit imperfect, to filter out insubstantial legal claims" and minimize the damage to the President's ability to discharge his duties, such as prosecutorial discretion (with its attendant ethical constraints) and Federal Rule of Criminal Procedure 17. *Cheney*, 542 U.S. at 386. Congress is not subject to such constraints. And, of course, a criminal subpoena does not raise the prospect of the President (or one of his immediate advisers) being summoned at Congress's will to appear before it to respond at a hearing conducted entirely on the terms and in the manner Congress chooses.

Two lower-court cases also bear mention. In *Senate Select Committee*, the Court of Appeals for the D.C. Circuit addressed a President's obligation to comply with a congressional subpoena, and concluded that the President could not assert a generalized claim of executive privilege to absolutely immunize himself from turning over certain tape recordings of presidential conversations. 498 F.2d 725. Again, we do not believe this holding undermines our conclusion that the President and his immediate advisers are absolutely immune from congressional compulsion to testify. In our view, Congress summoning a President to appear before it would suggest, far more than Congress compelling a President to turn over evidence, an Executive subordinate to the Legislature. In addition, when Congress issues a subpoena for documents, the Executive Branch may take time to review the request and object to any demands that encroach on privileged areas. Any documents that are produced may be redacted where necessary. By contrast (and as already discussed), a witness testifying before Congress may, in the heat of the moment and under pressure, inadvertently reveal information that should remain confidential.

Finally, in *Committee on Judiciary v. Miers*, the District Court for the District of Columbia considered a question very similar to the one raised here, and concluded that a former Counsel to the President was not entitled to absolute immunity from congressional compulsion to testify. 558 F. Supp. 2d at 99. The court's analysis relied heavily on *Harlow*, *Harlow*'s discussion of *Gravel*, and *Nixon*. 558 F. Supp. 2d at 99–105. For the reasons set forth above, we believe those cases do not undermine the

Executive Branch’s longstanding position that the President’s immediate advisers are immune from congressional compulsion to testify. We therefore respectfully disagree with the *Miers* court’s analysis and conclusion, and adhere to the Executive Branch’s longstanding view that the President’s immediate advisers have absolute immunity from congressional compulsion to testify.

C.

Applying this longstanding view, we believe that Mr. Simas has such immunity. We understand that Mr. Simas spends the majority of his time advising or preparing advice for the President. He is a member of a group of the President’s closest advisers who regularly meet with the President, as often as several times a week. In addition, Mr. Simas frequently meets with the President alone and with other advisers, at the President’s or Mr. Simas’s request. *See* Rehnquist Memorandum at 7 (President’s “immediate advisers” are “those who customarily meet with the President on a regular or frequent basis”). Mr. Simas is responsible for advising the President on such matters as what policy issues warrant his attention. He also advises the President on how his policies are being received, and on how to shape policy to align it with the needs and desires of the American public. Mr. Simas thus plays a crucial role in deciding how best to formulate and communicate the President’s agenda across a wide range of policy issues. In these respects, Mr. Simas’s duties are comparable to those of other immediate advisers who we have previously recognized are entitled to absolute immunity from congressional compulsion to testify. *See, e.g.*, Letter for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007) (immunity of Karl Rove, adviser to President Bush); Bradbury Memorandum (immunity of Harriet Miers, Counsel to President Bush). Consistent with these precedents, we likewise conclude that Mr. Simas has absolute immunity from compulsion to testify before Congress about his service to the President in the Office of Political Strategy and Outreach.

II.

For the reasons discussed above, we believe that Mr. Simas is entitled to immunity that is “absolute and may not be overborne by [the Commit-

tee’s] competing interests.” *Assertion of Executive Privilege*, 23 Op. O.L.C. at 4. But even if Mr. Simas were only entitled to qualified immunity, which could be overcome by a sufficient showing of compelling need, we would conclude that the Committee had not made the requisite showing.

A.

No court has yet considered the standard that would be used to determine whether a congressional committee’s interests overrode an immediate presidential adviser’s immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute. But two decisions of the Court of Appeals for the D.C. Circuit suggest possible standards. In *Senate Select Committee*, in the context of a presidential assertion of executive privilege against a congressional subpoena for tape recordings of conversations between the President and his Counsel, the court held that the Committee could overcome the assertion only by showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of [its] functions.” 498 F.2d at 731; *see also McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to “obtain information in aid of the legislative function”). And in *Sealed Case*, the court held that “in order to overcome a claim of presidential privilege raised against a grand jury subpoena, it is necessary to specifically demonstrate why it is likely that the evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source.” 121 F.3d at 757. (To be “important” to an investigation, “the evidence sought must be directly relevant to issues that are expected to be central to the trial.” *Id.* at 754.)

In our view, *Senate Select Committee* would provide the more appropriate standard for assessing whether a congressional committee’s assertion of need had overcome an immediate presidential adviser’s qualified testimonial immunity. As explained above, judicial proceedings—including criminal proceedings—differ in fundamental ways from congressional hearings. Because the *Senate Select Committee* standard was articulated in the congressional oversight context, and because it seeks to preserve the President’s prerogatives while recognizing Congress’s legitimate interest in information crucial to its legislative function, we believe it would be an

appropriate standard for evaluating whether an immediate presidential adviser’s qualified testimonial immunity has been overcome.

In applying this standard, it would be important to bear in mind the “implicit constitutional mandate” that the coordinate branches of government “seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.” *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). Through this accommodation process, which has been followed for decades, the political branches strive to avoid the “constitutional confrontation” that erupts when the President must make an assertion of privilege, or when an immediate presidential adviser’s testimonial immunity must be invoked. *See Cheney*, 542 U.S. at 389–90 (quoting *United States v. Nixon*, 418 U.S. at 692); *see also id.* (“[C]onstitutional confrontation between the two branches should be avoided whenever possible.” (internal quotation marks omitted)). Accordingly, before an immediate presidential adviser’s compelled testimony could be deemed demonstrably critical to the responsible fulfillment of a congressional committee’s legislative function, a congressional committee would, at a minimum, need to demonstrate why information available to it from other sources was inadequate to meet its legitimate needs. *See Senate Select Committee*, 498 F.2d at 732–33 (noting that, in light of the President’s public release of partially redacted transcripts of the subpoenaed tapes, the court had asked the Select Committee to state “in what specific respects the [publicly available] transcripts . . . are deficient in meeting [its] need,” and then finding that the Committee “points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes”).

B.

The Committee has not shown that Mr. Simas’s testimony is demonstrably critical to the responsible fulfillment of its legislative function. The Committee’s investigation began with a broad request for “all documents and communications, including e-mails, related or referring to the Office of Political Strategy and Outreach or the reopening of the Office of Political Affairs,” along with a request that White House officials brief Committee staff. Letter for Denis McDonough, White House Chief of Staff, from Darrell E. Issa, Chairman, Committee on Oversight and

Government Reform, House of Representatives at 4 (Mar. 18, 2014). Over the course of letters exchanged during the next three months, the White House explained that the Office engages only in activities that are permissible under the Hatch Act, and that the White House has taken steps to ensure that OPSO staff are trained in Hatch Act compliance. In response to those letters, the Committee reiterated its broad request for documents, but did not articulate particular unanswered questions or identify incidents in which OPSO staff may have violated the Hatch Act or related statutes. *See* Letter for Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from Kathryn H. Ruemmler, Counsel to the President (Mar. 26, 2014); Letter for Denis McDonough, White House Chief of Staff, from Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 & n.5 (May 27, 2014); Letter for Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President at 1–2 (June 13, 2014).

On July 3, 2014, the Committee requested Mr. Simas’s testimony at a public hearing to understand “whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act,” and to understand “the role and function of the White House Office of Political Strategy and Outreach.” Invitation Letter. The Committee did not, however, identify any specific unanswered questions that Mr. Simas’s testimony was necessary to answer. The White House responded with a letter providing additional information about White House efforts to ensure that OPSO was operating in a manner consistent with applicable statutes, and explaining that the activities cited by the Committee did not violate those statutes. *See* Letter for Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President (July 10, 2014). At that time, the White House also provided various documents reflecting its efforts to ensure that OPSO staff comply with relevant laws, including materials on the Hatch Act used in a mandatory training for all staff assigned to OPSO, e-mail correspondence demonstrating that OPSO staff were directed to read critical reports issued by the Office of Special Counsel and the Committee regarding the activities of the previous

Administration's Office of Political Affairs, documentation of a meeting between lawyers from the White House Counsel's Office and the Office of Special Counsel concerning compliance with the Hatch Act, and a memorandum sent to all White House staff from the President's Counsel reminding them of the law governing political activity by federal employees. *See id.* at 3. Finally, the White House Counsel's Office offered to brief the Committee to address any outstanding questions regarding OPSO's activities. *See id.*

After receiving these responses, the Committee, on Friday, July 11, 2014, subpoenaed Mr. Simas to testify at a public hearing on Wednesday, July 16. At the same time, the Committee indicated that it would accept the White House Counsel's Office's offer to brief the Committee, and would determine after the briefing whether to withdraw the subpoena for Mr. Simas's testimony. *See* Letter for W. Neil Eggleston, Counsel to the President, from Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 11, 2014). The White House provided that briefing on Tuesday, July 15, the day before the hearing was to occur. Following the briefing, the Committee indicated that Mr. Simas's testimony remained necessary. It explained that, during the briefing, White House staff "declined to discuss compliance with the Committee's document requests or even describe the process and identify relevant officials involved in the decision to reopen the White House political office." Letter for W. Neil Eggleston, Counsel to the President, from Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 (July 15, 2014).

The Committee has not adequately explained why, despite the information it has already received concerning OPSO's activities and the White House's efforts to ensure compliance with relevant statutes, it requires Mr. Simas's public testimony in order to satisfy the legitimate aims of its oversight investigation. Although the Committee has now indicated that it needs additional information on two specific topics, it has not explained why it must obtain that information from Mr. Simas at a Committee hearing. And to the extent that the Committee has other "outstanding questions for Mr. Simas," *id.* at 2, the Committee has not identified them, let alone explained why he must answer them at a public hearing. At this point, it is not evident that further efforts at accommodation would be futile, and hence that compelling an immediate presidential

adviser to testify before Congress is a justifiable next step. Because the Committee has not explained why (and it is not otherwise clear that) Mr. Simas’s live testimony is “demonstrably critical” to the responsible fulfillment of the Committee’s functions, we conclude that the Committee has not met the standard that would apply for overcoming Mr. Simas’s immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute.⁴

III.

For the foregoing reasons, we conclude that Mr. Simas is immune from the House Committee on Oversight and Government Reform’s subpoena to compel him to testify about matters concerning his service to the President in the Office of Political Strategy and Outreach.

KARL R. THOMPSON
Acting Assistant Attorney General
Office of Legal Counsel

⁴ Even if it were appropriate to apply the *Sealed Case* standard for overcoming qualified executive privilege in the context of congressional testimonial immunity, Mr. Simas’s testimonial immunity would not have been overcome here. For the reasons set forth in the text, we do not believe that the Committee could show that the testimony it demands from Mr. Simas is directly relevant to issues that are central to the Committee’s investigation *and* that the information that would be obtained through that testimony is not available from another source.

EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement

Based on principles of sovereign immunity, the Equal Employment Opportunity Commission lacks authority to order the Social Security Administration to pay a monetary award as a remedy for breach of a settlement agreement entered to resolve a dispute under Title VII of the Civil Rights Act of 1964.

August 13, 2014

MEMORANDUM OPINION FOR THE GENERAL COUNSEL SOCIAL SECURITY ADMINISTRATION

This memorandum responds to your letter of March 28, 2013, requesting our views on the authority of the Equal Employment Opportunity Commission (“EEOC”) to order the Social Security Administration (“SSA”) to pay a monetary award as a remedy for breach of a settlement agreement entered to resolve a dispute under Title VII of the Civil Rights Act of 1964.¹ We conclude, based on principles of sovereign immunity, that EEOC lacks authority to order SSA to pay such a monetary award for breach of the settlement agreement.

I.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. 42

¹ Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel (“OLC”), from David Black, General Counsel, SSA, *Re: Equal Employment Opportunity Commission’s Monetary Award Authority* (Mar. 28, 2013). In considering SSA’s request, we received additional views from that agency. *See* E-mail for OLC from Andrew Maunz, Office of the General Counsel, SSA, *Re: Additional Questions* (June 14, 2013) (“Maunz E-mail”); E-mail for OLC from Jay Ortis, Director, Labor and Employment Division, Office of General Law, SSA, *Re: Fwd: Solicitation of Views* (July 17, 2013, 9:58 AM). We also obtained the views of EEOC and the Civil Division of the Department of Justice. *See* Letter for John E. Bies, Deputy Assistant Attorney General, OLC, from Peggy R. Mastroianni, Legal Counsel, EEOC, *Re: Social Security Administration Request for OLC Opinion* (July 2, 2013); E-mail for OLC from Gary Hozempa, Office of Legal Counsel, EEOC, *Re: EEOC Breach of Settlement Decisions re Social Security Administration* (July 23, 2013, 2:16 PM); E-mail for OLC from Kerry A. Bollerman, Civil Division, Department of Justice, *Re: Solicitation of Views* (May 14, 2013, 5:20 PM).

U.S.C. § 2000e-2(a) (2012). A provision of Title VII extends this prohibition to employment by the federal government. Title VII's federal-sector provision states that "[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.* § 2000e-16(a). Congress authorized EEOC "to enforce the provisions of [section 2000e-16(a)] through appropriate remedies, including reinstatement or hiring of employees with or without back pay." *Id.* § 2000e-16(b). In addition, Congress authorized EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under [section 2000e-16]." *Id.*

Title VII and EEOC regulations set out a procedure for the filing, processing, and adjudication of complaints of unlawful discrimination in federal employment. The regulations, however, reflect a preference for voluntary settlement of discrimination complaints, *see* 29 C.F.R. § 1614.603 (2013), and treat settlement agreements as binding on the parties, *id.* § 1614.504(a). If a complainant believes that the respondent agency has failed to comply with the agreement, the regulations allow the complainant to "request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased." *Id.* If EEOC determines that the agency is not in compliance with the settlement agreement, the regulations provide that EEOC may "order . . . compliance with the . . . settlement agreement, or, alternatively, . . . order that the complaint be reinstated for further processing from the point processing ceased." *Id.* § 1614.504(c). The regulations further provide that "allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints . . . rather than [through actions to enforce the settlement]." *Id.*

In 1995, a group of African-American male employees working in the Baltimore, Maryland headquarters of SSA filed a class complaint alleging that the agency had discriminated against them with respect to promotions, awards, bonuses, and other personnel decisions. EEOC certified the class in 1998. The parties subsequently decided to settle their dispute and entered into an agreement under which the class members received monetary and non-monetary relief in exchange for dismissing their complaint.

See Settlement Agreement, *Burden v. Barnhart*, EEOC Case No. 120-99-6378X (Jan. 11, 2002) (“Settlement Agreement”). The Settlement Agreement made clear that it did not “represent an admission of liability by [SSA].” *Id.* at 20.

Pertinent here, Provision III.D of the Settlement Agreement, which appears under the heading “Non-Monetary Relief,” reads in relevant part:

[SSA] agrees that its policies and practices for granting performance awards and Quality Step Increases will be fair and equitable and consistent with merit principles. [SSA] agrees that it will correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles. At [SSA’s] discretion, an expert may be retained to recommend ways to assess these policies and practices and to ensure compliance with relevant statutes, regulations, EEO principles, and applicable collective bargaining agreements in [SSA’s] awards process. Any corrections [SSA] implements will be made after providing a 30-day notice and comment period to the Oversight Committee. [SSA] will provide a report to the Administrative Judge within 6 months of the Effective Date of this agreement of the actions it has taken to comply with this paragraph.

Id. at 10. The Settlement Agreement provided that the Administrative Judge (“AJ”) would “retain jurisdiction over this matter for a period of 4 years” to monitor compliance with the agreement. *Id.* at 6.

In 2005, the class contended that SSA had not fulfilled its obligation to correct “misapplications of its policies for granting performance awards and Quality Step Increases.” The class accordingly requested that the agency provide a “corrective action plan.” Letter for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Legal Counsel, EEOC, *Re: Social Security Administration Request for OLC Opinion* at 2 (July 2, 2013) (“EEOC Letter”). SSA responded that the expert analysis on which the class premised its request was flawed, and promised to hire another expert. *Id.*

SSA delivered a second expert report to the class in 2006. That report showed underrepresentation of African-American males in the distribution of Quality Step Increases (“QSIs”), cash awards, and honor awards in

certain SSA offices. In a September 2006 letter, SSA set forth a plan to address the areas of concern identified in the report and to prevent future disparities.

The class subsequently requested that the AJ find that SSA was not in compliance with the Settlement Agreement, arguing that the agency had not offered a plan to correct all of the disparities revealed in the second expert report. *See Jefferson v. Astrue*, Hearing No. 120-99-6378X, slip op. at 11 (Apr. 28, 2011) (“OFO Decision”). The judge denied the motion as moot because SSA had provided the statistical information the class demanded. *Id.* at 12.

The complainants appealed the AJ’s decision to EEOC’s Office of Federal Operations (“OFO”). In their appeal, the class members requested specific implementation of Provision III.D, which, they argued, included retroactive awards and QSIs for class members who had been unfairly denied those benefits. Class Brief in Support of Appeal at 13–14, *Burden v. Astrue*, EEOC Case No. 120-99-6378X (May 20, 2008) (“Class Brief in Support of Appeal”). SSA, on the other hand, took the position that implementation of Provision III.D did not include retroactive awards and QSIs. The Settlement Agreement, the agency contended, did not authorize prospective relief for any alleged breach; while SSA had agreed to ensure that its policies for awarding promotions and other honors would be fair and equitable and to correct any misapplications of its policies, it had not agreed that the distribution of such benefits would be mathematically exact, or that the class members would be entitled to relief in the event they disagreed with the distribution of awards. Agency’s Response to Class’s Brief on Appeal at 8–10, *Burden v. Astrue*, EEOC Case No. 120-99-6378X (May 20, 2008) (“Agency’s Response to Class’s Brief on Appeal”).

OFO, acting on behalf of the Commission, reversed the AJ’s decision. Relying on the 2006 expert report, OFO found that “the Agency did not ensure that its policies and practices for granting performance awards and QSIs were fair and equitable between April 1, 2003 and September 30, 2005.” OFO Decision at 18. OFO further found that SSA had failed to correct misapplications of its policies to ensure fair and equitable distribution of awards. OFO explained that there was no evidence to show that the policies and procedures described in SSA’s September 2006 letter had been implemented or that the agency had effectively corrected

the misapplication of its policy for granting performance awards and QSIs. *See id.* at 19.

