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 41

2017

WASHINGTON
2024

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(2017)

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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 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, except for certain Attorney General opinions published in *Administrative Decisions Under Immigration and Nationality Laws of the United States*. The first 40 published volumes of the OLC series covered the years 1977 through 2016. The present volume 41 covers 2017.

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

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Administration of the John F. Kennedy Centennial Commission

To avoid the separation of powers concerns posed by inclusion of six members of Congress on the eleven-member John F. Kennedy Centennial Commission, the Commission should create an executive committee, composed of its five presidentially appointed members, which would be legally responsible for discharging the purely executive functions of the Commission.

The six congressional members could participate in nearly all of the Commission's remaining activities, including in ceremonial functions.

January 10, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum provides our views on how the John F. Kennedy Centennial Commission ("JFK Commission") can be organized and administered so as to avoid the constitutional concerns raised by the statute that created the Commission. *See* John F. Kennedy Centennial Commission Act, Pub. L. No. 114-215, 130 Stat. 830 (2016) ("JFK Commission Act"). The same constitutional concerns prompted the President to issue a signing statement upon the enactment of the Ronald Reagan Centennial Commission Act, Pub. L. No. 111-25, 123 Stat. 1767 (2009) ("Reagan Commission Act"). Given the similarities between the two statutes, we recommend that the JFK Commission carry out its functions in keeping with the structure used to carry out the functions of the Ronald Reagan Centennial Commission.

The JFK Commission Act created an eleven-member commission with, among other duties, responsibility to "plan, develop, and carry out such activities as the Commission considers fitting and proper to honor John F. Kennedy on the occasion of the 100th anniversary of his birth." Pub. L. No. 114-215, § 3(1). Six of the eleven commissioners are members of Congress, appointed by congressional leadership. *Id*. § 4(a). Four commissioners are appointed by the President, and the remaining ex officio commissioner is also a presidential appointee—the Secretary of the Interior. *Id*.

The JFK Commission Act is functionally identical to the Reagan Commission Act. As we explained in a prior memorandum concerning the constitutionality of the Reagan Commission Act, the inclusion of mem-

bers of Congress on a commission like the Reagan Commission raises significant constitutional concerns, because the commission is called upon to engage in functions that constitute the execution of the laws. The Appointments Clause and the Ineligibility Clause of the Constitution, especially in light of the anti-aggrandizement principle underlying the constitutional separation of powers, prohibit congressional appointees from exercising such power.[1] *See Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193 (2009). When President Obama signed the Reagan Commission Act into law, he stated that "members of Congress 'w[ould] be able to participate only in ceremonial or advisory functions of [the] Commission, and not in matters involving the administration of the act.'" Daily Comp. Pres. Doc. No. 200900424 (June 2, 2009) (quoting Statement on Signing the Bill Establishing a Commission on the Bicentennial of the United States Constitution (Sept. 29, 1983), 2 *Pub. Papers of Pres. Ronald Reagan* 1390 (1983)).

Consistent with advice we gave regarding how the Reagan Commission could be lawfully structured—and advice this Office gave in 1984 regarding how the similarly designed Commission on the Bicentennial of the Constitution could be lawfully structured—we recommend that the JFK Commission create an "executive committee," composed of its five presidentially appointed members, which "would be legally responsible for discharging the purely executive functions of the Commission." *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207 (1984) ("*Bicentennial Commission*") (recommending a similar approach to structuring the Commission on the Bicentennial of the Constitution); *see Administration of the Ronald Reagan Centennial Commission*, 34 Op. O.L.C. 174 (2010). These functions would include determining which activities would be "fitting and proper to honor John F.

[1] The anti-aggrandizement principle provides that "where the effect of legislation is to vest Congress itself, its members, or its agents with 'either executive power or judicial power,' the statute is unconstitutional." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 127–28 (1996) (quoting *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991)); *see id.* at 131–32; *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (explaining that "once Congress makes its choice in enacting legislation, its participation ends," and "Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation").

Kennedy on the occasion of the 100th anniversary of his birth" and "plan-[ning], develop[ing], and carry[ing] out" such activities. Pub. L. No. 114-215, § 3(1). Indeed, in order to avoid serious constitutional questions, we would construe the Act itself to limit the exercise of "the purely executive functions of the Commission," *Bicentennial Commission*, 8 Op. O.L.C. at 207, to the five presidentially appointed commissioners.

Under this approach, the six congressional members could participate in nearly all of the Commission's remaining activities, including in ceremonial functions, and they could advise the executive committee on "the formulation of programs that would be technically approved and executed by non-congressional members." *Bicentennial Commission*, 8 Op. O.L.C. at 207. The entire Commission, including the congressionally appointed members, could also "provide advice and assistance to Federal, State, and local governmental agencies, as well as civic groups to carry out activities to honor John F. Kennedy on the occasion of the 100th anniversary of his birth," as section 3(2) of the Act contemplates. These functions, which are not purely executive in nature, do not raise the constitutional problems we have identified.

We believe the approach described above would allow the JFK Commission to constitute itself consistent with the requirements of the Act, while also alleviating the separation of powers concerns that would otherwise be implicated.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee Before Congressional Committees

The Department of Health and Human Services may pay for private counsel to represent an employee who has been subpoenaed to appear before the staff of two congressional committees for a deposition at which agency counsel is not permitted to be present.

January 18, 2017

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

You have asked whether the Department of Health and Human Services ("HHS") may pay for private counsel to represent an employee who has been subpoenaed to appear before the staff of two congressional committees for a deposition at which agency counsel is not permitted to be present.[1] We advised you orally that HHS has the authority to provide private counsel and that the provision of counsel may be considered a necessary expense that can be paid from the applicable HHS appropriation. This memorandum memorializes and further explains the basis for that advice. In brief, where a congressional committee questions an agency employee at a deposition or interview about actions performed within the scope of her employment, it may be in the agency's interest to provide private counsel to represent the employee in her individual capacity when the committee prohibits counsel for the agency from attending the deposition or interview. An agency may thus retain and pay for such counsel if it has both statutory authority and an available appropriation to do so, as we conclude HHS does, based on its representations regarding the circumstances here. In Part I, we discuss the factual background, including the congressional procedures applicable to this deposition. In Part II, we set

[1] *See* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Margaret M. Dotzel, Acting General Counsel, Dep't of Health and Human Services (Aug. 24, 2016) ("HHS Letter"). In preparing this opinion, we also requested and received the views of the Civil Division of the Department of Justice. *See* Memorandum for Ginger Anders, Deputy Assistant Attorney General, Office of Legal Counsel, from Kali N. Bracey, Deputy Assistant Attorney General, Torts Branch, Civil Division, Dep't of Justice (Oct. 14, 2016).

out the governing legal framework. In Part III, we apply this framework to the facts at issue here.

I.

A.

We understand that your question was prompted by a joint oversight investigation of the House Committee on Ways and Means and the House Committee on Energy and Commerce (collectively, "the Committees") into the system of cost-sharing reduction ("CSR") payments implemented by HHS and the Department of the Treasury pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA").[2] As part of their oversight investigation, the Committees issued a subpoena to an HHS employee to appear for a deposition before Committee staff relating to HHS's implementation of the CSR payments. We understand from HHS that neither the Committees nor any Executive Branch entity has alleged or suggested that the subpoenaed employee engaged in any misconduct. We also understand from HHS that the information sought at the deposition is related to HHS's implementation of the CSR payment program, including official actions taken by the employee and other Executive Branch personnel within the normal scope of their duties in the course of that implementation.

Attached to the subpoena was a set of procedures governing the deposition. The procedures included a provision stating that agency "[w]itnesses may be accompanied at a deposition by counsel to advise them of their rights," but "counsel for other persons, or for agencies under investigation, may not attend." *See* 161 Cong. Rec. E21 (daily ed. Jan. 7, 2015) (Extensions of Remarks) (Rep. Sessions submitting the "Procedures for the Use of Staff Deposition Authority") ("*Deposition Procedures*"). The procedures also mandate that an agency witness "may refuse to answer a question only to preserve a privilege." *Id*. If a witness refuses to answer

[2] CSR payments are payments the government makes to insurers to offset the "cost-sharing reductions" that insurers are required to provide under the ACA to eligible individuals to reduce those individuals' deductibles, coinsurance, copayments, and similar charges. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 171–72 (D.D.C. 2016) (describing the CSR payments).

a question to preserve a privilege, "the chair of the committee may rule on any such objection after the deposition has adjourned." *Id*. The chair may then overrule the objection in writing and, with proper notice, "order[] a witness to answer any question to which a privilege objection was lodged" at a reconvened deposition. *Id*. "A deponent who refuses to answer a question after being directed to answer by the chair in writing may be subject to sanction." *Id*.

B.

When congressional committees seek to question employees of an Executive Branch agency in the course of a congressional oversight inquiry of the agency, the Executive Branch's longstanding general practice has been for agency attorneys to accompany the witnesses.[3] *See Representation of White House Employees*, 4B Op. O.L.C. 749, 754 (1980) ("[L]egitimate governmental interests which arise whenever executive branch employees are called to testify before the Congress . . . [are] [o]rdinarily . . . monitored by agency counsel who accompany executive branch employees."); Memorandum for the Deputy Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Anne M. Burford for Private Counsel Fees* at 1–2 (May 3, 1983) ("*Burford I*"). That practice reflects the significant Executive Branch interests implicated by the oversight process. The employees' testimony occurs pursuant to the constitutionally mandated accommodation process, through which the Executive Branch provides to Congress information necessary to perform its legislative functions in a manner consistent with the Executive Branch's constitutional and statutory responsibilities and confidentiality interests. *See United States v. AT&T*, 567 F.2d 121, 127, 130–31 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."); Memorandum for

[3] In litigation, by contrast, the Department of Justice, under the supervision of the Attorney General, has the exclusive authority to represent the interests of the United States, except in situations covered by an express statutory exception. *See* 28 U.S.C. §§ 516, 519; 5 U.S.C. § 3106; *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 47–48 (1982).

the Heads of Executive Departments and Agencies from President Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* at 1 (Nov. 4, 1982) (providing that the "tradition of accommodation should continue as the primary means of resolving conflicts between the Branches"). Attorneys from the agency historically have accompanied the agency's employees in order to protect Executive Branch confidentiality and other institutional interests; to assist the employees in providing clear, accurate, and complete information in response to a congressional oversight inquiry; to support the employees in the face of potentially hostile questioning; and to ensure that any restrictions on the scope of the questioning are observed.[4]

In this case and in some previous oversight inquiries, however, congressional committees have refused to permit agency counsel to accompany agency employees to protect Executive Branch interests at interviews or depositions. On such occasions, we have advised that the agency may consider obtaining alternate counsel to represent either the agency or, if necessary, the employee. Alternate counsel may be obtained either by detailing attorneys from another government agency or—as relevant here—by using appropriated funds to retain and pay for private counsel. When alternate counsel represents the agency, or represents the employee

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[4] *See, e.g.*, *Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions*, 14 Op. O.L.C. 132, 133 (1990) ("*Reimbursing Justice Department Employees*") (the Department makes employees available "[i]n light of the oversight purpose of the [congressional] interviews" and "Department counsel or other representative will normally accompany the witness" in such interviews); Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 8, 1986) (a policy requiring the presence of government counsel at congressional interviews "protect[s] the confidentiality of privileged information" and "ensur[es] that any restrictions on the scope of the interview are observed by all parties"); Letter for Henry Waxman, Chairman, and Tom Davis, Ranking Minority Member, Committee on Oversight and Government Reform, U.S. House of Representatives, from Dinah Bear, General Counsel, Council on Environmental Quality, Executive Office of the President at 2 (Mar. 12, 2007) (in an oversight deposition of a former employee the agency has "a strong interest in ensuring that the information provided on its behalf is accurate, complete, and correct," a "fundamental and well-recognized interest in ensuring that its personnel are not pressed into revealing privileged information belonging to the Executive Branch," and "a strong interest in providing reassurance and support to staff who are called to Congress to provide information about their work-related activities").

in her official capacity, counsel's client is the agency, not the employee.[5] *See Burford I* at 3 n.3 ("[S]uits or subpoenas against employees in their official capacities are tantamount to suits or subpoenas against the government itself."). When counsel represents the employee in her individual capacity, by contrast, the attorney owes a fiduciary duty and a duty of confidentiality to the employee, not the agency. This opinion addresses the circumstances under which an agency may use appropriated funds to pay counsel to represent the employee in her individual capacity.[6]

II.

Appropriations law, prior opinions of this Office, and historical practice establish the legal framework governing an agency's ability to retain and pay for private counsel to represent its employees in a congressional oversight inquiry. A review of these sources makes clear that an agency may retain and pay for private counsel to represent an employee in a deposition or interview before a congressional committee where three conditions are met. First, representation of the agency by agency counsel at the deposition must be inappropriate or impermissible. Second, representation by private counsel must be in the government's interest, and the government may not pay fees incurred in representing the purely personal interests of the employee. Third, the agency must have the organic statutory authority and an available appropriation to retain and pay for private counsel.

The "basic rule" governing the use of appropriated funds to pay for private counsel is that "a general appropriation may be used to pay any

[5] The attorney's fiduciary duties and obligations run to the entity on whose behalf the employee is appearing, not to the employee herself. *See Restatement (Third) of the Law Governing Lawyers* § 97 cmt. c (Am. L. Inst. 2000) ("A lawyer who represents a governmental official in the person's public capacity must conduct the representation to advance public interests as determined by appropriate governmental officers and not, if different, the personal interests of the occupant of the office.").

[6] You have not asked about, and we have not evaluated, the constitutional concerns that may be raised by the Committees' prohibition on attendance by counsel representing the agency. We do note, however, that such a prohibition could potentially undermine the Executive Branch's ability to protect its confidentiality interests in the course of the constitutionally mandated accommodation process, as well as the President's constitutional authority to consider and assert executive privilege where appropriate.

expense that is necessary or incident to the achievement of the underlying objectives for which the appropriation was made." *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. 6, 8 (1986) (quoting General Accounting Office, *Principles of Federal Appropriations Law* 3-12 to 3-15 (1st ed. 1982)). The Constitution directs that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Congress has adopted several statutes reflecting this constitutional principle, among them the Purpose Act, 31 U.S.C. § 1301(a), which the Comptroller General has described as "one of the cornerstones" of federal appropriations law. 1 Government Accountability Office, *Principles of Federal Appropriations Law* 4-6 (3d ed. 2004) ("*Federal Appropriations Law*"). The Purpose Act provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); *see also United States v. MacCollom*, 426 U.S. 317, 321 (1976) (noting the "established rule" that "the expenditure of public funds is proper only when authorized by Congress"). As this Office has previously recognized, however, the Purpose Act "leaves federal agencies with 'considerable discretion in determining whether expenditures further the agency's authorized purposes and therefore constitute proper use of general or lump-sum appropriations.'" *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 35 Op. O.L.C. 77, 87 (2012) ("*Stafford Act Deployments*") (quoting *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 153 (1997)). "If the agency believes that the expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used." *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. at 8; *see also Indemnification of Treasury Department Officers and Employees*, 15 Op. O.L.C. 57, 60 (1991) (noting that an expenditure is permissible if it "directly" or "incidentally accomplishes a specific congressional purpose" or "is generally necessary for the realization of broader agency objectives covered by the appropriation" (internal quotation marks omitted)).[7]

[7] This understanding of an agency's discretion under the Purpose Act and Constitution mirrors the conclusions of the Comptroller General. The Comptroller General has found

In the context of retention of private counsel, this Office has concluded that the "logical relationship" standard may be met when the representation is in the government's interest, the employee is being questioned about conduct performed within the scope of her employment, and agency counsel is not available. In 1980, for instance, we concluded that the White House could use appropriated funds to retain private counsel to accompany White House employees to represent the government's interests when those employees testified about their official duties before a Senate committee. *Representation of White House Employees*, 4B Op. O.L.C. at 753–55. We explained that "there are . . . legitimate governmental interests which arise whenever executive branch employees are called to testify before the Congress," *id*. at 754, including interests in defending official policies and protecting the government's confidentiality interests, *id*. at 753. We recognized that those interests are normally protected by agency counsel, but because the White House had acquiesced in the Committee's demand that White House lawyers not serve as counsel, we concluded that the White House could retain private counsel to represent the government's interests.[8] *Id*. at 754.

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an expenditure permissible as a necessary expense when the expenditure, among other things, "bear[s] a logical relationship to the appropriation sought to be charged" by "mak[ing] a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available." *Stafford Act Deployments*, 35 Op. O.L.C. at 88 (quoting 1 *Federal Appropriations Law* at 4-21); *see also Department of Homeland Security—Use of Management Directorate Appropriations to Pay Costs of Component Agencies*, B-307382, 2006 WL 2567514, at 4 (Comp. Gen. Sept. 5, 2006) ("Even if a particular expenditure is not specifically provided for in the appropriation, the expenditure may be permissible under the 'necessary expense doctrine' if it will contribute materially to the effective accomplishment of the [agency] function."). Although the legal interpretations and opinions of the Comptroller General are not binding on Executive Branch agencies, they "often provide helpful guidance on appropriations matters and related issues." *Stafford Act Deployments*, 35 Op. O.L.C. at 89 n.8 (internal quotation marks omitted).

[8] That inquiry is consistent with the analysis employed in opinions issued by the Comptroller General. In a 1979 opinion, the Comptroller General approved the CIA's retention of a private attorney to represent an employee who was called to testify before Congress and required to defend himself before professional organizations regarding work he performed within the scope of his employment. *See Reimbursement by Central Intelligence Agency of Employee's Legal Fees*, B-193712, 1979 WL 12508 (Comp. Gen. May 24, 1979). In that opinion, the Comptroller General concluded that a general appropriation allowing the CIA to expend funds "for purposes necessary to carry out its functions"

Similarly, this Office, with the concurrence of the Civil Division, concluded in 1990 that the Department of Justice ("DOJ" or the "Department") could reimburse its employees for expenses they incurred retaining private counsel to represent them in their official capacities in depositions before a congressional committee. *Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 137–38. We explained that the committee's rules prohibited agency counsel from attending the depositions, *id*. at 133–34, and that there were "sufficient governmental interests . . . at stake in all of the depositions to justify representation by Department counsel—and when the Committee objected to the presence of Department counsel, representation by private counsel paid for by the Department." *Id*. at 137. We also noted that the employees' testimony pertained to their official duties. *Id*. at 133–34. In light of those considerations, we concluded that DOJ could use appropriated funds to reimburse the employees for legal fees incurred in connection with private counsel retained to represent them in their official capacities. *Id*. at 135 ("A number of opinions of this Office specifically hold that where Department representation would ordinarily be provided in a congressional investigation but is inappropriate under the specific circumstances, the Department may reimburse a government employee for legal fees incurred using private counsel.").

We have also concluded that in certain circumstances, it may be in the government's interest to pay for private counsel to represent an employee in her individual capacity in her testimony before congressional committees. In two memoranda written in 1983 and 1984, we stated that the EPA could use appropriated funds to reimburse former EPA Administrator Anne Burford for fees incurred by private counsel she had retained to represent her in her individual capacity in a congressional oversight inquiry. *Burford I* at 1; Memorandum for James A. Barnes, General Counsel, Environmental Protection Agency, from Theodore B. Olson,

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permitted the agency to reimburse the employee for his legal fees, because the conduct about which the employee was questioned "was in furtherance of an agency function" and "necessary to carry out the Agency's functions." *Id*. at 2. In a later opinion, the Comptroller General concluded that, where agency counsel was not available, private counsel could be permissibly retained when "representation of the employee is in the Government's interest," and the employee "performed the conduct in issue within the scope of his employment." *International Trade Commission—Legal Representation*, 61 Comp. Gen. 515, 516 (1982).

Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Private Counsel Fees Incurred by Anne M. Burford* at 1 (Mar. 12, 1984) ("*Burford II*"). In reaching that conclusion, we looked to the Department's regulations governing the provision of individual-capacity representation to federal employees as a guide.[9] *Burford I* at 3–4 & n.3. We noted that those regulations, consistent with the analysis described above, provide that representation is appropriate where "1) the employee was acting in the scope of his employment and 2) representation is in the interest of the United States." *Id*. at 4; *see* 28 C.F.R. §§ 50.15, 50.16.

With respect to the government-interest inquiry, we stated that "it is normally presumed to be in the interest of the United States to provide representation for employees sued (or subpoenaed) for acts performed within the scope of their employment." *Burford I* at 4 n.4. We therefore concluded that the regulations' threshold requirements for representation were met. *Id*. As a result, the regulations contemplated that DOJ ordinarily would provide representation by agency attorneys, "unless one of several conflicts of interest" was present, in which case DOJ could retain private counsel to represent the employee. *Id*. at 4–5. In Ms. Burford's case, we observed, DOJ attorneys were unable to represent her before the congressional committees because of an "apparent conflict" arising from the Department's investigation into the conduct that was the subject of the hearing. *Id*. at 3. Because representation by government counsel was inappropriate, and providing private representation for Ms. Burford in connection with her testimony about her official duties was in the government's interest, we concluded that the EPA could reimburse her for fees incurred by private counsel. *Id*. at 7. In our second memorandum concerning the Burford matter, we reaffirmed that "the retention of private counsel to represent [Ms. Burford] before congressional committees would have been and continues to be within the lawful authority of the EPA and the Department of Justice." *Burford II* at 5.

In determining whether and to what extent providing representation is in the government's interests, our Office has repeatedly emphasized the need to distinguish between government interests and personal interests. *See Representation of White House Employees*, 4B Op. O.L.C. at 754–55

[9] We noted, however, that the DOJ regulations did "not necessarily bind the EPA." *Burford I* at 3–4 n.3.

("Although it can become difficult to distinguish between personal and governmental interests, this point is one of considerable importance."). This need arises, in part, because general appropriations are available to pay for private counsel only when doing so is necessary to the furtherance of government interests; they are not available to pay for representation of purely private interests. *See id*. at 753; *see also Smithsonian Institution Use of Appropriated Funds for Legal Representation of Officers and Employees*, 70 Comp. Gen. 647, 649 (1991) ("It is well-established that federal funds may not be used to reimburse a government employee for legal fees incurred in connection with matters of personal, rather than official, interest.").

The existence of personal interests, however, "does not automatically preempt a legitimate government interest"; "[t]he two may exist side-by-side." 1 *Federal Appropriations Law* at 4-58. In the case of representation before a congressional committee, we have recognized that "the official and personal interests of employees may overlap to a large extent." *Representation of White House Employees*, 4B Op. O.L.C. at 753. The "interests in presenting information correctly and clearly" in congressional proceedings "are both personal and governmental." *Id*. By contrast, the employee's interests "in avoiding federal criminal prosecution, civil liability to the United States or adverse action by a federal agency" are "purely personal," and the Executive Branch's interests in "asserting a governmental privilege [and] defending official policies and procedures" are "entirely governmental." *Id*. Although congressional testimony thus may implicate both government and personal interests, we have opined that "any personal interests are merely incidental to the governmental interests" when it has appeared that there was no "personal or official wrong-doing of which the [testifying] employees could fairly be accused." *Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 137. We explained:

> Like all witnesses before Congress, the employees have "personal" interests such as being treated fairly, having a full and fair opportunity to respond, and avoiding being made an unfair target of congressional criticism; beyond that, these witnesses are appearing before Congress only because they did their jobs as Department employees. These personal interests would not appear to be of the kind this Office has previously identified as "purely personal."

Id. We therefore concluded that despite the presence of incidental personal interests, sufficient government interests were at stake to justify paying for representation for the employee. *Id*. The Department's regulations governing the retention of private counsel rely on this distinction as well, prohibiting reimbursement of expenses incurred for "legal work that advances only the individual interests of the employee."[10] 28 C.F.R. § 50.16(d).

III.

Under the principles established in these precedents, we conclude, as we previously advised you, that HHS may retain and pay for private counsel to represent its employee at the deposition before the Committees. Under the circumstances as you have described them to us, the three conditions set forth above have been satisfied. The Committees have prohibited HHS from providing agency counsel or any other attorneys representing the agency (i.e., substitute agency counsel) to accompany the employee. HHS has determined that providing individual representation of the HHS employee in these circumstances furthers important government interests and that doing so will not involve paying for counsel to represent the purely personal interests of the employee. And HHS has both organic statutory authority and an available appropriation to retain and pay for private counsel to represent the individual employee.

A.

First, under the procedures that govern a deposition conducted by the Committees, neither HHS nor any substitute agency counsel is permitted to represent the agency at the deposition. As we have explained, HHS counsel would ordinarily represent HHS at a congressional proceeding in

[10] The Civil Division has informed us that it does not interpret these regulations to apply to a federal employee who appears as a witness before Congress or in civil litigation, except in circumstances in which the witness is also a defendant in a related civil suit or faces other potential adverse legal consequences related to the actions about which they face questioning. As a result, representation of a federal employee in her individual capacity by DOJ attorneys is available only when the individual faces a personal risk of civil liability or other adverse legal consequences as a result of actions taken within the scope of her employment, and the Attorney General or her delegee determines that such representation is in the government's interest. *See* 28 C.F.R. §§ 50.15, 50.16.

which an employee was providing testimony about the agency's implementation of the CSR program and her own involvement in that implementation in the course of her official duties. But here, HHS attorneys are not permitted to perform this function because "counsel . . . for agencies under investigation may not attend" the deposition. *See Deposition Procedures*.

Our writings suggest that when a congressional committee has prohibited counsel from a particular agency from attending an interview of an agency employee, either an attorney from another government agency or private counsel may substitute for agency counsel, accompanying the employee to the interview to represent the government's interests. *See Representation of White House Employees*, 4B Op. O.L.C. at 754; *Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 134. That arrangement, however, also appears to be prohibited by the Committees' deposition procedures. Outside counsel substituting for HHS attorneys at the deposition would be representing the agency, not the individual. *See Representation of White House Employees*, 4B Op. O.L.C. at 755 (substitute agency counsel "must clearly understand that he is the Government's lawyer and not private counsel for the represented employee"). The attorney would be acting as substitute "counsel . . . for [the] agenc[y] under investigation," and thus would be barred by the Committees' procedures.[11] *See Deposition Procedures*. The Committees' procedures thus

[11] Counsel representing the individual employee in her "official capacity" would be barred by the Committees' procedures for the same reason. As discussed, counsel who represents an employee in her official capacity would also be acting as "counsel . . . for [the] agenc[y]," *see supra* note 5, and would be prohibited from attending the deposition under the Committees' procedures as we understand them. *Cf. Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703–04 (1949) (holding that a suit against a government employee was barred by sovereign immunity because the action at issue was "within [the officer's] authority" as a government official and "inescapably the action of the United States").

As suggested earlier, in the context of "representation in connection with Congressional subpoenas," we have opined that the "distinction between official capacity and individual capacity is difficult to make" because an employee's appearance before a congressional committee may "contain[] elements of both individual and governmental representation." *Burford I* at 3–4 n.3. Here, the Committees' deposition procedures do not allow for official-capacity representation, so any attorney retained by HHS must provide individual-capacity representation, pursuant to which the attorney owes duties of loyalty

preclude HHS from accompanying its employee to the deposition to represent the agency's interests and preclude HHS from arranging for any outside counsel, whether from within the Executive Branch or from private practice, to accompany its employee to represent the agency's interests.

B.

Second, it is reasonable for HHS to conclude that the provision of individual-capacity representation to the HHS employee is in the government's interest because she has been subpoenaed by the Committees to testify regarding actions taken in the course of her official duties, and she lacks the sort of purely personal interests that would preclude representation at government expense. The important government interests furthered by the representation include ensuring that the employee provides accurate and complete information, protecting her from inadvertently disclosing confidential information that she is not authorized to disclose, protecting her from questioning outside the scope of the deposition, supporting her in the face of potentially hostile questions from the Committees and their staffs, and preventing her from incurring substantial legal fees as a result of acts taken in the performance of her duties on behalf of the agency. As we have explained, it is "normally presumed to be in the interest of the United States to provide representation for employees sued (or subpoenaed) for acts performed within the scope of their employment." *Burford I* at 4 n.4. These employees "are appearing before Congress only because they did their jobs," *Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 137, and the government has an interest in providing them representation—even when the representation pertains to the employee's individual capacity, *see Burford I* at 4–5 & nn.3–4.

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and confidentiality to the employee, not the agency. To be sure, the employee arguably could be said to be *testifying* in her official capacity. The Civil Division has informed us that it considers employees who are called to testify about their official duties, but who otherwise do not face individual liability in damages or some other personal legal jeopardy, to testify in their official capacities. By allowing only individual-capacity representation, however, the Committees' deposition procedures make it unnecessary to resolve whether the HHS employee has been subpoenaed to testify in her individual or official capacity. As noted above, therefore, this opinion addresses only whether HHS may provide individual-capacity representation to its employee, the same situation we addressed in the two *Burford* memoranda. *See Burford I* at 3–4 & n.3; *Burford II* at 3–4.

In particular, providing individual-capacity representation furthers HHS's interest in protecting its employees from the burden of undergoing potentially hostile questioning and incurring legal fees as a result of actions taken in good faith on behalf of the agency. Our Office, the Comptroller General, and the Supreme Court have recognized on numerous occasions that forcing federal employees to defend themselves against the burdens of civil litigation and incur legal fees in doing so may chill the employees' exercise of their official duties. *See, e.g.*, *Indemnification of Treasury Department Officers and Employees*, 15 Op. O.L.C. at 61–63 (collecting authorities). As a result, providing counsel to employees facing such burdens serves important government interests in ensuring that Executive Branch employees acting in good faith may discharge their official duties and discretionary functions rigorously, without concern about potential reprisals or legal fees. *See Department of Justice Authority to Represent the Secretary of Housing and Urban Development in Certain Potential Suits*, 31 Op. O.L.C. 212, 216 (2007) ("[T]he United States has an interest in defending an officer from suits arising from the faithful discharge of his statutory responsibilities . . . because it would be protecting an officer from the potential burden of litigation arising out of his service."); *see also Fees of District Attorneys*, 9 Op. Att'y Gen. 146, 148 (1858) ("When a[n] . . . executive officer is sued for an act done in the lawful discharge of his duty, the government which employed him is bound, in conscience and honor, to stand between him and the consequences.").

Although an employee subpoenaed to appear before a congressional committee for a deposition is not subject to civil liability, the proceeding nonetheless may be burdensome, and providing representation may further the government's interest in protecting the employee from that burden. Without counsel paid for by the agency, the employee would have to incur legal fees to have any representation. *See* Memorandum for Dick Thornburgh, Attorney General, and Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Attorney Fees for Private Counsel Representing Former Government Officials in Federal Criminal Proceedings* at 18 (Oct. 19, 1989) ("[The employee] was caught in a power struggle between Congress and the executive branch. Such policy disputes are frequent, and should not invoke the

specter of personal liability for attorneys['] fees for Administration officials simply, and properly, doing their jobs. The potential for abuse in such circumstances is profound."). Proceeding without representation would leave the employee to defend herself against potentially hostile questioning without any legal advocate—in a setting in which there is no neutral magistrate to moderate the parties' conduct or adjudicate objections. The government has an interest in providing representation to such an employee. That is particularly true when the agency instructs the employee not to answer certain questions in order to protect the Executive Branch's privileges and confidentiality interests, as it is the employee who ultimately faces the potential for sanctions as a result.[12]

Private counsel representing the individual may also indirectly further the government's confidentiality interests. *Cf. Department of Justice Funding of Representation of Victims in Connection with a West German Prosecution*, 12 Op. O.L.C. 105, 107 (1988) ("[T]he existence vel non of a governmental interest in this case should not depend on the fact that the counsel we retain will technically be representing a private party, as opposed to the United States government itself."). To be sure, counsel representing the individual cannot fully protect those interests, as she may not assert government privileges and ultimately owes fiduciary duties to the individual employee, not the agency. *See Representation of White House Employees*, 4B Op. O.L.C. at 754–55. But that does not preclude private counsel from consulting with agency attorneys before or during the interview to understand where the government's confidentiality interests lie and what information the employee is authorized to disclose. Because the employee's testimony relates only to official actions taken in the scope of her employment, the information at issue in her testimony is agency information, not information that is personal to the employee. The Executive Branch controls the dissemination of such information. *See Authority of Agency Officials to Prohibit Employees from Providing*

[12] If the proceedings, including the potential for sanctions, evolve in a manner that gives rise to a conflict between the interests of the government and the employee, such that further representation is not in the government's interests, the agency may no longer pay for private counsel. *See Representation of White House Employees*, 4B Op. O.L.C. at 754; *cf.* 28 C.F.R. § 50.16(c)(2) ("Federal payment to private counsel for an employee will cease if . . . the Department of Justice . . . [d]etermines that continued representation is not in the interest of the United States.").

Information to Congress, 28 Op. O.L.C. 79, 80–82 (2004). Agencies have a longstanding practice of working with employees and former employees and, when necessary, their counsel, in the course of responding to congressional oversight requests about agency information. As long as the employee's and the agency's interests remain aligned, nothing about the attorney-client relationship between the private counsel and the employee prevents private counsel from working with agency counsel to understand the agency's positions about the oversight inquiry, the proper scope of the deposition or interview, and the potential confidentiality interests implicated by the requested testimony. Private counsel also may convey agency positions or requests to committee staff.

For all of these reasons, we continue to follow the view expressed in our 1983 *Burford I* memorandum that it is ordinarily in the interest of the United States to provide individual-capacity representation for an employee subpoenaed to testify before congressional committees about acts performed within the scope of her employment. *Burford I* at 4 n.4. That presumption applies here because, as we understand the circumstances, the acts that are the basis for the Committees' subpoena were performed within the scope of the employee's official duties.

The normal presumption may not apply where the employee is also the subject of a criminal investigation, has potential civil liability to the United States, or is subject to any adverse action by a federal agency on the basis of the actions under investigation by the congressional committee. *See Representation of White House Employees*, 4B Op. O.L.C. at 750–53; *see also supra* Part II. It is our understanding from HHS that none of these circumstances applies to the subpoenaed employee. Thus, the individual employee does not have any "purely personal" interests in this matter that would preclude the provision of representation at government expense under our previous opinions. The employee does have the kind of "personal" interests described in our 1990 *Reimbursing Department of Justice Employees* opinion, including "avoiding being made an unfair target of congressional criticism," having an opportunity to respond fully to questions, and avoiding possible sanctions under the congressional procedures for refusing to answer the Committees' questions. 14 Op. O.L.C. at 137. But, as we explained in that opinion, these interests are not "purely personal"; they are "incidental" to, and in many cases overlap with, the substantial government interests implicated by

a deposition before congressional committees relating solely to acts taken in the course of the employee's official duties. *Id*. Where, as here, the individual employee has only incidental personal interests that largely overlap with the government interests in supporting, informing, and protecting agency employees when they are compelled to testify about their official duties, we conclude that providing the employee with individual representation is permissible, and an expense that an agency may consider necessary to the performance of important agency functions.

C.

We also conclude that HHS has the statutory authority and an available appropriation to retain and pay for private counsel to represent its employee in the Committees' deposition.[13] HHS, like other federal agencies, may "procure by contract the temporary . . . or intermittent services of experts or consultants or an organization thereof" if that procurement is "authorized by an appropriation or other statute." 5 U.S.C. § 3109(b); *see Burford I* at 6 n.7 (noting the possibility of utilizing section 3109 to retain private counsel); *Use of White House Funds for Payment of Consultants to Assist Presidential Nominee to Regulatory Agency at Confirmation Hearing*, 2 Op. O.L.C. 376, 377 (1977) ("*Use of White House Funds*") (section 3109 "would thus appear to encompass the employment of outside counsel to assist the nominee if, in your judgment, this would provide expert or professional services not available within the White House Office").[14] Although we have advised in a similar context that section

[13] You asked for our legal advice about whether HHS may pay for private counsel to represent its employee. Organic statutory authority and an available appropriation to use that authority are necessary for the agency to retain private counsel, which is the issue we analyze in this section. However, if the agency lacks such organic authority, but determines that private representation would be in the government's interest, the agency may be able to reimburse its employee for private counsel expenses as "necessary expenses" incurred in furtherance of agency functions. *See Burford II* at 5. As we explained in the Burford matter, however, it would be preferable for the agency to contract directly with the private attorney because doing so "enables the agency to retain control over the terms of the contract, instead of leaving the negotiation of contract terms to individual employees." *Id*. at 6.

[14] The use of section 3109 is permissible only where agency employees are not able to perform the function for which the expert is retained. *See* 5 C.F.R. § 304.103(b)(3)–(5) (prohibiting the use of section 3109 to appoint an expert or consultant to "function in the

3109 alone "do[es] not . . . provide the substantive authority" to hire private counsel, we recognized that it does "provide a method of procedure for carrying into effect powers elsewhere granted." *Providing Representation for Federal Employees Under Investigation by the Inspector General*, 4B Op. O.L.C. 693, 695 (1980); *see also* 1 *Federal Appropriations Law* at 4-14 (section 3109 itself "does not authorize an agency to spend general operating appropriations to hire consultants," but requires a specific authorizing appropriation or statute). Section 3109 thus allows an agency to procure the services of an expert or consultant where a condition precedent is met: when that procurement is "authorized by an appropriation or other statute." *See* HHS Letter at 3 (noting that section 3109 is "best regarded as a type of appointment mechanism for certain Government employees when Congress has provided express authorization for its use").

HHS has a specific statutory authorization that enables it to use an appropriation for the purpose of hiring consultants under section 3109. In the Fiscal Year 1993 HHS appropriations act, Congress included a permanent authorization providing that HHS appropriations that are "available for salaries and expenses . . . shall be available for services as authorized by 5 U.S.C. 3109." Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-394, 106 Stat. 1792, 1825 (Oct. 6, 1992) ("FY 1993 Authorization"); HHS Letter at 3. We understand this provision to provide the necessary substantive authority for HHS to use available appropriations to contract for services "as authorized by" section 3109, that is, pursuant to the conditions and prohibitions set forth in section 3109 and its implementing regulations. *See* 5 U.S.C. § 3109(b), (c), (d) (limiting the contract to one year, prohibiting the filling of certain positions under the authority granted, and directing the Office of Personnel Management to promulgate regulations "necessary for the administration" of the section); 5 C.F.R. pt. 304 (setting forth regulations governing agencies' use of section 3109, including compensation and reporting requirements). Numerous opinions

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agency chain of command," to "do work performed by the agency's regular employees," or to "fill in during staff shortages"); *Employment of Temporary or Intermittent Attorneys and Investigators*, 3 Op. O.L.C. 78, 78–79 (1979) ("[I]n our view, this appropriation may not be used to hire employees to perform the same functions as are performed by regular employees in your Office.").

of this Office, the Comptroller General, and other bodies support that conclusion. *See, e.g.*, *Use of White House Funds*, 2 Op. O.L.C. at 376 (noting that a current White House appropriation for "services as authorized by section 3109" "authorize[d] the hiring of consultants"); *Charles R. Hobbes Corp.*, B-191865, 1978 WL 11030, at 2 (Comp. Gen. Nov. 13, 1978) (concluding that a Department of Interior appropriation, which made funds available to contract "for services as authorized by 5 U.S.C. 3109," *see* Pub. L. No. 95-74, § 104, 91 Stat. 295, 297 (July 26, 1977), "specifically permitted" the agency "to procure such services by contract or appointment"); *Lovoy v. Dep't of Health & Human Servs.*, 94 M.S.P.R. 571, 576–77 (2003) (stating that HHS's FY 1993 Authorization permits HHS to use appropriations to pay experts and consultants appointed under section 3109 at a particular pay rate).[15] Accordingly, the FY 1993 Authorization permits HHS to use funds available to pay for salaries and expenses to contract for the services of a private counsel pursuant to section 3109.

HHS also has a current appropriation available for salaries and expenses that it can use to pay for private counsel. In the 2016 Consolidated Appropriations Act, HHS received an appropriation "[f]or necessary expenses, not otherwise provided, for general department management." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2617 (Dec. 18, 2015). HHS has informed us that this appropriation is available to pay for salaries and expenses; it is thus also available under the FY 1993 Authorization to contract for services as authorized by section 3109. Because, as discussed above, the provision of private represen-

[15] In the course of our analysis, we considered whether the phrase "as authorized by section 3109," as used in the FY 1993 Authorization, should be interpreted to authorize the expenditure of appropriations only in circumstances in which section 3109 *itself* authorizes using appropriated funds to contract for services. We rejected that interpretation, however, because it would render the FY 1993 Authorization a nullity. As noted above, section 3109 does not itself authorize any action, but instead is contingent on authority provided in appropriations provisions or other statutes. Consistent with the canon against construing statutory provisions to be "superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted), the construction of the phrase "as authorized by section 3109" that we adopt here gives the FY 1993 Authorization operative effect. That construction is also consistent with both the Executive Branch's and the Comptroller General's historical interpretations of the identical phrase in other appropriations provisions.

tation is in the government's interest, the testimony of the employee relates solely to actions taken within the scope of her official duties, and agency counsel cannot be present, *see supra* Parts III.A–B, HHS may permissibly conclude that contracting for the services of a private attorney to represent its employee is a "necessary expense" that "bears a logical relationship to the objectives of [its] general appropriation." *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. at 8. Funds from the 2016 appropriation therefore are available under the FY 1993 Authorization to contract for the temporary service of an outside counsel pursuant to section 3109.[16]

IV.

For the reasons set forth above, we concluded in our prior oral advice that, in these circumstances and under the Committees' procedures governing depositions, HHS may retain and pay for private counsel to represent its employee in the deposition.

GINGER D. ANDERS
Deputy Assistant Attorney General
Office of Legal Counsel

[16] HHS, and other agencies that face circumstances similar to those that are the basis for this opinion, may benefit from consulting with the Civil Division about its administration of the Department of Justice's private counsel retention program. Civil Division Directive 2120B implements the Department's individual-capacity representation regulations, 28 C.F.R. §§ 50.15, 50.16, and currently includes, among other provisions, a fee limitation of $300 per hour, plus expenses, for private representation. *See* Civil Division, Dep't of Justice, Administrative Directive 2120B, *Retention and Payment of Private Counsel* at 13 (Oct. 1, 2016). The Civil Division encourages interagency coordination so that the Executive Branch continues to be able to retain private counsel where necessary at appropriate rates and in accordance with uniform standards of representation.

Who Qualifies as a "Very Senior" Employee Under 18 U.S.C. § 207(d)(1)(B)

Section 207(d)(1)(B) of title 18 encompasses any Executive Branch employee who receives a rate of basic pay of exactly the amount payable for level I of the Executive Schedule, regardless of whether the employee's pay is required to be set at level I by law or is set at level I by administrative action.

An employee's "rate of pay" in section 207(d)(1)(B) refers to the employee's rate of basic pay, exclusive of any other forms of compensation such as bonuses, awards, allowances, or locality-based comparability payments.

January 19, 2017

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

Section 207(d) of title 18 imposes stringent post-employment restrictions on "very senior" employees in the Executive Branch. The provision applies to, among others, "any person who . . . is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule." 18 U.S.C. § 207(d)(1)(B). Your office has asked two questions about the meaning of the phrase "employed in a position . . . at a rate of pay payable for level I": first, whether that phrase encompasses only those employees who are paid pursuant to a statute setting pay for the position exactly at level I, or whether it extends to employees who may be paid within a range and whose pay has been administratively set at exactly the amount payable for level I; and, second, whether "rate of pay" refers only to the employee's basic rate of pay, or whether it includes additional pay (such as bonuses, awards, or allowances) that the employee may receive. Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from William B. Schultz, General Counsel, Dep't of Health and Human Services at 3 (May 5, 2016) ("HHS Opinion Request"); *see also* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David J. Apol, General Counsel, Office of Government Ethics at 3 (Aug. 5, 2016) ("OGE Views") (clarifying HHS's first question).[1]

[1] In preparing this opinion, we received the views of the Office of Government Ethics

We have already addressed your first question, albeit in dictum, in an opinion about the application of section 207(d)(1)(B) to certain Treasury Department employees. *See Applicability of 18 U.S.C. § 207(d) to Certain Employees in the Treasury Department*, 24 Op. O.L.C. 284 (2000) ("*Treasury Employees*"). There, we concluded that employees compensated at a "rate of pay" *exceeding* level I of the Executive Schedule are not subject to section 207(d)'s post-employment bar. In reaching that conclusion, we stated that section 207(d)(1)(B) does not apply exclusively to officials listed in 5 U.S.C. § 5312, which sets the pay for Cabinet members and other high-level officials at level I, but instead sweeps in "any executive branch employee who is paid the same level I rate of pay that the officials listed in [section 5312] receive." *Treasury Employees*, 24 Op. O.L.C. at 287 n.2. The opinion further observed that "[i]f the salary of the Treasury employees in question had been set *exactly* at the rate for level I, subsection (d) by its terms would seem to apply." *Id*. at 287. Our *Treasury Employees* opinion therefore appeared to reject the possibility that section 207(d)(1)(B) applies only to employees in positions for which the pay is fixed at level I by statute.

Because your office's opinion request implicitly suggests that we revisit this question, and because other interested agencies have expressed their view that section 207(d)(1)(B) should be read to apply only to employees occupying positions for which the pay is legally required to be set at level I, *see* OGE Views at 3; VA Views at 1; Treasury E-mail, we have considered anew the scope of section 207(d)(1)(B). We once again conclude, however, that the provision encompasses all Executive Branch employees who receive a "rate of pay" equal to the amount payable for level I, whether their pay is required by law to be set at level I or is set at level I by administrative action.

With respect to your second question, we conclude that an employee's "rate of pay" in section 207(d)(1)(B) refers to the employee's rate of basic

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("OGE"), the Department of Veterans Affairs ("VA"), and the Treasury Department. *See* OGE Views; Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Leigh Bradley, General Counsel, Dep't of Veterans Affairs (Aug. 10, 2016) ("VA Views"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Rochelle F. Granat, Assistant General Counsel, Dep't of the Treasury, *Re: FW: Formal opinion request re application of 18 USC 207(d)* (July 28, 2016 7:03 PM) ("Treasury E-mail").

pay, exclusive of any other forms of compensation such as bonuses, awards, allowances, or locality-based comparability payments.

I.

A.

Section 207(d) of title 18 restricts the conduct of "very senior" Executive Branch employees once they have left their positions, and provides that violations of these restrictions may give rise to criminal and civil penalties. *See* 18 U.S.C. §§ 207(d), 216. The first half of the subsection defines the types of employees to whom section 207(d) applies and states the applicable prohibitions:

> (1) RESTRICTIONS.—In addition to the restrictions set forth in subsections (a) and (b) [of section 207], any person who—
>
> (A) serves in the position of Vice President of the United States,
>
> (B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or
>
> (C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,
>
> and who, within 2 years after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

Id. § 207(d)(1). Subsection (d)(2), in turn, specifies the individuals with whom "very senior" employees may not communicate after leaving their positions:

> (2) PERSONS WHO MAY NOT BE CONTACTED.—The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are—
>
> (A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and
>
> (B) any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5.

Id. § 207(d)(2). Thus, under section 207(d), a former official meeting the description of a "very senior" employee is barred from communicating with anyone who serves in his former agency, as well as with anyone serving in an Executive Schedule position in *another* federal agency, for two years after he has left the "very senior" position, if that communication is intended to influence official agency business and is not made on behalf of the United States.[2]

The prohibition in section 207(d) is broader than the so-called "cooling off" prohibition in another part of section 207, section 207(c), which applies to "senior" employees. Section 207(c) bars communications only with individuals in the senior employee's former agency and applies only for one year following the employee's departure. *See id*. § 207(c)(1). Moreover, section 207(c)(2)(C) allows the Director of OGE to waive the prohibition for some classes of senior employees if he makes particular findings, and section 207(h) allows him to narrow section 207(c)'s scope in another respect. *See id*. § 207(c)(2)(C), (h). Section 207(d), on the other hand, is not subject to waiver or narrowing.

B.

In the *Treasury Employees* opinion, our Office addressed a question about the scope of section 207(d)(1)(B). 24 Op. O.L.C. at 284. The opinion concerned some categories of Treasury employees in the Internal Revenue Service ("IRS") and the Office of Thrift Supervision ("OTS").

[2] Section 207(j) exempts communications made on behalf of certain other entities or for certain specified purposes. *See* 18 U.S.C. § 207(j).

These IRS and OTS positions were not listed in 5 U.S.C. § 5312,[3] and the statutes authorizing their salaries did not declare that they would be paid at level I of the Executive Schedule. Instead, Treasury had statutory authority to set those salaries within a specified range including and also exceeding level I (in the case of the IRS employees) or "without regard to the provisions of other laws applicable to officers or employees of the United States" (in the case of the OTS employees). *Treasury Employees*, 24 Op. O.L.C. at 285. As a result of this administrative discretion, all of the employees in question had salaries exceeding level I. Treasury asked whether the employees would therefore be subject to the more severe post-employment restrictions in section 207(d) instead of those in section 207(c). *Id*.

We determined that the Treasury employees in question were not "employed in a position in the executive branch of the United States . . . at a rate of pay payable for level I of the Executive Schedule." *Id*. at 286. The basis for our conclusion, however, was not that the salaries for the IRS and OTS positions were not set at level I by statute. *See id*. at 287 n.2. Instead, we reasoned that the phrase "employed in a position . . . *at* a rate of pay payable for level I" signified that section 207(d)(1)(B) "applies only to employees whose pay is the same as that of a level I official." *Id*. at 286. We contrasted that phrase with language in section 207(c) that, at the time of our opinion, covered employees whose basic rate of pay was "*equal to or greater than* the rate of basic pay payable for level 5 of the Senior Executive Service," 18 U.S.C. § 207(c)(2)(A)(ii) (Supp. IV 1998) (emphasis added), and we stated that "Congress presumably was aware that various statutes authorized pay above that for level I, yet chose the narrower and more targeted language of subsection (d)." *Treasury Employees*, 24 Op. O.L.C. at 286.