Based on these conclusions, OFO determined that the complaining class members were “entitled to specific enforcement of the class settlement agreement.” *Id.* OFO then ordered that “all African-American males working for the Agency’s Headquarters Office in Baltimore, Maryland from April 1, 2003, through September 30, 2005, [be] presumptively entitled to the average honor award, monetary award, and QSI received during the relevant time.” *Id.* OFO added that “the presumption of entitlement to the average honor award, monetary award, and QSI can be rebutted if the Agency can establish by clear and convincing evidence that an employee is not entitled to this relief.” *Id.* OFO remanded the case to an administrative judge to oversee the processing of relief, including calculating the total and individual amounts due. *Id.* at 20.

SSA sought reconsideration of the decision, arguing that the relief awarded exceeded the scope of EEOC’s authority. OFO denied the motion. *Jefferson v. Astrue*, Hearing No. 120-99-6378X (Dec. 18, 2012). SSA then submitted its request for the views of this Office on whether EEOC had authority to order the agency to pay a monetary award for breach of a settlement agreement, contending that the absence of an applicable waiver of sovereign immunity precludes EEOC from ordering SSA to pay such a monetary award.

II.

A.

The question whether EEOC has authority to issue a monetary award to remedy a breach of a settlement agreement by a federal agency turns on the doctrine of sovereign immunity, which bars suit against the federal government except to the extent it has consented. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Consent to suit must be provided by Congress explicitly, in clear statutory language; ambiguous statements will not suffice. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also United States v. Shaw*, 309 U.S. 495, 500–01 (1940) (explaining that “without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction”). Waivers of sovereign

immunity are “strictly construed, in terms of [their] scope, in favor of the sovereign.” *Lane*, 518 U.S. at 192. Waivers for one type of relief, such as injunctive relief, do not thereby waive immunity for other forms of relief, such as money damages. *See id.* at 195–96; *United States v. Nordic Vill.*, 503 U.S. 30, 34–37 (1992) (relying on sovereign immunity principles to construe statutory waiver of sovereign immunity to permit equitable but not monetary claims); *cf. Library of Congress v. Shaw*, 478 U.S. 310, 317–19 (1986) (statutory waiver of immunity from attorney’s fees does not thereby waive immunity from interest on those fees). Rather, “[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.” *Lane*, 518 U.S. at 192. We have previously explained that a statutory provision “does not waive sovereign immunity for monetary claims” where the provision can plausibly be read in a manner that would not authorize monetary relief. *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24, 26–27 (2003) (“Navy Opinion”) (citing *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 180 (1994)). The rule that suit is permitted only on the terms Congress has authorized extends as well to matters of forum; a waiver of immunity for suits in one forum does not necessarily constitute a waiver in all forums. *See Shaw*, 309 U.S. at 501 (“Even when suits [against the United States] are authorized[,] they must be brought only in designated courts.”).

As we observed in a prior opinion, “[a]lthough most of the sovereign immunity case law arises in the context of suits before federal district courts, these principles apply with equal force to agency adjudications.” *Navy Opinion*, 27 Op. O.L.C. at 27. “In our view, there can be no doubt that normal sovereign immunity presumptions apply” to the question whether an agency can itself grant a particular form of relief against the government. *Id.* at 28.²

² In *West v. Gibson*, 527 U.S. 212 (1999), the Supreme Court suggested in dicta that “ordinary sovereign immunity presumptions” may not apply to the question whether an agency may grant relief against the government when Congress has unambiguously waived sovereign immunity with respect to that form of relief for claims brought in district court. *Id.* at 217. In our 2003 opinion, we disagreed with that suggestion,

In 2003, we considered whether the statute conferring authority on EEOC to enforce Title VII’s federal-sector provision through “appropriate remedies,” 42 U.S.C. § 2000e-16(b), supplied the requisite waiver of sovereign immunity to support an order of attorney’s fees against an agency as a sanction for failure to follow an administrative judge’s orders. We concluded that it did not. We observed that section 2000e-16(b) waives federal agencies’ immunity from suits seeking remedies for unlawful discrimination, but “[a]ttorney’s fees imposed as a sanction for failure to comply with AJ orders relating to the adjudicatory process . . . are not a remedy for any act of discrimination.” Navy Opinion, 27 Op. O.L.C. at 29. We further explained that “neither section 2000e-16(b), nor any other statute, contains a provision that even pertains to violations of AJ orders, much less provides an explicit waiver of the government’s immunity to monetary sanctions for violations of such orders.” *Id.* Finally, we rejected EEOC’s argument that the Federal Rules of Civil Procedure supplied the necessary waiver. “[E]ven if Congress had waived sovereign immunity for violations of the Federal Rules of Civil Procedure in federal court,” we explained, “it would not follow that it has also waived immunity for arguably analogous (though formally distinct) violations before an entirely different body where these rules do not apply.” *Id.* at 31. “Indeed, . . . the doctrine of sovereign immunity requires the exact opposite presumption.” *Id.*

B.

Within this framework, we consider EEOC’s authority to award the monetary relief at issue in this case. Our 2003 opinion, SSA argues, compels the conclusion that EEOC may not issue such an award absent an express waiver of sovereign immunity. No such waiver exists, the agency urges, because Title VII waives the government’s immunity only for damages awards upon a finding of unlawful discrimination, and the Settlement Agreement included no admission of liability. Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from David Black, General Counsel, SSA, *Re: Equal Employment Oppor-*

observing that “[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums.” Navy Opinion, 27 Op. O.L.C. at 27–28 (quoting *West*, 527 U.S. at 226 (Kennedy, J., dissenting)).

tunity Commission's Monetary Award Authority at 3 (Mar. 28, 2013) (“SSA Memorandum”).

EEOC responds that our 2003 opinion is inapposite because the Commission did not impose sanctions on SSA for failing to comply with an AJ’s order. Rather, “the relief awarded . . . pertains only to SSA’s breach of an EEOC settlement agreement.” EEOC Letter at 10. In the past, EEOC observes, we have held that “an agency can award through a settlement agreement any relief which a court could order if a finding of prohibited discrimination were made.” *Id.* (citing *Proposed Settlement of Diamond v. Department of Health and Human Services*, 22 Op. O.L.C. 257, 262 (1998) (“Diamond Opinion”)); *see also Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 53 (1994) (“USDA Opinion”). In EEOC’s view, it follows that, “when an agency breaches an EEO settlement, EEOC can order as relief whatever a court could award upon a finding of a breach.” EEOC Letter at 10. Hence, the Commission asserts, if a court may order monetary relief upon finding that an agency has breached a Title VII settlement, so too can EEOC.

EEOC does not appear to dispute that the waiver of sovereign immunity in Title VII applies only to claims of unlawful discrimination and does not extend to monetary claims against the government for breach of a Title VII settlement. *See* EEOC Letter at 5 & n.2. Rather, EEOC argues that courts may award money damages for breach of a settlement agreement under the Tucker Act, which waives the government’s sovereign immunity with respect to claims “founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1) (2012). EEOC notes that in *Holmes v. United States*, 657 F.3d 1303 (Fed. Cir. 2011), the Federal Circuit determined that the Court of Federal Claims may exercise jurisdiction under the Tucker Act over suits alleging breach of a Title VII settlement, provided that the agreement itself contemplates money damages in the event of a breach. *Id.* at 1311–15. The agreement at issue in this matter, EEOC argues, contemplates money damages in the manner *Holmes* requires. Therefore, in EEOC’s view, the Tucker Act’s waiver applies, and sovereign immunity poses no bar to the Commission’s order of the monetary relief at issue in this matter.

EEOC further contends that “the fact that the waiver [of sovereign immunity]” is found in the Tucker Act rather than Title VII “is not

significant vis-à-vis EEOC’s authority to award back pay.” EEOC Letter at 11. In *West v. Gibson*, 527 U.S. 212 (1999), EEOC notes, the Supreme Court held that EEOC may award compensatory damages as an “appropriate remed[y]” for a violation of Title VII, 42 U.S.C. § 2000e-16(b), even though the provision authorizing that form of relief is found in a 1991 Title VII amendment that expanded the remedial authority of courts without explicitly referring to EEOC proceedings. 527 U.S. at 217. Similarly, here, EEOC argues that the Commission has authority to award money damages for breach of a Title VII settlement agreement because of the waiver of immunity contained in the Tucker Act. A contrary conclusion, EEOC contends, would “strip EEOC’s authority to enforce Title VII against agencies through appropriate remedies, and rob it of the ability to ensure that an agency complies with its Title VII settlement promises.” EEOC Letter at 11 (internal quotation marks omitted).

III.

A.

We are not persuaded by EEOC’s arguments. EEOC’s reliance on the Tucker Act is misplaced because the Tucker Act confers jurisdiction only on the Court of Federal Claims to hear contractual claims against the United States exceeding \$10,000. *See* 28 U.S.C. § 1491(a)(1) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”).³ That limited waiver of sovereign immunity does not authorize EEOC to provide a forum for such disputes. *See Shaw*, 309 U.S. at 501 (“Even when suits [against the United States] are authorized[,] they must be brought only in designated courts.”); *cf. Minnesota v. United States*, 305 U.S. 382, 388

³ Section 1346 of title 28, known as the “Little Tucker Act,” confers jurisdiction on United States district courts for claims founded “upon any express or implied contract with the United States” that do not exceed \$10,000.

(1939) (“[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.”).

1.

In *Holmes*, on which EEOC places principal reliance, the Federal Circuit determined that Title VII posed no bar to the Court of Federal Claims’ exercise of jurisdiction under the Tucker Act to adjudicate a claim that an agency breached a Title VII settlement agreement, notwithstanding Title VII’s comprehensive remedial scheme and its conferral of jurisdiction on federal district courts. 657 F.3d at 1312–13.⁴ In so holding, the court relied on the Supreme Court’s decision in *Kokkonen v. Guardian Life Insurance*, 511 U.S. 375 (1994), which held that a court with jurisdiction over an underlying dispute does not necessarily also have jurisdiction over claims that parties have breached an agreement settling that dispute. *Id.* at 381. Rather, the Court ruled, an independent basis of jurisdiction is generally needed for a federal court to adjudicate such breach of settlement claims. *Id.*; see *Holmes*, 657 F.3d at 1312–13. Following *Kokkonen*, the Federal Circuit explained that, “although the [settlement agreement] arose out of Title VII litigation, [the plaintiff’s] suit for breach of contract is just that: a suit to enforce a contract with the government.” 657 F.3d at 1312. The court therefore held that the case was properly heard in the Court of Federal Claims under the Tucker Act, rather than in the federal district courts authorized to hear claims under Title VII.

Conversely, federal courts with jurisdiction over Title VII claims have held that they may *not* adjudicate claims for damages resulting from a federal agency’s breach of a Title VII settlement agreement. See *Taylor v. Geithner*, 703 F.3d 328, 334 (6th Cir. 2013); see also *Munoz v. Mabus*, 630 F.3d 856, 861–64 (9th Cir. 2010); *Frahm v. United States*, 492 F.3d 258, 262–63 (4th Cir. 2007); *Lindstrom v. United States*, 510 F.3d 1191,

⁴ Neither party challenges this aspect of the Federal Circuit’s decision; we therefore assume that it is correct for purposes of this opinion. As it is irrelevant to our resolution of the question presented, we likewise take no position on the parties’ dispute over whether the contract at issue contemplates money damages. Compare EEOC Letter at 6–8 with Maunz E-mail, *supra* note 1.

1194–96 (10th Cir. 2007). Those courts have explained that the waiver of sovereign immunity in Title VII, which authorizes suits against federal agencies for unlawful discrimination, “does not expressly extend to monetary claims against the government for breach of a settlement agreement that resolves a Title VII dispute.” *Frahm*, 492 F.3d at 262. And while the waiver of sovereign immunity in the Tucker Act does extend to such claims, “invoking the Tucker Act is a non sequitur” in federal district court, “because where . . . a suit involves a claim for money damages over \$10,000, the Act waives the government’s immunity only in the Court of Federal Claims.” *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014); *see id.* at 1056 (“[T]he Tucker Act does not contain a waiver of sovereign immunity *in the district court* for breach of a Title VII settlement agreement seeking damages in excess of \$10,000.” (emphasis added)); *accord Munoz*, 630 F.3d at 864 (“Because [the plaintiff’s] breach of settlement agreement claim is essentially a contract action against the federal government whose resolution requires no interpretation of Title VII itself, his claim cannot seek jurisdictional refuge in Title VII and belongs, if anywhere, in the Court of Federal Claims.”).⁵

This case law highlights why, even if we were to accept EEOC’s position that it “can order as relief whatever a court could award upon a finding of a breach,” EEOC Letter at 10, that standard does not help its case. The waiver of sovereign immunity in the Tucker Act is limited to cases heard in the Court of Federal Claims. It does not waive the federal government’s immunity, either in federal district court or in EEOC proceedings, for claims arising from breach of a settlement agreement. As explained above, waivers of sovereign immunity are to be “strictly construed, in terms of [their] scope, in favor of the sovereign.” *Lane*, 518 U.S. at 192. Consequently, the Tucker Act provides no authority for EEOC to award money damages to remedy a federal agency’s breach of a Title VII settlement.

⁵ Notably, “unlike the district courts, . . . the [Court of Federal Claims] has no general power to provide equitable relief against the Government or its officers.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 313 (2011). And the Federal Circuit has found that “[e]xcept in strictly limited circumstances . . . there is no provision in the Tucker Act authorizing the Court of Federal Claims to order equitable relief.” *Massie v. United States*, 226 F.3d 1318, 1321 (2000).

2.

The Supreme Court’s decision in *West* does not compel a contrary result. In that case, the Supreme Court construed the provision granting EEOC authority to enforce Title VII “through appropriate remedies,” 42 U.S.C. § 2000e-16(b), as including the power to order remedies Congress deemed appropriate for enforcing Title VII’s substantive provisions in a later Title VII amendment. 527 U.S. at 218. Because Congress determined that compensatory damages are an appropriate remedy for victims of discrimination by federal agencies in the Civil Rights Act of 1991, the Court concluded, section 2000e-16(b) authorizes EEOC to afford such relief in its enforcement proceedings. *Id.* at 218–19.

West provides no support for construing the limited waiver of sovereign immunity in the Tucker Act to apply to breach-of-settlement proceedings before EEOC. Unlike the Civil Rights Act of 1991, which amended Title VII itself, the Tucker Act is an unrelated statute that predated Title VII by several decades and as such says nothing about the remedies Congress considered suitable to effectuate the aims of Title VII. *Cf. id.* at 218 (“[I]n context the word ‘appropriate’ most naturally refers to forms of relief that *Title VII itself authorizes.*” (emphasis added)). More fundamentally, this matter does not concern the scope of EEOC’s authority to award “appropriate remedies” for workplace discrimination, but its authority to award remedies for a federal agency’s breach of a settlement agreement. *See Frahm*, 492 F.3d at 262–63 (section 2000e-16(b) waives the government’s sovereign immunity with respect to substantive Title VII claims but “does not expressly extend to monetary claims against the government for breach of a settlement agreement that resolves a Title VII dispute”). The Court’s interpretation of the term “appropriate remedies” as it appears in Title VII provides no basis for reading the limited waiver of sovereign immunity in the Tucker Act to authorize EEOC to award monetary relief for a federal agency’s breach of a Title VII settlement agreement.

B.

In addition to considering EEOC’s argument that the Tucker Act allows it to order a compensatory remedy for breach of a settlement agreement, we have also considered whether EEOC’s award of monetary relief is authorized by Title VII itself insofar as the award constitutes an order to

perform on promises SSA made in the Settlement Agreement—in particular, promises to “distribute performance awards on a fair and equitable basis, consistent with merit principles” and “to take corrective action if it did not keep this promise.” See EEOC Letter at 12 (“SSA promised to distribute performance awards on a fair and equitable basis, consistent with merit principles. It also promised to take corrective action if it did not keep this promise. OFO found that SSA breached these promises. As relief, EEOC ordered SSA to take corrective action, the very corrective action which SSA promised to, but did not, take.”).

As EEOC notes, this Office has repeatedly recognized that Title VII’s waiver of sovereign immunity means that an agency may settle an administrative Title VII complaint by awarding monetary relief to a complainant, even without admitting liability for the alleged discrimination. USDA Opinion, 18 Op. O.L.C. at 52–54; see Diamond Opinion, 22 Op. O.L.C. at 261 & n.6 (quoting *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). As long as the intended relief does not exceed the scope of remedies available in court, the government’s consent to be sued for violations of Title VII ordinarily permits voluntary settlement of a complaint alleging such violations. See Diamond Opinion, 22 Op. O.L.C. at 261–62 & n.6; see also USDA Opinion, 18 Op. O.L.C. at 53 (explaining that, under appropriations law, “agencies have authority to provide for monetary relief in a voluntary settlement of a discrimination claim only if the agency would be subject to such relief in a court action regarding such discrimination brought by the aggrieved person”).

It might follow from this principle that EEOC has authority in certain circumstances to enforce a settlement agreement by ordering an agency to perform on its promises, even if those promises include a commitment to pay money to a complainant. If, for example, the agency had settled a Title VII claim by promising to provide a particular amount of back pay or other monetary relief and the complainant requested specific performance of that promise, EEOC might be able to order that relief without violating the doctrine of sovereign immunity. In such a circumstance, one could argue that the dispute is not, in essence, a contract dispute with the federal government, but rather a continuation of the same Title VII proceeding that gave rise to the settlement itself. Consequently, the same waiver of sovereign immunity that permitted the agency to resolve

the Title VII complaint by voluntary settlement might also permit EEOC to compel the agency to make good on its promise.⁶

But whatever effect the waiver of sovereign immunity in Title VII might have on EEOC's authority to award monetary relief in other circumstances, we do not believe it authorizes the monetary award at issue here. The award at issue was not an order to perform on an agreement that provided back pay or other specific monetary relief to settle an underlying Title VII claim alleging past misconduct. Rather, it was an order to perform on a promise to take corrective action in the future to remedy any failure to distribute performance awards and QSIs on a "fair and equitable basis." EEOC Letter at 12. Based on two principal considerations, we conclude that, for purposes of the sovereign immunity analysis, the dispute at issue here cannot fairly be characterized as merely a continuation of the same Title VII proceeding that gave rise to the settlement itself. Accordingly, the remedy EEOC awarded is not authorized by the waiver of sovereign immunity that allowed SSA to settle the class complaint and provide relief to the claimants in the first place.