We acknowledged that our reading, which meant that officials receiving pay above level I would be subject to more lenient post-employment restrictions than lesser-paid officials receiving exactly the level I amount, "may appear to lead to anomalous consequences." *Id*. Section 207 seemingly uses a former official's salary as a proxy for ability to exercise

[3] Section 5312 of title 5 lists Cabinet members along with the United States Trade Representative, the Director of the Office of Management and Budget, the Commissioner of Social Security, the Director of National Drug Control Policy, the Chairman of the Board of Governors of the Federal Reserve System, and the Director of National Intelligence.

influence, so that higher salaries generally result in more stringent post-employment restrictions. *Id*. But we concluded that the apparent anomaly could be resolved by reference to the statute's purpose. The officials listed in 5 U.S.C. § 5312 include Cabinet secretaries and other high-level officials; the IRS and OTS employees, by contrast, were not in leadership positions and therefore lacked the responsibility and stature of those designated as level I officials by statute. *Treasury Employees*, 24 Op. O.L.C. at 286–87. Thus, we reasoned that, even though the IRS and OTS employees received a higher salary than officials paid at level I, the IRS and OTS officials would "have less ability to exercise post-employment influence than those listed in [section 5312], and their former positions [would] also be far less likely to create an appearance of undue influence." *Treasury Employees*, 24 Op. O.L.C. at 287.

The opinion noted, however, that "[i]f the salary of the Treasury employees in question had been set *exactly* at the amount paid for level I, subsection (d) by its terms would seem to apply." *Id*. In other words, we determined that if a statute permitted an employee's pay to fall within a range and, within that range, to equal or exceed level I, the agency's decision to set the employee's pay exactly at level I would make the employee "very senior," whatever the nature of the employee's position, authority, and stature. We recognized that such a result, in the context of these IRS and OTS employees, was "truly anomalous." *Id*. But we explained that, "in view of the present opinion," it would seem that "any future decision to set a salary exactly at the rate for level I will presumably reflect at least an administrative determination that the more stringent post-employment restrictions should apply." *Id*.

Our analysis in the *Treasury Employees* opinion implicitly assumed that "rate of pay" in section 207(d)(1)(B) refers to the employee's annual salary. *See, e.g.*, *id*. at 285 ("We understand that there are some Treasury employees . . . whose salaries exceed the rate of pay for level I.").[4] But the opinion did not explicitly consider what constitutes an employee's "rate of pay" for purposes of the comparison to level I.

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[4] We did note that some of the IRS employees in question were potentially eligible to receive "critical pay" under 5 U.S.C. § 9502(a) (Supp. IV 1998). *See Treasury Employees*, 24 Op. O.L.C. at 285. That provision, however, enabled the Office of Management and Budget (as of 2000) to "fix the rate of basic pay" for those positions up to a certain amount. 5 U.S.C. § 9502(a) (Supp. IV 1998).

C.

You have advised us that HHS has several pay systems under which it sets the base pay for certain employees within a flexible range. HHS Opinion Request at 1. You provided the example of the pay system for members of the Silvio O. Conte Senior Biomedical Research Service ("SBRS"), which consists of "individuals outstanding in the field of biomedical research or clinical research evaluation." 42 U.S.C. § 237(b) (2012).[5] The Secretary of Health and Human Services has the authority to determine SBRS members' "pay," which, up until December 13, 2016, could be no less than "the minimum rate payable for GS-15 of the General Schedule" and no more than "the rate payable for level I of the Executive Schedule unless approved by the President." *Id*. § 237(d)(2). While the pay for SBRS members was therefore, for a time, capped by default at level I, your office has informed us that there are pay systems for other kinds of HHS employees that "contain no express limit" and "therefore permit total individual pay to exceed level I." HHS Opinion Request at 2. We also understand that HHS employees under all of these pay systems may receive "various bonuses, awards, and allowances," although they do not receive locality-based comparability payments. *Id*.[6]

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[5] After HHS's request for an opinion, Congress amended the SBRS provision, 42 U.S.C. § 237. *See* 21st Century Cures Act, Pub. L. No. 114-255, § 3071, 130 Stat. 1033 (2016). Among other changes, Congress renamed the entity (it is now the "Silvio O. Conte Senior Biomedical Research and Biomedical Product Assessment Service"), and specified that it is now composed of "individuals outstanding in the field of biomedical research, clinical research evaluation, or biomedical product assessment." *Id*. § 3071(a). More relevant to the present inquiry, Congress also changed the applicable pay cap for members: instead of being set at "the rate payable for level I of the Executive Schedule" (absent presidential approval), it is now set at "the amount of annual compensation (excluding expenses) specified in section 102 of title 3," which is the President's yearly salary of $400,000. *Id*. For two reasons, however, this recent development does not obviate HHS's question. First, the new pay cap still allows the members' pay to match or exceed the amount payable for level I of the Executive Schedule (currently, $207,800). Second, our advice regarding the application of section 207(d)(1)(B) would still apply to SBRS members paid under the old version of 42 U.S.C. § 237. For ease of reference, this opinion will continue to refer to the "SBRS" and the pay system in place before December 13, 2016 (the date of enactment of the 21st Century Cures Act).

[6] We understand that HHS interprets "pay" in 42 U.S.C. § 237(d)(2) to refer to a member's base salary in addition to any applicable bonuses or allowances, so that, under the old SBRS pay system, the combination of all those forms of compensation could not

Because some HHS employees paid under these flexible pay systems may therefore receive a base salary of exactly the level I amount (currently, $207,800[7]), and some other HHS employees—in particular, some SBRS members—may receive a base salary below that amount but also receive bonuses and allowances that bring them exactly to level I, your office has asked us to clarify the scope of section 207(d)(1)(B). *Id*. at 2–3. Other interested agencies have explained that they too have pay systems under which an employee's basic rate of pay, or the employee's basic rate of pay in combination with other bonuses, allowances, or forms of compensation, may equal or exceed the level I amount. *See* VA Views at 2–4; Treasury E-mail.

II.

We first consider the more general question, namely, whether section 207(d)(1)(B) applies to any employee whose "rate of pay" is set by law or administrative action at the level I amount, or only to employees whose rate of pay is set at level I by law. Although the particulars of their positions differ, OGE, VA, and Treasury all maintain that section 207(d)(1)(B) should be read to apply only to an employee occupying a position for which the rate of pay is legally required to be set at level I, rather than to any employee whose rate of pay equals the level I rate. OGE Views at 1; VA Views at 1; Treasury E-mail.

As noted above, section 207(d) applies to, among others, "any person who . . . is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule." 18 U.S.C. § 207(d)(1)(B). Under the most straightforward and natural reading of that provision, it applies to any employee who (1) occupies a position in the Executive Branch, and (2) receives in that position a rate of pay equivalent to the "rate of pay payable for level I." *See Treasury Employees*, 24 Op. O.L.C. at 286.

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exceed the level I threshold (absent presidential approval). HHS Opinion Request at 2; E-mail from Gretchen H. Weaver, Senior Ethics Counsel, Dep't of Health and Human Services, *Re: Question related to section 207(d) opinion* (Nov. 21, 2016 1:26 PM).

[7] Salary Table No. 2017-EX, *Rates of Basic Pay for the Executive Schedule (EX) Effective January 2017*, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/EX.pdf.

Section 207(d) would therefore apply to any Executive Branch employee whose rate of pay currently equals $207,800—whether by virtue of a statute setting the pay for the employee's position at level I, or by virtue of the employee's pay having been set at that amount pursuant to a statute allowing for pay within a range that encompasses the level I amount. In either case, the portion of the employee's annual salary in each paycheck would be the amount "payable for level I" in the pay period.

In advancing an interpretation under which the provision would apply only to employees whose rate of pay is set at level I by law, the agencies suggest that section 207(d)(1)(B)'s focus is on the pay designated for the *position*, rather than the pay received by the *employee* in that position. They suggest that the statutory phrase "at a rate of pay payable" ought to be read to modify "position" rather than "employed," so that section 207(d) would apply only to those occupying a "position . . . at a rate of pay payable for level I." According to the argument, when (for example) HHS sets the pay for an SBRS member pursuant to the agency's administrative discretion under 42 U.S.C. § 237(d), HHS is not setting the pay for the *position* of SBRS member. Instead, HHS is setting the pay for a particular individual. It therefore cannot be said (in the agencies' view) that the rate of pay payable for the "position" of SBRS member is the rate of pay for level I, and section 207(d) would not apply to any SBRS member, no matter what the employee's actual pay.

As an initial matter, even if the phrase "at a rate of pay payable for level I" could be fairly construed to modify "position" rather than "employed," it is not evident that that reading would produce the result the agencies propose. The agencies' argument assumes that an agency's setting a salary for a particular position within a statutory range does not constitute setting the pay for a "position," but rather involves setting the pay for an individual employee. But it is not at all clear that this is true. Agencies do not employ individuals in a vacuum, but instead employ them in particular positions that have prescribed duties, authorities, and compensation (even if the possible compensation covers a range). That the pay for a position may vary with the characteristics of the individual who occupies it does not necessarily mean that the agency is not setting the pay for the "position."

In any case, we do not think the agencies' proposed construction is consistent with the statute's text. When the statute uses the term "posi-

tion" to define a provision's coverage, it consistently refers to a position "for which" the pay is a certain rate or "for which" a specified condition obtains. *See* 18 U.S.C. § 207(c)(2)(A)(ii) ("a person . . . employed in *a position . . . for which* that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule" (emphasis added)); *id*. ("a person . . . employed in *a position . . . for which* the rate of basic pay . . . was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service" (emphasis added)); *id*. § 207(e)(7)(B) ("a former employee who . . . was employed in *a position for which* the rate of basic pay . . . is equal to or greater than the basic rate of pay payable for level IV of the Executive Schedule" (emphasis added)); *see also id*. § 207(c)(2)(A)(iv) ("a person . . . employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in *a grade or rank for which* the pay grade . . . is pay grade O–7 or above" (emphasis added)). By contrast, when the statute refers to the rate of pay at which a person is "employed" or "paid," it uses the preposition "at." *See id*. § 207(c)(2)(A)(i) ("a person . . . *employed at* a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5" (emphasis added)); *id*. § 207(c)(2)(A)(ii) ("a person . . . employed in a position . . . for which that person is *paid at* a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule" (emphasis added)). We believe that the two instances of the "employed . . . at a rate of pay payable" phrasing in 207(d)(1)(B) should be understood in the same way as in these other provisions. It should make no difference that additional words separate the prepositional phrase from the word it modifies.[8]

One of the agencies also suggests that our interpretation renders the statutory phrase "in a position" superfluous, because any person who "is employed in the executive branch . . . at a rate of pay payable for level I"

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[8] Even if we disregarded the phrasing conventions used elsewhere in section 207, "at" would be an awkward word to use to convey the agencies' preferred meaning. If the statute were meant to apply only to positions for which the pay is set by law at the level I amount, it would have been more natural to refer to a "position *with* a rate of pay payable for level I" rather than a "position *at* a rate of pay payable for level I." Treasury E-mail (acknowledging that "with" would be the more natural word to use); *see also Webster's Third New International Dictionary* 2626 (2002) (defining "with" as "characterized or distinguished by").

would work just as well. *See* Treasury E-mail. But the canon against superfluity is not absolute, *see Lockhart v. United States*, 577 U.S. 347, 356–57 (2016), and in any event, under our interpretation the phrase "in a position" serves a function within the structure of section 207(d) as a whole: the five instances of the phrase in subsections (d)(1)(A), (B), and (C) facilitate the hanging paragraph at the end of subsection (d)(1) and also facilitate subsection (d)(2). The hanging paragraph at the end of subsection (d)(1) explains that the two-year bar starts at the time that the person's service "in that position" ends—not at the conclusion of the person's government service, unless the two coincide.[9] And the use of the phrase "in a position" permits subsection (d)(2) to use a shorthand reference to "a position described in subparagraph (A), (B), or (C) of paragraph (1)" to bring in all of the various parts of (d)(1).

The revision history of section 207(d) likewise fails to suggest that "at a rate of pay" should be read to modify "in a position" rather than "employed." As first adopted in the Ethics Reform Act of 1989, section 207(d)(1)(B) encompassed any person "employed in a position paid at a rate of pay payable for level I of the Executive Schedule." Pub. L. No.

[9] *See* 5 C.F.R. § 2641.205(c). We recognize that the application of section 207(d)(1)(B) to employees who happen to receive level I pay at a point in time, but whose pay may be set within a range that exceeds level I, can lead to an odd result if the employee receives a pay increase that puts him over the level I amount. At that point, the employee would cease being a "very senior" employee (or, put differently, would have left his "very senior" position), and the two-year bar would begin even while the employee remained in the government with the same title. While this situation (if it arose) would be anomalous, it is not in our view so absurd or unworkable as to require abandoning the straightforward reading of section 207(d)(1)(B) discussed above. OGE regulations interpreting section 207(c) and 207(d) recognize that the statute allows for the possibility of former "senior" or "very senior" employees serving out their respective one- or two-year bars while still employed by the government. *See* 5 C.F.R. §§ 2641.104, 2641.204(d) & ex. 1, 2641.205(c). The statute exempts communications or appearances made on behalf of the United States, *see* 18 U.S.C. § 207(c)(1), (d)(1), so those employees would not violate the statute by acting within the scope of their employment. And other prohibitions in section 207 would still apply to those employees once they leave the government, even if the bars imposed by 207(c) or 207(d) had run. It is true that, in the example we have hypothesized, the former "very senior" employee could remain in the very same position and have the same job description, title, and stature as at the time that he happened to receive a level I salary. However, given the clear wording of section 207(d)(1)(B), it seems that this is simply an anomalous result that comes about because of the statute's reliance on salaries set exactly at level I.

101-194, § 101, 103 Stat. 1716, 1718. A year later, in an act making technical amendments to the Ethics Reform Act of 1989, Congress struck out the word "paid" and replaced it with "in the executive branch of the United States (including any independent agency)," which is how it appears today. *See* Pub. L. No. 101-280, § 2(a)(6)(A), 104 Stat. 149, 150 (1990). OGE argues that "[t]he original focus of the statute appears to have been . . . on the pay of the employee," and maintains that "Congress's decision to amend the law suggests an attempt to shift the focus to the pay of the employee's *position*." OGE Views at 4–5. Given that both versions of the statute refer to a "position," we do not believe that the change in language reflects the change in focus OGE suggests. In any event, the scant legislative history of the 1990 technical amendments indicates that this change was meant simply to clarify the application of 207(d) to independent agencies. *See* 136 Cong. Rec. H1646 (daily ed. Apr. 24, 1990) (detailed explanation of bill prepared by House and Senate legislative counsel) ("The amendment clarifies coverage of independent agency employees under the post-employment restrictions of section 207[.]"); *id*. at H1645–46 (statement of Rep. Fazio) ("The technical amendments also clarify coverage of Government officers and employees under the post-employment restrictions and make other technical and conforming amendments to the conflict-of-interest laws in title 18 of the United States Code.").

We therefore do not believe it is viable to read the statutory phrase "at a rate of pay payable for level I" to modify "position" rather than "employed," nor do we agree that, even under such a reading, section 207(d)(1)(B) would apply only to positions with salaries fixed at level I by law.

We have also considered whether our construction of the statute, under which the provision covers Executive Branch employees "employed . . . at a rate of pay payable" for level I, might nonetheless carry the agencies' preferred meaning—that is, whether the provision could be read to require that the person be "employed [*by statutory direction*] . . . at" the level I rate. Under that reading, if a person were employed pursuant to a statute that prescribes a pay range, he would not be "employed [*by statutory direction*]" at a rate of pay payable for level I. It would follow that the relevant portion of section (d)(1)(B) would apply only to Executive Branch employees for whom a statute sets the pay exactly at level I. This

argument would read into the provision a qualification that lacks a clear textual basis, but because the statutory language, read literally, can lead to anomalous and even puzzling results, *see supra* note 9; *infra* pp. 37–38, we sought to consider every plausible argument that would avoid such outcomes.

We believe, however, that this alternate reading cannot be sustained, either. Even if we were prepared to read an extra-textual "by statutory direction" qualification into section 207(d)(1)(B), we would presumably have to do so in section 207(c) as well. Subsection (c)(2)(A)(ii) covers any person "employed in a position . . . for which that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule" along with (for a time) any person who "was employed in a position . . . for which the rate of basic pay . . . was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service on the day prior to the enactment of [the National Defense Authorization Act for Fiscal Year 2004 ("2004 NDAA")]." That part of 207(c) is understood to cover, among others, members of the Senior Executive Service ("SES") who meet the pay thresholds. But the SES pay statute does not set SES members' pay at specific amounts on a position-by-position basis; instead, it prescribes a pay range. *See* 5 U.S.C. § 5382 (2012); *see also* 5 U.S.C. § 5382 (2000). Therefore, if we thought that sections 207(c) and 207(d) implicitly covered only employees for whom a statute requires pay at a discrete, specified amount—for instance, if we read section 207(c)(2)(A)(ii) to apply only to persons "paid [by statutory direction] at a rate of basic pay which is equal to or greater than 86.5 percent of the rate" for level II—then that provision would no longer cover SES employees. That result would be contrary to the settled understanding of section 207(c)(2)(A)(ii)'s application, both before and after the 2004 NDAA amendment to that provision.[10] *See, e.g.*, Office of Government Ethics, *One-Year Ban in 18 U.S.C. § 207(c)*, Informal Advisory Letter 93x10 (Apr. 21, 1993) (subsection (c)(2)(A)(ii), as then written, "identifies a class of individuals also subject to the restrictions of section 207(c) who hold positions other than those specified in the Executive Schedule, such as certain SES employees"); Office of Government Ethics, *Component Designations*, Informal

[10] *See* Pub. L. No. 108-136, tit. XI, § 1125(b)(1), 117 Stat. 1392, 1639 (2003).

Advisory Letter 07x10 (July 31, 2007) ("[S]ection 207(c)(2)(A)(ii) . . . generally governs whether an individual paid under the SES system is covered by section 207(c)."); H.R. Rep. No. 108-354, at 762 (Nov. 7, 2003) (conference report for 2004 NDAA) (describing the amended 207(c)(2)(A)(ii) as containing "post employment restrictions" relevant to the SES); *cf*. 5 C.F.R. § 2641.104, ex. 2 to the definition of senior employee (stating that subsection (c)(2)(A)(ii) applies to individuals paid under 5 U.S.C. § 5376, which also prescribes a pay range).[11]

The agencies also support their narrower reading of section 207(d)(1)(B) by relying on the statutory purpose. HHS points out that salary alone is not a very exact proxy for an employee's level of authority or ability to exercise influence after leaving a position. To illustrate, HHS explains that the pay of individual SBRS members, who are "employed in the conduct of biomedical research, not policy-making," is set "without regard to an individual's relative seniority or ability to influence policy," but instead "based on consideration of the individual's specific skills, impact and recognition in the scientific community, and the private sector salaries commanded by individuals with similar skills." HHS Opinion Request at 2. Similarly, the VA states that, under our interpretation, a significant number of VA certified registered nurse anesthetists ("CRNAs"), whose basic pay is capped by regulation at level I and who currently receive that amount, would be considered "very senior." VA Views at 2–3. The VA argues against an interpretation of section 207(d) under which a CRNA, who "provides health-care services in a local VA Medical Center," is subject to the same post-employment restrictions as the Secretary of Veterans Affairs, when those stringent restrictions "do not apply to the Deputy Secretary, Under and Assistant Secretaries, and other high-level employees whose duties actually involve policy making and whose Department-wide connections could be used during post-employment in ways that raise an appearance of impropriety." *Id*. at 3.

[11] To get around this problem with section 207(c)(2)(A)(ii) and SES members, an advocate of this hypothetical reading could argue that section 207 means "employed [by statutory direction]" when it uses the word "employed," but does not mean "paid [by statutory direction]" when it uses the word "paid." But that distinction seems contrived. Both "employed" and "paid" refer to an action that could be said to have been directed by statute, and we do not see why one word would carry that implicit qualifier and not the other.

Rather than relying on the dollar amount of an employee's pay to determine whether he is "very senior," the agencies suggest that we should use the authority establishing the position as a signaling device: if the pay for the position is legally required to be set at level I, that requirement likely "reflect[s] a deliberate decision that the person occupying the position has a commensurate level of responsibility and influence as a person specified in level I of the Executive Schedule." OGE Views at 5.

We recognize that our interpretation can lead to counterintuitive outcomes. We justified the result in our *Treasury Employees* opinion—i.e., the conclusion that employees who receive pay exceeding level I are not subject to 207(d)—by explaining that the IRS and OTS employees in question, despite their high salaries, were not the equivalent of agency heads and did not occupy the kinds of positions that "create the potential to exercise unusual continuing influence" over other level I officials once they left the government. *Treasury Employees*, 24 Op. O.L.C. at 286–87 (internal quotation marks and citation omitted). In offering that justification, we implicitly acknowledged that salary alone is an imperfect proxy for an employee's authority or stature within his agency or the federal government as a whole.

But salary is the proxy that Congress chose in section 207(d)(1)(B). And even if use of that proxy can lead to "truly anomalous" results, those results "follow[] from the precise language chosen by Congress." *Id*. at 287. Congress could have limited section 207(d)(1)(B)'s application to only those employees listed in 5 U.S.C. § 5312, or only those who are "employed at a rate of pay specified in or fixed according to" that provision—both formulations that appear elsewhere in section 207, *see* 18 U.S.C. § 207(d)(2)(B), (c)(2)(A)(i)—or else those who meet a more qualitative definition based on seniority or decision-making authority.[12] Instead, Congress defined the class of employees solely according to a salary amount, sweeping in anyone who is "employed" "at a rate of pay payable for level I," whether or not that high salary reflects the employee's hierarchical status or other considerations. We continue to believe

[12] Congress took that approach in the predecessor to section 207(c)(2), which extended the then-applicable prohibition in 207(c) to, among others, "a person employed . . . in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned." 18 U.S.C. § 207(d)(1)(C) (1982).

that the best interpretation of section 207(d)(1)(B) is one that gives effect to that choice of phrasing. And the premise on which the agencies' arguments about purpose are based—that by *requiring* a position's pay to be set at level I a statute reflects a "deliberate decision" that the employee is very senior, whereas merely *allowing* the pay to be set at level I does not reflect such a determination—is not in our view obviously correct. In any event, the premise finds no support in the text or legislative history of the statute. Accordingly, it cannot in our view justify a departure from the statute's plain language.

We also continue to believe that the anomalous results potentially generated by the most straightforward reading of section 207(d) can be readily avoided. If a statute authorizes the pay for a particular position to fall within a range encompassing level I, and if the employing agency believes that the position does not carry the kind of responsibility, authority, or influence that necessitates the stringent post-employment restrictions of section 207(d), the agency can exercise its discretion to set the employee's rate of pay at an amount other than level I. *Cf. Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act*, 24 Op. O.L.C. 94, 98 (2000) ("*Intergovernmental Personnel Act*"). If, for example, HHS believes that SBRS members do not occupy positions with significant policy-making authority and there is not likely to be an appearance of impropriety if they communicate with former HHS employees or other agency heads on behalf of outside parties during the two years after their tenure ends, HHS can elect to set the SBRS members' salaries below the level I amount (or above). "[I]n view of the present opinion," however, "any future decision to set a salary exactly at the rate for level I will presumably reflect at least an administrative determination that the more stringent post-employment restrictions should apply." *Treasury Employees*, 24 Op. O.L.C. at 287. Congress thus left this choice to the agencies that it enabled to set pay at the same rate as level I or at a lesser or greater rate.

Accordingly, in view of our *Treasury Employees* opinion and the present opinion, agencies (and in particular their ethics officials) should be on notice regarding the ramifications of a decision to set an employee's rate of pay exactly at level I. Furthermore, in light of the conclusion we reach in Part III of this opinion, an agency or employee need only compare the employee's basic rate of pay to the rate of pay for level I to

determine whether he will be subject to the two-year bar. Indeed, OGE suggests that this class of employees "would be relatively identifiable," allowing agencies to "proactively take steps to mitigate overbreadth issues through training and guidance." OGE Views at 7.

We therefore adhere to the view, expressed in our earlier opinion, that section 207(d)(1)(B) encompasses any Executive Branch employee whose "rate of pay" equals the level I amount, whether that rate is set by law or administrative action.

III.