The nature of the present dispute over the meaning and application of Provision III.D illustrates that the dispute was not merely a continuation of the Title VII claim that gave rise to the settlement, but rather a distinct proceeding beyond the scope of the waiver of sovereign immunity upon which the settlement rested. First, the present dispute does not concern a specific settlement term that imposes clear obligations on the SSA—such as an agreement to provide a particular sum in back pay—but instead concerns SSA's alleged failure to comply with a non-specific prospective promise to "correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles." Settlement Agreement at 10. As SSA points out, in agreeing to this provision, it neither expressly consented to a particular numerical distribution of awards and QSIs, nor expressly agreed that the class members would be entitled to monetary relief in the event that they were dissatisfied with the number of awards and promotions received. Agency's Response to

⁶ Editor's Note: The text of this footnote has been redacted. It includes privileged information and addresses an issue not necessary for the discussion here.

Class’s Brief on Appeal at 8–10. Provision III.D, SSA observes, “contains no discussion of a monetary component and neither memorializes nor evidences a meeting of the minds between the parties that all class members could receive the average monetary award, or any monetary award for that matter, for the oversight period.” SSA Memorandum at 3–4. Rather, in SSA’s view, the disputed settlement term simply required compliance with merit principles and active oversight of its policies for issuing promotions and performance awards. *See* Maunz E-mail, *supra* note 1 (“[S]pecific enforcement [of Provision III.D] could include an ordered review of the agency’s policies, perhaps even by an expert.”). As a consequence, the proceedings regarding the enforcement dispute at issue required not only extensive debate over the meaning of SSA’s promise to distribute awards and QSIs on a “fair and equitable basis” and to “correct any misapplications of its policies,” but also extensive fact-finding regarding SSA’s post-settlement conduct to determine whether the relevant standards had been met. *See* OFO Decision at 16–19.⁷

⁷ Although OFO characterized its order as “specific enforcement” of the Settlement Agreement, we note that OFO’s order appears more akin to a legal remedy for breach than the equitable remedy of specific performance as that term is generally understood in contract law. The Supreme Court has observed that specific performance requires an agreement that is “certain, fair, and just in all its parts.” *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U.S. 315, 325 (1893). “The contract which is sought to be specifically executed ought not only to be proved,” the Court explained, “but the terms of it should be so precise as that neither party could reasonably misunderstand them.” *Id.* at 326 (quoting *Colson v. Thompson*, 15 U.S. (2 Wheat.) 336, 341 (1817)). Accordingly, “[i]f the contract be vague or uncertain . . . a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.” *Id.* (quoting *Colson*, 15 U.S. (2 Wheat.) at 341); *see also* Restatement (Second) of Contracts § 368 (1981) (“Specific performance . . . will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.”).

In determining that the class members were presumptively “entitled to the average honor award, monetary award, and QSI” (a number unknown at the time of decision), we do not believe that OFO enforced a term “so precise as that neither party could reasonably misunderstand [it].” *Dalzell*, 149 U.S. at 326 (quoting *Colson*, 15 U.S. (2 Wheat.) at 341); *cf. TAS Distrib. Co., Inc. v. Cummins Engine Co.*, 491 F.3d 625, 637 (7th Cir. 2007) (rejecting claim that district court abused its discretion in refusing to order defendant to specifically perform on its “obligation to make ‘all reasonable efforts’ to manufacture and market the subject technology”).

Second, the present dispute does not concern monetary remedies for the alleged Title VII violations underlying the settlement, but monetary remedies for failure to comply with a settlement term governing SSA’s *future* conduct, i.e., SSA’s failure to distribute performance awards and QSIs on a “fair and equitable” basis after the settlement was reached. That is apparent from the extensive fact-finding required to determine SSA’s compliance with Provision III.D—if the monetary remedy awarded to the class members in the present dispute rested on the conduct that gave rise to their initial Title VII claims, there would have been no need for such additional fact-finding because those claims were resolved by the Settlement Agreement. It is, at a minimum, questionable whether the waiver of sovereign immunity in Title VII that permitted SSA to enter the Settlement Agreement in the first place would also permit SSA to promise to provide a monetary remedy in the event it failed to abide by a promise to refrain from particular conduct in the future. We have previously observed that, consistent with limitations on agencies’ ability to compromise or abandon claims made against the United States in litigation, “settlement of a discrimination claim should be based on the agency’s good faith assessment of the litigation risk that a court might find complainants entitled to relief” based on the claims raised in their complaint. *Diamond Opinion*, 22 Op. O.L.C. at 262. An agreement to provide monetary relief in the event of future noncompliance with a term of the settlement agreement would arguably be an impermissible agreement to compensate complainants for injuries not alleged in their complaint. Such conduct would not be at issue if the complainants were to proceed to court on their original claim. As such, an agreement to provide monetary compensation for future noncompliance would raise significant questions about whether the agency had acted in a manner consistent with its obligation to provide settlement remedies based on a “good faith assessment” of the complainants’ likely recovery from the pending complaint.⁸

⁸ We do not suggest that an agency is precluded from including in a settlement its promise not to discriminate in the future. Title VII explicitly authorizes courts to enjoin agencies from engaging in unlawful employment practices. 42 U.S.C. § 2000e-5(g)(1). And we have recognized that “an appropriate remedy under Title VII . . . may include relief, including injunctive relief, that will make the plaintiff whole, prevent future violations of the act, and prevent retaliation against complainants.” *Diamond Opinion*, 22 Op. O.L.C. at 263. Because agencies may settle a discrimination claim and award any

For both of these reasons, taken together, we conclude that the dispute at issue was not merely a continuation of the underlying Title VII proceedings that resulted in the Settlement Agreement, and that the waiver of sovereign immunity upon which the settlement rested therefore cannot be said to authorize the award EEOC provided to remedy SSA's alleged failure to comply with Provision III.D of the Settlement Agreement.⁹

IV.

We conclude that the doctrine of sovereign immunity precludes the monetary relief ordered in this case.

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relief that would be available in court, a promise to refrain from discriminatory behavior in the future would be entirely proper.

⁹ As noted in Part I, EEOC's regulations provide that "allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints . . . rather than [through actions to enforce the settlement]." 29 C.F.R. § 1614.504(c). In proceedings before OFO, SSA argued that this provision precluded the class from receiving relief on their claims that the agency's unequal post-settlement distribution of awards violated the Settlement Agreement. We express no view on this question, and do not address the scope of EEOC's regulations. Rather, we consider the fact that EEOC effectively compensated the class members for discrimination that followed the settlement only insofar as that fact informs our view that the Commission's award is barred by the doctrine of sovereign immunity.

Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States

The Department of Homeland Security’s proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS’s discretion to enforce the immigration laws.

DHS’s proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS’s discretion to enforce the immigration laws.

DHS’s proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS’s enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT*

You have asked two questions concerning the scope of the Department of Homeland Security’s discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department (“DHS”) to remove aliens unlawfully present in the United

* Editor’s Note: This opinion has been withdrawn. The opinion’s principal subject, the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) policy, was preliminarily enjoined before it went into effect. *See Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016). Based on the reasoning in the Fifth Circuit’s decision, on September 4, 2017, Attorney General Sessions concluded that the related Deferred Action for Childhood Arrivals (“DACA”) policy, which is briefly discussed in footnote 8 of this opinion, was unlawful. *See* Letter for Elaine Duke, Acting Secretary of Homeland Security, from Jefferson B. Sessions III, Attorney General (Sept. 4, 2017). Although the Acting Secretary of Homeland Security announced the rescission of DACA on September 5, 2017, the Supreme Court vacated that decision and remanded for further proceedings. *See Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020). In order to maximize the Acting Secretary’s discretion on remand, and without regard to the merits of the legal issues, Attorney General Barr withdrew Attorney General Sessions’ September 4, 2017 letter and, for the same reason, further directed this Office to withdraw this opinion. *See* Letter for Chad F. Wolf, Acting Secretary of Homeland Security, from William P. Barr, Attorney General (June 30, 2020).

States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully

present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS’s decision not to seek an alien’s removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an “economic necessity for employment”); *see also id.* § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien’s accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS’s discretion. *See Johnson Deferred Action Memorandum at 2, 5.*

For the reasons discussed below, we conclude that DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS’s discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS’s authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of DHS’s enforcement discretion under the immigration laws, and then analyze DHS’s proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. § 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. § 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the Nation's borders and

ports of entry. See Homeland Security Act §§ 403, 442, 451, 471, 116 Stat. at 2178, 2193, 2195, 2205; see also Name Change from the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services, 69 Fed. Reg. 60,938, 60,938 (Oct. 13, 2004); Name Change of Two DHS Components, 75 Fed. Reg. 12,445, 12,445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now “charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens.” 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President’s constitutional duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, and it reflects a recognition that the “faithful[]” execution of the law does not necessarily entail “act[ing] against each technical violation of the statute” that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to “balanc[e] . . . a number of factors which are peculiarly within its expertise.” *Id.* These factors include “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.” *Id.*; cf. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan” (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration’s refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency’s decision not to initiate enforcement proceedings is presumptively immune from judicial review. See 470 U.S. at 832. The Court explained that, while Congress may “provide[] guidelines for the agency to follow in exercising its enforcement powers,” in the absence of such “legislative direction,” an agency’s non-enforcement determination

is, much like a prosecutor’s decision not to indict, a “special province of the Executive.” *Id.* at 832–33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is “a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created DHS, it expressly charged DHS with responsibility for “[e]stablishing national immigration enforcement policies and priorities.” Homeland Security Act § 402(5), 116 Stat. at 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that “the broad discretion exercised by immigration officials” is a “principal feature of the removal system” under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, “[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, “[a]t each stage” of the removal process—“commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders”—immigration officials have “discretion to abandon the endeavor.” *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (alterations in original) (quoting 8 U.S.C. § 1252(g)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has chil-

dren born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is “faithful[]” to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see Chaney*, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress “may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.” *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.¹

¹ *See, e.g.,* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect “factors which are peculiarly within [the enforcing agency’s] expertise.” *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as “whether the agency has enough resources to undertake the action,” or “whether agency resources are best spent on this violation or another.” *Id.* Other relevant considerations may include “the proper ordering of [the agency’s] priorities,” *id.* at 832, and the agency’s assessment of “whether the particular enforcement action [at issue] best fits the agency’s overall policies,” *id.* at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* at 833 (an agency may not “disregard legislative direction in the statutory scheme that [it] administers”). In other words, an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency’s decision about the proper administration of the statute unless, among other things, the agency “‘has relied on factors which Congress had not intended it to consider’” (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, “‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, “the statute conferring authority on the agency might indicate that such decisions were not ‘com-

1970s); *see also, e.g., infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

mitted to agency discretion”). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, “the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law”).

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g., Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that “single-shot non-enforcement decisions” almost inevitably rest on “the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion.” *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute “general polic[ies] that [are] so extreme as to amount to an abdication of [the agency’s] statutory responsibilities.” *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all “general policies” respecting non-enforcement are categorically forbidden: Some “general policies” may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency’s use of “reasonable presumptions and generic rules” is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses “special risks” that the agency has exceeded the bounds of its enforcement discretion. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS’s proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predeces-

sor, INS, have long employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to “provide clearer and more effective guidance in the pursuit” of DHS’s enforcement priorities: namely, “threats to national security, public safety and border security.” Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id.* at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id.* at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they “qualify for asylum or another form of relief under our laws.” *Id.* at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner “commensurate with the level of prioritization identified.” *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy “requires DHS personnel to exercise discretion based on individual circumstances”). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, “there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.” *Id.* at 3. Similar discretionary provisions would apply to aliens in the second and third priority categories.² The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.³ In addition, the policy would expressly state that its terms should not be construed “to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities,” and would further provide that “[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority” if, “in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.” *Id.* at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under

² Under the proposed policy, aliens in the second tier could be deprioritized if, “in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.” Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, “in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.” *Id.* at 5.

³ These factors include “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative.” *Id.* at 6.

the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) (“Shahoulian E-mail”). The proposed policy explains that, because DHS “cannot respond to all immigration violations or remove all persons illegally in the United States,” it seeks to “prioritize the use of enforcement personnel, detention space, and removal assets” to “ensure that use of its limited resources is devoted to the pursuit of” DHS’s highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS’s proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly “within [DHS’s] expertise.” *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS’s organic statute itself recognizes this inevitable fact, instructing the Secretary to establish “national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5). And an agency’s need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors “peculiarly within [an agency’s] expertise” are “whether agency resources are best spent on this violation or another” and “whether the agency has enough resources to undertake the action at all”).

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS’s enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”

Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 (“DHS Appropriations Act”). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as “aggravated felonies” under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b), (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied “on factors which Congress had not intended it to consider.” *Nat’l Ass’n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a “single-shot non-enforcement decision,” neither does it amount to an abdication of DHS’s statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS’s severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy’s identification of categories of aliens who constitute removal priorities is also consistent with the categorical nature of Congress’s instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner “commensurate with the level of prioritization identified,” but (as noted above) it does not “prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities.” Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, “removing such an alien would serve an important federal interest,” a standard the policy leaves open-ended. *Id.* Accordingly, the policy provides for case-by-case determinations about whether an individual alien’s circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.⁴

⁴ In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA “mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not ‘clearly and beyond a doubt entitled to be admitted.’” No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23, 2013) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31, 2013). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court’s conclusion is, in our view, inconsistent with the Supreme Court’s reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch’s enforcement discretion. *See, e.g., Chaney*, 470

II.

We turn next to the permissibility of DHS’s proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents (“LPRs”), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term “deferred action” refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); see USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) (“USCIS SOP”); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.⁵

U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

⁵ Parole is available to aliens by statute “for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, see *id.* § 1255(a), and may eventually qualify them for federal means-tested benefits, see *id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure,

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant “non-priority” status to removable aliens who presented “appealing humanitarian factors.” Letter for Leon Wildes from E.A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a “non-priority case” as “one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors”); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed “deferred action.” *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever “adverse action would be unconscionable because of the existence of appealing humanitarian factors”).

which “has no statutory basis” but rather is an exercise of “the President’s constitutional powers to conduct foreign relations,” may be granted to nationals of appropriate foreign states. USCIS, Adjudicator’s Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien’s departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf.* 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of “discretionary relief formulated administratively under the Attorney General’s general authority for enforcing immigration law.” Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See* U.S. Citizenship and Immigration Services Fee Schedule, 75 Fed. Reg. 33,446, 33,457 (June 11, 2010) (proposed rule) (noting that “since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based ‘extended voluntary departure,’ and there no longer are aliens in the United States benefiting from such a designation,” but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was “codif[ying] and supersed[ing]” extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 5–10 (July 13, 2012) (“CRS Immigration Report”).

Although the practice of granting deferred action “developed without express statutory authorization,” it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions “to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]” in 8 U.S.C. § 1252(g) “seems clearly designed to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations”); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are “eligible for deferred action”). Deferred action “does not confer any immigration status”—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS’s decision not to seek the alien’s removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS’s statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an “economic necessity for employment.” 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an “unauthorized alien” not entitled to work in the United States as an alien who is neither an LPR nor “authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]”). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing “unlawful presence” for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42 (May 6, 2009) (“USCIS Consolidation of Guidance”) (noting that “[a]ccrual of unlawful presence stops on the date an alien is granted

deferred action”); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is “unlawfully present” if, among other things, he “is present in the United States after the expiration of the period of stay authorized by the Attorney General”).⁶

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as “ad hoc deferred action.” Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they “encounter cases during [their] normal course of business that they feel warrant deferred action.” USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing “[a]n explanation as to why he or she is seeking deferred action” along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as “Third Preference” visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states.

⁶ Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

See, e.g., CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a “Family Fairness” program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986 (“IRCA”), Pub. L. No. 99-603, 100 Stat. 3359. See Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (“Family Fairness Memorandum”); see also CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 (“VAWA”), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, “on a case-by-case basis, whether to place the alien in deferred action status” while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that “[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action.” *Id.* But because “[i]n an unusual case, there may be factors present that would militate against deferred action,” the agency instructed officers that requests for deferred action should still “receive individual scrutiny.” *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. See *Battered Women*

Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary, 106th Cong. at 43 (July 20, 2000) (“H.R. 3083 Hearings”).

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a “T visa” available to victims of human trafficking and their family members, and a “U visa” for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate “possible victims in the above categories,” and to use “[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal” to prevent those victims’ removal “until they have had the opportunity to avail themselves of the provisions of the VTVPA.” Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—“T” and “U” Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make “deferred action assessment[s]” for “all [T visa] applicants whose applications have been determined to be bona fide,” Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants “determined to have submitted *prima facie* evidence of [their] eligibility,” Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents “*prima facie* evidence” of his eligibility should have his removal “automatically stay[ed]” and

that applicants placed on a waiting list for visas “shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)”); *id.* § 214.14(d)(2) (promulgated by New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,039 (Sept. 17, 2007)) (“USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list” for visas).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include “pursuit of a ‘full course of study.’” USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf> (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students “based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina.” *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1–2 (Nov. 25, 2005), http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such requests for deferred action would be “decided on a case-by-case basis” and that it could not “provide any assurance that all such requests will be granted.” *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that “no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen’s death” and USCIS had not yet adjudicated a visa petition on the spouse’s behalf. Memorandum for Field Lead-

ership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). “In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens,” USCIS issued guidance permitting covered surviving spouses and “their qualifying children who are residing in the United States” to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, “serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons.” *Id.* at 6.⁷

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to “certain young people who were brought to this country as children” and therefore “[a]s a general matter . . . lacked the intent to violate the law.” Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) (“Napolitano Memorandum”). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor “poses a threat to national security or public safety.” *See id.* DHS evaluates applicants’ eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 (“DACA Toolkit”). Successful DACA appli-

⁷ Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen “for at least 2 years at the time of the citizen’s death” to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance “obsolete,” USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

cants receive deferred action for a period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and “confer[] no substantive right, immigration status or pathway to citizenship,” Napolitano Memorandum at 3.⁸

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.⁹ On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization

⁸ Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

⁹ Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS’s authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that “[a]pproved [VAWA] self-petitioners are placed in deferred action status,” such that “[n]o battered alien who has filed a[n approved] self petition . . . has been deported.” H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be “eligible for deferred action and work authorization.” VTVPA § 1503(d)(2), 114 Stat. at 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).¹⁰

Congress demonstrated a similar awareness of INS’s (and later DHS’s) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to “grant . . . an administrative stay of a final order of removal” to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that “[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action.” *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS’s “specially trained [VAWA] Unit at the [USCIS] Vermont Service Center” took to adjudicate victim-based immigration applications for “deferred action,” along with “steps taken to improve in this area.” *Id.* § 238. Representative Berman, the bill’s sponsor, explained that the Vermont Service Center should “strive to issue work authorization and deferred action” to “[i]mmigrant victims of domestic violence, sexual

¹⁰ Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, “[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization.” *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act’s sponsors explained that while this provision was intended to “give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue.” 151 Cong. Rec. 29,334 (2005) (statement of Rep. Conyers).

assault and other violence crimes . . . in most instances within 60 days of filing.” 154 Cong. Rec. 24,603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made “eligible for deferred action.” These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694 (2003). In the same legislation, Congress made these individuals eligible to obtain lawful status as “family-sponsored immigrant[s]” or “immediate relative[s]” of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. at 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. at 1694. *See generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at 49 U.S.C. § 30301 note), which makes a state-issued driver’s license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card’s recipient has “[e]vidence of [l]awful [s]tatus.” Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or “approved deferred action status.” *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS’s authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their “broad discretion” to administer the removal system—and, more specifically, their discretion to determine whether “it makes sense to pursue removal” in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS’s general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS’s power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an “unauthorized alien” not entitled to work in the United States as an alien who is neither an LPR nor “authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security].” This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as “permissive” and largely “unfettered”).¹¹ Although the INA requires the

¹¹ Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See* Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a “comprehensive scheme prohibiting the employment of illegal aliens in the United States,” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an “unauthorized alien.” As relevant here, Congress defined an “unauthorized alien” barred from employment in the United States as an alien who “is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.” 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that “the phrase ‘authorized to be so employed by this Act or the Attorney General’ does not recognize the Attorney General’s authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act.” Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg.

Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary’s authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary’s authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as “unlawfully present” for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he “is present in the United States after the expiration of the period of stay authorized by the Attorney General.” 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful pres-

46,092, 46,093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude “that Congress, being fully aware of the Attorney General’s authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined ‘unauthorized alien’ in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.” *Id.*; *see Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844 (1986) (stating that “considerable weight must be accorded” an agency’s “contemporaneous interpretation of the statute it is entrusted to administer”).

ence under section 1182(a)(9)(B)(i) or (a)(9)(C)(i). And DHS regulations and policy guidance interpret a “period of stay authorized by the Attorney General” to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 57–61. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.¹²

¹² For example, since 1978, the Department of Justice’s Antitrust Division has implemented a “leniency program” under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep’t of Justice, *Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters* (Nov. 19, 2008), <http://www.justice.gov/atr/public/criminal/239583.pdf> (last visited Nov. 19, 2014); *see also* Internal Revenue

Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency’s law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of “lawful status” for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy “rather than embarking on a frolic of its own.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency’s assertion of regulatory authority by “refus[ing] . . . to overrule” the agency’s view after it was specifically “brought to Congress’[s] attention,” and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress “implicitly approved the practice of claim settlement by executive agreement” by enacting the International Claims Settlement Act of 1949, which “create[d] a procedure to implement” those very agreements).

Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), <http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice> (last visited Nov. 19, 2014) (explaining that a taxpayer’s voluntary disclosure of misreported tax information “may result in prosecution not being recommended”); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, <http://www.usmarshals.gov/safesurrender/faqs.html> (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the “Fugitive Safe Surrender” program are likely to receive “favorable consideration”).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 46–47. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* p. 46 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* pp. 46–47 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 47 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS’s proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents “no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate.” Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS’s proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next subsection.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency’s expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress’s instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* pp. 50–51. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency’s lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where

such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 49. The agency must therefore make choices about which violations of the immigration laws it will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not other-

wise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such “human concerns” in the immigration context is a consideration that is generally understood to fall within DHS’s expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) (“The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.” (quoting H.R. Rep. No. 85-1199, at 7 (1957))). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.,* 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).¹³ Additionally, the INA empowers the Attorney

¹³ The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs’ parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempt-

General to cancel the removal of, and adjust to LPR status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States.

ed the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Pub. Res. No. 70-61, 45 Stat. 1009, 1009–10 (1928). The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

See USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary’s statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. See *supra* pp. 55, 65–66. But unlike the automatic employment eligibility that accompanies LPR status, see 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, see 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. See *supra* pp. 50–51. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. See IRCA § 201(a), 100 Stat. at 3394 (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years “have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways”); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who “have become well settled in this country” would be a “wasteful use of the Immigration and Naturalization Service’s limited enforcement resources”); see also *Arizona*, 132 S. Ct. at 2499 (noting that “[t]he equities of an individual case” turn on factors “including whether the alien has . . . long ties to the community”).

We also do not believe DHS’s proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS’s severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the

removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency’s removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS’s responsibilities. And the case-by-case discretion given to immigration officials under DHS’s proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she “present[ed] no other factors that, in the exercise of discretion,” would “make[] the grant of deferred action inappropriate.” Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien’s deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status “takes time.” *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mech-

anism for families to remain together, depending on their circumstances, for some or all of the intervening period.¹⁴ Immigration officials have on several occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress’s implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 61–63.¹⁵ In addition, much like these and

¹⁴ DHS’s proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been “inspected and admitted or paroled into the United States.” 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS’s proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children’s needs for care and support.

¹⁵ Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress’s implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually “acquire lawful permanent resident status” and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* p. 57. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that “the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be

other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive’s duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program’s potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS’s proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS’s proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS’s proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred

modified in any way before such date.” *Id.* § 301(g). INS’s policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 56.

action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5, 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those discussed above: Like the program for the parents of U.S.

citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses, and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such

parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

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Targeted Airstrikes Against the Islamic State of Iraq and the Levant

The President had the constitutional authority to order targeted airstrikes in Iraq against the Islamic State of Iraq and the Levant without prior congressional authorization.

The President had reasonably determined that these military operations would further sufficiently important national interests. A combination of three relevant national interests—protecting American lives and property; assisting an ally or strategic partner at its request; and protecting endangered populations against humanitarian atrocities, including possible genocide—supported the President’s constitutional authority to order the operations without prior congressional authorization.

The anticipated nature, scope, and duration of the military operations did not rise to the level of a “war” within the meaning of the Declaration of War Clause.

December 30, 2014

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On August 8, 2014, United States Armed Forces commenced targeted airstrikes in Iraq against the terrorist group the Islamic State of Iraq and the Levant (“ISIL”). Before the strikes began, our Office advised you that the President had the constitutional authority to order these military operations because he had reasonably determined that they would further sufficiently important national interests, and because their anticipated nature, scope, and duration were sufficiently limited that prior congressional approval was not constitutionally required. This memorandum memorializes and explains the basis for our advice.¹

¹ This advice was provided before the President decided to rely on statutory authority for military operations against ISIL. We accordingly do not address in this opinion whether the targeted military actions discussed herein were authorized by any statute. We further note that on September 10, 2014, after the advice memorialized in this opinion had already been provided, the President announced a new “comprehensive and sustained counterterrorism strategy” to address the threat posed by ISIL that, among other things, called for a “systematic campaign of airstrikes” against the organization in Iraq and, if necessary, Syria. Office of the Press Secretary, The White House, Statement by President Obama on ISIL (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>. You have not asked us to consider in this opinion, and we do not address, the President’s authority to implement this new strategy. We also do not consider whether the discrete military operations discussed in this opinion would

I.

The conflict that led to the airstrikes discussed in this opinion has its origins in the most recent Iraq War. In 2002, in response to concerns that Saddam Hussein’s regime might be developing and stockpiling weapons of mass destruction and aiding and harboring terrorists, Congress authorized the President to use military force against the threat posed by Iraq. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (“Iraq AUMF”); Raymond W. Copson, Cong. Research Serv., RL31715, *Iraq War: Background and Issues Overview* 1–2 (Apr. 22, 2003) (“*Iraq War: Background and Issues Overview*”). On March 19, 2003, after diplomatic efforts to resolve these concerns failed, the United States began aerial attacks in Iraq. *See Iraq War: Background and Issues Overview* at 4. U.S. and British ground forces entered Iraq the next day, *id.*, and several weeks later, Saddam Hussein’s regime fell, Kenneth Katzman, Cong. Research Serv., RS21968, *Iraq: Politics, Governance, and Human Rights* 1 (Aug. 12, 2014) (“*Iraq: Politics, Governance, and Human Rights*”). After the fall of the regime, a new Iraqi government was formed, and U.S. and other coalition forces remained in Iraq to help secure and stabilize the country. *See id.* Over the next few years, however, as sectarian divisions in Iraqi society deepened, *see id.* at 4, the terrorist group Al-Qaeda in Iraq—Al-Qaeda’s affiliate in Iraq and the primary source of armed opposition to the new Iraqi government and U.S. forces—intensified its operations and expanded its reach, *see* Kenneth Katzman, Cong. Research Serv., RL32217, *Al Qaeda in Iraq: Assessment and Outside Links* 1, 10–11 (Aug. 15, 2008); Bradley Graham, *Zarqawi “Hijacked” Insurgency*, Wash. Post, Sept. 28, 2005, at A17. In 2006, Al-Qaeda in Iraq renamed itself the Islamic State of Iraq (“ISI”). *See* Kenneth Katzman et al., Cong. Research Serv., R43612, *Iraq Crisis and U.S. Policy* 8 (Aug. 8, 2014) (“*Iraq Crisis and U.S. Policy*”). Violence continued to escalate and, by early 2007, had become widespread and severe. *See Nominations Before the Senate Armed Services Committee: Hearings Before the S. Comm. on Armed Servs.*, 110th Cong. 5–8 (2007) (statement of Lt. Gen. David H. Petraeus). The United States

have been within the President’s constitutional authority if they had been ordered pursuant to the newly announced strategy, rather than for the more limited missions for which they were actually ordered.

responded with a surge of nearly 30,000 troops. *See Iraq: Politics, Governance, and Human Rights* at 4. Over the course of 2007 and 2008, in the wake of the surge, sectarian violence in Iraq dropped dramatically. *See* Stephen Biddle et al., *Testing the Surge: Why Did Violence Decline in Iraq in 2007?*, 37 Int'l Sec. 7 (Summer 2012).

In 2008, the United States and Iraq signed a Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq (“Strategic Framework Agreement” or “Agreement”), which recognized that cooperation between the two countries would “improve and strengthen security and stability in Iraq and the region.” Strategic Framework Agreement at 2 (Nov. 17, 2008), <https://www.state.gov/documents/organization/122076.pdf>. Among its many provisions, the Agreement stated that the United States and Iraq would “continue to foster close cooperation concerning defense and security arrangements without prejudice to Iraqi sovereignty over its land, sea, and air territory.” *Id.* at 3. The United States began to reduce its military presence in Iraq in 2009, and in December 2011, the last U.S. troops left the country. *See Iraq: Politics, Governance, and Human Rights* at 8; Tim Arango & Michael S. Schmidt, *Last Convoy of American Troops Leaves Iraq, Marking a War’s End*, N.Y. Times, Dec. 19, 2011, at A6. In announcing this withdrawal, President Obama explained that the United States was “moving into a new phase in [its] relationship” with Iraq, “an equal partnership based on mutual interests and mutual respect.” Office of the Press Secretary, The White House, Remarks by the President on Ending the War in Iraq (Oct. 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq>.

After U.S. military forces had left Iraq in 2011, the long-standing sectarian and ethnic divisions in the country again widened, leading to increased discontent and unrest. *See Iraq: Politics, Governance, and Human Rights* at 15–19. During this period, Sunni extremists, including ISI, gained strength. *See id.* In April 2013, after having expanded into Syria, ISI adopted the name ISIL.² *See Iraq Crisis and U.S. Policy* at 8, 11. ISIL

² ISIL is also sometimes referred to as the “Islamic State of Iraq and Syria,” or “ISIS.” This opinion refers to the group as “ISIL” hereafter, including in references to the group following its decision to change its name to the “Islamic State.” *See infra* p. 86.

soon launched a series of attacks in Iraq. *See id.* at 7–9. In December 2013, aided by Sunni citizens and tribal fighters dissatisfied with the failure of Iraq’s Shiite-dominated leadership to create an inclusive government, ISIL attacked the Iraqi cities of Ramadi and Fallujah, ultimately gaining control of Fallujah despite an Iraqi counteroffensive. *See Iraq: Politics, Governance, and Human Rights* at 18. Then, in June 2014, ISIL launched a major offensive in Iraq and, assisted by the widespread surrender and withdrawal of the Iraqi Security Forces (“ISF”) and an influx of fighters from Syria, captured Mosul, Iraq’s second largest city, and large areas of the provinces of Nineveh and Salahuddin. *See id.* at 19; Rod Nordland, *Sunnis in Iraq Make Some Gains in Fighting in the North and West*, N.Y. Times, June 22, 2014, at A7. ISIL militants thereafter rapidly expanded their control over northwestern areas of Iraq, capturing key cities and attacking Iraq’s largest oil refinery. *See Iraq: Politics, Governance, and Human Rights* at 19–20. Within a week of Mosul’s fall, ISIL reached the outskirts of Baquabah, thirty-eight miles from Baghdad, prompting fear that the capital too would fall. *See Iraq Crisis and U.S. Policy* at 1. ISIL militants also advanced toward the Haditha Dam, situated about 120 miles northwest of Baghdad on the Euphrates River, raising the prospect of catastrophic flooding if the dam were to fail. *See* Alissa J. Rubin & Rod Nordland, *As Calls for New Iraqi Government Grow, Militants Advance Toward Strategic Dam*, N.Y. Times, June 25, 2014, at A10. In the course of its advance, ISIL looted banks of millions of dollars, seized a substantial amount of U.S.-supplied military equipment, and freed prisoners. *See Iraq Crisis and U.S. Policy* at 1. Its tactics were brutal: it executed innocent civilians, performed mass executions of ISF members, kidnapped and raped women and children, and displaced hundreds of thousands of Iraqis from their homes. *See* Office of the High Commissioner for Human Rights & U.N. Assistance Mission for Iraq (UNAMI) Human Rights Office, *Report on the Protection of Civilians in the Non-International Armed Conflict in Iraq: 5 June–5 July 2014*, at 7–13, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC%20Report_FINAL_18July2014A.pdf.

In remarks on June 19, 2014, President Obama declared ISIL “a threat to the Iraqi people, to the region, and to U.S. interests.” Office of the Press Secretary, The White House, Remarks by the President on the Situation in Iraq (June 19, 2014), <https://obamawhitehouse.archives.gov/>

the-press-office/2014/06/19/remarks-president-situation-iraq. He stated that “[i]t is in [the] national security interests [of the United States] not to see an all-out civil war inside of Iraq,” and to “mak[e] sure that we don’t have a safe haven” in Iraq “that continues to grow for ISIL and other extremist jihadist groups who could use that as a base of operations for planning and targeting ourselves, our personnel overseas, and eventually the homeland.” *Id.* The President then announced that he had positioned additional U.S. military assets in the region and “w[ould] be prepared to take targeted and precise military action” if and when he determined that “the situation on the ground require[d] it.” *Id.* In light of the growing threat from ISIL, the President also dispatched U.S. military personnel to Iraq three times in June to, among other things, provide support and security for U.S. embassy personnel in Baghdad and establish joint operations centers with Iraqi forces.³

On June 29, ISIL changed its name to the “Islamic State” and declared that it had established an Islamic “caliphate” extending from the Aleppo province in Syria to the Diyala province in Iraq. *Iraq Crisis and U.S.*

³ See Office of the Press Secretary, The White House, Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 16, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/16/text-letter-president-speaker-house-representatives-and-president-pro-te> (authorizing the deployment of 275 troops “to provide support and security for U.S. personnel and the U.S. Embassy in Baghdad”); Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Letter Regarding Iraq (June 26, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/26/letter-president-war-powers-resolution-letter-regarding-iraq> (authorizing the deployment of 300 additional troops “to assess how we can best train, advise, and support Iraqi security forces and to establish joint operations centers with Iraqi security forces to share intelligence and coordinate planning to confront the threat posed by ISIL”); Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Letter Regarding Iraq (June 30, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-war-powers-resolution-letter-regarding-iraq> (authorizing the deployment of 200 additional troops “to reinforce security at the U.S. Embassy, its support facilities, and the Baghdad International Airport”). In early September, the President authorized the deployment of an additional 350 U.S. military personnel “to provide support and security for U.S. personnel and the U.S. Embassy in Baghdad.” Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Regarding Iraq (Sept. 5, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/05/letter-president-war-powers-resolution-regarding-iraq>.

Policy at 8. The declaration named ISIL's leader Abu Bakr al Baghdadi as Imam and "[C]aliph." *Id.* In territories they controlled, ISIL militants intensified a campaign of persecution against non-Sunni religious groups and ethnic minorities, including Shiites, Christians, and Yezidis, an ancient and long-persecuted religious sect. *See* Alissa J. Rubin, *ISIS Expels Last Iraqi Christians from Mosul*, N.Y. Times, July 19, 2014, at A4; Loveday Morris, *Islamic State Forces Take an Iraqi Town*, Wash. Post, Aug. 4, 2014, at A9; Press Statement, Office of Press Relations, U.S. Dep't of State, *ISIL Claims Massacre in Tikrit (June 15, 2014)* ("State Department June 15 Press Statement"), <https://2009-2017.state.gov/r/pa/prs/ps/2014/06/227605.htm>. Journalists reported that when ISIL militants swept through Sinjar, a town in northwestern Iraq with a large Yezidi population, they "set about their method of conquest, which is as familiar as it is brutal: They destroyed a Shiite shrine, executed resisters, overran local security forces and hoisted the black flag of [ISIL] above government buildings." Tim Arango, *Sunni Extremists in Iraq Seize 3 Towns From Kurds and Threaten Major Dam*, N.Y. Times, Aug. 4, 2014, at A7. Yezidi residents reported witnessing kidnappings and executions of members of their sect. *See id.* Tens of thousands of residents fled to the northern Kurdish region of Iraq, while thousands of others, largely from the Yezidi community, sought refuge on Mount Sinjar, where they were besieged by ISIL militants. *See* Alissa J. Rubin, *For Refugees on Mountain, "No Water, No Nothing,"* N.Y. Times, Aug. 10, 2014, at A1. Those trapped on the mountain confronted a choice between descending into areas controlled by the militants and facing likely death, or remaining on the mountain without sufficient food, water, or medicine. *See* Loveday Morris, *Cornered on Mountain, Minority-Sect Iraqis Are Dying of Thirst*, Wash. Post, Aug. 6, 2014, at A10. The U.N. Special Representative of the Secretary-General for Iraq warned that "[a] humanitarian tragedy [wa]s unfolding in Sinjar." UN News Centre, *UN Warns of "Humanitarian Tragedy" as Militants Seize Town in Northern Iraq* (Aug. 3, 2014); *see also* Security Council, *Press Statement on Iraq*, U.N. Press Release SC/11509 (Aug. 5, 2014) ("Security Council August 5 Press Release") (expressing "deep concern" about the thousands of Iraqis, many from the Yezidi community, displaced by ISIL and "in urgent need of humanitarian assistance"). Days after the siege on Mount Sinjar began, the U.N. Security Council "call[ed] on the international community to support the Gov-

ernment and people of Iraq and to do all it c[ould] to help alleviate the suffering of the population affected by the current conflict in Iraq.” Security Council, Press Statement on Iraq, U.N. Press Release SC/11515 (Aug. 7, 2014) (“Security Council August 7 Press Release”).