While the *Treasury Employees* opinion did not address what constitutes an employee's "rate of pay" for purposes of section 207(d)(1)(B)'s comparison, the opinion did observe that "[i]f *the salary* of the Treasury employees in question had been set *exactly* at the rate for level I, subsection (d) by its terms would seem to apply." *Treasury Employees*, 24 Op. O.L.C. at 287 (first emphasis added). We similarly explained that "any future decision *to set a salary* exactly at the rate for level I will presumably reflect at least an administrative determination that the more stringent post-employment restrictions should apply." *Id*. (emphasis added). Our analysis thus appears to have assumed that "rate of pay" refers solely to the employee's annual salary. *See id*. at 285 ("We understand that there are some Treasury employees . . . whose salaries exceed the rate of pay for level I."); *id*. at 286 ("Section 207 uses a former official's salary as a proxy for ability to exercise influence, so that higher salaries in general lead to greater post-employment restrictions."); *Webster's Third New International Dictionary* 2003 (2002) (defining "salary" as "fixed compensation paid regularly (as by the year, quarter, month, or week) for services").[13]

Now that the question has been squarely posed to us, we affirm that implicit understanding: the phrase "rate of pay" in 207(d)(1)(B) refers solely to an employee's basic rate of pay (i.e., base salary), and does not include any forms of additional pay.[14] Three considerations lead to this view.

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[13] *See supra* note 4.

[14] HHS did not specifically ask us to determine whether "rate of pay" in section 207(d)(1)(B) includes locality-based comparability payments, as the HHS employees in

First, if "rate of pay" refers only to the employee's rate of basic pay, section 207(d)(1)(B) calls for an apples-to-apples comparison. The provision asks whether the "rate of pay" of the Executive Branch employee is equal to the "rate of pay payable for level I of the Executive Schedule." The "rate of pay . . . for level I of the Executive Schedule" is a rate of basic pay; the Executive Schedule sets forth base annual salaries for each of its five levels. *See* 5 U.S.C. § 5311 (defining the Executive Schedule as "the basic pay schedule" for the positions to which it applies); *accord id*. §§ 5312–5316. It would therefore make sense that the figure section 207(d)(1)(B) is comparing against the rate for level I—the employee's "rate of pay"—would also be a base-salary figure.

Second, that interpretation adheres to the natural reading of the phrase "employed at . . . a rate of pay." Although the meaning of the term "rate" can vary depending on context, it often denotes a set amount fixed according to some standard. *See Webster's Third New International Dictionary* 1884 (2002) (defining "rate" as "a charge, payment, or price fixed according to a ratio, scale, or standard"); 13 *Oxford English Dictionary* 208–09 (2d ed. 1989) (defining "rate" as "[t]he amount of a charge or payment (such as interest, discount, wages, etc.) having relation to some other amount or basis of calculation" and "[a] fixed charge applicable to each individual case or instance; *esp*. the (*or* an) amount paid or demanded for a certain quantity of a commodity, material, work, etc."); *Black's Law Dictionary* 1375 (9th ed. 2009) (defining "rate" as "[p]roportional or relative value" and "[a]n amount paid or charged for a good or service"). The word does not readily encompass one-off payments made at irregular intervals such as bonuses and awards. Moreover, section 207(d) refers to the "rate" that the employee is "*employed . . . at*," and that phrase sug-

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question do not receive such payments. *See* HHS Opinion Request at 2. Similarly, Treasury and the VA did not specifically mention whether they have any employees whose total pay might equal or exceed the level I amount because of their receiving locality pay (though the VA noted that locality considerations are taken into account in setting the basic rate of pay for VA CRNAs, *see* VA Views at 3). Although we do not know whether such employees exist, it follows from our conclusion here—that a "rate of pay" refers to a rate of basic pay—that locality-based comparability payments, to the extent they constitute a form of compensation separate and apart from the employee's basic pay, would be excluded. *Cf.* 5 U.S.C. § 5304(c)(2)(A); *Calculating Rate of Pay of Department of Justice Employees for Purposes of "Covered Persons" Determination Under Independent Counsel Act*, 21 Op. O.L.C. 68 (1997) ("*Independent Counsel Act*").

gests the compensation for the employee's continuing and regular services and not any additional forms of compensation the employee may receive from time to time.[15]

Third, the language in this instance readily lends itself to an interpretation that accommodates the statutory purposes. As discussed above, section 207 generally uses pay as a proxy for the importance of the employee's duties and hierarchical position and thus as a measure of post-employment influence. *See Intergovernmental Personnel Act*, 24 Op. O.L.C. at 96–97. Given the statute's use of that proxy, it seems unlikely that Congress intended for an employee's receipt of discrete payments, or supplemental payments that turn solely on a factor like the employee's geographic location, to determine whether the employee would be subject to 207(d). If an agency awarded a bonus because of circumstances unique to the employee's performance in a particular year, the award would not be closely tied to the nature of the position itself or the employee's continuing status in the agency. Similarly, allowances (such as a relocation allowance) are not necessarily based on a position's or an employee's duties but rather on practical considerations of attracting or retaining personnel.

Our Office came to a similar conclusion regarding the phrase "rate of pay" in an opinion about the class of "covered persons" subject to investigation by an Independent Counsel. *See Calculating Rate of Pay of Department of Justice Employees for Purposes of "Covered Persons" Determination Under Independent Counsel Act*, 21 Op. O.L.C. 68 (1997) ("*Independent Counsel Act*"). The covered class included, among others, "any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule." 28 U.S.C. § 591(b)(4). We found that the statute's reference to "rate of pay" did not include locality-based comparability payments under 5 U.S.C. § 5304.

[15] Locality-based comparability payments, although they supplement an employee's basic rate of pay, are distributed concurrent with the employee's basic pay and thus comprise a portion of an employee's regular paycheck. *See* 5 U.S.C. § 5304(c)(2)(B). Thus, locality payments could reasonably be understood to be part of the "rate" the employee is employed at under the dictionary definitions set forth above. As discussed just below and in our *Independent Counsel Act* opinion, however, there is good reason to conclude that Congress did not intend an employee's coverage to depend on the geographic location where he happens to serve.

We explained that, because locality pay is aimed simply at achieving pay parity between federal employees and their non-federal counterparts on a locality-by-locality basis, it would make little sense to interpret the Independent Counsel Act so that its application might depend on whether the employee receives such pay: "Persons otherwise not covered by the Act would become 'covered persons' as a result of the location where they work, rather than the position they occupy. Such a result would not only fail to serve the purposes of the Act, but would actually be contrary to them as well." *Independent Counsel Act*, 21 Op. O.L.C. at 69. We find that logic persuasive again here, with respect not only to locality pay but to other forms of additional pay.[16]

To be sure, an employee's basic rate of pay—especially when an agency has discretion to set the rate for an employee's position within a flexible range—may, to some extent, reflect circumstances tailored to the employee rather than to the position more generally, and those individual factors might not correspond to the likely extent of the employee's influence after leaving the government. As noted above, we understand that the rate of pay for SBRS members is set on an individual basis and in consideration of the researcher's specific skills, standing in the scientific community, and salaries that similar individuals receive in the private sector. HHS Opinion Request at 2. Likewise, the VA represents that the pay for VA CRNAs is determined in a way that renders it "impossible" to extract a locality component from the basic rate of pay, because that rate is determined by salary surveys conducted by each VA medical center that take into account local market conditions for registered nurses. VA Views

[16] OGE has concluded that General Schedule step increases (within-grade pay increases) and cost-of-living adjustments should be included in determining whether an employee is subject to 18 U.S.C. § 207(c). *See* Office of Government Ethics, *Definition of "Senior Employee" and "Very Senior Employee"*, Informal Advisory Letter 92x20 (July 23, 1992). OGE reached that conclusion because those pay adjustments "lead to a new rate of basic pay," unlike "bonuses, awards, and various allowances," which OGE found should not factor into the section 207(c) determination. *Id*.; *see also* Office of Government Ethics, *Senior Employees; Post-Government Employment Restrictions; Public Financial Disclosure Requirement*, Informal Advisory Letter 98x2, at 2 n.3 (Feb. 11, 1998). OGE's position in this regard is consistent with our analysis regarding "rate of pay" in section 207(d)(1)(B), and we note that if a pay adjustment results in an increase or decrease in the employee's rate of basic pay, so defined, the amount of the adjustment should not be excluded for purposes of the "very senior" determination.

at 3. These factors reinforce the point, acknowledged above, that the use of the employee's base salary as a measure of his stature or influence is "necessarily inexact." *Independent Counsel Act*, 21 Op. O.L.C. at 71. Nonetheless, and as we reasoned in the *Independent Counsel Act* opinion, the inclusion of bonuses, allowances, and locality pay in the rate-of-pay calculation "would greatly magnify the imprecision" that is unavoidable with the salary proxy. *Id*. We therefore believe that additional pay should be disregarded unless the statute's text clearly indicates otherwise.

The strongest argument against this reading of "rate of pay" arises from a comparison of section 207(d)(1)(B) to two other subsections of section 207 that specifically refer to "rate[s] of basic pay" or "basic rate[s] of pay." That Congress included that qualifier in some instances but not others would ordinarily counsel against reading the word "basic" into section 207(d)(1)(B). But because one of those subsections, through a cross-reference, also uses the unadorned phrase "rate of pay" to refer to a *basic* rate of pay, we believe that the statute's use of the word "basic" in some instances but not others is not itself determinative.

The first subsection is section 207(c), which defines the category of "senior" employees to include, among others, persons:

> (i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,
>
> [and]
>
> (ii) employed in a position which is not referred to in clause (i) and for which that person is paid at a *rate of basic pay* which is equal to or greater than 86.5 percent of the *rate of basic pay* for level II of the Executive Schedule, or, for a period of 2 years following the enactment of the National Defense Authorization Act for Fiscal Year 2004, a person who, on the day prior to the enactment of that Act, was employed in a position which is not referred to in clause (i) and for which the *rate of basic pay, exclusive of any locality-based pay adjustment under section 5304 or section 5304a of title 5*, was equal to or greater than the *rate of basic pay* payable for level 5 of the Senior Executive Service on the day prior to the enactment of that Act . . . .

18 U.S.C. § 207(c)(2)(A) (emphases added). The second is section 207(e), the provision applicable to former members of Congress and employees

of the Legislative Branch. Section 207(e)(7) qualifies the category of employees subject to that subsection's post-employment restrictions:

> (A) The restrictions contained in paragraphs (2), (3), (4), and (5) [of section 207(e)] apply only to acts by a former employee who . . . was paid a *rate of basic pay* equal to or greater than an amount which is 75 percent of the *basic rate of pay* payable for a Member of the House of Congress in which such employee was employed.
>
> (B) The restrictions contained in paragraph (6) [of section 207(e)] apply only to acts by a former employee who . . . was employed in a position for which the *rate of basic pay*, *exclusive of any locality-based pay adjustment under section 5302 of title 5*,[17] is equal to or greater than the *basic rate of pay* payable for level IV of the Executive Schedule.

Id. § 207(e)(7) (emphases added).

Section 207(c)(2)(A)(ii) and section 207(e)(7)(A) and (B) thus refer several times to a "rate of basic pay" or a "basic rate of pay." "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). We might therefore infer that "rate of pay" in section 207(d)(1)(B) must mean something other than "rate of basic pay." Furthermore, the distinct phrases appear in the same statutory section, and Congress created the key distinction between them—the inclusion of the word "basic" in 207(c) and 207(e) and the qualifier's omission in 207(d)—in a single enactment, the Ethics Reform Act of 1989, *see* Pub. L. No. 101-194, § 101, 103 Stat. 1716, 1716–20.[18] And we have found such distinctions in section 207 significant in the past. Our *Treasury Employees* opinion placed weight on the "notably different" phrases in section 207(c)(2)(A)(ii), which at the time included employees whose rates of basic pay were "*equal to or greater than* the rate of basic pay payable for level 5 of the Senior Executive

[17] This appears to be an incorrect reference. Section 5304 of title 5 provides for locality-based comparability payments, not section 5302. *See* 18 U.S.C. § 207(c)(2)(A)(ii).

[18] We found no illuminating legislative history on the issue. As the *Treasury Employees* opinion noted, the history relating to section 207(d) is sparse. 24 Op. O.L.C. at 286 n.1.

Service," and section 207(d)(1)(B), with its "*at* a rate of pay" phrasing. In light of this difference, we reached the conclusion that the "at a rate of pay" language applied only to officials with pay set exactly "at" level I. 24 Op. O.L.C. at 286. The difference in language, we said, reinforced the "unambiguous" phrase "at a rate of pay."

Here, however, subsection (c) itself uses the relevant phrases—"rate of pay" and "rate of basic pay"—to refer to the same thing. Accordingly, we do not think the distinction in phrasing indicates that the "rate of pay" in subsection (d)(1)(B) means something different from "rate of basic pay." *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170–71 (2012) (noting that the presumption of consistent usage, "more than most other canons, . . . assumes a perfection of drafting that, as an empirical matter, is not often achieved," and is "particularly defeasible by context"); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002) (disregarding the *Russello* presumption when context indicated otherwise). Section 207(c)(2)(A)(i) uses "rate of pay" to refer to rates "specified in" the Executive Schedule. The Executive Schedule is defined by statute as "*the basic pay schedule* for positions" to which it applies. 5 U.S.C. § 5311 (emphasis added).[19] It follows that "a rate of pay specified in . . . subchapter II of chapter 53 of title 5" necessarily refers to a basic rate of pay, even though the word "basic" is omitted. Because section 207 thus uses the two different phrases to mean the same thing in the same subsection, we think it is likewise reasonable to understand the two phrases to mean the same thing in different subsections—particularly where, as discussed earlier, there are compelling reasons to read "rate of pay" in 207(d)(1)(B) to mean rate of basic pay. *See supra* pp. 40–44. Sections 207(d)(1)(B) and 207(c)(2)(A)(i), moreover, are not out of the ordinary: many other statutes use "rate of pay" or "rate payable" to describe the rates of basic pay under the Executive Schedule. *See, e.g.*, 2 U.S.C. § 356(D); 5 U.S.C. § 5318; 7 U.S.C. § 7657(d)(2)(B); 22 U.S.C. § 3961(a); 50 U.S.C. § 3024(s)(3), (4); *id.* § 3610(c).[20]

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[19] In addition, the provisions designating positions at each Executive Schedule level state that "the annual rate of basic pay" for each position shall be the rate set for that level. *See* 5 U.S.C. §§ 5312–5316.

[20] *See also* 5 U.S.C. § 5302(8) (explaining that for the purpose of that subchapter, "the term 'rates of pay under the General Schedule' [and] 'rates of pay for the General Sched-

Nor do we find it probative that, at times when section 207(c) and section 207(e) refer to "the rate of basic pay," the provisions state that such a rate is "exclusive of any locality-based pay adjustment" afforded by statute. *See* 18 U.S.C. § 207(c)(2)(A)(ii), (e)(7)(B). The statute's use of that qualifying phrase in some instances, but not all, could give rise to the inference that "rate of basic pay" should be read to include locality pay unless otherwise stated. Otherwise, the phrase "exclusive of any locality-based pay adjustment" would be superfluous. If that were the case, that reading of 207(c) and 207(e) could require the conclusion that "rate of pay" in section 207(d) *also* includes locality-based comparability payments whenever applicable (and possibly other forms of additional pay). In our view, however, the initial inference that "rate of basic pay" includes locality pay unless otherwise stated would not be warranted. Such a reading comes into conflict with the general understanding that the phrase "rate of basic pay" (or "basic rate of pay") is a "term of art specifically meaning 'the rate of pay . . . before any deductions and exclusive of additional pay of any other kind, such as locality-based comparability payments.'" *Independent Counsel Act*, 21 Op. O.L.C. at 70 (quoting 5 C.F.R. § 534.401(b)(3) (1996)). That understanding derives from the statute establishing locality-based comparability payments, which states that such payments "shall be considered to be part of basic pay" for certain specified purposes and "for such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe." 5 U.S.C. § 5304(c)(2)(A). In fact, OGE relied upon 5 U.S.C. § 5304(c)(2)(A) to find that an employee's "rate of basic pay" for purposes of section 207(c)(2)(A)(ii) does *not* include locality pay, despite language specifically addressing locality pay elsewhere in that subsection. *See* Office of Government Ethics, *Elements of Basic Pay for Purposes of Senior Employee Determinations*, Informal Advisory Letter 07x15 (Dec. 13, 2007). We believe that the language in sections 207(c) and 207(e) making clear that the term "rate of basic pay" is exclusive of locality pay was merely intended to clarify what was already implicit in the term itself. *Cf. United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) ("[O]ur hesitancy to construe statutes to render language superflu-

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ule'" mean "the rates of basic pay under the General Schedule as established by section 5332, excluding pay under section 5304 and any other additional pay of any kind").

ous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage . . . .").

We therefore conclude that section 207(d)(1)(B) refers to the employee's rate of basic pay, exclusive of additional forms of payment such as bonuses, awards, allowances, and locality pay.[21]

IV.

For these reasons, we interpret the statutory phrase "any person who . . . is employed in a position in the executive branch of the United States . . . at a rate of pay payable for level I of the Executive Schedule" to encompass any Executive Branch employee who receives a rate of basic pay of exactly the level I amount. Should any SBRS member or other HHS employee receive a base salary set at level I, that employee would be subject to section 207(d)'s post-employment restrictions, whether the employee's pay is set at level I by law or administrative action, and whether that employee also receives allowances, bonuses, or other additional pay putting his total pay above that level. Conversely, an employee would not be subject to section 207(d) if his base salary were set below level I but his receipt of additional pay brought his total pay to the level I threshold.

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[21] We understand that this interpretation accords with OGE practice since the issuance of our *Treasury Employees* opinion in 2000. *See* OGE Views at 2, 6.

Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office

Section 105(a) of title 3, U.S. Code, which authorizes the President to appoint employees in the White House Office "without regard to any other provision of law regulating the employment or compensation of persons in the Government service," exempts positions in the White House Office from the prohibition on nepotism in 5 U.S.C. § 3110.

January 20, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether section 3110 of title 5, U.S. Code, which forbids a public official from appointing a relative "to a civilian position in the agency . . . over which [the official] exercises jurisdiction or control," bars the President from appointing his son-in-law to a position in the White House Office, where the President's immediate personal staff of advisors serve. We conclude that section 3110 does not bar this appointment because the President's special hiring authority in 3 U.S.C. § 105(a) exempts positions in the White House Office from section 3110.

A decision of the D.C. Circuit, *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam), lays out a different, but overlapping, route to the same result. According to the reasoning of *Haddon*, section 3110 does not reach an appointment in the White House Office because section 3110 covers only appointments in an "agency," which the statute defines to include "Executive agenc[ies]," and the White House Office is not an "Executive agency" within the definition generally applicable to title 5. Although our analysis does not track every element of the D.C. Circuit's reasoning about the meaning of "Executive agency," we believe that *Haddon* arrived at the correct outcome and that our conclusion here—that, because of the President's special hiring authority for the White House Office, section 3110 does not forbid the proposed appointment—squares with both the holding and a central part of the analysis in that case.

I.

Section 105(a) of title 3 authorizes the President "to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons

in the Government service," as long as the employees' pay is within listed salary caps. 3 U.S.C. § 105(a)(1). These employees are to "perform such official duties as the President may prescribe." *Id*. § 105(b)(1). We understand that most White House Office employees are appointed under section 105 or a similar hiring authority, such as 3 U.S.C. § 107 (the authorization for domestic policy staff). *See Authority to Employ White House Officials Exempt from Annual and Sick Leave Act During Appropriations Lapse*, 36 Op. O.L.C. 40, 46 (2011); *Authority to Employ the Services of White House Office Employees During an Appropriations Lapse*, 19 Op. O.L.C. 235, 236 (1995). Such employees are the President's "immediate personal staff" and work in close proximity to him. *Meyer v. Bush*, 981 F.2d 1288, 1293 & n.3 (D.C. Cir. 1993). The appointment at issue here, we understand, would be under 3 U.S.C. § 105(a).

Section 3110 of title 5, also known as the anti-nepotism statute, states that "[a] public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official." 5 U.S.C. § 3110(b). The statute expressly identifies the President as one of the "public official[s]" subject to the prohibition, and a son-in-law is a covered "relative." *Id*. § 3110(a)(2), (a)(3). Moreover, under Article II of the Constitution, the President exercises "jurisdiction or control" over the White House Office as well as over the rest of the Executive Branch. *See Myers v. United States*, 272 U.S. 52, 163–64 (1926); *Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977). Less certain is whether the White House Office is an "agency"—a term that section 3110 defines to include an "Executive agency," thereby calling up the definition of "Executive agency" generally applicable to title 5, *see* 5 U.S.C. § 3110(a)(1)(A); *id*. § 105. But whether or not the White House Office meets this definition (a subject to which we will return in Part II, *infra*), we believe that the President's special hiring authority in 3 U.S.C. § 105(a) permits him to make appointments to the White House Office that the anti-nepotism statute might otherwise forbid.

Section 3110 prohibits the appointment of certain persons to positions of employment in the federal government. It is therefore a "provision of law regulating the employment . . . of persons in the Government ser-

vice."[1] Under section 105(a), the President can exercise his authority to appoint and fix the pay of employees in the White House Office "without regard to" such a law. 3 U.S.C. § 105(a)(1). This authority is "[s]ubject" only to the provisions of subsection (a)(2), which limit the number of White House employees the President may appoint at certain pay levels. *See id*. § 105(a)(2). Thus, according to the most natural and straightforward reading of section 105(a), the President may appoint relatives as employees in the White House Office "without regard to" the anti-nepotism statute.

This reading of the two statutes gives section 105(a) a meaning no more sweeping than its words dictate. The ordinary effect of "without regard" language is to negate the application of a specified class of provisions. In *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987), for example, the D.C. Circuit declared that the "plain meaning" of a "without regard" exemption, which there enabled the Secretary of Health and Human Services ("HHS") to carry out his contracting authority "without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States," was "to exempt HHS from . . . the vast corpus of laws establishing rules regarding the procurement of contracts from the government," although not from the requirements of the Administrative Procedure Act. *Id*. at 1054; *see also Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016) (holding that a statutory direction to issue a rule "without regard to any other provision of statute or regulation that applies to issuance of such rule" effectively changed the Endangered Species Act); *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174–75 (9th Cir. 2012) (reaching the same conclusion about a direction to issue a rule "without regard to any other provision of statute or regulation"); *cf. Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1282–83 (D.C. Cir. 1989) (noting, in interpreting an authorization to the President to take certain action "notwithstanding any other provision of this chapter or any other

[1] Subsection (c) of section 3110, which states that an individual appointed, employed, promoted, or advanced in violation of the statute's prohibition is "not entitled to pay," 5 U.S.C. § 3110(c), may also make section 3110 a "provision of law regulating the . . . compensation of persons in the Government service" rendered inapplicable by section 105(a).

Act," that a "clearer statement is difficult to imagine," and declining to "edit" the language to add an implied exemption).

Applying the "without regard" language, our Office has interpreted section 105(a) as a grant of "broad discretion" to the President "in hiring the employees of [the White House Office]"; the provision, we have said, "reflect[s] Congress's judgment that the President should have complete discretion in hiring staff with whom he interacts on a continuing basis." *Applicability of the Presidential Records Act to the White House Usher's Office*, 31 Op. O.L.C. 194, 197 (2007); *see also* Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Authority under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office* at 2–3 (July 30, 1993) (section 105(a)'s "sweeping language" gives the President "complete discretion" in adjusting pay of White House Office employees "in any manner he chooses"). That congressional intent is manifest in the House and Senate committee reports accompanying the 1978 legislation by which Congress enacted section 105(a). *See* Pub. L. No. 95-570, 92 Stat. 2445 (1978). Both reports state that the language "expresses the committee's intent to permit the President *total discretion in the employment*, removal, and compensation (within the limits established by this bill) *of all employees in the White House Office*." H.R. Rep. No. 95-979, at 6 (1978) (emphasis added); S. Rep. No. 95-868, at 7 (1978) (same). Aside from the reference to the compensation limits in subsection (a)(2), that statement is qualified only by the committees' explanation that section 105(a) "would not excuse any employee so appointed from full compliance with all laws, executive orders, and regulations governing such employee's conduct while serving under the appointment." H.R. Rep. No. 95-979, at 6; S. Rep. No. 95-868, at 7 (same).