By early August 2014, ISIL militants had seized control of additional towns in northern Iraq and were advancing towards the city of Erbil, where numerous American diplomats, military advisers, and other citizens were based. See Helene Cooper et al., *Obama Allows Airstrikes Against Iraq Rebels*, N.Y. Times, Aug. 8, 2014, at A1; *Iraq: Politics, Governance, and Human Rights* at 19. ISIL militants had also seized control of the Mosul Dam, Iraq’s largest, from Kurdish forces. See Tim Arango, *Jihadists Rout Kurds in North and Seize Strategic Iraqi Dam*, N.Y. Times, Aug. 8, 2014, at A1 (“*Jihadists Rout Kurds*”). ISIL’s seizure of the Mosul Dam raised concerns because, as a 2007 report by the Army Corps of Engineers explained, the Mosul Dam rests on a “very poor” foundation of water-soluble rock and soil and therefore “demand[s] extraordinary engineering measures to maintain” its “structural integrity and operating capability.” Julie R. Kelley et al., U.S. Army Corps of Engineers, ERDC TR-07-10, *Geologic Setting of Mosul Dam and Its Engineering Implications 2* (Sept. 2007) (“*Geologic Setting of Mosul Dam*”). Consistent with that report, the United States had advised Iraq that an extensive grouting program should be continued to “mitigat[e] the risk at Mosul Dam,” explaining that “a catastrophic failure” of the dam would “result in flooding along the Tigris River all the way to Baghdad,” and, in a worst case scenario, “a flood wave 20 meters [65 feet] deep at the city of Mosul,” threatening “significant loss of life and property.” Letter for Nouri al-Maliki, Prime Minister, Republic of Iraq, from General David H. Petraeus, U.S. Army, and Ambassador Ryan C. Crocker, United States Embassy, Baghdad (May 3, 2007), reprinted in Office of the Special Inspector General for Iraq Reconstruction, *Relief and Reconstruction Funded Work at Mosul Dam*, SIGIR PA-07-105, app. D (Oct. 29, 2007) (“Mosul Dam Letter”). A later article by an Army Corps official estimated that the dam’s failure “could lead to as many as 500,000 civilian deaths by inundating the cities of Mosul and Baghdad under water.” Amanda Ellison, *An Unprecedented Task*, 63 Int’l Water Power & Dam Construction 50, 50–51 (Sept. 2011).

ISIL militants also continued to battle ISF and allied tribal forces for control of the Haditha Dam. *See Jihadists Rout Kurds*, N.Y. Times, Aug. 8, 2014, at A1. According to press accounts, releasing water from or destroying that dam could unleash walls of water that could travel hundreds of miles down the Euphrates River, cripple the electricity supply in Iraq, and potentially flood the southern regions of Baghdad. *See* Nigel Wilson, *Middle East Water Wars: Why Islamic State Wants Iraq's Dams*, Int'l Bus. Times, Aug. 5, 2014, <https://www.ibtimes.co.uk/middle-east-water-wars-why-islamic-state-wants-iraqs-dams-1459895>; Doug Struck, *The Coolest Posting in a Hot War Zone*, Wash. Post, Aug. 8, 2004, at A17.

In response to these developments (and subsequent developments described below), the United States began a series of targeted airstrikes against ISIL positions in Iraq, each directed at either protecting Americans from an impending threat or preventing a humanitarian catastrophe, and each also undertaken in part to assist Iraq, at its request, in combating ISIL.

Airstrikes Near Erbil and Mount Sinjar. On August 7, 2014, President Obama announced that he had authorized two military operations in Iraq: “targeted airstrikes to protect our American personnel, and a humanitarian effort to help save thousands of Iraqi citizens who are trapped on a mountain without food and water and facing almost certain death.” Office of the Press Secretary, The White House, Statement by the President (Aug. 7, 2014) (“President Obama August 7 Statement”), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>. In the first operation, U.S. military forces “conducted targeted airstrikes against terrorist forces outside the city of Erbil to prevent them from advancing on the city and to protect our American diplomats and military personnel.” Office of the Press Secretary, The White House, Statement by the President on Iraq (Aug. 9, 2014) (“President Obama August 9 Statement”), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>. In the second operation, U.S. forces conducted airdrops of food and water on Mount Sinjar and targeted airstrikes against ISIL militants besieging the mountain in order to protect the stranded Yezidis and assist in their escape. *See* Office of the Press Secretary, The White House, Statement by the President (Aug. 14, 2014) (“President Obama August 14 Statement”), <https://obamawhitehouse>.

archives.gov/the-press-office/2014/08/14/statement-president; President Obama August 9 Statement. The President explained:

When we face a situation like we do on that mountain—with innocent people facing the prospect of violence on a horrific scale—when we have a mandate to help—in this case, a request from the Iraqi government—and when we have the unique capabilities to help avert a massacre, then I believe the United States of America cannot turn a blind eye. We can act, carefully and responsibly, to prevent a potential act of genocide.

President Obama August 7 Statement. The President declined to specify a particular timetable for the airstrikes. *See* President Obama August 9 Statement. But he also emphasized that the United States was “not going to have . . . combat troops in Iraq again.” *Id.*⁴

Consistent with the War Powers Resolution, 50 U.S.C. § 1543(a), President Obama provided a report to Congress less than forty-eight hours after the operations began:

As I announced publicly on August 7, 2014, I have authorized the U.S. Armed Forces to conduct targeted airstrikes in Iraq. These military operations will be limited in their scope and duration as necessary to protect American personnel in Iraq by stopping the current advance on Erbil by the terrorist group Islamic State of Iraq and the Levant and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there.

Pursuant to this authorization, on August 8, 2014, U.S. military forces commenced targeted airstrike operations in Iraq.

⁴ On August 13, a senior White House official stated that the United States would consider using U.S. ground troops to assist the Iraqi government in evacuating refugees from Mount Sinjar but reiterated the President’s commitment not to “reintroduc[e] U.S. forces into combat on the ground in Iraq.” Colin Campbell, *White House: We May Use Combat Troops for Iraq Operation*, Bus. Insider, Aug. 13, 2014, <https://www.businessinsider.com/white-house-we-may-use-combat-troops-in-iraq-2014-8>; *see also id.* (senior official explaining that any deployment of ground troops to assist in evacuating refugees would be “different than reintroducing U.S. forces in a combat role to take the fight to ISIL”). Ultimately, the President determined that ground troops were not necessary because the humanitarian airdrops and airstrikes had been successful. *See* President Obama August 14 Statement.

In addition, I have authorized U.S. Armed Forces to provide humanitarian assistance in Iraq in an operation that commenced on August 7, 2014. These operations will also be limited to supporting the civilians trapped on Mount Sinjar.

Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Regarding Iraq (Aug. 8, 2014) (“August 8 Report to Congress”), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>. The report also explained that, in the President’s judgment, the actions were “in the national security and foreign policy interests of the United States.” *Id.* As authority for the military operations, President Obama invoked his “constitutional authority to conduct U.S. foreign relations” and his authority “as Commander in Chief and Chief Executive.” *Id.*

The President and other administration officials emphasized on multiple occasions that both operations were undertaken at the specific request of the Iraqi government. *See, e.g.*, President Obama August 7 Statement; News Transcript, U.S. Dep’t of Def., Remarks by Secretary Hagel at a Troop Event, San Diego, California (Aug. 12, 2014), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5485>. The President’s report to Congress likewise indicated that these actions were “being undertaken in coordination with the Iraqi government.” August 8 Report to Congress.

Airstrikes Near Mosul Dam. On August 14, the President authorized further targeted airstrikes against ISIL positions around the Mosul Dam to assist the Iraqi forces in recapturing and establishing control of the dam. *See* Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Regarding Iraq (Aug. 17, 2014) (“August 17 Report to Congress”), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>. In a report to Congress describing his authorization of this third set of airstrikes, the President cited the dangers posed by ISIL’s control of the dam:

On August 14, 2014, I authorized the U.S. Armed Forces to conduct targeted air strikes to support operations by Iraqi forces to recapture the Mosul Dam. These military operations will be limited in their scope and duration as necessary to support the Iraqi forces in their

efforts to retake and establish control of this critical infrastructure site, as part of their ongoing campaign against the terrorist group the Islamic State of Iraq and the Levant (ISIL). The failure of the Mosul Dam could threaten the lives of large numbers of civilians, endanger U.S. personnel and facilities, including the U.S. Embassy in Baghdad, and prevent the Iraqi government from providing critical services to the Iraqi populace.

Id. Administration officials noted that the airstrikes against ISIL positions in and around the Mosul Dam, like the prior sets of strikes, were undertaken “at the request of the Iraqi government.” U.S. Dep’t of Def., News Release, No. NR-432-14, Statement from Pentagon Press Secretary Rear Admiral John Kirby (Aug. 18, 2014), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=16891>. The strikes began on August 15 and ultimately assisted Iraqi forces in regaining control of the dam. *See id.*

Airstrikes Near Amirli. By late August, it had become clear that a humanitarian crisis was developing in Amirli, a town in northern Iraq populated by Shiite Turkmen that had been besieged by ISIL militants for many weeks. *See, e.g.,* Ben Hubbard, *Dozens Killed at Sunni Mosque in Iraq After Attack on Shiite Leader*, N.Y. Times Int’l, Aug. 22, 2014, at A6. The siege had left the community without sufficient food, water, or medical supplies, and Iraqi leaders and human rights officials were appealing to the international community for assistance. *See id.* Further, because ISIL viewed the Shiite residents of the town as “infidels,” the members of the community faced possible mass executions if ISIL gained control of the town. *See id.*; *see also* State Department June 15 Press Statement (noting ISIL’s claim that it had massacred 1700 Iraqi Shiite air force recruits). In light of these developments, the State Department indicated that the United States was “very concerned about the dire conditions for the mainly Turkmen population in Amirli.” Office of Press Relations, U.S. Dep’t of State, Daily Press Briefing (Aug. 28, 2014) (“State Department August 28 Daily Press Briefing”), <https://2009-2017.state.gov/r/pa/prs/dpb/2014/08/231125.htm>. This concern was also reflected in earlier calls by U.N. officials for “immediate action to prevent the possible massacre of [Amirli’s] citizens” and to address the “desperate” situation and “inhuman conditions” there. UN News, *Iraq: UN Envoy Calls for Immediate Action to Avert Possible “Massacre” in*

Northern Town (Aug. 23, 2014), <https://news.un.org/en/story/2014/08/475762-iraq-un-envoy-calls-immediate-action-avert-possible-massacre-northern-town>; see also Office of the High Commissioner, U.N. Human Rights, *Iraqi Civilians Suffering “Horrific” Widespread and Systematic Persecution—Pillay* (Aug. 25, 2014) (noting the “possible imminent massacre” of the 13,000 members of the Amirli Turkmen community and calling upon the “Government of Iraq and the Kurdistan region of Iraq, and the international community” to “take all necessary measures . . . to protect members of ethnic and religious communities”), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14961&LangID=E>.

On August 28, in response to this unfolding humanitarian crisis, President Obama authorized airdrops of supplies to Amirli as well as “targeted airstrikes in support of [the humanitarian] operation.” Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Regarding Iraq (Sept. 1, 2014) (“September 1 Report to Congress”), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/01/letter-president-war-powers-resolution-regarding-iraq>. U.S. aircraft dropped 109 bundles of humanitarian aid by August 31, and additional aid was delivered by coordinated British, French, and Australian airdrops. See News Release, U.S. Central Command, Release No. 20140835, *U.S. Military Conducts Airstrikes Against ISIL, Airdrops Humanitarian Aid Near Amirli* (Aug. 30, 2014) (“CENTCOM August 30 Release”), <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/884834/us-military-conducts-airstrikes-against-isil-airdrops-humanitarian-aid-near-ami>. U.S. aircraft also conducted strikes on ISIL positions in support of the humanitarian operation. *Id.*

Within forty-eight hours after the Amirli operation began, President Obama reported the operation to Congress:

On August 28, 2014, I . . . authorized U.S. Armed Forces to conduct targeted airstrikes in support of an operation to deliver humanitarian assistance to civilians in the town of Amirli, Iraq, which is surrounded and besieged by ISIL. Pursuant to this authorization, on August 30, 2014, U.S. military forces commenced targeted airstrike operations in the vicinity of Amirli, Iraq. These additional operations will be limited in their scope and duration as necessary to address this

emerging humanitarian crisis and protect the civilians trapped in Amirli.

September 1 Report to Congress. The President indicated that the Amirli operation, like the previous operations, had been “undertaken in coordination with and at request of the Iraqi government.” *Id.*; see also CENTCOM August 30 Release (noting the actions were taken “[a]t the request of the Government of Iraq”).

Airstrikes Near Haditha Dam. Throughout August, ISF and allied tribal fighters maintained control of the Haditha Dam against advances by ISIL militants. See *Jihadists Rout Kurds*, N.Y. Times, Aug. 8, 2014, at A1; Helene Cooper et al., *U.S. Intervention in Iraq Extends to a Second Dam*, N.Y. Times, Sept. 8, 2014, at A8. On September 6, 2014, to support these efforts, President Obama authorized the U.S. military to launch airstrikes against ISIL positions around the dam. See Office of the Press Secretary, The White House, Letter from the President—War Powers Resolution Regarding Iraq (Sept. 8, 2014) (“September 8 Report to Congress”), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/08/letter-president-war-powers-resolution-regarding-iraq>. These airstrikes were conducted “in support of Iraqi Security Forces’ efforts to retain control” of the dam, because the “destruction of the dam or release of water would create a level of flooding that would potentially pose a catastrophic threat to thousands of Iraqis along the Euphrates valley from Anbar province into parts of Baghdad, including possible flooding in areas in and around the Baghdad International Airport, where hundreds of U.S. personnel reside.” Office of the Press Secretary, The White House, Statement by NSC Spokesperson Caitlin Hayden on Airstrikes Around the Haditha Dam (Sept. 7, 2014) (“NSC September 7 Statement”), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/07/statement-nsc-spokesperson-caitlin-hayden-airstrikes-around-haditha-dam>; see also News Release, U.S. Dep’t of Defense, Release No. NR-468-14, Statement from Pentagon Press Secretary Rear Admiral John Kirby on Haditha Dam Airstrikes (Sept. 7, 2014), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=16927> (noting that flooding that might have resulted from a catastrophic failure of the dam “would have threatened U.S. personnel and facilities in and around Baghdad, as well as thousands of Iraqi

citizens”). President Obama reported this operation to Congress within forty-eight hours:

On September 6, 2014, pursuant to my authorization, U.S. Armed Forces commenced targeted airstrikes in the vicinity of the Haditha Dam in support of Iraqi forces in their efforts to retain control of and defend this critical infrastructure site from ISIL. These additional military operations will be limited in their scope and duration as necessary to address this threat and prevent endangerment of U.S. personnel and facilities and large numbers of Iraqi civilians.

September 8 Report to Congress. President Obama again emphasized that, as in prior operations, he had authorized the use of force “in coordination with and at the request of the Iraqi government.” *Id.*; *see also* U.S. Dep’t of Def., News Transcript, Joint Press Availability by Secretary Hagel and Minister Alasania in Georgia (Sept. 7, 2014), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5499> (noting that the “Iraqi security forces on the ground . . . conceived of the operation” and the “Iraqi government asked [the United States] for [its] support in th[e] strikes”).⁵

II.

In our recent opinion concerning the President’s authority to conduct military operations in Libya, we explained in detail our framework for analyzing the President’s legal authority to use military force abroad without prior congressional authorization. *See Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20, 27–33 (2011) (“*Military Force in Libya*”). In light of that discussion, we need not provide a detailed explanation of our framework here. Instead, we will summarize briefly the

⁵ Although the President had begun developing his new comprehensive strategy to counter ISIL at the time that he authorized airstrikes around the Haditha Dam, *see supra* note 1, it is our understanding that those airstrikes were not intended to implement the new strategy, which had not yet been finalized or announced when the strikes were initiated. Rather, as the President’s Report to Congress explains, the Haditha airstrikes were an independent operation “limited in their scope and duration” as necessary to protect the dam, U.S. personnel and facilities, and Iraqi civilians. September 8 Report to Congress.

relevant legal principles before applying them to the airstrike operations described above.

As our Libya opinion explains, Attorneys General and this Office have consistently 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.” *Id.* at 27–28 (quoting *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992) (“*Military Forces in Somalia*”). This power is rooted in the President’s constitutional authority as Chief Executive and Commander in Chief of the armed forces. U.S. Const. art. II, § 1, cl. 1; *id.* § 2, cl. 1. The assignment of the “executive Power” to the President has, over time, been understood to give him 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)), as well as “independent authority ‘in the areas of foreign policy and national security,’” *id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). And the President’s authority as Commander in Chief gives him the authority to superintend and direct the movements of the military forces placed at his command. *See Loving v. United States*, 517 U.S. 748, 772 (1996); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). The President also holds an “implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action,” because of his ability to act and respond to developing situations with greater facility and speed. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) (“*Presidential Power*”); *see also Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area*, 1 Op. O.L.C. Supp. 313, 314 (1970) (noting that the Framers “recognized the need for quick executive response to rapidly developing international situations”).