One piece of section 105(a)'s legislative history does point the other way. During the House subcommittee hearing, the General Counsel to the President's Reorganization Project at the Office of Management and Budget ("OMB") testified that the language exempting the White House Office (along with other entities in the Executive Office of the President) from the usual rules on hiring and compensation "would not exempt [these entities] from the restrictions under the nepotism statute because of the specific provisions of that act which apply to the President." *Authori-*

zation for the White House Staff: Hearings Before the Subcomm. on Employee Ethics and Utilization of the H. Comm. on Post Office and Civil Service, 95th Cong. 20 (1978) ("*Authorization for the White House Staff*") (testimony of F.T. Davis, Jr.). Even if we were prepared to reach a different understanding of section 105(a)'s text based on a single witness statement, *but see S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972) ("In construing laws we have been extremely wary of testimony before committee hearings[.]"), this particular statement does not offer a persuasive basis on which to do so. Although no member of the subcommittee disputed the OMB official's interpretation, it is far from clear whether the members (and later, the authors of the House and Senate reports) ultimately endorsed his view about the language. The OMB official offered his interpretation after the subcommittee chair asked about the language's effect on a number of federal laws and authorities, including "the Hatch Act, nepotism law, criminal conflict of interest laws, [and] Executive Order 11222 regulating employee conduct"; the chair explained that she was asking in order to draft the committee report. *Authorization for the White House Staff* at 20 (question of Rep. Schroeder). But while another of the witness's assertions ultimately made it into the committee reports—his statement that the language would not affect any laws "dealing with conduct by public officials once they are appointed," *id*. (testimony of Mr. Davis); *see also* H.R. Rep. No. 95-979, at 6; S. Rep. No. 95-868, at 7—his comment about the anti-nepotism statute did not. *Cf. Gustafson v. Alloyd Co*., 513 U.S. 561, 580 (1995) ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."). Moreover, the rationale the OMB official offered for his interpretation—that "specific provisions" of section 3110 "apply to the President"—is not particularly convincing. Because the President exercises "jurisdiction or control" over the entire Executive Branch, section 3110, by its express terms, would seemingly apply to the President's filling of numerous positions in federal agencies, even if the "without regard to any other provision of law" language carved out a handful of entities in the Executive Office of the President, such as the White House Office. *Cf. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993) ("*AAPS*") (suggesting a reading of section 3110 under which "a President would be barred from appointing his brother as Attorney General, but perhaps not as a White House special assistant").

In our view, therefore, section 105(a) exempts presidential appointments to the White House Office from the scope of the anti-nepotism statute.

II.

Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam), also bears on the question here and might appear to resolve it, albeit through a different route. Relying on arguments that would apply equally to the White House Office, *Haddon* held that the Executive Residence at the White House is not an "Executive agency" within the title 5 definition. *Id.* at 1490. Because the prohibition in section 3110 applies, as relevant here, only to appointments in "Executive agenc[ies]," *Haddon* seems to compel the conclusion that the bar against nepotism would not extend to appointments in the White House Office. Reinforcing this conclusion, though resting on other grounds, an earlier opinion of the D.C. Circuit had expressed "doubt that Congress intended to include the White House" as an "agency" under section 3110. *AAPS*, 997 F.2d at 905; *but see id.* at 920–21 (Buckley, J., concurring in the judgment) (disputing that interpretation of "agency").

The matter, however, is somewhat more complicated. Not every part of the reasoning in *Haddon* is entirely persuasive, and the court's rationale extends more broadly than necessary, in our view, to address the question now at hand. Nonetheless, we believe that *Haddon* lends support to our conclusion that the President may appoint relatives to positions in the White House Office.

Haddon held that the Executive Residence, which like the White House Office has a staff appointed under title 3, *see* 3 U.S.C. § 105(b), is not an "Executive agency" within the title 5 definition. *Haddon* was considering 42 U.S.C. § 2000e–16, which extends the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 to employees or applicants for employment "in executive agencies as defined in [5 U.S.C. § 105]." 42 U.S.C. § 2000e–16(a). Under that definition (the same one that governs section 3110), an "Executive agency" means "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. Because the Executive Residence, like the White House Office, is plainly not an "Executive department" or a "Government corporation,"

see id. §§ 101, 103, the issue in *Haddon* came down to whether the Executive Residence is an "independent establishment," *see id*. § 104.

The D.C. Circuit had two reasons for concluding that the Executive Residence is not an independent establishment and therefore not an Executive agency under 5 U.S.C. § 105. First, the court observed that another statute, 3 U.S.C. § 112, authorizes "[t]he head of any department, agency, or independent establishment of the executive branch of the Government [to] detail, from time to time, employees of such department, agency, or establishment to the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration." In the court's view, this phrasing suggested that the listed entities in the Executive Office of the President are not themselves "department[s], agenc[ies], or independent establishment[s]." *Haddon*, 43 F.3d at 1490 ("That Congress distinguished the Executive Residence from the independent establishments, whatever they may be, suggests that Congress does not regard the Executive Residence to be an independent establishment, as it uses that term."). Second, the court said that title 5 of the U.S. Code "relates to government organization and employees and prescribes pay and working conditions for agency employees," while title 3 of the Code "addresses similar concerns with respect to the President's advisors and the staff of the Executive Residence." *Id*. The incorporation of the title 5 definition in section 2000e–16, the court explained, suggests that Congress intended the statute to cover only "title 5" positions—not positions provided for in 3 U.S.C. § 105 and other title 3 authorities. *Id*.[2]

The D.C. Circuit's first reason may be the less convincing of the two. The wording of the detail statute, 3 U.S.C. § 112, "distinguish[es]" between the sending and receiving entities only insofar as the sending entities are identified generically, while the small group of entities that may receive details, including the Executive Residence and the White House Office, are specifically named. This wording might well be an apt way to authorize a detail without implying anything about the status of the re-

[2] Shortly after *Haddon*, Congress passed the Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, 110 Stat. 4053 (1996), which expressly applies Title VII and other federal civil rights and workplace laws to entities in the Executive Office of the President, including the White House Office and the Executive Residence. *See id.* § 2(a) (relevant provisions codified at 3 U.S.C. §§ 401, 402, 411).

ceiving entities. Indeed, Congress elsewhere used similar constructions to provide for transfers between executive departments. Section 2256 of title 7, U.S. Code, declares that the "head of any department" may "transfer to the Department [of Agriculture]" funds to perform certain inspections, analyses, or tests. Similarly, under 22 U.S.C. § 2675, the Secretary of State may "transfer to any department" certain "funds appropriated to the Department of State." The generic references to "departments" on one side of these transactions could not be read to imply that the entities on the other side, the Departments of Agriculture and State, are not "departments."

The court's second argument seems stronger, although the court stated it more broadly than the facts of *Haddon* required. The court apparently viewed the provisions in title 3 as creating a complete substitute for title 5: "while Title 5 relates to government organization and employees and prescribes pay and working conditions for agency employees, Title 3 addresses similar concerns with respect to the President's advisors and the staff of the Executive Residence." *Haddon*, 43 F.3d at 1490 (citation omitted). The court then quoted, in a parenthetical, the "without regard" provision for hiring in the Executive Residence that exactly parallels the one for the White House Office. *Id*. (quoting 3 U.S.C. § 105(b)(1)). Inasmuch as the plaintiff in *Haddon* claimed that he had been unlawfully passed over for promotion—that he had not been appointed to a higher position with higher pay—his claim had to do with exactly the subjects identified in 3 U.S.C. § 105(b)(1), "employment or compensation of persons in the Government service." Section 105(b)(1) could therefore be understood to displace the restrictions in Title VII, even if title 3 did not completely displace all of title 5. Thus, the court's broader statements about the relationship of title 3 and title 5, though not dicta, went further than necessary to decide the case and further than we need to go here.

In any event, our conclusion above—that the President's special hiring authority in 3 U.S.C. § 105(a) allows him to appoint relatives to the White House Office without regard to section 3110's bar against nepotism—is consistent with the holding in *Haddon* and with the court's reliance on the parallel language in 3 U.S.C. § 105(b)(1). In accordance with *Haddon*, we believe that the White House Office is not an "Executive agency" insofar as the laws on employment and compensation are concerned. Both the "without regard" language of section 105(a) and the general treatment

of the White House Office under title 3 instead of title 5 undergird this conclusion.[3] Having conformed our analysis, to this extent, with the only authoritative judicial guidance bearing on this question, we have no need to delve into the issue whether the White House Office should be considered outside of title 5 for all purposes whenever the application of that title is confined to "Executive agenc[ies]."[4]

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[3] We do not address the application of section 3110 to any other component of the government.

[4] We have observed before that the D.C. Circuit's reasoning in *Haddon* would seemingly extend to other entities listed in section 112 with special hiring authorities under title 3, including the White House Office. *See* Memorandum for Gregory B. Craig, Counsel to the President, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees* at 18 (Sept. 17, 2009); *Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118, 118 (2003) ("Section 603 Opinion"). In one circumstance, however, because of features "unique" to the statutory scheme at issue—the Hatch Act Reform Amendments of 1993 ("HARA")—we have found that the White House Office should be treated as an "Executive agency" under title 5 notwithstanding *Haddon*. *See* Section 603 Opinion, 27 Op. O.L.C. at 119 (White House Office employees may make contributions to a President's authorized re-election campaign by virtue of an exception available to employees in an "Executive agency").

Section 603 of title 18 prohibits "an officer or employee of the United States or any department or agency thereof" from "mak[ing] any contribution . . . to any other such officer, employee or person . . . if the person receiving such contribution is the employer or employing authority of the person making the contribution." 18 U.S.C. § 603(a). But section 603(c) exempts from liability "employee[s] (as defined in section 7322(1) of title 5)"—meaning, employees subject to HARA. Section 7322(1), in turn, defines "employee" as "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency." 5 U.S.C. § 7322(1)(A). Several considerations led us in our Section 603 Opinion to confirm a prior opinion treating the White House Office as an "Executive agency" for purposes of section 7322(1), *see Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee*, 19 Op. O.L.C. 103 (1995). First, there would be "no purpose" for section 7322(1)'s express exclusion of the President and the Vice President if they were not understood to be "holding office in . . . an Executive agency." Section 603 Opinion, 27 Op. O.L.C. at 119. Second, the exception to HARA's substantive prohibition on partisan political activity in 5 U.S.C. § 7324(b)(2)(B)(i) applies to "employee[s] paid from an appropriation for the Executive Office of the President," further reflecting HARA's assumption that such employees are otherwise covered. Section 603 Opinion, 27 Op. O.L.C. at 119. Third, reading section 7322(1) to exclude employees of the White House Office "might be thought to produce highly anomalous results," as it would follow that White House

III.

Our Office, on several occasions, has addressed the application of section 3110 to presidential appointments, including appointments to the White House Office and other entities within the Executive Office of the President. Although our conclusion today departs from some of that prior work, we think that this departure is fully justified. Our initial opinions on the subject drew unwarranted inferences about Congress's intent from a single witness statement in a congressional hearing. Moreover, the surrounding legal context has been transformed by the subsequent enactment of section 105(a), which expressly and specifically addresses employment within the White House Office, and also by the D.C. Circuit's decision in *Haddon*.

A.

Section 3110 was enacted in 1967. In a 1972 memorandum, our Office concluded that the statute would bar the President from appointing a relative "to permanent or temporary employment as a member of the White House staff." Memorandum for John W. Dean, III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability to President of Restriction on Employment of Relatives* at 1 (Nov. 14, 1972) ("Cramton Memo"). The Cramton Memo is brief but unequivocal: section 3110, we said, "seems clearly applicable to . . . positions on the White House staff." *Id.* at 2.

In 1977, we advised that section 3110 would preclude the President from appointing the First Lady to serve as chair of the President's Commission on Mental Health ("Mental Health Commission"), whether with or without compensation. *See* Memorandum for Douglas B. Huron, Associate Counsel to the President, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Possible Appointment of*

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employees "would be entirely free from the restrictions of [HARA]" and "would be able to engage in all sorts of partisan political activity," including by "us[ing] [their] official authority or influence for the purpose of interfering with or affecting the result of an election," *see* 5 U.S.C. § 7323(a)(1). Section 603 Opinion, 27 Op. O.L.C. at 119. Thus, we determined that there are "powerful reasons to conclude that the term 'Executive agency' in section 7322(1) does not have the same meaning that section 105 of title 5 generally assigns it (and that cases like *Haddon* recognize) for the purpose of title 5." *Id.*

Mrs. Carter as Chairman of the Commission on Mental Health (Feb. 18, 1977) ("Mental Health Commission Memo I") (referencing attached Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the President's Appointing Mrs. Carter as Chairman of the Commission on Mental Health* (Feb. 17, 1977) ("Mental Health Commission Memo II")). We determined that the Mental Health Commission, which would be established by executive order and assigned specific authorities, would "clearly" qualify as an independent establishment within the "comprehensive" meaning of that term. Mental Health Commission Memo I. Our analysis noted, however, that the funding for the Commission would come from an annual appropriation for the Executive Office of the President covering "Unanticipated Needs," and we accordingly considered the effect of language in that appropriation that, presaging section 105(a), authorized the President to hire personnel "without regard to any provision of law regulating employment and pay of persons in the Government service." Mental Health Commission Memo II, at 5–6. We ultimately concluded that the appropriation language did not override section 3110. Although we did not say that the Mental Health Commission would be located in the White House Office specifically, our analysis suggested that our conclusion about the appointment would have been the same, whether or not the position was located there. *See id*.

Shortly afterward, the White House asked us to answer that very question: whether section 3110 applied to the contemplated appointment of the President's son to serve as an unpaid assistant to a member of the White House staff. *See* Memorandum for the Attorney General from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Employment of Relatives Who Will Serve Without Compensation* (Mar. 23, 1977) ("White House Aide Memo I") (referencing attached Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of President's Son to Position in the White House Office* (Mar. 15, 1977) ("White House Aide Memo II")). The Civil Service Commission, the predecessor of the Office of Personnel Management, had advanced several arguments why section 3110 did not forbid the President's appointment of relatives to his personal staff. *See* White House Aide Memo I, at 1. Reaffirming the points made in the Mental Health Commission Memos, however, our Office concluded that the statute also covered the proposed appointment. Once again, we rejected an

argument that the language in the annual appropriation for the White House Office (i.e., the "without regard" language) exempted those appointments from section 3110. White House Aide Memo II, at 1–3.

In 1983, we were asked whether the President could appoint a relative to a Presidential Advisory Committee on Private Sector Initiatives ("CPSI"). *See* Memorandum for David B. Waller, Senior Associate Counsel to the President, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of Member of President's Family to Presidential Advisory Committee on Private Sector Initiatives* (Feb. 28, 1983). We answered that the President's proposed appointment of a relative to the CPSI raised "virtually the same problems raised by Mrs. Carter's proposed service on the President's Commission on Mental Health." *Id*. at 2. Because we lacked "sufficient time to reexamine the legal analysis contained in our earlier memoranda," we stated that we had no choice but to "adhere to the conclusion" that "the President cannot, consistently with section 3110, appoint a relative as an active member of such a Commission." *Id*.

Most recently, we advised whether the President could appoint his brother-in-law and his half-sister to two advisory committees. Once again, we found that section 3110 precluded the appointments. *See* Memorandum for Gregory B. Craig, Counsel to the President, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees* (Sept. 17, 2009) ("Barron Opinion"). In the course of that analysis, we considered whether one of the committees, the President's Commission on White House Fellowships ("Fellowships Commission"), was located within the Executive Office of the President or was instead a free-standing establishment within the Executive Branch. *Id*. at 14–15.[5] Concluding that, either way, the Fellowships Commission was, or was within, an "independent establishment" falling within the title 5 definition of Executive agency, we did not decide the question. *Id*.

[5] We concluded that the other advisory committee at issue, the President's Council on Physical Fitness and Sports, constituted part of the Department of Health and Human Services. Barron Opinion at 9. Nothing in our present opinion should be understood to question our prior conclusions about filling positions not covered by the special hiring authorities in title 3.

But we explicitly rejected the possibility that the Fellowships Commission constituted a part of the White House Office. *Id*. at 14. As a result, the Barron Opinion had no occasion to reapply or reconsider our precedents finding that section 3110 barred the President from appointing relatives to White House Office positions. *See id*. at 18–19 (distinguishing *Haddon*).

B.

Although none of our previous opinions analyzed the interaction between 3 U.S.C. § 105(a) and the anti-nepotism statute, our 1977 memoranda did consider the effect of language in annual appropriations for the Executive Office of the President that was nearly identical to section 105(a). Prompted by the inconsistency between our earlier memoranda and the implications of *Haddon*, we now revisit the reasoning in those memoranda in order to assess the issue presented under section 105(a).

While acknowledging that the appropriation language was "broad" and the issue "not wholly free of doubt," our memorandum regarding the White House appointment reasoned that section 3110 should be understood as a "specific prohibition" constituting an "exception to the general rule that limitations on employment do not apply to the White House Office." White House Aide Memo II, at 3. We therefore invoked the "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Id*. (quoting *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 153 (1976)). But the canon about general and specific statutes seems of limited help here, because neither of the two relevant statutes can readily be characterized as more or less specific than the other. To be sure, section 3110 could be said to concern the "specific" subject of nepotism. But section 105(a) could reasonably be described as a statute "dealing with [the] narrow, precise, and specific" subject of hiring for the White House Office that ought to overcome the generally applicable anti-nepotism rule of section 3110.

The 1977 memoranda also put significant weight on the legislative history of section 3110, discerning a clear congressional intent that the Executive Office of the President, including the White House Office, be among the entities subject to the anti-nepotism prohibition. *See* Mental

Health Commission Memo I; Mental Health Commission Memo II, at 5; White House Aide Memo I, at 2; White House Aide Memo II, at 2–3. We think that this history is not so compelling, however, as to direct the outcome on the question here.

Section 3110 was enacted as part of the Postal Revenue and Federal Salary Act of 1967. *See* Pub. L. No. 90-206, § 221, 81 Stat. 613, 640. When Congress considered and passed the legislation, the annual appropriations for the Executive Office of the President then in effect included the permissive language about the President's authority to hire personnel in the White House Office. *See* Pub. L. No. 90-47, tit. III, 81 Stat. 113, 117 (1967). As our 1977 memoranda observed, there was no mention of those appropriations or that language during Congress's consideration of the anti-nepotism provision. But one witness, the Chairman of the Civil Service Commission, testified before the Senate committee that, in his view, the language then under consideration would have prevented President Franklin Delano Roosevelt from appointing his son "at the White House as a civilian aide" (as President Roosevelt had done). *Federal Pay Legislation: Hearings Before the S. Comm. on Post Office and Civil Service*, 90th Cong. 366 (1967) ("*Federal Pay Legislation Hearings*") (testimony of Chairman Macy). Following the hearing, the Senate amended the provision in the bill and explicitly named the President as a "public official" to whom the bar applied. "Because the Senate Hearings contain the only extended discussion of the provision and the only discussion at all of its application to the President," we explained in our memorandum concerning the White House appointment, "it seems appropriate to attach particular significance to the Civil Service Commission's interpretation of the statute in the course of the hearings. It is reasonable to assume that the Senate Committee and eventually the Congress acted on the basis of Chairman Macy's interpretation of the prohibition as drafted." White House Aide Memo II, at 2.

Having reexamined the legislative materials, we no longer would make that assumption. The Senate committee and Chairman Macy were reviewing a version of the bill that prohibited nepotistic appointments to "department[s]," defined more broadly to include "each department, agency, establishment, *or other organization unit* in or under the . . . executive . . . branch of the Government . . . including a Government-owned or controlled corporation." H.R. 7977, 90th Cong. § 222 (as referred to S. Comm.

on Post Office and Civil Service, Oct. 16, 1967) (emphasis added). It is unclear why the Senate amended the provision to apply instead to "Executive agenc[ies]" and thus to call up the title 5 definition of that term. *See* H.R. 7977, 90th Cong. § 221 (as reported out of S. Comm. on Post Office and Civil Service, Nov. 21, 1967). The Senate report does not explain the change. *See* S. Rep. No. 90-801, at 28 (1967). Nevertheless, that the Civil Service Commission Chairman was considering different statutory language when offering his view about the scope of the prohibition dilutes the strength of his testimony—which, as a witness statement, should typically be afforded less weight to begin with. *See S&E Contractors*, 406 U.S. at 13 n.9; *Gustafson*, 513 U.S. at 580.

Because the appropriation language was apparently never mentioned during the House's or Senate's consideration of the bill, the debates and other materials include no clear statement that the anti-nepotism provision was intended to prevail over the broad hiring authority previously granted in that year's appropriation for the Executive Office of the President.[6] Moreover, aside from that single question about the service of President Roosevelt's son as a White House aide—which was part of a series of questions posed by the senators to Chairman Macy about the language's application to the President generally, *see Federal Pay Legislation Hear-*

[6] Individual senators did stress the amended provision's breadth in floor statements. *See* 113 Cong. Rec. 36103 (1967) (statement of Sen. Randolph) (indicating that the Senate amended the provision "to plug any loopholes which might exist," because "[i]t was critical that the nepotism provisions be applied across the board"); *id.* (stating that "[w]e could not stop at a certain point in formulating a policy on nepotism" and "had to apply the policy across the board"); *id.* at 36103–04 (suggesting that "the White House believes, as does now the Congress, that a nonnepotism policy should apply equally to any branch of Government"); *id.* at 37316 (statement of Sen. Udall) (explaining that the provision applies "across-the-board, from the highest office to the lowest paid job, with equal force and effect" and that "[n]o official in any of the three branches of the Government . . . may appoint or promote a relative to any position under his or her control or jurisdiction," and calling it "the strongest possible guarantee against any abuse of Federal appointive authority and any preference in Federal positions that is adverse to the public interest"). These statements, whatever their worth in demonstrating congressional intent more generally, suggest that at least those senators meant for section 3110 to have broad effect across the three branches of government. But because those statements do not speak to section 3110's relationship to the President's hiring authority under the annual appropriations for the Executive Office of the President—and, of course, could not speak to the relationship between section 3110 and the later-enacted section 105(a)—they do not illuminate the matter at hand.

ings at 360–69—neither the Senate nor the House appears to have focused on the White House Office. We therefore are hesitant to infer that the 90th Congress envisioned that section 3110 would overcome the President's hiring authorities under the annual appropriation. We are even more reluctant to draw that inference with respect to the permanent special hiring authority for the White House Office that Congress enacted ten years later.

IV.

Finally, we believe that this result—that the President may appoint relatives to his immediate staff of advisors in the White House Office—makes sense when considered in light of other applicable legal principles. Congress has not blocked, and most likely could not block, the President from seeking advice from family members in their personal capacities. *Cf. In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (referring to the President's need, "[i]n making decisions on personnel and policy, and in formulating legislative proposals, . . . to seek confidential information from many sources, both inside the government and outside"); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989) (construing the Federal Advisory Committee Act ("FACA") not to apply to the judicial recommendation panels of the American Bar Association in order to avoid "formidable constitutional difficulties"). Consequently, even if the anti-nepotism statute prevented the President from employing relatives in the White House as advisors, he would remain free to consult those relatives as private citizens. *See* Barron Opinion at 8–9 (finding the application of section 3110 to presidential advisory committees constitutional in part because "[t]he President remains free to consult his relatives in their private, individual capacities at the time and place of, and on the subjects of, his choosing"). And our Office has found that such an informal, "essentially personal" advisory relationship, even if the private person offers advice to the President on a "wide variety of issues," does not make that person an employee of the federal government subject to the conflict of interest laws in title 18. *Status of an Informal Presidential Advisor as a "Special Government Employee"*, 1 Op. O.L.C. 20, 20–21 (1977) ("*Informal Presidential Advisor*"); *see also id.* at 22 ("Mrs. Carter would not be regarded as a special Government employee solely on the ground that

she may discuss governmental matters with the President on a daily basis.").[7]

But the conflict of interest laws do apply to employees of the White House Office. *See* 18 U.S.C. §§ 203, 205, 207, 208, 209 (all applicable to, *inter alia*, officers and employees in the "executive branch"); *id.* § 202(e)(1) (defining "executive branch" for purposes of those statutes to include "each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch"); *id.* § 207(c)(2)(A)(iii), (d)(1)(C) (applying more stringent post-employment restrictions to employees appointed to the White House Office pursuant to 3 U.S.C. § 105(a)(2)); *see also, e.g.*, *Applicability of Post-Employment Restrictions in 18 U.S.C. § 207 to a Former Government Official Representing a Former President or Vice President in Connection with the Presidential Records Act*, 25 Op. O.L.C. 120 (2001) (considering section 207's application to former employees of the White House Office).

A President wanting a relative's advice on governmental matters therefore has a choice: to seek that advice on an unofficial, ad hoc basis without conferring the status and imposing the responsibilities that accompany formal White House positions; or to appoint his relative to the White House under title 3 and subject him to substantial restrictions against conflicts of interest. *Cf. AAPS*, 997 F.2d at 911 n.10 (declining, after holding that the First Lady qualifies as a "full-time officer or employee" of the government under FACA, to decide her status under the conflict of interest statutes). In choosing his personal staff, the President enjoys an unusual degree of freedom, which Congress found suitable to the demands of his office. Any appointment to that staff, however, carries with it a set of legal restrictions, by which Congress has regulated and fenced in the conduct of federal officials.

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[7] Our opinion explained, however, that while the informal presidential advisor's general practice (as we understood it) of discussing policy issues directly with the President did not itself render him a government employee, his more extensive "work" on a particular "current social issue"—in connection with which the advisor "called and chaired a number of meetings that were attended by employees of various agencies" and "assumed considerable responsibility for coordinating the Administration's activities in that particular area"—did cross a line and made him a government employee for purposes of that work. *Informal Presidential Advisor*, 1 Op. O.L.C. at 23.

* * * * *

In our view, section 105(a) of title 3 exempts appointments to the White House Office from the bar in section 3110 of title 5. Section 3110 therefore would not prohibit the contemplated appointment.

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

Appointment of United States Trade Representative

Were it constitutional, 19 U.S.C. § 2171(b)(4) would prohibit anyone "who has directly represented, aided, or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States" from being appointed as United States Trade Representative. A nominee's previous work on two matters involving antidumping or countervailing duty proceedings before administrative agencies would not be disqualifying under the statute, because neither matter was a "trade negotiation" or, during the time of his engagement, a "trade dispute[] with the United States."

March 13, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT[*]

You have asked for our opinion whether 19 U.S.C. § 2171(b)(4) (Supp. III 2015), if legally effective, would bar the appointment of Robert E. Lighthizer as United States Trade Representative. The provision, first enacted in 1995,[1] states that anyone "who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative." In 1996, we concluded that the provision—then codified at 19 U.S.C. § 2171(b)(3)—"is an unconstitutional intrusion on the President's power of appointment and thus has no legal effect." Memorandum for John M. Quinn, Counsel to the President, from Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of United States Trade Representative* at 1

[*] Editor's note: A copy of this opinion was provided to the Senate Committee on Finance before Mr. Lighthizer's March 14, 2017 confirmation hearing. *See Nomination of Robert E. Lighthizer: Hearing Before the S. Comm. on Finance*, 115th Cong. 3 (2017). The Consolidated Appropriations Act, 2017, made the statutory limitation discussed in this opinion inapplicable to "the first person appointed" as U.S. Trade Representative after May 5, 2017, "if that person served as" a Deputy U.S. Trade Representative before the limitation's 1995 enactment (as Mr. Lighthizer had). Pub. L. No. 115-31, div. B, § 541(a), 131 Stat. 135, 229 (2017). Six days later, the Senate provided its advice and consent to Mr. Lighthizer's appointment. *See* 163 Cong. Rec. S2906 (daily ed. May 11, 2017).

[1] *See* Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 21(b), 109 Stat. 691, 704–05.

(July 1, 1996) ("1996 USTR Memorandum") (citation omitted).[2] President Clinton, however, had stated his intention, "as a matter of practice, to act in accordance with [the] provision" despite its unconstitutionality. Statement on Signing the Lobbying Disclosure Act of 1995 (Dec. 19, 1995), 2 *Pub. Papers of Pres. William J. Clinton* 1907 (1995). We therefore considered whether the provision, if effective, would have barred the proposed 1996 appointment, and we concluded that it would have. *See* 1996 USTR Memorandum at 3. Two years later, we addressed whether the same restriction would have barred the appointment of a Deputy United States Trade Representative, and we concluded that it would not have. *See* Memorandum for Charles F.C. Ruff, Counsel to the President, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of Deputy United States Trade Representative* (June 25, 1998) ("1998 Deputy USTR Memorandum").

For similar reasons, we now conclude, on the basis of publicly available documents and other information you have provided about selected matters on which Mr. Lighthizer has worked, that, if section 2171(b)(4) were legally effective, his work on those matters would not be disqualifying under the statute.

I.

Since 1985, Mr. Lighthizer has been in private practice, primarily handling a variety of international-trade matters on behalf of domestic entities, foreign governments, and other foreign entities. You have asked us to consider his work on behalf of two clients and to assume that each of those clients was a "foreign entity" as defined by 18 U.S.C. § 207(f)(3).[3]

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[2] The portions of the 1996 USTR Memorandum addressing the constitutional question were published as *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279 (1996).

[3] As defined by 18 U.S.C. § 207(f)(3), "the term 'foreign entity' means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act." Under the cross-referenced provision, "'government of a foreign country' includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such

These matters involved Mr. Lighthizer's representation of Chinese or Brazilian entities in antidumping or countervailing duty proceedings before the Department of Commerce's International Trade Administration ("ITA") or the U.S. International Trade Commission ("ITC").

As relevant here, an antidumping or countervailing duty proceeding commences when an "interested party"—such as a company, a trade or business association, or a union—files a petition with both the ITA and the ITC contending that a domestic industry is injured or threatened by imports that are being sold in the United States at less than fair value or being subsidized by a foreign government. *See* ITC, *Antidumping and Countervailing Duty Handbook*, USITC Pub. 4540, at I-3 (14th ed. June 2015), https://www.usitc.gov/trade_remedy/documents/handbook.pdf ("*ITC Handbook*"); *see also* 19 U.S.C. §§ 1671a(b), 1673a(b), 1677(9). Upon receipt of a petition, the ITA must "notify the government of any exporting country named in the petition" and, in certain instances, "provide the government of any exporting country . . . an opportunity for consultations with respect to the petition." 19 U.S.C. §§ 1671a(b)(4)(A), 1673a(b)(3)(A). Each agency conducts a preliminary investigation and renders a preliminary determination, which may be followed by a final investigation and final determination by each agency. *See* 19 U.S.C. §§ 1671–1671h, 1673–1673h; *ITC Handbook* at II-3 to II-23. The ITA may impose antidumping or countervailing duties if the following two conditions are satisfied: (1) the ITA renders a "final determination" that dumping of goods below fair value has occurred or that an exporting nation has provided a countervailing subsidy with respect to the goods; and (2) the ITC renders a "final determination"—in what is referred to as the "injury phase" of the proceeding—that the importer's behavior materially injures, threatens to materially injure, or materially retards the establishment of, an industry in the United States. *See* 19 U.S.C. §§ 1671–1671h, 1673–1673h, 1677; *ITC Handbook* at II-14, II-24 to II-25.

After each agency's final determination is published, a party to the proceeding may "contest[] any factual findings or legal conclusions upon which the determination is based" by commencing a civil action in the U.S. Court of International Trade. 19 U.S.C. § 1516a(a)(1)–(2); *see*

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sovereign de facto or de jure authority or functions are directly or indirectly delegated." 22 U.S.C. § 611(e).

28 U.S.C. § 2631(c).[4] In such an action, the United States is named as the defendant and is represented by either the Department of Justice or the ITC. *See* 28 U.S.C. § 516; 19 U.S.C. § 1333(g); *see, e.g.*, *Zhengzhou Harmoni Spice Co. v. United States*, 34 C.I.T. 40, 42 (Ct. Int'l Trade 2010) (observing that, in an action challenging a final administrative determination of the ITA, "the only necessary parties are the plaintiff[] and the defendant (*i.e.*, Commerce)"); *Shandong TTCA Biochemistry Co. v. United States*, 34 C.I.T. 582, 582 (Ct. Int'l Trade 2010) (counsel listing denoting that, in a challenge to an injury determination by the ITC, the ITC appeared "for Defendant United States").

II.

As noted, the matters in question involved antidumping or countervailing duty proceedings before the ITA or ITC. We see no reason to believe that either matter was a "trade negotiation." Nor was either, during the period of Mr. Lighthizer's engagement, a "trade dispute[] with the United States" that would make his work disqualifying under section 2171(b)(4).

A.

You have informed us that, between March and November 1991, Mr. Lighthizer represented the China Chamber of Commerce for Machinery and Electronics Products by "assisting another partner [at his law firm] with respect to the injury phase of U.S. antidumping litigation [i.e., an ITC investigation] regarding certain electric fans from China." In December 1991, shortly after Mr. Lighthizer's own involvement ended, the ITC issued its final determination of material injury to U.S. fan manufacturers. *See Certain Electric Fans from the People's Republic of China*, Inv. No. 731–TA–473, USITC Pub. 2461 (Dec. 1991) (Final).

In 1996, we briefly discussed the meaning of a "trade dispute[] with the United States" under what was then 19 U.S.C. § 2171(b)(3). We explained that, "within the ordinary meaning of the statutory language, advice about dissolving a trade agreement [between the United States and a foreign

[4] For goods coming from Canada or Mexico, the administrative determinations of the ITA and the ITC are subject to review by a "binational panel," selected by the governments involved. *See* 19 U.S.C. §§ 1516a(g)(8), 3432(a)(1)(D)–(E).

country] would concern a 'trade dispute,' albeit a dispute that might be averted." 1996 USTR Memorandum at 5. But we reserved the question "whether the statutory bar is triggered by . . . work on countervailing duty cases . . . in administrative fora." *Id*. at 5 n.4. We considered the latter question in 1998, concluding that while an antidumping or countervailing duty matter was pending before the ITA, "the dispute was not 'with' the United States, as we interpret that term in the statute." 1998 Deputy USTR Memorandum at 2.[5]

We reaffirm that reasoning here and confirm that it is equally applicable to work performed during an antidumping or countervailing duty investigation by the ITC. As we explained in 1998, "[w]e read the word 'with,' in this context, as meaning 'in opposition to' or 'against' the United States." 1998 Deputy USTR Memorandum at 2 (citing *Webster's Third New International Dictionary* 2626 (def. 1a) (1993)). That is the well-settled meaning of the term *with* when used in the context of a dispute. *See* 20 *Oxford English Dictionary* 443 (2d ed. 1989) (def. 2: "Of conflict, antagonism, dispute, injury, reproof, competition, rivalry, and the like: In opposition to, adversely to: = AGAINST"). Thus, a foreign entity is in a trade dispute "with" the United States only if that entity's position is in opposition, or adverse, to that of the U.S. Government.[6]

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[5] The nominee at issue in the 1998 Deputy USTR Memorandum disclosed to the Senate that she had previously worked on behalf of a foreign governmental entity during an ITA proceeding. *See Nominations of Susan G. Esserman, Timothy F. Geithner, Gary S. Gensler, Edwin M. Truman, & David C. Williams: Hearing Before the S. Comm. on Finance*, 106th Cong. 42 (1999). Although the statutory prohibition was neither modified nor waived, the Senate gave its advice and consent to her appointment.

[6] The plain meaning of the statutory text is reinforced by a structural consideration. In the same section of the 1995 statute that restricted the range of permissible appointees, Congress also removed the time limit on the post-employment restriction that forbids a former U.S. Trade Representative or Deputy U.S. Trade Representative from representing, aiding, or advising a foreign entity "with the intent to influence a decision of" an officer or employee of the United States. 18 U.S.C. 207(f)(1)–(2); *see* Lobbying Disclosure Act § 21(a), 109 Stat. at 704. Congress could have used such a formulation in section 2171 if it had intended to exclude from the class of Trade Representative appointees not just those who have opposed a final determination of the ITA or the ITC but also those who have appeared before those agencies with "the intent to influence" their officers or employees before such determinations have been made. In comparison, section 2171(b)(4) seems "designed to reach a narrower category of activities, of a more directly adversarial nature." 1998 Deputy USTR Memorandum at 2.

The kinds of ITA and ITC administrative proceedings at issue here do not present such circumstances. Although the proceedings are adversarial in nature, the United States is not one of the adversaries. Instead, when the agencies conduct their investigations, each one is still deciding, on behalf of the U.S. Government, whether to side with the petitioners representing domestic industries or with the foreign respondents. *Cf. Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1385 (Fed. Cir. 2012) (characterizing the ITA's "role" as that of "a neutral arbiter in trade disputes"). An antidumping or countervailing duty investigation may be correctly described as a "trade dispute[] *before* the agency." *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (Ct. Int'l Trade 2014), *aff'd*, 790 F.3d 1358 (Fed. Cir. 2015) (emphasis added). But the foreign respondent in an investigation initiated at the behest of a petitioner does not have a dispute "with" the agency any more than a party in a district court proceeding has a dispute "with" the court.

When the ITA and the ITC have rendered their final determinations and one of the parties seeks judicial review, the nature of the trade dispute changes. At that point, the agencies cease to be mere adjudicators. Their final determinations become the position of the United States, which becomes the defendant, directly adverse to the party challenging the decision (which may or may not be a foreign respondent). As we explained in 1998, the United States is then "a real party" before a court (or a binational panel) and may therefore find itself in a trade dispute "with" a foreign entity challenging the ITA's or ITC's determination. *See* 1998 Deputy USTR Memorandum at 3.

While we recognize that any proceeding before the ITA or ITC has the potential to become a "trade dispute with the United States," that outcome is contingent on the position that the agency, and hence the United States, ultimately adopts. If the ITA and the ITC find in the foreign entity's favor, the foreign entity will not be adverse to the United States. Instead, the domestic petitioner will be the one that has a trade dispute "with" the United States. Indeed, that is what happened in the Chinese-fan matter after Mr. Lighthizer's representation concluded. The judicial challenge to the ITA's final determination was filed by "a major American manufacturer of oscillating and ceiling fans." *Lasko Metal Prod., Inc. v. United States*, 810 F. Supp. 314, 315 (Ct. Int'l Trade 1992), *aff'd*, 43 F.3d 1442 (Fed. Cir. 1994). Some Chinese companies—but

apparently not the China Chamber of Commerce for Machinery and Electronics Products—intervened as defendants and "support[ed] the agency's decision." *Id*. at 315, 316.[7]

Accordingly, Mr. Lighthizer's representation of the China Chamber of Commerce for Machinery and Electronics Products, which ended before the ITC's final injury-phase determination, did not occur in a trade dispute with the United States and therefore would not disqualify him from appointment under section 2171(b)(4).

B.

From October 1985 through February 1986, Mr. Lighthizer represented the Sugar and Alcohol Institute of Brazil (which was then part of the Brazilian Ministry of Industry and Commerce) in an effort to achieve a settlement of antidumping and countervailing duty proceedings. On the basis of publicly available information and the facts you have provided, we do not believe that Mr. Lighthizer's representation of the Institute would be disqualifying under section 2171(b)(4).

The relevant matters were initiated by petitions filed with the ITA and the ITC in February 1985. *See* ITC, Certain Ethyl Alcohol from Brazil, Inv. Nos. 701–TA–239 and 731–TA–248, USITC Pub. 1678, at 1 (Apr. 1985) (Preliminary). The ITA issued its final determination in February 1986, concluding that fuel ethanol imported from Brazil was being sold in the United States at less than fair value, and the ITC issued its final determination in March 1986, finding no injury or threat of injury to an industry in the United States. *See* Final Determination of Sales of Fuel Ethanol from Brazil at Less than Fair Value, 51 Fed. Reg. 5572 (Feb. 14, 1986) (ITA final determination); Certain Ethyl Alcohol from Brazil, Inv. Nos. 701–TA–239 and 731–TA–248, USITC Pub. 1818 (Mar. 1986)

[7] The situation here thus differs from one that led us to conclude that a potential appointee had given advice about a "trade dispute with the United States" when she advised a foreign government about the legal consequences of terminating its trade agreement with the United States. 1996 USTR Memorandum at 5. There, it was readily apparent that, should the foreign government decide to terminate the trade agreement, the termination would initiate an adversarial relationship—a dispute—with the United States. We indicated that any advice prepared for the purposes of informing the foreign government's termination decision was therefore inseparable from the anticipated trade dispute with the United States.

(Final). More than two months after Mr. Lighthizer's last involvement in these matters, a challenge to the ITA's determination was filed in the Court of International Trade. *See Internor Trade Inc. v. United States*, 10 C.I.T. 472, 472 (Ct. Int'l Trade 1986) (complaint filed on May 20, 1986); *see also Internor Trade, Inc. v. United States*, 651 F. Supp. 1456 (Ct. Int'l Trade 1986).

The November 1985 representation agreement provided that lawyers from a different firm would "continue representing the government of Brazil and the producers in the above mentioned pending antidumping and countervailing duty cases," while Mr. Lighthizer's firm would "assist them to the extent possible in the defense of such cases." Skadden, Arps, Slate, Meagher & Flom, Registration Statement Pursuant to the Foreign Agents Registration Act of 1938 as Amended, Registration No. 3746, app. (Dec. 3, 1985). The representation was expected to "involve legal interpretations and advice, the drafting of legal documents and briefs, strategy sessions, as well as numerous meetings with administration, congressional and U.S. business interests." *Id*. Mr. Lighthizer was named in the agreement and signed it on behalf of the firm. *Id*. Even assuming that he was involved in both the ITA and the ITC proceedings, for the reasons set forth above, his activities—which occurred during the administrative stage, in which each federal agency was an adjudicator rather than a party—did not involve a trade dispute "with" the United States.

The registration statement filed by Mr. Lighthizer's law firm in December 1985 stated more generally that the firm intended to "provide general legal services related to settlement of *disputes between Brazil and the United States* involving the trading of ethanol" and that, in the course of the engagement, the firm could communicate on behalf of its client with both Congress and "executive agencies." Skadden, Arps, Slate, Meagher & Flom, Exh. B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938 as Amended, Registration No. 3746 (Dec. 3, 1985) (emphasis added). Again, insofar as the "disputes" referred to in the registration statement as objects of potential settlement were the same disputes that were being litigated before the ITA and the ITC, we do not believe they qualify as trade disputes "with" the United States for the purposes of section 2171(b)(4). As explained above, at least until a party initiates a civil action in the Court of International Trade, any adversity is between the petitioners and the respondents in the administra-

tive proceedings, rather than "with" the United States. Because you have indicated that the "disputes" referred to in the above-cited materials were in fact the investigations that were pending before the ITA and the ITC, we believe that Mr. Lighthizer's representation in these matters would not be disqualifying under section 2171(b)(4).[8]

III.

On the basis of the information you have provided and our review of publicly available documents, we conclude that, if 19 U.S.C. § 2171(b)(4) were legally effective, neither of the matters discussed above would bar Mr. Lighthizer's appointment as United States Trade Representative.

CURTIS E. GANNON
Acting Assistant Attorney General
Office of Legal Counsel

[8] Because we reach this conclusion, we need not determine whether Mr. Lighthizer was "directly represent[ing]" the Government of Brazil.

Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch

The constitutional authority to conduct oversight—that is, the authority to make official inquiries into and to conduct investigations of Executive Branch programs and activities—may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen).

Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee. They may request information from the Executive Branch, which may respond at its discretion, but such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings.

May 1, 2017

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT[*]

We understand that questions have been raised about the authority of individual members of Congress to conduct oversight of the Executive Branch. As briefly explained below, the constitutional authority to conduct oversight—that is, the authority to make official inquiries into and to conduct investigations of Executive Branch programs and activities—may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen). Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee. Accordingly, the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when

[*] Editor's note: On February 13, 2019, this Office issued a memorandum opinion for the files that "expand[ed] upon" this letter opinion. *See Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. 42, 42 (2019). The 2019 opinion explained that while "the Executive Branch's longstanding policy has been to engage in the established process for working to accommodate congressional requests for information only when those requests come from a committee, subcommittee, or chairman acting pursuant to oversight authority delegated from a House of Congress," "[d]epartments and agencies . . . may appropriately give due weight and sympathetic consideration to requests for information from individual members of Congress not delegated such authority." *Id.* at 55.

those requests come from a committee, subcommittee, or chairman authorized to conduct oversight.

The Constitution vests "[a]ll legislative Powers" in "a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. The Supreme Court has recognized that one of those legislative powers is the implicit authority of each house of Congress to gather information in aid of its legislative function. *See McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Each house may exercise its authority directly—for example, by passing a resolution of inquiry seeking information from the Executive Branch. *See* 4 *Deschler's Precedents of the United States House of Representatives*, ch. 15, § 2, at 30–50 (1981) (describing the practice of resolutions of inquiry and providing examples); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure*, S. Doc. No. 101-28, at 882 (1992) ("The Senate itself could investigate or hear witnesses as it has on rare occasions[.]").

In modern practice, however, each house typically conducts oversight "through delegations of authority to its committees, which act either through requests by the committee chairman, speaking on behalf of the committee, or through some other action by the committee itself." *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001) ("*Application of Privacy Act*"); *see also* Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 65 (Dec. 19, 2014). As the Supreme Court has explained, "[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose" and, in such circumstances, "committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony." *Watkins v. United States*, 354 U.S. 178, 200–01 (1957).

By contrast, individual members, including ranking minority members, "generally do not act on behalf of congressional committees." *Application of Privacy Act*, 25 Op. O.L.C. at 289; *see also id*. at 289–90 (concluding that "the Privacy Act's congressional-disclosure exception does not generally apply to disclosures to ranking minority members," because ranking minority members "are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee"). Under existing congressional rules, those mem-

bers have not been "endowed with the full power of the Congress" (*Watkins*, 354 U.S. at 201) to conduct oversight. *See Congressional Oversight Manual* at 65; *see also Exxon Corp. v. FTC*, 589 F.2d 582, 593 (D.C. Cir. 1978) ("[D]isclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities."). Individual members who have not been authorized to conduct oversight are entitled to no more than "the *voluntary* cooperation of agency officials or private persons." *Congressional Oversight Manual* at 65 (emphasis added).

The foregoing reflects the fundamental distinction between constitutionally authorized oversight and other congressional requests for information. When a committee, subcommittee, or chairman exercising delegated oversight authority asks for information from the Executive Branch, that request triggers the "implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches." *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977); *see also id*. at 130–31 (describing the "[n]egotiation between the two branches" as "a dynamic process affirmatively furthering the constitutional scheme"). Such oversight requests are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings. *See McGrain*, 273 U.S. at 174; 2 U.S.C. §§ 192, 194; *see also* Standing Rules of the Senate, Rule XXVI(1), S. Doc. No. 113-18, at 31 (2013) (empowering all standing committees to issue subpoenas); Rules of the House of Representatives, 115th Cong., Rule XI, cl. 2(m)(1) (2017) (same). Upon receipt of a properly authorized oversight request, the Executive Branch's longstanding policy has been to engage in the accommodation process by supplying the requested information "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch." Memorandum for the Heads of Executive Departments and Agencies from President Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982). But a letter or inquiry from a member or members of Congress not authorized to conduct oversight is not properly considered an "oversight" request. *See Congressional Oversight Manual* at 56 ("Individual Members, Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee, may, like any person, request agency records. When they do, however,

they are not acting pursuant to Congress's constitutional authority to conduct oversight and investigations."). It does not trigger any obligation to accommodate congressional needs and is not legally enforceable through a subpoena or contempt proceedings.

Members who are not committee or subcommittee chairmen sometimes seek information about Executive Branch programs or activities, whether for legislation, constituent service, or other legitimate purposes (such as Senators' role in providing advice and consent for presidential appointments) in the absence of delegated oversight authority. In those non-oversight contexts, the Executive Branch has historically exercised its discretion in determining whether and how to respond, following a general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act, 5 U.S.C. § 552. Whether it is appropriate to respond to requests from individual members will depend on the circumstances. In general, agencies have provided information only when doing so would not be overly burdensome and would not interfere with their ability to respond in a timely manner to duly authorized oversight requests. In many instances, such discretionary responses furnish the agency with an opportunity to correct misperceptions or inaccurate factual statements that are the basis for a request.

CURTIS E. GANNON
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Office of Legal Counsel

Temporary Certification Under the President John F. Kennedy Assassination Records Collection Act of 1992

Section 5(g)(2)(D) of the President John F. Kennedy Assassination Records Collection Act of 1992 authorizes the President to issue a temporary certification postponing disclosure of a set of records without articulating record-specific justifications for further postponement of each individual record. The purpose of this postponement would be limited to providing sufficient time to resolve which specific records warrant postponement under section 5(g)(2)(D). There is a strong likelihood that many of the records in question implicate the kinds of sensitivities about national security, law enforcement, and foreign affairs contemplated by the statute.

Serious constitutional concerns would arise if the Act were construed to require the President to make premature disclosures of records while they are likely to contain still-sensitive information.

October 26, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Under the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (codified as amended at 44 U.S.C. § 2107 note) ("JFK Act" or "the Act"), approximately 34,000 records relating to President Kennedy's assassination that have not previously been disclosed in full or in part to the public are to be released by October 26, 2017, unless the President certifies that their release would present identifiable harm that outweighs the public's interest in disclosure. *See* JFK Act § 5(g)(2)(D). In an October 12, 2017, memorandum, the Archivist of the United States expressed "significant concerns" about the manner in which certain federal agencies had applied that standard in their proposals for postponing the release of some of their records beyond that deadline. Memorandum for the President, from David S. Ferriero, Archivist of the United States, *Re: Concerns Regarding Agency Proposals to Postpone Records Pursuant to Section 5 of the President John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act)* at 1 (Oct. 12, 2017) ("Archivist Memorandum"). Although the Archivist acknowledged that legitimate sensitivities "could warrant continued postponement" of some of these records under the Act, he concluded that "there is insufficient time for [the National Archives and Records Administration ("NARA")] and the pertinent agencies to . . . identify those certain, specific instances" in which continued postponement is appropriate. *Id*. at 1, 2.