Presidents have exercised these authorities numerous times throughout the Nation’s history to deploy the armed forces abroad without either a declaration of war or other congressional authorization, beginning in the earliest days of the Republic. *See Military Forces in Somalia*, 16 Op. O.L.C. at 9 (citing an example from 1801); *Presidential Power*, 4A Op. O.L.C. at 187 (“Our history is replete with instances of presidential uses

of military force abroad in the absence of prior congressional approval.”). See generally Barbara Salazar Torreon, Cong. Research Serv., R42738, *Instances of Use of United States Armed Forces Abroad, 1798–2013*, at 2–33 (Aug. 30, 2013) (“*Instances of Force Abroad*”) (citing numerous examples). In the foreign affairs and national security context, where judicial review is rare, see *Agee*, 453 U.S. at 292, such a “pattern of executive conduct, made under claim of right, extended over many decades[,] and engaged in by Presidents of both parties, evidences the existence of broad constitutional power.” *Military Force in Libya*, 35 Op. O.L.C. at 29–30 (internal quotation marks omitted); 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 the “scope and limits” of the President’s and Congress’s respective powers have been “clarified by 200 years of practice”).

To be sure, the Constitution also gives Congress the power to “declare War,” to provide for the common defense, and to raise, support, maintain, and make rules for the armed forces. U.S. Const. art. I, § 8, cls. 1, 11–14. These congressional powers may limit the President’s authority to initiate without prior congressional authorization a “prolonged and substantial” “planned military engagement that constitutes a ‘war’ within the meaning of the Declaration of War Clause.” *Military Force in Libya*, 35 Op. O.L.C. at 31. They may also permit Congress in certain respects to restrict how the President exercises his military authorities. See *id.* at 28. 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.” *Id.* at 31. Indeed, “Congress itself has implicitly recognized” the President’s unilateral authority to initiate military engagements in the War Powers Resolution, which, by imposing reporting and other requirements on the President’s introduction of armed forces into hostilities or imminent hostilities absent a congressional declaration of war, “recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces” into such situations. *Id.* at 30 (quoting *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 175 (1994) (“*1994 Haiti Deployment*”)).

Synthesizing these precedents in our Libya opinion, we explained that, in any particular instance, the President’s authority to order military

action abroad without prior congressional approval turns on two considerations: first, whether the contemplated action would serve “sufficiently important national interests” to “permit the President’s action as Commander in Chief and Chief Executive”; and second, whether the contemplated action would be sufficiently limited in “nature, scope, and duration” so as not to constitute a “war” requiring prior congressional approval under the Declaration of War Clause. *Id.* at 33. We now turn to an analysis of the airstrike operations detailed above under this two-part framework.

A.

We consider first whether the operations served “sufficiently important national interests” to fall within the President’s constitutional authority as Commander in Chief and Chief Executive. *Military Force in Libya*, 35 Op. O.L.C. at 33. In authorizing the targeted airstrikes against ISIL, President Obama identified at least three relevant national interests: protecting American lives and property; assisting an ally or strategic partner at its request; and protecting endangered populations against humanitarian atrocities, including possible genocide. In our view, a combination of these interests supported the President’s constitutional authority as Commander in Chief to order each of the airstrike operations described above without express congressional authorization.

1.

The first national interest identified by President Obama—the protection of American citizens and property—has long been recognized as a basis on which Presidents may authorize military action abroad without prior congressional approval. *See Presidential Power*, 4A Op. O.L.C. at 121 (“It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad.”); *Military Forces in Somalia*, 16 Op. O.L.C. at 9 (“At the core of” the President’s power to use military force without prior congressional authorization “is the President’s authority to take military action to protect American citizens, property, and interests from foreign threats.”); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (noting that “[t]he United States frequently employs

Armed Forces outside this country . . . for the protection of American citizens”); *In re Neagle*, 135 U.S. 1, 63–64 (1890) (recognizing that the obligation to protect American citizens abroad is among the President’s “rights, duties, and obligations growing out of the Constitution itself”); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (stating that “the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion”). Presidents have relied on this interest numerous times to support both defensive and offensive military action abroad. *See, e.g.*, J. Reuben Clark, U.S. Solicitor, Dep’t of State, *Right to Protect Citizens in Foreign Countries by Landing Forces* 34–38 (3d rev. ed. 1933) (“*Right to Protect*”) (collecting examples prior to 1910); *Authority of the President to Repel the Attack in Korea*, 23 Dep’t of State Bull. 173, 177–78, reprinted in H.R. Rep. No. 81-2495, at 61, 67–68 (1950) (collecting examples between 1812 and 1932) (“Korea Memorandum”); *Instances of Force Abroad* at 2–33 (citing additional examples). President McKinley, for instance, dispatched 5,000 troops to China in significant part to protect American lives and property during the Boxer Rebellion. *See* William McKinley, Annual Message of the President to Congress (Dec. 3, 1900), *Papers Relating to the Foreign Relations of the United States, 1900*, at XI–XIV (1902) (describing the operation in detail); *see also* *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30, 32 (2004) (“*2004 Haiti Deployment*”). President Taft sent more than 2,000 troops to Nicaragua in 1912 in part to protect Americans during an ongoing revolution in that country. *Right to Protect* at 119–22; *see also* W.H. Taft, Annual Message of the President to Congress (Dec. 3, 1912), *Papers Relating to the Foreign Relations of the United States, 1912*, at XII–XIII (1919). And President Johnson ordered military intervention in the Dominican Republic in 1965 in large part to protect Americans living there. *See 2004 Haiti Deployment*, 28 Op. O.L.C. at 32. More recently, in 2004, President George W. Bush deployed troops to Haiti in part to protect the thousands of Americans living there who “would [have been] in danger if the country [had] descend[ed] into lawlessness.” *Id.*

In our view, it was reasonable for the President to rely on a national interest in protecting American personnel and property in authorizing the airstrikes around Erbil, the Mosul Dam, and the Haditha Dam. As noted earlier, numerous American military advisers, diplomats, and other civilians are based in Erbil. Given ISIL’s brutal treatment of the populations it

encounters and those who oppose its aims, *see supra* Part I, the lives of these Americans would have been placed in jeopardy if ISIL had taken control of Erbil. The airstrikes against ISIL forces outside the city were therefore justified in order to protect these American lives. Similarly, American lives and property in Baghdad would have been placed in jeopardy if ISIL had destroyed the Mosul Dam—whether through purposeful action or an inability to perform the “extraordinary engineering measures” necessary to maintain it, *Geologic Setting of Mosul Dam* at 2— or if ISIL had taken control of and destroyed or released floodwaters from the Haditha Dam, *see* NSC September 7 Statement. More than 5,000 contractors, including 2,000 U.S. citizens, were working at the U.S. Embassy in Baghdad as of June. *See* Dan Lamothe, *Diplomats, Pilots, and Hired Guns: Here Are the Americans Left in Iraq*, Wash. Post, June 12, 2014, <https://www.washingtonpost.com/news/checkpoint/wp/2014/06/12/diplomats-pilots-and-hired-guns-here-are-the-americans-left-in-iraq>. The destruction of the Mosul Dam could have resulted in flooding in Baghdad, *see* Mosul Dam Letter, which the President determined could have “endanger[ed] U.S. personnel and facilities, including the U.S. Embassy in Baghdad, and prevent[ed] the Iraqi government from providing critical services” to the populace. August 17 Report to Congress. The destruction of the Haditha Dam could similarly have caused flooding in the southern areas of Baghdad, including areas where U.S. personnel are located, which the President determined could have “endanger[ed] U.S. personnel and facilities.” September 8 Report to Congress; *see also* NSC September 7 Statement. In light of these risks, it was also reasonable for the President to rely on the national interest in protecting U.S. personnel and property in authorizing military action to help Iraqi forces retake the Mosul Dam and retain control of the Haditha Dam.

2.

In authorizing the airstrike operations at issue in this opinion, President Obama also invoked a national interest in assisting Iraq, a strategic partner, in its campaign against ISIL. *See* August 8 Report to Congress (indicating the airstrikes near Erbil and Mount Sinjar would “help forces in Iraq” and were “undertaken in coordination with the Iraqi government”); August 17 Report to Congress (indicating the airstrikes around the Mosul

Dam were undertaken “to support the Iraqi forces in their efforts” to recapture the dam and in “their ongoing campaign against [ISIL]”); September 1 Report to Congress (noting the operation had been undertaken “in coordination with and at the request of the Iraqi government”); September 8 Report to Congress (indicating the airstrikes around Haditha Dam were undertaken “in support of Iraqi forces in their efforts to retain control of and defend this critical infrastructure site from ISIL”). We believe that it was reasonable for the President to rely on this interest, in combination with a national interest in protecting American citizens and property or averting a humanitarian catastrophe, in ordering the use of military force abroad.

Our Office has previously recognized that, in authorizing military action abroad, the President may rely on a national interest in assisting an ally or strategic partner at its request. In our 1980 opinion on possible uses of force related to the Iranian hostage crisis, for example, we identified “defending our allies” as a purpose for which the President may constitutionally use force without prior congressional approval, and pointed to the deployment of troops to Korea as “precedent . . . for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion.” *Presidential Power*, 4A Op. O.L.C. at 186 n.2, 187–88.⁶ Similarly, in our 1994 opinion concluding that the President had constitutional authority to send 20,000 troops to Haiti to forcibly remove its military dictators from power, we relied in significant part on the fact that the planned deployment was to take place at the invitation of Haiti’s legitimate government, citing in support several prior examples of Presidents deploying the military abroad at the request of foreign countries.

⁶ The fact that this national interest supported the Korea operation does not mean that the Korea deployment was sufficiently limited in nature, scope, and duration to be within the President’s constitutional authority to act without congressional authorization. *See 1994 Haiti Deployment*, 18 Op. O.L.C. at 178–79. We take no position on the latter question in this opinion. *See The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. 321, 329 (1970) (noting that President Truman’s action in Korea had ignited a “Great Debate” in Congress over the President’s war power); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 331–32 n.5 (noting that “[t]he boldest claim of Executive authority to wage war without congressional authorization was made at the time of the Korean War,” and that “[s]uch sweeping claims of inherent Executive authority have been sharply criticized”).

1994 Haiti Deployment, 18 Op. O.L.C. at 174 n.1, 178–79 & n.10⁷; *see also* Leonard C. Meeker, Legal Adviser, Dep’t of State, *The Legality of*

⁷ The discussion of U.S. military action taken at the request of foreign governments in our 1994 Haiti opinion appeared in the context of a discussion of the Declaration of War Clause, rather than a discussion of national interests supporting an exercise of the Commander in Chief power. But that is because the entire constitutional discussion in that opinion was framed as a discussion of the Declaration of War Clause. This feature of the opinion is not unusual: the two-part inquiry we developed in our Libya opinion is a recent refinement in this Office’s jurisprudence, and our earlier opinions frequently analyzed the question of the President’s constitutional authority to deploy the military abroad without prior congressional authorization under the rubric of a single inquiry, asking either whether a contemplated military action fell within the President’s constitutional power as Commander in Chief and Chief Executive to act in the national interest, *see, e.g., 2004 Haiti Deployment*, 28 Op. O.L.C. at 31–33; *Military Forces in Somalia*, 16 Op. O.L.C. at 9–12; *Presidential Power*, 4A Op. O.L.C. at 186–88, or whether a proposed use of force would constitute a “war” within the meaning of the Constitution, *see, e.g., Proposed Bosnia Deployment*, 19 Op. O.L.C. at 330–34; *1994 Haiti Deployment*, 18 Op. O.L.C. at 177–79. The analysis in these earlier opinions, however, frequently incorporated in substance both components of the two-part framework set forth above.

Thus, even though we considered assistance to an ally or partner in our 1994 Haiti opinion in the context of a discussion of the Declaration of War Clause, our opinion appeared to invoke that interest at least in part as a justification for the use of force abroad, not simply as an explanation for why the conflict was likely to be limited in nature, scope, and duration. In introducing historical examples of such assistance, for example, we observed that “the President, as Chief Executive and Commander in Chief . . . may, absent specific legislative restriction, deploy United States armed forces abroad or to any particular region,” and then noted that “Presidents have often utilized this authority, in the absence of specific legislative authorization, to deploy United States military personnel into foreign countries at the invitation of the legitimate governments of those countries.” *1994 Haiti Deployment*, 18 Op. O.L.C. at 178 (internal quotation marks omitted). This formulation suggests that we recognized that prior Presidents had considered a foreign government’s request for assistance to be an overall justification for the deployment of troops abroad under their Chief Executive and Commander in Chief authority, not simply an indicator of a conflict’s likely scope. The examples of prior presidential action we cited in our opinion are consistent with this characterization. *See infra* pp. 103–109 (discussing examples of Nicaragua, Greenland, Iceland, and the Philippines also cited in 1994 Haiti opinion). Further—and significantly—our 1994 Haiti opinion also recognized that the mere fact that the United States “deploys its troops into a country at the invitation of that country’s legitimate government” does not mean that the engagement is not a “war,” and conducted a separate analysis of the proposed Haitian deployment’s “nature, scope, and duration” to establish that it did not “rise to the level of ‘war.’” *1994 Haiti Deployment*, 18 Op. O.L.C. at 178–79. These features of our 1994 opinion suggest that its discussion of assistance to an ally or partner fits most naturally into the “national interest” element of our current two-part test.

United States Participation in the Defense of Viet-Nam, 54 Dep't of State Bull. 474, 489 (1966) (“*Participation in Viet-Nam*”) (concluding that the President had constitutional “authority to commit United States forces in the collective defense of South Viet-Nam” on the request of that country and that “[t]his authority stems from the constitutional powers of the President”).

Historical practice is consistent with this position. Presidents have taken military action abroad or deployed U.S. military personnel into foreign countries without prior congressional approval on numerous occasions for the purpose of assisting an ally or partner at its request. In February 1874, for example, rioting began in still-independent Hawaii after the election of a new king. *Right to Protect* at 67. “[A]t the earnest solicitation of [Hawaii’s] government,” U.S. troops landed amid active rioting in Honolulu “to aid in restoring order.” *Id.* (quoting *Report of the Secretary of the Navy*, H.R. Exec. Doc. No. 43-1, pt. 3, at 8 (1874)); see also *Instances of Force Abroad* at 6. In 1912, an attempted coup resulted in “open rebellion” against the government in Nicaragua. *Papers Relating to the Foreign Relations of the United States, 1912*, at 1032. In response, the Government of Nicaragua requested that the United States “guarantee with its forces security for the property of American citizens” and provide “protection to all inhabitants of the Republic.” *Id.*; see also *Right to Protect* at 119–20. Conveying this request to President Taft, the Secretary of State asked for the deployment of troops to Nicaragua “in view of the specific request of the Nicaraguan Government and of the seemingly possible danger of resultant anarchy.” *Papers Relating to the Foreign Relations of the United States, 1912*, at 1032–33. President Taft granted the request. See *id.* at 1033. And in 1919, at the request of Italian

We do not mean to imply that if the government of a particular territory requests that the United States use armed force in that territory, such a request cannot also be relevant in some circumstances to whether an action constitutes a “war.” In our opinion regarding a proposed deployment to Bosnia, for instance, we explained that the “consensual nature” of the operation—the fact that the parties who controlled the territory at issue had requested intervention—tended to suggest that “little or no resistance to the deployment w[ould] occur,” and served to distinguish the deployment of force from traditional wars aimed at conquest or occupation of territory, both considerations that inform an analysis of the anticipated “nature, scope, and duration” of a conflict. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332.

authorities and without the prior knowledge or consent of Congress, U.S. troops landed at Trau, Dalmatia—territory that was the subject of a post-World War I dispute between Italian and Serbian forces—in order to prevent an imminent conflict. *See Instances of Force Abroad* at 9; Clarence Arthur Berdahl, *War Powers of the Executive in the United States* 56 (1921). In response to a Senate resolution seeking information about the incident, the Secretary of the Navy emphasized the “fact that Italian authorit[ies] [had] requested [the] action” and that, had the United States not acted, “a state of actual war” might have resulted. *Landing Marines at Trau, Dalmatia*, S. Doc. No. 66-117, at 2 (1919).⁸

Similarly, before the United States joined the Second World War—but after the war had begun in Europe and it was feared that Germany might attack the Western Hemisphere—President Franklin D. Roosevelt unilaterally authorized military action “designed to aid the allied forces” at the request of foreign officials. *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. 321, 330 (1970). Pursuant to an agreement made with a Danish minister, President Roosevelt ordered the U.S. military to occupy Greenland after Denmark fell to Germany in 1940. *Id.*; *see also 1994 Haiti Deployment*, 18 Op. O.L.C. at 178. And in 1941, he authorized U.S. troops to occupy Iceland “in defense of that country,” pursuant to an agreement he concluded with Iceland’s Prime Minister. Korea Memorandum, 23 Dep’t of State Bull. at 175, *reprinted in* H.R. Rep. No. 81-2495, at 65; *see also 1994 Haiti Deployment*, 18 Op. O.L.C. at 178. Although these actions plainly furthered the national security interest in preventing Germany from gaining a foothold in the Western Hemisphere and attacking transatlantic shipping lanes, President Roosevelt indicated that the actions were also undertaken to assist friendly nations in defending their territory against Germany’s aggression. *See* Samuel I. Rosenman, *The Public Papers and Addresses of*

⁸ In congressional debates about the Trau incident, one Senator argued that the deployment of U.S. forces had been authorized by the “practically unlimited resources and unlimited power” Congress had given the President to fight World War I. 58 Cong. Rec. 6124–25 (1919). But as other Senators pointed out, at the time the troops were sent to Dalmatia, the United States had already signed an armistice, and in any event had never been at war with Italy or Serbia. *See id.* at 6123–29; *see also Landing at Trau Hotly Condemned in Senate Debate*, N.Y. Times, Sept. 30, 1919 (describing the competing views).

Franklin D. Roosevelt 1941, at 262 (“[T]he Government of the United States, while undertaking this defensive measure for the preservation of the independence and security of the democracies of the New World, [will] at the same time be afforded the privilege of cooperating in this manner with your Government in the defense of this historic democracy of Iceland.” (quoting message sent by President Roosevelt to the Prime Minister of Iceland)); *id.* at 96–97 (quoting President Roosevelt’s announcement that the establishment of U.S. bases in Greenland was “new proof of our continuing friendliness to Denmark”).