You have asked whether section 5(g)(2)(D) of the Act allows the President to issue a temporary certification postponing disclosure of a set of records without articulating record-specific justifications for further postponement of each individual record. The purpose of this postponement would be limited to providing sufficient time to resolve which specific records warrant postponement under section 5(g)(2)(D). Under the circumstances, in which the initial postponement would last for only a few months and there is a strong likelihood that many of the records in question implicate the kinds of sensitivities about national security, law enforcement, and foreign affairs contemplated by the statute, we conclude that section 5(g)(2)(D) authorizes the President to make such a certification.

I.

A.

The Act mandates that governmental entities with records relating to the assassination of President Kennedy collect, review, and transfer those records to the President John F. Kennedy Assassination Records Collection ("JFK Collection") maintained by NARA. *See* JFK Act §§ 2(a)(1), 4, 5(a). Approximately 272,000 records have already been released in full under the Act. *See* Memorandum for John A. Eisenberg, Legal Adviser to the National Security Council, from John P. Fitzpatrick, Senior Director for Records, Access and Information Security Management, National Security Council, *Re: Department and Agency Requests for Continued Postponement of Records under the JFK Assassination Records Collection Act* at 1 (Oct. 25, 2017) ("NSC Memorandum"). As relevant now, the Act provides that each yet-to-be-released assassination record "shall be publicly disclosed in full" and made "available in the [JFK] Collection" by October 26, 2017, "unless the President certifies" that "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations" necessitates continued postponement of disclosure and "outweighs the public interest in disclosure." JFK Act § 5(g)(2)(D).[1]

[1] We assume without deciding that the President's certification power under section 5(g)(2)(D) is not delegable.

The Act defines an "assassination record" as "a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of" various governmental entities. *Id*. § 3(2). In 1995, the Assassination Records Review Board ("Board")—a short-lived agency established by the Act, *see id*. § 7—issued regulations interpreting "assassination record" broadly, to encompass "[a]ll records collected by or segregated by all Federal, state, and local government agencies in conjunction with any investigation or analysis of or inquiry into the assassination of President Kennedy." 36 C.F.R. § 1290.1(b)(2). Under the Board's interpretation, "assassination record[s]" include documents created well into the 1990s pertaining to investigations, analyses, or inquiries into President Kennedy's assassination.[2]

The Act gave federal offices until late 1993 to identify and review all assassination records in their possession and to begin transferring them to NARA for immediate public release. *See* JFK Act § 5(c)(1). The Act, however, also established an exception under section 6, which allowed public disclosure to be postponed up to October 26, 2017. A postponement under section 6 required "clear and convincing evidence that" the record in question implicated (1) certain sensitive information whose disclosure would threaten national security or foreign affairs; (2) living individuals who provided confidential information and would face a substantial risk of harm if their identities were revealed; (3) unwarranted intrusions into personal privacy; (4) confidential understandings between United States agents and cooperating individuals or foreign governments that would be compromised and cause harm if publicly revealed; or (5) security or protective procedures that the government uses or might use, where disclosure of those procedures would be sufficiently harmful.[3]

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[2] Conducting an "Expert Search" of the JFK Collection Reference System for records dated between 1990 and 1998 returns nearly 5,000 records. *See* NARA, *JFK Assassination Records, Collection Reference System*, https://www.archives.gov/research/jfk/search.html (last visited Oct. 26, 2017).

[3] More specifically, section 6 authorizes postponement of public disclosure of records or portions of records only when

> there is clear and convincing evidence that—
>
> (1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination

The Board reviewed every record that a "[g]overnment office" identified as subject to postponement of disclosure under section 6 and made its own determination whether the record qualified as an "assassination record" and whether postponement was warranted. *See id*. § 7(i)(2). The Board began its work in April 1994 and ceased operating on September 30, 1998. *See Final Report of the Assassination Records Review Board* at 13, 15 (Sept. 30, 1998) ("*ARRB Report*"), https://www.archives.gov/files/research/jfk/review-board/report/arrb-final-report.pdf. In many cases, the Board appears not only to have upheld the postponement of disclosure but also to have concluded that postponement until 2017 was warranted. *See id*. at 30 ("[T]he Review Board employs the term 'postponed' to mean 'redacted until the year 2017.'"); *see generally id*. at 48–74 (identifying

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record is of such gravity that it outweighs the public interest, and such public disclosure would reveal—

(A) an intelligence agent whose identity currently requires protection;

(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person;

(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;

(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

JFK Act § 6. Although section 6 itself does not limit postponements to October 26, 2017, section 5(g)(2)(D) requires that postponed records "be publicly disclosed in full" by that date unless the President certifies a further postponement under a different standard.

various types of records as "postponed"; explicitly identifying certain types of records as postponed for shorter periods of time when appropriate). The Act also allowed agencies to appeal the Board's determinations to the President, who was to issue a written certification specifying his determination "under the standards set forth in section 6" whether to postpone or disclose a record. JFK Act § 9(d)(1).

Even when the Board found that an assassination record qualified for a postponement under section 6, the Act thereafter required periodic review "by the originating agency and the Archivist" of whether the justifications for postponement remained valid. *See id*. § 5(g)(1)–(2). Under this process, many records that previously qualified for postponement of disclosure under section 6 have already been released. Most recently, in July 2017, NARA released "3,810 documents, including 441 formerly withheld-in-full documents and 3,369 documents formerly released with portions redacted," originating from the Federal Bureau of Investigation and the Central Intelligence Agency. NARA, *JFK Assassination Records – 2017 Additional Documents Release*, https://www.archives.gov/research/jfk/2017-release (last visited Oct. 26, 2017).

While approximately 272,000 assassination records have already been released in full, approximately 34,000 documents have yet to be disclosed, in whole or in part, because they have continued to satisfy section 6. NSC Memorandum at 1, 2. In other words, federal agencies identified these records as being subject to postponed disclosure under section 6, the Board confirmed that "clear and convincing evidence" established that one of the section 6 criteria applied, and the Act required periodic rereview to confirm that postponed disclosure remained justified. "Over 90% of the remaining postponed records originated from or contain equities of the Central Intelligence Agency or the Federal Bureau of Investigation." *Id*. at 2 n.5.

In light of section 5(g)(2)(D), the authority to withhold assassination records under section 6 expires on October 26, 2017. At that point, each remaining record "shall be publicly disclosed in full . . . unless the President certifies" that continued postponement is necessary to protect against identifiable harm to national security, law enforcement, or foreign affairs, and that the harm outweighs the public interest in disclosure. JFK Act § 5(g)(2)(D).

B.

When President George H.W. Bush signed the Act in 1992, he issued a signing statement—consistent with this Office's recommendation[4]—explaining that section 6 is unduly restrictive because it "does not contemplate nondisclosure of executive branch deliberations or law enforcement information of the executive branch . . . , and it provides only a narrow basis for nondisclosure of national security information." Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), 2 *Pub. Papers of Pres. George Bush* 2004, 2004–05 (1992–93) ("1992 Signing Statement"). He further explained that the President's "authority to protect these categories of information comes from the Constitution and cannot be limited by statute," and that the President "cannot abdicate [his] constitutional responsibility to take such action when necessary." *Id*. at 2004.

C.

Between September 2014 and November 2015, NARA sent notices to all agencies that still had records or portions of records postponed under section 6, reminding them of the Act's October 26, 2017, disclosure deadline. *See* NSC Memorandum at 3. The National Security Council's Records Access and Information Security Interagency Policy Committee instructed each affected agency to provide by May 1, 2017, a memorandum either advising that it was not asking the President to certify under section 5(g)(2)(D) that continued postponement of records was necessary, or requesting continued postponement and supplying justifications that would support presidential certification. *Id*. at 3–4. The agencies have requested that the President certify that it is necessary to continue postponing the disclosure, either in whole or in part, of approximately 31,000 records. *Id*. at 4.

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[4] *See* Memorandum for W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, from David G. Leitch, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Enrolled Bill S. 3006, President John F. Kennedy Assassination Records Collection Act*, att. at 1–2 (Oct. 6, 1992) (recommending that the President "make clear that the bill cannot restrict the President's authority under the Constitution to protect confidential information").

In recent months, subject-matter experts at NARA reviewed the agencies' requests and raised concerns with National Security Council staff about whether the agencies had complied with the statutory standard. As noted above, on October 12, 2017, the Archivist of the United States wrote to the President of his "significant concerns" about the proposed postponements. Archivist Memorandum at 1. In light of "the information at issue and the related sensitivities," the Archivist "agree[d]" that the records "could warrant continued postponement in certain, specific instances." *Id*. Based on NARA's review of a sampling of postponed records, however, the Archivist expressed doubt that agencies had properly applied the standard for postponing disclosure under section 5(g)(2)(D) in every instance. The Archivist also expressed the view that inconsistencies existed between the agencies' current requests for postponing disclosure of certain information and prior instances in which the same information had been disclosed. Accordingly, the Archivist concluded that "there is insufficient time for NARA and the pertinent agencies to further consider our concerns and identify those certain, specific instances where information could warrant continued postponement." *Id*. at 2.

II.

You have asked whether the Act permits the President to make a temporary certification that would postpone disclosure of a large number of the remaining undisclosed records (or portions of records) to enable completion of the full review contemplated by the Archivist. You expect the process of resolving the Archivist's concerns and making the necessary determinations to require an additional six months beyond the October 26, 2017, statutory deadline. For the reasons that follow, we conclude that section 5(g)(2)(D) of the Act authorizes the President to certify the short-term postponement you describe.

A.

The Act requires public disclosure of all remaining assassination records by October 26, 2017, unless the requisite certification is made. In relevant part, it provides as follows:

> Each assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after

> the date of enactment of this Act [Oct. 26, 1992], unless the President certifies, as required by this Act, that—
>
> (i) continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and
>
> (ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

JFK Act § 5(g)(2)(D). We conclude that the certification you propose would satisfy the balancing test in section 5(g)(2)(D). As explained more fully below, the President could reasonably determine that a short-term postponement is necessary because a premature release of records without adequate time to resolve agencies' concerns would present an identifiable harm to the interests identified in clause (i). Furthermore, he could reasonably determine that the public interest in immediate disclosure does not outweigh the identifiable harm because disclosures would be postponed for, at most, six months.

1.

Such a certification would satisfy section 5(g)(2)(D) even though the President would be determining that a group of records collectively warrants continued postponement. Section 5(g)(2)(D), in our view, does not require the President to articulate record-specific justifications for further postponement of each individual record. Although section 5(g)(2)(D) requires that "[e]ach assassination record" withheld until 2017 "shall be publicly disclosed in full" unless the President makes the necessary certification, that provision is silent as to whether the President must make a certification regarding each individual record, or whether he may make a certification applicable to a group of withheld records that raises an identifiable harm. In the absence of specificity on this point, we believe that section 5(g)(2)(D) gives the President discretion to issue a certification postponing disclosure of an entire group of records.

Language in sections 6 and 9 of the Act reinforces the conclusion that the contrasting language in section 5(g)(2)(D) does not require the President to determine that each individual record (or portion of a record), considered in isolation, would pose an identifiable harm outweighing the public interest in disclosure. All of these provisions set forth criteria for

postponing the disclosure of records. Within section 6, which defines the threshold criteria that supported withholding records up until now, every subsection demands an assessment of whether "the public disclosure *of the assassination record*" would cause particular harms. JFK Act § 6(1), (2), (3), (4), & (5) (emphasis added). For instance, section 6(1) requires that "the threat to the military defense, intelligence operations, or conduct of foreign relations . . . posed by the public disclosure of the assassination record [be] of such gravity that it outweighs the public interest." Similarly, section 9(c), which specifies the Board's process for reviewing agencies' determinations that records satisfy section 6, commands the Board to review each assassination record individually before making "a determination that *an assassination record* shall be publicly disclosed in the Collection or postponed for disclosure." *Id*. § 9(c)(4)(A) (emphasis added); *see id*. § 9(c)(1)(A)–(B) (the Board must direct public disclosure unless "a Government record is not an assassination record" or "a Government record or particular information within an assassination record qualifies for postponement"); *id*. § 9(c)(2) (setting forth requirements for "approving postponement of public disclosure of an assassination record"). And section 9(d), which authorizes the President to issue a certification approving or disapproving the Board's decision, similarly requires the President to apply the section 6 criteria separately to each record to determine whether postponement is warranted. *See id*. § 9(d)(1) ("After the Review Board has made a formal determination concerning the public disclosure or postponement of disclosure of an executive branch assassination record or information within such a record . . . the President shall have the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6[.]").

Section 5(g)(2)(D)(i), however, uses very similar language to section 6(1) in describing "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," without expressly tying that harm to an individual assassination record. These textual differences indicate that section 5(g)(2)(D) authorizes the President to certify that it is necessary to withhold an entire group of records the disclosure of which would present an identifiable harm outweighing the public interest in disclosure. *See Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) ("We have long held that where Congress includes particular language in one section of a statute but omits it in another section

of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and brackets omitted)).

This reading also reflects sensible policy aims. By the time the President determines whether to continue to postpone records under section 5(g)(2)(D), each record has gone through an extensive and individualized multi-year review process to verify that public disclosure would have been harmful in the 1990s and would still be harmful through October 26, 2017. That history explains why Congress would have afforded the President additional flexibility when determining the necessity of postponing disclosure beyond 2017. The different timetables for review under section 6 and section 5(g)(2)(D) bolster this conclusion. By design, the section 6 process took years and multiple stages of review—including the possibility of presidential review—to resolve which individual records should be withheld. Congress could have concluded that the President's review under section 9(d)(1) of the Board's determinations about individual records would not interfere with the President's core duties, since any appeals would likely be staggered in time and most Board determinations would not demand presidential action. Section 5(g)(2)(D), on the other hand, requires the President to make determinations about all remaining postponed records in a very short timeframe, because he must determine whether postponement remains necessary in light of current concerns about national security, law enforcement, and foreign affairs. If the President were barred from determining that a group of records collectively warranted continued postponement, he would be forced to evaluate the individual justifications for postponing tens of thousands of records on a compressed timetable without adequate time for full consideration. Policy concerns thus support interpreting section 5(g)(2)(D) to allow the President to issue a certification encompassing multiple records.

We further conclude that the proposed certification would satisfy the requirement of section 5(g)(2)(D)(i) that there be "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations." An "identifiable harm" to national security, law enforcement, or foreign affairs includes the potential harm to those interests resulting from prematurely disclosing a batch of records that appears to contain sensitive information. The ordinary meaning of "identifiable" is "[a]ble to be identified; capable of identification." 7 *Oxford English*

Dictionary 618 (2d ed. 1989); *see also, e.g.*, *Random House Dictionary of the English Language (Unabridged)* 950 (2d ed. 1987) (defining "identify" as "[t]o recognize or establish as being a particular person or thing"). And the ordinary meaning of "harm" in this context is "injury" or "damage." 6 *Oxford English Dictionary* at 1121. Thus, an "identifiable harm" under section 5(g)(2)(D)(i) involves the type of damage to national security, law enforcement, or foreign affairs that could be articulated or ascertained.

Textual differences between sections 6, 9(d)(1), and 5(g)(2)(D) support the conclusion that section 5(g)(2)(D) authorizes continued postponement based on broad but recognizable harms. Specific language in section 6 expressly compels the government both to identify why disclosure would present particularized harms to national security, law enforcement, or foreign affairs and also to substantiate that such harms would materialize. For instance, section 6(1) does not just require that "the threat to the military defense, intelligence operations, or conduct of foreign relations . . . posed by . . . public disclosure . . . [be] of such gravity that it outweighs the public interest." JFK Act § 6(1). It also demands evidence that public disclosure (A) would specifically threaten the identity of an intelligence agent who "requires protection," (B) would "interfere with the conduct of intelligence activities" by compromising intelligence sources or methods that the United States presently used or was likely to use, or (C) "would demonstrably impair the national security of the United States." *Id.* Similarly, under section 9(d)(1), if the President wishes to reverse a Board determination to disclose or postpone a record, he must not only apply "the standards set forth in section 6," but must also issue "an unclassified written certification . . . stating the justification for the President's decision, including the applicable grounds for postponement under section 6."

Under section 5(g)(2)(D), by contrast, the President need only certify that "continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," and that "the identifiable harm is of such gravity that it outweighs the public interest in disclosure." Section 5(g)(2)(D) contains no additional specifications of the types of harms that would warrant postponing disclosure. Nor does it compel the President to describe which specific grounds necessitate postponement. Those differ-

ences from the earlier process are strong evidence that Congress intended section 5(g)(2)(D) to be a less exacting standard that would not require the President to pinpoint specific instances of harm that could arise from disclosure. For the reasons noted above, there are also convincing policy reasons why Congress would have chosen to make section 5(g)(2)(D) less stringent than sections 6 and 9 in these regards.

Nor, in our view, does section 5(g)(2)(D) require evidentiary proof substantiating the likelihood that disclosing a record would cause "identifiable harm." Section 5(g)(2)(D) merely provides that the President must certify that it is "necessary" to postpone disclosure in light of an "identifiable harm," not that the President must establish that such harm would occur. By contrast, section 6 requires evidence that disclosing an intelligence source or method "would interfere with the conduct of intelligence activities," *id*. § 6(1)(B), or that disclosing other sensitive information "would demonstrably impair the national security of the United States," *id*. § 6(1)(C). Those showings, like others under section 6, must be supported by "clear and convincing evidence." *Id*. § 6. In other statutes, too, Congress has specified the necessary level of certainty that harm to national security will occur. *See, e.g.*, 50 U.S.C. § 1885a(c) (requiring the Attorney General to certify that disclosure of certain materials in litigation "would harm the national security of the United States"); *id*. § 1845 (requiring the Attorney General to certify that disclosure of evidence derived from the use of a pen register or trap-and-trace device "would harm the national security of the United States"); *id*. § 2656 (requiring the Secretary of Energy to notify Congress of intelligence losses deemed "likely to cause significant harm or damage to the national security interests of the United States"). The fact that Congress did not specify in section 5(g)(2)(D) the degree of likelihood that disclosure would harm national security, law enforcement, or foreign affairs suggests that Congress authorized the President to determine what level of risk necessitates postponing disclosure.[5]

[5] We recognize that section 5(g)(2)(D) refers to an "identifiable *harm* to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," whereas section 6(1) instead refers to a "*threat* to the military defense, intelligence operations, or conduct of foreign relations" (emphases added). While a "harm" is an "injury" and a "threat" generally refers to the prospect of an impending injury, "harm" in the present context is necessarily a prediction of what injury may occur after disclosure.

Thus, for purposes of the first half of section 5(g)(2)(D)'s balancing test, the President may reasonably conclude that the premature disclosure of the records at issue would present "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations." JFK Act § 5(g)(2)(D)(i). Courts have long recognized that forcing the Executive Branch to disclose sensitive information can harm national security, law enforcement, or foreign affairs.[6]

Moreover, the risk that the yet-to-be-released assassination records include sensitive information is not speculative. These records have previously and reliably been found to contain sensitive information about national security, law enforcement, or foreign affairs, making it highly likely that their release would present the harm identified in section 5(g)(2)(D)(i). Disclosure of each of these records has already been postponed on the ground that the withheld information satisfied one of section 6's standards, which overlap considerably with the interests protected by

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We do not believe that Congress's use of the term "harm" in section 5(g)(2)(D) implies that this predicted injury must be more certain to occur than the "threats" described in section 6. Rather, as noted above, Congress in section 6 and other statutes appears to have deliberately required the Executive Branch to specify a particular degree of likelihood or certainty about a future harm, yet declined to add any such language to section 5(g)(2)(D).

[6] *See CIA v. Sims*, 471 U.S. 159, 175–77 (1985) ("[F]orced disclosure of the identities of [the CIA's] intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission" and "[d]isclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources."); *Snepp v. United States*, 444 U.S. 507, 511–12 (1980) (per curiam) (disclosure of even unclassified information "can be detrimental to vital national interests" by "reveal[ing] information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful"); *Haig v. Agee*, 453 U.S. 280, 307–08 (1981) ("foreign policy and national security considerations cannot neatly be compartmentalized," and "[s]ecrecy in respect of information gathered by [diplomatic officials] may be highly necessary, and the premature disclosure of it productive of harmful results") (internal quotation marks omitted); *Halkin v. Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) ("[I]t is obvious that the exposure of one who acted—and indeed may still be acting—as a CIA operative here and abroad would pose a threat to our diplomatic and military interests."); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (recognizing "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" and noting that the "purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement"); *United States v. Ortega*, 854 F.3d 818, 824 (5th Cir. 2017) (citing *Roviaro*); *Smith v. Lanier*, 726 F.3d 166, 167 (D.C. Cir. 2013) (same).

section 5(g)(2)(D)(i). For example, for a record to have been protected from disclosure until 2017 under section 6(2), there had to be "clear and convincing evidence" that disclosure would risk substantial harm to a living confidential informant by revealing his or her identity and that this harm outweighed the public interest in disclosure. If that informant is alive today, disclosure would still likely pose "an identifiable harm to . . . law enforcement." JFK Act § 5(g)(2)(D)(i).[7] The examples of records that the Board deemed eligible for postponement under section 6 underscore this point. For instance, the Board authorized postponing disclosure of records containing "CIA surveillance methods where CIA provided convincing evidence that the method still merited protection." *ARRB Report* at 53. It is reasonable to conclude that disclosing such a method now could still present "an identifiable harm to . . . intelligence operations." JFK Act § 5(g)(2)(D)(i). More generally, NARA's independent review of a sampling of the records at issue concluded that many still contain highly sensitive information. *See* Archivist Memorandum at 1 ("We are familiar with the information at issue and the related sensitivities and agree that they could warrant continued postponement in certain, specific instanc-

[7] To be sure, the section 6 categories are not wholly subsumed within the section 5(g)(2)(D) standard. Section 6(3)—covering records whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy"—does not have an obvious analogue in section 5(g)(2)(D). But that is a relatively minor concern, as very few of the remaining postponements were made under section 6(3). *See ARRB Report* at 63 (noting that the Board "almost never agreed to sustain [an] agency's requests for postponements on personal privacy grounds"); *id*. at 64 (noting that certain prisoner-of-war information was postponed under section 6(3), but only until 2008). Of the privacy postponements that remain in effect, some may still fall within one of the categories identified in section 5(g)(2)(D)(i). For example, the Board "agreed to sustain the postponement of the identity of a 13-year-old girl who was a rape victim . . . in the file of an organized crime figure." *Id*. at 63. The President could still find that the continued postponement of this sort of information is necessary to prevent identifiable harm to law enforcement sufficient to meet section 5(g)(2)(D)(i). Such a finding would be consistent with part of the "oft-cited *Frankenhauser* test" for the law enforcement component of executive privilege, which asks courts to consider, among other factors, "the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information." *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006) (quoting *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. Mar. 13, 1973) (unpublished)); *see also, e.g.*, *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995) (protecting the withholding of names of "law enforcement officers, interviewees, and witnesses" because of the possibility of "harassment and retaliation").

es."). And in the absence of further interagency coordination and review, it is not yet possible to determine which specific records would warrant continued postponement of disclosure.

2.

We also believe that it would be reasonable for the President to conclude that the identifiable harm from premature disclosure of such records would, as section 5(g)(2)(D)(ii) requires, be "of such gravity that it outweighs the public interest in disclosure."

Importantly, the proposed postponement would last only a few more months. As a result, the relevant public interest consists only in the difference between having disclosures occur now and having disclosures occur within the next six months. That interest weighs comparatively little in the statutory balance, especially in the wake of fully authorized postponements of decades.[8] The public interest in full access to assassination records is significant. But a temporary delay in disclosure would still allow that interest to be vindicated fairly soon; in contrast, disclosure of sensitive information would compromise other important interests irrevocably. In our view, the concrete risk of harm that premature disclosure of sensitive records would pose to national security, law enforcement, and foreign affairs clearly outweighs the public interest in accessing these records up to six months earlier.

It could of course be said that the government has already had 25 years to review the records at issue, and that the public interest in disclosure after the Act's statutory deadline should outweigh the Executive's need for still more time to assess these records. But that argument misapprehends the review process, as well as the Act's different standards for delaying the disclosure of records before and after October 26, 2017. As noted, the records at issue have already been repeatedly reviewed. Thus far, the Act has required the government to satisfy section 6's criteria for delaying disclosure of each record. As part of that process, the Board

[8] Accounting for the length of the proposed postponement is consistent with the Board's analysis under section 6 of whether particular types of risks from disclosure outweighed the public interest. *See, e.g.*, *ARRB Report* at 64 (postponing until 2008 the release of private details from prisoner-of-war records from the Korean conflict, based on the expected lifespan of affected individuals).

confirmed that records could remain exempt from disclosure until October 26, 2017. After that date, however, the government must instead rely on a certification under section 5(g)(2)(D) that continued postponement is necessary. But during the certification review process, NARA's questions about other agencies' applications of section 5(g)(2)(D) have prevented the Executive Branch from definitively resolving which remaining records can continue to be withheld. Nor would it have been feasible to begin reviewing records under the section 5(g)(2)(D) standard much earlier. The further in advance of 2017 that agencies tried to apply section 5(g)(2)(D), the greater the risk of inaccurately assessing whether disclosure in 2017 would risk an identifiable harm to national security, law enforcement, or foreign affairs.

B.

Principles of constitutional avoidance strongly support our conclusion that section 5(g)(2)(D) authorizes the President to postpone temporarily the full disclosure of the records at issue. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Serious constitutional concerns would arise if the Act were construed to require the President to make premature disclosures of records while they are likely to contain still-sensitive information.

The President's position as "head of the Executive Branch and as Commander in Chief" confers upon him the "authority to classify and control access to information bearing on national security"—an authority that "exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Courts accordingly "show[] deference to what the Executive Branch has determined . . . is essential to national security." *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017) (internal quotation marks omitted); *see also Egan*, 484 U.S. at 529 (finding that "the protection of classified information must be committed to the broad discretion of the agency responsible," and declining to "determine what constitutes an acceptable margin of error in assessing the potential risk" of improper access or disclosure). The Supreme Court has similarly em-

phasized "the generally accepted view that foreign policy [is] the province and responsibility of the Executive," and that "courts have traditionally shown the utmost deference to Presidential responsibilities" in that area. *Id*. at 530 (internal quotation marks and citations omitted).

Opinions by Attorneys General and this Office have repeatedly recognized the President's authority and responsibility to protect against the release of information affecting the Executive Branch's intelligence activities, military operations, conduct of foreign affairs, or law enforcement proceedings, even in the face of statutory disclosure requirements. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998) (discussing "the right of the President to decide to withhold national security information from Congress under extraordinary circumstances"); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 265–76 (1996) (discussing the "President's constitutional authority to control the disclosure of documents and information relating to diplomatic communications"); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 35 (1982) (Smith, Att'y Gen.) ("[I]f the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination."); *see also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984) ("Nearly every President since George Washington has found that in order to perform his constitutional duties it is necessary to protect the confidentiality of certain materials, including . . . national security information[] and sensitive law enforcement proceedings, from disclosure to Congress."). Those opinions are consistent with President Bush's determination that the Act's disclosure requirement could not be allowed to interfere with the President's constitutional authority to "protect confidential executive branch materials and to supervise and guide executive branch officials." 1992 Signing Statement at 2005.

One necessary incident of the President's authority to control sensitive Executive Branch information is the ability to determine in the first instance which records contain such information. Thus, construing section

5(g)(2)(D) to deprive the President of the ability to withhold records in order to give the Executive Branch adequate time to determine which records contain still-sensitive information about national security, law enforcement, or foreign affairs would impermissibly encroach upon a core presidential prerogative. In an analogous circumstance, when it had not been possible to review a large set of documents in the time allowed by a congressional subpoena, Attorney General Janet Reno concluded that a protective assertion of executive privilege was appropriate, pending final decisions about "which specific documents are deserving of a conclusive claim of executive privilege." *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1, 1 (1996). There, the protective assertion was necessary because the volume of documents could not be "specifically and individually reviewed" within the time available. *Id*. Here, too, the Archivist has concluded that it is not possible within the time available to resolve remaining questions regarding whether individual records still contain sensitive information.

As we have explained, "[w]here the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be 'subject to an implied exception in deference to such presidential powers.'" *Title III Electronic Surveillance Material and the Intelligence Community*, 24 Op. O.L.C. 261, 274 (2000) (quoting *Rainbow Navigation, Inc. v. Dep't of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.)); *see also, e.g.*, *Presidential Certification Under the Mexican Debt Disclosure Act*, 20 Op. O.L.C. at 264 (finding that constitutional avoidance required a particular construction of a statute "because any other reading would fail to preserve the President's constitutional authority and responsibility to preserve the absolute confidentiality of documents the disclosure of which would be contrary to the public interest"); *Prosecution for Contempt of Congress*, 8 Op. O.L.C. at 139–41 (concluding, in light of the Executive's sole authority over law enforcement, that "the constitutionally mandated separation of powers requires the [criminal-contempt-of-Congress] statute to be interpreted so as not to apply to Presidential assertions of executive privilege"). Accordingly, principles of constitutional avoidance require interpreting the Act to authorize the President to postpone the disclosure of the records at issue on a temporary basis.

III.

For the reasons set forth above, we conclude that section 5(g)(2)(D) of the Act authorizes the President to issue a temporary certification postponing the full disclosure of certain undisclosed records in the JFK Collection to allow for further review before they are fully released to the public.

CURTIS E. GANNON
Acting Assistant Attorney General
Office of Legal Counsel

Designating an Acting Director of the Bureau of Consumer Financial Protection

The statute providing that the Deputy Director of the Bureau of Consumer Financial Protection shall "serve as acting Director in the absence or unavailability of the Director" authorizes the Deputy Director to serve as the Acting Director when the position of Director is vacant.

Both the Federal Vacancies Reform Act of 1998 and the statute specific to the office of Director are available to fill a vacancy in the office of Director on an acting basis; the office-specific statute does not displace the President's authority to designate an acting officer under 5 U.S.C. § 3345(a)(2) or (3).

November 25, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the President may designate an Acting Director of the Bureau of Consumer Financial Protection ("CFPB") upon the resignation of the Director. This opinion confirms the oral advice that we gave you before the Director's resignation took effect at the end of November 24, 2017. *See* Letter for the President, from Richard Cordray, Director, CFPB (Nov. 24, 2017) (communicating resignation).

The CFPB Director is an office filled by presidential appointment, by and with the advice and consent of the Senate. 12 U.S.C. § 5491(b)(2). The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d, provides the President with authority "for temporarily authorizing an acting official to perform the functions and duties" of an officer of an "Executive agency" whose appointment "is required to be made by the President, by and with the advice and consent of the Senate," and it is the "exclusive means" for authorizing acting service "unless" another statute expressly designates an officer to serve in an acting capacity or provides an alternative means for a designation as an acting officer. 5 U.S.C. § 3347(a).

The CFPB has such a statute. Specifically, 12 U.S.C. § 5491(b)(5) provides that the CFPB's Deputy Director shall "serve as acting Director in the absence or unavailability of the Director." While the statute is unusual in failing expressly to reference temporary service in the case of a vacancy in the office, we believe that the resignation of the Director would satisfy the requirement of "absence or unavailability." Therefore, the

statute would permit a properly appointed Deputy Director to serve as the Acting Director during a vacancy.[1]

The fact that the Deputy Director may serve as Acting Director by operation of the statute, however, does not displace the President's authority under the Vacancies Reform Act. As we have advised in our prior opinions, even when the Vacancies Reform Act is not the "exclusive" means for filling a vacancy, the statute remains an available option, and the President may rely upon it in designating an acting official in a manner that differs from the order of succession otherwise provided by an office-specific statute. This interpretation of the Vacancies Reform Act is in accord with the only federal court of appeals to address the issue. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016). The President therefore may designate an Acting Director of the CFPB under the Vacancies Reform Act. *See* 5 U.S.C. § 3345(a)(2), (3).

I.

Because the Vacancies Reform Act specifies that it constitutes the "exclusive means" for temporarily authorizing an acting official absent another statutory provision, 5 U.S.C. § 3347(a), we first consider whether 12 U.S.C. § 5491(b)(5) authorizes the Deputy Director to serve as the CFPB's Acting Director when the Director has resigned his office.

Section 5491(b)(5) refers to the "absence or unavailability of the Director," but does not expressly state that it applies when the office is vacant. This phrasing is unusual. The Report of the Senate Committee on Gov-

[1] We understand that the CFPB had not had a Deputy Director since August 2015, and so, for over two years, the CFPB functioned with an Acting Deputy Director. On November 24, 2017, the CFPB Director's last day in office, he stated that he had appointed a Deputy Director in order to take advantage of the succession provision of 12 U.S.C. § 5491(b)(5) upon his resignation. Because we have no other details about this appointment, we express no view about its validity. Even if the Deputy Director were properly appointed, she did not become Acting Director; the President designated the Director of the Office of Management and Budget ("OMB") to perform the functions and duties of the Director of the CFPB, effective upon the CFPB Director's resignation. As someone who already "serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate," the Director of OMB is among the persons the President could select under 5 U.S.C. § 3345(a)(2) to "perform the functions and duties of the vacant office temporarily in an acting capacity."

ernmental Affairs on the Vacancies Reform Act identified forty office-specific statutes that the committee believed would continue to provide alternative mechanisms for acting service. S. Rep. No. 105-250, at 16–17 (1998). Each of these statutes refers to either a vacancy or a resignation. We have, for instance, construed the succession provisions of the Department of Justice and the Office of the Management and Budget. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) ("*Acting Attorney General*"); *Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 121 n.1 (2003) ("*Acting Director of OMB*"). The Department of Justice's statute speaks of service as Acting Attorney General by "reason of absence, disability, or *vacancy*" in the offices of the Attorney General and the Deputy Attorney General. 28 U.S.C. § 508(b) (emphasis added). Similarly, the Office of Management and Budget's succession statute speaks of the Director's being "absent or unable to serve or when the office of the Director is *vacant*." 31 U.S.C. § 502(b)(2) (emphasis added). Accordingly, it could be argued that section 5491(b)(5) applies only in cases of the Director's transient "absence or unavailability," and does not apply in the case of a vacancy or a resignation.

This Office distinguished between an "absence" and a "vacancy" when considering whether the Vice Chairman of the Federal Reserve Board would automatically assume the duties of the Chairman upon the expiration of his term. *Status of the Vice Chairman of the Federal Reserve Board*, 2 Op. O.L.C. 394, 395 (1978). There, the statute provided that the Vice Chairman would preside at meetings of the Federal Reserve Board in the Chairman's "absence," but was otherwise silent on succession following the end of the Chairman's term. We advised that "[t]he term 'absence' normally connotes a failure to be present that is temporary in contradistinction to the term 'vacancy' caused, for example, by death of the incumbent or his resignation." *Id*. Accordingly, the Vice Chairman's authority to preside in the "absence" of the Chairman did not mean that he would automatically assume the duties of the chairmanship upon a vacancy. Rather, we determined that the President would need to designate an acting Chairman. *Id*. at 396. If section 5491(b)(5) were limited to service when the Director is "absent," we might similarly conclude that the CFPB statutory provision would not apply in the case of a "vacancy" in the office of the Director.

Section 5491(b)(5), however, speaks not only of the Director's "absence," but also of his "unavailability." While the question is not free from doubt, we believe that the provision's reference to "unavailability" is best read to refer both to a temporary unavailability (such as the Director's recusal from a particular matter) and to the Director's being unavailable because of a resignation or other vacancy in office. *See Acting Attorney General*, 31 Op. O.L.C. at 209 n.1 (referring to officials who "have died, resigned, or *otherwise* become unavailable") (emphasis added); *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 214 (2002) (describing provisions of the Vacancies Reform Act as contemplating "that a 'vacancy' occurs when the occupant dies or resigns or is *otherwise* unavailable") (emphasis added). *Cf. TCF Film Corp. v. Gourley*, 240 F.2d 711, 714 (3d Cir. 1957) (observing, for purposes of law-of-the-case doctrine, that a judge who "dies or resigns from the court . . . obviously is no longer available") (footnote omitted). This broader reading of "unavailability" is consistent with how this Office has interpreted the Vacancies Reform Act's reference to when an officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). In our view, an officer is "unable to perform the functions and duties of the office" during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer's removal (which would arguably not be covered by the reference to "resign[ation]"). *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999) ("In floor debate, Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick.") (citing statements by Senators Thompson and Byrd). We think that "unavailability" should be similarly construed, and thus that 12 U.S.C. § 5491(b)(5) would authorize a properly appointed Deputy Director of the CFPB to serve as its Acting Director during a true vacancy in the Director position.

II.

We next consider whether 12 U.S.C. § 5491(b)(5), by authorizing the CFPB's Deputy Director to serve as its Acting Director, eliminates the President's authority under the Vacancies Reform Act to fill a vacancy in the Director position on an acting basis. We have addressed this question

before in connection with similar statutes, and our answer is straightforward. The Vacancies Reform Act is not the "exclusive means" for the temporary designation of an Acting Director, but it remains available to the President as one means for filling a vacancy in the Director position.

The Vacancies Reform Act expressly addresses how it interacts with statutes that deal with who shall act when specific offices are vacant. It provides that its mechanisms for designating an acting officer (5 U.S.C. § 3345) and the accompanying time limitations (*id.* § 3346) are

> the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—
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> (1) a statutory provision expressly—
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> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
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> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
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> (2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

Id. § 3347(a); *see also* 12 U.S.C. § 5491(a) (specifying that the CFPB "shall be considered an Executive agency").

By its terms, section 3347(a) provides that the Vacancies Reform Act shall be the "exclusive means" of filling vacancies on an acting basis unless another statute "expressly" provides a mechanism for acting service. It does not follow, however, that when another statute applies, the Vacancies Reform Act ceases to be available. To the contrary, in calling the Vacancies Reform Act the "exclusive means" for designations "unless" there is another applicable statute, Congress has recognized that there will be cases where the Vacancies Reform Act is non-exclusive, i.e., one available option, together with the office-specific statute. If Congress had intended to make the Vacancies Reform Act *unavailable* whenever

another statute provided an alternative mechanism for acting service, then it would have said so. It would not have provided that the Vacancies Reform Act ceases to be the "*exclusive* means" when another statute applies.

This Office has consistently adhered to this reading of section 3347. In 2007, we concluded that the President has the authority to designate an Acting Attorney General under the Vacancies Reform Act, even though a separate statute specific to the position of Attorney General, 28 U.S.C. § 508, also provides a mechanism by which other designated officials in the Department of Justice may "act as Attorney General" during the "vacancy," "absence," or "disability" of the Attorney General. *Acting Attorney General*, 31 Op. O.L.C. at 209–11. We observed that "[t]he Vacancies Reform Act nowhere says that, if another statute [for naming an acting officer] remains in effect, the Vacancies Reform Act may not be used." *Id*. at 209. We reached the same conclusion in 2003, when we examined the availability of the Vacancies Reform Act in light of a separate statute that identified several officers who could be designated as Acting Director of the Office of Management and Budget in the event of a vacancy in that office. Notwithstanding that office-specific alternative mechanism, we concluded that "the Vacancies Reform Act may still be used." *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1.

A federal court of appeals adopted the same reading of section 3347. In *Hooks*, an employer challenged the service of an individual designated under the Vacancies Reform Act as Acting General Counsel of the National Labor Relations Board. 816 F.3d at 554. The employer argued, among other things, that the Vacancies Reform Act was not available because a provision of the National Labor Relations Act specifically provided for the temporary designation of an Acting General Counsel. *Id*. at 555–56. The Ninth Circuit rejected that contention, concluding that, under section 3347, "neither the [Vacancies Reform Act] nor the [National Labor Relations Act] is the *exclusive* means of appointing an Acting General Counsel" and that "the President is permitted to elect between these two statutory alternatives to designate an Acting General Counsel." *Id*. at 556.

Our past opinions have recognized that the legislative history confirms this reading of the Vacancies Reform Act. *Acting Attorney General*, 31 Op. O.L.C. at 209; *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1.

Discussing an earlier draft of the bill, the Senate committee noted that, "with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105-250, at 17. The enacted version of the statute differs from the version discussed in the Senate Report, but it does so in ways that reinforce the conclusion that both the Vacancies Reform Act and an office-specific statute are available to fill a vacancy on an acting basis. The earlier version of section 3347 discussed in the Senate Report would have provided that "[s]ections 3345 and 3346 are applicable" to offices to be filled by appointment of the President, by and with the advice and consent of the Senate, "unless—(1) another statutory provision expressly provides that . . . such provision supersedes sections 3345 and 3346; [or] (2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly" designates or authorizes the designation of an acting officer. *Id*. at 26. That phrasing could well have been susceptible to a reading that the Vacancies Reform Act would cease to apply when another statute provided a mechanism for filling a vacancy, notwithstanding the committee's explanation to the contrary. But the enacted version of section 3347(a) has removed all doubt, both by striking the language contemplating that another provision might expressly supersede the Vacancies Reform Act and by adopting the formulation that the latter is to be "exclusive" when no other statute is available.[2]

The CFPB-specific statute does state that the Deputy Director "shall" serve as Acting Director where the Director is unavailable. 12 U.S.C. § 5491(b)(5). However, the Vacancies Reform Act itself, like the CFPB-specific statute, similarly uses mandatory terms, providing that the first assistant to a vacant office "shall perform the functions and duties" of that office unless the President invokes his authority under the statute to direct another official to do so. 5 U.S.C. § 3345(a)(1). Accordingly, we cannot view either statute as more mandatory than the other. Rather, they should be construed in parallel. Furthermore, the Senate Report lists forty office-

[2] The enacted version also removed the requirement that a statutory provision be in effect on the date of the Vacancies Reform Act's enactment in order to be available for filling a vacancy. As a result, the fact that section 5491(b)(5) was enacted after 1998 does not affect our analysis.

specific statutes to which the Vacancies Reform Act is an alternative, *see* S. Rep. No. 105-250, at 16–17, and a number of those statutes similarly employ mandatory language that, like the CFPB-specific statute, provides that the first assistant to the vacant office "shall" serve in an acting capacity.[3] Nevertheless, Congress plainly intended in those cases that the President could invoke the Vacancies Reform Act as "an alternative procedure" and depart from the statutory order of succession. S. Rep. No. 105-250, at 17.

The canon of statutory interpretation that "[a] specific provision controls one of more general application," *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991), does not prevent the Vacancies Reform Act from being available here. While the CFPB-specific statute arguably is more specific than the Vacancies Reform Act in the sense that it applies only to the position of Director, the same is true with all of the office-specific statutes retained by section 3347(a). Yet in the text and the legislative history, Congress expressly recognized that both the Vacancies Reform Act and office-specific statutes would be available as separate means of temporarily authorizing individuals to serve in an acting capacity. In view of executive practice before the CFPB statute was enacted, as reflected in *Acting Attorney General* and *Acting Director of OMB*, and in the absence of some clearer statement in the CFPB's statute altering the applicability of the Vacancies Reform Act, there is no reason to conclude that Congress expected 12 U.S.C. § 5491(b)(5) to operate any differently than any of the other office-specific statutes.

The CFPB-specific statute providing that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director,"

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[3] *See, e.g.*, 15 U.S.C. § 633(b)(1) ("The Deputy Administrator shall be Acting Administrator of the [Small Business] Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator."); 20 U.S.C. § 3412(a)(1) ("During the absence or disability of the Secretary [of Education], or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary."); 29 U.S.C. § 552 ("The Deputy Secretary [of Labor] shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed[.]"); 31 U.S.C. § 301(c) ("The Deputy Secretary [of the Treasury] shall carry out . . . (2) the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant."); 44 U.S.C. § 2103(c) ("In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed[.]").

12 U.S.C. § 5491(b)(5), satisfies section 3347(a)'s reference to "a statutory provision" that "expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(B). It therefore should interact with the Vacancies Reform Act in the same way as other, similar statutes providing an office-specific mechanism for an individual to act in a vacant position. *See Acting Attorney General*, 31 Op. O.L.C. at 209–11; *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. Both the Vacancies Reform Act and section 5491(b)(5) are available for filling on an acting basis a vacancy that results from the resignation of the CFPB's Director. And, as with other office-specific statutes, when the President designates an individual under the Vacancies Reform Act outside the ordinary order of succession, the President's designation necessarily controls. Otherwise, the Vacancies Reform Act would not remain available as an actual alternative in instances where the office-specific statute identifies an order of succession, contrary to Congress's stated intent.

III.

Nothing about the CFPB's statutory structure changes our analysis. Congress has characterized the CFPB as "independent," 12 U.S.C. § 5491(a), and has purported to make the Director removable only "for inefficiency, neglect of duty, or malfeasance in office," *id.* § 5491(c)(3).[4] But those indications of independence do not prevent the President from using the Vacancies Reform Act, because Congress has specified that the

[4] In pending litigation, the Department of Justice is contending that Congress may not impose a for-cause restriction on the President's power to remove the CFPB's Director, because he is a single-member head of an agency. *See* Brief for the United States as Amicus Curiae, *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177 (D.C. Cir. Mar. 17, 2017). That conclusion is consistent with the panel's decision in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *judgment vacated upon grant of reh'g en banc* (Feb. 16, 2017), as well as with earlier advice from this Office, as reflected in, for instance, a 1994 signing statement of President Clinton. *See* Statement on Signing the Social Security Independence and Program Improvement Act of 1994 (Aug. 15, 1994), 2 *Pub. Papers of Pres. William J. Clinton* 1471, 1472 (1994).

Editor's note: In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court held that the for-cause restriction on the President's ability to remove the CFPB Director—who, "acting alone, wield[s] significant executive power"—violates the separation of powers. *Id.* at 2211.

CFPB "shall be considered an Executive agency," *id*. § 5491(a), which brings it within section 3347(a), and because the CFPB's Director does not fall within the category of officers whom Congress has excluded from coverage under the Vacancies Reform Act.

In 5 U.S.C. § 3349c, Congress specified that the Vacancies Reform Act "shall not apply" to the following officers:

> (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—
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> (A) is composed of multiple members; and
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> (B) governs an independent establishment or Government corporation;
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> (2) any commissioner of the Federal Energy Regulatory Commission;
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> (3) any member of the Surface Transportation Board; or
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> (4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

As that provision illustrates, Congress has indeed determined that some positions with hallmarks of independence should not be filled on an acting basis through the Vacancies Reform Act. But section 3349c does not exclude the Director of the CFPB, because the CFPB is not governed by any "entity that . . . is composed of *multiple* members," *id*. § 3349c(1) (emphasis added), and the Director does not appear among the other specifically enumerated positions.[5]

[5] The fact that the Director's position did not exist when the Vacancies Reform Act was enacted does not change the analysis. *See supra* note 2. To the contrary, it reinforces the proposition that Congress could have excluded the Director of the CFPB from coverage upon creating the office, but did not do so. In fact, the Senate Report on the Vacancies Reform Act expressly noted that both the Vacancies Reform Act and an office-specific statute would be available to fill a vacancy in the office of the Commissioner of the Social Security Administration, another single-member agency head with certain statutory tenure protections. *See* S. Rep. No. 105-250, at 16–17; *see also* 42 U.S.C. § 902(a)(3), (b)(4). Thus, the exclusion for an "independent establishment" headed by a multiple-member entity, but not by a single member, cannot be ignored.

Even apart from the Director's absence from section 3349c's list of carve-outs, the removal protections for the Director would not insulate an *Acting* Director from displacement by the President under the Vacancies Reform Act. In *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), the court considered whether members of the Board of the National Credit Union Administration, whom the court assumed to have tenure protection during their statutory terms of office, continued to have tenure protection while serving in a holdover capacity following the expiration of their terms. *Id*. at 983. It concluded that, "even if the [relevant] statute were interpreted to grant removal protection to Board members during their appointed terms . . . , this protection does not extend to holdover members." *Id*. at 988. To the extent that a designation under the Vacancies Reform Act might be regarded as comparable to a "removal" of an Acting Director of the CFPB, a similar analysis would apply. Congress does not, by purporting to give tenure protection to a Senate-confirmed officer, afford similar protection to an individual who temporarily performs the functions and duties of that office when it is vacant.

Nor is our conclusion affected by the drafting history of section 5491. The version of that provision that passed the House of Representatives would have provided that, "[i]n the event of vacancy or during the absence of the Director . . . an Acting Director shall be appointed in the manner provided in [the Vacancies Reform Act]." Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 4102(b)(6)(B)(i) (as passed by House of Representatives, Dec. 11, 2009). That version of the bill would not have established a position of Deputy Director. *See id*. § 4106(a) (providing for the Director's appointment of other officials). Although the enacted version of the provision dealing with a vacancy in the Director position does not expressly refer to the Vacancies Reform Act, there is no reason to infer that Congress deemed the Vacancies Reform Act inapplicable. Such an inference from the failure to enact the House-passed version "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that" the enacted version of the provision "already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted). In fact, that is the most plausible inference, given that the statutory backdrop at the time included the Vacancies Reform Act. Because the enacted

provision makes the Deputy Director available to act as Director, the Vacancies Reform Act is not the "exclusive means" for designating an Acting Director, as indicated by the text of section 3347(a) and this Office's 2003 and 2007 opinions. Yet the Vacancies Reform Act continues to provide an available mechanism for the President to designate an Acting Director of the CFPB.

IV.

For the reasons set forth above, we conclude that the President may designate an Acting Director of the CFPB under 5 U.S.C. § 3345(a)(2) or (3), because both the Vacancies Reform Act and the office-specific statute are available to fill a vacancy in that office on an acting basis.

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