Several years later, in July of 1958, President Eisenhower sent a “contingent of United States Marines” to Lebanon in response to an “urgent request” from its president for assistance in the face of a “violent insurrection” whose “avowed purpose” was to “overthrow the legally constituted government of Lebanon.” *Special Message to the Congress on the Sending of United States Forces to Lebanon* (July 15, 1958), Pub. Papers of Pres. Dwight D. Eisenhower 550, 550–51 (1958). President Eisenhower explained to Congress that “United States forces are being sent to Lebanon to protect American lives and by their presence to assist the Government of Lebanon in the preservation of Lebanon’s territorial integrity and independence.” *Id.*; *see also Statement by the President on the Lebanese Government’s Appeal for U.S. Forces* (July 15, 1958), Pub. Papers of Pres. Dwight D. Eisenhower 549, 549–50 (1958). “As we act at the request of a friendly government to help it preserve its independence and to preserve law and order which will protect American lives,” the President added, “we are acting to reaffirm and strengthen principles upon which the safety and security of the United States depend.” *Special Message to Congress on Lebanon*, Pub. Papers of Pres. Dwight D. Eisenhower at 552 (1958). Vice President Nixon made clear that the “President had the constitutional power to do what he did” in part because of the U.S. interest in “strengthen[ing] th[e] [Lebanese] government in its efforts to resist forces in its country which were stimulated and materially assisted by forces outside the country.” 104 Cong. Rec. 14,548 (1958). The Vice President explained that the “failure to come to the aid of a government that had been friendly to the United States” and had requested America’s help “would have struck fear and consternation and probably panic into the hearts of the friends

of the United States not only in that area, but all the way from Morocco on the Atlantic clear over to the Pacific area.” *Id.* at 14,550.⁹

In 1982, President Reagan again sent U.S. troops to Lebanon “[i]n response to the formal request of the Government of Lebanon,” this time to help ensure the departure of Palestine Liberation Organization leadership, offices, and combatants from Beirut and the restoration of Lebanese government authority in the area. *Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Beirut, Lebanon* (Aug. 24, 1982), 2 Pub. Papers of Pres. Ronald Reagan 1078, 1078 (1982). See generally *The Situation in the Middle East: Hearing Before the S. Comm. on Foreign Relations*, 97th Cong. 1–14 (1982). In a notification to Congress “consistent with the War Powers Resolution,” President Reagan stated that U.S. forces had been deployed, “pursuant to the President’s constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces,” to “assist the Government of Lebanon in carrying out its responsibilities concerning the withdrawal [from Beirut] of . . . personnel [associated with the Palestine Liberation Organization] under safe and orderly conditions,” as agreed to by the Government of Lebanon, the Government of Israel, and the Palestine Liberation Or-

⁹ In 1957, Congress had passed a Joint Resolution to Promote Peace and Stability in the Middle East, which gave the President the authority to “use armed forces to assist” nations or groups of nations in the Middle East if they “request[ed] assistance against armed aggression from any country controlled by international communism.” Pub. L. No. 85-7, § 2, 71 Stat. 5, 5 (1957). After President Eisenhower deployed troops to Lebanon, there was some discussion in Congress about whether the deployment fit within the terms of this resolution, with several Senators expressing the position that it did not. See Arthur Krock, *Law and Intervention: An Analysis of Eisenhower Doctrine’s Application to U.S. Landing in Lebanon*, N.Y. Times, July 16, 1958, at 8; see also Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale L.J. 845, 870 n.132 (1996) (noting the debate on the question). In any event, Vice President Nixon subsequently made clear that the President had acted solely in reliance on his constitutional authority, see 104 Cong. Rec. 14,548 (1958), and later Executive Branch opinions have described President Eisenhower’s deployment of troops to Lebanon as having been undertaken without statutory authorization, see, e.g., *Participation in Viet-Nam*, 54 Dep’t of State Bull. at 484–85; Memorandum for President Lyndon Johnson from Secretary of State Dean Rusk, *Re: Legal Basis for Sending American Forces to Viet-Nam* (June 29, 1964), reprinted in Stephen M. Griffin, *A Bibliography of Executive Branch War Powers Opinions Since 1950*, 87 Tul. L. Rev. 649, 658–61 (2013).

ganization. *Letter on the Deployment of United States Forces in Beirut, Lebanon*, 2 Pub. Papers of Pres. Ronald Reagan at 1078–79 (1982). And in his remarks to the Nation on the deployment, the President emphasized the “irreversible commitment” of the United States “to the survival and territorial integrity of friendly states.” *Address to the Nation on United States Policy for Peace in the Middle East* (Sept. 1, 1982), 2 Pub. Papers of Pres. Ronald Reagan 1093, 1093 (1982).¹⁰

The next year, when Grenada experienced widespread anarchy and violence after a “Revolutionary Military Council” assassinated the Prime Minister and several other government officials and seized political power, President Reagan authorized the deployment of nearly 2,000 U.S. troops to invade the island, supported by the U.S. Air Force and Navy. See *Conyers v. Reagan*, 765 F.2d 1124, 1125–26 (D.C. Cir. 1985); Richard F. Grimmet, Cong. Research Serv., R42699, *The War Powers Resolution: After Thirty-Eight Years* 15 (Sept. 24, 2012) (“*War Powers Resolution*”). The President noted in oral remarks that he had “received an urgent, formal request” from the Organization of Eastern Caribbean States (“OECS”), of which Grenada was a member, “to assist in a joint effort to restore order and democracy on the island of Grenada.” *Remarks of the President and Prime Minister Eugenia Charles of Dominica Announcing the Deployment of United States Forces in Grenada* (Oct. 25, 1983), 2 Pub. Papers of Pres. Ronald Reagan 1505, 1505 (1983).¹¹ Presi-

¹⁰ The U.S. troops formed part of a multinational force that was sent to the country on multiple occasions beginning in August 1982 to “facilitate the restoration of Lebanese Government sovereignty and authority” and “thereby further the efforts of the Government of Lebanon to assure the safety of persons in the area and bring to an end the violence” in the region. *Letter to the Speaker of the House and President Pro Tempore of the Senate Reporting on United States Participation in the Multinational Force in Lebanon* (Sept. 29, 1982), 2 Pub. Papers of Pres. Ronald Reagan 1238, 1238 (1982). Although President Reagan indicated repeatedly that the troops would not engage in hostilities except in self-defense, the ongoing hostilities in the country resulted in the deaths of numerous U.S. troops, and President Reagan ultimately received legislative authorization for continuing the operations beyond October 1983. See Richard F. Grimmet, Cong. Research Serv., R42699, *The War Powers Resolution: After Thirty-Eight Years* 13–15 (Sept. 24, 2012); *Multinational Force in Lebanon Resolution*, Pub. L. No. 98-119, 97 Stat. 805 (1983).

¹¹ In addition, the Governor-General of Grenada—described by the former U.S. ambassador to the Eastern Caribbean as the “sole legitimate source of authority on the island”—

dent Reagan also made clear that, along with protecting American citizens trapped in Grenada, the mission was intended “to forestall further chaos” and “to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada.” *Id.* at 1506. The President’s letter to Congress, transmitted “consistent with the War Powers Resolution,” similarly indicated that, pursuant to his “constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief,” he had authorized military action because the OECS, “concerned by the deteriorating conditions in [its] member State of Grenada,” had “requested the immediate cooperation of a number of friendly countries” in an effort to “restore order,” as well as to “protect[] the lives of the United States citizens” there. *Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada* (Oct. 25, 1983), 2 Pub. Papers of Pres. Ronald Reagan 1512, 1512–13 (1983).

Similarly, President George H.W. Bush authorized the use of military force in the Philippines in 1989 when military leaders seized an air force base, attacked government facilities, and bombed the presidential palace as part of a coup attempt. *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Assistance to the Philippines* (Dec. 2, 1989), 2 Pub. Papers of Pres. George Bush 1622, 1622–23 (1989). After the President of the Philippines “formally requested limited U.S. military assistance to support her forces as they attempted to put down the coup,” President Bush, acting “pursuant to [his] constitutional authority with respect to the conduct of foreign relations and as Commander in Chief,” authorized U.S. military aircraft to “establish a protective cover . . . to prevent rebel aircraft from taking off.” *Id.* at 1623. Although “[n]o rebel aircraft attempted to take

appealed to the United States for help, adding “weight to the legal and political basis for the invasion.” *U.S. Military Actions in Grenada: Implications for U.S. Policy in the Eastern Caribbean: Hearings Before the Subcomm. on Int’l Sec. and Scientific Affairs & on W. Hemisphere Affairs of the H. Comm. on Foreign Affairs*, 98th Cong. 59 (1988) (statement of Sally A. Shelton); see also *Radio Address to the Nation on International Stability* (Oct. 26, 1985), 2 Pub. Papers of Pres. Ronald Reagan 1294, 1294 (1985) (noting on the second anniversary of the operation that “Grenada’s Governor-General” had “appealed for [the United States’s] help to restore order in his country, threatened by the machinery of dictatorship”).

off, and U.S. aircraft did not fire,” President Bush made clear in his War Powers Resolution notification to Congress that he would be “prepared . . . to take additional [military] actions” not only “to protect the lives of Americans” but also, “if requested, to provide further assistance to the government of the Philippines,” in recognition of the fact that the United States had “worked . . . over the years to provide assistance to the democratically elected government of the Philippines.” *Id.*

Along similar lines, after Iraq had invaded Kuwait and was threatening Saudi Arabia in 1990, and the “Saudi Government had requested [the] help” of the United States, President Bush deployed the military to “assist the Saudi Arabian Government in the defense of its homeland.” *Address to the Nation Announcing the Deployment of United States Armed Forces to Saudi Arabia* (Aug. 8, 1990), 2 Pub. Papers of Pres. George Bush 1107, 1107–08 (1990). In his address to the Nation, President Bush explained that his decision “gr[e]w[] out of the longstanding friendship and security relationship between the United States and Saudi Arabia” and out of the principle that “America will stand by her friends.” *Id.* at 1109. And in his War Powers Resolution report to Congress, the President indicated that the U.S. troops would remain “so long as their presence is . . . desired by the Saudi government to enhance [its] capability . . . to defend the Kingdom.” *Letter to Congressional Leaders on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East* (Aug. 9, 1990), 2 Pub. Papers of Pres. George Bush 1116, 1116 (1990). President Bush also stated that he had taken these actions “pursuant to [his] authority to conduct our foreign relations and as Commander in Chief.” *Id.*

Finally, as referenced above, President Clinton, in coordination with the deposed, democratically elected President of Haiti, authorized military action in Haiti without congressional approval to force the military dictators from power and “restore Haiti’s legitimate, democratically elected government.” *Address to the Nation on Haiti* (Sept. 15, 1994), 2 Pub. Papers of Pres. William J. Clinton 1558, 1558–60 (1994); *see also War Powers Resolution* at 37–39. Although an eleventh-hour agreement with the dictators reduced the risk of direct hostilities, President Clinton had authorized a hostile military invasion involving 20,000 troops, to be deployed in conjunction with an international coalition. *See 1994 Haiti Deployment*, 18 Op. O.L.C. at 174 n.1, 179 n.10; *War Powers Resolution*

at 38; *Address to the Nation on Haiti* (Sept. 18, 1994), 2 Pub. Papers of Pres. William J. Clinton 1571, 1571–72 (1994).¹²

In light of this historical practice and our precedent, we believe the President had the constitutional authority to rely on a national interest in supporting Iraq, a strategic partner, in ordering targeted airstrikes against ISIL without congressional approval. Although the President’s support to the Iraqi government was limited to five particular operations that also served other national interests, *see supra* Part II.A.1 and *infra* Part II.A.3, the Iraqi government requested the assistance of the United States with respect to all of those operations, and the President determined that agreeing to these requests would materially aid Iraq in its “ongoing campaign against [ISIL].” August 17 Report to Congress; *see* August 8 Report to Congress (noting the Erbil operation would help “stop[] the current advance on Erbil”); September 1 Report to Congress (noting the action had been taken “at the request of the Iraqi government”); September 8 Report to Congress (noting the Haditha Dam airstrikes were undertaken “in coordination with and at the request of the Iraqi Government” to support “Iraqi forces in their efforts to retain control of and defend [their] critical infrastructure”). ISIL, moreover, presents an acute threat to the Iraqi Government’s control over its country, to law and order within the country, and to the safety of Iraq’s citizens. *See supra* Part I. President Obama’s actions in assisting the Iraqi government’s campaign against ISIL thus mirror military action taken by past Presidents to suppress insurrection, maintain order, or restore a rightful government upon an ally’s or strategic partner’s request, or to answer a friendly government’s request for help in defending itself from attack.

¹² Responding to an ally’s or partner’s request for assistance bears some resemblance to obtaining the consent of a foreign government for using armed force in its territory, which is a justification under international law for the use of force in such circumstances. But even leaving aside the differences between responding to an affirmative request from an ally or partner and seeking consent from a country for military action the United States seeks to initiate, nothing in the presidential statements discussed in the text suggests that these Presidents were invoking assistance to an ally or partner primarily as an international law justification for their actions. Indeed, as we noted in the text, Presidents have included assistance to allies or strategic partners as a reason for taking military action in reports sent to Congress “consistent with the War Powers Resolution,” which requires an explanation of the domestic “constitutional and legislative authority” pursuant to which the President has authorized military action. 50 U.S.C. § 1543(a).

In addition, Iraq—like many of the allies or partners Presidents assisted in the examples described above—is a country of particular strategic importance to the United States and one that the United States has aided in the past and has made an ongoing commitment to assist. The use of military force to assist allies in general is consistent with the current U.S. national security strategy, which expressly states that “[t]he foundation of the United States, regional, and global security will remain America’s relations with our allies, and our commitment to their security is unshakable.” National Security Strategy 41 (May 2010), <http://nssarchive.us/NSSR/2010.pdf>. And with respect to Iraq in particular, the United States has a recent history of providing assistance, including military assistance authorized by Congress, as Iraq works to establish itself as a stable country in a volatile and strategically important region. *See* Iraq AUMF; *supra* Part I (discussing surge). Although the United States withdrew its troops from Iraq in 2011, it simultaneously committed to “continue to foster close cooperation concerning defense and security arrangements” and to “improve and strengthen the security and stability in Iraq.” Strategic Framework Agreement at 2–3; *see also* U.S. Dep’t of Def., News Transcript, Joint Press Conference by Secretary Hagel and Minister Johnston in Sydney, Australia (Aug. 11, 2014) (Secretary Hagel), <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/606908/joint-press-conference-by-secretary-hagel-and-minister-johnston-in-sydney-austr> (“[T]he [P]resident has also made it clear we’re going to support the Iraqi security forces in—in every way we can, as they request assistance there.”). In addition, as the President has explained, a stable Iraq will permit the United States “to craft [a] . . . joint counterterrorism strategy” with “the Iraqi Government [and] also with regional actors . . . beyond the Middle East.” Remarks on the Situations in Iraq and Ferguson, Missouri, and an Exchange with Reporters, Daily Comp. Pres. Doc. No. DCPD201400615, at 4 (Aug. 18, 2014); *see also* John Kerry, U.S. Dep’t of State, Press Statement, U.S. Welcomes Important Step in Iraq’s Government Formation Process (Aug. 11, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/08/230506.htm> (emphasizing that “[t]he United States will continue to . . . stand with the Iraqi people in their fight against terrorism”). The President thus had the constitutional authority to rely on a national interest in supporting Iraq, a strategic partner, in ordering targeted airstrikes against ISIL without congressional approval.

3.

The third national interest cited by President Obama—relevant in particular to the airstrikes near Mount Sinjar, the Mosul Dam, Amirli, and the Haditha Dam—is an interest in averting humanitarian catastrophe. *See* President Obama August 7 Statement (citing the need to prevent a “potential act of genocide” at Mount Sinjar); August 8 Report to Congress (explaining that the airstrikes around Mount Sinjar were authorized to “protect the civilians trapped there”); August 17 Report to Congress (noting the failure of the Mosul Dam could “threaten the lives of large numbers of civilians”); September 1 Report to Congress (noting that the Amirli airstrikes would “address the emerging humanitarian crisis and protect the civilians trapped” in that town); September 8 Report to Congress (noting the danger to “large numbers of Iraqi civilians”). We believe it was reasonable for the President, in exercising his constitutional authority as Commander in Chief and Chief Executive, to rely on this humanitarian interest, at least in combination with a national interest in protecting American citizens and property or supporting a strategic partner, as a basis for conducting military action without prior authorization from Congress.

The United States places great importance on protecting innocent lives and reducing suffering around the world. In a recent presidential directive, for example, President Obama recognized that “[p]reventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.” Office of the Press Secretary, The White House, PSD-10, Presidential Study Directive on Mass Atrocities (Aug. 4, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>. Consistent with that interest, the United States has ratified and implemented, through the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988), the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, which affirms that the contracting parties will “undertake to prevent” genocide and recognizes that “in order to liberate mankind from such an odious scourge, international co-operation is required,” *id.* pmb., art. I; *see also* Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 47, ¶ 165 (Feb. 26) (finding that “the contracting parties have a direct

obligation to prevent genocide”). The United States has also made clear that preventing mass atrocities may in some instances require the use of military force. *See, e.g.*, National Security Strategy 48 (May 2010) (“In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and—in certain instances—military means to prevent and respond to genocide and mass atrocities.”).

Consistent with these policies, Presidents have cited humanitarian concerns as an important national interest supporting multiple U.S. military deployments in the past, including those in Haiti in 1994, the former Yugoslavia in 1995, and Libya in 2011. *See, e.g.*, *Letter to Congressional Leaders on Deployment of United States Armed Forces to Haiti* (Sept. 18, 1994), 2 Pub. Papers of Pres. William J. Clinton 1572, 1572 (1994) (“The deployment of U.S. Armed Forces into Haiti is justified by United States national security interests” including “stop[ping] the brutal atrocities that threaten tens of thousands of Haitians[.]”); *Letter to Congressional Leaders on the Deployment of United States Military Forces for Implementation of the Balkan Peace Process* (Dec. 21, 1995), 2 Pub. Papers of Pres. William J. Clinton 1917, 1917–18 (1995) (“I authorized these deployments . . . as part of our commitment to secure the peace and halt the tragic loss of life in the former Yugoslavia.”); Office of the Press Secretary, The White House, *Letter from the President Regarding the Commencement of Operations in Libya* (Mar. 21, 2011) (“Libya Report to Congress”), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya> (notifying Congress of the commencement of operations “to prevent a humanitarian catastrophe”).

Indeed, in some past military deployments, a humanitarian purpose appears to have been one of the primary reasons for the President’s decision to act. In March 1999, for example, when President Clinton, together with certain NATO allies, launched airstrikes against the Serbian forces and military infrastructure of the Federal Republic of Yugoslavia to protect civilians in Kosovo, humanitarian purposes were the central focus of the mission. As President Clinton weighed his military options in the region, he stated that “[o]ur objective in Kosovo remains clear: to stop the killing and achieve a durable peace that restores Kosovars to self-government.” *Remarks on the Situation in Kosovo* (Mar. 22, 1999), 1 Pub. Papers of

Pres. William J. Clinton 426, 426 (1999). And when he announced the airstrikes, President Clinton notified Congress that he was doing so for the principal purposes of emphasizing to Serbian leaders “the imperative of reversing course” in their offensive against civilians in Kosovo; “to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military’s capacity to harm the people of Kosovo.” *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)* (Mar. 26, 1999), 1 Pub. Papers of Pres. William J. Clinton 459, 459 (1999).¹³ Two weeks later, President Clinton reaffirmed these objectives when he stated that he would “continue to intensify our actions to achieve the objectives . . . described” in the previous report to Congress, and to “support the international relief efforts being conducted in the region.” *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)* (Apr. 7, 1999), 1 Pub. Papers of Pres. William J. Clinton 516, 516 (1999). The President underscored the humanitarian nature of the operation by ordering the deployment of forces to Albania and Macedonia “to support humanitarian disaster relief operations for the Kosovar refugees.” *Id.* And shortly thereafter, he described his actions in Kosovo and surrounding areas as an effort “to stand against ethnic cleansing, save lives, and bring peace in Kosovo.” *Remarks Following a Meeting with Congressional Leaders and an Exchange with Reporters* (Apr. 13, 1999), 1 Pub. Papers of Pres. William J. Clinton 546, 546 (1999).

Similarly, President George H.W. Bush’s deployment of more than 25,000 troops to war-torn and divided Somalia during a widespread famine in 1992 was undertaken “to address a major humanitarian calamity, avert related threats to international peace and security, and protect the safety of Americans and others engaged in relief operations.” *Letter to Congressional Leaders on the Situation in Somalia* (Dec. 10, 1992), 2 Pub. Papers of Pres. George Bush 2179, 2179–80 (1992–93); see *Address to the Nation on the Situation in Somalia* (Dec. 4, 1992), 2 Pub. Papers of Pres. George Bush 2174, 2175 (1992–93) (“It’s now clear that

¹³ Although the notification to Congress also mentions other concerns—including concerns about regional stability that we cited in our Libya opinion, see *Military Force in Libya*, 35 Op. O.L.C. at 34–35—the notification makes clear that the mission was principally a humanitarian one.

military support is necessary to ensure the safe delivery of the food Somalis need to survive.”). In his address to the Nation, President Bush said: “Let me be very clear: Our mission is humanitarian[.]” *Address to the Nation on Situation in Somalia*, 2 Pub. Papers of Pres. George Bush at 2175 (1992–93); see also Michael R. Gordon, *Mission to Somalia: U.S. Is Sending Large Force as Warning to Somali Clans*, N.Y. Times, Dec. 5, 1992, at 5 (noting the Pentagon had issued an “official ‘mission statement’ for the operation, which underscored that the purpose of the intervention is to provide humanitarian aid”). The mission’s purpose was thus not simply to protect the American citizens already in Somalia and to “facilitate the safe and orderly deployment of U.N. peacekeeping forces in Somalia,” but also “to restore the flow of humanitarian relief to those areas of Somalia most affected by famine and disease.” *Military Forces in Somalia*, 16 Op. O.L.C. at 6. In explaining why such an expansive U.S. military action was needed, President Bush emphasized that “[o]nly the United States has the global reach to place a large security force on the ground in such a distant place quickly and efficiently and thus save thousands of innocents from death.” *Address to the Nation on the Situation in Somalia*, 2 Pub. Papers of Pres. George Bush at 2175 (1992–93). President Clinton also reiterated the humanitarian nature of the Somalia mission when the deployment ended. See *Remarks on Welcoming Military Personnel Returning from Somalia* (May 5, 1993), 1 Pub. Papers of Pres. William J. Clinton 565, 565 (1993) (noting it was “the largest humanitarian relief operation in history” and that “tens of thousands would have died” if the U.S. had not acted).

While Presidents have often stressed the humanitarian purposes underlying military actions taken abroad, this Office’s analysis of these actions has frequently emphasized other relevant national interests, such as regional stability or the protection of American lives. See, e.g., *Military Force in Libya*, 35 Op. O.L.C. at 27 (emphasizing “important U.S. interests in preventing instability in the Middle East and preserving the credibility and effectiveness of the United Nations Security Council”); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332–33 (emphasizing support for the United Nations and the North Atlantic Treaty Organization, as well as the need to preserve regional stability); *1994 Haiti Deployment*, 18 Op. O.L.C. at 177–79 (highlighting the fact that the operation took place with the consent of the legitimate government). But despite

focusing on other national interests, our opinions have often expressly noted the humanitarian purpose of those deployments. And in so doing, we have never suggested that the goal of preventing humanitarian catastrophes could not be an important national interest supporting the use of military force abroad. *See Military Force in Libya*, 35 Op. O.L.C. at 23, 35; *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 329; *1994 Haiti Deployment*, 18 Op. O.L.C. at 177.

We have also more than once suggested that, when a military deployment is undertaken in part to protect American citizens abroad, its scope can legitimately be expanded to achieve broader humanitarian objectives. In analyzing the legality of the deployment of U.S. forces to Somalia, for example, we began with the national interest in the protection of U.S. persons, *see Military Forces in Somalia*, 16 Op. O.L.C. at 6, but then went on to determine that the President’s power to deploy forces abroad was not “strictly limited to the protection of American citizens,” *id.* at 11. “Past military interventions,” we explained, “extended to the protection of foreign nationals” and “provide precedent for action to protect endangered Somalians and other non-United States citizens.” *Id.* (citing, among other examples, President Johnson’s ordering of military intervention in the Dominican Republic to “preserve the lives of American citizens and citizens of a good many other nations” and President McKinley’s dispatch of 5,000 troops to China during the Boxer Rebellion to rescue the besieged foreign legations, including both U.S. and foreign contingents, in Beijing (internal quotation marks omitted)); *see also Right to Protect* at 65 (troops landed in Uruguay in 1868 “for the protection of foreign residents” generally during an insurrection); *id.* at 120 (troops sent to Nicaragua in 1912 to help the Nicaraguan government protect American citizens and “all inhabitants” of the country during an attempted revolution (internal quotation marks omitted)). We reached a similar conclusion in 2004, determining that “[w]hen the armed forces [we]re deployed [to Haiti] for the protection of American citizens and property, their mission once deployed” did not need to be “so narrowly limited,” but rather could extend to the protection of Haitians and other innocent civilians. *2004 Haiti Deployment*, 28 Op. O.L.C. at 32.¹⁴

¹⁴ Although the engagements in Somalia and Haiti had the reinforcement of U.N. resolutions authorizing force, our opinions did not suggest that a President could expand the

In light of these precedents, we believe it was reasonable for the President to rely on a national interest in preventing humanitarian catastrophe, at least in combination with an interest in protecting Americans or supporting an ally or strategic partner, as a justification for conducting airstrikes against ISIL's positions around Mount Sinjar, the Mosul Dam, Amirli, and the Haditha Dam. As discussed above, the President determined that the situation on Mount Sinjar presented "the prospect of violence on a horrific scale," involving "a potential act of genocide" that the United States had "unique capabilities to help avert." President Obama August 7 Statement; cf. *Address to the Nation on the Situation in Somalia*, 2 Pub. Papers of Pres. George Bush at 2175 (1992–93) (noting that, in Somalia, "[o]nly the United States" could "save thousands of innocents from death"). This concern was shared by U.N. officials, who warned that a "humanitarian tragedy [wa]s unfolding in Sinjar." UN Daily News, *UN Warns of "Humanitarian Tragedy" as Militants Seize Town in Northern Iraq* (Aug. 4, 2014), <http://www.un.org/News/dh/pdf/english/2014/04082014.pdf>; see also Security Council August 5 Press Release (expressing "deep concern" about the thousands of Iraqis, many from the Yezidi community, displaced by ISIL and "in urgent need of humanitarian assistance"). Similarly, the failure of either the Mosul Dam or the Haditha Dam could have unleashed flood waves capable of killing large numbers of innocent civilians and endangering or displacing hundreds of thousands of others, in cities from Mosul to Baghdad. See August 17 Report to Congress; Mosul Dam Letter; September 8 Report to Congress; NSC September 7 Statement; see also Ellison, *An Unprecedented Task*, 63 Int'l Water Power & Dam Construction at 50–51 (noting the failure of the Mosul Dam could potentially kill a half-million civilians). And in Amirli, the President likewise identified an "emerging humanitarian crisis" caused by ISIL's siege of the town, September 1 Report to Congress, an assessment that reflected the State Department's

scope of a mission for humanitarian reasons only if a U.N. resolution was in effect. See *2004 Haiti Deployment*, 28 Op. O.L.C. at 33; *Military Forces in Somalia*, 16 Op. O.L.C. at 7. Moreover, although the U.N. Security Council has not passed a resolution authorizing the use of force in Iraq, it has called on the international community "to support the Government and people of Iraq and to do all it can to help alleviate the suffering of the population affected by the current conflict in Iraq." Security Council August 7 Press Release.

concern about the “dire conditions for the mainly Turkmen population,” State Department August 28 Daily Press Briefing, and that was consistent with calls by U.N. officials for “immediate action” to alleviate the “desperate” and “inhuman conditions” in Amirli and prevent a “possible imminent massacre” of the town’s citizens, *see* UN News, *Iraqi Civilians Suffering “Horrific” Persecution, Ethnic Cleansing—UN Rights Chief* (Aug. 25, 2014), <https://news.un.org/en/story/2014/08/475812-iraqi-civilians-suffering-horrific-persecution-ethnic-cleansing-un-rights-chief>; UN News, *Iraq: UN Envoy Calls for Immediate Action to Avert Possible “Massacre” in Northern Town* (Aug. 23, 2014), <https://news.un.org/en/story/2014/08/475762-iraqi-un-envoy-calls-immediate-action-avert-possible-massacre-northern-town>. In all four instances, U.S. airstrikes were designed to help Iraqi and aligned forces prevent the humanitarian catastrophes that were unfolding, either by mitigating ISIL’s threat, permitting the delivery of humanitarian aid, or both. Given these circumstances, we think the President reasonably invoked a national interest in preventing humanitarian catastrophe, in combination with a national interest in protecting American citizens and property or supporting a strategic partner, to justify deploying military forces abroad.¹⁵

B.

We next consider whether the anticipated nature, scope, and duration of the airstrike operations discussed in this opinion were sufficiently limited so as not to require prior congressional approval under the Declaration of War Clause. As we have previously explained, determining whether a military engagement amounts to a “war” for constitutional purposes involves a “fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations,” analyzed in light of the applicable historical precedent. *Military Force in Libya*, 35 Op. O.L.C. at 31 (quoting *1994 Haiti Deployment*, 18 Op. O.L.C. at 179). Here, we

¹⁵ Our conclusion addresses only the President’s domestic legal authority to engage in such military intervention without prior congressional approval. We do not address the validity of humanitarian intervention as a justification for the use of force under international law. *See, e.g.,* Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 Case W. Res. J. Int’l L. 473, 479–80 (2012) (noting the controversy surrounding humanitarian intervention in international law).

believe the anticipated nature, scope, and duration of the operations at issue were sufficiently limited so as not to constitute a “war.”

Military actions generally rise to the level of “war” for constitutional purposes only when they involve “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” *Id.* Certain factors reduce the likelihood that a military engagement will amount to a “war” in the constitutional sense. For example, military operations that do not include the introduction of ground troops are less likely to constitute a “war.” *See id.* at 38; *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333.¹⁶ In addition, we have previously suggested that where an “operation does not aim at the conquest or occupation of territory” or seek to “impos[e] through military means a change in the character of the political regime,” the operation’s more limited aims will likely reduce the risk of resistance to the U.S. deployment and decrease the time needed to fulfill those aims. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332. Both the lack of ground troops and the more limited goal of an operation also limit the “antecedent risk that United States forces” will “suffer or inflict substantial casualties as a result of the deployment.” *1994 Haiti Deployment*, 18 Op. O.L.C. at 179.

Consistent with these principles, we advised in 2011 that the conduct of limited airstrikes and associated support missions in Libya for the purpose

¹⁶ We do not mean to imply that contemplated deployments of ground forces—even in substantial numbers—necessarily constitute “wars” for constitutional purposes. For example, in 1994, we concluded that the planned deployment of 20,000 troops to Haiti to oust military dictators and reinstall the legitimate government was not a “war,” placing great weight on “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.” *1994 Haiti Deployment*, 18 Op. O.L.C. at 179. And in 1995, we concluded that the planned deployment of about 20,000 ground troops to Bosnia and Herzegovina to ensure compliance with a peace agreement was not a “war.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332–33. We acknowledged that the deployment of ground troops was “an essentially different, and more problematic, type of intervention” than air or naval operations, because of the increased risk of casualties and the greater difficulty of withdrawing ground forces, but nevertheless found that that concern was outweighed by the fact that the deployment was at the invitation of warring parties to support the agreement they had reached and thus it was “reasonably possible that little or no resistance to the deployment w[ould] occur.” *Id.*

of preventing regional instability and preserving the credibility and effectiveness of the U.N. Security Council did not amount to a “war” in the constitutional sense. *Military Force in Libya*, 35 Op. O.L.C. at 37–39. The U.S. mission had at first targeted the Libyan regime’s “air defense systems, command and control structures, and other capabilities . . . used to attack civilians and civilian populated areas,” and had then shifted to providing support for a NATO-led effort to enforce a no-fly zone and otherwise protect civilians in Libya. *Id.* at 25–26 (internal quotation marks omitted). We compared this operation to two prior campaigns conducted without prior congressional authorization—a series of no-fly zone patrols and periodic airstrikes in Bosnia that had lasted for more than two years prior to the deployment of ground troops in 1995 and a two-month NATO bombing campaign in Yugoslavia in 1999—and concluded that the operations in Libya similarly fell short of requiring a congressional declaration of war. We reached this conclusion in part based on the President’s assurance that—as in the air campaigns in Bosnia and Yugoslavia—ground troops would not be deployed, which meant that “[t]he planned operations [would] avoid[] the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces.” *Id.* at 38. We also based our conclusion on the “limited means, objectives, and intended duration” of the mission, explaining that the proposed action “did not ‘aim at the conquest or occupation of territory,’” but instead was “‘in support of international efforts to protect civilians and prevent a humanitarian disaster.’” *Id.* (quoting *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332; Libya Report to Congress).

For similar reasons, we do not believe that the operations addressed in this opinion constituted a “war” in the constitutional sense. President Obama made clear that—aside from a rejected proposal to use ground troops to help extract the trapped Yezidis, *see supra* note 4—the operations would be restricted to airstrikes and associated support missions. “American combat troops,” the President explained, “will not be returning to fight in Iraq.” Office of the Press Secretary, The White House, Weekly Address: American Operations in Iraq (Aug. 9, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/09/weekly-address-american-operations-iraq>; *see also* Office of the Press Secretary, The White House, Press Briefing by Principal Deputy Press Secretary Eric Schultz and Deputy National Security Advisor Ben Rhodes (Aug.

13, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/13/press-briefing-principal-deputy-press-secretary-eric-schultz-and-deputy-> (noting, in response to questions about the possibility of ground troops assisting in an evacuation of Mount Sinjar, that President Obama had “ruled out . . . reintroducing U.S. forces into combat, on the ground, in Iraq”). Thus, like our efforts in Libya, these operations were designed to “avoid the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces.” *Military Force in Libya*, 35 Op. O.L.C. at 38.

Moreover, these operations furthered “limited mission[s]” with well-defined and narrow objectives. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332; *see also, e.g., Military Force in Libya*, 35 Op. O.L.C. at 38. In the airstrikes directed at ISIL positions around Mount Sinjar and Erbil, President Obama directed U.S. military forces to conduct operations that were “limited in their scope and duration as necessary to protect American personnel in Iraq by stopping the current advance on Erbil by [ISIL] and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there.” August 8 Report to Congress; *see also, e.g., President Obama August 7 Statement* (describing the operations’ scope and purpose). The later operations against ISIL positions around the Mosul Dam, Amirli, and the Haditha Dam were similarly limited to specific, narrowly defined objectives involving the protection of Americans, assistance to Iraq, and the prevention of humanitarian catastrophe. *See August 17 Report to Congress* (indicating that the President had authorized “targeted air strikes to support operations by Iraqi forces to recapture the Mosul Dam”); September 1 Report to Congress (stating that operations related to Amirli would be “limited in their scope and duration as necessary to address this emerging humanitarian crisis and protect the civilians trapped in” the town); September 8 Report to Congress (indicating the operations would “be limited in their scope and duration as necessary to address th[e] threat [to Haditha Dam] and prevent endangerment of U.S. personnel and facilities and large numbers of Iraqi civilians”). It was thus anticipated that the specific operations at issue would be confined to narrow geographic regions within Iraq and would serve limited and largely “protective purposes” that did “not aim at the conquest or occupation of territory” or “at imposing through military means a change in the character of a political regime.” *Proposed Bosnia*

Deployment, 19 Op. O.L.C. at 332. Those factors made it less likely that the operations would be of a lengthy duration or that, as a result of the operations, the United States would “find itself involved in extensive or sustained hostilities.” *Id.*; see also *1994 Haiti Deployment*, 18 Op. O.L.C. at 173 (anticipated military operations did not amount to a “war” in part because they “did not involve the risk of major or prolonged hostilities”).

Because of the absence of ground troops and the limited nature of the specific missions involved, the anticipated operations discussed in this opinion did not, in our view, amount to a “prolonged and substantial military engagement[.] . . . involving exposure of U.S. military personnel to significant risk over a substantial period.” *Military Force in Libya*, 35 Op. O.L.C. at 31. We therefore conclude that the “anticipated nature, scope, and duration” of those military operations did not rise to the level of a “war” within the meaning of the Declaration of War Clause.

III.

For the reasons set forth above, we conclude that President Obama had the constitutional authority to order the targeted airstrike operations against ISIL described above. The President reasonably determined that these military operations furthered important national interests in protecting American lives, assisting an ally or strategic partner at its request, and preventing humanitarian catastrophe; and the anticipated nature, scope, and duration of the operations were sufficiently limited so as not to require prior congressional approval.

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